

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jaico Corp. v. YMCA – YWCA of Greater
Victoria, Inc.*,
2026 BCSC 920

Date: 20260522
Docket: S105107
Registry: Victoria

Between:

Jaico Corp. and 1352115 Alberta Ltd.

Plaintiffs

And

**YMCA – YWCA of Greater Victoria, Inc., Capital Regional District, His Majesty
the King in the Right of the Province of British Columbia**
Defendants

Before: The Honourable Justice Laurie

Reasons for Judgment

Counsel for the Plaintiffs:

E.A. Cooke

Counsel for His Majesty the King in the
Right of the Province of British Columbia:

W.C. Vaughan
D.S. Ball

Counsel for YMCA – YWCA of Greater
Victoria, Inc.:

J.A. Bloomenthal
S.C.J. Evans

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INTRODUCTION

[1] There are two applications before the Court.

[2] The defendant, YMCA – YMCA of Greater Victoria, Inc. (“YMCA”), applies for an order pursuant to Rule 22-7(7) of the *Supreme Court Civil Rules*, B.C. Reg 168/2009 [SCCR] dismissing the plaintiffs’ action for want of prosecution.

[3] The plaintiffs, Jaico Corp. (“Jaico”) and 1352115 Alberta Ltd. (“1352115”), apply for an interim injunction: mandating the YMCA to open its gate on Glintz Lake Road, prohibiting the YMCA from closing or locking the gate or otherwise impeding public access to the road, and prohibiting the YMCA from demanding identification or other personal information from any member of the public who is on Glintz Lake Road.

[4] The defendant, Her Majesty the Queen in right of the Province of British Columbia (the “Province”) takes no position on the applications.

[5] For the reasons that follow, I dismiss both applications.

BACKGROUND

[6] The plaintiffs, Jaico and 1352115, are registered owners of lands located north of Glintz Lake, Capital Regional District, in British Columbia, legally known and described as PID: 008-008-876, Section 59, Goldstream District (“Section 59”). They are also the owners and operators of Victoria Teleport Corporation (“VTC”), a company that wishes to install a wireless telecommunication antenna on Section 59.

[7] The defendant YMCA is a society incorporated under the *Societies Act*, S.B.C. 2015, c.18 operating as a charitable association. It is the registered owner of seven properties in the Goldstream and Sooke Districts, purchased between 1935 and 1960 (the “YMCA Lands”), including:

- a) PID: 009-835-792, Section 53, Goldstream District (“Section 53”);
- b) PID: 001-680-790, Lot 54, Goldstream District (“Lot 54”);

- c) PID: 001-680-811, Section 56, Goldstream District (“Section 56”);
- d) PID: 001-680-838, Section 57, Goldstream District (“Section 57”);
- e) PID: 009-388-702, Block A of Section 59, Sooke District.

[8] The YMCA has also occupied a parcel of land adjacent to the YMCA Lands legally known as PID: 010-730-346, Section 58, Goldstream District (“Section 58”) pursuant to a long-term lease with the Province dated March 10, 1988.

[9] Collectively, the YMCA Lands and Section 58 are used for the Y Outdoor Centre and Camp Thunderbird (the “Camp”). The YMCA began operating the Camp in or about 1935.

[10] The underlying action relates to the plaintiffs’ attempt to access Section 59 through a road that goes through Sections 53, 54, 56, 57 and 58 (the “Road”). The Road is shown on a map which is attached as “Schedule A” to the notice of civil claim (“NOCC”) and to the subsequent amended claims.

[11] The pleadings refer to the Road as “Settler’s Road” or “Glinz Lake Road” depending on which part of the Road is being referenced. The plaintiffs allege, and it is not disputed, that the YMCA has erected a gate on the Road (the “Gate”) at Block A, Section 59 of Sooke District. The YMCA has maintained this Gate for more than 50 years.

[12] In the action, the plaintiffs seek a declaration that the Road is a public highway 20 meters in width. It also seeks an injunction prohibiting the YMCA from blocking the alleged public highway. Further, it seeks damages for trespass or nuisance. In the alternative, the plaintiffs seek a grant of easement of necessity or an easement by prescription over the Road.

LITIGATION HISTORY

[13] The action was commenced on December 17, 2010 by Jaico, 1352115, I.M. Sherwin Ltd. (“I.M. Sherwin”) and 1353067 Alberta Ltd. (“1353067”) against the

YMCA, the District of Metchosin (“Metchosin”), the Capital Regional District (“CRD”), and the Province.

[14] Responses to civil claim were filed in February and March of 2011.

[15] On July 27, 2011, the plaintiffs filed a notice of trial setting down a two-week trial commencing on August 7, 2012 (the “First Trial Date”).

[16] On February 20, 2012, the plaintiffs filed an amended notice of civil claim adding the District of Sooke (“Sooke”) as a defendant. This resulted in an adjournment of the First Trial Date.

[17] On February 12, 2013, the plaintiffs filed a second amended notice of civil claim seeking a declaration that Harbourview Road, located in Sooke Mountain Provincial Park, west of the YMCA Lands, is a public highway. In addition, the amended claim sought a grant of an easement of necessity against the YMCA over Settlers Road.

[18] On July 9, 2013, the plaintiffs filed a second notice of trial setting down a 15-day trial commencing on September 15, 2014 (the “Second Trial Date”).

[19] In June 2014, the action against Metchosin and Sooke was discontinued.

[20] On September 12, 2014, following a trial management conference (“TMC”), the Court adjourned the Second Trial Date.

