

CANADA / JUDGMENT

## M.P.W. v. Victoria (City)

2023 BCCA 14

COURT

British Columbia Court of Appeal

DECIDED

12 January 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCCA 14 M.P.W. v. Victoria (City)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

M.P.W. v. Victoria (City),

2023 BCCA 14

Date: 20230112

Docket: CA46915

Between:

M.P.W.

Appellant

(Plaintiff)

And

City of Victoria, Mark Knoop and Cory Moore

Respondents

(Defendants)

Corrected Judgment: The title page of the judgment was corrected  
on January 17, 2023.

Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated June 9, 2020 (M.P.W. v. City of Victoria, 2020 BCSC 858, Victoria Docket S124134).

The Appellant, appearing in person,  
via videoconference:

M.P.W.

Counsel for the Respondent:

D.G. Butcher, K.C.

C. Fleck

Place and Date of Hearing:

Vancouver, British Columbia

December 28, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 12, 2023

Summary:

The applicant appellant applies to reinstate his appeal, which has twice been placed on the inactive appeal list. HELD: the appeal is reinstated (on conditions), but only as against the City of Victoria. The application for reinstatement is dismissed in respect of the two individual respondents. There has been significant delay in advancing the appeal and the prejudice to the individual respondents arising from the delay outweighs the appellant's interests. For that reason, as well as others, it is not in the interests of justice to allow the appeal to continue specific to the individual respondents.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

## Introduction

- [1] The appellant, MPW, applies to remove his appeal from the inactive appeal list pursuant to Rule 50(3) of the Court of Appeal Rules, B.C. Reg 120/2022 [Rules]. Without reinstatement, MPW is restricted from filing documents in relation to the appeal: Rule 49(3).
- [2] The appeal challenges a June 2020 decision by a Supreme Court judge (indexed as 2020 BCSC 858), dismissing MPW's claim for damages arising out of an allegedly unlawful arrest and negligent investigation in 2010. The notice of appeal was filed in July 2020.

- [3] Two police officers who participated in the arrest and investigation of MPW were named as defendants at the trial and are respondents in the appeal. The City of Victoria (the "City") was also named as a defendant and continues as a respondent in the appeal.
- [4] MPW claimed against the City on the basis that it was vicariously liable for the alleged torts of the police officers, both of whom worked with the Victoria Police Department: see s. 20(1) (a) of the Police Act, R.S.B.C. 1996, c. 367.
- [5] Because of ss. 21(2) and (3)(a) of the Police Act, the police officers could only be held personally liable for damages if their allegedly tortious conduct involved dishonesty, gross negligence or malicious or willful misconduct. (The trial judge made note of this limitation at para. 132 of her reasons for judgment.)
- [6] MPW's appeal does not allege that the trial judge misdirected herself on the legal principles she was bound to apply in assessing whether MPW proved his claim, or that she made palpable and overriding errors of fact.
- [7] Rather, he says the trial judge did not meaningfully consider his health challenges when assessing his credibility and, importantly, did not properly accommodate his disabilities. As a result, she denied him sufficient opportunity to present his case.
- [8] The latter assertion is the predominant focus of the appeal. From MPW's perspective, the trial judge dismissed his claims based on an incomplete record. He says that if he had been properly accommodated, he could have better marshaled and presented evidence that would have made a difference to the outcome.
- [9] The background to the appeal and its chronology in this Court were helpfully summarized by Justice Fisher in a judgment indexed as 2022 BCCA 113 (Chambers). In September 2021, MPW's appeal was placed on the inactive appeal list. Justice Fisher heard an application to have it removed. In the course of her reasons, she explained that:
- [2] The appellant sued the City of Victoria and two officers of the Victoria Police Department for alleged wrongful arrest and negligence in connection with their investigation of allegations made in 2010 by a seven-year-old family member, VW, of sexual impropriety on his part. The police arrested the appellant without a warrant on November 30, 2010, and released him four hours later. In early January 2011, the Crown decided it would not charge the appellant
- [4] The trial proceeded over 15 days in September and October of 2019, followed with written submissions by the parties. The respondent, Det. Mark Knoop, was the investigating officer who interviewed the complainant and her mother. The respondent, Cst. Cory Moore, was the officer who arrested the appellant. In lengthy reasons for judgment, released June 9, 2020, the trial judge dismissed all of the appellant's claims. In assessing the credibility of the witnesses, the judge described a number of issues that raised concerns for her about the credibility of the appellant's evidence. She found that the respondent Det. Knoop did not carry out a negligent investigation and that both Det. Knoop and Cst. Moore had reasonable grounds to arrest the appellant.

