COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *O.W. v. British Columbia (Human Rights Tribunal),* 2025 BCCA 226

Date: 20250630
Docket: CA50226

Between:

O.W.

Appellant
(Petitioner/Applicant)

And

The British Columbia Human Rights Tribunal and Arts Umbrella Association and Glenda Love-Hirsch

Respondents
(Respondents)

Before: The Honourable Justice Dickson
The Honourable Madam Justice Fisher
The Honourable Justice Gomery

On an application to vary: an order of the Court of Appeal for British Columbia, dated April 11, 2025 (*O.W. v. British Columbia (Human Rights Tribunal)*, Vancouver Docket CA50226).

The Appellant, appearing in person:	O.W.
Counsel for the Respondent, the British Columbia Human Rights Tribunal:	J. Thackeray
Counsel for the Respondents, Arts Umbrella Association and Glenda Love-Hirsch:	J. Mehat
Place and Date of Hearing:	Vancouver, British Columbia June 19, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 30, 2025

Written Reasons by:
The Honourable Justice Gomery

Concurred in by:
The Honourable Justice Dickson
The Honourable Madam Justice Fisher

Summary:

The applicant applies to review an order made by a justice in chambers dismissing several applications including an application for leave to appeal procedural orders in the court below. He says the justice erred by refusing to grant his request to modify the style of cause, refusing to grant leave to appeal, refusing a stay, and ordering costs.

Held: Application dismissed. The applicant's submissions misconceive the applicable law and misunderstand the purpose of a costs award. The justice made no reviewable error in exercising his discretion to dismiss the applications before him.

Reasons for Judgment of the Honourable Justice Gomery:

Overview

[1] This is an application to review an order made by Justice Harris on April 11, 2025. The order under review dismisses an application pertaining to the conduct of this proceeding in this Court and for leave to appeal procedural orders in the Supreme Court of British Columbia. This review application has itself become encumbered with further procedural requests by the applicant. All this is delaying resolution of an underlying proceeding that, as Harris J.A. observed, should have been concluded long ago in the interests of justice.

[2] The review application is brought pursuant to s. 29 of the *Court of Appeal Act,* S.B.C. 2021, c. 6. This Court has repeatedly held that the standard of review is highly deferential. A review application can only succeed if the decision under review is tainted by an error of law, an error of principle, or a misconception of the facts: *J.P. v. K.S.,* 2024 BCCA 78 at para. 11.

[3] The underlying proceeding in the Supreme Court is an application for judicial review of a decision of the British Columbia Human Rights Tribunal. The Tribunal summarily dismissed the applicant's claim that he was a victim of discrimination on the basis of a physical disability and retaliation by his former employer, Arts Umbrella Association, and one of its employees, Ms. Love-Hirsch. The Tribunal made two decisions, the second dismissing a request for reconsideration. They are indexed at 2021 BCHRT 36 and 2021 BCHRT 51.

[4] The applicant's employment with Arts Umbrella ended in March 2018. The Tribunal's decisions were made more than four years ago in March and April 2021. The applicant filed a petition seeking judicial review on May 31, 2021.

[5] In the Supreme Court, the applicant applied for orders compelling production of documents by the Tribunal and the preparation of affidavits from 13 individuals employed by Arts Umbrella. This application was heard by Hoffman J. over two days in September 2024 and dismissed in written reasons on October 1. Her reasons are indexed at 2024 BCSC 1797.

[6] The applicant applied to this Court for leave to appeal Hoffman J.'s decision. He also sought a stay of proceedings, an order that he be identified by the name of the medical condition he suffers in all documents related to this proceeding, and amendment of the style of cause. These were the applications heard and dismissed by Harris J.A. on April 11, 2025.

[7] On this review application, the applicant renews his request for the orders he sought before Harris J.A. In aid of his position on review, he seeks to adduce fresh evidence pertaining to his disability and what he characterizes as procedural unfairness associated with the hearing before Harris J.A. He also asks the Court to correct what he says is a misstatement in the Court's minutes of the hearing before Harris J.A. He seeks leave to appeal and a stay of the proceeding in the Supreme Court if leave to appeal is granted, or even if we would not grant leave to appeal at this time.

[8] For the reasons that follow, I would dismiss the application to adduce fresh evidence and the review application.

Background

[9] The applicant was employed by Arts Umbrella from 2016 until 2018. He suffers from a rare medical condition that was diagnosed in 2015.

[10] In parallel to his application for production of documents by the Tribunal, the applicant was pursuing a request for them pursuant to the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 [*FOIPPA*]. In September 2024, when his application was heard by Hoffman J., his *FOIPPA* request was under consideration by the Office of the Information and Privacy Commissioner as

contemplated in s. 56 of the *FOIPPA*. We are told that the inquiry is not yet concluded.

