

CANADA / JUDGMENT

McLelland v. McLelland

2025 BCCA 401

COURT

British Columbia Court of Appeal

DECIDED

20 November 2025

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2025 BCCA 401 McLelland v. McLelland

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McLelland v. McLelland,

2025 BCCA 401

Date: 20251120

Docket: CA50362

Between:

Shannon Leigh McLelland

Appellant

(Plaintiff)

And

Colleen Anne McLelland, Brian Michael McLelland, and

The Canada Trust Company, Administrators of the

Estate of Brian Alexander McLelland, Deceased

Respondents

(Defendants)

Before:

The Honourable Justice Dickson

The Honourable Madam Justice Horsman

The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated
December 12, 2024 (McLelland v. The Canada Trust Company, 2024 BCSC 2452,
Vancouver Docket S175172).

Counsel for the Appellant:

J.S. Andrews

Counsel for the Respondent,

Colleen Anne McLelland:

B.J. Cabott

S.E. Howe

Place and Date of Hearing:

Vancouver, British Columbia

September 29, 2025

Place and Date of Judgment:

Vancouver, British Columbia

November 20, 2025

Written Reasons by:

The Honourable Madam Justice Horsman

Concurred in by:

The Honourable Justice Dickson

The Honourable Justice Warren

Summary:

The appellant appeals the order of a chambers judge dismissing her claim to vary her father's will for want of prosecution. She argues that the chambers judge erred in (1) finding that her pursuit of related litigation in Alberta was not an adequate excuse for the appellant's inordinate delay; and (2) in failing to consider the absence of litigation prejudice to the respondents due to the delay in assessing the interests of justice. The appellant also applies to adduce new evidence on appeal.

Held: The appeal is allowed. The order of the chambers judge dismissing the action is set aside, and the respondent's application to dismiss the claim for want of prosecution is dismissed. The chambers judge did not err in concluding that the appellant's reliance on legal advice to pursue the Alberta action was not an excuse for delay in the proceeding in British Columbia. This was a finding open to him on the record. However, the chambers judge made errors in principle in his assessment of the interests of justice that warrant appellate intervention. The interests of justice weigh in favour of allowing the action to proceed. The application to adduce new evidence is dismissed as the proposed new evidence would not have affected the outcome in the court below and does not bear on a decisive issue.

Reasons for Judgment of the Honourable Madam Justice Horsman:

- [1] In this appeal, the appellant seeks to set aside the order of a chambers judge dismissing her claim to vary her father's will for want of prosecution. She also applies to adduce new evidence on appeal.

Background

- [2] The appellant's father, Brian Alexander McLelland (the "deceased"), died on August 31, 2016. He was a resident of British Columbia. He left three children: Colleen, Brian, and the appellant. The deceased executed a last will and testament dated September 28, 1993, and two codicils dated January 30, 1995, and August 11, 2000 (collectively, the "Will"). The Will provides that the residue of the deceased's estate is to be divided equally between Colleen, Brian, and the appellant.
- [3] On August 26, 2016, five days before his death, the deceased executed deeds of gift and transfers that transferred ownership of two investment condominiums in Calgary, Alberta to Colleen, and a third one to Brian (the "Calgary Condos").
- [4] On December 15, 2016, probate of the deceased's estate was issued in British Columbia granting administration of the estate to the Canada Trust Company (formerly the TD Trust Company) ("Canada Trust").
- [5] On January 13, 2017, Canada Trust sent a letter to the appellant in response to her correspondence expressing concern about the transfers of the Calgary Condos. Canada Trust stated that the estate lawyer had reviewed the transactions and determined that each one was a completed gift. Therefore, they did not form part of the deceased's estate.

The British Columbia action

- [6] On June 1, 2017, the appellant filed a notice of civil claim in British Columbia seeking to vary the Will pursuant to the Wills, Estates and Succession Act, S.B.C. 2009, c. 13. The appellant pleaded that the transfers of the Calgary Condos to Brian and Colleen functionally result in an inequitable distribution of the deceased's estate. She sought: (1) a declaration that the Will does not make adequate, just, or equitable provision out of the estate for the support

and maintenance of the appellant; and (2) an order for such provision as the Court considers adequate, just and equitable.