- [5] The appellant filed his notice of appeal on July 8, 2020. Since then, he has obtained extensions of time to file the appeal record, transcripts, appeal book and his factum. On November 4, 2020, Justice Groberman granted the appellant an extension of time to November 30, 2020 to file the appeal record and to December 31, 2020 to file transcripts, with liberty to apply for a further extension. The appellant filed an appeal record on November 30 (although the respondents say it was incomplete), as well as a Notice of Constitutional Question, and sought further extensions of time for the other documents. On December 23, 2020, Justice Hunter granted him an extension of time to March 25, 2021 to file transcripts and the appeal book and to May 15, 2021 to file his factum. On March 26, 2021, the respondents consented to a further extension of time to May 7, 2021 and June 25, 2021, respectively.
- [6] The appellant filed transcripts on May 7, 2021, and the respondents consented to a further extension for filing the appeal book.
- [7] On June 1, 2021, the respondents filed a certificate of costs certifying, by consent, that their costs against the appellant at trial had been allowed in the amount of \$65,000.
- [8] On June 22, 2021, the respondents consented to extend time to August 20, 2021 for the appellant to file his factum and the appeal book. On August 19, 2021, they consented to another extension, to September 3, 2021, and subsequently to further extensions, first to September 14, 2021, and finally to September 17, 2021.
- [9] On September 15, 2021, the matter was placed on the inactive appeal list, pursuant to s. 25(1) of the Court of Appeal Act. In doing so, the Registry notified the appellant that if no steps are taken, the appeal will stand dismissed as abandoned pursuant to s. 25(5) on March 15, 2022.
- [10] Meanwhile, the appellant met the September 17, 2021 deadline but was unable to file his factum and appeal book due to its placement on the inactive list. Hence, this application.
- [10] The factum MPW attempted to file in September 2021 did not comply with the Rules; it was almost double the allowable length. As noted, he attempted to file an appeal book at the same time, which was incomplete.
- [11] Nonetheless, Justice Fisher removed the appeal from the inactive list. She noted that the delay in the appeal had been "considerable" and inherently prejudicial to the respondents: at para. 23. However, she was prepared to "accommodate [MPW] to a limited extent given his circumstances": at para. 27. She attached conditions to her order, including that MPW file and serve his factum and appeal book by April 15, 2022. Justice Fisher described this condition as "strict". She directed that MPW's factum not exceed the length permitted under the Rules and his appeal book "must include all the necessary material": at para. 29.

- [12] Under Rule 26, an appeal book must contain the evidence referred to in a party's factum. It must also be prepared in accordance with the Court's "completion instructions". Those instructions require that an appeal book "contain only as much evidence as is necessary to resolve the issues on appeal". If an appeal is from a trial judgment (the situation here), the appeal book must include the "necessary evidence entered at the trial in the order that evidence was introduced".
- [13] On April 19, 2022, MPW filed his factum (now 28 pages in length), and an appeal book. However, the appeal book remained incomplete.
- [14] On July 26, 2022, the Court's registrar made an order striking MPW's appeal book and providing him with six weeks from that date to file an amended appeal book (which would be September 6, 2022). The order stipulated that the appeal book contain "only true copies of the exhibits that were before the trial judge".
- [15] MPW did not comply with this order.
- [16] On September 15, 2022, the matter was once again placed on the inactive appeal list.
- [17] On October 17, 2022, MPW filed an affidavit with various exhibits, including an unfiled notice of motion seeking accommodation for his disabilities and a court appointed lawyer. The asserted jurisdictional bases for these orders are not clear to me. The unfiled notice of motion asks that the Court "[provide] resources to hire a lawyer so [that MPW] will have equal and fair access to the court system".
- [18] On October 31, 2022, the appeal was before Justice Fitch for a case management conference. Justice Fitch directed MPW to get his amended appeal book ready for filing and to bring an application to remove the appeal from the inactive list by December 12, 2022.
- [19] Justice Fitch explained to MPW that the amended appeal book had to include copies of the exhibits marked at the trial. If new evidence is to be adduced for the purpose of the appeal or material that was not formally marked as an exhibit is needed by MPW, he must bring a fresh evidence application. I have reviewed a transcript of the case management conference. Justice Fitch said this:

