Court of Appeal for Saskatchewan
Docket: CACV4274 and CACV4300

Citation: ***Yashcheshen v Saskatchewan Government Insurance*, 2024 SKCA 47**
Date: 2024-04-26

CACV4274
Between:

Alicia Yashcheshen

Applicant/Respondent (Applicant)

And

Saskatchewan Government Insurance

Respondent/Applicant (Respondent)

And

Attorney General for Saskatchewan

Intervenor

CACV4300
Between:

Alicia Yashcheshen

Applicant/Respondent (Applicant)

And

Saskatchewan Government Insurance

Respondent/Applicant (Respondent)

Before:	Caldwell, Tholl and McCreary JJ.A.
Disposition:	Leave to appeal denied; appeals quashed
Written reasons by:	The Court
On appeal from:	KBG-YT-00168-2023 (Sask KB), Yorkton (CACV4274) and QBG-RG-02705-2019 (Sask KB), Regina (CACV4300)
Appeal heard:	April 19, 2024
Counsel:	Alicia Yashcheshen on her own behalf Reginald Watson, K.C., and Luc Chabanole (articling) for the Respondent Noah Wernikowski for the Intervenor

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The Court

I. INTRODUCTION

[1] Alicia Yashcheshen filed notices of appeal from two interlocutory orders made in two separate matters in the Court of King's Bench. She did not initially apply for leave to appeal for either. Saskatchewan Government Insurance [SGI] applied to have both notices of appeal struck for failure to seek leave and abuse of process and, in the case of CACV4300, mootness. Ms. Yashcheshen then applied for leave to appeal in each, and all the applications were heard together. For the reasons that follow, Ms. Yashcheshen's applications for leave to appeal are both dismissed, and in the absence of leave having been granted, both appeals must be quashed.

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II. BACKGROUND

A. CACV4274 context

[2] Ms. Yashcheshen was declared to be a vexatious litigant in the Court of King's Bench in June of 2020 and is required to obtain leave from a judge before she can commence any further actions "that are commenced by statement of claim or originating application" in that court (*Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 121 at para 2, [2022] 12 WWR 189).

[3] On October 26, 2023, Ms. Yashcheshen applied in the Court of King's Bench, in a without notice application, for leave to commence an action against SGI related to an automobile accident that occurred in 2005. In the application, Ms. Yashcheshen listed the name and address of SGI's counsel, but she did not provide SGI or its counsel with the notice of the application. On October 27, 2023, Tochor J. (as he then was) rendered a written fiat in which he made the following orders (*Yashcheshen v Saskatchewan Government Insurance* (27 October 2023) Yorkton, KBG-YT-00168-2023 (Sask KB) at para 9 [*Tochor Decision*]):

> (a) This application without notice is dismissed but the applicant has leave to reapply upon proper notice being served upon the proposed defendant in accordance with the *Rules of Court*;
>
> (b) Once the application is served and filed, the Local Registrar is requested to set a special hearing date for the hearing of the leave application, in consultation with the parties; and
>
> (c) The applicant shall also serve a copy of this fiat upon the proposed defendant.

[4] Instead of reapplying to the Court of King's Bench, with notice to SGI, Ms. Yashcheshen filed a notice of appeal from the *Tochor Decision* on November 8, 2023. She did not seek leave to appeal. On February 6, 2024, SGI applied to have the appeal quashed as disclosing no right of appeal, for failure to seek leave, and as an abuse of the process of the Court. Ms. Yashcheshen applied on February 23, 2024, for leave to appeal.

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B. CACV4300 context

[5] Ms. Yashcheshen is suing SGI in QBG-RG-02705-2019. This action was commenced prior to the decision that found her to be a vexatious litigant. The action has progressed to the point where oral questioning had started. In the course of that procedure, Ms. Yashcheshen had given nine undertakings. Ms. Yashcheshen maintained that she had provided the required responses in various documents, but SGI asserted that it was unclear which document was in response to which undertaking or whether the documents responded to an undertaking at all. As a result, SGI filed an application seeking an order requiring Ms. Yashcheshen to provide a formal response to the undertakings. On December 20, 2023, Norbeck J. rendered a fiat and made, inter alia, the following orders (*Yashcheshen v Saskatchewan Government Insurance* (20 December 2023) Regina, QBG-RG-02705-2019 (Sask KB) at para 10 [*Norbeck Decision*]):

