COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Delane Industry Co. Ltd. v. Tsawwassen Quay Market Corporation,* 2025 BCCA 129

Date: 20250410
Docket: CA50106

2025 BCCA 129 (CanLII)

Between:

Delane Industry Co. Ltd.

Appellant
(Plaintiff)

And

Tsawwassen Quay Market Corporation

Respondent
(Defendant)

Before: The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated August 9, 2024 (*Delane Industry Co. Ltd. v. Tsawwassen Quay Market Corporation*, 2024 BCSC 1441, Vancouver Docket S103253).

Oral Reasons for Judgment

Appearing as Representative for the Appellant Company:	K. Au Yeung
Counsel for the Respondent:	D.W. Gibbons F. Liedl Pierce
Place and Date of Hearing:	Vancouver, British Columbia April 7, 2025
Place and Date of Judgment:	Vancouver, British Columbia April 10, 2025

Summary:

This appeal involves a longstanding dispute over common area expenses payable under a five-year subleasing agreement entered into in 2005/06. A Registrar's Report determined no monies were owing, by other side. That Report was confirmed by a Supreme Court judge. The appellant appealed from the confirmation, alleging multiple errors. It also brought a fresh evidence application in support of the appeal, and sought review of a decision by a chambers judge denying leave to add a third party as a respondent to the appeal. HELD: All three matters are dismissed. The appellant does not meet the test for the admissibility of fresh evidence. Nor has he established a proper basis for appellate interference with the other two orders.

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[1] **DEWITT-VAN OOSTEN J.A.**: More than 15 years ago, the parties to this appeal were in a commercial subleasing relationship specific to retail space in a public market housed within Tsawwassen's BC Ferry Terminal (the "Market"). The sublease required that the appellant, Delane Industry Co. Ltd. ("Delane"), pay a portion of costs associated with the Market's common areas.

[2] Eventually, the relationship broke down, the sublease was not renewed, and the respondent, Tsawwassen Quay Market Corporation ("Tsawwassen"), petitioned for vacant possession. Delane responded with a civil action of its own. The parties have been embroiled in litigation ever since, involving multiple proceedings at both the trial and appellate levels. Those proceedings are too numerous to list here. A helpful chronology is set out in the decision at issue in the appeal, indexed at *Delane Industry Co. Ltd. v. Tsawwassen Quay Market Corporation*, 2024 BCSC 1441. In particular, see paras. 25–50 of that decision.

[3] There are three related matters before us, each of which was initiated by Delane. They consist of: (a) an appeal from a Supreme Court order confirming a February 2024 Registrar's Report which concluded that Tsawwassen does not owe Delane any money for allegedly overpaid common area expenses under the sublease; (b) a fresh evidence application in support of the appeal; and (c) an application for review of a March 2025 order from a chambers judge in this Court denying Delane leave to add BC Ferries Corporation ("BC Ferries") as a respondent to the appeal.

[4] We will address each of these matters in turn, in reverse order.

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Application for Review

[5] In support of its appeal, Delane applied under R. 18(2) of the *Court of Appeal Rules*, B.C. Reg. 120/2022 to have BC Ferries added as a respondent. Delane's application also asked for leave to issue subpoenas to BC Ferries "for evidence and documents necessary to resolve the issues in this case", and an order directing BC Ferries to "produce all relevant documents, including maps and agreements identifying exclusive domain common areas, financial records, invoices, and communications regarding common area expenses". It was Delane's position before the chambers judge that these documents (if they exist) would verify the allocation of the Market's common area expenses during the term of the sublease, and by so doing, expose allegedly fraudulent invoicing tactics by Tsawwassen.

[6] Delane's application was dismissed by Justice Iyer on March 18, 2025. She determined the application was without merit. Among other things, she was not persuaded the sought-after documents actually exist, or importantly, that any such documents would have relevance to the appeal.