[21] On November 3, 2014, the plaintiffs filed a third notice of trial setting down a 10-day trial to commence on January 18, 2016 (the “Third Trial Date”).

[22] In October 2015, the plaintiffs decided not to discontinue the action against CRD after previously communicating that this was their intention. For this reason, CRD sought and obtained an adjournment of the Third Trial Date with the consent of all the parties.

[23] On October 18, 2019, the plaintiffs filed a fourth notice of trial setting down a 10-day trial to commence on April 19, 2021 (the “Fourth Trial Date”).

[24] On March 30, 2021, following a TMC, the Fourth Trial Date was adjourned on the basis that more than 10 days was required.

[25] In January 2022, counsel for the plaintiffs filed a third further amended notice of civil claim.

[26] In July 2024, the plaintiffs filed and served a notice of appointment or change of lawyer after retaining new counsel.

[27] On August 7, 2024, the plaintiffs’ new counsel served a notice of intention to proceed. The counsel also delivered a letter to counsel for the YMCA demanding that the Gate be removed as an unlawful obstruction of the Road. Further, letters were delivered to the YMCA and the Province seeking further production of documents.

[28] In December 2024, the Province produced its 10th amended list of documents.

[29] On March 4, 2025, the plaintiffs’ counsel requested all the parties to provide available dates for the hearing of the plaintiffs’ application for an injunction to have the Gate removed from the Road.

[30] On March 19, 2025, the YMCA filed a notice of the present application for dismissal of the action.

[31] On March 21, 2025, the plaintiffs filed their notice of application for the said injunction.

[32] On March 27, 2025, the plaintiffs’ counsel asked all the parties for available trial dates.

[33] On June 3, 2025, the plaintiffs filed a notice of discontinuance against the CRD after reaching a settlement agreement.

[34] In July 2025, the plaintiffs obtained a court order to remove the two defunct plaintiffs, I.M. Sherwin and 1353067, and two non-responsive defendants, as parties to the action.

[35] On July 15, 2025, counsel for the YMCA conducted an examination for discovery of Mr. Scott Bonertz who is the principal of Jaico.

[36] On July 23, 2025, the plaintiffs filed a fourth further amended notice of civil claim.

[37] On September 10, 2025, the plaintiffs filed a fifth further amended notice of civil claim.

[38] A 15-day trial date has been scheduled to commence in April 2027.

THE YMCA’S APPLICATION FOR DISMISSAL FOR WANT OF PROSECUTION

Legal Framework

[39] Recently, in *Kaur v. Residential Tenancy Branch*, 2025 BCSC 473 [*Kaur*], Justice Layton summarized the governing legal principles in a dismissal application for want of prosecution:

[25] Rule 22-7(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides that if, on application by a party, it appears to the court that there is a want of prosecution in a proceeding, the court may order that the proceeding be dismissed...

[26] Rule 22-7(7) must be interpreted in light of the general object of the rules, which as stated in Rule 1-3(1) is “to secure the just, speedy and inexpensive determination of every proceeding on its merits”. This general object reflects a potential tension between the goals of, on the one hand, determining a proceeding on its merits, and on the other hand, doing so in a just and speedy manner. See *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 at para. 29; *Forgotten Treasures International Inc. v. Lloyd’s Underwriters*, 2025 BCSC 222 at para. 41.

[27] The power to dismiss for want of prosecution is not to be lightly exercised, as it deprives the plaintiff of an adjudication of their claim on the

merits. An application to dismiss will succeed only if the court is persuaded the interests of justice justify depriving the plaintiff of their presumptive entitlement to an adjudication on the merits. But this entitlement cannot be given primacy to the extent that the interests of the defendants, and society more generally, in the expeditious resolution of civil disputes are undervalued. Generally speaking, a party who has filed a proceeding should be expected to get on with it, and if in the circumstances it is not in the interests of justice to permit a proceeding characterized by inordinate and inexcusable delay to continue, then the remedy of dismissal is justified. See *Giacomini* at paras. 29, 74-75.

[28] These policy considerations underlie the three-part test, recently recalibrated in *Giacomini* at paras. 69-71, which courts apply to determine whether to dismiss a proceeding for want of prosecution:

- (a) has the defendant established that the plaintiff's delay in prosecuting the proceeding is inordinate?
- (b) if so, has the plaintiff shown that the delay is excusable?
- (c) if not, is it in the interests of justice for the proceeding to continue?

See also *Ghag v. Ghag*, 2024 BCSC 400 at para. 13; *Forgotten Treasures International Inc.* at para. 28; *0761979 B.C. Ltd. v. Scorpio Security Inc.*, 2025 BCSC 183 at para. 17 [*Scorpio Security*].

[29] Under this recalibrated test, prejudice to a defendant's ability to defend the underlying action is a relevant consideration in the interests of justice analysis. But it is no longer a threshold requirement to obtain a dismissal. See *Giacomini* at paras. 57-58, 63-65, 68.

[30] The commencement of the proceeding is the point from which delay is measured. Delay becomes inordinate where it is uncontrolled, immoderate, excessive and out of proportion to the matters in question. The delay should be analysed holistically, in all the circumstances, and not in a piecemeal fashion. For example, complexity of the matter and the number of litigants can inform the analysis. Some cases by their nature are susceptible to faster carriage, or in light of the allegations may call for more expeditious prosecution. See *Giacomini* at paras. 38-39; *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, 2024 BCCA 288 at para. 70; *Forgotten Treasures International Inc.* at paras. 32-33; *Scorpio Security* at paras. 19, 24.