- [7] Colleen filed her response to civil claim on August 10, 2017. Colleen pleaded that the Will makes generous provision for the appellant in the circumstances, and that the deceased had valid and rational reasons for the unequal treatment of the appellant and her siblings. She originally pleaded that the British Columbia Supreme Court "does not have jurisdiction over foreign real estate (the Alberta Condominiums)". On March 21, 2019, Colleen filed an amended response to civil claim that removed the jurisdictional objection.
- [8] Neither of the other defendants--Brian and Canada Trust--have filed a response to civil claim.

The Alberta action

- [9] In August 2018, the appellant commenced a separate action in the Alberta Court of Queen's Bench. In this action, the appellant challenged the validity of the transfer of the Calgary Condos, alleging that the transfer was the result of undue influence or that the deceased lacked capacity at the time of the transfer. She sought orders transferring title to the Calgary Condos to the deceased's estate, to be distributed in accordance with the terms of the Will.
- [10] Colleen filed a statement of defence in the Alberta action in October 2018. In her pleading, Colleen alleged that the Alberta action was an abuse of process as the appellant had filed a similar or identical claim in British Columbia.
- [11] Brian did not file a statement of defence to the Alberta action. On October 4, 2018, the appellant applied for and obtained a partial default judgment order against Brian. The judgment declared that the presumption of resulting trust applied to the transfer of the condominium to Brian and that he held the property in trust for the deceased's estate. There is a dispute between the parties as to the status of the partial default judgment order.
- [12] Colleen filed a motion to strike the Alberta action as an abuse of process. The appellant filed a cross-application to be appointed the litigation representative of the estate in the action. On October 7, 2019, a case management judge of the Alberta Court of Queen's Bench dismissed Colleen's application to strike on the basis that the claims in Alberta and British Columbia raised different issues. The judge granted the appellant's cross-application and appointed her as litigation representative.
- [13] Colleen filed an appeal of this decision. On March 17, 2021, the Alberta Court of Appeal allowed Colleen's appeal, and dismissed the Alberta action: *McLelland v. McLelland*, 2021 ABCA 102. The majority held that the case management judge had erred in concluding that the action did not rise to the level of an abuse of process. The majority recognized that there were aspects of the Alberta action that were "somewhat different" than the action in British Columbia: at para. 22. However, at their core, both proceedings challenged the distribution of the estate assets on the basis that the Calgary Condos should have formed part of the

estate. The majority stated:

- [24] Rather than pursuing potential remedies in the BC court, [the appellant] instead sought the assistance of the Alberta courts solely on the grounds the Calgary condominiums in question are located here. In doing so, she is attempting to bypass the supervisory jurisdiction of the BC probate court and, in so doing, she has delayed the distribution of the Estate in British Columbia because of the duplicative proceedings. Such actions are contrary to judicial economy and to the principle of comity between the two jurisdictions. In that context, her conduct is an abuse of process and the case management judge erred when he found that not to be the case on the facts that were before him.
- [14] The majority also found that the case management judge had erred in appointing the appellant as litigation representative of the estate.
- [15] On June 14, 2021, the appellant applied for a rehearing in the Alberta Court of Appeal. The Court of Appeal denied her rehearing application on June 28, 2021.

