Case Name:

Langston v. Teamsters Local 155

Between
Gordon C. Langston, Appellant (Petitioner), and
Teamsters Local 155, BC Council of Film Unions, Dungeon Siege Productions, and British Columbia Labour Relations Board, Respondents (Respondents)

[2010] B.C.J. No. 2099

2010 BCCA 481

294 B.C.A.C. 151

86 C.C.E.L. (3d) 177

2010 CarswellBC 2890

Docket: CA038147

British Columbia Court of Appeal
Vancouver, British Columbia

M.V. Newbury, D.M. Smith and C.E. Hinkson JJ.A.

Heard: October 5, 2010.
Judgment: October 29, 2010.

(44 paras.)

Civil litigation -- Civil procedure -- Parties -- Indigent status -- Costs -- Security for costs -- Application by appellant union member to vary order dismissing application for indigent status and granting stay pending posting of security dismissed -- Appellant's applications for judicial review of dismissal of complaints that union arbitrarily disciplined him and unfairly refused to grieve his dismissal were dismissed -- On appeal, appellant applied for and was denied indigent status -- Determination of indigent status not reviewable -- Chambers judge correctly found appeal had no possibility of success -- Given that appeal was meritless and there was no evidence appellant could pay costs if unsuccessful, chambers judge correctly to ordered appellant to post security.

Labour law -- Unions -- Duties -- Representation of members -- Complaints -- Application by appellant union member to vary order dismissing application for indigent status and granting stay pending posting of security dismissed -- Appellant's applications for judicial review of dismissal of complaints that union arbitrarily disciplined him and unfairly refused to grieve his dismissal were dismissed -- On appeal, appellant applied for and was denied indigent status -- Determination of indigent status not reviewable -- Chambers judge correctly found appeal had no possibility of success -- Given that appeal was meritless and there was no evidence appellant could pay costs if unsuccessful, chambers judge correctly to ordered appellant to post security.

Application by the appellant union member to vary or discharge an order dismissing his application for indigent status and granting the union and his former employer a stay of proceedings pending his posting of security for costs. The appellant was a member of the respondent union which represented drivers in the BC movie industry. The respondent employer was a movie company. It terminated the appellant's employment for alleged sexual harassment and unsafe driving. The union declined to pursue a grievance on the appellant's behalf, and suspended him for 30 days. The appellant filed a complaint against the union alleging that it had arbitrarily disciplined him and that it acted arbitrarily and in a discriminatory and unfair manner by refusing to grieve his dismissal. A panel of the BC Labour Board dismissed the appellant's complaints on the basis that the appellant had refused to cooperate in the union's process and he had not pursued the available remedies under the union's internal appeal procedures before filing his complaint with the Board. The appellant applied for leave to reconsider the Board's findings. The reconsideration panel denied the appellant leave to reconsider his complaint of arbitrary discipline, and granted leave but dismissed his application for reconsideration of his complaint regarding the union's refusal to grieve his dismissal. The reconsideration panel found that the original panel was correct in finding that the appellant's complaint was unmeritorious. Before the reconsideration panel had rendered its decision, the appellant filed a second complaint regarding the union's refusal to grieve his dismissal on the same basis as the first complaint, believing that remedy was available to him as he had unsuccessfully exhausted his internal remedies with the union and the Board had not rendered a decision on the merits of his complaint. A reconsideration panel dismissed his second complaint on the basis that it was res judicata. 17 months after the decision of the first reconsideration panel, the appellant filed an application for judicial review, applying for an order quashing the reconsideration decisions of the Board and setting aside the original decisions. The appellant applied for an order to extend the time for filing his petition, which was dismissed on the basis that he had failed to provide a satisfactory explanation for the delay. Following the Board's dismissal of his second complaint, the appellant filed a second application for judicial review, seeking to quash the decisions of both reconsideration panels. His application was dismissed. The appellant appealed the decision and applied for a declaration of indigent status for the purpose of pursuing his appeal. The respondents cross-applied for an order that the appeal be stayed pending the posting of security for costs by the appellant. The chambers judge reviewed the appellant's financial circumstances and concluded that the payment of filing fees would not deprive the appellant of the necessaries of life or effectively deny him access to the

courts. In addition, the chambers judge found that the appellant's appeal was doomed to fail because his application for judicial review of the proceedings related to his first complaint had been dismissed as untimely and he could not launch a new application in which that decision was collaterally attacked. The chambers judge granted the respondents' request for security for costs in the amount of $10,000 as he concluded that the appeal was without merit and the evidence suggested that the respondents would be unable to collect appeal costs from the appellant.

