# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Liu v. Borden Ladner Gervais LLP,* 2026 BCCA 71

Date: 20260224
Docket: CA51071

Between:

**Jiukang Liu and Tony Liu**
**Notary Corporation**

Applicants/Appellants
(Plaintiffs)

And

**Borden Ladner Gervais LLP, Steven Ping Li, and Royal Pacific Realty Corp.**

Respondents
(Defendants)

Before: The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice MacNaughton

On an application to vary: An order of the Court of Appeal for British Columbia, dated November 10, 2025 (*Liu v. Borden Ladner Gervais LLP*, Vancouver Docket CA51071).

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| Counsel for the Applicants/Appellants: | R.S. Fleming |
| Counsel for the Respondent, Borden Ladner Gervais LLP (via videoconference): | J.G. Dives, K.C.<br>W. Kunimoto |
| No one appearing for the Respondents, Steven Ping Li and Royal Pacific Realty Corp. | |
| Place and Date of Hearing: | Vancouver, British Columbia<br>January 20, 2026 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>February 24, 2026 |

**Written Reasons by:**
The Honourable Madam Justice DeWitt-Van Oosten

**Concurred in by:**
The Honourable Justice Dickson
The Honourable Justice MacNaughton

***Summary:***

*This is an application for review of a decision denying leave to appeal a Supreme Court order that dismissed a de novo appeal from a refusal to direct a defendant to answer certain questions and produce certain documents. HELD: Application for review dismissed. The appellants have not established reversible error in the denial of leave. It was open to the chambers justice to conclude that the proposed appeal does not raise issues of significance to the practice and carries minimal significance to the action. Nor is there any reasonable prospect of success.*

**Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:**

## Introduction

[1] This is an application to review a chambers judgment denying leave to appeal a Supreme Court order that dismissed a *de novo* appeal from a refusal to direct that a defendant in a civil action answer questions and produce documents.

[2] The review is conducted pursuant to s. 29(1) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 and attracts a deferential standard. To succeed, the plaintiff appellants, Jiukang Liu and Tony Liu Notary Corporation, must show that the denial of leave reflects an error of law, an error in principle, or a misconception of the facts: *J.P. v. K.S.*, 2024 BCCA 78 at para. 11.

[3] In my view, they have not done so. Circumstances have changed since leave to appeal was denied; however, the core of that denial remains unassailable—it is not in the interests of justice to grant leave. Accordingly, I would dismiss the application for review.

## Background

[4] The litigation underlying this application has a lengthy and complicated history, including a previous decision from this Court: *Liu v. Borden Ladner Gervais LLP.*, 2020 BCCA 50 at paras. 1–3.

[5] It is not necessary to detail that history. Instead, it suffices to note that the appellants have sued the defendant (now respondent) law firm, Borden Ladner Gervais LLP (“BLG”), for failure to hold back and remit $695,000 in non-resident

taxes from the proceeds of a court-ordered sale of residential property over which BLG had conduct. Borden Ladner represented the creditor who obtained the order for sale; the appellants represented the purchasers.

[6] The appellants allege the order for sale obliged BLG to remit the taxes under s. 116 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Borden Ladner did not do so, and the appellants (plaintiffs by assignment from the purchasers) contend they have been unfairly left to cover that debt.

[7] They advance various claims against BLG in search of indemnity or contribution. The appellants claim the respondent breached its court-ordered and fiduciary obligations as trustee of the sale proceeds. They also claim in negligence, alleging that in not withholding and remitting the non-resident taxes before payout to its client, BLG failed to meet the standard of care expected of a reasonably competent solicitor. Borden Ladner does not interpret the order for sale the same way as the appellants and defends the lawsuit by contending it did everything required of it in managing the proceeds.

[8] At discoveries, the appellants asked the BLG lawyer with conduct of the file about his interpretation of the court order. He answered some of their questions; however, he claimed solicitor-client privilege in respect of others. The appellants applied to an associate judge for an order requiring that the lawyer be directed to answer the remaining questions and BLG be required to produce all related documents. In their application material, the appellants identified the issues for which they most wanted answers:

a) How the lawyer formed the view that the non-resident taxes were not covered by the court order;

b) What steps he took to inquire into that matter; and

c) Who else at BLG (apart from a named paralegal) “touched on the issues”.