The application to dismiss for want of prosecution

- [16] The appellant has taken no steps to prosecute the British Columbia action since her notice of civil claim was filed in June 2017.
- [17] In November 2024, Colleen filed an application to dismiss the action for want of prosecution pursuant to R. 22-7(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR]. Brian filed a response consenting to the relief sought by Colleen, but did not appear on the application. The appellant filed a response opposing the relief sought. Colleen represented herself on the application. The appellant was represented by counsel. Colleen and the appellant both provided affidavit evidence.
- [18] The appellant deposed in her affidavit that in January 2018, her then-counsel advised her to start a separate action in Alberta to challenge the transfers of the Calgary Condos to Colleen and Brian based on the concern that the British Columbia courts did not have jurisdiction to adjudicate the claim. At this time, Colleen's response to civil claim in the British Columbia action still contained her jurisdictional objection. The appellant stated that after the Alberta Court of Appeal dismissed her action, her financial circumstances became so dire that she became homeless, living in a storage locker and then in a shelter. In March 2024, she moved into social housing. It was only after this time that she felt able to turn her attention back to the British Columbia action. In summary, the appellant stated in her affidavit:
67. I did not start the Alberta Action with the intention to delay the BC Action. I was advised by my counsel at the time, Mr. Pat Lewis, that I was required to commence the Alberta Action. There turned out to be no benefit to me to direct my limited energy and legal budget from the BC Action by commencing the Alberta Action. Instead, the delay has caused me significant stress, anxiety and financial hardship.

- [19] Colleen swore two affidavits for the application. In the first affidavit (sworn on November 5, 2024), Colleen reviewed the chronology of the British Columbia and Alberta actions. She noted that on July 11, 2019, the appellant was convicted of one count of criminally harassing Colleen. The Provincial Court made a two-year probation order that prevented the appellant from communicating with Colleen except through counsel for the purposes of addressing the litigation. Colleen stated that after the Alberta action, she could not afford to retain counsel. She indicated the following concern with allowing the British Columbia action to proceed:
33. As [the appellant] and I are now both [self-represented litigants] it will be distressing for me to communicate with my abuser directly or indirectly to move her now dormant claim forward.
- [20] In her second affidavit (sworn on December 10, 2024), Colleen described the "Hardship Experienced by Colleen and Brian". Colleen deposed that Brian had advised her that he had been experiencing financial hardship for at least four years, and that his current income was \$400. As noted, Brian did not file his own affidavit on the application. Colleen stated that she has physical challenges due to congenital hip dysplasia. She also questioned how the appellant would be able to finance the litigation and pay future costs awards in light of her limited resources. Colleen estimated that the appellant had between \$180,000-\$230,000 of her inheritance left in the estate.

The reasons of the chambers judge

- [21] The application was heard on December 12, 2024. On the same day, the chambers judge issued oral reasons for judgment granting Colleen's application and dismissing the action: *McLelland v. The Canada Trust Company*, 2024 BCSC 2452 ("RFJ").
- [22] The chambers judge set out the governing legal framework. He cited this Court's decision in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [Giacomini], for the proposition that a party seeking to dismiss a claim for want of prosecution must satisfy the court that:
- a) the delay is inordinate;
 - b) there is no reasonable excuse for the delay; and
 - c) the interests of justice are such that the action should be dismissed.
- [23] The chambers judge addressed each of these criteria.
- [24] On the issue of inordinate delay, the chambers judge addressed the appellant's argument that she proceeded with the Alberta action on the advice of counsel and therefore should not be held responsible for any delay in the prosecution of the British Columbia action that was due to this legal advice. On this basis, the appellant argued that the "delay clock" should not be considered to have started until June 2021, when the Alberta Court of Appeal dismissed

the appellant's application for a rehearing. The appellant submitted that the delay was not inordinate when viewed in this light.