HELD: Application dismissed. The chambers judge's determination on the issue of the appellant's indigent status was not reviewable as he weighed the limited evidence provided by the appellant and drew appropriate inferences of fact. In addition, the chambers judge made no reviewable error in his assessment of the merits of the appellant's appeal, and he correctly found that the appellant had no possibility of succeeding on his appeal. Given the chambers judge's findings that the appeal was without merit and the lack of evidence provided by the appellant of any financial means by which he might be able to pay the respondents' costs if unsuccessful on appeal, the chambers judge was correct to order the appellant to post security for costs.

Statutes, Regulations and Rules Cited:

Administrative Tribunals Act, SBC 2004, CHAPTER 45, s. 57

Court of Appeal Act, RSBC 1996, CHAPTER 77, s. 9(6), s. 24(1)

Court of Appeal Rules, Rule 56

Labour Relations Code, RSBC 1996, CHAPTER 244, s. 10, s. 12

Appeal From:

On appeal from: Supreme Court of British Columbia, April 21, 2010 (***Langston*** *v. Teamsters Local 155 (The Union)*, 2010 BCSC 534, Vancouver Docket No. S091964)

Counsel:

Agent for the Appellant: S. Pineau.

Counsel for the Respondent, Teamsters Local 155: G. Baugh.

Counsel for the Respondent, BC Council of Film Unions: L. Terai.

Counsel for the Respondent, BC Labour Relations Board: J. O'Rourke.

Reasons for Judgment

The judgment of the Court was delivered by

D.M. SMITH J.A.:--

A. <u>Introduction</u>

1 The appellant, Gordon **Langston,** applies to vary or discharge the order of a chambers judge of this Court made on June 17, 2010. His application is made pursuant to s. 9(6) of the *Court of Appeal Act,* R.S.B.C. 1996, c. 77, (the "*Act*"). The chambers judge dismissed the appellant's application for indigent status and granted the application of the respondents, Teamsters Local 155 (the "Union"), B.C. Council of Film Unions (the "Council") and Dungeon Siege Productions ("Dungeon"), for an order staying the appeal pending the appellant's posting $10,000 security for costs, which was to be shared equally among all three respondents (the "Chambers Order"). See ***Langston*** *v. Teamsters Local 155,* 2010 BCCA 310.

2 For the reasons that follow, I would dismiss the appellant's application.

B. Background

3 The appellant is a member of the Union which represents drivers in the B.C. movie industry. The Council is a council of trade unions certified as the bargaining agent for certain employees in the industry. Dungeon is a movie company and was the appellant's employer at the material time.

4 On August 5, 2005, Dungeon terminated the appellant's employment for alleged sexual harassment and unsafe driving. As a result of its investigation, the Union declined to pursue a grievance on the appellant's behalf, and suspended him for 30 days.

5 The appellant filed a complaint against the Union pursuant to s. 10 of the *Labour Relations Code,* R.S.B.C. 1996, c. 244 (the "LRC") alleging that the Union had arbitrarily disciplined him contrary to the Union's constitution and principles of natural justice. He also filed a complaint under s. 12 of the LRC against the Union, alleging that it had acted arbitrarily and in a discriminatory and unfair manner by refusing to grieve his dismissal.

6 On February 21, 2007, Vice-Chair Topalian, sitting as a single member panel of the B.C. Labour Relations Board (the "Board"), dismissed both complaints following a hearing based only on written submissions from all of the parties (B38/2007). The Vice-Chair dismissed the s. 10 complaint because the appellant had chosen not to cooperate with the Union's investigation and had refused to participate in its process. He also dismissed the appellant's s. 12 complaint on the basis that the appellant was first required to pursue the available remedies under the Union's internal appeal procedures before filing his complaint with the Board.

