

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Portnov v. West Vancouver (District)*,  
2024 BCCA 79

Date: 20240222  
Docket: CA49555

Between:

**Abraham Portnov**

Appellant  
(Plaintiff)

And

**District of West Vancouver**

Respondent  
(Defendant)

Before: The Honourable Mr. Justice Abrioux  
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated  
November 27, 2023 (*Portnov v. District of West Vancouver*,  
Vancouver Docket S225565).

## Oral Reasons for Judgment

The Appellant, appearing in person:

A. Portnov

Counsel for the Respondent:

M. Cheung

Place and Date of Hearing:

Vancouver, British Columbia  
February 22, 2024

Place and Date of Judgment:

Vancouver, British Columbia  
February 22, 2024

**Summary:**

*The applications are for an extension of time to file an application book for leave to appeal and that no fees are payable. Held: Applications dismissed. The appeal has no merit and is bound to fail. The appellant previously entered into a settlement to resolve this claim and subsequently commenced a proceeding that was dismissed as it was barred by the doctrine of res judicata, or alternatively, abuse of process. The appellant is seeking to re-litigate claims that have already been decided.*

**ABRIOUX J.A.:**

**Introduction**

[1] The appellant, Mr. Portnov, has two applications before the Court. The first is an application for an extension of time to file an application seeking leave to appeal and an application book, (the “extension of time application”), the second an application that no fees are payable.

[2] Mr. Portnov also seeks an order granting him leave to appeal pursuant to section 31 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [Act], which, however, is predicated on Mr. Portnov being granted an extension of time to file the application book pursuant to s. 32 of the *Act* (the “leave application”).

[3] The leave application relates to the order of Justice Tucker that was pronounced on November 27, 2023. Mr. Portnov’s application at that time was to appeal the dismissal of an application by Associate Judge Robertson of September 27, 2023 in which he had sought:

- a) an ‘authentic’ list of documents from the defendant District of West Vancouver (the “District”);
- b) work orders related to 575-16th Street which is located in the District;
- c) an order to inspect the original work orders;
- d) an order under Rule 7-7(4) that the Plaintiff “be permitted to re-litigate”;

- e) an order that the affidavits of the defendants be declared abusive and scandalous; and
- f) an order for a trial with a jury.

[4] As I shall explain, Associate Judge Robertson dismissed that application on the basis that she was *functus officio*.

[5] In unreported oral reasons for judgment delivered on November 27, 2023, Justice Tucker dismissed the appeal of Associate Judge Robertson’s order (the “Appeal dismissal order”). She also granted the District’s application to strike the Notice of Civil Claim without leave to amend and ordered that Mr. Portnov’s claim be dismissed “in its entirety” (the “Strike order”).

[6] Two separate orders were entered on November 27, 2023. The first provides:

THIS COURT ORDERS that:

1. The Notice of Civil Claim filed by the Plaintiff in the within action be struck, without leave to amend and the Plaintiff’s claim be dismissed in its entirety.
2. The Defendant, the District of West Vancouver be awarded costs of this application.
3. The signature of the Plaintiff be dispensed with.

[7] The second states:

THIS COURT ORDERS that:

1. The Appeal filed by the Plaintiff be dismissed.
2. The Defendant, the District of West Vancouver be awarded costs in the event of the cause.
3. The signature of the Plaintiff be dispensed with.

[8] Mr. Portnov filed a Notice of Appeal on December 18, 2023, which appears to relate only to the Appeal dismissal order and in which he seeks production of certain documents. It does not refer to the Strike order.

[9] On February 8, 2014, Mr. Portnov filed the extension of time application and on February 12, 2024, he filed an amended application in that regard. On February

13, 2024, he filed a transcript of the proceedings before Justice Tucker on November 27, 2024.

**Background**

[10] The background and procedural history of this matter is set out in Justice Tucker’s reasons.