The fresh evidence application

[11] The fresh evidence the applicant wishes to submit consists of:

a) affidavits filed in the Supreme Court that were before Hoffman J.;

b) the applicant's correspondence with the Court of Appeal Registry concerning his request that the minutes of the hearing before Harris J.A. be corrected; and

c) a memorandum dated April 30, 2025 from the Superior Courts Judgment Office announcing corrections to Hoffman J.'s reasons for judgment.

[12] I would admit only the memorandum of corrections and corrected reasons.

[13] The test for the admission of fresh evidence on an application or an appeal is well known. Appellate courts have a discretion to admit additional evidence to supplement the record on appeal. According to what is usually described as the *Palmer* test set out in *Palmer v. The Queen,* [1980] 1 S.C.R. 759, 1979 CanLII 8 and confirmed in *Barendregt v. Grebliunas,* 2022 SCC 22 at paras. 29–31, the discretion is one to be exercised in the interests of justice, having regard to four criteria:

1. the evidence could not, by the exercise of due diligence, have been obtained for the trial;

2. the evidence is relevant in that it bears upon a decisive or potentially decisive issue;

3. the evidence is credible in the sense that it is reasonably capable of belief; and

4. the evidence is such that, if believed, it could have affected the result at trial.

[14] The affidavits that were filed in the Supreme Court do not satisfy the *Palmer* test. They could have been placed before Harris J.A. on the application for leave to appeal. The issue on this review application is whether Harris J.A. erred in the exercise of his discretion having regard to the materials placed before him. It is not in the interests of justice that the applicant be afforded an opportunity to reargue his application on additional materials available at the time, that Harris J.A. had no opportunity to consider.

[15] The applicant's correspondence with the registry concerning his request that the minutes of the hearing before Harris J.A. be corrected does not satisfy the *Palmer* test. It is not relevant to any question that was before Harris J.A. or is properly before this Division. The minutes are a contemporaneous record kept by the clerk of the court during the hearing. They reflect the clerk's appreciation of fragments of what is being said at the time, and their principal utility is to provide signposts for reference to the live digital record of the proceeding. They have no precedential value.

[16] The applicant maintains that the minutes do not accurately record one of his submissions. According to his transcription from listening to the digital recording, he stated:

> So when I asked the Tribunal to reconsider [their] decision, I pleaded with them and explained to them how I felt it was unjust for them to erase from the record my disability.

[17] He points to the minute which states:

> …my request for anonymization to the tribunal … I pleaded with them to erase from the record my disability …

[18] If the applicant's transcription is accurate, he is correct that the minutes misstate this part of his argument. However, the inaccuracy is inconsequential because it is not relevant to an assessment of the issues on this review application and does not bear on Harris J.A.'s reasoning. The Division's task is to decide whether there is merit to the applicant's submissions as presented to us at this hearing. It is not to correct a fragmentary record of the submissions presented to the judge whose decision is under review.

[19] The corrected version of Hoffman J.'s decision does satisfy the *Palmer* test. It was not yet in existence during the hearing before Harris J.A. While the

corrections are of no great significance, it is in the interests of justice that this Division consider the authoritative version of the judgment under appeal.

The review application

Anonymity order

[20] Pursuant to previous orders made at the applicant's request, he is identified by initials in the style of proceeding. To further protect his identity, they are not his initials. He contends that Harris J.A. erred in refusing to substitute for his initials the name of his medical condition.

[21] The decision to anonymize, and how to anonymize, is discretionary. Harris J.A. recognized it as such. He considered the applicant's submissions and gave cogent reasons for declining to accept them. He reasoned that, contrary to the applicant's argument as he understood it, the identification of the applicant in the style of proceeding would not limit or affect the arguments available to him on appeal. He noted that a party does not control how they are identified on a style of proceeding. He said that "amending the style of proceeding as suggested, in fact, risks identifying the applicant thereby defeating the object of the currently anonymized proceedings".

[22] The applicant says that Harris J.A. mistook his argument and erred in law. He maintains that his medical condition has a psychological component that is aggravated by the omission to name it in published media such as the Court's records. He says that the Court's refusal to name his condition exacerbates an earlier refusal to the same effect by the Tribunal that demonstrated bias against him. He describes the Tribunal as having sought to vilify him for complaining, increasing the stigma towards those with a disability, and says that Harris J.A. made a similar error. He says that the Court's refusal to name his illness amounts to an abuse of the court openness principle discussed in *Sherman Estate v. Donovan*, 2021 SCC 25.

[23] I am not persuaded that Harris J.A. erred in law. The applicant's argument misconceives the object of an anonymization order which is, of course, a restriction on the general principle that the court's records and process are open to the public. The object of anonymization is the protection from publication of sensitive personal information concerning the applicant. The protection of sensitive

personal information serves an important public interest, but anonymization is not automatic or routine: *Sherman Estate* at paras. 72–77 & 85. In this case, it was justified by the applicant's medical condition and its consequences for him. The applicant's former employer is known. Harris J.A. was undoubtedly correct that naming the applicant's rare medical condition would increase his identifiability.

