

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Yu v. Oechsner*,
2026 BCCA 57

Date: 20260123
Dockets: CA51142; CA51143

Docket: CA51142

Between:

May Yee Yu and Kam Yu Yuen

Appellants
(Defendants)

And

Nicole Lee Oechsner

Respondent
(Plaintiff)

- and -

Docket: CA51143

Between:

**Mercedes-Benz Financial Services Canada Corporation,
Qiu Chen, Xuanxi Chen, and Raad Hewary**

Appellants
(Defendants)

And

Payam Ali

Respondent
(Plaintiff)

Before: The Honourable Justice Griffin
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 21, 2025 (*Ali v. Mercedes-Benz Financial Services Canada Corporation*, 2025 BCSC 2057, Vancouver Dockets M204577 and M199868).

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia
January 23, 2026

Place and Date of Judgment:

Vancouver, British Columbia
January 23, 2026

Summary:

The applicants are defendants in motor vehicle injury claims. Their proposed appeals are from the dismissal of their appeals in the Supreme Court of British Columbia from orders excluding disbursements for expert reports from the cap pursuant to s. 5 of the Disbursements and Expert Evidence Regulation [DEER]. They seek confirmation that they have an automatic right to appeal or in the alternative, an order granting them leave to appeal. Held: Applications dismissed. There is no right of appeal because an order under DEER is an order “in respect of costs” within the meaning of R. 11(f) of the Court of Appeal Rules and therefore is a limited appeal order. It is not in the interests of justice to grant leave to appeal because the issues on appeal are moot, as the parties have settled.

GRIFFIN J.A.:**Nature of the Application**

[1] The applicants, who are defendants in two actions involving vehicle injury claims, seek confirmation that they have an automatic right to appeal from the dismissal of their appeals in the Supreme Court of British Columbia (“BCSC”), or in the alternative, an order granting them leave to appeal. The order they seek to appeal was made on October 21, 2025, and is indexed at 2025 BCSC 2057.

Background

[2] The applicants are defendants in two personal injury actions.

- 1) The plaintiff-respondent, Nicole Lee Oechsner, brought a claim against the applicants, May Yee Yu and Kam Yu Yuen, for injuries allegedly suffered from a motor vehicle accident that occurred in June 2018 (the “Oechsner Action”). The trial for the Oechsner Action was scheduled to begin on February 9, 2026, but has settled.
- 2) The plaintiff-respondent, Payam Ali, brought a claim against the applicants, Mercedes-Benz Financial Services Canada Corporation, Qiu Chen, Xuanxi Chen, and Raad Hewary, for injuries allegedly suffered from two motor vehicle accidents in August 2018 and September 2020 (the “Ali Action”). The parties settled on May 8, 2024.

[3] In the Oechsner Action, the respondent retained two physicians as expert witnesses. She attended assessments with the experts in February and March 2024. The experts provided her with estimates for the costs of their expert opinion reports for use at trial.

[4] In the Ali Action, the respondent retained three medical experts. He scheduled assessments with them in January and February 2024. As in the Oechsner Action, the experts provided him with cost estimates.

[5] Section 5(2) of the *Disbursements and Expert Evidence Regulation*, B.C. Reg. 210/2020 [DEER], limits the amount of disbursements that can be awarded to a party in a vehicle injury proceeding to a cap of 6% of the total award of damages assessed by the court or agreed in an accepted offer to settle. A party has the ability to apply for an order that certain disbursements be excluded from the cap.

[6] I will set out the relevant sections for purposes of today's application:

Limits on amount of disbursements

5 (1) In this section:

“**disbursement limit**” means, in relation to a vehicle injury proceeding,

- (a) the amount that is 6% of the total award of damages assessed by the court in the vehicle injury proceeding or, if an offer to settle the vehicle injury proceeding is accepted, 6% of the amount offered, or
- (b) if the court dismisses the vehicle injury proceeding or, at the conclusion of the vehicle injury proceeding, does not make an award of damages, the amount determined by the court;

“**excluded disbursements**” means the following:

...

