

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gichuru v. Purewal*,  
2023 BCCA 345

Date: 20230831  
Dockets: CA48036; CA48037  
Docket: CA48036

Between:

**Mokua Gichuru**

Appellant  
(Petitioner)

And

**Vancouver Swing Society, Matthew Lam, Kaitlin Russell,  
Angelena Weddell and the BC Human Rights Tribunal**

Respondents  
(Respondents)

– and –

Docket: CA48037

**Mokua Gichuru**

Appellant  
(Petitioner)

And

**Kulbir Singh Purewal, Sukhbir Purewal a.k.a.  
Sukhbir Purawal and the BC Human Rights Tribunal**

Respondents  
(Respondents)

Before: The Honourable Mr. Justice Groberman  
The Honourable Justice Dickson  
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: Orders of the Supreme Court of British Columbia, dated  
January 3, 2022, In the Matter of the *Supreme Court Act* (Section 18 — Vexatious  
Proceedings Leave Applications of Mokua Gichuru).

The Appellant, appearing in person  
(via videoconference):

M. Gichuru

Counsel for the Respondent, BC Human Rights Tribunal:

K.A. Hardie  
R.B. Chin

Appearing as agent for the Respondent, Sukhbir Purewal a.k.a. Sukhbir Purawal:

R. Purewal

Place and Date of Hearing:

Vancouver, British Columbia  
May 24, 2022

Place and Date of Judgment:

Vancouver, British Columbia  
August 31, 2023

**Written Reasons by:**

The Honourable Mr. Justice Groberman

**Concurred in by:**

The Honourable Justice Dickson

The Honourable Madam Justice DeWitt-Van Oosten

**Summary:**

*Mr. Gichuru has been declared a vexatious litigant. An order precludes him from filing proceedings in the BC Supreme Court without leave while costs awards against him remain unpaid. He sought leave to file judicial review applications in respect of two decisions of the BC Human Rights Tribunal. A Supreme Court judge denied leave, noting the existence of unpaid costs, and stating that the petitions did not have sufficient merit to justify the granting of leave. Mr. Gichuru argues that the threshold for granting leave is a low one, and that if it is shown that the claim is not doomed to fail, leave ought to be granted. Held: Appeals dismissed. The purpose of a vexatious litigant order is to prevent a person who has repeatedly abused the legal process from doing so again. A vexatious litigant is given the right to apply for leave to pursue litigation so that the order does not occasion injustice. A judge considering a leave application must be convinced that there are arguable grounds for the litigation, but the inquiry does not end there. The judge is entitled to consider what is at stake in the litigation and what resources will have to be devoted to pursuing it. Where pursuit of the litigation is unreasonable, the judge has discretion to deny leave even if the claim is not completely unarguable. The judge did not err in refusing leave on that basis. His reasons, while brief, were sufficient in the context.*

**Reasons for Judgment of the Honourable Mr. Justice Groberman:**

[1] Mr. Gichuru has commenced numerous petitions and civil claims in the trial court. Although some of his proceedings have succeeded, most have been dismissed, and several have been vexatious. He has failed to pay at least one substantial award of costs. As a result of that history, he is currently precluded from commencing proceedings in the Supreme Court of British Columbia without leave. The appeal before us is brought by Mr. Gichuru from orders refusing leave to bring two judicial review proceedings against the BC Human Rights Tribunal. The judge who denied leave was of the view that the proceedings had “insufficient merit” to be allowed to proceed.

[2] The main issues on these appeals are the standard that Mr. Gichuru must meet before leave will be granted, and the degree of detail that a judge must include in reasons refusing leave.

[3] Mr. Gichuru contends that he need only show that the proceedings that he wishes to pursue are not doomed to fail. For reasons that follow, I am not persuaded that is the test to be applied. A judge exercises discretion in determining whether to

allow a vexatious litigant to file new proceedings and is fully entitled to consider the nature of the claim, its apparent merits, and the resources that will be expended in pursuing it. In the absence of demonstrated legal error that might have had a material impact, this Court must show deference to the exercise of discretion. Only where the Court is convinced that precluding a vexatious litigant from pursuing a claim might result in real injustice should it interfere.

[4] On the facts of this case, the judge was entitled to find that the merits of the proposed proceedings were insufficient to justify allowing them to proceed. Accordingly, I am not persuaded that Mr. Gichuru has shown any reversible error in his decision.

### **The Vexatious Litigant Order Against Mr. Gichuru**

[5] In 2017, after giving judgment in longstanding litigation between Mr. Gichuru and a former landlord, the judge made an order declaring Mr. Gichuru a vexatious litigant and precluding him from filing further proceedings unless he paid outstanding costs awards. In reasons indexed as *Gichuru v. Pallai*, 2017 BCSC 1083, the judge began his discussion of the vexatious litigant order with some general observations regarding the role of the courts:

[39] Courts exist so that those who are wronged or legitimately aggrieved have an independent branch of government available to them to address their concerns. Courts must and do give voice to those who require redress, be it from government or administrative tribunals, from criminal authorities for prosecution purposes, or from other individuals or corporations in the general civil context or one's opponent in a matrimonial context.

[40] We are here as a court as a method of redress for wrongs alleged or real. Suffice it to say, however, that court resources are limited and are not readily available to all, in the sense that there is not an unlimited amount of resources in the court.

[6] He then turned to the situation of Mr. Gichuru, noting that Mr. Gichuru was trained as a lawyer, yet failed to adhere to the rules of court. He also reflected on the

absence of any application before him to have Mr. Gichuru declared a vexatious litigant:

[52] Mr. Gichuru, I find, did not follow the rules of court because it was not convenient for him to do so. Likewise, Mr. Gichuru has ignored orders for costs and, rather, has paid the order for security of costs, again because it was convenient for him to do so. He is admittedly litigious and he wants to litigate. He does not want to deal with the consequences of his litigation, which are orders for costs, which he ignores, in this case for four or five years, and frankly he proceeds on his merry way using the resources of the court and ignoring the obligations that he has to pay for costs to parties that he has forced into court and has been unsuccessful against.

[53] There is no application before me today to declare Mr. Gichuru a vexatious litigant, though the facts in my view justify such an application. I understand that it might not be in anyone's interest to do so, as it would only provide a further opportunity for Mr. Gichuru to do what he apparently likes to do, which is to litigate and cause discomfort, real and financial, to virtually anyone he comes in contact with. As such, I can understand why one would not want to have brought on such an application.

