

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Fuller v. Epic Restoration Services Inc.*,  
2025 BCCA 187

Date: 20250603  
Docket: CA50361

Between:

**Rudyard Kipling Fuller**

Appellant  
(Defendant)

And

**Epic Restoration Services Inc.**

Respondent  
(Plaintiff/Defendant by way of Counterclaim)

And

**The Estate of Desmond Maurice Fuller, Deceased, by His Executor and  
Personal Representative Rudyard Kipling Fuller**

Respondent  
(Defendant)

And

**The Dominion of Canada General Insurance Company and,  
In French, Compagnie D'Assurance Generale Dominion Du Canada  
also known as Travelers Canada**

Respondent  
(Third Party)

Before: The Honourable Madam Justice Fisher  
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated  
December 11, 2024 (*Epic Restoration Services Inc. v. Fuller et al.*, 2024  
BCSC 2245, Vancouver Docket S186318).

## Oral Reasons for Judgment

Counsel for the Appellant:

M.S. Menkes

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Restoration Services Inc.:

S.M.M. Hirji-Lalani

Counsel for the Respondent, The Dominion  
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Place and Date of Hearing:

Vancouver, British Columbia  
June 3, 2025

Place and Date of Judgment:

Vancouver, British Columbia  
June 3, 2025

**Summary:**

*This is an application for leave to appeal an order making the applicant personally liable for costs arising from litigation continued by him as personal representative of his late father's estate. The litigation involved the defence of a claim against the estate and a counterclaim and third party claim and the applicant was found liable to pay the costs of the counterclaim and the third-party claim. The applicant also seeks leave to include a subsequent order apportioning the costs as between the defence of the claim and the other claims. The respondents say the proposed appeal does not raise a question of principle capable of justifying leave to appeal from a costs award. The parties agree that if leave is granted, a stay should be entered upon the payment into court of security by the applicant.*

*Held: Leave to appeal the initial costs order is granted. The proposed appeal from the order making the applicant personally liable for costs raises question of principle relating to the doctrines of res judicata and functus officio, as well as questions of law relating to the personal liability for costs of estate trustees who continue claims and counterclaims commenced by the deceased. It is unnecessary to grant leave to appeal the order apportioning costs. As consented to by the parties, there will be a stay of the costs order pending final determination of the appeal and the applicant shall post security against the order being appealed and for the costs of this appeal.*

**FISHER J.A.:**

**Overview**

[1] This is an application seeking leave to appeal and a stay pending appeal from an order making the applicant, Mr. Fuller, personally liable for a costs award arising out of litigation continued by him as personal representative on behalf of his father's estate (the Estate). A consent order extending the time to file and serve the notice of application for leave to April 19, 2025 has been entered.

[2] The parties have agreed that, if leave to appeal is granted, a stay is appropriate on the payment into court of security by Mr. Fuller.

**Background**

[3] The applicant's late father was insured by the third-party respondent, Dominion of Canada (known as Travelers Canada). His home suffered water damage in 2017, and the respondent, Epic Restoration Services Inc. (Epic), was retained to repair the damage. Epic invoiced Travelers Canada, which issued a joint cheque to Mr. Fuller and Epic for the total amount of the invoice. The applicant's father deposited the cheque into his personal account, and when Epic sought payment from him, refused to pay.

[4] In June 2018, Epic sued for breach of contract, unjust enrichment, and breach of fiduciary duty. The applicant's father counterclaimed, alleging an equitable setoff based on the quality of work performed, and filed a third-party claim against Travelers Canada that included allegations that the insurer breached a duty to defend and a claim for lost rental income.

[5] Mr. Fuller's father passed away in January 2019, before the matter came to trial. Mr. Fuller, as personal representative, continued the actions on behalf of the Estate. He was also one of two beneficiaries under the will and at some point, during the litigation, he transferred full title in the property where the work at issue had been performed to himself. This fact was disclosed to the other parties.

[6] The trial took place in November and December 2022. Epic and Travelers Canada were both substantially successful. At a subsequent costs hearing, the trial judge ordered costs against the Estate. Neither respondent sought any relief against Mr. Fuller personally, and that order was entered. At that time, however, the Estate had already been administered, and no assets remained in the Estate to pay costs.

[7] Epic and Travelers Canada then advanced separate applications before another judge, seeking orders that would make Mr. Fuller personally liable for all outstanding amounts that were ordered to be paid to them by the Estate—under both the trial order and the costs order. They sought relief under the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [WESA] on the basis that Mr. Fuller had breached his fiduciary duties by distributing the assets of the Estate without regard to the claims made in the underlying litigation. Those applications were dismissed in June 2024 by Justice Shergill, who concluded that Epic could only seek personal liability for the trial order against Mr. Fuller under WESA by adding him as a party in his personal capacity to the existing action or by commencing a separate proceeding. With respect to the costs order, she concluded that Epic and Travelers Canada could seek costs against Mr. Fuller personally without adding him as a party but such an application should have been brought before the trial judge. On this point, it was Shergill J.’s view that the orders sought “have the impact of amending or varying the costs award” made by the trial judge.