The first step you have to take is to put together your appeal book that includes only the exhibits that were filed as exhibits at trial. I know that you want to put additional materials before the court including diagnostic information that came into your possession either during the trial or after the trial that wasn't brought to the attention of the trial judge. Those after-the-fact documents will have to be the subject of a fresh evidence application. But let's just put that to the side at the moment because the first step you have to take is to file the appeal book with just the exhibits that were before the trial judge. And you must do that right away.

[Emphasis added.]

[20] Justice Fitch made it clear to MPW that if he did not prepare his amended appeal book as required and apply to have his appeal removed from the inactive list, the appeal would be deemed to have been dismissed as of March 14, 2023.

[21] On December 12, 2022, MPW filed an application to remove his appeal from the inactive list, along with an affidavit. The application reads:

[MPW] is applying so that this Appeal can go back on the Active list. The file became inactive due to cognitive and related disabilities. These have been presented by affidavit and multiple third-party medical diagnosis at trial and post trial. The Hon. Justice Fitch ruled that this application needs to be done before there can be an application for the court to provide legal assistance as [MPW's] cognitive challenges, lack of capacity makes advocating his case near impossible.

The purpose of the appeal is a new trial as [MPW] did not get a fair trial because the trial judge did not recognize or accommodate his disabilities with the result that [his] ability to prove [his] case was adversely affected.

[22] MPW also attempted to file another appeal book. However, it was rejected on the basis that it contained an affidavit that was not before the trial judge. Contrary to Justice Fitch's directions, the appeal book did not include copies of "the exhibits that were before the trial judge". MPW says he did not include the exhibits because from his perspective, they are not necessary for advancing his appeal. He believes he can present his appeal based on the trial transcripts alone (which have been filed), copies of medical documents that were tendered at the trial but not marked as formal exhibits, and medical information gathered during or after the trial that was not before the trial judge. He intends to support his appeal with this latter material by way of a fresh evidence application.

[23] On December 21, 2022, the respondents filed their response to the second application to remove the appeal from the inactive list. I heard submissions on December 28, 2022 and reserved judgment on the application.

## Discussion

### Parties' Positions

[24] MPW says he appreciates the need to move his appeal forward and wants to do so. However, moving quickly and meeting the requirements of the Rules has been challenging for him. MPW says he suffers from cognitive disabilities that significantly impact his energy levels, his ability to read, comprehend material and follow instructions, and his capacity to stay focused and committed to tasks. He says the delay in advancing his appeal is attributable to his health struggles. He is doing the best he can as a self-represented litigant, reaching out for assistance and advice when available (including to organizations such as Access Pro Bono and the federal government's Court Challenges Program), and making concerted efforts to produce the material necessary for a hearing on the merits. However, it takes him longer than is usually the case because of his health challenges.