[7] After further discussion, which included observations with respect to the ongoing dispute between Mr. Gichuru and the Purewals, the judge continued:

[57] As a judge of this court, I, like other judges, am responsible to ensure that judicial resources are allocated in an efficient manner, and it is completely inappropriate, in my view, to allow an individual to wreak havoc on those he is in litigation with when he chooses to do so if he ignores the obligations which arise when one is unsuccessful in litigation, and that is an obligation in costs.

[58] Mr. Gichuru, because of his legal training, has the ability to litigate at no cost to him other than his time. Those who he litigates against have to find the resources to pay lawyers, and even if they succeed in getting costs, that is only a small reflection of what an individual must actually pay.

[59] As a judge of this court, I must protect the integrity of this court and make the courts available for those who need redress, but I feel I must act when I have an individual in front of me who uses litigation as a weapon or litigates for sport or profit as it appears Mr. Gichuru likely does. He wants his days in court, but he refuses to be responsible for his losses to others, who then are in fact the victims of his actions.

[8] The judge then made an order prohibiting Mr. Gichuru from commencing further proceedings while costs orders remained outstanding:

[60] I am directing that Mr. Gichuru is not entitled to file any further actions in any registry of the British Columbia Supreme Court until such time as all certificates of costs issued by the British Columbia Supreme Court now or in

the future or any certificate of costs issued by the Court of Appeal now or in the future are paid in full and that proof of such payment is provided.

[9] Mr. Gichuru applied for a stay of the vexatious litigant order and was partially successful before a judge of this Court in chambers. In reasons indexed as *Gichuru v. Pallai*, 2017 BCCA 269, she said:

[14] ... I am of the view, given the findings of fact made by Mr. Justice Groves, that the appropriate balance is struck by refusing to stay the vexatious litigant order except in respect to litigation involving unrelated parties to this action. In the case of unrelated party litigation, I would impose a term that Mr. Gichuru must first seek leave on notice to the unrelated party from a Supreme Court judge to commence any action or petition in the British Columbia Supreme Court.

[10] Mr. Gichuru applied to a panel of this Court for a variation of the stay order pending appeal, but this Court declined to further relax the provisions requiring him to obtain leave before commencing a proceeding (*Gichuru v. Pallai*, 2017 BCCA 337).

[11] Vexatious litigant orders in the B.C. Supreme Court are usually made under the *Supreme Court Act*, R.S.B.C. 1996, c. 443:

18 If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

[12] On his appeal (*Gichuru v. Pallai*, 2018 BCCA 78), Mr. Gichuru argued, among other things, that the order was invalid because it was made on the Court's own motion, and not on an "application by any person". He also noted the absence of any reference to unpaid costs orders in s. 18.

[13] In its judgment on the appeal of the vexatious litigant order, this Court confirmed that the trial court had jurisdiction to make the order, notwithstanding that no application had been brought under s. 18:

[74] [Section] 18 does not exhaust the Supreme Court’s ability to control its own process in respect of vexatious litigants; the inherent jurisdiction of the court is another source for that power. I make two observations in support of this conclusion.

[75] First, this Court has already recognized that the ancillary (inherent) jurisdiction of the Court of Appeal can ground vexatious litigant orders made on the Court’s own motion: *Houweling Nurseries Ltd. v. Houweling*, 2010 BCCA 315 [*Houweling*]; see also *Extra Gift Exchange Inc. v. The Owners, Strata Plan LMS3259*, 2014 BCCA 228; *Booty v. Hutton*, 2010 BCCA 185. In *Houweling*, Justice Frankel drew on Justice Arbour’s decision in *United States of America v. Shulman*, 2011 SCC 21 at para. 33, where she stated that an appellate court “has, like all courts, an implied, if not inherent, jurisdiction to control its own process, including through the application of the common law doctrine of abuse of process”. Frankel J.A. held this to be the case notwithstanding s. 29 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, which is substantially similar to s. 18 of the *Supreme Court Act*.

[76] If a statutory appellate court can draw on (at least) an implied jurisdiction to control its own process, then *a fortiori* the Supreme Court must be able to rely on its inherent jurisdiction to do the same.

[77] Second, this Court has already adverted to this possibility with specific reference to the Supreme Court [citing *Foy v. Tranfo*, 2011 BCCA 494].

[14] The Court also agreed that a vexatious litigant order was properly made in this case:

[81] [T]he circumstances of this case are precisely those presaged in *Foy* — the judge here considered his order necessary to protect the integrity of the court and otherwise control its own process. He saw limiting Mr. Gichuru’s access to the courts as the only reasonable course, considering *inter alia*: the number and size of the cost awards outstanding against Mr. Gichuru; Mr. Gichuru’s abuse or purposeful flouting of the Rules; Mr. Gichuru’s admission that he is a litigious person; and that all of these occurred despite Mr. Gichuru’s self-description as an officer of the court and references to his legal training.... In the judge’s words, it is inappropriate “to allow an individual to wreak havoc on those he is in litigation with when he chooses to do so”, while at the same time ignoring cost obligations when he is unsuccessful....

[15] While accepting that the circumstances of the case justified a vexatious litigant order, the Court considered that the order that was granted needed to be modified:

[82] ... In my view, the order has two deficiencies. First, it applies to cost awards that may be made against Mr. Gichuru in the future. Second, it does not provide that Mr. Gichuru may apply for leave of the court to commence legal proceedings.

[83] Thus, I would order that Mr. Gichuru cannot institute any legal proceedings in any registry of the British Columbia Supreme Court, without leave of that court, until he has paid in full all of the outstanding cost orders against him (including the costs of this appeal) as ordered by all courts in this province.

[16] It is worthwhile to note that it was not solely the failure to pay costs awards that led to the Court concluding that a vexatious litigant order was appropriate. At para. 2 of the decision, the Court characterized Mr. Gichuru as a “prolific litigator”. Some indication of the number of proceedings he has commenced can be seen in *Gichuru v. Community Legal Assistance Society*, 2021 BCSC 2018, which lists, in an appendix, some 53 decisions in seven different proceedings between 2011 and 2021. For the most part, the decisions are not interlocutory ones, but rather decisions on attempts to appeal, re-open, review, or re-litigate matters following a final decision. A large number of the proceedings exhibited hallmarks of vexatious litigation.

### **The Rationale and Bases for Vexatious Litigant Orders**

[17] Courts make orders restricting vexatious litigants from commencing proceedings both to prevent parties from wasting court resources and to protect prospective defendants from the anguish, frustration, and expense of having to mount defences to frivolous or abusive lawsuits. These two goals were discussed by Stratas J.A. in *Canada v. Olumide*, 2017 FCA 42, an application brought under s. 40(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. He began by referring to the harm vexatious litigants cause to the justice system as a whole:

[17] Section 40 reflects the fact that the Federal Courts are community property that exists to serve everyone, not a private resource that can be commandeered in damaging ways to advance the interests of one.