7 The appellant then applied under s. 141 of the LRC for leave and reconsideration of the Vice-Chair's findings. On June 7, 2007, a three-member reconsideration panel of the Board dismissed the appellant's application for leave to reconsider of his s. 10 complaint, and granted the appellant leave but dismissed his application for reconsideration of his s. 12 complaint (B119/2007). The reconsideration panel wrote:

> [7] We find that the facts of **Langston's** complaint do not raise an issue of bad faith or discrimination. To the extent that his complaint potentially had merit, it related to his allegations that the Union failed to conduct an adequate investigation and made its decision without ensuring he first had sufficient opportunity to obtain and respond to the particulars

of the allegations against him. **Langston** thus had a potential argument that the Union's decision was so uninformed it constituted arbitrary representation.

[8] However, in paragraphs 21 through 27 of the Original Decision [B38/2007], the original panel finds that: (1) **Langston** was, in fact, aware of the substance of the harassment allegation; (2) the driving allegations did, in fact, include some very specific information; and (3) **Langston** failed to cooperate with the Union's attempt to assess the merits of his case. The original panel concluded that **Langston** "was not excluded from the investigation process by the Union. Rather he elected not to participate in that process." (para. 30)

[9] In light of these circumstances, **Langston** has not established that the Union represented him in an arbitrary manner. We find the original panel's analysis establishes that the complaint is unmeritorious. We reach the same conclusion ourselves, for the reasons summarized above.

8 Before the reconsideration panel had rendered its decision in B119/2007, the appellant filed a second s. 12 complaint with the Board on the same basis as the first complaint. The appellant believed that this course of action was now available to him as he had unsuccessfully exhausted his internal remedies with the Union and because the Board had not rendered a decision on the merits of his complaint. This second complaint was dismissed by a one-member panel of the Board on April 24, 2008 (B52/2008) and by a reconsideration panel of the Board on January 14, 2009 (B7/2009) on the basis that it had been previously decided and dismissed, and was therefore *res judicata.*

9 On March 13, 2009, 17 months after the decision of the first reconsideration panel, and well past the 60-day appeal period under the *Administrative Tribunals Act,* S.B.C. 2004. c. 45 (the "*ATA*"), the appellant filed his first judicial review petition. In the petition he applied for an order quashing the first and second reconsideration decisions of the Board (B119/2007 and B7/2009). In the pleadings, he also sought to set aside the two underlying original decisions (B38/2007 and B52/2008).

10 Since the appellant was out of time to file his application for judicial review, he had to apply for an order to extend the time for filing his petition. He did not succeed. Mr. Justice Greyell dismissed the appellant's application for an extension of time, finding that the appellant had failed to meet the burden on him of providing a satisfactory explanation for his delay in commencing the proceeding: ***Langston*** *v. Teamsters Local 155,* 2009 BCSC 1580. The appellant did not appeal this decision.

11 In written reasons for judgment, Greyell J. provided the following analysis:

[19] Much of the petition is based on a challenge of Decisions B38/2007 and B119/2007. The "Grounds" for setting Decisions B38/2007 and B119/2007 aside as set forth in the Petition include:

1 allegations of denial of natural justice and procedural fairness when it denied an oral hearing;
2 finding there were no facts in dispute on which to make its decision;
3 violating its rules of procedure in allowing the same adjudicator who conducted a settlement conference to issue the written decision; and
4 requiring the petitioner to pursue internal union appeals, by basing its decision on irrelevant facts and others.

[20] These issues should have been challenged by way of judicial review brought within the time limits set out in s. 57. These grounds are discreet to the challenge to the first two decisions and are quite independent from the challenge to Decision B7/2009.

[21] The petitioner has not satisfied me that any of the prerequisites to the exercise of my discretion under s. 57(2) have been met. Specifically, the petitioner has not demonstrated there are serious grounds for the relief sought. The relief sought is cast in the broadest possible terms. The decision sought to be impugned was made June 7, 2007. The petition and application seeking the extension of time were brought March 13, 2009, some 17 months after the time limitation set out in the *Act.* The petitioner has provided no reasonable excuse for the delay in bringing the application - apart from the fact he was not successful in his second application before the Board. By bringing and pursuing the second application to the Board, the petitioner chose to take his chances with the Board rather than to challenge the decision of the first reconsideration panel. He chose not to apply for judicial review of Decision B119/2007 when it was issued on June 7, 2007, notwithstanding the significant number of errors he now alleges the Board made in that decision. To grant leave as the petitioner requests would offend the principles underling s. 57 of the *Act,* as outlined in the passage from *Speckling,* cited above.