[7] An issue arose at the chambers hearing as to whether Delane could properly invoke R. 18(2) as an appellant. Justice Iyer considered it unnecessary to decide that issue because however it may be invoked, R. 18(2) requires that the proposed additional party have "interests that could be affected by the relief" sought in the appeal (18(1)(b)). Justice Iyer received submissions from BC Ferries stating it has no interest in any outstanding disputes between Delane and Tsawwassen, including the ones under appeal. BC Ferries has never had a contractual relationship with Delane nor was it a party to the action that resulted in the Registrar's Report. Tsawwassen leases the Market from BC Ferries and Delane sublet its space in the Market directly from Tsawwassen. BC Ferries told Justice Iyer (and maintains in written submissions before us) that whatever the outcome of the appeal, it will not be affected.

[8] Delane's application for review of Justice Iyer's decision is predominantly grounded in allegations of procedural unfairness, including allegations that:

Delane's sole director and its representative at the hearing, Karry Au Yeung, received insufficient time to advance his submissions; Justice Iyer did not adequately consider Mr. Au Yeung's submissions and affidavit material, including assertions that the record was incomplete because of Tsawwassen's failure to produce documents; and she did not consider or address the legal authorities he filed in support of the application.

[9] Delane also says Justice Iyer misunderstood BC Ferries' role in the subleasing arrangement between Delane and Tsawwassen. From Mr. Au Yeung's perspective, the "interests of justice require that [her] decision be reviewed by a panel to ensure fairness, accuracy, and adherence to legal principles". Finally, Delane claims that the lawyers who responded to its application on behalf of Tsawwassen and BC Ferries made false representations to Justice Iyer about the circumstances surrounding the sublease, the history of the related proceedings, and/or the legal relevance of the documents sought by Delane.

[10] It is well-established that an application for review is not a re-hearing of the original application: *Alam v. Leung*, 2025 BCCA 85 at para. 16. As an appeal court, we do not step into the shoes of the chambers judge, revisit the record, and make the decision ourselves. Instead, substantive rulings and findings of fact by the chambers judge attract a highly deferential standard of review. Allegations of procedural unfairness are assessed by asking whether the judge acted fairly: *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia*, 2022 BCCA 247 at para. 71.

[11] We have reviewed the material filed in support of Delane's review application, the positions taken by the parties before Justice Iyer, and her reasons. We are not persuaded that she erred in law or principle or misconceived the facts surrounding Delane's requests: *Deline v. Shecter*, 2024 BCCA 116 at paras. 21–22; *Alam* at para. 16. Nor has Delane persuaded us that the chambers hearing was unfair. Without one or more of these bases for appellate intervention, the chambers judgment must stand.

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[12] The fact that reasons for judgment do not refer to specific submissions made by an applicant or a legal authority cited by them does not mean the application was not given serious consideration. Judges are not legally obliged to lay out the entirety of their reasoning process in the judgment or specify everything they considered: *R. v. R.E.M.*, 2008 SCC 51 at paras. 19–20, 45. We are also of the view Delane received adequate opportunity to advance its position before Justice Iyer through written and oral submissions.

[13] Assuming it was open to Delane to invoke R. 18(2) (and we make no comment on that issue, one way or another), we agree with Justice Iyer that the application to add BC Ferries as a respondent had no merit. It was brought late in the day (after the appeal had already been set for hearing); the proposed new respondent has stated it has no interest in the outcome of Delane's appeal; and it is readily apparent Delane sought to use R. 18(2) for the purpose of document discovery, rather than a purpose consistent with the object of the Rule. That object has been described as ensuring a participatory opportunity for parties whose legal, financial, or reputational interests could be affected by the result of the appeal: *Sunshine Coast (Regional District) v. Vanderhaeghe*, 2023 BCCA 192 at paras. 19–20 (Chambers). On the record accepted by Justice Iyer, such is not the case here. Mr. Au Yeung says R. 18(2) "requires the Court to join any party with [a] material interest in the outcome and access to key evidence" (emphasis added). We do not interpret the Rule the same way. Moreover, whether someone is added as a respondent is up to the chambers judge, in the exercise of their discretion.