[18] As community property, courts allow unrestricted access by default: anyone with standing can start a proceeding. But those who misuse unrestricted access in a damaging way must be restrained. In this way, courts are no different from other community properties like public parks, libraries, community halls and museums.

[19] The Federal Courts have finite resources that cannot be squandered. Every moment devoted to a vexatious litigant is a moment unavailable to a deserving litigant. The unrestricted access to courts by those whose access



should be restricted affects the access of others who need and deserve it. Inaction on the former damages the latter.

[20] This isn't just a zero-sum game where a single vexatious litigant injures a single innocent litigant. A single vexatious litigant gobbles up scarce judicial and registry resources, injuring tens or more innocent litigants. The injury shows itself in many ways: to name a few, a reduced ability on the part of the registry to assist well-intentioned but needy self-represented litigants, a reduced ability of the court to manage proceedings needing management, and delays for all litigants in getting hearings, directions, orders, judgments and reasons.

[18] He then referred to the harm vexatious litigants visit upon those who they bring before the courts:

[21] On occasion, innocent parties, some of whom have few resources, find themselves on the receiving end of unmeritorious proceedings brought by a vexatious litigant. They may be hurt most of all. True, the proceedings most likely will be struck on a motion, but probably only after the vexatious litigant brings multiple motions within the motion and even other motions too. In the meantime, the innocent party might be dragged before other courts in new proceedings, with even more motions, and motions within motions, and maybe even more.

[19] In provincial superior courts, where litigation involving private law disputes is more prevalent than in the Federal courts, such occurrences are more than "occasional". The hardship faced by the victims of vexatious litigants is a serious concern, as is the damage done to the reputation of the justice system.

[20] Justice Stratas pointed out that there are a variety of ways in which litigation can be vexatious:

[32] Vexatiousness comes in all shapes and sizes. Sometimes it is the number of meritless proceedings and motions or the reassertion of proceedings and motions that have already been determined. Sometimes it is the litigant's purpose, often revealed by the parties sued, the nature of the allegations against them and the language used. Sometimes it is the manner in which proceedings and motions are prosecuted, such as multiple, needless filings, prolix, incomprehensible or intemperate affidavits and submissions, and the harassment or victimization of opposing parties.

[33] Many vexatious litigants pursue unacceptable purposes and litigate to cause harm. But some are different: some have good intentions and mean no harm. Nevertheless, they too can be declared vexatious if they litigate in a way that implicates section 40's purposes: see, e.g., *Olympia Interiors [Canada v. Olympia Interiors Ltd., 2001 FCT 859, aff'd. 2004 FCA 195]*.

[21] This Court, similarly, recognizes that a wide variety of factors can be considered in determining whether a litigant is vexatious. In *Dawson v. Dawson*, 2014 BCCA 44, the Court noted:

[16] This Court has regularly adverted to and endorsed the following non-exhaustive factors that should be considered in an application to declare a person a vexatious litigant enumerated in *Re Lang Michener and Fabian* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.J., per Henry J. at para. 19):

- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
- (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
- (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

See, for example, *Attorney General of B.C. v. Lindsay*, 2007 BCCA 165 at para. 27, Huddart J.A., leave to appeal ref'd [2007] S.C.C.A. No. 359; *Holland v. Marshall*, [2010 BCCA 243, aff'd 2010 BCCA 56], at para. 13; *Pearlman v. Insurance Corporation of British Columbia*, 2010 BCCA 362 at para. 5, Low J.A. (Chambers), aff'd 2010 BCCA 568, leave to appeal ref'd [2011] S.C.C.A. No. 39.

[22] Vexatious litigant orders are discretionary and are granted sparingly. The fact that a court finds litigation to be vexatious will not necessarily lead to the making of such an order. In *Lindsay v. Canada (Attorney General)*, 2005 BCCA 594,

Donald J.A. commented on the discretionary nature of vexatious litigant orders under s. 18 of the *Supreme Court Act*:

[24] The judge was cautious in his application of s. 18 in recognition of the nature of the impediment to a person's access to court. I do not see that as an error in principle; there is an onerous aspect to the provision and recourse to it must be measured.

...

[26] Each of [the] hallmarks [of vexatious litigation listed in *Re Lang Michener and Fabian*], the respondents submit, is present in this case. I do not disagree, but the ultimate question is whether the litigant has taken himself over the line. Drawing the line in any particular case is a matter of judgement reviewable only on the demonstration of clear error.

[27] ... I cannot say that the judge's determination was unreasonable. I will, however, permit myself to observe that Mr. Lindsay has surely taken himself so close to the line that any further litigious behaviour of a vexatious nature will put the matter beyond doubt and an order should be issued.

[23] In short, the courts are justifiably reluctant to issue vexatious litigant orders, but at some point, it becomes necessary to do so.

### **Considerations on Leave Applications**

[24] In *Olumide*, Stratas J.A. recognized the emphasis that courts have placed on the extraordinary nature of a vexatious litigant order, but noted the importance of the fact that a litigant is entitled to seek leave to bring proceedings:

[26] On occasion, some courts, including this Court, have characterized section 40 as being a drastic, last-resort option. It has been called a "most extraordinary" power that "must be exercised sparingly and with the greatest of care" because an individual is "entitled to access the courts": *Olympia Interiors* (F.C.A.), above, at paragraph 6.

[27] But in characterizing section 40, care must be taken not to exaggerate it. A declaration that a litigant is vexatious does not bar the litigant's access to the courts. Rather, it only regulates the litigant's access to the courts: the litigant need only get leave before starting or continuing a proceeding.

...

[29] Seen in this way, section 40 is not so drastic. A litigant can still access the courts by bringing a proceeding but only if the Court grants leave. Faced with a request for leave, the Court must act judicially and promptly, considering the legal standards, the evidence filed in support of the granting of leave, and the purposes of section 40. The Court could well grant leave to a vexatious litigant who has a *bona fide* reason to assert a claim that is not frivolous and vexatious within the meaning of the case law on pleadings.

[25] The severity of a vexatious litigant order, then, is tempered by the ability of the litigant to apply for leave to bring proceedings.

[26] A leave application, by its very nature, seeks to have a judge exercise discretion. Indeed, Mr. Gichuru concedes that a court is making a discretionary decision when it decides whether leave should be granted. It makes sense that to obtain leave, the litigant must convince a court that the proposed claim is of sufficient merit to justify bringing the responding party before the court, and to justify the expenditure of public resources to resolve the dispute. Vexatious litigant orders are granted only where they are considered necessary. Their value would be undercut if the leave requirement were treated as a mere formality.