[Emphasis added.]

12 Greyell J.'s reference to *Speckling* related to the comments of Madam Justice Huddart in *Speckling v. British Columbia (Workers Compensation Board),* 2008 BCCA 155, 77 B.C.L.R. (4th) 44 at para. 16, which Greyell J. quoted at para. 16 of his reasons:

The rationale for requiring timely applications for judicial review rests on the need to balance the justice of an individual applicant's complaint about an exercise of a statutory power of decision with the need to preserve the integrity of the administrative scheme, make efficient use of judicial resources, avoid a multiplicity of proceedings, and avoid prejudice to any other person. The chambers judge interpreted s. 57

consistently with this long-standing public policy.

13 Following the Board's dismissal of the appellant's second s. 12 complaint, the appellant filed his second judicial review petition in which he sought to quash and set aside the decision of the second reconsideration panel in B7/2009. The petition again also sought to quash the decision of the first reconsideration panel in B119/2007. However, Mr. Justice Sewell, who heard the second judicial review proceeding, declined to revisit the decision of the first reconsideration panel because Greyell J. had dismissed the appellant's application for an extension of time. See ***Langston*** *v. Teamsters Local 155 (The Union),* 2010 BCSC 534.

14 Before Sewell J., the appellant advanced the argument that the principle of *res judicata* should not have been applied by the second original and reconsideration panels of the Board in regard to his application to review the decision of the first reconsideration panel in B7/2009. He submitted that in doing so, the Board denied him procedural fairness and natural justice in regard to his first s. 12 complaint which had never been decided on its merits. Sewell J. summarized the appellant's argument in this manner:

> [31] Pursuant to s. 58(2)(b) of the *ATA* questions about the application of the common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly. Questions of procedural fairness and natural justice do not arise directly on this application. Mr. **Langston's** complaints about these issues relate to the way his first complaint was dealt with by the Board. They do however arise indirectly because the principal argument that Mr. **Langston** made to support this position that the Board made a reviewable error in invoking the doctrine of *Res Judicata* was that that invocation denied him the opportunity to have his complaint dealt with on the merits at a hearing. Although these are not his words, in effect he argues that the Board's processes, taken as a whole amount to a "Catch 22". He argues that in Decision no. B38/2007 Vice Chair Topalian did not decide or consider his complaint on the merits. He submitted that that decision of the review panel in B119/2007 that the findings of Vice-Chair Topalian established that his complaint was unmeritorious therefore amounted to a denial of natural justice. Mr. **Langston** submits that the invoking of the doctrine of *Res Judicata* to deny him a hearing of his complaint perpetuated the denial of natural justice.
>
> [Emphasis added.]

15 Sewell J. rejected the appellant's submission. He found that the decisions of the first original and reconsideration panels of the Board in B38/2007 and B119/2007 had met their duty of procedural fairness and natural justice to the appellant. He noted that Vice-Chair Topalian had offered the appellant an opportunity to provide him with submissions on the merits of his complaint before making his determination, and that in any event, both Vice-Chair Topalian and the reconsideration panel, in arriving at their decisions, had

assumed that the appellant's version of what had transpired between him and the Union was correct. Sewell J. held that the Board's decision to dismiss the appellant's second s. 12 complaint fell within a range of reasonable outcomes for the specialized administrative tribunal with a privative clause (paras. 32 and 33) and therefore he dismissed the proceeding.

16 The appellant appealed the decision of Sewell J. He then applied to the chambers judge for a declaration of indigent status for the purpose of pursuing his appeal. The respondents cross applied for an order that the appeal be stayed pending the posting of security for costs by the appellant of the appeal and in the court below.

C. The Chambers Judge's Reasons for Judgment

1 *Indigent Status*

17 In written reasons for judgment, the chambers judge set out the test to be applied in determining whether the appellant was indigent. The overriding consideration is the interests of justice. The two criteria relevant to that determination are: (1) the appellant's financial position; and (2) the likelihood of success of the appeal: *Duszynska v. Duszynski,* 2001 BCCA 155 at para. 3.