[31] Unless the plaintiff can establish a credible excuse, the natural inference is usually that inordinate delay is inexcusable. Whether the reason offered for the delay constitutes an excuse depends on the circumstances, including whether the delay was: (a) intentional or tactical; (b) a result of dilatoriness, negligence, impecuniosity, illness or some other relevant cause; or (c) caused by a lack of diligence by plaintiff's counsel, which viewed in proper context may or may not amount to a reasonable excuse. See *Giacomini* at para. 40; *Ghag* at paras. 20-21; *Forgotten Treasures International Inc.* at para. 36; *Scorpio Security* at paras. 22-23.

[32] At the third stage of the test, the following non-exhaustive list of factors is relevant to assessing whether it is in the interests of justice for the proceeding to continue:

- (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's delay continued despite pressure from the defendant to proceed;
- (f) the reasons offered for the delay;
- (g) the role of counsel in causing the delay;
- (h) the public interest in having cases that are of genuine public importance heard on their merits; and
- (i) the merits of the action, and in particular whether it is bound to fail.

See *Giacomini*, at paras. 66-68, 71 and 76; *Ghag* at para. 14; *Forgotten Treasures International Inc.* at para. 42; *Scorpio Security* at para. 25.

Has the Delay been Inordinate?

[40] The action was commenced in 2010. The defendant points to two significant periods of delay during which it alleges the plaintiffs took no substantive steps to advance the litigation. The first period is between November 2015 and October 2019 between the adjournment of the Third Trial Date and the setting of the Fourth Trial Date. The second period is from the adjournment of the Fourth Trial Date in March 2021 to mid-2024, when new counsel for the plaintiffs was retained. It is submitted that these two periods comprise approximately 50% of the total delay of about 15 years. The defendant also submits that the issues in the action are not so complicated as to justify such a delay.

[41] While the issues in the litigation have some complexity, in my view, a total delay of 15 years is excessive and disproportionate to the nature of the proceeding. I have no difficulty concluding that the delay here is inordinate.

Has the Delay been Inexcusable?

[42] The plaintiffs submit that the following contributed to the slow pace of the litigation: Mr. Sherwin's declining capacity and death in 2022, poorly framed pleadings, the Covid-19 pandemic, and an evolving understanding of the underlying facts.

[43] The YMCA disputes the evidence of Terrence Martin, the plaintiff's litigation agent, in respect of Mr. Sherwin's declining capacity. Further, it submits that none of the above reasons excuses the delay in prosecuting this action.

[44] The YMCA also argues that the delay from 2021 to 2024 was "tactical" because the plaintiffs' principals, through their involvement in VTC, chose to focus on mineral tenure claims brought by VTC for the purpose of obtaining road access to Section 59 through the YMCA Lands. The YMCA relies on the discovery evidence of Mr. Bonertz in which he expressed the belief that the mineral tenure claims were related to this action. As I understand it, the YMCA alleges that the plaintiffs made a tactical decision to put this action in abeyance while they pursued the mineral tenure claims to achieve the same result.

[45] The YMCA asserts that the circumstances here are analogous to those in *Irving v. Irving* (1982), 1982 CanLII 475 (BCCA), 38 B.C.L.R. 318 at 324 (C.A.), where the plaintiff decided to put the proceedings on hold to await positive changes in the law. In *Irving*, the Court found that this delay which was "calculated to help the plaintiff and therefore hurt the defendants", and was inexcusable.

[46] Although I find that some of the delay in this case was excusable, I am satisfied that the majority of the delay was not. Importantly, there was no explanation provided for the delay between 2015 and 2019.

[47] With respect to the delay from 2021 to 2024, I accept that some of this delay was occasioned by a review and re-evaluation of the plaintiffs' case, including changes in their legal representation. In the affidavit of Mr. Martin dated April 28,

2025, he deposed that he was retained by Jaico and 1352115 in around October 2021 as their agent for the purpose of advancing the litigation.

[48] Mr. Martin deposed that at the time of his engagement, he conducted a review of the plaintiffs' pleadings, evidence, and litigation approach. He identified gaps in the document production and areas where further research was required. In mid-2023, Jaico and 1352115 retained new counsel. This counsel erroneously filed a notice of change of solicitor for all of the plaintiffs even though they were retained only by Jaico and 1352115. Present counsel for the plaintiffs submits that this error caused further delay.

[49] Mr. Martin also deposed that by mid-2024, it was decided that another change in counsel was required. As a result, present counsel was retained.

[50] As mentioned, I accept that these developments provide some explanation for part of the delay. I assess that approximately one year of the delay is excusable on account of these matters.

[51] With respect to the plaintiffs' reliance on Mr. Sherwin's declining capacity and death in 2022, I do not give this factor much weight given the contradictory evidence from Mr. Martin and Mr. Bonertz regarding whether Mr. Sherwin's capacity declined in his last years and insufficient evidence on the record respecting how Mr. Sherwin's death caused delay in the litigation.

[52] With respect to the Covid-19 pandemic, while I accept that the pandemic generally resulted in delays that impacted the prosecution of claims (see *Parvanta v. Gajoum*, 2026 BCSC 300 at paras. 70-71), in the absence of specific evidence regarding its impact on this litigation, I do not consider this factor to be significant.