[8] Epic and Travelers Canada accordingly brought an application before the trial judge for an order that Mr. Fuller be personally liable to pay the costs award against the estate.

**The Decision of the Chambers Judge**

[9] In reasons for judgment indexed as *Epic Restoration Services Inc. v. Fuller et al.*, 2024 BCSC 2245, the trial judge found Mr. Fuller personally liable for the costs of the counterclaim and third-party claim, but not for the costs of unsuccessfully defending the original claim by Epic.

[10] The judge relied on the principle from *Shafer v. Jones* [1950], 2 W.W.R. 625 (ABKB) that “in ordinary cases an executor or administrator who sues as such and fails is personally liable for the costs of the action”, noting that it had been cited with approval in several trial decisions. He also relied on *Vancouver Trade Mart Inc. (Trustee of) v. Creative Prosperity Capital Corp.* [1998], B.C.J. No. 2686 (S.C.) at para. 13 [*Vancouver Trade Mart*], a case involving a trustee in bankruptcy, for the proposition that “at common law trustees in bankruptcy (like other trustees, executors, administrators, receivers and liquidators) are personally liable for costs if they unsuccessfully make a claim against another person, subject to the qualification that they are entitled to indemnity out of the estate unless they are guilty of misconduct”.

[11] Mr. Fuller sought to distinguish these and other cases on the basis that the trustee was a plaintiff, not a plaintiff by counterclaim, and that he had only continued the action already commenced by his late father, rather than commencing one on his own. The judge held that these were “distinctions without a difference”, and there was “no principled reason” to differentiate between claims and counterclaims, or commencing and continuing claims, for the purposes of the personal liability of trustees for costs. However, he acknowledged that the law, as stated in *Vancouver Trade Mart*, is that executors are personally liable for costs in respect of claims they advance, not where they fail to successfully defend an estate against a claim. On this basis, he concluded that Mr. Fuller was personally liable for costs in the counterclaim and third-party claim, but not the main claim brought by Epic.

[12] Mr. Fuller also argued that the judge was barred from considering the applications because the final costs order had already been entered against the Estate. He submitted that relitigating the issue of liability for costs was barred by the doctrines of cause of action estoppel, abuse of process, and *functus officio*. Mr. Fuller contended that Epic and Travelers Canada could and should have argued his personal liability at the time of the original costs hearing, and they should be barred from seeking a new order after costs had been finally determined.

[13] The judge rejected this argument. He again relied on *Shafer*, where the fact that costs had already been ordered against the estate, albeit by the Supreme Court of Canada in allowing an appeal, did not preclude the court from awarding costs against the administrator. He noted different results in other cases (*Hall Estate v. Hall and Marshall*, 2002 BCSC 893 and *Stobbe Estate v. Insurance Corp. of British Columbia* (1994), CanLII 2424 B.C.S.C.) but found they did not address the issues of *functus* or cause of action estoppel. The judge agreed with the respondents that an action to enforce a costs judgment against a personal representative was not a challenge to the validity of the original costs order, or an attempt to amend or set it aside. It was new relief, ancillary to but distinct from, the issue of costs. He therefore concluded that there was no bar to the respondents bringing their application after the issue of costs had already been determined: at paras. 44–46.

[14] The judge subsequently issued supplementary reasons (2025 BCSC 224) apportioning the costs as between the main action and the counterclaim and reflected in an order dated February 13, 2025. Mr. Fuller seeks to extend his leave application to include this order as well.

### **The Application**

[15] If an order in respect of costs is the only matter being appealed, leave is required under Rule 11(f) of the *Court of Appeal Rules*, B.C. Reg. 120/2022. The general test for leave to appeal is well-known. The applicant must satisfy the Court that:

- a) The point on appeal is of significance to the practice;
- b) The point on appeal is of significant to the action itself;
- c) The appeal is *prima facie* meritorious and not frivolous; and
- d) The appeal will not seriously hinder the progress of the action.

*Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10.

[16] On an appeal from a costs order after trial, the test is slightly different; the proceedings have concluded, so the appeal will not be of significance to the action or hinder its progress. In *Gichuru v. Pallai*, 2019 BCCA 282 (Chambers) at para. 10 [*Gichuru*], Justice Hunter noted that the following factors should be considered in addressing “the specific issues that arise in respect of appealing costs awards where the underlying litigation has concluded”:

- a) Whether the proposed appeal raises questions of principle that extend beyond the parameters of the particular case;
- b) Whether the questions of principle are of significance to the practice; and
- c) Whether the proposed grounds for appeal are arguable.