[14] We also note that in January 2024 Delane issued a subpoena to the Chief Executive Officer of BC Ferries, seeking to have him attend before the Registrar for purposes of the Report. BC Ferries had the subpoena set aside. Delane has appealed that order (Court of Appeal File CA49741). As we understand it, in March of this year, the appeal was placed on the Court's "inactive list". On the face of it, Delane's application for a subpoena before Justice Iyer was done in circumvention of the already existing appellate process. This is not a strategy we should countenance.

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[15] In the circumstances, considered as a whole, we see no principled basis on which to interfere with Justice Iyer's decision and we dismiss the application for review.

Fresh Evidence Application

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[16] Delane applies to introduce two affidavits as fresh evidence in its appeal (both filed on December 23, 2024). Delane says the affidavits are important because:

- they show that Tsawwassen representatives made untrue submissions in earlier proceedings, which misled the courts on material issues;
- they show that Tsawwassen representatives provided "false justifications" to secure adjournments, delaying the resolution of the case;
- the affidavits highlight material facts previously unavailable to the courts, including: (i) evidence contradicting submissions by Tsawwassen in previous hearings; and (ii) documentation and transcripts that prove Tsawwassen misrepresented various facts to secure adjournments;
- the new evidence is necessary for a fair and just determination of outstanding issues between the parties, as it supports Delane's claims of fraud, misrepresentation, and "procedural abuse" by Tsawwassen; and,
- this Court's consideration of the new evidence is in the interests of justice because it will ensure that Tsawwassen's misconduct (under the sublease and in the course of the litigation) does not undermine the integrity of the proceedings.

[17] We have reviewed the affidavits. In our view, they do not meet the test for fresh evidence under *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8. That test requires an applicant to establish that the fresh evidence: (a) was not available for the lower court hearing through due diligence; (b) is relevant evidence that bears upon a decisive or potentially decisive issue; (c) is credible evidence that

is reasonably capable of belief; and (d) is evidence that, when considered with the other evidence, can be expected to have affected the result.

[18] It is not necessary to address each of the *Palmer* criteria in deciding Delane's application. Instead, it will suffice to make two comments.

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[19] First, when before us, Mr. Au Yeung advised that "most" of the material attached to the affidavits formed part of the record that was before the lower court judge. There was no need to file a fresh evidence application to have that evidence considered on appeal. The remainder of the attachments have apparently been included to flesh out the lower court's record and provide greater detail on issues addressed by the judge. If this added material was available to Mr. Au Yeung when he made his submissions in the lower court (which appears to be the case), it raises obvious concerns about whether he meets the due diligence requirement of the *Palmer* test.

[20] Second, and in any event, we are of the view the fresh evidence, if admitted, could not reasonably be expected to affect the result of the appeal. It is evident from the affidavits that the proposed evidence seeks to revisit a myriad of issues that were or could have been raised, assessed, and determined in the litigation that led to today's appeal. The affidavits attach selective documents, transcript excerpts, correspondence, and other material generated between the parties that Mr. Au Yeung says support his overall theory of Tsawwassen and its representatives, including legal counsel, misrepresenting the facts, destroying relevant evidence, misleading the courts, telling falsehoods, and attempting to defraud Delane with respect to both the sublease and the Market's common area expenses.

[21] These matters are <u>not</u> properly before us in the appeal. Instead, we are tasked with assessing whether the judge below erred in confirming the Registrar's Report, dismissing Delane's application for the production of documents, and granting a vexatious litigant order. The affidavits Delane seeks to admit as fresh evidence will not assist us in that task. More importantly, and in light of the history between these parties, we will not allow this appeal to be used as a means by which

to revisit already-determined issues or matters that could and should have been raised elsewhere. See, for example, *Delane Industry Co. Ltd. v. Tsawwassen Quay Market Corporation*, 2023 BCCA 298 and *Delane Industry Co. Ltd. v. Tsawwassen Quay Market Corp.*, 2022 BCCA 435.