[27] What, then, is the proper approach to an application by a vexatious litigant to commence a proceeding?

[28] For various reasons, there is little jurisprudence dealing with this issue. Courts exercise restraint in granting vexatious litigant orders, so there are few litigants to whom the leave requirements apply, and applications are uncommon. The leave procedure does not encourage the pronouncement of comprehensive judgments: the application is typically in writing, without an oral hearing. Usually, only the applicant makes submissions. Where the application is granted, a judge will normally not provide reasons — indeed, we have not been referred to any reasoned judgments given in situations where leave has been granted.

[29] Extensive reasons are unusual even where leave is denied. A vexatious litigant order will typically be against a litigant who is particularly recalcitrant. Such litigants will often bring applications for leave to commence proceedings, but it will be rare for such applications to have any substance. A fundamental purpose of a vexatious litigant order is to prevent the unnecessary expenditure of judicial resources on vexatious litigation. That purpose would not be served if judges were expected to provide detailed judgments on baseless applications for leave.

[30] The most comprehensive discussion that we have been referred to is in *Yashcheshen v. Allergan Inc.*, 2021 SKQB 33. The vexatious litigant order against Ms. Yashcheshen had been made under Rule 11-28 of the Saskatchewan *Queen's Bench Rules*, whose provisions were materially similar to those in s. 18 of the B.C. *Supreme Court Act*. The court in *Yashcheshen* began its analysis by recognizing that a vexatious litigant applying for leave bears the burden of demonstrating to a court that leave ought to be granted:

[16] The case law ... draws attention to the result of an order declaring a litigant vexatious: a presumption that this person litigates in an inappropriate manner. This presumption results in an onus upon such a litigant to establish any proposed action meets the requisite legal test before being allowed to proceed.

[17] In *Re Thompson*, 2018 ABQB 87, 74 Alta LR (6th) 160 [*Thompson*] this presumption and resulting onus were explained in this way at paras. 17 and 19:

[17] When a person is made subject to court access restrictions under this Court's inherent jurisdiction that means that the Court has concluded that a litigant's conduct and statements predict future litigation misconduct: *Hok v Alberta*, 2016 ABQB 651, at paras 36-37, 273 ACWS (3d) 533, leave denied 2017 ABCA 63, leave to appeal to SCC refused, 37624 (2 November, 2017); 1985 *Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 at paras 42-79.

...

[19] This restriction, functionally, can also be expressed as a presumption: that a person subject to court access control is presumed to engage in illegitimate litigation unless the Court is satisfied otherwise. However, this is not a high threshold, such as that the prospective litigant needs to establish the proposed litigation will be successful on a balance of probabilities. Instead, using the language of *Thompson Order*, he is required to:

... [depose] fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it; ...

[Ellipses and emphasis inserted by the court in *Yashcheshen*]

[18] The onus placed on such a litigant is to demonstrate the proposed action is not an abuse of process and that there are reasonable grounds for it: see also *Alberta Treasury Branches v Hok*, 2018 ABQB 316 at para 17.

[31] The judge then considered statutory provisions governing vexatious litigant orders in other jurisdictions. He considered, for example, the following subsections

of the *Federal Courts Act*, which apply when a vexatious litigant order is made under s. 40(1) of that statute:

40. ...

(3) A person against whom a court has made an order under subsection (1) may apply to the court for rescission of the order or for leave to institute or continue a proceeding.

(4) If an application is made to a court under subsection (3) for leave to institute or continue a proceeding, the court may grant leave if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding.

(5) A decision of the court under subsection (4) is final and is not subject to appeal.

[32] Provisions similar to those found in the *Federal Courts Act* are included in s. 140(4) of the *Ontario Courts of Justice Act*, in s. 23.1(7) of the *Alberta Judicature Act*, R.S.A. 2000, c. J-2.<sup>1</sup> In each case, a court is able to grant leave to commence a proceeding only if it is satisfied that the proceeding “is not an abuse of process” and that “there are reasonable grounds for the proceeding”.<sup>2</sup> The judge in *Yashcheshen* referred to the Alberta and Ontario statutes, as well as to the *Federal Courts Act*. He considered that the tests under those various statutes should apply, as well, to applications for leave under the Saskatchewan legislation.

[33] The judge interpreted the requirements very narrowly, equating them with the tests for striking a pleading as disclosing no cause of action or as an abuse of process. Even applying those very lenient tests, however, he denied leave to commence the proceeding.

[34] I am not persuaded that a judge considering an application by a vexatious litigant to commence proceedings is limited to considering whether the pleadings are such that they disclose no cause of action or are manifestly an abuse of the court’s process. Rather, it is my view that the judge should start by considering the terms of

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<sup>1</sup> The Ontario *Court of Justice Act* provisions expressly preclude appeals. The Alberta *Judicature Act* provisions do not directly prohibit appeals from denials of leave, but such appeals are precluded by Rule 14.5(3) of the *Alberta Rules of Court*, Alta. Reg. 124/2010.

<sup>2</sup> The test is also applicable under Yukon vexatious litigant legislation — see *Supreme Court Act*, R.S.Y. 2002, c. 211, s. 7.1(3)(b); *Court of Appeal Act*, R.S.Y. 2002, c. 47, s. 12.1(3)(b).

the vexatious litigant order and the purposes underlying it. In interpreting the bounds of the discretion that the order confers, the judge must consider both the language of the order and the concerns that it is intended to address.

[35] Vexatious litigant orders do not typically expressly set out the factors that a court is required to consider on an application for leave. The order against Mr. Gichuru (which was founded on the inherent (or implied) jurisdiction of the Supreme Court) is in the usual form, and does not, in terms, describe the factors that are to be considered by the leave judge.

[36] Statutes that provide for the making of vexatious litigant orders may also be silent on the criteria to be applied when a litigant who has been declared vexatious applies for leave to commence an action. Neither s. 18 of B.C.'s *Supreme Court Act* nor the corresponding section of the *Court of Appeal Act* (S.B.C. 2021, c. 6, s. 22) set out the criteria to be considered in determining whether leave should be granted.

[37] Even where a statute provides some guidance (as do the provisions of the *Federal Courts Act*, the *Alberta Judicature Act*, the *Ontario Court of Justice Act* and the *Yukon Supreme Court Act* and *Court of Appeal Act*), the guidance is not comprehensive. First, those statutes do not expressly define the criteria that a court is intended to apply in satisfying itself that a proceeding “is not an abuse of process”, or in determining whether “there are reasonable grounds for the proceeding”. I am not convinced that those provisions are intended to be as narrowly focussed on the pleadings as *Yashcheshen* suggests. Such a narrow reading of their provisions would fail to address many concerns in respect of vexatious litigation.

