IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *T&S Transportation Systems Inc. v Bendix Commercial Vehicle Systems LLC,* 2026 BCSC 1942

Date: 20260921
Docket: S140356
Registry: Vancouver

Between:

T & S Transportation Systems Inc.

Plaintiff

And

Bendix Commercial Vehicle Systems LLC, Bendix CVS Canada Inc., Navistar Canada, Inc. Navistar International Corporation

Defendants

Before: Associate Judge Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	L. Beukman
Counsel for the Defendants, Bendix Commercial Vehicle Systems LLC and Bendix CVS Canada Inc.:	C. Horkins S. Stephenson
Counsel for the Defendants, Navistar Canada, Inc. and Navistar International Corporation:	T. Burnett, K.C.
Place and Date of Hearing:	Vancouver, B.C. September 21, 2026
Place and Date of Judgment:	Vancouver, B.C. September 21, 2026

2026 BCSC 1942 (CanLII)

[1] **THE COURT:** This is an application by the defendants to strike the plaintiff's claims for want of prosecution pursuant to Rule 22-7 of the *Supreme Court Civil Rules*, BC Reg 168/2009 and the doctrine of spoliation recently defined by the Supreme Court of Canada in *SS&C Technologies Canada Corp. v Bank of New York Mellon Corp*., 2026 SCC 29 [*SS&C*].

[2] By way of overview, on January 19, 2012, a fire occurred in the right wheel area of a truck that was owned and operated by the plaintiff towing a trailer containing a shipment of material while in transit from Toronto, Ontario to Vancouver, British Columbia. The incident itself occurred in Manitoba.

[3] The plaintiff claims that the defendants designed or manufactured the truck, and that there were defects in the design and manufacture of the truck and/or its braking system. ICBC insured the truck, and Intact insured the cargo. ICBC brought their action in Manitoba and Intact brought their action in Vancouver.

[4] Efforts were made to move the action along but one stumbling block was the fact that the two actions needed to be consolidated, or the Vancouver action needed to be amended to include the allegations made in the Manitoba action. Ultimately, the parties chose the latter route and amended the Vancouver action.

[5] The efforts to consolidate the actions into a single action, to subsequently amend the pleadings, and to conduct examinations for discoveries took the better part of a decade. A trial date has never been set, although Justice Walker granted leave to do so at a recent case planning conference on January 29, 2026.

[6] At the recent examination for discoveries, the defendants learned the vehicle was scrapped, or salvaged years ago, and the plaintiff, following their policy of record destruction after six years, had destroyed all the records related to the truck in question, including the maintenance records. The destruction of the records also resulted in the plaintiff not being able to identify one of the two occupants of the truck at the time of the incident giving rise to the action.

2026 BCSC 1942 (CanLII)

[7] The truck was inspected by a Mr. Dave Tyerman of Bendix, who is an account manager, and Mr. Al Grassing of Navistar, who is a technical service manager. The inspection was done on May 22, 2012. There are two-and-a-half pages of memo in bullet form that make comments on the inspection of the truck, and there is a series of photographs that are attached to the memo as well. I note that the memo was signed by Mr. Tyerman and he states therein: "I am no certified inspector."

[8] It is now 14 years after the incident giving rise to the action. The truck and all the documents related to it have since been destroyed. The defendants learned of this unfortunate sequence of events at the recent examination for discovery of the plaintiff's vice president, Ms. Virk. In addition to the absence of the truck and the documents, Ms. Virk's memory of the events and the information surrounding the truck are extremely limited. Her inability to recall key events and facts is apparent in the examination for discovery transcript.

[9] Pursuant to *Supreme Court Civil Rule* 22-7(7):

> (7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

The seminal test is set out in *Giacomini Consulting Canada Inc. v The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*].

[10] The test is essentially in three parts. First, has the defendant must establish the plaintiff's delay in prosecuting the action was inordinate. The second consideration is whether the delay is inexcusable. Finally, if both the above questions are answered in the affirmative, the court must determine whether it is in the interests of justice for the action to proceed, despite the existence of inordinate and inexcusable delay.