- [25] The chambers judge rejected these arguments. He concluded that the appropriate time to begin measuring delay is when the action commenced, citing this Court's decision in *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corp.*, 2014 BCCA 52 at para. 38 [Ed Bulley]. In this instance, the appellant had taken no steps to prosecute her action in the seven and one-half years since the appellant commenced her action in British Columbia. The chambers judge noted that the Alberta Court of Appeal had found the appellant's litigation tactics to be an abuse of process. The chambers judge found the fact that the appellant "may have pursued her Alberta action in reliance on flawed legal advice is not of assistance to her": RFJ at para. 18, citing *Manitoba (Workers Compensation Board) v. Ali*, 2020 MBCA 122 at para. 75 [Ali]. Accordingly, the chambers judge concluded that the delay was inordinate.
- [26] The chambers judge next addressed the appellant's argument that her delay, even if inordinate, was excused. The appellant argued her impecuniosity and health issues amounted to a reasonable excuse after June 2021, regardless of whether the Alberta action excused her delay to that point. The chambers judge summarized the appellant's affidavit evidence on this point. He noted that the evidence was not supported by "any medical or other evidence regarding severity" and thus fell short of establishing a reasonable excuse for the delay: RFJ at para. 21.
- [27] Finally, the judge turned to the criterion of the interests of justice. He stated:
- [23] The evidence before me demonstrates that each of Colleen and Brian are suffering hardship as a consequence of the deceased's estate being tied up by this litigation. Brian's financial difficulties are significant and are even more dire than [the appellant's]. Colleen has health issues that she has struggled with most of her life, including congenital hip dysplasia.
- [24] To date, the estate has incurred approximately \$176,000 in legal fees, more than 12 percent of its net value. In my view, the continued depletion of the estate is not warranted. The interests of justice, in the circumstances of this case, cry out for an end to this languishing litigation.
- []
- [42] [T]his is not a case where a testator failed to provide for a child or where the will provides a greater percentage of the residue of the estate to one child to the exclusion of another. Here, the residue of the estate is to be divided equally among the deceased's three children. In my view, this case is a classic example of why the right to apply for dismissal of an action for want of prosecution is available in our Supreme Court Civil Rules.
- [28] In the result, the chambers judge allowed the application and dismissed the claim.

On appeal

[29] The appellant does not challenge the findings of the chambers judge that: (1) the delay must be measured from the commencement of the action; and (2) the delay here was inordinate. Rather, she alleges that the chambers judge erred in principle in:

- a) finding that the appellant's decision to pursue the Alberta action in reliance on legal advice was not an excuse for the delay; and
- b) failing to consider the absence of prejudice to the defendants' ability to defend the action in addressing the interests of justice.

[30] A judge's decision on whether to dismiss a claim for want of prosecution is discretionary and depends on their view of what is fair and just in a particular case. A discretionary decision is subject to appellate interference only if the judge "erred in principle, gave no or insufficient weight to relevant considerations, made a palpable and overriding factual error, or made a decision that is so clearly wrong as to amount to an injustice": *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, 2024 BCCA 288 at paras. 36-37 [Plaza 500].

Discussion

The new evidence application

[31] The appellant applies to adduce her affidavit made on August 27, 2025, as new evidence on appeal. The evidence consists of:

- a) Social media posts by Colleen after the judgment under appeal was issued stating her intention to proceed with a claim she has filed against Canada Trust;
- b) Evidence that Colleen has written letters to the appellant's housing coordinator and to the provincial government seeking to interfere with the appellant's receipt of social housing and income assistance; and
- c) Social media posts by Colleen referring to the appellant as a "welfare heiress" and encouraging her followers to contact the appellant's housing coordinator to raise concerns about the appellant's receipt of social housing.

[32] The appellant argues that this evidence is relevant to the argument advanced in Colleen's factum that her distress in having to communicate with the appellant weighs in favour of not allowing the action to continue.

[33] I am not persuaded that the appellant's affidavit meets the test for the admission of new evidence on appeal set out in *Barendregt v. Grebliunas*, 2022 SCC 22 at paras. 31-32. Specifically, the evidence does not bear on a decisive or potentially decisive issue, and it could not have affected the outcome below. There is no question that Colleen and the appellant have had an acrimonious relationship for many years, including the appellant's 2019 conviction of criminally harassing Colleen. There was evidence before the chambers judge that addressed some of this history. He did not find it necessary to review the

evidence. The chambers judge's analysis of the interests of justice did not include distress to Colleen in having to communicate with the appellant.

- [34] Without intending to minimize the severity of the appellant's conduct, as reflected by the criminal conviction, I observe that the probation order described in Colleen's affidavit expired in July 2021. Even when it was in effect, the terms of the probation order did not prevent the appellant from pursuing the British Columbia action. The chambers judge apparently took the view that the appellant's past conduct, and the generally tumultuous relationship between the parties, was not central to his determination of whether the appellant's claim should be dismissed for want of prosecution. This view was justified on the record before him.
- [35] As the proposed new evidence would not have affected the outcome in the court below and does not bear on a decisive or potentially decisive issue, I would dismiss the appellant's application to adduce new evidence.