[17] Generally speaking, because costs orders are discretionary, this Court will only grant leave where the proposed appeal involves a question of principle: *Neufeld v. Foster*, 2000 BCCA 485 (Chambers) at para. 14.

[18] Mr. Fuller submits that his proposed appeal raises questions of principle with broad significance to the practice and he has a good arguable case. He alleges that the judge made a number of legal errors in his interpretation and application of the doctrines of cause of action estoppel, collateral attack and *functus officio*. He also says the judge erred in extending the personal liability of trustees to claims commenced on behalf of the beneficiary to the circumstances of his case, where he continued pre-existing claims commenced by his father. He says there is no caselaw to support this extension, and the judge erred in law in concluding that there was no principled difference between continuing and commencing a claim, and between a counterclaim and a claim. He submits that, while the judge cited no cases from this province dealing with this proposition, there are cases from Ontario supporting his position on this point: citing *Moodie v. Toronto Transit Commission (Costs)*, 2015 ONSC 5927 at paras. 32–35.

[19] Mr. Fuller did not address a basis for seeking leave to appeal the February 13, 2025 order apportioning the costs, and did not pursue this in argument. In any event, if Mr. Fuller were to be successful in having the December 11, 2024 costs order set aside, it would follow that February 13, 2025 order would fall.

[20] Epic submits that Mr. Fuller has not identified an error in principle and cannot satisfy the test for leave. It says the judge's conclusions on Mr. Fuller's liability were supported by the jurisprudence, including *Shafer* and *Vancouver Trade Mart*, and the judge did not err in permitting Epic to enforce the costs award against Mr. Fuller. Epic also submits there is no principled basis on which this Court would entertain an appeal of the subsequent order apportioning the costs, given its clearly discretionary nature.

[21] Travelers Canada adopts and relies on Epic's submissions, adding only that the low merits threshold is not met here given the fact that the claim against it as third party had nothing to do with Epic's action against the Estate.

[22] In my view, Mr. Fuller's appeal raises questions of principle beyond the parameters of this case. The scope of a personal representative's liability for litigation continued on behalf of an estate, as well as the scope of the doctrines of *res judicata* and *functus officio* as they apply to an application like this, are questions of law with broader implications of potential significance to the practice.

[23] The question then, is whether there is sufficient merit in this appeal, that is, whether the proposed grounds of appeal are arguable. The respondents say they are not because these questions are settled in the jurisprudence.

[24] It is acknowledged that the threshold for merit is not high on an application for leave to appeal. The justice hearing the application has a gatekeeper function to fulfill, to ensure that unmeritorious appeals are not heard at the cost of scarce judicial resources: *Teck Cominco Metals Ltd. v. British Columbia (Minister of Revenue)*, 2009 BCCA 3 (Chambers) at para. 27. However, my role is not to prejudge the merits of the appeal beyond ascertaining that there is an arguable case; the threshold therefore is "relatively low": *Bartram v. Glaxosmithkline*, 2011 BCCA 539 (Chambers) at para. 16

[25] Here, I am satisfied that the threshold is met. There is an arguable case that the jurisprudence in Canada is not entirely settled on the circumstances in which a

personal representative should be personally liable for costs incurred against an estate in litigation continued on behalf of the estate, or the proper procedure for seeking such a costs order. The authorities cited by the parties and addressed by the trial judge are not all clearly applicable to the circumstances here or do not address the issues raised. Almost all of the jurisprudence cited is at the trial level.

[26] The fact that the respondents chose first to seek relief that included relief related to the costs award before a different judge indicates to me that the process for raising personal liability in these circumstances and the basis for doing so may not be entirely settled. *Shafer*, in particular, is a very brief, and dated decision that relies on the general principle that an executor who sues and fails is personally liable for the costs of the action without an analysis of the application of the principle to the facts. *Vancouver Trade Mart* involved a trustee in bankruptcy in circumstances different from this case. Other decisions as to whether an entered costs order can be revisited to address personal liability are not consistent or do not address the issues raised in this case.

[27] For these reasons, the application for leave to appeal the order of December 11, 2024 is allowed. I see no basis to grant leave to appeal the subsequent order of February 13, 2025.

[28] As noted above, the parties have agreed that if leave to appeal is granted, a stay of execution of the order under appeal will be entered on the payment into Court by Mr. Fuller of security in the amount of \$50,000 to the credit of Epic, and \$40,000 to the credit of Travelers Canada. Mr. Fuller has advised that these funds are currently held in trust in the trust account of Mr. Fuller's counsel.

**Disposition**

[29] In conclusion, there will be an order granting leave to appeal the order of December 11, 2024. There will also be an order by consent to stay execution of the order pending final determination of this appeal and requiring Mr. Fuller to pay security against the order being appealed and for the costs of this appeal by paying into Court: (a) \$50,000 to the credit of Epic; and (b) \$40,000 to the credit of Travelers Canada.

“The Honourable Madam Justice Fisher”