[11] On January 17, 2022, Mr. Portnov filed a Notice of Claim in the North Vancouver Provincial Court Small Claims registry with respect to an injury that occurred in September 2021. In the small claims proceedings, Mr. Portnov signed a Settlement Record dated May 27, 2022 which included the following terms of the order:

District of West Vancouver to mail a cheque in the amount of \$1,000 to Abraham Portnov on or before June 10, 2022. This amount is full and final satisfaction of any claims that Mr. Portnov has over this accident as if there had been a trial.

[12] Subsequently, in July 2022, Mr. Portnov filed a Notice of Civil Claim against the District seeking what is in essence the same relief that was granted in the settlement. There were also additional allegations which included that the District was hiding documents and that its solicitor had engaged in fraudulent conduct including fraud on the Court.

[13] On July 14, 2022, Mr. Portnov filed an application for judgment. While it is difficult to discern the legal basis for the application from the notice of application itself, Justice McDonald, correctly in my view, considered the application to be one seeking judgment against the District for damages. On August 12, 2022, in reasons for judgment indexed as 2022 BCSC 2411, she dismissed the application for judgment. In doing so, she found that the matter was barred by the doctrine of *res judicata* as the claim was settled by consent as if there had been a trial pursuant to the settlement agreement. In the alternative, she found that the claim was barred as an abuse of process.

[14] Justice McDonald's order is the basis of Associate Judge Robertson declaring herself *functus officio* and subsequently Justice Tucker dismissing that appeal.

**Application for Extension of Time**

[15] A party must file and serve a notice of application for leave to appeal and their application book not more than 30 days after filing the notice of appeal: *Court of Appeal Rules*, B.C. Reg. 120/2022 [*Rules*], Rule 13. The leave application was filed beyond this time limit.

[16] Pursuant to s. 32(2) of the *Act*, a justice may extend a time limit provided in the *Act* or *Rules* for doing an act, including the time limit for commencing an appeal or application for leave to appeal.

[17] The Notice of Appeal is to the effect that leave is required. And yet it is difficult to discern what order(s) are being appealed. The District submits in its written argument that the order in question is in fact that of Justice McDonald of August 12, 2022, dismissing his application for judgment. The Notice of Appeal is also directed however, in part, to the production of certain documents, which Mr. Portnov says are essential to the continued prosecution of his claims against the District. Those documents formed the basis of the application before Associate Judge Robertson, which was dismissed.

[18] To further complicate matters, in his written argument in support of his amended leave application Mr. Portnov states that he is "asking the Court of Appeal to give me time to answer on any questions, to get me the possibility to explain my proceeding. It is not only to me, but for getting the justice, in which the public is interested." He then sets out the orders he seeks in this Court:

Part 1: ORDER(S) SOUGHT

To prepare the original documents for a hearing or for a trial it needs:

1. Defendant's List of real documents
2. R7(10)(11) to obtain from the Defendant the work order related to 575-16 Street in West Vancouver
3. Accordingly to Rule 7(15) (20) to inspect the work orders #M-83573 and #M-33099

4. Accordingly the R7-7(4) makes an order for supporting the Defendant's allegations, including re-litigate, or
5. Order to make the affidavits for the defendant's statements, including abusive statement of scandalous
6. order for the trial with jury

[19] Some of this relief clearly relates to Associate Judge Robertson's order and, by implication Justice Tucker's Appeal dismissal order.

[20] There is nothing in the Notice of Appeal, the amended notice seeking leave to appeal or the written argument which directly addresses the Strike order.

[21] If Mr. Portnov were to be appealing the Strike order, leave would not be required since that is a final order dismissing the action. If his appeal is limited to the production of documents then leave would be required.

[22] At the hearing of the applications today I explained to Mr. Portnov that if the Strike order is not being appealed then there is no basis for any proceedings in this Court. Mr. Portnov then indicated that the leave application was linked to the Strike order.

[23] I invited counsel for the District to obtain instructions that, in the alternative to the leave application, Mr. Portnov's application should be considered as an application to extend the time to file the Appeal Record, which would be the case if leave were not required.