[53] Finally, although I find that the majority of the delay is inexcusable, I would not accede to the defendant's characterization of the plaintiffs' conduct in pursuing the mineral tenure claims as constituting an inappropriate tactical decision. The record does not establish that there was a deliberate decision to put the action on hold pending the determination of the mineral tenure claims, as alleged. As noted, it

appears that there were some background efforts undertaken for the purpose of advancing the litigation during this period. During his examination for discovery, Mr. Bonertz was questioned at some length regarding what steps he took to advance the action while VTC was engaged in the parallel mineral claim proceedings; however, I am not persuaded that his responses support the inference urged by the YMCA. The questions put to Mr. Bonertz were in large part legal questions and as Mr. Bonertz responded more than once, he was not a lawyer. It appeared from Mr. Bonertz evidence that he believed the two proceedings were “together”.

[54] Even if it could be inferred that there was a deliberate decision to put the action on hold pending the resolution of the mineral tenure claims, the limited evidence before me does not establish that the plaintiffs were motivated by improper objectives in pursuing the mineral tenure claims. See for example: *424376 B.C. Ltd. v. Jensen*, 2002 BCSC 989 at para. 42, aff’d 2003 BCCA 157.

[55] The circumstances here are very different from *Irving* where the plaintiff deliberately kept the action alive but inactive for ten years in the hopes that the law would change, in circumstances where delay was the plaintiff’s only weapon that could assist their position: *Irving* at para. 5. See also: *Knight v. Imperial Tobacco Canada Limited*, 2017 BCSC 1487 at paras. 40-42.

Is it in the interests of justice to allow the petition to continue?

[56] Having found that the delay was inordinate and inexcusable, I must consider whether the interests of justice nonetheless weigh in favour of allowing the action to proceed. In this connection, I turn to the factors discussed in *Giacomini*.

Prejudice

[57] Prejudice caused by the delay to the defendant’s ability to defend the action remains an important factor in the interests of justice analysis and is to be considered alongside all the relevant factors: *Giacomini* at para. 72.

[58] Once a defendant has established inordinate and inexcusable delay, a rebuttable presumption of prejudice arises: *Busse v. Chertkow*, 1999 BCCA 313 at para. 18; *Weigert v. Rogers*, 2019 BCCA 334 at para. 33.

[59] The Court in *Trak Energy Corporation v. Happy Valley Resort Ltd.*, 2015 BCSC 1928, aff'd 2017 BCCA 201, discussed this presumption as follows:

[50] The specific nature of this presumption was discussed in *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145, 98 B.C.L.R. (3d) 238, as follows:

[35] I also regard it as error in principle to dispose of the issue of prejudice by asking whether the plaintiffs had rebutted 'the presumption of prejudice that arises in the circumstances' and by going on to answer that question in the negative. The "presumption of prejudice" is not a presumption of law. It can be termed a presumption of fact but only in the sense, as it is put in Sopinka and Lederman *"The Law of Evidence in Civil Cases"*, 1974 at p. 378:

The term "presumption of fact" is used in many instances in which it is desired merely to shift the secondary burden to a particular party. When used in this sense, it means that the facts are such that a certain inference should, but need not, be logically drawn.

[36] It is in that sense that the word "presumption" is employed in *Busse v. Robinson Morelli Chertkow*, *supra*. In considering whether the presumption of prejudice has any application in a particular case, the question properly to be asked, as stated by Goldie J.A. in para. 27 of *Busse*, is:

...has the plaintiff established on a balance of probabilities that the defendant has not suffered prejudice or that other circumstances would make it unjust to terminate the action?

[51] Madam Justice Fisher in *Pardy v. Levant*, 2015 BCSC 130, states at para. 13:

It has long been recognized that memories fade with the passage of time, and witnesses may disappear. Prejudice may be presumed from this, but without evidence of specific prejudice, such a presumption may be insufficient to support a finding of prejudice serious enough to warrant dismissal. Specific prejudice may be apparent in cases where disputed facts must be determined from oral testimony of witnesses: see *Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd.*, 2012 BCCA 251 at para. 12; *Ed Bulley* at paras. 51, 55, 57.

[60] The YMCA argues that the length of the delay in this case is, in itself, sufficient to establish a strong presumption of prejudice. It also submits that a

number of the plaintiffs' anticipated witnesses who claim to have firsthand knowledge of the existence and purported use of the alleged Settler's Road have now passed away. In addition to the plaintiffs' witnesses, the YMCA had intended to call Martin Chambers, who attended the Camp in around the 1940s and early 1950s, as a witness. Mr. Chambers passed away in 2022. He was expected to testify that he used the hiking trails in and around the Camp and that there was no road capable of supporting vehicular traffic on or about the route of Settler's Road.

[61] The plaintiffs submit that their case will largely be determined based on historical documents; therefore, any prejudice to the defence resulting from the passing of its witness is limited. To the extent that the YMCA relies on the death of the plaintiffs' witnesses, the plaintiffs argue that this factor weakens the plaintiffs' case and does not cause prejudice to the defendant.

[62] I accept that there is some prejudice to the defendant caused generally by the passage of time and specifically Mr. Chambers' death. On the record, it is unclear how the unavailability of the plaintiffs' witnesses would prejudice the defendant's case. I agree with the plaintiffs that generally, this factor would tend to work in the defendant's favour.

[63] I also accept that the plaintiffs' case appears to rely in large part on historical records, maps, and correspondence to establish their allegation that the Road is a public road. For example, the plaintiffs allege, based on historical documents, that public funds were expended on the Road; therefore, it is deemed to be a highway pursuant to s. 42 of the *Transportation Act*, S.B.C. 2004, c. 44.

[64] Similarly, the plaintiffs allege, based on historical records, that the Province and the YMCA have acknowledged that the Road was utilized by landowners and the public to access the lands beyond the YMCA.

