

In the Court of Appeal of Alberta

Citation: Westcan Recyclers Ltd v Calgary (City), 2025 ABCA 144

Date: 20250428
Docket: 2301-0194AC
Registry: Calgary

Between:

Westcan Recyclers Ltd. and 664078 Alberta Ltd.

Applicants

- and -

The City of Calgary

Respondent

**Reasons for Decision of
The Honourable Justice Bernette Ho**

Application for Stay Order

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Introduction and background

[1] The applicants, Westcan Recyclers Ltd. and 664078 Alberta Ltd (Westcan), apply for a stay pending leave to appeal to the Supreme Court of Canada of a decision of this Court in *Westcan Recyclers Ltd v Calgary (City)*, 2025 ABCA 67 [*Westcan ABCA*] dated February 27, 2025.

[2] The facts of this case are set out in detail in *Westcan ABCA*, and the decision below: *Westcan Recyclers Ltd v Calgary (City)*, 2023 ABKB 442 [*Westcan ABKB*]. They will not be recited in detail here. In brief, Westcan owns a parcel of land in Calgary on which it operates a scrap metal recycling business (the Westcan Site). The City of Calgary has an ownership interest in nearby lands that are being developed into an industrial park. This development is overseen by the City's internal Real Estate and Development Services business unit (REDS). The subdivision approval for development includes a binding condition requiring REDS, as the developer, to upgrade 68th Street SE into a four-lane divided road at its expense. The changes to 68th Street led to a dispute between the City of Calgary and Westcan, because Westcan maintains the road changes, as designed, would interfere with access to and from the Westcan Site, in a way that would prevent it from safely conducting business there. At one point, Westcan maintained that it would have to close its business.

[3] This dispute escalated into litigation in 2021. Westcan filed a statement of claim and applied for an interim injunction prohibiting the City from physically interfering with its existing access points. A temporary injunction was granted pending a further hearing with additional evidence. The injunction was continued in some fashion by consent after two further court appearances. The latest injunction was granted in April 2022 by consent.

[4] Several months later, after a hearing before the municipal Infrastructure and Planning Committee in which Westcan participated to some degree, the City passed a bylaw closing Westcan's existing direct access points to 68th Street and providing alternate access points through 86th Avenue and 90th Avenue. However, the City also provided Westcan with a temporary permit allowing it to legally use the existing access points until further notice was provided.

[5] After the bylaw was enacted, the City brought an application to set aside the injunction and Westcan brought an application for judicial review of the bylaw. The chambers judge quashed the bylaw, and upheld the injunction: *Westcan ABKB*. The majority of the Court of Appeal allowed the appeal, upholding the bylaw and ordering that the injunction be vacated: *Westcan ABCA*.

Analysis

[6] It should be noted at the outset that neither the applicants nor respondent filed new evidence in relation to this application. Instead, portions of the excerpts of key evidence filed before the panel were re-submitted.

[7] The applicants apply for a stay under section 65.1(1) of the *Supreme Court Act*, RSC 1985, c S-26, which provides a single judge of this Court may “order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.” Therefore, this decision considers whether a stay should be granted until the leave application is decided.

[8] The respondent raises as a preliminary argument that a stay is not available under section 65.1(1) because there is no executory aspect to the panel’s order. In support of its position, the respondent relies on *Baier v Alberta*, 2006 ABCA 187 [*Baier ABCA*] where this Court held that a stay could not be granted by the Court of Appeal under section 65.1. In that case, the lower court found legislation to be unconstitutional, which was overturned by the Court of Appeal. On the stay application, the Court reasoned that the Court of Appeal’s judgment, in effect replaced the lower court’s judgment, such that there was nothing to stay as the legislation continued in effect: *Baier ABCA* at paras 12-15. This principle has been considered by this Court since: *Alberta Energy Regulator v Grant Thornton Limited*, 2017 ABCA 278 at paras 68-107; *Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Limited*, 2024 ABCA 214 at paras 5-12.