[11] There are a number of factors for consideration when the court addresses whether the interests of justice would be achieved by allowing the action to continue, and they are set out in *Intl. Capital Corp. v Schafer*, 2010 SKCA 48, at para 45, and

2026 BCSC 1942 (CanLII)

this approach has been adopted by *Giacomini* at para 77. The factors that the court is to look at is the prejudice the defendant will suffer in defending the action, the length of alleged inexcusable delay, the stage of the litigation, the impact of the inexcusable delay on the defendant, the context in which the delay occurred, and, finally, the reasons offered for the delay, and the merits of the action, among other factors.

[12] There is a further basis to dismiss a claim that is relied upon by the applicants which is spoliation. The factors required for a dismissal based upon spoliation are outlined by the Supreme Court of Canada in *SS&C*. The court states at para 80:

> To successfully prove spoliation, the alleging party must prove the following elements on a balance of probabilities: (1) the evidence was intentionally destroyed, altered, mutilated, or concealed; (2) at the time of destruction, litigation was ongoing or reasonably contemplated; (3) the evidence was relevant to said litigation; and (4) it is reasonable to infer that the evidence was destroyed to affect the litigation.

[13] First, addressing the *Giacomini* factors, the first is whether the delay is inordinate. In *Wiegert v Rogers*, 2019 BCCA 334, at para 32 the court states that a delay is inordinate when it is uncontrolled, immoderate, excessive, and out of proportion to the matters in question. This assessment is to be done wholistically. And in making that assessment, while the defendants' conduct may be relevant to considering delay generally, a defendant has no obligation to advance the action and mere inactivity where there has been no step required by the defendant is ultimately irrelevant: See *Tri-City Contracting Ltd. v Leko Precast Ltd.*, 2016 BCSC 623, at para 31.

[14] The defendants have put their alleged inordinate delay in tranches. They have talked about the consolidation as being the first tranche, the amendment of the notice of civil claim being the second, and the scheduling of examinations for discovery being the third. Those delays taken together total roughly 12 years. It has been 14 years since the actual occurrence of the incident giving rise to the action.

[15] The applicants cite *Krist v British Columbia*, 2024 BCSC 1925, where the court notes at para 23:

2026 BCSC 1942 (CanLII)

> A delay of over four years, in which nothing has occurred, is inordinate, and should not be normalized by the court: *Trinity Western University v. Johnson Controls LP*, 2022 BCSC 1632 at para. 13. Actions have been dismissed for delays of comparable length, especially when the plaintiff has failed to take any real steps to advance the action - see e.g. *Trinity* (four years); *Mangat v. Hehar*, 2022 BCSC 480 (five years); *Unrau v. McSween*, 2013 BCCA 343 (three years); *Drennan v. Smith*, 2021 BCSC 1302 (five years).

[16] I note also the comments of Associate Judge Bilawich in *Louie v Security National Insurance Company*, 2025 BCSC 1315, where he states at para 44:

> Generally, exchanges of correspondence or communications do not constitute steps in the action. Filing a notice of change of lawyer (and presumably a notice of intention to act in person) likewise does not constitute a step...

[17] I agree with the submissions of the defendants on this point that the action has suffered multiple periods of excessive and uncontrolled delay which was within the control of the plaintiff, and that it is out of proportion to the matters in question.

[18] The next step is whether that delay is inexcusable. Unless there is a credible excuse offered, the natural inference is that inordinate delay is inexcusable. See *Giacomini* at para 40. The plaintiff has submitted that he made numerous attempts to facilitate agreement within the action. First with respect to the consolidation of the action, then with the scheduling of discovery, and attempting to obtain agreement on the amendments to the pleadings.

[19] I take the defendants' point that the plaintiff in cases of this nature drives the case. The more counsel, the more lawyers, the more vigilant the plaintiff needs to be with respect to the potential for delay. At times, cases have to be forced forward, sometimes by unilaterally scheduling matters with the proviso that if the dates are not convenient for the defendants, that those dates can either be adjourned or rescheduled, but the onus is on the plaintiff to move the matter forward. In my view, that effort was lacking here.