[65] It appears that the YMCA also intends to rely on expert opinion to attempt to demonstrate, in large part through historical records, surveys, and maps, that the alleged Road does not exist.

[66] Given this context, while I accept that the delay has caused some prejudice to the YMCA's case, in my view, the prejudice is limited.

Length of Delay and Stage of the Litigation

[67] The longer the inordinate and inexcusable delay, the more likely that allowing the proceeding to continue will not be appropriate. Further, while the length of the delay is determined from the commencement of the action, in assessing the interests of justice, the court may consider whether there was activity related to the litigation between the commencement of the action and the filing of the application to dismiss: *Kaur* at para. 44; *Giacomini* at para. 81.

[68] Generally speaking, a court will be less inclined to strike an action that is well-advanced as opposed to one that is in its early stages. The interests of justice will normally weigh in favour of allowing a case to be determined on its merits if it has stalled just short of that mark: *Kaur* at para. 47.

[69] The complexity of the case also provides important context in assessing how the length of the delay and the stage of the litigation impact the interests of justice analysis: *Forgotten Treasures* at para. 54.

[70] The length of the delay in this case is significant; however, its impact is tempered by the advanced stage of the litigation and its complexity. This is not a case where, as the Court in *Giacomini* noted, the plaintiff filed an action and then left it dormant for many years with no apparent intention to move the matter forward: *Giacomini* at para. 81.

[71] In this case, the parties have previously scheduled four trial dates that did not proceed for one reason or another. The litigation is at a well-advanced stage. Voluminous documents have been produced. Pleadings have been filed and amended multiple times. Notices to admit have been served and answered. Examinations for discovery have been conducted. Multiple parties have been settled out. A new trial date has been scheduled for April 2027.

[72] I also accept that there is some complexity to this litigation, given that the claim relies largely on historical events and information, and expert evidence is anticipated.

[73] In my view, although the length of the delay weighs in favour of dismissal, the advanced stage of the litigation militates towards allowing the case to be determined on its merits.

Impact of the Delay on the Defendant

[74] The court should be sensitive to the impact of claims which put into question the professional, business, or personal reputation of the defendant, which put the livelihood of the defendant at risk, or which involve significant or ongoing negative publicity for the defendant: *Ghag* at para. 14(d).

[75] There is no evidence that the claims have put into question the reputation of the YMCA, or put its finances at risk, or caused significant or ongoing negative publicity for the YMCA. While I accept that the delay has had an adverse impact on the YMCA's interests including the financial and non-financial costs incurred in defending the action, the disruption to its operations, and the impact of the uncertainty of the litigation on its future programming, as described in the affidavit of Derek Gent dated March 18, 2025, I do not consider these matters to be over and above what any defendant organization might face: *0761979 B.C. Ltd. v Scorpio Security Inc.*, 2025 BCSC 183 at para. 54; *Giacomini* at para. 79.

[76] As a result, I assess this factor to be neutral in the interests of justice analysis.

[77] To the extent that the YMCA appears to rely on prejudice to its members or the community at large by asserting that the litigation has caused it to divert resources that would otherwise have been dedicated to its important charitable work and community-oriented programming, I am not persuaded that this is a proper consideration in assessing the interests of justice and no authority was provided to support this submission.

Context in Which the Delay Occurred Including any Action Taken by the Defendant in the Face of Delay

[78] There is no obligation on a defendant to take steps to move the plaintiff's case forward. However, as the Court in *Giacomini* observed, there are avenues available to defendants concerned about the pace of the litigation, and the plaintiff's delay does not tie the hands of a defendant who is motivated to bring the case to its conclusion. A defendant's inaction in the face of a lengthy delay by the plaintiff may weigh against dismissal of the action: *Giacomini* at para. 76. By contrast, delay in the face of repeated requests by the defendant to move the matter forward may be more serious: *Kaur* at para. 50.

[79] The YMCA submits that in the period between 2021 and 2024, it could not be expected to have pushed for a trial as it was dealing with the mineral tenure claims. It submits that its management was already stretched thin by the litigation on this action. It contends that this factor should not weigh against dismissal of the action.

[80] There is no evidence before me that the delay here occurred in the context of efforts by the YMCA to move the action forward. On the contrary, the YMCA admits that it caused part of the delay as the Second Trial Date was adjourned due to the late amendment of its pleadings. I would also note that the Third and Fourth Trial Dates were adjourned with the consent of the YMCA.

[81] Given the overall context, I find that the YMCA's inaction in the face of the plaintiffs' delay weighs against dismissal of the action.

The Reason for the Delay

[82] In assessing the interests of justice, the court may revisit the reasons offered by the plaintiff for the delay. An explanation which falls short of establishing an "excuse" may inform the analysis: *Ghag* at para. 14(f); *Kaur* at para. 53.

[83] In oral submissions, the plaintiffs' counsel submitted that the plaintiffs' preoccupation with the mineral tenure claims provides some explanation for the

dilatory pace of the action between 2021 to 2024. I accept that it provides some explanation, although not an excuse, for that period.

Role of Counsel in Causing Delay

[84] Although the plaintiffs were previously represented by two different law firms, they do not suggest that the role of counsel caused any material delay. Therefore, this is not a significant factor.

Interest in Cases of Genuine Public Importance being Heard on the Merits

[85] The plaintiffs submit that resolving the status of the public portion of the Road is in the public interest as members of the public would benefit from having access to it. In my view, whether the resolution of the case will have an incidental benefit to the public and the extent of it, is unclear at best on the record.