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[22] We appreciate Mr. Au Yeung feels strongly that his version of events has not been received fairly over the years, that there is much more to the story than what the courts have been told, and that the evidentiary record surrounding the sublease and common area expenses is incomplete because of Tsawwassen's conduct. However, Delane has had ample opportunity to challenge Tsawwassen's conduct under the sublease, to pursue its allegations of misrepresentations and falsehoods to the extent available through the court system, and to obtain an outcome. Those outcomes have not been favourable to Delane. The allegations of misrepresentations, falsehoods, and fraudulent conduct have been firmly rejected. Delane cannot repeatedly ask the courts, including this one, to continue to revisit the dealings between the parties and reach different conclusions based on an ever-expanding record.

[23] Accordingly, we dismiss the application to adduce fresh evidence.

Appeal

[24] That brings us to the appeal.

[25] Delane challenges an August 9, 2024 order confirming a Registrar's Report in which the Registrar concluded that:

> [18] … No funds are owed by Delane Industry Co. Ltd. ("Delane") to Tsawwassen Quay Market Corporation ("TQMC"), or by TQMC to Delane, <u>with respect to common area expenses in relation to the sublease between Delane and TQMC dated March 14, 2005 and the Addendum and Modification dated March 31, 2006</u>. The amounts paid for common area expenses in relation to the sublease were properly calculated, assessed and paid.
>
> [Emphasis added.]

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[26] This conclusion was based on the Registrar's assessment of the evidentiary foundation established by the parties, including an affidavit from Tsawwassen's Chief Financial Officer. That affidavit set out the "exact amount of expenses charged to Delane during the term of the sublease": *Delane Industry Co. Ltd. v. Tsawwassen Quay Market Corporation* (12 February 2024), Vancouver S103253 (B.C.S.C.) at para. 13. The Registrar found the calculations to be "thorough": at para. 13. He rejected Delane's theory that Tsawwassen charged it for expenses that were actually the responsibility of BC Ferries. The Registrar concluded this theory was not supported by the evidence: at para. 15.

[27] After the Registrar released his Report, Tsawwassen applied in the Supreme Court to have it confirmed. Delane opposed the application, purporting to "appeal" the Report.

[28] In addition to seeking confirmation, Tsawwassen applied to have Delane and Mr. Au Yeung declared vexatious litigants. It also asked that money held as security be released to Tsawwassen.

[29] Delane had an application of its own; namely, it sought document production from Tsawwassen and pre-emptive contempt findings if Tsawwassen did not comply.

[30] The judge confirmed the Registrar's Report, which was produced in response to a referral first made in November 2010, but not heard until February 2024. In assessing the Report, the judge instructed himself that a confirmation assessment is not like an appeal, with a deferential standard of review: at paras. 18–19. Instead, a judge has broader authority to confirm, vary, or disregard the recommendations of a registrar if they disagree with them: at para. 18, citing *Narwal v. Narwal*, 2018 BCSC 1561 at paras. 23–24.

[31] The judge reviewed the record considered by the Registrar and heard "lengthy submissions" from Mr. Au Yeung. Ultimately, he concurred with the Registrar's findings. Independent of the Registrar, and based on his own

assessment of the record, the judge found that the "terms of the lease [were] clear and … the amounts set for common area expenses were justified in the evidence that was before the [R]egistrar": at para. 21.

[32] The judge dismissed Delane's application for the production of documents, concluding it was "not properly framed" and did not "clearly specify the documents being sought": at para. 12. Importantly, he also found that the documents at issue had already been sought by Delane in two previous applications: at para. 13. The judge found that the production application amounted to an abuse of process:

