

CANADA / JUDGMENT

Tavender v. Giltrow

2025 BCCA 473

COURT

British Columbia Court of Appeal

DECIDED

2 October 2025

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2025 BCCA 473 Tavender v. Giltrow COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Tavender v. Giltrow, 2025 BCCA 473 Date: 20251002 Docket: CA50948 Between: Robin Michael Steven Tavender Appellant (Petitioner) And Janet Giltrow and The University of British Columbia Respondents (Respondents) Before: The Honourable Justice Gomery (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated August 28, 2025 (Tavender v. Giltrow, Vancouver Docket S120935). Oral Reasons for Judgment The Appellant, appearing in person: R.M.S. Tavender Counsel for the Respondents: N.V. Tzemis Place and Date of Hearing: Vancouver, British Columbia October 2, 2025 Place and Date of Judgment: Vancouver, British Columbia October 2, 2025 Summary: The appellant seeks a no fee order, leave to appeal, a stay of proceedings in the court below, and an order that the Court appoint counsel to represent him in the appeal. The respondents seek security for costs. Held: The no fee order is granted. The applications for leave to appeal, a stay of proceedings, and appointment of counsel are dismissed. Much of the order below is unappealable, and grounds of appeal for the portions that are appealable have very little merit or are bound to fail. The respondents' application for security for costs is adjourned generally. GOMERY J.A.:

Introduction:

- [1] This appeal involves a procedural order made at a hearing in chambers to move matters forward in a judicial review proceeding commenced 13 years ago, in February 2012. The order was made on August 28, 2025, and the notice of appeal filed on September 3. In the short time since, the appellant, who is self-represented, has filed four applications. He seeks: a no fee order; leave to appeal; a stay of proceedings in the court below; and an order that the Court appoint counsel to represent him in the appeal. The respondents seek security for costs of the appeal.
- [2] At the commencement of the hearing, I directed that the appellant's applications proceed before hearing argument on the security for costs application. Having heard the appellant's applications, for the reasons that follow, I need not address the question of security for costs.

Background

- [3] The appellant is Robin Tavender. On August 31, 2009, Mr. Tavender was suspended from the University of British Columbia for 12 months following allegations of non-academic misconduct. Mr. Tavender appealed the suspension to the Senate Appeal Committee on Student Discipline, which dismissed the appeal.
- [4] On February 14, 2012, Mr. Tavender filed a petition for judicial review in the Supreme Court of British Columbia. On March 6, 2012, the respondents filed a response to the petition.
- [5] Mr. Tavender took no further steps in this litigation. Thirteen years later, in 2025, the respondents advised Mr. Tavender that they would be filing an application to have the petition dismissed for want of prosecution.
- [6] On June 10, 2025, the respondents advised Mr. Tavender that chambers dates had been secured, and he would be served with the want of prosecution application in due course.
- [7] On July 10, 2025, Mr. Tavender filed a notice of intention to proceed and a notice of hearing setting the petition for hearing on the dates reserved for the want of prosecution application.
- [8] On July 16, 2025, the respondents served Mr. Tavender with their application to dismiss the petition proceeding for want of prosecution.
- [9] Mr. Tavender filed two applications to set aside the want of prosecution application for failing to comply with the Supreme Court Civil Rules. The first application, filed July 23, 2025, stated that the notice of application exceeded 10 pages. The second application, filed August 15, 2025, stated that the respondents served one, rather than two, paper copies on Mr. Tavender.
- [10] On August 14, 2025, the respondents filed an application seeking scheduling assistance. In particular, the respondents requested that the want of prosecution application be heard and determined before the petition hearing or any further applications in the petition proceeding.
- [11] On August 28, 2025, these three applications relating to the want of prosecution application came on for hearing before Justice Milman. There was, pending, an application brought by Mr. Tavender to require that counsel be appointed to represent him without charge in the petition proceeding. It was scheduled for hearing on September 2.
- [12] Justice Milman refused Mr. Tavender's request for an adjournment until the representation application had been decided. He dismissed Mr. Tavender's applications to adjourn the want of prosecution application and held that it should be heard in advance of others brought or that might be brought by Mr. Tavender. His order states:

1. The petitioner's application to adjourn the hearing of respondents' notice of application filed August 14, 2025, the petitioner's notice of application filed July 23, 2025, and the petitioner's notice of application filed August 15, 2025, and set for hearing for August 28, 2025, is denied.
 2. The petitioner's notice of application filed July 23, 2025 and notice of application filed August 15, 2025 are dismissed, and the respondents are permitted to rely on their notice of application filed July 16, 2025 ("Want of Prosecution Application") as filed.
 3. The Want of Prosecution Application will be heard and determined before the petition and any applications in this proceeding, except that the petitioner may bring at any time his notice of application filed August 7, 2025 for which Justice Masuhara granted the petitioner leave to bring.
 4. Subject to paragraph 3, no party will be permitted, without leave of court, to file any further applications in this proceeding until the Want of Prosecution Application is heard and determined. Any such application for leave will be made before Justice Milman.
 5. A transcript of Justice Milman's reasons will be provided to the parties and paid for by court services.
 6. The petitioner's signature on this order is dispensed with.
 7. Counsel for the respondents will provide the petitioner with a draft of this order and the petitioner will provide counsel for the respondents with any objections within 24 hours of receipt of the draft order.
 8. If the petitioner provides any objections to the draft order within 24 hours of receipt, the parties have leave to schedule a 9:00 am hearing before Justice Milman to settle the order; otherwise, the order will be submitted to Justice Milman's attention for signature.
 9. Costs of these applications will be in the cause.
- [13] During the hearing before Milman J., Mr. Tavender objected that counsel appearing for the respondents had not been properly appointed, relying on an English text. The judge summarily dismissed the objection.
- [14] Mr. Tavender maintains that the judge erred by:
- a) Refusing an adjournment of the hearing on August 28, 2025 until after the appointment application was heard;
 - b) Adjourning the hearing of the petition until after the want of prosecution application was heard;
 - c) Summarily dismissing his objection to the respondents' counsel;
 - d) Dismissing his applications to set aside the want of prosecution application;
 - e) Refusing Mr. Tavender sufficient time to argue his applications; and

- f) Refusing Mr. Tavender time to argue costs. Merits of the appeal Legal significance of the merits
- [15] All of the applications before me require consideration of the merits of the appeal, albeit in various ways. The application for a no fee order must be refused if the appeal is bound to fail: Court of Appeal Rule 85(6). Leave to appeal requires an assessment of whether the appeal is, on its face, meritorious or, on the other hand, frivolous: *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) at para. 3. On an application for a stay of proceedings, the applicant must demonstrate that, on appeal, there is some merit to the appeal, sometimes described as a serious question to be tried or an arguable case: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 335; *Kropp v. Swaneset Bay Golf Course Ltd.* (1998), 50 B.C.L.R. (3d) 55 at para. 2 (C.A.).
- [16] Mr. Tavender's application for the appointment of counsel is out of the ordinary. He relies on the Statute of Henry VII, 11 Henry VII, c. 12, and the inherent jurisdiction of the court. The statute seems to contemplate an order that is in some sense discretionary. It was enacted in 1496, and modern authority adopts a restrictive approach to the appointment of counsel at public expense: *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286 at para. 85; *M.P.W. v. Victoria (City)*, 2023 BCCA 111 at paras. 16-20.
- [17] To the extent that this Court has jurisdiction to appoint counsel as requested by Mr. Tavender, and that the jurisdiction is one that can be exercised by a justice in chambers, in my view, the authority to make the order must be discretionary and the apparent merits of the appeal must be a relevant consideration in the exercise of the Court's discretion. Assessment of the merits Unappealable portions of the order
- [18] Portions of the Milman J.'s order are unappealable, that is, they are not subject to review on appeal to this Court. Although this Court has jurisdiction to hear an appeal from "an order of the Supreme Court", not every pronouncement a Supreme Court judge makes is an "order" for the purpose of an appeal: *Skyllar v. The University of British Columbia*, 2022 BCCA 138 at para. 17. In particular, a ruling that addresses the sequencing of competing sets of applications is not appealable: *Badela v. Donald*, 2024 BCCA 215 at para. 22. More generally, procedural rulings of the trial court are not generally appealable: *First Majestic Silver Corp. v. Davila Santos*, 2015 BCCA 452 at para. 34; *Chaplin v. Sun Life Assurance Company of Canada*, 2002 BCCA 292 at paras. 21-24.
- [19] Paragraphs 3 to 8 of Milman J.'s order are procedural. Paragraphs 3 and 4 concern the sequencing of applications. Paragraphs 5 to 8 provide for the provision of a transcript of the hearing to the parties and entry of the order. These paragraphs are unappealable.
- [20] In my opinion, para. 2 of the order is also unappealable. It dismisses two applications brought by Mr. Tavender for the purpose of upending the want of prosecution application, and orders that the respondents may rely on their filed notice of application to bring the want of prosecution application. The substance of this paragraph is procedural.