> (a) Pursuant to Rule 5-33 of *The King's Bench Rules*, the plaintiff, Alicia Yashcheshen, is required to produce complete responses to undertakings given at questioning on January 10, 2023, no later than January 29, 2024;
>
> (b) If no further responses to undertakings are forthcoming, the plaintiff is to confirm the same in writing to the defendant no later than January 5, 2024;
>
> (c) In the event that no further responses to undertakings are forthcoming and in any event, the plaintiff is to provide to the defendant a complete list of responses to undertakings identifying the corresponding undertaking, organized in one, complete document, no later than January 29, 2024;
>
> (d) Should the plaintiff fail to produce all responses to undertakings or the complete list of responses to undertakings identifying the corresponding undertaking by January 29, 2024, the plaintiff shall be exposed to an application to strike pursuant to Rule 5-36 of *The Court of King's Bench Rules*;
>
> (e) Rule 10-4 of *The King's Bench Rules* is waived; and
>
> (f) The defendant shall have its costs of and incidental to this application in any event of the cause.

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[6] In the same fiat, acting as the case management judge, Norbeck J. addressed the continuation of the questioning and ordered Ms. Yashcheshen "to advise counsel for the defendant of her availability for continued questioning via WebEx over two afternoons during the month of January 2024, no later than January 4, 2024" (at para 18).

[7] Ms. Yashcheshen filed a notice of appeal from the *Norbeck Decision* on December 29, 2023, without seeking leave to do so. On February 14, 2024, SGI applied to have the appeal quashed for failure to seek leave, mootness, and abuse of process. Ms. Yashcheshen applied for leave to appeal on March 1, 2024.

III. ANALYSIS

A. General principles

[8] Pursuant to s. 8 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, leave must be obtained to appeal from an interlocutory decision, subject only to exceptions that have no application to the matters at hand. Both the *Tochor Decision* and the *Norbeck Decision* are interlocutory decisions because they did not dispose of any substantive issues or rights in a final manner: see *Aecon Mining Construction Services Inc. v K+S Potash Canada GP*, 2023 SKCA 102 at para 26, 485 DLR (4th) 685 [*Aecon*].

[9] The test for leave to appeal is set out in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 at para 6, 227 Sask R 121, and was recently described by Kalmakoff J.A. in *Michel v Saskatchewan*, 2023 SKCA 97:

> [19] Where leave to appeal is required, the determination as to whether it should be granted is guided by two key considerations: merit and importance. An applicant for leave to appeal bears the onus of establishing that the prospective appeal is "of *sufficient merit* to warrant the attention of the Court of Appeal" and "of *sufficient importance* to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal" (*Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 at para 6, 227 Sask R 121, emphasis in original [*Rothmans*]).
>
> [20] The merit criterion does not set a high bar for a prospective appellant to clear. At this stage of the analysis, an appellate Chambers judge is not required to decide whether the proposed appeal will succeed, but rather to consider whether the proposed appeal is prima facie frivolous or vexatious or prima facie destined to fail, bearing in mind the standard of review that would apply were leave to be granted and the appeal to proceed [references omitted]. Under the merit branch of the test, a judge should also consider whether the appeal would unduly delay the proceedings or add unduly or disproportionately to their cost [reference omitted].

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> [21] The second branch of the test – assessing the importance of the proposed appeal – requires consideration of whether the issues raised by the proposed appeal are of sufficient importance to the proceedings before the court, the field of practice or the state of the law, or the administration of justice generally to warrant determination by the Court of Appeal. This branch of the *Rothmans* test asks questions such as:
>
> • does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
>
> • does it raise a new or controversial or unusual issue of practice?
>
> • does it raise a new or uncertain or unsettled point of law?
>
> • does it transcend the particular in its implications?
>
> [22] In the end, the authority to grant leave is discretionary and calls for an appellate Chambers judge to decide whether they are sufficiently concerned about the correctness of a decision to warrant its exercise [reference omitted]. Such concerns, however, must amount to something of substance. Judges of this Court have repeatedly endorsed the position that the party applying for leave to appeal must demonstrate that both the merit and importance considerations weigh decisively in favour of leave being granted [references omitted]. Even where a proposed appeal appears to have merit, leave may be properly denied if the application fails under the importance branch (see, for example: *Transwest Air v BNK Heli-Lease Inc.*, 2015 SKCA 76 at paras 6–9, 465 Sask R 31).