[86] I agree with the YMCA that the remedies sought in the action are directed exclusively at establishing access to Section 59 for the benefit of the plaintiffs. This is a private law dispute and not one of public importance.

The Merits of the Action

[87] Although counsel for the YMCA made extensive submissions regarding the merits of the claim, the analysis at this stage does not entail a searching examination of the merits. If the action is bound to fail, then the interests of justice favour its dismissal: *Giacomini* at para. 71.

[88] Having reviewed the application record and considered the parties' submissions, I am unable to conclude, nor was it argued, that the action is bound to fail.

Additional Considerations: Non-expiry of Limitation Period

[89] The plaintiffs submit that a significant factor to consider in the interests of justice analysis is that no limitation period applies to their claims for declarations with respect to the status of the Road and the alleged easements. Thus, the plaintiffs

submit that a dismissal for want of prosecution would not end the litigation as the plaintiffs could simply file a new action. The plaintiffs rely on the following authorities in support of their position: *Faber (Re)*, 2007 BCSC 496; *Crepnjak v. British Columbia Hydro and Power Authority*, 2011 BCSC 1357; *Azeri v. Esmati-Seifabad*, 2009 BCCA 133; *674191 B.C. Ltd. v. Gold Spring Recreation Association*, 2013 BCSC 446. They submit that dismissal of the action in these circumstances would only cause further delay.

[90] The YMCA does not dispute that this is a relevant factor. However, it questions the utility of the plaintiffs' ability to re-file a new action for narrow declarations without consequential relief. In this context, it submits that the significance of this factor is limited. Relying on *Chu v. Chu*, 2023 BCCA 129, it also submits that the fact that a limitation period has not expired is not a significant factor where part of the relief sought is an equitable remedy and the defence of laches, which runs from the date of the cause of action, would apply.

[91] I accept that the ability of the plaintiffs to re-file the action is a relevant factor, in assessing the interests of justice. In my view, this factor weighs against dismissing the action.

Summary of Interests of Justice Analysis

[92] In summary, the length of the delay, which has resulted in prejudice to the defendant, favours dismissal of the action. On the other hand, the advanced stage of the litigation including a scheduled trial date in 2027, non-expiration of the limitation period, and the defendant's inaction in the face of the lengthy delay, militate towards allowing the action to proceed.

[93] In balancing these factors, in my view, this is not a case where the interests of justice support depriving the plaintiffs of having their case adjudicated on the merits.

CONCLUSION ON WANT OF PROSECUTION APPLICATION

[94] Despite the inordinate and inexcusable delay, it is in the interests of justice to allow the action to proceed. The YMCA's application to dismiss the action for want of prosecution is dismissed.

THE PLAINTIFFS' INJUNCTION APPLICATION

[95] In the second application before me, the plaintiffs seek an interim injunction: (a) mandating the YMCA to immediately open the Gate; (b) prohibiting the YMCA from closing or locking the Gate; (c) prohibiting the YMCA from impeding access to the Road; and (d) prohibiting the YMCA from demanding identification or other personal information from any member of the public who is on the Road.

LEGAL FRAMEWORK

[96] The court has discretion to grant an interlocutory injunction pursuant to *SCCR* R. 10-4, s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the court's inherent jurisdiction: *Epiroc Rock Drills AB v. Zimmerman*, 2025 BCSC 1757 [*Epiroc*] at para. 46.

[97] An interlocutory injunction is a drastic and extraordinary remedy involving the exercise of the court's civil power to restrain the activities of its citizens: *JTT Electronics Ltd. v. Farmer*, 2014 BCSC 2413 [*JTT Electronics*] at paras. 63-64.

[98] The conceptual justification for ordering such extraordinary relief lies in the risk that a plaintiff faces in the form of apprehended and irreparable harm, if the remedy is not granted: *JTT Electronics* at para. 65.

[99] In *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 [*Vancouver Aquarium*] at para. 37, our Court of Appeal summarized the well-established three-part test for an interlocutory injunction from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 194 CanLII 117 (SCC) [*RJR*]:

Before issuing an interlocutory injunction, there must be a preliminary assessment of the merits of the case to ascertain that there is i) a serious question to be tried, ii) a consideration of whether the applicant will suffer

irreparable harm if the application were dismissed, and finally, iii) an assessment of the "balance of convenience", that is, which of the parties would suffer the greater harm from the granting or refusing the injunction pending a decision on the merits of the case. As noted in *Google Inc.* at para. 25, the fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case.

[100] In British Columbia, this test is often expressed as a two-part test, with irreparable harm and balance of convenience considered as the second part. In substance, there is no practical difference between the two-part test and the three-part test: *British Columbia (Attorney General) v. Wale*, 1986 CanLII 171 (BCCA), [1986] 9 B.C.L.R. (2d) 333 at 346, aff'd, 1991 CanLII 109 (SCC), [1991] 1 S.C.R. 62; *Vancouver Aquarium* at para. 37; *Epiroc* at para. 49.

[101] The factors are not to be treated as independent hurdles that an applicant must meet but rather a guide to determining a just and equitable result. The fundamental question is whether granting an injunction is just and equitable in all the circumstances: *Winking Judge Pub Ltd. v. Donnelly Hospitality*, 2019 BCSC 336 at para 37; *Epiroc* at para. 50.

[102] The threshold for establishing that there is a serious question to be tried is a low one. It is sufficient if the applicant satisfies the court that the claim is not frivolous or vexatious. The court's function at this stage is not to engage in a prolonged examination of the merits: *Vancouver Aquarium* at para. 39 citing *RJR* at 335, 338.