[38] Rather, the expressions should be interpreted in accordance with the general principles of statutory interpretation including the “modern rule” of statutory interpretation expressed by Professor Elmer Driedger as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21;  
*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26.

[39] The obvious purpose of the various statutes is to reduce or eliminate the squandering of public resources by vexatious litigants, as well as their harassment (intentional or otherwise) of other litigants. It is not surprising, given these purposes, that the statutory provisions are open-textured. Because “[v]exatiousness comes in all shapes and sizes”, measures designed to protect against it must be flexible.

[40] In my view, the criteria employed by the court in *Yashcheshen* to determine whether there were reasonable grounds for the proceedings did not fully reflect the purposes of vexatious litigant orders. For example, they do not address such matters as a persistent failure to pay costs orders, or the pursuit of claims that are uneconomical to litigate. A broad consideration of whether litigation is being “reasonably” pursued should include such matters.

[41] It is also important to recognize that the statutes discussed in *Yashcheshen* merely set out the conditions precedent to courts exercising their discretion to allow a vexatious litigant to bring a claim. The *Federal Courts Act*, for example, states that “the court may grant leave if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding” (emphasis added).

[42] Where a statute provides that a court “may grant leave” on being satisfied that particular conditions have been met, the language will be interpreted as furnishing the court with a residual discretion to deny leave. That discretion is to be exercised judicially, and in accordance with the language and purpose of the legislation: see *BCIT (Student Association) v. BCIT*, 2000 BCCA 496 at paras. 25–32 and *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 85–92.



[43] *BCIT* and *Sattva* both concerned the residual discretion to refuse leave to appeal under s. 31(2)(a) of the *Arbitration Act*, R.S.B.C. 1996, c. 55.<sup>3</sup> In *Sattva*, the Court stated:

[87] In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 52). This would include the urgent need for a final answer.

[44] The Court recognized that it was not possible to list all factors that might be relevant to the exercise of the residual discretion and acknowledged that it was providing a “non-exhaustive” list of factors to be taken into account under the statutory scheme it was considering.

[45] In my view, *Yashcheshen* adopted an unduly narrow interpretation of the threshold factors to be considered on an application by a vexatious litigant to commence proceedings. It also failed to recognize that a court has a residual discretion to deny leave. I would, therefore, caution against any direct application of *Yashcheshen* in British Columbia.

[46] In deciding whether to grant a vexatious litigant leave to commence a proceeding, a judge is entitled to consider the totality of the circumstances, keeping in mind that the vexatious litigant order is in place to prevent misuse of the justice system, not as a punitive measure. The judge must guard against the very real possibility that the vexatious litigant, true to past form, is seeking to press proceedings that will waste court resources and serve to harass litigants. Of course, the judge must also consider the possibility that the litigation is not abusive, and that denying leave might result in a serious injustice to the applicant.

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<sup>3</sup> Although the same statute at issue in both cases, it was known as the *Commercial Arbitration Act* at the time of the *BCIT* case. The title was changed before *Sattva* was commenced.

[47] Mr. Gichuru's application for leave in the *Purewal* matter was rejected previously, and this Court allowed an appeal and remitted the matter to the Supreme Court for reconsideration. It did so on the basis that the court below had misapprehended the provisions of the vexatious litigant order. In the course of its judgment (2021 BCCA 375), this Court said:

[15] The purpose of orders such as the one granted against Mr. Gichuru is to prevent vexatious litigants from abusing the court's process by bringing frivolous or vexatious claims, or from making minor claims that will result in disproportionate expense and inconvenience. These purposes must guide the exercise of discretion.

[16] The failure of a litigant to pay orders for costs is an important consideration on the leave application; indeed, in some circumstances, a judge or master may find it to be determinative. It is not, however, the only consideration that is to be taken into account. The judge or master considering an application for leave must turn their mind to such issues as the *bona fide* nature of the claim, its importance to the parties, whether it has a prospect of success, and whether it is the sort of claim that would ordinarily justify the effort that must be expended to bring it to a conclusion. I do not suggest this is an exhaustive list of considerations.

[17] A judge or master may grant or deny leave, or grant leave to advance part of a claim only. If leave is granted, there may be conditions attached to it, such as a requirement to post security for costs (see, for example, *Gichuru v. Pallai*, 2014 BCSC 2330, leave to appeal dismissed 2015 BCCA 81, application to vary dismissed 2015 BCCA 189).

[18] I do not suggest that the reasons for denying leave need be lengthy, formal, or comprehensive. They must, however, show that the master or judge considered the application and applied discretion to it. In an appropriate case, a simple notation such as "doomed to fail", "uneconomical to litigate", or "*res judicata*" will suffice.

[48] Mr. Gichuru contends that the above-quoted passages were *obiter* and were not a correct articulation of the test for leave. I acknowledge that the passages were not essential to the result of the appeal and are properly characterized as *obiter*. They were, however, articulated for the purpose of providing guidance to the trial court, and represented the considered view of the Court. In my view, what was said by the Court was consistent with the proper approach to this matter. I am not persuaded that we should depart from what we said in that earlier judgment.

[49] The result is this: where a vexatious litigant seeks leave to commence a new proceeding, the court must be convinced that the proposed proceeding is not

doomed to fail and is not brought for an improper purpose or otherwise a clear abuse of process. Once the court is satisfied that the litigant has met those minimal requirements, the court may consider the totality of the circumstances to determine whether to exercise discretion in favour of granting leave. Where a serious injustice might result from a failure to allow the litigant to pursue the claim, discretion will invariably be exercised in favour of granting leave. On the other hand, where it is clear that a claim is weak, of no real importance, and uneconomical to litigate, discretion will almost certainly be exercised against granting leave. Many cases, of course, will fall between these two extremes, and the judge hearing the application will have to exercise judgment and decide whether leave should be granted.

[50] The decision is a discretionary one. In British Columbia, it is appealable, but this Court must approach it with great deference. While Mr. Gichuru, in his factum, acknowledges that a high degree of deference is owed to the judge at first instance, he suggests that the Court is entitled to interfere with the decision if it concludes that the judge “failed to give sufficient weight to all relevant considerations”, citing *Reza v. Canada*, [1994] 2 SCR 394 at 404.