- [25] MPW says it is in the interests of justice to allow him to proceed with his appeal.
- [26] He has filed the transcripts, an appeal record, and a factum. He says he does not need an appeal book to advance the issues that he seeks to raise, as he believes the transcripts will suffice. (The respondents acknowledge that if they consider it necessary that certain trial exhibits be before the Court for purposes of an appeal, they can file their own appeal book. I understand that the trial involved approximately 40 marked exhibits, most of which were adduced by the respondents.)
- [27] MPW says there is merit to his appeal and it raises issues of public importance, namely, the extent to which a trial judge is duty bound to accommodate persons with disabilities in the trial process. He has also filed a notice of constitutional question that, among other things, raises equality issues and seeks to challenge the jurisdiction or authority of a trial judge to award costs against a person with disabilities. (The Court's registrar has ordered that the request for leave to raise the constitutional question must be heard prior to the appeal.) MPW argues that the appeal should be heard so this Court can provide important guidance for the lower courts on how to accommodate someone in MPW's circumstances and ensure access to justice.
- [28] The respondents argue that the delays in the lower court litigation and on appeal have already been so excessive that it is not in the interests of justice for the matter to carry on. This is particularly so for the individual respondents, who have now borne the weight of the claims against them for more than 10 years. The respondents ask that MPW's application for removal from the inactive list be dismissed; alternatively, that he be allowed to proceed only with the appeal against the City.
- [29] The events that gave rise to MPW's civil action occurred in 2010. MPW did not file a notice of claim until just before expiry of the two-year statutory limitation period. The claims were not resolved by trial until June 2020. Accordingly, it took seven and one-half years for the case to make its way through the trial court. As I understand it, there were multiple interlocutory appearances. The notice of appeal was filed in July 2020, we are now almost two and one-half years post-filing, and the appeal is still not ready for hearing. Not only has MPW failed to comply with the Rules and with specific directions given to him on the contents of his appeal book, he has said that he intends to apply for the appointment of a lawyer, bring a fresh evidence application (which must be heard before the appeal, as ordered by the registrar), and he has raised constitutional issues.
- [30] The respondents say that if the appeal is removed from the inactive list, further delay is inevitable and it is likely to be significant. From their perspective, MPW's past actions show that he is unlikely to exercise diligence; as such, further interlocutory appearances to keep things on track or to clarify MPW's direction in the appeal will be necessary. He has already been accommodated many times in the appeal, clear directions have been provided to him, and the appeal continues to lag. It has twice been placed on the inactive list.

- [31] The respondents also say the appeal has no merit.
- [32] In support of this argument, they point to a decision from Justice Newbury in December 2020 (indexed as 2020 BCCA 351), in which she denied MPW an order for indigent status. Justice Newbury noted that she had read the trial judge's reasons and saw "nothing to suggest that the trial judge assessed [MPW's] credibility in a manner that was unfair in light of his health difficulties": at para. 12. She acknowledged that she could not say the appeal was bound to fail because of the fact-intensive nature of a credibility assessment. However, the "standard of review is a high one for factual matters, especially for credibility findings, and success would seem extremely unlikely": at para. 12.
- [33] The respondents also point to Justice Fisher's reasons from March 2022, cited earlier. Justice Fisher described the merits of the appeal as "questionable": at para. 23. Although she acknowledged that it was difficult to fully assess the merits in the context of the application before her, Justice Fisher agreed with the respondents that the appeal appears to have "little likelihood of succeeding": at para. 26.

## Legal Principles

- [34] Rule 50(3) stipulates that the Court's registrar must remove an appeal from the inactive appeal list if a justice grants leave to proceed with the appeal.
- [35] The party applying for leave must show good reason for proceeding: *Galiano Conservancy Association v. British Columbia (Ministry of Transportation and Highways)* (1997), 40 B.C.L.R. (3d) 171 at 176, 1997 CanLII 4128 (B.C.C.A.) (Chambers).
- [36] The principal question is whether removal from the inactive list is in the interests of justice: *Kar Recovery, Ltd. v. KDA*, 2004 BCCA 503 at para. 23 [Kar Recovery]. Relevant factors include: (a) the extent of the delay; (b) the explanation for the delay; (c) prejudice arising from the delay; and (d) the likelihood of success on appeal: *Kar Recovery* at para. 24; *Booty v. Hutton*, 2009 BCCA 375 (Chambers) at para. 22, reconsideration ref'd 2010 BCCA 185.
- [37] Self-represented litigants are often afforded flexibility in meeting this Court's form and procedural requirements; however, they must still have an acceptable explanation for the delay in advancing their appeal and provide a good reason for reinstatement: *Berg v. Berg*, 2000 BCCA 574 at para. 19 (Chambers); *Faro (Town) v. Knapp*, 2012 YKCA 13 at para. 52 (Chambers).