[10] Leave to appeal must be sought within 15 days of the date of an interlocutory order or within any further time ordered by the Court or a judge: s. 9(3) of *The Court of Appeal Act, 2000* and Rule 11 of *The Court of Appeal Rules*. Here, Ms. Yashcheshen filed her applications well outside the required 15 days. As such, if leave is to be granted, the Court must further consider whether it should extend the time and grant such leave *nunc pro tunc*: *Aecon* at paras 37–41.

[11] The analysis to be conducted when considering an extension of time for filing a notice of appeal is described in *Dutchak v Dutchak*, 2009 SKCA 89 at paras 11–12, 337 Sask R 46, *Fiesta Barbecues v Andros Enterprises Ltd*., 2018 SKCA 32 at paras 20–21, and *Hoffart v Carteri*, 2019 SKCA 23 at paras 21–22. The same principles apply when considering an extension of time in which to file a leave application: *Royal Bank of Canada v. G.M. Homes Inc*. (1982), 25 Sask R 6 (CA). The Court has commonly examined and balanced the following factors to determine if it is just and equitable to extend the time to apply for leave:

(a) Did the proposed appellant possess a bona fide intention to appeal within the time limited for the appeal?

(b) Was there a reasonable explanation for the delay?

(c) Is there an arguable case to be made to a panel of this Court?

(d) Will there be prejudice to the responding party?

[12] Rule 46.1(a) of *The Court of Appeal Rules* permits a party to apply to have an appeal quashed:

> **Quashing an appeal in certain circumstances**
> **46.1**(1) On application by any party to an appeal, the court may make an order quashing an appeal on the ground:
>
> (a) it discloses no right of appeal;
>
> (b) it is frivolous or vexatious;
>
> (c) it is manifestly without merit; or
>
> (d) it is otherwise an abuse of the process of the court.

[13] If leave is required and it was not obtained then an appeal may be quashed pursuant to Rule 46.1(a).

B. CACV4274

[14] Ms. Yashcheshen asserts the following grounds of appeal (as written):

> (a) ***Selective Enforcement***: Justice Tocher erred in his interpretation and application of Rule 11-28 of the *King's Bench Rules* in the circumstances of this case by determining that SGI has a "right of reply" or right to participate in the leave test process.
>
> (b) Justice Tochor erred in his enforcement of court rules against the Appellant more harshly than others, which suggest bias.
>
> (c) Justice Tochor erred in overruling his own previous decision in *Yashcheshen v Allergan Inc.*, 2021 SKQB 33, which grants authority to bring *ex parte* applications to seek leave but clarifies none when those circumstances would apply, creating ambiguity within the Rule.
>
> > a. Justice Tochor erred in creating onerous or arbitrary procedures that are unfair for the Appellant and violated her right to procedural fairness by failing to follow established court procedures for *ex parte* applications.
>
> (d) Justice Tochor erred in effectively trying to rewrite the *King's Bench Rules* by altering the meaning of Rule 11-28 by interpreting the words differently than "shall not institute any proceedings in the Court without leave of the Court".
>
> (e) ***Inconsistent Rulings***: Justice Tochor erred in not applying the leave test to the *ex parte* application that he created in *Yashcheshen v Allergan Inc.*, 2021 SKQB 33, when he has applied it in several other cases of the Appellant.
>
> > a. Justice Tochor erred by consistently ruling in favour of other parties without apparent legal justification or inconsistently applies the law, and it may indicate bias.
>
> (f) Justice Tochor erred in dismissing the Appellant's *ex parte* application when she was instructed by Yorkton Registrar, Yvonne Rohatynsky, to apply this avenue (*inter alia*) and was harassed by her when she attempted to file another leave application on or about July 24th, 2023, for a hearing.

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> (g) Justice Tochor erred by misinterpreting or misapplying the leave requirement under *King's Bench Rule* 11-28 when there is no test for leave or procedures set out in the Rules. Therefore, this appeal is of importance to the public and administration of justice.