- (f) disbursements that the court has ordered to be excluded disbursements on application made under subsection (6).

(2) Only the following may be allowed or awarded to a party in a vehicle injury proceeding as disbursements:

- (a) disbursements up to the disbursement limit;
- (b) excluded disbursements.

...

(6) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (8) are met, order that the disbursements itemized in the order are excluded disbursements.

...

(8) The following are the conditions for the purposes of subsection (6):

- (a) the application is made before the disbursements are incurred;
- (b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.

[Emphasis added.]

[7] The respondents applied to exclude some of their disbursements from the 6% cap pursuant to s. 5(6) of *DEER*. They argued that they met the conditions set out in s. 5(8) and that the disbursements had not yet been “incurred”.

[8] The applicants argued that because the assessments occurred before the respondents filed the application (even though reports had not been delivered), the disbursements had been incurred before the application. Therefore, the conditions in s. 5(8) were not met, and the disbursements could not be excluded.

[9] Mr. Ali’s application came before Associate Judge Bilawich. Ms. Oechsner’s application came before Associate Judge Scarth.

[10] On March 5, 2024, Bilawich A.J. issued his decision, with reasons for judgment indexed as 2024 BCSC 384 [*Ali 2024*]. He held that the disbursement had not been “incurred” within the meaning of s. 5(8)(a) of *DEER* prior to the application. He held:

[22] The plaintiff says he cannot be ... considered to have incurred a disbursement for Dr. MacInnes’ assessment and report until after Dr. MacInnis has issued an invoice and has thus demanded payment. He relies on then District Registrar Bouck’s decision in *Couture v. Oviatt*, 2009 BCSC 15 [*Couture*] at paras. 24-25. In that case she considered whether a plaintiff who had accepted a defendant’s formal offer to settle was entitled to recover the cost of a medical report for which the invoice had been issued after the date the formal offer to settle was delivered to the plaintiff. The applicable rule provided that when the accepted offer to settle was made by the defendant, the plaintiff was entitled to costs assessed up to the date the offer was delivered and the defendant to costs after that date. The relevant passages are:

24 The costs assessed will include disbursements which have been “necessarily or properly incurred in the conduct of the proceeding”: *Rule 57(4)* (my emphasis).

25 The issue to determine, therefore, is whether Dr. Makin’s charges were incurred before June 29, 2007. An expense or disbursement is not incurred until the third party demands payments. While Dr. Makin may well have performed some of his work before issuing his invoice, the plaintiff did not become liable for any of Dr. Makin’s charges until the July 3, 2007 invoice was issued. Thus, the expense was incurred after the offer to settle was delivered. The plaintiff is not entitled to be reimbursed for this expense.

[23] Couture approved a relatively narrow interpretation of “incurred”. Until an invoice is issued, technically nothing [is] due and owing. In the ordinary course, an invoice would be expected after a written report is completed, assuming one is ordered, or after the examination and verbal report if a written report is not ordered. In the present case Dr. MacInnis had not completed a report or issued an invoice at the time the plaintiff’s application for exclusion was filed.

[24] Following the approach taken in *Couture*, I conclude that a disbursement for Dr. MacInnis’ examination of the plaintiff and potential report had not been “incurred” prior to the plaintiff filing his application for exclusion. The anticipated disbursement for Dr. MacInnis’ examination of the plaintiff and any report arising from that can be considered for possible exclusion.

[Emphasis added.]

[11] Associate Judge Bilawich granted the application and ordered the exclusion of disbursements related to three of Mr. Ali’s experts, including their assessments and initial reports.

[12] On March 28, 2024, Scarth A.J. followed the decision in *Ali 2024* and granted the application to allow Ms. Oechsner’s disbursements from her two physicians to be excluded disbursements.

[13] The applicants appealed from the orders made by Bilawich A.J. and Scarth A.J. Both appeals were heard together by Justice Baker on July 24, 2024.

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[14] Justice Baker dismissed both appeals and awarded costs to the respondents on October 21, 2025.