## Application of Legal Principles

- [38] It is indisputable that this appeal has involved substantial delay. Justice Fisher made note of this fact in her reasons. Another nine months have passed since then and MPW has still not filed an appeal book containing copies of the exhibits from the trial, despite receiving clear directions to do so.

- [39] Consistent with the respondents' submission, I am satisfied that further delay is inevitable if the appeal is removed from the inactive list. MPW has three motions that he wishes to bring and have resolved before the appeal is set for hearing. The jurisdictional basis relied upon by MPW for his sought-after order appointing counsel is unclear. The notice of constitutional question is convoluted, raises issues that were not before the trial judge, and, among other things, appears to challenge the costs regime established by the Supreme Court Civil Rules, B.C. Reg. 168/2009, specific to claims brought against the state. That is an issue with far-reaching implications and for which there may be intervention interest if leave is granted. The interlocutory motions will take time to prepare and respond to, and given how the appeal has progressed thus far, I have no confidence that they will move expeditiously. Assuming they are heard and resolved (along with a fresh evidence application), and the respondents then file their factum, it is unlikely that the appeal -- if removed from the inactive list -- will be heard before the end of 2023. In my view, 2024 is more likely.
- [40] As noted, MPW explains the delay with reference to his stated disabilities. In his affidavit filed on December 12, 2022, he deposes that he has "done everything in [his] power to move this appeal forward". However, he "suffers from disabilities that impede [his] daily functioning". These include "cognitive challenges that prohibit the use of computers for any length of time, the ability to concentrate and memory issues. Reading and recalling is very difficult".
- [41] MPW's affidavit refers to a "Neurologist report from ICBC". I have reviewed that report (dated August 27, 2020). A CT brain scan from September 2019 revealed "mild bilateral patchy white matter angiopathic change". The neurologist said the scan shows that MPW "has been developing multiple, cumulative, small strokes", and opined that MPW's "cognitive complaints are explained by his cerebrovascular disease". Ongoing symptoms include reduced endurance, poor concentration and impaired memory.
- [42] For the purpose of this application, I accept that MPW's medical condition impacts his ability to move the appeal forward, as well as his ability to marshal and prepare the material required to perfect the appeal and ready it for hearing. Justice Fisher reached this same conclusion, finding that MPW's "disabilities certainly appear to have contributed to his need for all the extensions of time": at para. 22. It was for this reason that she considered it to be in the interests of justice to remove his appeal from the inactive list in March 2022: at para. 27.
- [43] At the same time, the appeal record demonstrates that MPW is capable of arranging for the production of materials, preparing affidavits, conducting research, and producing written argument without assistance. Before me, he was able to put a position forward in support of his application, articulate the reasons why he says the appeal should be removed from the inactive list, and respond to issues raised and submissions made by counsel for the other side.

- [44] There is evidence supporting MPW's claim that he has ongoing cognitive and physical challenges. I accept that these challenges make the appeal process more difficult to navigate than would ordinarily be the case and provide an explanation for much of the delay.
- [45] However, MPW has also demonstrated that his challenges are not insurmountable, and that he does have the capacity to do what is required of him with additional time. Sometimes he has received assistance in doing so. At other times, he has not. I am not convinced that the entirety of the delay at issue here is driven by MPW's medical condition.
- [46] In any event, MPW's personal circumstances cannot be determinative of whether I allow him to continue with the appeal. There are also countervailing interests to consider, even in the face of explained delay. This includes prejudice to the respondents. Whether removing an appeal from the inactive list is in the interests of justice is a question that must be decided through an individualized inquiry, is contextually informed, and requires a balancing of all relevant factors, not just ones that weigh in favour of the applicant appellant.
- [47] Specific to the issue of prejudice, Justice Fisher found that the ongoing appellate delay in this case was inherently prejudicial to the respondents: at para. 23. The respondents say there was ample support for this finding and that the prejudice remains ongoing, especially for the individual respondents. I agree.
- [48] Prejudice logically arises from the fact that the circumstances underlying MPW's civil claims occurred in 2010. The lives and circumstances of relevant witnesses will change with the passage of time. Among other things, memories fade. Witness availability is impacted. Documents or other forms of evidence may be lost. As a matter of human experience and common sense, the greater the amount of time between the events at issue and the adjudication process, the harder it can become to marshal and adduce reliable evidence in the event of an order for a new trial: *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145 at para. 37 and *Lost Lake Properties Ltd. v. Nanaimo (Regional District)*, 2016 BCCA 487 at para. 19.
- [49] The respondents also continue to incur litigation costs in relation to this matter. I understand that costs were awarded against MPW at the trial and assessed in the amount of \$65,000. (MPW said he is making payments towards the trial costs.) Given the chronology of the appeal, the number of interlocutory appearances that have been and likely will be required if the appeal is removed from the inactive list, and the nature of the issues MPW seeks to advance, the costs of the appeal will also likely be considerable.
- [50] The individual respondents' professional and personal reputations will suffer continuing prejudice in light of the nature of the allegations that have been made against them.
- [51] Specific to this point, the respondents analogize the case to *Deline v. Kidd, et al.*, 2003 BCCA 170 [Deline]. In *Deline*, a division of the Court upheld an order of a justice in chambers denying an application to remove an appeal from the inactive list. Mr. Deline sued Crown