[15] As a first observation, it is important to understand that all the *Tochor Decision* did was require Ms. Yashcheshen to reapply with notice to SGI. It did not dispose of any substantive rights or create any prejudice to Ms. Yashcheshen's ability to apply for leave to commence her action. It merely required notice to be given before the application would be heard. It is within this context that merit and importance must be examined.

[16] Although the bar for merit is low, none of Ms. Yashcheshen's grounds of appeal cross that threshold. While Ms. Yashcheshen attempts to characterize her appeal as one that would examine the test to be applied when considering a vexatious litigant's leave application, the *Tochor Decision* is a simple procedural decision in which the judge required that notice of the application be given to the other party. It does not address the test for leave or any substantive aspects of Ms. Yashcheshen's application in the Court of King's Bench. On the narrow issue of whether Tochor J. erred in making this discretionary decision, Ms. Yashcheshen's proposed grounds of appeal are frivolous and are destined to fail. Further, such an appeal would cause unnecessary delay and expense.

[17] The proposed appeal also fails the importance aspect of the test in that it has no bearing on the ultimate outcome of the matter, and there is no pressing need revealed in the circumstances for this Court to provide any further guidance for when a Chambers judge should exercise their discretion to require notice when an application has been brought without notice.

[18] The application for leave to appeal in CACV4274 is dismissed and leave to appeal is denied. As a result, the appeal must be quashed pursuant to Rule 46.1(a).

[19] Ms. Yashcheshen shall pay costs of $1,000 to SGI for these leave and quash applications.

[20] Lastly, Ms. Yashcheshen provided an affidavit of Nadine Yashcheshen. The affidavit is replete with argument and does not provide any factual information that informed the circumstances of Ms. Yashcheshen's application.

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C. CACV4300

[21] Ms. Yashcheshen's proposed grounds of appeal are as follows (as written):

> a. Justice Norbeck erred in procedural fairness whereby the Defendant/Respondent, SGI, engaged in tactics that undermined the principles of procedural fairness throughout the proceedings, and adversely affecting the overall fairness, and she failed to properly remedy it.
>
> b. Justice Norbeck erred in allowing or misinterpreting an abuse of the King's Bench Rules of Court whereby the Defendant/Respondent demonstrated a pattern of abuse in applying for case conference 30-minutes before a chamber judge (that SGI did not want) was ready to rule on the herein matter; SGI applied for undertakings that were already received with clearly marked emails of what undertaking # the documents pertained to – thus SGI misleading the court ought to have been struck out; SGI largely ignored the undertakings provided in good faith or reply materials (e.g. Affidavit of Alicia Yashcheshen); mispresenting evidence and facts to the court; SGI refused to sign Acknowledgments of Service because SGl's name was missing from the top of the form; and misused court rules and procedures to abuse the process to take advantage of the Appellant/Plaintiff.
>
> c. Justice Norbeck erred in conducting the hearing in a biased manner whereby there were instances during the hearing where the tone of her voice and demeanour suggested a bias against the Appellant/Plaintiff, as a self-represented person. Justice Norbeck erred by not affording the Appellant/Plaintiff an impartial hearing, evidenced by the judge's defensive demeanour and comments in support of SGI.
>
> d. Justice Norbeck erred in dismissing the Appellant/Plaintiff's Originating Application to strike the Affidavit of Tara Schmunk, dated April 13th, 2023, based on a minor procedural error (wrong form) which could have been corrected but for her biased attitude towards the Appellant/Plaintiff (para. 13).
>
> e. Justice Norbeck erred in not considering the Appellant/Plaintiff's Affidavit of Alicia Yashcheshen, dated April 18th, 2023, and the evidence in it to refute SGl's bad faith application.
>
> f. Justice Norbeck erred in applying Rule 5-33 by overlooking or disregarding relevant legal precedent that should have been applied to the case. There were instances where the court misinterpreted or failed to consider the plain language and intent of the applicable Rule. This misapplication of the rules of court had a direct and prejudicial impact on the outcome of the case, resulting in an unjust and inaccurate judgment.
>
> g. Justice Norbeck erred in interpreting Rule 5-33 to mean it to include the undertakings must only be provided in one document. A review of established precedent would demonstrate that the court deviated from established norms and failed to follow binding decisions that should have guided the outcome of the case.
>
> h. Justice Norbeck erred in procedural fairness; in that, the Appellant/Plaintiff is a self-represented litigant and had no knowledge of the unwritten requirement embedded in Rule 5-33 that all the undertaking's documents must be provided at once and in one document.
>
> i. Justice Norbeck erred in modifying Rule 5-33 not within the scope of established rules and procedures. This unauthorized addition to a rule had a substantial impact on the case and resulted in an outcome that was not consistent with established legal standards.