[24] The applicant's contention that a discretionary refusal to name his medical condition in place of random initials in the style of proceedings amounts to an attempt to vilify him is untenable. No reasonable person would view it in that way.

[25] If the applicant would prefer to be known in connection with his medical condition, that is his right. He can waive anonymity. I agree with Harris J.A. that what he cannot do is insist upon the manner in which he will be described as an anonymous individual in the Court's records. The applicant is entitled to privacy, but not to insist upon publication of what he views as a particularly salient circumstance.

[26] I would decline the applicant's request that we overturn Harris J.A.'s refusal of the anonymity order sought by the applicant.

Leave to appeal

[27] One aspect of the test applied in determining whether to grant leave to appeal involves asking whether the proposed argument on appeal is meritorious or frivolous: *Goldman, Sachs & Co. v. Sessions,* 2000 BCCA 326 (Chambers) at para. 10. Justice Harris found that the applicant failed to surmount this low bar. He held that "this appeal is without merit and the arguments advanced by the applicant are misguided": at para. 18. He added:

> [19] Even if I were able to discern some arguable merit to the appeal, that is not the end of the matter. First, the issues raised on this appeal are not of significance to the practice in general. Second, the matters raised on this judicial review have been outstanding for a considerable time. O.W.'s petition was filed in May 2021. No hearing date has been set. Granting leave to appeal would only further delay the conclusion of the underlying proceeding. Further protracting a matter that should have been concluded long ago is not in the interests of justice.

[28] In concluding that the proposed appeal lacks merit, Harris J.A. found that, in refusing the applicant what amounted to pre-hearing discovery, Hoffman J.

correctly applied legal authorities binding upon her, made findings that were open to her on the evidence, and exercised her discretion judiciously and properly.

[29] The applicant submits that Harris J.A. erred in his assessment of the merits in two respects. First, he says that Harris J.A. overlooked an error of law in Hoffman J.'s reliance on *Chestacow v. British Columbia (Workers' Compensation Appeal Tribunal),* 2023 BCCA 389. Second, he repeats his submission that Harris J.A. erred in failing "to consider that the published Decisions of the Tribunal admit bias and infringe on an individual's Privacy Rights by breaching the basic tenets of the Court Openness Principle". He says that Hoffman J. should have felt herself compelled by evidence of procedural unfairness to grant the document disclosure he sought.

[30] I am not at all persuaded that Harris J.A. erred in the exercise of his discretion to refuse leave to appeal.

[31] Supposing for the moment that the applicant is correct that Harris J.A. erred in his assessment of the merits, his submission fails to come to terms with the Justice's conclusion that, even if the applicant's arguments had some merit, he would not grant leave to appeal. It was open to Harris J.A. to conclude that the applicant's argument lacks significance for the practice in general and that further delay in resolution of this matter is not in the interests of justice.

[32] The applicant maintains that the delay that has occurred is justified and appropriate because he is awaiting the resolution of his *FOIPPA* request, which may result in his obtaining materials that would be of assistance on the substantive application for judicial review. I reject this submission because it is founded on speculation that there may exist materials not produced by the Tribunal as part of its record that would manifest bias or some other improper conduct by persons associated with the Tribunal. There is a strong public policy favouring the expeditious resolution of judicial review proceedings. It is not overcome by suspicions, without more, of impropriety.

[33] The applicant submits that the fact that the Office of the Information and Privacy Commissioner is inquiring into the producibility of documents pursuant to *FOIPPA* establishes that the documents are relevant in the judicial review proceeding. It does not. The legal criteria governing production under *FOIPPA* are

different and in some respects broader than those governing production pursuant to the *Supreme Court Civil Rules*. The two production regimes serve fundamentally different purposes.

[34] The applicant points, in particular, to the Tribunal's failure to produce a particular electronic document with the explanation that the file was corrupted and could not be opened. I agree with Hoffman J. who rejected the applicant's argument that the Tribunal's failure to produce the document was suspicious. She said that "[t]he petitioner's speculative and unfounded allegations regarding this document are not sufficient for me to order its disclosure": at para. 30. I would add that nothing would be achieved by ordering production of a corrupted electronic file.

[35] I should add that I do not accept the applicant's submission that Harris J.A. erred in his assessment of the merits of the proposed appeal. I turn to consideration of the applicant's two arguments concerning the merits.