counsel and the provincial government for malicious prosecution. The claim was dismissed after a summary trial. Mr. Deline filed a notice of appeal, but took no further steps to move the appeal forward and it was placed on the inactive list. Mr. Deline applied to continue the appeal approximately 18 months after the initial filing. He explained the delay by referencing health issues and other stressors.

- [52] A chambers justice refused leave. Among other things, he found that reactivating the appeal would prejudice the defendants given the nature of the allegations against them: "The allegation of malice strikes at the heart of the defendants' professional reputations, and keeping those allegations alive could not do other than cause them prejudice": at para. 8, emphasis added. The division agreed with this observation. Reactivating the appeal would "perpetuate allegations of professional misconduct against respondents that have been rejected by the summary trial judge in her findings": at para. 17.
- [53] In this case, MPW alleged unlawful arrest and negligent investigation against the individual respondents.
- [54] The trial judge found that (now-retired) Mark Knoop had reasonable grounds to arrest MPW. In his role as a detective, he held a subjective belief that reasonable grounds existed and the belief was objectively reasonable: at para. 244. The trial judge also found that there was "no basis" for MPW's unlawful arrest claim against Cory Moore: at para. 252.
- [55] Specific to the claim of negligent investigation, the trial judge found there was "absolutely no evidence to support any intentional wrongdoing or malice" by Mr. Knoop: at para. 189, emphasis added. To the contrary, "[a]ll of the evidence [supported] that Det. Knoop exercised his discretion reasonably throughout the course of the investigation": at para. 189. There was no breach of police policy and "no conduct, egregious or otherwise" that supported a breach of the standard of care: at para. 190.
- [56] By the time the trial completed, the allegations against the individual respondents had been outstanding for more than 10 years. MPW's claims were dismissed after a fact-intensive hearing, concrete credibility findings, and comprehensive reasons for judgment. The appeal proceeding "keep[s] [those] allegations alive": Deline. See also *Foreman v. Reid*, 2011 BCCA 394 (Chambers) at paras. 27-28.
- [57] In this context, I agree with the respondents that MPW's claims against Mr. Knoop and Mr. Moore, and the specific nature of the assertions made by him, carried significant implications for their reputations -- then and now. For instance, the trial judge noted at para. 156 of her reasons that MPW claimed more than simply a negligent investigation by Mr. Knoop. He alleged:
- [156] "an intentional malicious effort to side-step mandated policies and investigative steps" so that Det. Knoop could put the plaintiff "in the interrogation seat and then punish the plaintiff." He submits that Det. Knoop and Cst. Moore ignored their training and procedures in an effort to coerce the plaintiff into confessing to a crime that he did not commit.

[Emphasis added.]

Removing the appeal from the inactive list will mean that the individual respondents will continue to bear the weight of allegations that they abused their positions of authority, notwithstanding the trial judge's factual determination to the contrary. Deline resonates here.

[58] That brings me to the merits of the appeal, the fourth factor for consideration under the Rule 50(3) analysis.