[15] The applicants argued before Baker J. that both Associate Judges had erred in law in finding that an expense was “incurred” within the meaning of s. 5(8)(a) of *DEER* only once an invoice was issued, even if the expert performed some or all of the work relating to that invoice prior to the party applying under s. 5(6).

[16] The applicants argued the requirement in s. 5(8)(a) of *DEER* means that the application for exclusion must be made before a disbursement for an expert report is commissioned, ordered, or requested.

[17] In her analysis, the judge examined *DEER*'s legislative history. *DEER* was promulgated pursuant to the *Evidence Act*, R.S.B.C. 1996, c. 124. She observed that s. 12.1 of the *Evidence Act* and *DEER* were enacted as part of a law reform effort to address the high cost of motor vehicle litigation. Section 5 of *DEER*, which originally provided no discretion to exclude a disbursement from the cap on disbursements, was amended to be consistent with s. 12.1 of the *Evidence Act*, which allows a party to increase the number of expert reports they can tender above the maximum of three experts. She noted that this Court in *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, stated that the purpose of the amendments to the *Evidence Act*, including s. 12.1, was to enhance proportionality and to avoid disproportionately prejudicial outcomes in the resolution of motor vehicle disputes.

[18] The judge found that *DEER*'s context is inconsistent with the applicants' interpretation of s. 5(8)(a). Where a party seeks to add a fourth expert and anticipates that the associated costs will exceed the 6% cap under *DEER*, they must apply to allow the additional expert under s. 12.1(5) of the *Evidence Act* and to exclude the disbursements under s. 5(6) of *DEER*. The judge found it would be unfairly prejudicial to the plaintiff to require them to file their application for exclusion without first being assessed by an expert and obtaining an estimate for their expert opinion: Reasons at para. 44.

[19] The applicants take issue particularly with a sentence in the judge's reasons, which I highlight in the attached quote of paras. 46 and 47:

[46] At the time the plaintiff applies for additional experts, the court will have before it evidence relating to the costs the plaintiff will incur, should the application for additional experts be allowed.

[47] I find that “incurred”, as used in s. 5(8)(a) of DEER means the point in time at which the party is liable to pay for the expert’s work. While each case will need to be determined on its own facts, generally a party will be liable at the time the expert delivers their account. I find this interpretation conforms to the plain meaning of “incurred”, is consistent with the overall goal of proportionality, avoids a disproportionately prejudicial outcome for plaintiffs, and is consistent with the operation of s. 12.1 of the *Evidence Act* and *DEER* as a whole.

[Emphasis added.]

[20] The applicants filed in this Court notices of appeal seeking leave to appeal. The parties consented to adjourn the hearing after receiving a memorandum from Justice DeWitt-Van Oosten, asking the parties to address the issue of whether the orders were limited appeal orders for which leave is required.

Issues

[21] There are two issues in this application:

- 1) Do the applicants appeal from orders that constitute limited appeal orders pursuant to R. 11 of the *Court of Appeal Rules*, B.C. Reg. 120/2022 [*CA Rules*], and thereby require leave to appeal?
- 2) If yes, should leave to appeal be granted?

Issue 1: Is Baker J.’s Order a Limited Appeal Order?

Legal Framework

[22] Section 13(2)(a) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*CA Act*], provides that an appeal does not lie to this Court from a “limited appeal order” without leave of a justice.

[23] Rule 11 of the *CA Rules* enumerates the orders that constitute “limited appeal orders”. In this context, R. 11(f) and (g) are relevant:

Limited appeal orders

11 For the purposes of the definition of “limited appeal order” in section 1 of the Act, the following orders are prescribed as limited appeal orders:

...

- (f) an order in respect of costs or security for costs, if the only matter being appealed is in respect of costs or security for costs;
- (g) an order of a Supreme Court judge granting or refusing an appeal from an order referred to in any of paragraphs (a) to (f).