[9] The appellants argued this information is "relevant to [BLG's] state of knowledge of its obligations to withhold taxes … and therefore to the claim in breach of trust and negligence".

**Associate Judge's Reasons**

[10] Unpublished reasons of the associate judge are indexed at 2024 BCSC 816.

[11] With the parties' consent, the associate judge reviewed the documents over which BLG claimed solicitor-client privilege. She found that BLG properly asserted privilege and that disclosure of the documents could reveal legal advice provided to the creditor client: at para. 38. She sealed the documents: at para. 43.

[12] The associate judge also concluded BLG properly objected to the impugned questions and that answering those questions would "enable the [appellants] to know or infer the legal advice that may have been provided by BLG to its client …": at para. 39. She dismissed the application.

**Supreme Court Judge's Reasons**

[13] The appellants appealed the dismissal. Published reasons for judgment on the appeal are indexed at 2025 BCSC 2004 (Chambers). The Supreme Court judge who heard the appeal (the "SCJ") approached it as a *de novo* hearing: at para. 26.

[14] The SCJ understood the appellants to argue that the associate judge erred by permitting solicitor-client privilege to "trump the specific rule of law relating to the right of beneficiaries to access legal advice given or obtained in the administration of their trust": at para. 6. The "specific rule of law" relied upon by the appellants is often described as the "common interest exception" to privilege and recognizes that in some narrowly defined circumstances, the existence of a fiduciary or fiduciary-like relationship between parties that share a common interest in the subject matter of otherwise privileged communications justifies disclosure of that material as between them. See, for example, the discussions in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at paras. 22–25 and *Barbieri Estate v. White*, 2023

BCSC 1176 at paras. 45–58 (Chambers), rev'd in part on other grounds, 2024 BCCA 225.

[15] In *Pritchard*, the Supreme Court of Canada described the exception this way:

> 24 The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.
>
> [Emphasis added.]

[16] The SCJ found the appellants did not establish a *prima facie* case in support of a relationship that would engage the common interest exception:

> [46] On the circumstances in this case, in my view, the appellants have not established a *prima facie* case that they (or the purchasers) were the beneficiaries of a trust, nor have they established that any documents or communications between [BLG] and [its client] relate to the alleged trustee carrying out duties as trustee of the appellants as beneficiaries.
>
> [Emphasis added.]

[17] The appeal was dismissed. The SCJ did not consider it necessary to review the documents over which BLG claimed privilege. As such, those documents remained sealed as per the associate judge.

## Chambers Judgment

[18] The appellants sought leave to appeal the second dismissal to this Court. Leave was denied in unpublished reasons dated November 10, 2025. A three-week trial of the action was scheduled to start seven days later, on November 17.

[19] The appellants advanced several arguments in support of leave, including that: a) the SCJ made findings of fact only available at trial; b) he erred in concluding that the sought-after information is protected by privilege and/or that the case does not support the common interest exception; c) the questions the appellants seek to

have answered are central to their claims; d) BLG had a duty to interpret the order for sale in good faith on behalf of all stakeholders, not just its creditor client; and e) what happened in this case represents a "profound failure of justice".

[20] After reviewing the history of the case and the rulings below, the chambers justice instructed herself on the criteria for leave to appeal. Citing *Goldman, Sachs & Co. v. Sessions,* 2000 BCCA 326 at para. 10 (Chambers), she correctly noted that to obtain leave, the appellants had to show that: a) the points they wish to raise on appeal are of significance to the practice; b) those points are also significant to the action itself; c) the proposed appeal has *prima facie* merit or is not frivolous; and d) an appeal will not unduly hinder the progress of the action: at para. 31. The chambers justice understood that the merits threshold is low: at para. 33. At the same time, the overarching question on an application for leave to appeal is whether leave is in the interests of justice: at para. 32.

[21] Applying these criteria, the chambers justice determined that the primary issue raised by the proposed appeal, the applicability of the common interest exception, is of no significance to the practice. From her perspective, the parties do not disagree on the existence or the nature of that exception. Rather, they disagree on whether it applies in the circumstances of this case. As I interpret her reasons, the chambers justice determined that resolving this issue would necessarily depend on the factual matrix of the case and its overall context; consequently, the outcome of the proposed appeal would likely be unique to the case and of limited (if any) broader value: at para. 38.