[24] The District agreed to proceed in that manner and to limit its submissions to the 4th and 5th *Davies* factors, to which I shall refer below.

[25] In other words, if the Notice of Appeal were considered to include an appeal of the Strike order, it would not argue that there was no *bona fide* intention to appeal that order during the appeal period. The application would proceed on the basis of the 4th and 5th *Davies* factors, that is the merits of the appeal, and the interests of justice.

[26] The practical result of the application would be the same. Bearing in mind the ambiguous drafting of the Notice of Appeal and the fact it does not refer to the Strike order, if leave is required then the application is for an extension of time to seek leave to appeal and file the application book. If leave is not required then the application is for an extension of time to file the Appeal Record. I am mindful that if it is not known whether leave is required, an application seeking leave is to be brought (Rule 12 (c)), but the leave application itself is not before the Court at this time.

[27] An application to extend the time to apply for leave to appeal is governed by the factors from *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 (C.A.):

- 1) Was there a *bona fide* intention to appeal?
- 2) When were the respondents informed of the intention to appeal?
- 3) Would the respondents be unduly prejudiced by the passage of time?
- 4) Is there merit in the appeal?
- 5) Is it in the interest of justice that an extension be granted?

[28] The same factors apply to other applications seeking extensions of time: *Anvik v. Mason*, 2022 BCCA 114 at para. 4 (Chambers).

### **Discussion**

[29] The District opposes the relief sought. It does not challenge the first three *Davies* factors but submits that the application should be dismissed on the basis of the 4th and 5th factors that is there is no merit to the appeal and the interests of justice do not militate in favour of the extension being granted.

[30] Mr. Portnov argues there is merit to the appeal and that he needs the opportunity to re-litigate the prior proceedings in order to prove that the settlement was fraudulently obtained and he should receive compensation for the injuries sustained in the accident and the conduct of the District and its representatives. He

submits he requires production of the documents in question to advance those claims.

[31] I will consider the application on the basis of whether there is merit to the appeal and if it is in the interests of justice that an extension be granted.

[32] Justice McDonald decided that Mr. Portnov had failed to establish the settlement was obtained fraudulently. Mr. Portnov's application before Associate Judge Robertson appeared to be an attempt to re-litigate the findings of Justice McDonald, and thus Associate Judge Robertson declared herself *functus officio*.

[33] In *Sherwood v. The Owners, Strata Plan VIS 1549*, 2020 BCCA 311 at para. 27, Justice Saunders reiterated the "general principle that once an order is entered, the court is *functus officio*." She quoted from *Booty v. Hutton*, 2009 BCCA 29 (Chambers), where Donald J.A. stated:

[14] It seems obvious that the review of Frankel J.A.'s order refusing leave is bound to fail on the ground that Allen has appealed the wrong order of Shabbits J., i.e., instead of appealing the substantive order, he appealed the refusal to vary that order. The only issue that can arise in respect of the latter is whether the order conformed with the reasons, and there is no apparent disparity.

[34] Mr. Portnov did not appeal Justice McDonald's order which dismissed his application for judgment on the basis of the principles of *res judicata* or as an abuse of process. Instead he has effectively sought orders before Associate Judge Robertson which are designed to circumvent Justice McDonald's order. During his submissions he stated that he contacted Access Pro Bono to appeal Justice McDonald's order, but they did not do so. He was not aware of this since he was in the Ukraine for several months during this time frame. Be that as it may, there was no appeal filed of Justice McDonald's order nor was an application brought to extend the time for doing so.

[35] The merits threshold for an extension of time is whether the appeal is "doomed to fail" or whether "it can be said with confidence" that it has no merit: *Anvik* at para. 7.



[36] The District submits that Mr. Portnov has made numerous bare allegations and speculations with respect to the alleged fraudulent settlement which have never been substantiated. For this reason alone, it submits there is no merit to the appeal as the matter has been decided by Justice McDonald.