[24] The *CA Act* and *CA Rules* are intended to set out an exhaustive list of circumstances where leave to appeal is required: *Yao v. Li*, 2012 BCCA 315 at para. 27, addressing the former R. 2.1 of the *Court of Appeal Rules*, B.C. Reg. 297/2001.

Positions of the Parties**Applicants**

[25] The applicants’ position is that they do not require leave to appeal. In the alternative, they submit that if leave is required, it should be granted.

[26] They submit that they do not require leave to appeal because Baker J.’s order is not an order refusing an appeal from an order in respect of costs within the meaning of R. 11(f) and (g) of the *CA Rules*.

[27] The applicants submit that in determining whether an order is a limited appeal order, the court must consider the jurisdictional basis for the order, citing this Court’s chambers decisions in *The Owners, Strata Plan VR29 v. Kranz*, 2021 BCCA 32 [*Kranz*]; *Clifford v. Lord*, 2013 BCCA 302 (Chambers); and *TELUS Communications Inc. v. Telecommunications Workers Union*, 2024 BCCA 403 at para. 18 (Chambers).

[28] The applicants submit that though Baker J. did not state the jurisdictional basis for her order dismissing the appeals, the orders of Scarth A.J. and Bilawich A.J. were pursuant to ss. 5(2) and (6) of *DEER*.

[29] The applicants also accept that *Kranz* provides that some subsections of R. 11 require leave based on the subject matter of the order. However, they say the subject matter of the order was not “in respect of costs” because it was not an order granting or refusing costs.

[30] The applicants submit that neither Scarth A.J. nor Bilawich A.J. made a costs order because they did not “grant” or “refuse” costs or disbursements. The applicants rely on a predecessor section to R. 11 of the *CA Rules*, namely R. 2.1(f), where leave was required for “an order granting or refusing costs”. They suggest the former Rule should assist in narrowing the meaning of the present Rule.

[31] They argue that an order designating a disbursement as an “excluded disbursement” determines whether disbursements fall within the 6% cap, and this determination occurs before liability is determined and any party’s entitlement to costs arises, and so is neither “granting” or “refusing” costs.

Respondents

[32] The respondents submit that the decision of Baker J. was an appeal from an order in respect of costs, pursuant to R. 11(g), and thus leave is required pursuant to R. 11(f). They submit leave should not be granted.

[33] They point out that no principle of statutory interpretation suggests that a predecessor statute, which contains narrow wording, applies to narrow the interpretation of a successor statute, which contains broader wording. The words “in respect of costs” clearly encompass the Associate Judges’ orders here.

Analysis

[34] I turn to the applicants’ submission that the determination of what is a limited appeal order is based in part on the authority for the order. They are correct to observe that R. 11 of the *CA Rules* does not list, in the list of limited appeal orders, orders made pursuant to s. 5(2) or (6) of *DEER*.

[35] In analyzing this argument, it is useful to set out all of the subsections of R. 11:

Limited appeal orders

11 For the purposes of the definition of “limited appeal order” in section 1 of the Act, the following orders are prescribed as limited appeal orders:

- (a) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the Supreme Court Civil Rules:
 - (i) Rule 3-7 (22) [*order for particulars*];
 - (ii) Part 5 [*Case Planning*];
 - (iii) Part 7 [*Procedures for Ascertaining Facts*], other than Rule 7-7 (6) [*application for order on admissions*];
 - (iv) Rule 9-7 (11), (12), (17) or (18) [*adjournment or dismissal, preliminary orders, orders, and right to vary or set aside order*];
 - (v) Part 10 [*Property and Injunctions*];
 - (vi) Part 11 [*Experts*];
 - (vii) Rule 12-2 [*Trial Management Conference*];
 - (viii) Rule 18-1 [*Inquiries, Assessments and Accounts*];
 - (ix) Rule 21-7 [*Foreclosure and Cancellation*];
 - (x) Rule 22-1 (4) [*evidence on an application*];
 - (xi) Rule 22-9 [*vexatious litigants*];
- (b) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the Supreme Court Family Rules:
 - (i) Rule 4-6 (3) [*order for particulars*];
 - (ii) Part 5 [*Financial Disclosure*], other than Rule 5-1 (28) (b) and (c) [*relief*];
 - (iii) Rule 7-1 [*Judicial Case Conference*];
 - (iii.1) Part 7.1 [*Case Planning*];
 - (iv) Part 9 [*Procedures for Obtaining Information and Documents*], other than Rule 9-6 (6) [*application for order on admissions*];
 - (v) Rule 10-3 (4) [*evidence on an application*];
 - (vi) Rule 11-3 (11), (12), (17) or (18) [*adjournment or dismissal, preliminary orders, orders and right to vary or set aside order*];
 - (vii) Part 12 [*Property and Injunctions*];
 - (viii) Part 13 [*Court Ordered Reports and Expert Witnesses*];
 - (ix) Rule 14-3 [*Trial Management Conference*];
 - (x) Rule 18-1 [*Inquiries, Assessments and Accounts*];
 - (xi) Rule 21-8 [*vexatious litigants*];