[22] The chambers justice accepted that the proposed appeal carries "some" significance to the action. However, she agreed with BLG that the rulings below do not prevent the appellants from substantively advancing their claims, and in any event, access to the sought-after information can be revisited at trial if necessary, depending on how the trial unfolds and assuming the appellants establish a supporting evidentiary foundation: at para. 43.

[23] In assessing the merits of the proposed appeal, the chambers justice viewed the SCJ's ruling as one of mixed fact and law. Consequently, his order would be "reviewable on the very high standard of palpable and overriding error" unless the appellants could establish an extricable legal error: at para. 56. She was not persuaded the arguments made in support of leave had sufficient strength to displace a deferential standard; nonetheless, she was prepared to acknowledge that "some aspects" of the alleged errors "meet the relatively low merits threshold": at para. 57.

[24] Finally, the chambers justice considered whether the proposed appeal would hinder the progress of the action. At that time, a trial was only seven days away. She concluded that granting leave would result in an adjournment and the "inevitable delay involved in rescheduling a trial of this length" weighed "strongly in favour of dismissing the application": at para. 60.

[25] Having weighed these factors, the chambers justice concluded that leave to appeal is not in the interests of justice and dismissed the application: at paras. 61–62.

## Discussion

### Fresh evidence

[26] The appellants seek to introduce fresh evidence showing that within days of leave being denied, the parties agreed for unrelated reasons to adjourn the trial scheduled for November 17, 2025.

[27] I would admit the fresh evidence. Although evidence of post-hearing events is rarely accepted on applications for review, it is appropriate to do so where that evidence could have affected the result, and importantly, its admission is clearly in the interests of justice: *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2016 BCCA 215 at para. 42; *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 27. The chambers justice assigned considerable weight to the proximity of

the trial. In these circumstances, the fact that the trial has been adjourned could have affected the result. The interests of justice clearly favour admission.

**Analysis of the merits**

[28] However, this does not mean the denial of leave must be set aside. In some cases, as it did here, the fact that an appeal will hinder the progress of an action may appropriately carry substantial weight; however, it is nonetheless only one factor for consideration and not dispositive. As the appellants acknowledge in their written material, a decision on leave "requires a balancing of all the [relevant] factors" (emphasis added). The overarching question remains whether leave to appeal is in the interests of justice.

[29] In *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123, 1997 CanLII 2240 (Ont. C.A), the phrase "interests of justice" was held to signal a broad-scoped and contextually applied discretion to be exercised case-by-case. Importantly, deciding whether an order is in the interests of justice is not exclusive to the interests of the applicant: at para. 16. Instead, the analysis allows a court to consider factors that extend beyond the applicant's interests, and in fact, may be contrary to them. Although *Bernardo* was decided in the criminal law context, I find the definition helpful. The chambers justice decided it is not in the interests of justice to grant leave in the circumstances of this case and with the *Bernardo* articulation in mind, I see no principled basis for interfering with that determination.

[30] As noted, to justify interference, the appellants must establish an error of law, an error in principle, or that the chambers justice misconceived the facts. They do not allege she committed the last of these.

[31] In my view, the appellants have not established reversible error.

[32] First, I am satisfied it was open to the chambers justice to conclude that the proposed appeal is of no real significance to the practice: at para. 37.

[33] The legal principles the appellants seek to raise on appeal are well-established. The common interest exception to solicitor-client privilege has been the subject of much jurisprudence, including from this Court, and is not novel or lacking definition. Furthermore, the relevant authorities have long recognized that this exception, although narrowly applied, is not restricted to classic trustee and beneficiary relationships, such as ones that arise in the wills and estates context or specific to the administration of a settled trust. See, for example, the discussions in *Pritchard* at paras. 22–24; *Froese v. Montreal Trust Company of Canada*, [1993] B.C.J. No. 1847, 1993 CanLII 2706 at paras. 3–5 (C.A. Chambers); *McRae v. Canada (Attorney General)*, 46 B.C.L.R. (3d) 137, 1997 CanLII 4121 at paras. 12, 48–49 (C.A.); *Cooke v. The Canada Trust Company*, 2005 BCCA 112; *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510 at para. 14.