The grounds of appeal

Issue 1: Did the chambers judge err in finding that the Alberta action was not an excuse for the appellant's delay?

- [36] The appellant argues that the law of British Columbia is clear that (1) the existence of parallel proceedings, and/or (2) conduct on the part of counsel, may provide an excuse for inordinate delay on an application to dismiss a claim for want of prosecution. The appellant cites several cases, including *Ghag Estate v. Ghag*, 2025 BCCA 88 and *Tundra Helicopters v. Allison Gas Turbine*, 2002 BCCA 145. She notes that rather than referring to these authorities, the chambers judge cited the decision of the Manitoba Court of Appeal in *Ali*. In particular, the chambers judge quoted para. 75 of *Ali* where the Court observed that conduct by counsel contributing to delay "will not be a valid adequate excuse for the delay". The appellant contends that this statement from *Ali* may represent the law of Manitoba, but it is not the law of British Columbia.
- [37] The issue of whether counsel's conduct constitutes an adequate excuse for inordinate delay generally arises where counsel has failed to promptly take steps to advance the litigation for reasons that are not the fault of the plaintiff. The Saskatchewan Court of Appeal has observed that the conduct of counsel is traditionally considered at the interests of justice stage of the analysis, after inordinate and inexcusable delay is established: *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 28. However, it is clear from the jurisprudence of this Court that, at least in British Columbia, the conduct of counsel may be relevant both to the issue of whether there is an excuse for inordinate delay as well as to the question of whether the interests of justice favour dismissing an action for want of prosecution: *Giacomini* at paras. 30, 66 and 71. The relevance of this factor, and the stage of the analysis at which it is considered, depends on the context.

- [38] It is also clear that the existence of parallel litigation may, depending on the context, provide an excuse for inordinate delay. In *Ghag Estate*, this Court dismissed an appeal from the decision of a chambers judge finding that the uncertainty created by the existence of related litigation was an excuse for the plaintiff's inordinate delay. The defendant/appellant in *Ghag Estate* cited a number of cases holding that inordinate delay was not excused by the existence of parallel litigation. This Court concluded that "[w]hile other cases may provide helpful illustrations, the ultimate question was one to be assessed by the chambers judge on the record before him": *Ghag Estate* at para. 39.
- [39] In the present case, the appellant contends that the chambers judge wrongly applied a blanket rule that precluded consideration of whether her reliance on legal advice in bringing a claim in Alberta excused her delay in prosecuting the British Columbia proceeding. I am not persuaded that the chambers judge erred in the manner alleged by the appellant. It is true that the chambers judge cited *Ali*, which appears to establish a general rule in Manitoba that conduct by counsel cannot excuse inordinate delay. However, I interpret the reasons of the chambers judge, read holistically, to indicate that he was simply not persuaded that the appellant's decision to bring, and prioritize, the Alberta action excused her inordinate delay in prosecuting the action in British Columbia.
- [40] The chambers judge addressed the Alberta action primarily in his discussion of whether the delay was inordinate because this is how the application was argued before him. He rejected the appellant's argument that the delay associated with her shift of focus to the Alberta action should not lie at her feet. The chambers judge noted that the Alberta Court of Appeal found the appellant's tactics to be an abuse of process. He also noted that the appellant had not taken any steps to prosecute her action in British Columbia since filing her notice of civil claim in 2017. In these circumstances, the chambers judge concluded the fact that the appellant had relied on legal advice did not assist her in demonstrating either that the delay was not inordinate or that it was adequately excused.
- [41] In my view, it was open to the chambers judge on the record before him to conclude that the appellant's reliance on legal advice in pursuing the Alberta action did not excuse her inordinate delay in the British Columbia proceeding. This is particularly so given the length of the delay and the absence of evidence that the defendants had acquiesced in the appellant's decision to prioritize the Alberta action. The chambers judge was not obliged to conclude that the Alberta action excused the appellant's delay, and his failure to do so does not constitute reversible error. The appellant objects to the chambers judge's characterization of the legal advice she received as "flawed". However, I interpret this characterization to reflect the outcome of the Alberta proceeding, viewed in hindsight, rather than any criticism of the appellant's motives. I will return to this point in addressing the appellant's challenge to the chambers judge's analysis of the interests of justice.
- [42] For these reasons, I would not accede to the appellant's first ground of appeal.