> [14] It is clear that Mr. Au Yeung, on behalf of Delane, has become very focused on the "10 banker's boxes" of receipts and invoices. Having reviewed the transcript of the hearing in which the documents in question were referred to in 2010, it is evident to me that "10 banker's boxes" was simply an estimate of the volume of material at issue, not a representation that the documents were contained in actual banker's boxes. In any event, I do not find it unreasonable for TQMC to have disposed of the documents. There was no indication prior to 2021 that the documents were required. I accept that the disposal of such documents would have occurred in the ordinary course of business after seven years, as attested to by Mr. Sam. Delane has provided no evidence that the documents in question actually exist and they have been told, in sworn evidence, that they do not.
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> [15] In my view, the application for production of documents was an abuse of process. The form of the application was improper, not only insofar as it did not clearly identify the documents sought, but also in seeking an anticipatory contempt finding if the unspecified documents were not produced within 15 days. The documents at issue had already been sought in a previous application that was abandoned with costs thrown away. Finally, the sworn evidence before the court made it clear the documents no longer exist. The application is dismissed.
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> [Emphasis added.]

[33] The last issue addressed by the judge was Tsawwassen's application to have Delane and Mr. Au Yeung declared vexatious litigants. As noted, he canvassed the extensive history between the parties (see paras. 25–50 of his reasons), and based on that history and in light of the legal principles that govern a vexatious litigant determination, the judge concluded that:

> [53] … Delane has demonstrated a pattern of conduct that is abusive of the court's processes, in particular in recent months. It has filed numerous duplicative applications, seeking the same relief on multiple occasions including the one before me which seeks production of documents that has

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> been sought multiple times before. Aside from appealing almost every adverse decision, Delane has also demonstrated a pattern of seeking to have past decisions revisited, or reframing them in another guise.
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> [54] The language used by Delane continues to be vexatious, despite clear comments from the courts about the problematic nature of this conduct. …
>
> …
>
> [56] I do not propose to go through the numerous examples of ongoing conduct by Mr. Au Yeung in his affidavits, correspondence and application materials. He freely makes allegations of misconduct, untruth and fraud on behalf of TQMC and various counsel. He describes judges of this Court as being misled and "brainwashed".
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> [57] Both Delane and Mr. Au Yeung have been found in contempt of court for continuing to defame the officers of TQMC despite a court order prohibiting them to do so. They have demonstrated a willingness and ability to abuse this Court's process to circumvent orders. Notably, when precluded from filing applications between January 25, 2024, and February 12, 2024, Delane sought reconsideration of the same decision using the court scheduling portal. When precluded from filing applications between April 16, 2024, and June 19, 2024, Delane sought relief by way of a reformatted application response.
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> [58] The common area costs at issue in the underlying referral to the registrar were incurred and paid beginning in 2005. The referral to the registrar has been outstanding since first being made on November 16, 2010, and newly ordered to proceed on February 25, 2021. All of the issues in the initial litigation have now been decided and I agree with TQMC that it is long past time for these proceedings to come to their conclusion.
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> [59] Unfortunately, it was clear from the submissions and conduct of Mr. Au Yeung before me that he is both willing and motivated to initiate a barrage of additional proceedings. He is highly unlikely to treat any adverse decision in this or any other court with finality. He has demonstrated his willingness and ability to abuse this Court's process, and I find it likely he will do so in pursuing further litigation against TQMC and its officers. In my view, the order sought by TQMC is appropriate in the circumstances.
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> [Emphasis added.]

[34] On appeal, Delane says the judge's orders should be set aside because Tsawwassen:

- destroyed invoices and receipts that were subject to a production order;
- misled the Supreme Court;
- acted "inconsistently" during the litigation between the parties; and,

- breached the terms of the sublease.

[35] Specific to the judge's reasoning, Delane says: (a) he inadequately considered the issue of "spoliation" in reaching his conclusions; (b) wrongfully accepted documents from Tsawwassen "without scrutiny", thereby relying on a false record; (c) did not address the fact that over time, Tsawwassen has made contradictory claims; (d) failed to consider Tsawwassen's breach of the sublease; (e) treated Delane unfairly by limiting its ability to present argument and evidence and interrupting its submissions; and (f) did not assess the whole of the evidence.

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[36] Delane asks that the appeal be allowed, the judgment set aside, and Delane be reimbursed for all "overcharges" paid under the sublease. Delane also asks us to declare that Tsawwassen has engaged in fraud, order the production of documents, impose "sanctions for spoliation", grant Delane a subpoena for a third party (presumably BC Ferries), and release any monies paid into court. Finally, Delane seeks special costs in the appeal.

