COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Green Light Solutions Corp. v. Kern BSG Management Ltd.,* 2025 BCCA 231

Date: 20250623
Docket: CA50380

Between:

Green Light Solutions Corp.

Appellant
(Respondent)

And

Kern BSG Management Ltd.

Respondent
(Claimant)

Before: The Honourable Justice Iyer
(In Chambers)

On an application to vary: An Order of the Court of Appeal for British Columbia, dated May 8, 2025 (*Green Light Solutions Corp. v. Kern BSG Management Ltd.*, 2025 BCCA 166, Vancouver Docket CA50380).

Oral Reasons for Judgment

Counsel for the Appellant:	M. Charles
Counsel for the Respondent:	M.G. Swanson C. Fawcett
Place and Date of Hearing:	Vancouver, British Columbia June 23, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 23, 2025

Summary:

The appellant applies to extend the time to bring an application to vary the order of a justice who denied the appellant leave to appeal a costs order made by an arbitrator. Held: Application granted. Although unexplained, the delay was not inordinate, and there was no prejudice to the respondent. The variation application was not bound to fail. It is in the interests of justice to grant the application because the central question in the variation application is whether an appeal lies to this Court under s. 59 of the Arbitration Act on issues of procedural fairness. Hearing the variation application provides an opportunity for a division of this Court to consider that question.

[1] **IYER J.A.**: Green Light Solutions Corp. ("Green Light") applies under ss. 29 and 32 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 to extend the time limit for bringing an application to vary an order of a justice. Kern BSG Management Ltd. ("Kern") opposes the application.

[2] Earlier this year, Green Light applied for leave to appeal a costs order made in an arbitration award. In oral reasons dated May 8, 2025, Justice Edelmann denied leave to appeal ("Order").

[3] Rule 62(2)(a) of the *Court of Appeal Rules*, B.C. Reg 120/2022 establishes that an application to vary an order of a justice must be filed and served within seven days of the date of the order. Green Light did not do so. It notified Kern of its intention to apply to vary the Order on June 4, 2025, 20 days after the deadline.

[4] The issue before me is whether the time for Green Light to file its variation application should be extended.

[5] The test on an application to extend the time to file and serve a notice of appeal was established in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259–260, 1987 CanLII 2608 (C.A.). The same criteria apply, with appropriate modifications, in other applications to extend time limits: *Morrison v. Laas*, 2024 BCCA 191 at para. 20 (Chambers.) The *Davies* criteria are:

1) Was there a *bona fide* intention to appeal?
2) When were the respondents informed of the intention?
3) Would the respondents be unduly prejudiced by an extension of time?

4) Is there merit in the appeal?
5) Is it in the interest of justice that an extension be granted?

The latter is the overriding consideration.

[6] With respect to the first two criteria, I infer from the affidavit of Green Light's principal that he did not decide whether to apply to vary until he received advice, and this was after the expiration of the filing deadline and just before Green Light informed Kern of its intention.

[7] With respect to prejudice, Kern submits it is prejudiced because the proposed review of the Order lacks merit and if it proceeds, Kern will incur needless costs. In the context of an extension application, assessment of prejudice requires a comparison between the respondent's present position and its position if the time limit had been complied with: *Cost Plus Computer Solutions Ltd. v. VKI Studios*, 2015 BCCA 467 at para. 40 (Chambers). Had Green Light applied within the time limit, Kern would still have incurred the costs of the review. As Kern has not tendered any other evidence of prejudice, I conclude no prejudice has been shown.

[8] The threshold for assessing the merits of the application to vary is low: it is whether it can be said with confidence the application is without merit or is "doomed to fail": *Lit v. Lit*, 2019 BCCA 158 at para. 33 (Chambers).

[9] Section 59 of the *Arbitration Act*, S.B.C. 2020, c. 2 provides appeals to this Court are confined to those questions of law arising out of an arbitral award that the Court, in its discretion, considers should be heard, in light of the criteria set out in s. 59(4):

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
(c) the point of law is of general or public importance.

[10] Justice Edelmann considered each of the five errors Green Light proposed in support of its leave application, including two allegations of procedural unfairness. He found none of the alleged errors were errors of law.

[11] Green Light submits there is merit to its variation application because questions of procedural fairness are questions of law.

[12] The procedural errors Green Light alleges are that the arbitrator failed to consider offers to settle because he did not invite submissions on costs, and that he made an error of contractual interpretation by not giving effect to a procedure agreed upon by the parties.

[13] Justice Edelmann held that neither of these alleged errors were questions of law within the meaning of s. 59 of the *Arbitration Act* because s. 58 of the *Act* provides for their review by the Supreme Court:

> [12] Section 58(1)(h) specifically addresses circumstances such as those alleged here where "the applicant was not given a reasonable opportunity to present its case or to answer the case presented against it." In my view, to seek to recharacterize the types of breaches of procedural fairness described in s. 58(1)(h) as questions of law under s. 59 would not be consistent with the legislative intent in enacting that section. I am not satisfied that the alleged breach of procedural fairness raises a question of law for the purposes of s. 59. Even if it did raise a question of law, I would decline to grant leave, given the existence of s. 58(1)(h).
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> [13] For the same reasons, I do not find the alleged misapplication of the procedural rules to raise a question of law for the purposes of s. 59 of the *Arbitration Act* and, even if it did, I would decline to grant leave in the circumstances, given the structure of the new *Arbitration Act*.

[14] Green Light argues that the justice erred in interpreting ss. 58 and 59 of the *Arbitration Act* to provide that what is included in s. 58 is necessarily excluded from s. 59. It submits that the statute contemplates overlap between the two sections, and some questions of procedural fairness are questions of law that may be appealed to this Court under s. 59. As this is a question of law, there would be no deference on the variation application.

[15] In addition to Justice Edelmann, two other justices of this Court have held that issues of procedural fairness fall within s. 58(1)(h) and are therefore not questions of law under s. 59: see *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure)*, 2022 BCCA 440 at para. 94 (Chambers) and *Magnum Management Inc. v. Chilliwack Hangar Corp.*, 2024 BCCA 212 at para. 34 (Chambers). While not binding, these decisions may have persuasive weight.

[16] That said, I consider the variation application is not bound to fail. The parties have advanced reasoned arguments supporting their differing interpretations of ss. 58 and 59 in the context of procedural fairness. It is not apparent from the reasons for judgment in *A.L. Sims*, *Magnum* or the present case that the justices had the benefit of full argument on that issue.

[17] Turning to the interests of justice, the delay in this case is not inordinate, but Green Light has not provided any real explanation for it; no prejudice to Kern has been shown, and the proposed application is not bound to fail.

[18] Since the enactment of these provisions in 2020, the question of whether questions of procedural fairness must be taken to the Supreme Court under s. 58(1)(h) or may (at least in some circumstances) be appealed to this Court under s. 59 has arisen at least three times. That suggests the question is of some importance to the community.

[19] Balancing these factors, I conclude that it is in the interests of justice for a division of this Court to hear the variation application.

[20] The application to extend the time to apply to vary is granted. Green Light shall pay Kern’s costs of responding to this application in any event of the cause.

“The Honourable Justice Iyer”