Issue 2: Did the chambers judge err in failing to consider the absence of litigation prejudice due to the delay in assessing the interests of justice?

[43] The appellant acknowledges that after this Court's decision in *Giacomini*, it is no longer necessary for a defendant to establish litigation-related prejudice due to the delay to obtain an order dismissing an action for want of prosecution. Prejudice is now 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. The appellant emphasizes that under the framework of analysis set out in *Giacomini*, prejudice to the defendant's ability to defend the action remains a relevant and important factor in the assessment of the interests of justice. The appellant says that the chambers judge's failure to consider this factor, combined with errors in his treatment of the evidence relevant to the assessment of justice, amounts to reversible error in this case.

[44] For the reasons that follow, I am persuaded that this ground of appeal has merit.

The chambers judge erred in assessing the interests of justice

[45] I emphasize at the outset that a judge's failure to expressly address one or more of the factors set out in *Giacomini* in relation to the assessment of the interests of justice is not in itself a reversible error. As this Court observed in *Plaza 500* at para. 80, provided that the "what" and "why" of a decision are discernible when considered in context, brevity in a judge's reasons is not a basis for appellate intervention. However, it appears to me that the issue in this case is not simply in the chambers judge's failure to cite a factor from *Giacomini*, but in the errors in principle he made in relation to the three factors he identified as grounding his assessment of the interests of justice:

- (a) The hardship to the defendants "as a consequence of the estate being tied up by this litigation": RFJ at para. 23;
- (b) The legal fees incurred by the estate to date: RFJ at para. 24;
- (c) The lack of merit in the appellant's claim: RFJ at para. 42.

I will address each in turn.

- (a) The hardship to the defendants

[46] In support of his finding that the defendants were suffering hardship as a consequence of the deceased's estate being tied up by the litigation, the chambers judge cited: (1) Brian's "dire" financial difficulties, and (2) Colleen's life-long health issues, including congenital hip dysplasia: RFJ at para. 23.

[47] There was no direct evidence about Brian's circumstances in the record. Brian did not provide an affidavit. Instead, Colleen provided information about Brian's financial circumstances based on what she was told by him. Specifically, Colleen deposed in her affidavit that Brian advised her that he had suffered financial hardship for at least four years

and that his income was currently \$400 per month. I note, parenthetically, that Colleen's evidence about Brian's financial difficulties does not refer to the fact that in February 2022 he received an interim distribution of \$100,000 from the estate, nor does it explain whether he currently receives income from the Calgary Condo his father transferred to him. In any event, Colleen's hearsay evidence about Brian's financial situation was presumptively inadmissible given that the defendants sought a final order dismissing the appellant's claim: SCCR, R. 22-2(12) and (13). The chambers judge erred in principle in admitting, and relying on, hearsay evidence where the conditions for its admission--necessity and reliability--were not established.

[48] The same hearsay issue does not apply to Colleen's evidence. Colleen did provide affidavit evidence, including medical documentation to demonstrate that she had been diagnosed with hip dysplasia as early as 1987. However, the chambers judge does not explain the link he perceived between the litigation delay and the existence of Colleen's congenital hip dysplasia.

(b) The legal fees incurred by the estate

[49] The chambers judge indicated that to date "the estate has incurred approximately \$176,000 in legal fees", which he accepted was more than 12 percent of its net value. The chambers judge characterized this as an unwarranted "continued depletion of the estate". He concluded that the interests of justice "cry out for an end to this languishing litigation": RFJ at para. 24.