[51] Several authoritative decisions, including *Reza*, use that formulation as part of their description of the test for appellate interference with a discretionary decision. In doing so, however, it is apparent that they are not suggesting that an appellate court is entitled to undertake its own weighing of relevant considerations. Rather, the cases make it clear that an appellate court can interfere only if the weight attached to a consideration by the judge at first instance was manifestly inappropriate.

### **Reasons on Leave Applications**

[52] As I have indicated, one goal of a vexatious litigant order is to prevent such litigants from squandering the limited resources of the courts. The application for leave to commence a proceeding, itself, requires the expenditure of court resources. Applications that are poorly organized or not readily intelligible can require an inordinate amount of judicial time. While applications by vexatious litigants for leave to commence proceedings are not always disorganized or inscrutable, they are often

so. While judges must give appropriate consideration to a litigant’s application to commence proceedings, they need to do so efficiently. They should not be required to produce lengthy or exhaustive reasons when they deny leave.

[53] In keeping with the rationale of vexatious litigant orders, courts are entitled to give brief reasons for their decisions on leave applications. Where those reasons provide a clear indication of the judge’s basis for denying leave, they are adequate.

[54] In this case, the judge simply endorsed the application in the first proposed proceeding as follows:

Leave is not granted because Mr. Gichuru has not paid costs orders as required by [the vexatious litigant order]. On initial review, [the] proposed Petition has insufficient merit to grant leave despite [the] outstanding .... Order.

[55] He endorsed the application in the second proposed proceeding as follows:

Same reasons for denial as other request.

[56] While the reasons are brief, they are intelligible and clear. The judge recognized that he had discretion to grant leave but considered that the proposed proceeding was of insufficient merit to do so. I would interpret “merit” as being an assessment of the importance of the proposed proceeding as well as the apparent strength of the case.

[57] The judge, then, after considering the material available to him, was of the view that the proposed proceedings were of insufficient significance and strength to justify allowing them to proceed.

[58] I will briefly review the circumstances of the two proceedings to demonstrate that the judge made no reversible error in his assessment of the cases. My purpose is to illustrate the types of considerations that are appropriate on a leave application. In doing so, I should not be taken as suggesting that judges on leave applications should provide similarly detailed analyses.

**The Residential Tenancy Complaint**

[59] I turn to the two applications made by Mr. Gichuru to commence proceedings. The first arose out of a complaint of discrimination in a residential tenancy.

[60] Mr. Gichuru rented one of two basement suites in Ms. Purewal's residence beginning December 15, 2010. Ms. Purewal's English skills were limited, and her son, Mr. Purewal, generally interacted with Mr. Gichuru on his mother's behalf. There was no written tenancy agreement, and Mr. Purewal insisted that rent be paid in cash.

[61] By June 2014, relations between Mr. Gichuru and the Purewals were strained. There was a disagreement that arose out of one of Ms. Purewal's sons spraying Mr. Gichuru's bike while doing some cleaning, and Mr. Gichuru decided that he would retaliate by paying his rent by cheque.

[62] In early July 2014, there were further unpleasantries when the landlord requested access to the suite, allegedly to inspect it for a fire hazard and Mr. Gichuru denied entry.

[63] After that event, on July 5, 2014, one of Ms. Purewal's sons verbally advised Mr. Gichuru that relatives were coming from India. He told Mr. Gichuru that he would have to vacate the premises, as the Purewals needed the suite in September.

[64] It is not clear from the materials whether Ms. Purewal intended to consolidate the basement suite with her own living unit and occupy it herself, or to maintain it as a separate unit to be occupied by extended family members. Accordingly, it is not clear whether there were proper grounds for termination of Mr. Gichuru's tenancy. It is clear, however, that the notice of termination did not comply with the requirements of the *Residential Tenancy Act*, S.B.C. 2002, c. 78, both because the notice period was insufficient, and because the notice was not given in writing.

[65] On August 1, 2014, Mr. Purewal gave Mr. Gichuru a letter entitled "Eviction Notice" requiring him to vacate the premises by the end of the month. Mr. Gichuru

knew the new notice did not comply with the requirements of the *Residential Tenancy Act* but did not advise the Purewals of his position until August 25, 2014, when he contacted Mr. Purewal by phone. Mr. Purewal was upset at the late response and threatened to forcefully remove Mr. Gichuru from the premises if he did not vacate them.

[66] On August 26, Mr. Purewal attended about 15 feet from the door to Mr. Gichuru's suite, upset about Mr. Gichuru's position. In the course of a diatribe that Mr. Gichuru perceived as threatening, Mr. Purewal referred to Mr. Gichuru's mental illness, suggesting that this would detract from Mr. Gichuru's credibility if a lawsuit ensued.

[67] On the following day, Mr. Gichuru contacted the police, who apparently told both parties to leave each other alone. Later that day, Mr. Gichuru says Mr. Purewal yelled to him that "the police are not going to be around forever to protect you".

[68] On August 30, Mr. Purewal attended on Mr. Gichuru's residence and asked whether he was going to move. Mr. Gichuru was unresponsive. Mr. Purewal then taunted Mr. Gichuru, saying "You should get your mental illness checked out. It's like fucking talking to a brick wall."

[69] Later that day, Mr. Purewal contacted the Vancouver Police and falsely reported that Mr. Gichuru was attempting to burn down the premises. He told the police that Mr. Gichuru was suffering from a mental illness. Mr. Gichuru sued the Purewals for defamation in respect of the false report, and was awarded damages (2019 BCSC 731).

[70] On September 1, Mr. Purewal served Mr. Gichuru with a new eviction notice and asked Mr. Gichuru to sign an agreement to end the tenancy, but Mr. Gichuru refused. There also appears to have been a dispute about rent that was due at that time. A further heated exchange occurred on September 21.

[71] The Purewals eventually served a proper notice on Mr. Gichuru to end the tenancy for non-payment of rent. A teleconference hearing was arranged for

November 4, but on the date of the hearing, Mr. Gichuru advised that he had found new accommodations, and would be vacating on December 2. He did, in fact, vacate on December 3.

[72] Mr. Gichuru filed a complaint with the Human Rights Tribunal alleging that the Purewals discriminated against him in respect of a tenancy by threatening and harassing him and evicting him from his tenancy, based on a mental illness, contrary to s. 10 of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[73] In the complaint, he sought damages for moving expenses and for increased costs of rental accommodations, as well as damages for lost employment income, and costs of the human rights proceeding. Finally, he sought damages for injury to his dignity.