[36] The first point concerns Hoffman J.'s reliance on *Chestacow* at paras. 12–15 of her reasons. *Chestacow* is a recent decision of this Court that directly addresses the test to be applied where a petitioner seeks documentary discovery from a tribunal in the context of an application for judicial review. It did not establish new principles but rather reiterated and applied well-settled principles of law. Justice Harris concluded that "the judge was clearly correct to follow binding authority on her from this Court and she would have erred had she not done so": at para. 12.

[37] *Chestacow* holds that "[a] focussed order for document production in a judicial review proceeding may be justified if there is some basis in the evidence for an objectively reasonable concern that the tribunal process was unfair or conducted in bad faith": at para. 44. Further, "any judicial intervention in a tribunal's process on the ground of alleged procedural unfairness would have to be based on something more than mere speculation": at para. 34. The applicant's argument is that this case falls on the side of the line that favours production because there is, he submits, objective evidence that the Tribunal was not taking his best interests to heart and was, accordingly, biased.

[38] In my view, it was open to Hoffman J. and to Harris J.A. to conclude otherwise. The objective evidence relied upon by the applicant is that there are Tribunal decisions involving complaints of discrimination based on physical or mental disability where it has anonymized the name of the complainant while disclosing the details of the disability. The applicant infers that the decision in this case to withhold public disclosure of both his name and his disability is attributable to bias. But the inference is unsustainable as a general proposition because every case is different, anonymization involves a fact intensive inquiry into very particular circumstances, and bias is not to be inferred simply from the fact that a decision-maker has made a decision with which one disagrees.

[39] As to the applicant's second point, I am not persuaded that the Tribunal's decisions manifest ignorance of the open court principle or systemic infringement of the privacy rights of individuals, as alleged. I do not agree that Hoffman J. was confronted with compelling evidence of procedural unfairness.

[40] In short, like Harris J.A., I view the applicant's arguments on the merits of the proposed appeal as weak and unpersuasive.

Stay application

[41] Justice Harris viewed the dismissal of the leave application as dispositive of the application of a stay of proceedings in the Supreme Court. The applicant submits that this was an error, because the Justice could have adjourned the leave application until the *FOIPPA* request is resolved and stayed the proceeding in the court below in the meantime. While the applicant's materials included a request for a stay of proceedings, it is not clear that the option of a stay coupled with an adjournment of the leave application was presented to Harris J.A.

[42] I reject the applicant's submission. As already stated, I do not agree that the proceeding in the Supreme Court should have been delayed to this point. Nor do I think its resolution should be delayed going forward. In any event, s. 20 of the *Court of Appeal Rules* contemplates a stay "pending the outcome of an appeal". It would be unusual to order a stay in a case in which leave to appeal is required while holding the question of whether leave should be granted in abeyance for some indefinite and possibly lengthy period. While I cannot say that it would never be appropriate, it would require exceptional circumstances that are not present.

Costs

[43] The applicant submits that both Hoffman J. and Harris J.A. erred in law in ordering him to pay costs. The Tribunal did not seek costs. Justice Hoffman ordered the applicant to pay Arts Umbrella costs of his failed application in any event of the cause, but not forthwith. Justice Harris ordered the applicant to pay Arts Umbrella lump sum costs of $1,000, payable forthwith.

[44] The applicant argues that the judges failed to appreciate the privacy issues at stake, that it was unfair for Harris J.A. to favour Arts Umbrella with a costs award when he did not call on them to make oral submissions, and that his proposed appeal would advance the law by expanding the scope of what is admissible on an application such as this. He describes the costs he has been required to pay as a fine that he is being made to pay just for wanting to have his disability acknowledged and documents in the possession of the Tribunal disclosed.

[45] The applicant misunderstands why costs are ordered and his arguments lack merit. Ordinary costs (as opposed to special costs, which were not ordered in this case) are not a fine. They are an ordinary incident of civil litigation. The general rule is that costs follow the event, so that the losing party must pay them. Their purpose is not to punish the losing party, but to afford some limited compensation to a successfully opposing defendant or respondent who ought not to have been troubled by an unsuccessful suit or application.

[46] In the case of an interlocutory application, the judge has a somewhat broader discretion to address whether and when costs should be paid than where a judge is making an order that brings to an end the proceeding. Justice Hoffman's order was interlocutory. But for this review application, Harris J.A.'s order would have brought the proceeding in this Court to an end.

[47] Neither judge erred in the exercise of their discretion or committed any error of law. Justice Harris was not obliged to withhold costs from Arts Umbrella because its counsel was not called on in oral argument. Arts Umbrella incurred the expense of preparing a memorandum of argument and sending a lawyer to the hearing. No doubt that expense greatly exceeded the $1,000 the Justice ordered the applicant to pay. The applicant's arguments have not advanced the law, but

have failed through the application of settled legal principles restated in *Chestacow* and other cases.

Disposition

[48] For these reasons, I would dismiss the review application and refuse all the relief sought by the applicant.

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Madam Justice Fisher"