[59] MPW's factum, which was filed on April 19, 2022, alleges "Constitutional and Civil Rights Errors" and "Administrative and Procedural Errors". These include allegations that the trial judge: (a) did not accommodate his disabilities during the trial; (b) "pushed [him] beyond his cognitive limits, despite objections"; (c) erroneously relied on a "compromised and uncompleted trial"; (d) "dismissed and ignored" his complaints of not "being able to finish interviewing witnesses"; and (e) "silenced [MPW] when attempting to bring up his cognitive limitations".

[60] According to MPW, his "right to equal and fair access to the court, both as a person with [demonstrable] and documented disability and as a self-represented litigant were continually denied, dismissed resulting in prejudice and a lack of credibility at trial". His factum asserts that he:

had to limit, because of disabilities the scope of his case At trial, [MPW] continually had to make sacrifices such as insisting on witnesses and evidence in what became a losing proposition only to find himself unable to complete the trial and assert his case.

Much of the trial, [MPW] could not take notes, construct an exhibit binder, recall fact and information moments after they were presented

[MPW] lacked both the capacity and the time to properly depose the witnesses and more importantly to consider and present evidence to be used as exhibits. [MPW] was not even able to create a usable exhibits binder and thus this Appeal is limited to access for persons with disability and a limited scope at that.

[61] In support of his appeal, MPW's plans on invoking s. 15 of the Canadian Charter of Rights and Freedoms [Charter]; the British Columbia Human Rights Code, R.S.B.C. 1996, C. 210; and Ethical Principles for Judges (Ottawa: the Canadian Judicial Council, 2021), online: cjc-ccm.ca (accessed January 4, 2023).

[62] Among other things, the factum seeks: a new trial with orders that specify the type of accommodation MPW is entitled to; "direction and clarity on how all participants in our legal systems should accommodate litigants with cognitive and related disabilities; a declaration that ordering costs against litigants who do not succeed in their claims against the state is unconstitutional; and an order that "applicable government agencies, under legislation and other rules provide assistance at the new trial".

- [63] Similar to Justices Newbury and Fisher, I find it difficult to assess the merits of MPW's appeal on the basis of the limited material before me.
- [64] It is readily apparent from the trial judge's reasons that, in expressing concerns about MPW's credibility, she considered matters separate from his testimony and the manner in which he gave his evidence. This included a finding that he had sworn a false affidavit in support of an ex-parte family law application brought in the Provincial Court in September 2011: at para. 114.
- [65] The respondents have also presented various excerpts from the transcripts that show the trial judge was alive to MPW's expressed concerns about his cognitive and physical health during the trial, and made efforts to accommodate him. As one example, the trial judge told MPW that he was "free to say [he was] not feeling well and [she would do her] best to accommodate that". As another example, when MPW advised the trial judge that he wanted to adjourn the trial to attend a medical clinic so that he could be assessed for a possible stroke, the adjournment was granted.
- [66] The respondents were also prepared to accommodate MPW when shown to be necessary so that the trial would finish and whatever the outcome, there could be no complaint about MPW's "ability to handle the trial", presumably on appeal.
- [67] However, I appreciate that to fully assess the merits of the appeal, one would likely need to read the entirety of the trial record and contextually consider the trial judge's response to concerns raised by MPW about his medical condition, or medical information tendered by him, and its demonstrated impact on his ability to present his claims. I have not done that; nor have I been asked to. That is a role for a division if leave to proceed is granted.
- [68] For the purposes of this application, I am prepared to assume that the appeal is not bound to fail. I do so in recognition of the fact that procedural fairness is foundational to the adjudicative process, including in the civil context (a proposition accepted by the respondents). As noted by the Supreme Court in *Toronto (City of) v. C.U.P.E.* (2001), 55 O.R. (3d) 541 at para. 74, 2001 CanLII 24114 (Ont. C.A.) aff'd 2003 SCC 63:

The adjudicative process in its various manifestations strives to do justice. ...the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

See also *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 313.