[103] However, if the applicant is seeking a mandatory injunction, i.e. one that directs a party to take positive action, a modified test applies and the applicant must establish a strong *prima facie* case in the first part of the test: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [CBC] at paras. 13, 18.

[104] A strong *prima facie* case is one in which the application judge is satisfied that there is a strong likelihood on the law and the evidence presented that the applicant will ultimately be successful at trial: *CBC* at para. 17.

[105] With respect to irreparable harm, the analysis involves an assessment of the nature of the harm rather than its magnitude. Irreparable harm refers to harm that

either cannot be quantified in monetary terms, or cannot be cured, usually because one party cannot collect damages from the other: *EnWave Corporation v. Dehydration Research, LLC*, 2022 BCSC 637 at para. 46, leave ref'd 2022 BCCA 347.

[106] As mentioned, the irreparable harm and balance of convenience test are commonly considered together to determine who will suffer the greater harm from the granting or refusal of the injunction. The relevant factors to be considered are:

- a) the adequacy of damages as a remedy for such harm,
- b) the likelihood that awarded damages will be paid,
- c) whether the harm from granting or refusing the injunction would be irreparable,
- d) which of the parties has acted to affect the *status quo*,
- e) the strength of the applicant's case,
- f) the public interest, and
- g) any other factors affecting the balance of justice and convenience.

See: *Taseko Mines Limited v. Tsilhqot'in National Government*, 2019 BCSC 1507 at para. 92, leave ref'd 2019 BCCA 479.

Mandatory or Prohibitive Injunction

[107] The parties disagree on whether the injunctions sought are mandatory or prohibitive.

[108] The plaintiffs take the position that, in substance, they seek a prohibitive injunction, i.e. one that requires the Gate not to be closed and locked. Therefore, they submit that the low threshold of "a serious question to be tried" applies.

[109] The YMCA argues that the injunction sought is mandatory, requiring the YMCA take positive action, i.e. to open the Gate. Even though the plaintiffs also seek injunctions to prohibit the YMCA from closing or locking the Gate or otherwise impeding access to the Road, it submits that these are ancillary to, and flow from, the mandatory injunction sought. The YMCA submits therefore, that the modified *RJR* test applies and the applicants must establish a “strong *prima facie* case”.

[110] In *CBC*, the Court recognized that distinguishing between mandatory and prohibitive injunctions can be difficult. It stated at para. 16:

...Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, “what the practical consequences of the...injunction are likely to be” (footnote omitted). In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something.

[111] I conclude that, in substance, the overall effect of the injunctions sought is mandatory. It is not disputed that for the past 50 years, the YMCA has monitored access to the Camp by maintaining the Gate. In Mr. Gent’s affidavit, he deposed that this was for the safety of the children attending the Camp. In the circumstances, in my view, the practical consequence of the injunctions sought is for the YMCA to alter its practice over the past 50 years of monitoring access to the Camp, by opening the Gate and leaving it open. I agree with the YMCA that the other injunctions sought, although framed as prohibiting the YMCA from closing or locking the Gate, or otherwise impeding access to the Road, are ancillary to the injunction seeking to require the YMCA to open the Gate.

[112] I would add that in oral submissions, the plaintiffs’ counsel suggested in the alternative that it may be appropriate to order the YMCA to move the Gate to a northern terminus location conceded by the YMCA to be the end of the public part of the Road within the YMCA Lands. In my view, this would clearly constitute a mandatory injunction.

A Strong *Prima Facie* Case

[113] Given my finding that the plaintiffs' application is for a mandatory injunction, the modified *RJR* test applies, and the applicants are required to establish a strong *prima facie* case.

[114] The plaintiffs submit that they have met this burden because the YMCA has admitted, based on its responses to the plaintiffs' notice to admit, that a portion of the Road beyond the Gate is a public road. On this basis, the plaintiffs argue that the Gate unlawfully blocks access to the admitted stretch of public road.

[115] The parties disagree as to the scope and significance of the alleged admission. The applicants allege that the YMCA has admitted that the Road is public from Highway 14 in Sooke northward to Glinz Lake. While the YMCA questions whether the admission made by its previous counsel was correct and proper, for the purpose of this application, it acknowledges that it could be said that the YMCA has admitted that there is a length of public road beyond the Gate which terminates at or about the entrance to the Camp which is located within Section 56 south of the southernmost tip of Glinz Lake.

[116] It is important to note that Section 59 is still a significant distance to the north of either the Camp's entrance or Glinz Lake. Glinz Lake straddles Section 56, and Section 57 to the north. To the north of Section 57 is Section 58. Section 59 is to the north of Section 58.

[117] The precise northern terminus point of any alleged public road will be an issue for the trial. Since the plaintiffs' claims for declaratory relief and grants of easement are directed at establishing access to Section 59, I agree with the YMCA that the alleged admission, however interpreted, does not demonstrate the strength of the plaintiffs' case.

[118] On the record, I find that the applicants have not established a strong likelihood that their claims will ultimately succeed at trial.

[119] Even if the injunctions sought are prohibitive and the lower threshold applied, which I accept the applicants have met, the applicants still face a significant problem in that irreparable harm has not been demonstrated, as discussed below.