[34] Given the jurisprudential context, it was open to the chambers justice to conclude that the proposed appeal would likely not introduce new principles, develop first-instance frameworks, or provide needed clarity on existing ones. Rather, the outcome of the appeal would largely turn on the application of already established principles to the factual matrix of the case. The SCJ did not deny the existence of a common interest exception to solicitor-client privilege; instead, based on the record before him, he found that the appellants did not lay a sufficient foundation in support of its application. They had not established a *prima facie* basis for a fiduciary or fiduciary-like relationship between BLG and the purchasers (now the appellants) or that the documents related to BLG's duties as trustee *vis-à-vis* the purchasers, as opposed to its creditor client: 2025 BCSC 2004 at paras. 41–46.

[35] This was an individualized finding grounded in the SCJ's assessment of the interactions between BLG, its creditor client and the purchasers, their respective roles, and the circumstances surrounding the court-ordered sale and distribution of proceeds, as revealed by the record. The SCJ conducted this inquiry as part of the *de novo* appeal for the purpose of deciding whether the appellants had shown a *prima facie* case in support of the type of relationship that properly attracts the common interest exception. In this context, it was open to the chambers justice

to conclude that appellate review of the *de novo* dismissal would likely produce an outcome dependent on the particulars of that relationship and therefore of meaningful relevance only to the parties.

[36] A second basis asserted by the appellants in support of access to otherwise privileged material is anchored in the duty of care owed by a solicitor to a non-client recognized by this Court in *Dhillon v. Jaffer*, 2012 BCCA 156. The SCJ did not refer to *Dhillon* in his reasons. The appellants say he erred in principle in not asking whether this line of authority offered a separate basis for challenging the privilege claimed by BLG, and that this Court's analysis of that proposition would be of significance to the practice.

[37] Before the SCJ, the appellants explained *Dhillon*'s relevance this way:

> The plaintiffs, who are the appellants here, claim they were among the beneficiaries of that trust and that [BLG] breached the trust when they distributed to their own clients monies that the judgement debtor had to remit somewhere else …
>
> …
>
> When appointed under a court order to handle funds, solicitors in British Columbia are expected to apply the terms of the order in good faith and not to creatively interpret it for the benefit of their client only. That's the *Dhillon v. Jaffer* principles. And plaintiffs, whatever the trustee's view of the order is, they're -- the -- all of the persons who are entitled to funds under the order are entitled to have that view shared with them …
>
> [Emphasis added.]

[38] When before the chambers justice, the appellants' counsel said this:

> As *Dhillon* makes clear, lawyers holding funds belonging to others have an obligation to those other parties, and I have quoted that already but I've -- it's set out there again. If that's not a trust obligation, My Lady, it's awfully close. [The] difference should make no difference as a matter of law to the application of the principles above to the privilege claim by [BLG].
>
> [Emphasis added.]

[39] Given the submissions made to the SCJ (repeated in this Court), it is not surprising that the SCJ considered the main issue before him to be whether the common interest exception applied in the circumstances of this case and did not cite *Dhillon*. The appellants have clearly been using *Dhillon* and the duty of care defined

in that case as a means by which to align their situation with one or more of the fiduciary-like scenarios that have been found in other cases to engage the common interest exception. With that focus, the SCJ appropriately concentrated on the applicability of the exception, rather than some sort of stand-alone abrogation of privilege potentially arising from *Dhillon*, *per se.*

[40] In any event, *Dhillon* says nothing about a solicitor's duty to a non-client extending to the non-client obtaining full access to otherwise privileged communications for purposes of advancing a claim in breach of trust or negligence against the solicitor. To the extent the appellants rely upon *Dhillon* as authority for that proposition, I am satisfied the reliance is misplaced.

[41] My second reason for not interfering with the denial of leave is that I agree with the chambers justice the proposed appeal has "some, but very limited, significance to the action": at para. 43.

[42] Before us, the appellants acknowledged they can continue with their lawsuit against BLG without answers to the contested questions or access to the contested documents. In my view, this fact renders an appeal of limited (if any) practical utility.

[43] As explained, when before the associate judge, the appellants identified three questions they want answered: a) how the BLG lawyer with conduct of the file formed the view that non-resident taxes were not covered by the court order; b) what steps he took to inquire into that matter; and c) who else at BLG (apart from a named paralegal) "touched on the issues".