- (c) an order granting or refusing interim relief under the *Family Law Act* or the *Divorce Act* (Canada);
- (d) an order granting or refusing an assessment of a family matter made under section 211 [*orders respecting reports*] of the *Family Law Act*;
- (e) an order granting or refusing an adjournment or an extension or a shortening of time;
- (f) an order in respect of costs or security for costs, if the only matter being appealed is in respect of costs or security for costs;
- (g) an order of a Supreme Court judge granting or refusing an appeal from an order referred to in any of paragraphs (a) to (f).

[36] Contrary to the applicants' submission, the authority for an order does not always determine whether it is a limited appeal order. To be sure, most of the categories of orders listed in R. 11 expressly state the jurisdiction on which the order requiring leave to appeal is based. But notably, R. 11(e) dealing with adjournments or time limits does not, and R. 11(f) does not.

[37] Instead, R. 11(f) focuses on the subject matter of the order and does so quite generally. It does not say "a costs order"; nor does it say "costs awards after hearings". It says an order "in respect of costs" [my emphasis].

[38] This point was made by this Court in *Kranz*. In that case, this Court noted that the basis of the authority under which the order was granted governs the question of whether leave to appeal is required in many cases (para. 40), but not all. What are now R. 11(e) and R. 11(f) are based on the subject-matter of the order: *Kranz* at para. 47.

[39] This Court further confirmed that R. 11(f) is concerned with the subject-matter of the order, not its jurisdictional basis in *Singh v. Singh*, 2025 BCCA 309 at para. 20, citing *Kranz* at para. 47. Thus, the governing question is whether Baker J.'s order was "in respect of costs", regardless of the jurisdictional basis for making the order: *Singh* at para. 21.

[40] The applicants attempt to distinguish this case from *Singh*, where this Court held that the trial judge's correction of a special costs award required leave to appeal

because it was an order in respect of costs pursuant to R. 11(f). The applicants argue that unlike in *Singh*, the orders here preceded any costs award.

[41] In my view, this distinction does not assist the analysis. The order in *Singh* was an order in respect of costs because it “clearly” impacted the special costs award against the respondent, and the fact that it did so by correcting a prior order did not change its subject-matter: *Singh* at para. 21.

[42] Again, the question of whether leave to appeal is required in this case turns on whether the order sought to be appealed is “in respect of costs”. The language of the former Rule does not assist us. The present language, “in respect of”, is wider than the concept of an order that grants or refuses an award of costs.

[43] The applicants do not attempt to argue that an order in respect of a sub-category of costs known as disbursements is not an order in respect of costs.

[44] This is because it is widely recognized that, as a term of art in the civil litigation context, “costs” include the allowable disbursements a party incurred in prosecuting or defending litigation. For example, R. 14-1(5) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides that when assessing costs, the registrar must allow for a reasonable amount for disbursements that have been incurred in the proceeding; see also the historical discussion in *Skidmore v. Blackmore*, (1995) 122 D.L.R. (4th) 330, 1995 CanLII 1537.