[37] In responding to the appeal, Tsawwassen emphasizes that a deferential standard of review applies to findings of fact or mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19–23. To the extent Delane complains of procedural unfairness, those issues are addressed by asking whether the process before the judge was fair: *Nova-BioRubber Green Technologies Inc.* at para. 71.

[38] We have reviewed the judge's reasons in light of the record before him. Delane has not persuaded us of an extricable error of law or palpable and overriding error of fact, nor has it demonstrated procedural unfairness.

[39] It is apparent the judge did consider Delane's submission that Tsawwassen intentionally destroyed documents to affect the litigation and rejected it: at para. 14. Contrary to Delane's submission, the judge independently assessed the sublease, was alive to its terms, adopted an interpretation that was open to him, and considered the parties' conduct. Ultimately, he concluded that the "amounts set for common area expenses were justified in the evidence that was before the

[R]egistrar": at para. 21. Delane does not agree with that conclusion; however, the fact of disagreement does not mean the judge must have failed to consider Delane's submissions.

[40] There is no objective indication of unfairness in the proceeding. To the contrary, this was a two-day hearing and the judge allowed Delane to make "lengthy submissions" in support of its position: at para. 21. Delane's suggestion that the judge did not assess the whole of the evidence is without foundation. The reasons for judgment reflect the opposite. Before deciding whether to grant a declaration of vexatious litigant status, the judge comprehensively reviewed the parties' 15-year litigation history to ensure that he fully understood the "context of conduct by [Tsawwassen] and Mr. Au Yeung": at para. 24. Delane has not identified that the judge misapprehended the history or that his analysis of the vexatious litigant application was tainted by legal misdirection or a material error in principle. Instead, on appeal, Delane makes bald and generalized assertions of error, each one grounded in Mr. Au Yeung's interpretation of events since the onset of the litigation, and his apparently unwavering belief that the representatives and legal counsel for Tsawwassen have not been truthful. As noted, those allegations have been firmly rejected and are not open for reconsideration by this Court. In our view, the judge's findings about Delane's conduct (at paras. 53–57, 59) were reasonably open to him. He was not obliged to see the case the same way as Mr. Au Yeung.

[41] Accordingly, we are not persuaded the judge's order should be set aside.

[42] In his reasons, the judge said this:

> [58] The common area costs at issue in the underlying referral to the registrar were incurred and paid beginning in 2005. The referral to the registrar has been outstanding since first being made on November 16, 2010, and newly ordered to proceed on February 25, 2021. <u>All of the issues in the initial litigation have now been decided and I agree with [Tsawwassen] that it is long past time for these proceedings to come to their conclusion</u>.
>
> [Emphasis added.]

[43] We agree. However, it is clear from Delane's factum, the reply filed in response to Tsawwassen's submissions, and his oral submissions before us that

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Mr. Au Yeung is not prepared to treat the matter as final. Delane's written material is once again replete with allegations of "untrue statements [by Tsawwassen] and omissions designed to mislead the courts and obscure [Delane's] legitimate claims". Any judicial findings made to the contrary appear to have had no effect on Mr. Au Yeung. In this context, the judge was right to grant the vexatious litigant orders. These orders are to be made sparingly; however, in this case, they are necessary to "bring to an end the misuse of the litigation process caused by the repetitive filing of unmeritorious applications that result in the needless expenditure of judicial resources and, in some cases, unnecessary expense to other parties": *Houweling Nurseries Ltd. v. Houweling*, 2010 BCCA 315 at para. 40.

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Disposition

[44] Delane has not established a proper basis for appellate intervention.

[45] Consequently, we: (a) dismiss the application for a review of Justice Iyer's order of March 18, 2025; (b) dismiss the application to adduce fresh evidence in the appeal; and (c) dismiss the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

"The Honourable Madam Justice Horsman"

"The Honourable Justice Mayer"