[9] In the circumstances of this case, I am satisfied that there is an executory element to the Court of Appeal’s judgment which can be stayed. In the court below, the chambers judge was satisfied that the applicants had met their burden of proof in establishing an injunction was appropriate: *Westcan ABKB* at para 122. The majority of the panel set aside the decision of the chambers judge, finding it contained reviewable errors: *Westcan ABCA* at para 81-85. The majority also concluded through its own analysis that the consent injunction should be vacated and issued an order to that effect: *Westcan ABCA* 86-89. In these circumstances, the order to vacate the consent injunction is sufficiently executory to be distinguishable from the cases relied on by the respondent. Having found this to be the case, it is unnecessary to consider Westcan’s alternative argument that this Court’s jurisdiction under section 65.1 is co-extensive with the broad authority of the Supreme Court of Canada: *RJR MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at 329-330 [*RJR*]; *Baier v Alberta*, 2006 SCC 38 at paras 13-14 [*Baier SCC*]; *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, 1998 CanLII 779 (SCC), [1998] 1 SCR 1074; *Saskatchewan (Environment) v SGEU*, 2018 SKCA 96 at paras 6-7; *Minister of Community Services v BF*, 2003 NSCA 125 at para 9 [*BF*].

[10] Westcan’s notice of leave to appeal application states the proposed appeal raises issues of public and national importance under section 40(1) of the *Supreme Court Act*, including the following:

- (a) Are municipalities required to distinguish between the exercise of statutory authority and the exercise of natural person powers?
- (b) How, if at all, may a municipality exercise its statutory authority in the presence of its own collateral, commercial objectives to ensure procedural fairness for impacted parties and to avoid bad faith and potential conflicts of interest?

[11] This Court may grant a stay if the tripartite test set out in *RJR* is satisfied. Under this test, the applicants have the burden of demonstrating that: (1) there is a serious question to be determined; (2) the applicants will suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours granting a stay. The latter two stages of the analysis overlap to some degree and the fundamental question to be decided is whether a stay is just and equitable in the circumstances: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paras 24-25 [*Equustek*]; *Cabin Ridge Project Limited v Alberta*, 2025 ABCA 109 at para 12 [*Cabin Ridge*].

[12] Westcan's application is due by the end of April, and the adjudication of leave applications generally takes a matter of months, rather than years: *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General)*, 2018 BCCA 477 at paras 44-45; *Yaiguaje v Chevron Corporation*, 2014 ONCA 40 at paras 17-20.

[13] The first branch of the test requires me to consider whether there is a serious question to be determined, considering both the merits of the proposed questions, and whether any of the questions are of such a nature that the Supreme Court of Canada will be of the opinion that it ought to decide them: *Supreme Court Act*, s 40(1); *BF* at para 11. On the merits, the majority of the panel overturned the decision of the chambers judge, and Feehan JA dissented, based on issues related to the questions proposed by Westcan. I am satisfied that the disagreements between these jurists on these points, as reflected in their careful and thoughtful reasons, are sufficient to show there is a serious issue on the merits: *Baier SCC* at para 16(a).

[14] Regarding whether the Supreme Court of Canada will form the opinion that it ought to decide them, I am required to apply my own judgment in considering and assessing whether any of the proposed issues are of sufficient public importance or otherwise may warrant granting leave: *BF* at para 11; *Cabin Ridge* at paras 15-20.

[15] Westcan referred to *Kitsilano Coalition for Children & Family Safety Society v British Columbia (Attorney General)*, 2024 BCCA 423 and *Ontario Place Protectors v Ontario*, 2025 ONCA 183, arguing that there is discord among appellate Courts relevant to the proposed issues on appeal, and therefore, the leave application presents issues of national importance. However, these cases deal primarily with the extent to which municipal bylaws may be insulated from judicial review, which does not appear to be an issue directly engaged by the grounds of appeal proposed by Westcan.

[16] The matter before the Court in this case involves a situation where the City allegedly unfairly exercised its regulatory powers to enable the City to satisfy legal obligations binding on it in its capacity as a natural person, to the prejudice of Westcan.