Irreparable Harm

[120] Relying on the cases of *Pacific Coast Terminals Co. Ltd. v. ILWU-Canada*, 2023 BCSC 1432 [*Pacific Coast*] and *Coastal GasLink Pipeline Ltd. v. Huson*, 2019 BCSC 2264 [*Coastal GasLink*], the plaintiffs argue that evidence of irreparable harm is not required where the conduct sought to be enjoined is clearly unlawful. As mentioned, they assert that the YMCA's conduct in maintaining the Gate is clearly unlawful because it impedes access to the admitted public portion of the Road.

[121] In my view, these cases involve distinguishable facts. *Coastal GasLink* involved a blockade by protesters attempting to prevent construction of a pipeline on the applicant's property. *Pacific Coast* involved picketing union members who impeded traffic to the applicant's bulk shipping terminal and blocked management and cleaners from entering buildings. Importantly, in each case, the Court found that the defendants were engaged in unlawful activity. Further, although the Court accepted that evidence of irreparable harm was not necessary for an injunction to issue, irreparable harm had been made out.

[122] The record before me includes correspondence between the former plaintiff Mr. Sherwin, and the Minister of Transportation and Highways regarding maintenance of the alleged Settler's Road and the status of the Gate. In a letter dated April 11, 1997, the Minister advised Mr. Sherwin that the YMCA had been given permission to erect a gate (the "Permission"):

As for your concerns regarding access to the southern portion of Glinz Lake Road, I can confirm that the road is classified as a public road from its intersection with Sooke Road to Glinz Lake within the Young Men's Christian Association (Y.M.C.A.) property. However, as you may appreciate, this is an isolated area and, as such, the Y.M.C.A. was given permission to erect a gate, in order to control vandalism. Nonetheless, assurance has been given to the Ministry that public access to the lake, and the obsolete logging roads beyond, will not be denied. If you experience anything to the contrary, I

encourage you to contact my Ministry's District Highways office and they will take the necessary steps to remedy the situation. (Underline added).

[123] There is no evidence that members of the general public have been denied access through the Gate. Further, since Metchosin and Sooke took over responsibility for the Road in 1999, neither have sought to remove the Gate or otherwise taken issue with it.

[124] As the YMCA submitted, whether the Permission is still valid is a live issue in the litigation. For the purpose of the injunction application, I am not satisfied on the record that the YMCA's conduct is clearly unlawful. Consequently, I do not find this to be an appropriate case for an injunction to issue without evidence of irreparable harm.

[125] I conclude that the plaintiffs have not established irreparable harm. The plaintiffs did not tender evidence of any damage or loss resulting from the Gate not being opened. In addition, the Gate was in existence when the plaintiffs commenced the action in 2010. In my view, the lengthy delay in seeking the present injunctions also significantly undermines any claim of irreparable harm.

[126] To the extent that the plaintiffs allege that they have not been able to access the Road between the Gate and Glinz Lake in order to conduct surveys or gather evidence for the purpose of the litigation, this is contradicted by the discovery evidence of Mr. Bonertz in which he confirmed that the expert surveyor that the plaintiffs engaged was given access beyond the Gate and a survey had been conducted. If further surveys are required and access is denied, an application could be made in the future related to this purpose.

Balance of Convenience

[127] With respect to the balance of convenience, in my view, the absence of irreparable harm, clearly unlawful conduct, and a strong *prima facie* case weighs in favour of preserving the *status quo* and not issuing the injunctions sought. This Court has held that, for the purpose of assessing where the balance of convenience

lies on an injunction application, the *status quo* is to be defined as of the time the claim is brought: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 at para. 325. As mentioned, the Gate had been in place since before the commencement of the action. Therefore, in this application, it is the applicants that seek to alter the *status quo*.

[128] There is no dispute that Glinz Lake is located on the boundary of Section 56 and Section 57, both of which are parcels owned by the YMCA, and the entire area surrounding Glinz Lake is owned by the YMCA. I accept the evidence of Mr. Gent that the Gate serves an important purpose, i.e. to ensure the safety and security of the YMCA staff, volunteers, and program participants, especially the children. In saying this, I make no determination as to the lawfulness of the Gate, which is an issue to be determined at the trial.

[129] On the other hand, opening the Gate would not give the plaintiffs access to Section 59 through the YMCA Lands. The plaintiffs have not adduced any evidence of damage or harm arising from not opening the Gate, or any benefit that they may derive from the Gate's opening.

[130] It is also significant that while the YMCA has tendered evidence of its cash assets to demonstrate its ability to pay an award of damages for any loss or damage suffered by the plaintiffs from a denial of their injunction application, there is no evidence before the Court of the plaintiffs' ability to pay a damage award if their application is granted and the YMCA suffered losses as a result.

[131] In all the circumstances, I find that the risk of harm to the YMCA from granting the injunctions sought is greater than any harm that may result to the plaintiffs from refusing to grant the injunctions.

CONCLUSION ON INJUNCTION APPLICATION

[132] For the foregoing reasons, the plaintiffs' injunction application is dismissed.

COSTS

[133] The YMCA submits that special costs are warranted in respect of the injunction application regardless of whether the YMCA is successful, because of the plaintiffs' reprehensible conduct in alleging that the YMCA committed the offence of criminal intimidation under s. 423(1) of the *Criminal Code* with no supporting evidence.

[134] I agree that there is no evidence to support an allegation of criminal intimidation and the mention of this offence in the plaintiffs' notice of application is misguided. However, the plaintiffs' counsel did not advance this allegation in oral submissions. In the circumstances, I am not persuaded that an award of special costs is warranted. I decline to order special costs.

[135] Costs in respect of both applications shall be in the cause.

"Laurie J."