[37] I would agree but with one caveat. Justice McDonald dismissed Mr. Portnov's application for judgment but did not specifically dismiss the action itself. As Justice Tucker observed:

[9] In my view, Justice McDonald's Decision did dispose of this matter in its entirety when she dismissed Mr. Portnov's application for judgment, and held that the matter was barred by *res judicata* and, in the alternative, barred as an abuse of process.

[Emphasis added.]

[38] The judge went on to state:

[10] Notwithstanding, I consider that the District of West Vancouver has raised a valid question as to whether or not a further order is required here given that applications continue to be filed by Mr. Portnov in the proceeding.

[11] I agree that it is appropriate, pursuant to the outcome in Justice McDonald's Decision, that there should be an order that the Notice of Civil Claim is hereby struck without leave to amend and that the plaintiff's claim is dismissed in its entirety.

[39] I am of the view the judge was correct in her interpretation of the effect of Justice McDonald's order. It is clear that Mr. Portnov seeks to have this Court order the production of certain documents so that he can then re-litigate his claims against the District which would also include serious allegations of fraudulent conduct by it and its representatives, including its legal counsel.

[40] In her reasons for judgment, Justice McDonald stated:

[8] On July 14, 2022, Mr. Portnov filed an application. He confirmed to me during submissions that he is seeking an order requiring the District to pay him damages for the injuries he sustained in the fall on September 18, 2021, and for the District's subsequent deceit and deception in relation to failing to disclose information about his claim.

...

[11] The District submits that I ought to dismiss the application for judgment on the basis that Mr. Portnov received a full and final settlement of

his claim in Provincial Court. In essence, the District says that the claim is either barred by the doctrine of *res judicata* or in the alternative, it is an abuse of process.

...

[13] ... I am unable to conclude that the settlement reached on May 27, 2022, was fraudulent, as Mr. Portnov alleges. Mr. Portnov had the work order from the District prior to the settlement conference but he submits that he did not read it carefully until after he settled.

[14] While I understand that Mr. Portnov may not wish he had settled his Provincial Court action, he failed to show that the settlement was obtained through fraudulent actions, such as fraudulent misrepresentations by the District.

[15] In my view, when the parties entered into the settlement on May 27, 2022, the claim was settled by consent as if there had been a trial. As a result, Mr. Portnov's claim is *res judicata*. If I am incorrect to find that the claim is *res judicata*, then I find it is clearly an abuse of process since it raises the identical issues as those he raised in the Provincial Court action.

...

[17] I therefore dismiss Mr. Portnov's application for judgment.

[41] I would not grant an extension of time to file either the application book or the Appeal Record since the appeal has no merit and is bound to fail. It is also not in the interests of justice to do so.

### **No Fee Application**

[42] Under Rule 85(4) of the *Rules*, a justice of the Court may make an order that no fees are payable in respect of an appeal where the appeal is not (i) bound to fail, (ii) scandalous, frivolous or vexatious, or (iii) an abuse of process, and the person's payment of court fees under R. 84 would cause undue hardship.

[43] The "bound to fail" standard is less onerous than the "lacks merit" standard: *Harrison v. Law Society of British Columbia*, 2022 BCCA 316 at para. 5 (Chambers). Despite the lower standard, Justice Willcock in *Harrison* dismissed the application for a no fee order on the basis that the applicant had not established the appeal was not bound to fail.

[44] As I have already explained in relation to the extension of time application, Mr. Portnov has not established that his appeal is not bound to fail. Furthermore, as

Justice McDonald noted, Mr. Portnov’s claims, if not barred by the principles of *res judicata*, constitute an abuse of process.

[45] Accordingly, although the criteria for “undue hardship” has been established, I would dismiss the no fees application on the basis that it is not in the interests of justice to do so.

[46] In conclusion, both applications are dismissed. I am advised by counsel that there have been difficulties in the past in obtaining Mr. Portnov’s approval as to form on orders. Justice Tucker dispensed with his approval as to form and I make a similar order.

“The Honourable Mr. Justice Abrioux”