[74] The hearing of the complaint took place over several days in April and June 2016. The Tribunal issued a 60-page decision, indexed as 2017 BCHRT 19. The Tribunal concluded that Mr. Purewal made disparaging remarks referring to Mr. Gichuru's mental disability on August 26 and August 30, 2014, and found those remarks to constitute harassment contrary to the *Human Rights Code*. It issued a cease and desist order against the Purewals. The Tribunal also awarded Mr. Gichuru his costs against the Purewals in the amount of \$2,000 and made a punitive costs award against Mr. Purewal in the amount of \$10,000.

[75] The Tribunal found, however, that discrimination based on mental disability was not a factor in other harassment and intimidation by the landlord and did not play a role in the eviction. It also found that the evidence did not support the inference that Mr. Gichuru's employment difficulties stemmed from the discriminatory conduct.

[76] The Tribunal also found that Mr. Gichuru had provoked the landlord in the hope of generating behaviour that would found a human rights complaint, and, in the result, declined to make a monetary award for harm to Mr. Gichuru's dignity.

[77] Mr. Gichuru brought judicial review proceedings in the Supreme Court, arguing that the Tribunal erred in finding that the termination of his tenancy was unconnected with the discrimination, and also contending that the Tribunal erred in not awarding damages for loss of employment income and for the affronts to Mr. Gichuru's personal dignity. Finally, he said that the Tribunal erred in failing to award certain expenses associated with the proceeding.

[78] While the judge did not accede to all of Mr. Gichuru's arguments, he did find that the Tribunal had improperly isolated Mr. Purewal's discriminatory remarks from other forms of intimidation and harassment in the tenancy.

[79] The primary error identified by the judge was the Tribunal's failure to fully examine Mr. Gichuru's reasons for not paying his rent:

**Did the Tribunal ignore material evidence?**

[110] The Tribunal was manifestly wrong in stating "there was no evidence connecting the failure to make a rental payment with Mr. Gichuru's mental disability." In fact, Mr. Gichuru specifically testified that "the threats from the landlord ... made an untenable situation" and that he "desperately wanted to leave". Given that Mr. Gichuru knew the Purewals did not have grounds to evict him, this was some evidence that he did not pay his rent on October 1, 2014 because he felt he had to leave due to Mr. Purewal's threatening behaviour, including his discriminatory behaviour.

**Did the Tribunal fail to make required factual findings?**

[111] If Mr. Gichuru did not pay rent on October 1, 2014 because the Purewals made it intolerable for him to stay and Mr. Purewal's discriminatory conduct was a factor in Mr. Gichuru's decision to not pay rent, then Mr. Gichuru's complaint in relation to his eviction would have to be validated.

[112] The Tribunal was manifestly wrong to conclude "[w]hether or not Mr. Gichuru felt a need to leave the premises was essentially immaterial". In fact, it was precisely the issue.

[113] Unfortunately, the Tribunal did not ask or answer the appropriate question. Specifically, the Tribunal did not ask why Mr. Gichuru did not pay his rent on October 1, 2014 and, as a result, the Tribunal did not make the necessary finding as to whether Mr. Gichuru's mental disability was a factor in that decision.

[80] The Court set aside the Tribunal's decision not to award damages for the eviction, for employment income loss, and for injury to dignity. It ordered the Tribunal



to reconsider those matters. It also directed the Tribunal to consider Mr. Gichuru's claimed expenses for advancing the complaint.

[81] The Tribunal reconsidered the matters without inviting further submissions from the parties. It issued reasons indexed as 2019 BCHRT 231. Its decision took into account the directions made by the Supreme Court of British Columbia on the judicial review decision.

[82] It found that the landlord/tenant relationship had irretrievably broken down prior to any discriminatory conduct, and that the tenancy would have terminated in any event within a short time. It accepted, however, that the actual termination of the tenancy in December 2014 was a result of Mr. Gichuru's non-payment of rent, which was at least partially a result of the discriminatory conduct. It therefore awarded Mr. Gichuru \$723.45 for his moving expenses. The Tribunal found as a fact, however, that the tenancy would not have lasted much longer in any event and declined to award Mr. Gichuru damages for his long-term rent differential or his increased expenditures for electricity. It considered that the award of moving expenses was adequate compensation for the loss and inconvenience Mr. Gichuru suffered.

[83] The Tribunal found that Mr. Gichuru's employment losses were not contributed to by the discriminatory conduct. It found Mr. Gichuru's evidence not to be credible, and considered that his employment losses were a result of other stressors in his life that were unconnected with the discriminatory conduct of Mr. Purewal.

[84] With respect to damages for injury to dignity, the Tribunal examined the evidence and concluded that the damage to Mr. Gichuru's dignity was extremely limited. It refused to award even nominal damages, however, finding that Mr. Gichuru's own conduct should be taken into account. It considered that his conduct in provoking discriminatory conduct served to erode the purposes of the *Human Rights Code*. Accordingly, it declined to award damages for loss of dignity.

[85] Finally, the Tribunal considered the costs associated with bringing the complaint and awarded Mr. Gichuru the sum of \$101.63 to reimburse him for the cost of engaging a process server.

[86] Mr. Gichuru sought leave to judicially review the reconsideration decision of the Human Rights Tribunal, but, as I have indicated, leave was denied.

[87] The proposed judicial review petition sets out seven grounds of review, some of which appear to overlap, and some of which appear to be boilerplate allegations which enjoy no support. I will refer only to those which might be seen as having some merit.

[88] First, Mr. Gichuru takes issue with the Tribunal's decision to undertake the reconsideration without hearing further submissions by the parties. He contends that in doing so, the Tribunal violated principles of natural justice and fairness, though he cites no authority for that proposition.

[89] While courts and tribunals usually invite further submissions when matters are returned to them for reconsideration following a successful appeal or judicial review, there is no absolute rule requiring them to do so. In *Suen v. Suen*, 2013 BCSC 1615, for example, a trial judge to whom a matter had been returned for reconsideration simply issued additional reasons without hearing further submissions from the parties. On appeal (2016 BCCA 107), this Court noted that such a procedure had been adopted but did not suggest it was improper.

[90] The rules of procedural fairness are functional in nature. There is no suggestion, here, that Mr. Gichuru was denied the opportunity to make full submissions on the evidence and the law at the initial hearing. Nor is there any suggestion that he failed to address any aspect of the case, or that the Tribunal did not fully understand his position. I am not persuaded that there is any merit in the procedural fairness ground.

[91] Next, Mr. Gichuru makes a blanket claim that the Tribunal misinterpreted the judicial review decision that returned the case to it for reconsideration. The

Tribunal's reconsideration reasons, however, carefully track the judicial review decision, and quote liberally from it. The Tribunal clearly understood and followed the directions of the reviewing judge. The Tribunal was called upon to make findings of fact in order to resolve certain issues identified on the first judicial review, and it did so. Nothing in the tribunal's approach suggests that it misunderstood the ruling on the judicial review.