[17] A cursory search shows that while municipal statutes in Canada are complex and varied, many confer some sort of natural person powers: *Municipal Government Act*, RSA 2000, c M-26, s 6: “A municipality has natural person powers, except to the extent that they are limited by this or any other enactment;” *Municipal Act, 2001*, SO 2001, c 25, s 9: “A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act;” *Community Charter*, SBC 2003, c 26, s 8(1): “A municipality has the capacity, rights, powers and privileges of a natural person of full capacity;” *Local Governance Act*, SNB 2017, c 18, s 6(1): “Subject to this Act or any other Act, a local government has the capacity, rights, powers and privileges of a natural person;” *Municipal Government Act*, RSPEI 1988, c M-12.1, s 4(2): “In addition to the rights and liabilities referred to in subsection (1), a municipality has, for the exercise of its powers under this Act, the capacity and, subject to this Act, the rights, powers and privileges of a natural person.” This generally supports the conclusion that the applicants’ proposed questions may have broader public or national importance in Canada. I am reluctant to comment further, as the question of whether to grant leave is ultimately to be answered by the Supreme Court of Canada and will be before that Court imminently. However, I am satisfied that the questions posed by Westcan meet the threshold required by the first branch of the test.

[18] The second branch of the test requires me to consider whether the applicants have demonstrated that they will suffer irreparable harm if a stay is not granted, which is generally satisfied if the appeal will be rendered nugatory: *Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta*, 2020 ABCA 85 at para 23 [*Prosper Petroleum*]; *Cabin Ridge* at paras 25-26. An appeal is rendered nugatory if the benefit sought in the appeal would be permanently lost: *Cabin Ridge* at para 26, citing *Alberta (Consumer and Corporate Affairs) v Bennett*, 1992 ABCA 227 at para 4. Some have described this test as being satisfied where the absence of a stay “might” render the appeal nugatory: *Prosper Petroleum* at para 23. Other cases use the word, “would” render the appeal nugatory: *Triple Five Corporation Ltd v United Western Communications Ltd*, 1994 ABCA 141 at para 6; *R v Canadian Broadcasting Corporation*, 2016 ABCA 372 at para 7; *Poole v City Wide Towing and Recovery Service Ltd*, 2020 ABCA 102 at para 20 [*Poole*]. It is well established that evidence of irreparable harm must be clear, and it is not enough if the alleged harms are only speculative, hypothetical, or arguable: *Fawcett v College of Physicians and Surgeons of Alberta (Complaint Review Committee)*, 2022 ABCA 416 at para 23. It follows that this same principle applies when considering whether the appeal may be rendered nugatory, such that the applicant must demonstrate, in the very least, some real probability that the benefit sought in the appeal will be lost if the stay is not granted.

[19] The applicants want to continue using the existing 68th Street access points pending determination of their application for leave to appeal to the Supreme Court of Canada. They submit that absent a stay, if the respondent proceeds with the contemplated road construction, then any

remedy allowing them to continue long term use of the 68th Street access points will be lost. Indeed, as the chambers judge found, the road expansion would require Westcan to make modifications to the Westcan Site and disrupt access to the site: *Westcan ABKB* at para 80-81, 87. Materials would have to be relocated, in some cases to an off-site location, and use of alternate access on 86th and 90th Avenue will require some re-grading of the Westcan Site.

[20] The majority of the Court of Appeal disagreed with the chambers judge's conclusion that the evidence established irreparable harm because the chambers judge erred by failing to account for the possibility of compensation under the *Highways Development and Protection Act*, SA 2004, c H-8.5 [*HDP*A], and that the evidence did not establish any impacts to the Westcan Site that would not be measurable or compensable in damages: *Westcan ABCA* at paras 83-84, 87. What became clear from oral argument before me is that the matter of whether the applicants may be entitled to compensation pursuant to the *HDP*A, and if so how much, will be highly contested in future litigation between the parties.

[21] The applicants acknowledge that the respondent has previously stated that it will provide the applicants with 2 months' notice prior to closing the applicants' direct 68th Street access points. The respondent confirmed in written and oral submissions that this remains the case, and no such notice has been issued yet so there is no harm to the applicants pending. The applicants argued that this notice period did not mitigate any potential irreparable harm, because once the notice is given, they would have to begin work immediately to modify the Westcan Site in time for the impending access changes. Moreover, the temporary permit granted to the applicants provides it may be terminated on 10 days' notice.