- [69] Having considered, weighed and balanced the factors discussed above, I have concluded it is in the interests of justice to remove MPW's appeal from the inactive list and to allow him to continue; however, I am granting leave to continue only in respect of the appeal against the City.
- [70] Reinstating the appeal against the City will allow MPW to challenge the fairness of the trial process and seek an order for a new hearing in the Supreme Court. His stated disabilities find prima facie medical support in the information before me. I accept that the legal and constitutional issues MPW wishes to raise on appeal are not only important to him, but are also issues of public importance to persons with disabilities, generally, and on the face of it, raise access to justice concerns. He has explained the delay in the appeal, at least in part.
- [71] I cannot say that his appeal is bound to fail; he has filed much of what is required of him for the appeal to be heard; and the respondents have acknowledged that they can put the marked trial exhibits before the Court if they consider them necessary for the appeal.
- [72] However, I do not consider it to be in the interests of justice that MPW be allowed to proceed with his appeal against the individual respondents, Mark Knoop and Cory Moore.
- [73] For reasons already given, there has been significant delay here and removing the appeal from the inactive list is likely to result in further delay. Although I cannot say the appeal is bound to fail, I do consider that MPW will have a difficult time persuading a division of this Court that the trial was procedurally unfair and that the trial judge failed to accommodate his needs as a self-represented litigant. The trial judge had a unique advantage in assessing MPW's personal complaints in the context of the trial and the evidence as a whole. Her discretionary decisions, factual findings, and credibility assessments will be entitled to considerable deference on appeal.
- [74] In the absence of a clearly identified error in principle or palpable and overriding error of fact, this Court is unlikely to interfere with the verdict. At least as I read it, MPW's factum does not identify a specific error in principle, a palpable and overriding error of fact, or allege that the trial judge somehow misapprehended the evidence before her. Nor, from my reading, does he identify in any concrete way what evidence he would have presented, or submissions he would have made, had he been given more time. Instead, his appeal is a generalized complaint about the fairness of the trial that he hopes to support, at least in part, with reference to fresh evidence.
- [75] In light of the delay, past and anticipated, my assessment of the strength of the appeal, and the serious nature of MPW's allegations against the individual respondents, I consider the ongoing prejudice against the individual respondents to be too great and they outweigh MPW's interests in proceeding.

[76] Allowing reinstatement, but only in part, keeps MPW's route to a remedy for the 2010 events alive if he is successful in setting the Supreme Court order aside. He will still be able to seek damages against the City for the police officers' allegedly tortious conduct, subject to statutory or other defences the City may have.

## Disposition

[77] MPW is granted leave to proceed with his appeal against the respondent City of Victoria. However, subject to further order by a justice of this Court, I consider it necessary to attach the following conditions:

- (1) MPW is not required to file an appeal book;
- (2) If he has not already done so, MPW is encouraged to reach out again to Access Pro Bono to seek assistance in this matter;
- (3) If MPW intends to proceed with an application for the appointment of legal counsel, he must file and serve that application by no later than February 17, 2023, with a view to the application being heard by no later than March 31, 2023;
- (4) If the application for the appointment of legal counsel is successful, filing deadlines for MPW's applications to introduce fresh evidence and raise constitutional questions, and a hearing date for a combined hearing of those applications, shall be arranged between counsel;
- (5) If the application for the appointment of legal counsel is not successful, filing deadlines for MPW's applications to introduce fresh evidence and raise constitutional questions, and a hearing date for a combined hearing of those applications, shall be fixed by a case management justice within 15 days after the release of judgment on the application for the appointment of counsel;
- (6) The respondents are not obliged to file a factum in the appeal unless and until there is resolution of MPW's applications to introduce fresh evidence and for leave to raise constitutional questions; and,
- (7) This appeal is referred to the Court's registrar for the appointment of a case management justice.

[78] The application to remove the appeal from the inactive appeal list as against the individual respondents, Mark Knoop and Cory Moore, is dismissed.

"The Honourable Madam Justice DeWitt-Van Oosten"

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.bccourts.ca/jdb-txt/ca/23/00/2023BCCA0014cor1.htm>

**CASE PAGE**              <https://chat.esheria.ai/case-law/canada/m-p-w-v-victoria-city-2023-bcca-14>

Prepared on 28 October 2026 · Esheria