[92] The third major aspect of the proposed judicial review is Mr. Gichuru's contention that the Tribunal erred in denying him damages for injury to his dignity on the basis that he deliberately provoked some of the discriminatory remarks. In my view, this issue is arguable on both sides.

[93] That said, the damages in this case would be minuscule, so the issue, while arguable, is of very little importance to the case. The Tribunal gave clear reasons for finding Mr. Gichuru not to be a credible witness, and for finding that any injury to his dignity was slight. It indicated that any damage award would have been nominal. Especially in light of the fact that the most serious affront to Mr. Gichuru's dignity — the false report to the police — has already been dealt with by the courts in the defamation case, any award under this head of damages would, of necessity, be tiny.

[94] Given Mr. Gichuru's failure to pay costs awards in the past, I am unable to see any injustice in denying him access to the courts to press a claim which is of questionable validity and at its highest, is uneconomical to pursue.

[95] Mr. Gichuru also makes a general assertion that the Tribunal made unreasonable findings of fact, and that there was a reasonable apprehension that it was biased. He provides no concrete basis for either of those assertions.

[96] The proposed judicial review, then, is largely without merit. The one issue that may be meritorious is not one of great significance to the case. In the result it was open to the judge to conclude that the proceeding had insufficient merit to justify the granting of leave.

**The Vancouver Swing Society Complaint**

[97] The second proposed judicial review arises out of a matter concerning the Vancouver Swing Society. Mr. Gichuru was a member of the Society and attended its swing dance events beginning in 2015.

[98] In 2016, following the US presidential election, Mr. Gichuru posted comments on Facebook. Another member of the society reacted negatively to the post, and posted a response that contained personal comments about Mr. Gichuru's conduct towards another member of the Society. Mr. Gichuru complained to the Society that the post violated its Code of Conduct.

[99] The Society advised that its Code of Conduct did not extend to such matters but did agree to speak with Mr. Gichuru and with the other party in an attempt to resolve the matter. After having preliminary discussions, however, the executive became concerned about conduct alleged against Mr. Gichuru that appears to have made some other members uncomfortable.

[100] A member of the executive asked Mr. Gichuru not to attend the final two events of the season, as a "cooling off period" and also sent him articles explaining power imbalances between older men and younger women in dance events. He hoped that reading the articles would give Mr. Gichuru a greater understanding of the discomfort that his behaviour caused.

[101] The articles did not have the desired effect. Instead, they appear to have enraged Mr. Gichuru, and he accused the Society of discrimination on the basis of age and sex. Far from agreeing to change his behaviour, Mr. Gichuru indicated that he would be bringing a human rights complaint against the Society.

[102] Soon afterwards, the Society advised Mr. Gichuru that he was not welcome to attend events until further notice.

[103] Mr. Gichuru then filed two complaints with the Human Rights Tribunal — a primary complaint alleging discrimination on the basis of sex, age, and race and a

second complaint alleging that the Society had engaged in retaliation when he advised it he would be making the first complaint, contrary to s. 43 of the *Human Rights Code*.

[104] The Human Rights Tribunal has a screening process to eliminate complaints that have no merit, and on February 1, 2017, it advised Mr. Gichuru that it was declining to accept the complaint of discrimination. Mr. Gichuru brought judicial review proceedings, but his petition was dismissed in reasons indexed as 2019 BCSC 402. Mr. Gichuru's appeal to this Court was also dismissed, in reasons indexed as 2021 BCCA 103.

[105] The Tribunal agreed to hear the retaliation complaint, and scheduled the hearing for January 30 to February 1, 2019. It had planned to hear evidence and submissions, but the hearing took much longer than anticipated, and it set a schedule for written submissions.

[106] Following the hearing, but before final submissions were due, Mr. Gichuru indicated he would be seeking to have the Tribunal member recuse herself on the basis of a reasonable apprehension of bias. She advised that she was prepared to receive submissions on that issue, but indicated that the schedule for submissions would not be delayed.

[107] Mr. Gichuru eventually filed an application for recusal on the same day that submissions were due. His submissions on the primary complaint were brief.

[108] In its submissions, the respondent included submissions applying to have Mr. Gichuru declared vexatious and also submissions seeking costs.

[109] In its decision, indexed as 2020 BCHRT 1, the Tribunal dismissed the application for recusal, dismissed the retaliation complaint, and granted a vexatious litigant order and costs order against Mr. Gichuru.

[110] Mr. Gichuru applied for a reconsideration by the Tribunal. By the time the reconsideration took place, the original Tribunal member had retired, so a second

Tribunal member presided over the Reconsideration. She gave reasons, indexed as 2020 BCHRT 145 dismissing the application for reconsideration.

[111] On the judicial review, Mr. Gichuru proposes to argue that there was a denial of procedural fairness in respect of the vexatious litigant order, because the Tribunal had already directed that the application would take place after the decision on the retaliation complaint.

[112] He also alleges that the costs award was improperly made, and that the Tribunal's findings of fact were patently unreasonable.

[113] These various issues are comprehensively addressed in the very lengthy decision of the Tribunal, and in the somewhat briefer reconsideration decision. None of the grounds appear to be arguable.

[114] The findings of fact made by the Tribunal were clearly open to it on the evidence. With respect to the procedural arguments, it is apparent that the Tribunal did not, at any time, make a formal decision that the vexatious litigant application would take place after the hearing was over. Rather, the discussion that Mr. Gichuru alleges was a decision was an informal one, in which the Tribunal was seeking assurance that it did not have to embark on the vexatious litigant application immediately.

[115] The materials provided to Mr. Gichuru clearly established that the respondent was seeking a vexatious litigant order and costs. Mr. Gichuru made a conscious decision not to respond to the materials. Further, he had a full opportunity to include any response in his submissions on reconsideration but did not do so. It is evident that there was no denial of procedural fairness, but merely a decision by Mr. Gichuru not to respond to the materials that sought to have him declared vexatious.

[116] The other issues were fully and fairly canvassed in the Tribunal's decisions. There does not appear to be any merit in the proposed judicial review. Accordingly, the judge did not err in refusing leave.

**Conclusion**

[117] I am not persuaded that the judge who denied leave erred in either the test he applied to the granting of leave or in the exercise of his discretion. I would dismiss these appeals.

“The Honourable Mr. Justice Groberman”

I AGREE:

“The Honourable Justice Dickson”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”