[20] The next issue is whether the interests of justice require the dismissal of the action. As set out above, the court's assessment of whether it is in the interests of justice to allow the matter to proceed to trial despite inordinate and inexcusable

2026 BCSC 1942 (CanLII)

delay includes a number of factors. First, the prejudice the defendants will suffer in mounting its defense if the matter goes to trial. Second, the length of inexcusable delay. Third, the stage of the litigation. Fourth, the impact of inexcusable delay on the defendant. Fifth, the context in which the delay occurred. Sixth, the reasons offered for the delay. Seventh, the role of counsel in causing the delay. Eighth, the public interest. And, finally, the merits of the action.

[21] I also note that in *Wiegert* at para 33 the court states that once a defendant establishes that delay is inordinate and inexcusable a rebuttable presumption of prejudice arises. The concern is always that there will be failing memories, unavailable witnesses, the loss or destruction of evidence, and any other issues which might prevent a fair trial.

[22] The factors I consider particularly relevant here are that the truck, the single most important piece of evidence in the action, no longer exists, the records related to it have been destroyed, and no engineering evidence was ever obtained. It is difficult to conceive how the allegation of a manufacturing or design defect could be proven, or defended in the circumstances.

[23] The plaintiff signed the salvage agreement back in 2012. It authorized ICBC to dispose of the truck at a time when the plaintiff was aware of the incident, although it was done prior to the commencement of the action.

[24] The plaintiff took no steps to preserve either the truck, the trailer attached to it, or the records. There is the evidence in the memo of Mr. Tyerman dated May 22, 2012 which provides some observations. However, it is a far cry from an expert report, and Mr. Tyerman describes himself as “no certified inspector.” At the discovery, truck parts, including the Bendix ATR-6 valve and other air brake components installed on the truck were requested, however, it is clear they no longer exist.

[25] The defendants never had an opportunity to conduct an expert forensic examination of the truck for the purposes of the action prior to its destruction and

2026 BCSC 1942 (CanLII)

they will not have that opportunity. No notice was given to the defendants that the truck and its component parts would be disposed of. Further, the plaintiff, following its operational policy, destroyed its maintenance records, driver logs, and pre-trip inspection log for the truck within six years after it was aware of the incident and the litigation.

[26] The failure to preserve those records is significant, particularly so when the plaintiff was aware and involved in litigation at the time. Amongst those records would have been mileage records, man hours, and such of the like. These no longer exist.

[27] In my view, there is a substantial risk that a fair trial is no longer possible, and that the interests of justice favour the dismissal of the action. Accordingly, the order sought is granted. The action is dismissed pursuant to *Supreme Court Civil Rules* Rule 22-7(7).

[28] Turning to the alternate argument, that being the issue of spoliation as set out by the Supreme Court of Canada in *SS&C* at para 80, to successfully prove spoliation four factors must be satisfied. The first factor is the evidence was intentionally destroyed, altered, mutilated, or concealed. I find here that the destruction of both the truck and the records was intentional. Second, at the time of destruction litigation was ongoing or reasonably contemplated. In my view, both those tests are met. An alleged defect in the truck required its preservation, and any associated records were crucial to the litigation. Both were intentionally destroyed, either when litigation could reasonably have been presumed, or had been commenced.

[29] The third factor is the evidence was relevant to the said litigation. In my view, it clearly was. The truck, the fleet records, the eyewitness’s identification, the maintenance records of the truck, all would have been relevant to the litigation.

[30] The final factor is whether it is reasonable to infer that the evidence was destroyed to affect the litigation. In regard to this factor, it has been argued that this

2026 BCSC 1942 (CanLII)

can be inferred. I acknowledge Ms. Virk, was the vice president of the plaintiff company, and that she followed their company policy and destroyed the records. However, in the circumstances I am not prepared to infer that this was done deliberately to affect the litigation. In my view, it was just an unfortunate event and, at the most, was utterly thoughtless. So, I am not dismissing the action on a spoliation basis.

[31] The applicant will have their costs of the application.

"Nielsen A.J."

2026 BCSC 1942 (CanLII)