- [21] Accordingly, paras. 2 to 8 of Milman J.'s order are unappealable and, so far as these paragraphs are concerned, the appeal is bound to fail.
- [22] This leaves paras. 1 and 9 of the order for consideration. Paragraph 1 of the order
- [23] Paragraph 1 of the order dismisses Mr. Tavender's application to adjourn the hearing of the petition. An order allowing or refusing an adjournment is appealable, albeit with leave: Court of Appeal Rule 11(a)(iv).
- [24] Leave to appeal a discretionary order is rarely granted: *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, 1998 CanLII 6468 at para. 23 (B.C.C.A.). A decision on an adjournment application is highly discretionary: *Bodnar v. The Cash Store Inc.*, 2007 BCCA 366 at para. 16.
- [25] If leave is granted, the standard of review is deferential. Interference with a discretionary order is only justified where the judge erred in principle, ignored, afforded insufficient weight to, or misapplied a relevant factor, or came to a decision that is so clearly wrong as to amount to an injustice: *Ip v. Wilson*, 2019 BCCA 189 at para. 4.
- [26] In my view, there is very little merit to an appeal of the adjournment ordered in para. 1 for the following reasons:
- a) The adjournment was ordered as an exercise in case management, in which judges of the trial court are afforded wide discretionary powers with a view to the just, speedy and inexpensive resolution of proceedings on their merits, taking into account considerations of proportionality: *Morad v. Iannone*, 2023 ABCA 293 at para. 31; *Iris Legal Law Corporation v. Purcell*, 2024 BCCA 90 at paras. 52-54; Supreme Court Civil Rules 1-3;
 - b) The adjournment was ancillary to the essential and unappealable question of sequencing;
 - c) It must have been open to the judge to consider that the want of prosecution application should be heard first, considering its apparent merit in the context of a 13-year-old petition proceeding and that the respondents took steps to schedule it before Mr. Tavender filed his notice of intention to proceed;
 - d) It must be borne in mind that Mr. Tavender's position was essentially tactical. He wanted to avoid consideration of his 13 years of inaction in prosecuting his petition by pre-empting the want of prosecution application and forcing a hearing of the petition on the merits without reference to the delay; and
 - e) Mr. Tavender says that it is not in the interests of justice that the respondents should be afforded an opportunity to have his proceeding dismissed without reference to the merits. He takes issue with the leading decision in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473, and maintains that dismissal for want of prosecution should not be available in a judicial review proceeding commenced by petition. All that has been decided to this point is that the respondents may make their application in the court below before the petition for judicial review is heard on the merits. When that application is heard, Mr. Tavender will have his chance to explain his delay in prosecuting

the judicial review proceeding and argue that it is in the interests of justice that the proceeding be permitted to proceed. Paragraph 9 of the order: costs