[50] There was no evidence before the chambers judge concerning the legal fees incurred by the estate. In her written submissions on the application, Colleen, who was self-represented, stated that the legal fees charged by counsel for the executor (Canada Trust) totalled over \$176,000. This was not in evidence in any of the affidavits filed on Colleen's dismissal application. There was also no evidence as to: (1) whether Canada Trust had passed their accounts; (2) the specific services provided by Canada Trust in relation to any of the legal fees that were charged; and (3) the extent to which the appellant's delay in pursuing the British Columbia proceeding caused an increase in the legal fees.

[51] It was an error in principle for the judge to rely on the untested assertions in Colleen's unsworn submissions on a point that was so central to his assessment of the interests of justice.

(c) The lack of merit in the proceeding

[52] The third factor cited by the chambers judge in his assessment of the interests of justice was the perceived lack of merit in the appellant's claim. The chambers judge observed that this was not a case where the Will treated the beneficiaries unequally; rather, the residue of the deceased's estate was to be divided equally among the appellant, Colleen, and Brian. This led the chambers judge to conclude that "this case is a classic example of why the right to apply for dismissal for want of prosecution is available in our Supreme Court Civil Rules": RFJ at

para. 42.

- [53] While a court may give limited consideration to the merits of a case in determining if it is in the interests of justice to dismiss an action, any searching examination of the merits should be avoided. If the action is "bound to fail", then the interests of justice may favour its dismissal: *Giacomini* at para. 71, citing *Ed Bulley* at para. 62.
- [54] In focussing on the fact that the residue of the deceased's estate was to be equally divided between the appellant and her siblings, the chambers judge overlooked the central focus of this litigation: the deceased's transfer of the Calgary Condos to Colleen and Brian outside of the estate five days before his death. In her notice of civil claim, the appellant pleaded that these inter vivos gifts should be taken into consideration in determining the fairness of the deceased's Will. In her application response before the chambers judge, the appellant indicated that she also intends to argue, presumably by way of an amendment to her pleading, that the inter vivos gifts were made when the deceased lacked competency and was under the influence of Colleen. It cannot be that there is no forum available to the appellant in which she can question the validity of the inter vivos transfers. Whether or not the appellant's arguments can be characterized as strong, it cannot be said that her claim is bound to fail.
- [55] In these circumstances, the judge erred in principle by relying on the perceived weakness of the appellant's claim to determine that it was in the interests of justice to dismiss the claim. This is particularly so given that the chambers judge's assessment of the merits referenced only the equal division of the residue of the deceased's estate and ignored the inter vivos gifts that are at the centre of the claim.

Is it in the interests of justice for the action to proceed?

- [56] In light of the errors in principle I have identified in the chambers judge's analysis, his assessment of the interests of justice cannot stand. It is unnecessary to remit this matter back to the trial court as the record permits this Court to assess the interests of justice. *Giacomini* directs that the non-exhaustive list of factors set out at para. 45 of the judgment of the Saskatchewan Court of Appeal in *International Capital Corporation* provide a useful starting point in assessing the interests of justice: *Giacomini* at paras. 66 and 71. I will address those factors that appear particularly relevant in the present case.

The prejudice to the respondents in defending the case if the action goes to trial

- [57] Prejudice to a defendant in their ability to defend a claim remains an important consideration in assessing the interests of justice. The lapse of time may prejudice the defendants if it results, for example, in failing memories on the part of witnesses, the death or disappearance of witnesses, or the loss or destruction of evidence. The greater the prejudice, the more likely it is that the interests of justice will favour the dismissal of the action: *International Capital Corporation* at para. 45(a).

- [58] This form of prejudice is absent in the present case. The respondents do not say, and have not shown, that the lapse of time has impaired their ability to defend the action in any way.

The length of the inexcusable delay and the stage of the litigation

- [59] These factors tend to weigh in favour of dismissing this action. At the time of the application before the chambers judge, the appellant had not taken steps to advance the action for over seven and one-half years. Furthermore, the action has not advanced beyond the pleadings stage. This is not a situation where progress has stalled at a point in time when the case was close to trial.