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i. The modification introduced by the court lacks a legal basis or purpose.

ii. The modification is not recognized in the Court Forms, with a document for making formal Replies, as allegedly authorized by the Court and SGI.

iii. The absence of a proper legal foundation for this modification raises concerns about the fairness and legitimacy of the order.

iv. The unauthorized addition to the rule denied the Appellant/Plaintiff an opportunity to address or challenge the new requirement, thereby violating principles of due process.

v. This lack of notice and opportunity to be heard on the modified rule compromised the fairness of the proceedings.

vi. SGI did not ask the Appellant/Plaintiff for the alleged “reply” document before seeking an order of the court.

j. Justice Norbeck erred in arbitrarily granting the Appellant/Plaintiff 16-days to provide the undertakings, again. There are clear inaccuracies in the court’s understanding of the facts which directly contributed to an unjust and inappropriate judgment.

[22] It seems that Ms. Yashcheshen filed two originating applications in this matter, which Norbeck J. refused to accept for filing. Some of the proposed grounds of appeal appear to relate to those refusals. However, that is unclear because, in this appeal (and in CACV4274), Ms. Yashcheshen failed to file an issued order, in violation of Rule 10.1 of *The Court of Appeal Rules*. As such, this Court is left with the descriptions of the orders as set out in the fiat. Based on a review of the *Norbeck Decision*, we see nothing in relation to *orders* concerning service issues or the striking of an affidavit.

[23] Regardless, both parties agree that Ms. Yashcheshen has provided the required formal response to undertakings and that, not only has she provided dates for the continuation of questioning, she has also attended further questioning. As a result, this proposed appeal is moot. In the course of her oral argument, Ms. Yashcheshen conceded that a successful appeal would not create any practical result regarding her responses to undertakings and questioning because she has already complied with the *Norbeck Decision*. As a remedy, she wants this Court to set aside the *Norbeck Decision* and create a wide-ranging set of procedures and directions for the Court of King’s Bench related to the underlying applications.

[24] While this Court may hear moot appeals – *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 (WL) at paras 15 and 16 – this is not the type of case where this Court would exercise its discretion to do so:

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(a) while there remains an ongoing adversarial relationship, there are no collateral consequences of the outcome of the appeal;

(b) hearing this appeal would consume scarce judicial resources, unduly delay the resolution of this and other matters, and thereby impede access to justice and undermine judicial economy; and

(c) by entertaining the proposed appeal, the Court would be departing from its traditional appellate role in our adversarial system of justice.

[25] Given the mootness of the issues, combined with the extreme weakness of the grounds of appeal, this proposed appeal does not cross the necessary merit threshold. In any event, it would not meet the test of importance.

[26] The application for leave to appeal in CACV4300 is dismissed and leave to appeal is denied. As a result, the appeal must be quashed pursuant to Rule 46.1(a).

[27] Ms. Yashcheshen shall pay costs of $1,000 to SGI for these leave and quash applications.

IV. CONCLUSION

[28] Given the above results, it is not necessary to address SGI's further grounds upon which it asserted that the appeals should be quashed. Nor is it necessary to address the submissions of the Attorney General for Saskatchewan on the constitutional issues Ms. Yashcheshen sought to raise in CACV4274.

[29] Ms. Yashcheshen's applications for leave to appeal are both dismissed, and both appeals are quashed with costs payable from Ms. Yashcheshen to SGI in the total amount of $2,000, as set out above.

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[30] Costs were not sought and none are awarded for the Attorney General for Saskatchewan.

"Caldwell J.A."
Caldwell J.A.

"Tholl J.A."
Tholl J.A.

"McCreary J.A."
McCreary J.A.

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