[22] While it remains to be seen when the 2 months' notice may be provided, when asked about the City's intention to undertake construction in the coming months, counsel to the respondent indicated she did not have instructions. In addition, counsel referred to the City's desire to complete the work sometime during the 2025 road construction season, if possible. Without any further commitment to refrain from issuing notice pending determination by the Supreme Court of the leave application, I must assume the City would like to undertake the road construction along 68th Street as soon as reasonably practicable. In my view, this weighs in favour of granting the stay. The applicants' position is that they will be permanently impacted by the closure of the 68th Street access points, and the temporary avoidance of the closure and its impacts is one of the very benefits sought in the appeal. In this way, the appeal would be rendered nugatory if a stay was not granted.

[23] The balance of convenience analysis requires me to consider which party would suffer greater harm from the granting or refusal of the stay. In addition, when the stay at issue engages public interest concerns that go beyond the interests of the immediate parties, those broader interests may be considered in assessing the balance of convenience: *RJR* at 348-349; *Poole* at para 21.

[24] With respect to public interest concerns, the majority found that concerns that supported vacating the injunction included the public interest in promoting the safe and efficient transportation within the City of Calgary, and the risk of harm to the public associated with maintaining the existing restriction of the four-lane road into two-lanes near the Westcan Site if the injunction was maintained: *Westcan ABCA* at para 88. The respondent submits this finding by the majority is determinative of the application before me.

[25] Conversely, the applicants submit that I do not need to be concerned about the safety issues highlighted by the majority because if the lane reduction posed a serious safety issue, the City would not have agreed to provide 2 months' notice of closure of the 68th Street access points. The applicants submitted any harm to the respondent was merely economic. In my view, the respondent's interest in safety and other issues related to completing the 68th Street road construction are greater than that advocated by the applicants. The respondent has a legitimate interest in seeing the work completed promptly, in furtherance of its general interest in good government, economic development, and safety of the municipality: *Municipal Government Act*, RSA 2000, c M-26, s 3.

[26] In my view, many of the same factors considered by the majority in *Westcan ABCA* continue to be relevant to the balance of the convenience here, but the context is different because: (a) the detriment to Westcan includes the possibility its appeal of the majority's decision will be rendered nugatory; and (b) the analysis here is primarily focused on the effects of a stay between now, and the time the Supreme Court of Canada decides the leave to appeal application. I also note that the respondent did not tender any updated evidence speaking to the safety risks associated with the narrowing of 68th Street from four lanes to two lanes adjacent to the Westcan Site, a situation that has been in place for quite some time as the litigation has continued.

[27] Weighing the relative irreparable harm to each party and balance of convenience considerations, including the relevant public interest considerations, I am satisfied that the balance of convenience favours granting a stay. Further, in conjunction with the other factors under the tripartite analysis, I am satisfied that granting a stay is just and equitable in the circumstances.

[28] As a final point, during oral argument the respondent submitted that if a stay was granted, Westcan should be required as a condition of the stay to apply to expedite its application for leave to appeal, presumably in the interests of preserving the ability to complete the 68th Street construction during the 2025 construction season. I am not inclined to impose such a condition on the applicants. First, while I have a general understanding of what months road construction is undertaken in the City of Calgary, I have no evidence regarding the exact work that remains to be completed, how quickly that work could be completed and when the latest such work could be undertaken this year. Second, I understand that assuming a typical schedule is followed, the Supreme Court may decide whether to grant leave sometime between the middle of July to end of October 2025, thus it is possible that an early decision from the Supreme Court would allow for the work to be completed this year if leave is not granted. Moreover, a decision from the Supreme

Court could be expedited if the respondent, of its own volition, filed its response materials in less than the allotted 30 days for a response. Finally, it appears that the *Rules of the Supreme Court of Canada*, SOR/2002-156 provide that either party may bring a motion to expedite the decision-making process. Therefore, it is open to the respondent to bring such motion, and arguably, it is better positioned to adduce affidavit evidence regarding timing and urgency.

[29] The application for a stay pending the Supreme Court of Canada's decision on the applicants' leave to appeal decision is granted. Subject to any further Court order, the applicants are required to advance their application for leave promptly and without undue delay.

Application heard on April 10, 2025

Reasons filed at Calgary, Alberta
this 28th day of April, 2025

Ho J.A.

Appearances:

M. Mohamed, KC

M.J. LaFleche

for the Applicants

K. Colborne

K. Zucchi

J. Watson

for the Respondent