The impact of the inexcusable delay on the respondents

- [60] The impact of the delay on the respondents in this case does not strongly favour dismissal of the action. I have already addressed my concerns with the chambers judge's treatment of the evidence of hardship to Colleen and Brian. I accept that there is some prejudice to the parties in having the distribution of the estate further delayed by this action. There is a strong interest in finality in these circumstances. On the other hand, the appellant, Colleen and Brian have all been able to take interim distributions from the estate while the action has been pending. To the extent Colleen and Brian are concerned about their future costs, it appears that the appellant has a sufficient inheritance left in her father's estate, even on Colleen's estimate, to cover the costs of the litigation if she is unsuccessful.

The context in which the delay occurred

- [61] While defendants do not have an obligation to move litigation forward, Giacomini reminds us that there are avenues available to a defendant concerned about the pace of litigation, including setting timelines through a case plan order. As stated in Giacomini, "[a] defendant's inaction in the face of lengthy delay by the plaintiff may weigh against dismissal of the action at the interests of justice stage of the analysis": at para. 76.
- [62] There is no evidence in this case that the respondents took any steps to press the appellant to move forward with the British Columbia action.

The reasons offered for the delay and counsel's role in causing the delay

- [63] A court may revisit the reasons offered by the plaintiff for the delay in considering the interests of justice of allowing a claim to proceed: *International Capital Corporation* at para. 45(f). Even if those reasons do not amount to an excuse, they may still be relevant to the interests of justice. The role of counsel in contributing to the delay may also be relevant to the interests of justice, although this factor should not be given undue weight. As noted in *International Capital Corporation* at para. 45(g), care must be taken to ensure that an application to dismiss for want of prosecution cannot be defeated by the simple expedient of having counsel assuming blame for the delay.

- [64] In this case, the appellant's evidence, corroborated by documents from her former legal counsel, is that she relied on legal advice in pursuing the action in Alberta. While a majority of the Alberta Court of Appeal ultimately found that the action was an abuse of process, it seems to me that the appellant's motives should not be coloured by the ultimate outcome of the case. While it may have been unwise for the appellant to prioritize the Alberta action at the expense of the British Columbia action, her reasons for doing so are explicable. There is no basis to conclude that the appellant engaged in deliberate delay tactics, or had anything other than a good faith belief that the issue of the transfer of the Calgary Condos should be adjudicated in Alberta.
- [65] The appellant's reasons for her delay after the Alberta Court of Appeal dismissed her claim in 2021 also reflect a genuine struggle on her part to cope with health issues and housing insecurity.

Conclusion on the interests of justice

- [66] The circumstances of this case are very close to the line. The delay is lengthy, and the appellant has taken no steps to advance her claim since 2017. The existence of the British Columbia litigation has delayed the distribution of the deceased's estate and will continue to do so until its conclusion.
- [67] However, in the unusual circumstances of this case, I am persuaded that it is in the interests of justice to allow the case to proceed. The appellant has offered reasons for the delay that do not suggest any deliberate inaction on her part. The respondents took no steps to press the matter forward, and there is no evidence that they will suffer any prejudice in their ability to defend the action due to the passage of time. It cannot be said that the appellant's action is bound to fail. The judgment of the Alberta Court of Appeal was not that the claim lacked merit, but rather that it should be pursued in British Columbia. In my view, the appellant should have an opportunity to do so.
- [68] The appellant should also be on notice that if she is intent on proceeding, she cannot delay further in prosecuting this action. If there is a period of further delay, it will be open to the respondents to bring another application to dismiss for want of prosecution. In that event, the interests of justice in the dismissal of the action may outweigh other considerations.

Disposition

- [69] For the foregoing reasons, I would allow the appeal and make the following orders:
- (a) the appellant's application to adduce new evidence is dismissed;
 - (b) the orders of the chambers judge dismissing the action and awarding Colleen her costs of the proceeding are set aside;

- (c) Colleen's November 5, 2024, application to dismiss the action for want of prosecution is dismissed;
- (d) the costs of the application in the Supreme Court are in the cause; and
- (e) the appellant is entitled to her costs of the appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice Warren"

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Prepared on 29 October 2026 · Esheria