- [27] Paragraph 9 of the order is appealable, though leave to appeal is required if costs are the only issue on appeal, as will occur if leave to appeal para. 1 is refused and the appeal of paras. 2 to 8 is quashed for want of jurisdiction because those portions of the order are unappealable: Court of Appeal Rule 11(f); *Singh v. Singh*, 2025 BCCA 309 at paras. 18-20.
- [28] Paragraph 9 orders that costs of the applications be in the cause. Mr. Tavender's complaint about this part of the order is that he was not given time to argue costs, "including statute law, case law, and argument, and to raise a Charter issue that I should have raised in my application, but which I did not, which would have required an adjournment to notify the attorney general".
- [29] An appeal of the disposition of costs in para. 9 is bound to fail. "Costs in the cause" simply attributes responsibility for the costs of the application at hand to the party who loses at the end of the day. It is a routine and neutral disposition ordered in the exercise of a broad discretion. There is no reasonable likelihood that a division of this Court would conclude that the judge was obliged to afford Mr. Tavender time to make extensive submissions before making such an order. The judge could not be said to have erred in failing to address an unnamed Charter issue not disclosed in Mr. Tavender's materials. Conclusion as to the merits
- [30] To summarize, only paras. 1 and 9 of the order are appealable. An appeal of para. 1 would require leave to appeal, and there is very little merit to the appeal, if leave were granted. An appeal of para. 9 is bound to fail.
- [31] I turn to the various applications at hand. Order that the Court appoint counsel
- [32] In my view, Mr. Tavender's application for an order that the Court appoint counsel must fail because there is very little merit to the appeal. I do not decide whether such an application might succeed if the appeal had apparent merit. Leave to appeal
- [33] The established test for granting leave to appeal involves an assessment of:
- 1) Whether the point on appeal is of significance to the practice;
 - 2) Whether the point raised is of significance to the judicial review proceeding;
 - 3) Whether the appeal is on its face meritorious or, on the other hand, frivolous; and
 - 4) Whether the appeal will unduly hinder the progress of the proceeding: *Power Consolidated* at para. 3.
- [34] In my view, leave to appeal paras. 1 and 9 of the order should be refused. The points Mr. Tavender wishes to argue on appeal are not significant to the practice. As noted, the appeal has very little merit. Granting leave to appeal would further delay the progress of a proceeding that has already been long delayed. I accept that, if Mr. Tavender were to

achieve what he seeks on appeal, it would be potentially significant to the outcome of the litigation, but this solitary point in favour of granting leave is overwhelmed by the other considerations I have canvassed. Stay of proceedings

- [35] The test for a stay of proceeding begins with an assessment of whether there is some merit to the appeal, and proceeds on to a consideration of irreparable harm and the balance of convenience. In this case, the application fails at the first stage because there is very little merit to the appeal. No fee application
- [36] The test for a no fee order under R. 85 has two parts. The first part requires a finding that paying court fees under R. 84 would cause the applicant undue hardship. I am satisfied that this requirement is satisfied. In his application form, Mr. Tavender indicates that he has been on social assistance for persons with disabilities since 2010 and his gross household income is in the order of \$16,000. I accept that requiring payment of court fees would cause him undue hardship.
- [37] The second part of the test requires that the justice hearing the application find, in the words of R. 85(6)(b): that the appeal is not
- (i) bound to fail, (ii) scandalous, frivolous or vexatious, or (iii) an abuse of the process of the court.
- [38] While I have found that there is very little merit to the appeal of para. 1, I do not find that it is bound to fail. It will not proceed because I have refused leave to appeal, but that is through the application of a different test. I would not characterise the appeal as scandalous, frivolous or vexatious, or an abuse of the process of the Court.
- [39] Accordingly, I allow the application for a no fee order. Security for costs
- [40] The consequence of my disposition of Mr. Tavender's applications is that the appeal will not proceed because leave to appeal is required in respect of the only appealable parts of the order and I have refused leave. I will hear from the respondents if they wish it, but it appears to me that the question of their entitlement to security for costs is moot. [Discussion re: security for costs application moot, and re: terms of order] GOMERY J.A.:

Disposition

- [41] In summary, I make the following orders:
- a) No fees are payable by the appellant under R. 84;
 - b) Mr. Tavender's application for an order appointing counsel is dismissed;
 - c) Leave to appeal is refused;
 - d) A stay of proceedings in the court below is refused;

- e) In so far as the appeal concerns paras. 2 to 8 of Milman J.'s order, it is quashed for want of jurisdiction; and
 - f) The respondents' application for security for costs is adjourned generally.
- [42] The respondents have achieved substantial success on the appellant's applications, taken together with the exception of the application for the no fee order, and are entitled to costs. There will be no costs of the application for the no fee order. [Discussion re: signature on order]
- [43] GOMERY J.A.:I will dispense with Mr. Tavender's signature on the order on the following basis: at least three days before submitting the order for entry, a draft will be provided to Mr. Tavender in order that he may review it and offer comments. In the event that he is not in agreement with the draft, then, when it is submitted for entry, his objections will be included with the submission. "The Honourable Justice Gomery"

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Prepared on 25 October 2026 · Esheria