[44] Excerpts from discoveries conducted by the appellants reveal the BLG lawyer acknowledged that after obtaining the order for sale and before distributing proceeds, the possibility of non-resident taxes was brought to his attention. He did not consider BLG obliged to withhold and remit those taxes and acknowledged that BLG did not do so. He said he did not interpret the order as "speaking to anything other than property taxes". He was asked why he did not return to court to seek clarification on this issue. He said: "I didn't see a need for clarification"; he did not

"see that [the s. 116 tax issue] was relevant to the order for sale". He was asked who he spoke to or engaged with in relation to managing the sale. Although he was not prepared to identify everyone, he did provide the name of a paralegal at the law firm that assisted with the file.

[45] From these answers, the appellants obtained admissions about the fact that BLG did not withhold and remit the non-resident taxes even though the issue was brought to its attention, did not consider itself obliged to do so, and did not return to court to seek clarification.

[46] If the appellants are correct that the order for sale mandated BLG to withhold and remit the taxes and the failure to do so constitutes a breach of fiduciary duty, negligence, or both, based on the principles delineated at para. 47 of *Dhillon* or otherwise (a matter for trial), they have what they need to advance those claims. I fail to see how the absence of more in-depth answers to their questions or access to BLG's communications will deprive them of "meaningful discovery" (the appellants' language).

[47] The third and final reason for not interfering with the denial of leave is that I consider the chambers justice to have rightly assessed the proposed appeal as "weak": at para. 57. Indeed, I would go one step further and conclude it is highly unlikely a division of this Court would set aside the SCJ's order. In other words, I see no realistic prospect of success in the appeal.

[48] As explained, the appellants advance two paths to accessing the impugned information. They say the purchasers had a common interest in the distribution of the sale proceeds arising from the court-ordered sale and given that fact, no privilege could attach to BLG's communications relevant to that issue. Alternatively, and perhaps in any event (again, this part of the argument is unclear), the appellants contend that *Dhillon* supports a stand-alone abrogation of privilege because BLG had a duty to interpret the court order correctly to the benefit of all affected parties, including the purchasers as non-clients.

[49] The chambers justice was alive to both arguments: at paras. 50–51. In response to the first, she held that the SCJ's conclusion the appellants did not establish a *prima facie* case in support of a fiduciary-like relationship was a finding of mixed fact and law, subject to a "very high standard" of review, and consequently, unlikely to be set aside: at para. 56. Specific to *Dhillon*, she reviewed this Court's decision and determined it "did not deal with solicitor-client privilege, nor suggest that any opinions formed as to the proper interpretation of an order in [the context of this case] need to be shared with all stakeholders …": at para. 54.

[50] I agree with both conclusions.

[51] In their review material, the appellants say the chambers justice underestimated the strength of the arguments they would make on appeal, including that: a) the common interest exception is "[not] limited to pure trust cases"; and b) *Dhillon* applies to "questions of privilege vis a vis the parties to whom the duties (identified in *Dhillon*), are owed".

[52] I do not see that the chambers justice underestimated the strength of these arguments. To the contrary, I am of the view she was generous in her assessment of their merit.

[53] It is readily apparent from the SCJ's review of common interest exception authorities that he was aware the exception has been considered and applied in varied contexts: at para. 28–40. Furthermore, his search for a fiduciary or fiduciary-like relationship to ground the exception, which was central to dismissal of the *de novo* appeal, is not inconsistent with what the Supreme Court of Canada identified in *Pritchard* as a necessary foundation: a "fiduciary or like duty … between the parties so as to create common interest": at para. 24. The appellants say the SCJ erred in law or principle in not recognizing that the common interest exception applied here; at the same time, they point to no authority in which it has been given meaningful effect in similar circumstances.

[54] Finally, as explained, to the extent the appellants rely on *Dhillon* as supporting a stand-alone abrogation of solicitor-client privilege based on duties owed to a non-client, I consider that reliance misplaced. The chambers justice correctly noted that *Dhillon* did not deal with solicitor-client privilege.

**Disposition**

[55] For these reasons, I would admit the fresh evidence but dismiss the application for review. The appellants have not persuaded me of an error of law or an error in principle that justifies intervention with the chambers justice's conclusion that leave to appeal is not in the interests of justice.

[56] At the hearing of the review application, we were provided with a copy of the documents that were sealed by the associate judge. It is not necessary to address those documents for purposes of the appeal. We imposed a temporary sealing order, specific to the duplicates. I would make that order permanent.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice MacNaughton"