[45] The very title of *DEER* and the subsections in question use the word “disbursements” in the sense of “costs” that may be claimed by a party in litigation. Decisions reviewing the constitutionality of *DEER* similarly understand the regulation to deal with disbursements as a subset of “costs” that may be claimed in litigation, such as *Le and Shrieves v. British Columbia (Attorney General)*, 2025 BCSC 1792.

[46] I therefore have little difficulty in concluding that an order under *DEER* is an order “in respect of costs” within the meaning of R. 11(f) of the *CA Rules*.

[47] In short, the order made by Baker J. was refusing an appeal from an order in respect of costs. Pursuant to R. 11(f) and (g) of the *CA Rules*, leave is required to appeal from the order.

Issue 2: Should Leave to Appeal be Granted?

Legal Framework

[48] The criteria for leave to appeal are as follows:

- 1) whether the appeal is *prima facie* meritorious;
- 2) whether the point on appeal is of significance to the practice;
- 3) whether the point raised is of significance to the action itself; and
- 4) whether the appeal will unduly hinder the progress of the action.

Goldman, Sachs & Co. v. Sessions, 2000 BCCA 326 at para. 10 (Chambers).

[49] The criteria for leave are “all considered under the rubric of the interests of justice”: *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).

[50] I do not find the merits of the appeal strong; indeed, I find the merits quite weak. While the applicants insist that Baker J. erred at para. 47 of her reasons in imposing an immutable rule as to the meaning of “incurred” in s. 5(8)(a) of *DEER*, I do not read her judgment that way. Rather, I would emphasize her caution that each case will need to be determined on its own facts.

[51] I am also not convinced that if leave was granted, it will result in this Court providing a “rule” as to the interpretation of the word “incurred” in s. 5(8)(a) of *DEER*, because again it surely turns on the facts of each case.

[52] There are hardly any reported decisions addressing applications under s. 5(6) of *DEER*, and I am advised only three reported decisions address the meaning of the word “incurred”. This would suggest that reasonable people can settle these issues. The applicants refer to the fact that many plaintiffs have contacted the

insurer to obtain their consent to retaining additional experts as “excluded disbursements”. But that was before the decision of Baker J., and it also does not mean this is because there is considerable uncertainty on the legal analysis. Again, it is because reasonable people should be able to reach agreement on these issues. At most, having this Court pronounce on the issue might have modest significance to the practice for those who bring or defend vehicle injury cases, and so I will not say the appeal has no merit. But I do note that those numbers are declining given the change in the law in BC which diverted vehicle injury cases out of the BCSC.

[53] Most importantly, the point for which leave is sought is not of significance to the action itself.

[54] The issue is entirely moot in the Ali Action, as that case is settled: see *Borowski v. Canada (Attorney General)*, [1989]1 S.C.R. 342, 1989 CanLII 123.

[55] Second, the Oechsner Action has also settled just prior to today’s hearing, with the small exception that the parties have not yet reached agreement on costs because information is still being exchanged. I am advised that the costs of disbursements being claimed in that case are in the range of \$18,000.

[56] This illustrates why it would be disproportionate and inefficient to grant leave to appeal these issues. Many cases, including vehicle injury cases, settle prior to trial. The issue of what disbursements are subject to the cap under *DEER* is surely a small piece in the overall context of whether each party has good reason to go to trial or to settle.

[57] While s. 5(2) of *DEER* applies to put a cap on the disbursements that may be allowed or awarded to a party in a vehicle injury proceeding, and a party may apply to exclude disbursements from that cap, when costs are assessed after trial the court retains discretion to not allow those disbursements as part of its overall authority to award costs.

[58] Here, given the settlements that have occurred, there is no incentive for either respondent to be involved in the appeal of these issues. It would not be in the

interests of justice to grant leave when the only party that seems interested in the issue is the insurer that lies behind the applicants, and not because it matters in the context of the present actions.

[59] I conclude it is not in the interests of justice to grant leave to appeal

Disposition

[60] The applicants' applications for leave to appeal are denied.

“The Honourable Justice Griffin”