18 In considering the financial position of the appellant, the chambers judge relied on the standard of financial hardship formulated by Madam Justice Ryan in *Ancheta v. Ready,* 2003 BCCA 374 at para. 7, namely that indigent status should be granted if the payment of filing fees "would deprive [the appellant] of the necessaries of life or effectively deny him access to the courts".

19 The chambers judge reviewed the appellant's financial circumstances as they were disclosed in his affidavit and concluded:

> [14] I am not satisfied that the appellant has met that test. He has the capacity to earn income as a driver; he took a long winter vacation; he manages to get by but does not say how; he has the ability to command the resources to pursue multiple proceedings at the Labour Relations Board and at the Supreme Court. The appellant has left unanswered too many questions about his financial circumstances.

20 The chambers judge then turned to the "merits" of the appellant's appeal and concluded that it was "doomed to fail" (para. 28) for the following reasons:

> [29] The primary element driving the appellant's litigation is his belief that he was denied natural justice in the disposition of his first complaint, particularly the absence of an oral hearing. He alleges other procedural defects as well, such as institutional bias.
>
> [30] If the appellant was ever entitled to a remedy for these alleged defects, it lay in proceedings connected to the first complaint. As stated, that judicial review petition was dismissed as untimely. The appellant cannot resurrect the challenge by launching a new petition in which the

first decision is collaterally attacked. The time limits in the *Administrative Tribunals Act* would be finessed by such a strategy.

[31] Regrettably, Sewell J. was drawn into examining the merits of the first decision in an effort to deal with all of the appellant's arguments, including the natural justice allegations. But to the contention that *res judicata* does not apply when the first decision is tainted, the only answer can be "no". Otherwise, *res judicata* could never prevent the rehashing of issues decided and litigants would be vexed twice for something they have already successfully defended.

[32] To the extent that the appellant wants this Court to examine Sewell J.'s judgment about natural justice, I think that is out of the question. That would give the appellant the judicial review that he was denied by Greyell J.

[33] Sewell J. also dealt with the "different parties" argument which was, in brief, that the Council was not a party in the first instance and was joined in the second complaint. The judge agreed with the analysis of the Labour Relations Board on this point. The record will not support any other conclusion. In both complaints, the Labour Relations Board found it unnecessary to decide whether the Council was a proper party because it dismissed the complaint against the primary representative, the Union.

[34] There were no discretionary factors related to *res judicata* that either the Labour Relations Board or Sewell J. ignored.
[Emphasis added.]

1 ***Security for Costs***

21 At the chambers hearing the respondents requested an order of security for costs in an amount between $5,000 and $7,000 for each respondent. The chambers judge made an order collectively granting them security for costs in the amount of $10,000. He reasoned that an amount less than requested by the respondents would not impede the appellant's opportunity to pursue his appeal, even though, in his view, the appeal was without merit:

[36] There can be no doubt that the respondents should have security for appeal costs if the amount is not so high as to prevent the appellant from continuing with the appeal.

[37] He has taken the parties through multiple Labour Relations Board proceedings and two judicial review petitions in the Supreme Court. The respondents have outstanding bills of costs which are unpaid. (They have not taxed them and so a request for security for Supreme Court costs is premature.) Nothing suggests that it will be easy to

collect appeal costs from the appellant.

[38] It would, in my opinion, be unfair to leave the respondents to defend a meritless appeal without requiring some security. ...

[Emphasis added.]

22 The chambers judge dismissed the respondents' application for security for costs of the proceedings below on the basis that the application was premature as the outstanding bills of cost had not yet been taxed.

1 ***Grounds for Review***

23 The appellant raises the following issues in his review application:

1 Was the chambers judge wrong in law in concluding that the Court has no jurisdiction to hold tribunals to the test for *res judicata* as established by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44, [2001] 2 S.C.R. 460 if the original decision is time barred by section 57 of the *Administrative Tribunals Act?*
2 If the courts have jurisdiction to apply the test for *res judicata* is the appeal bound to fail?
3 Was the original decision of the Labour Board B38/2007 to decline to adjudicate the complaint against the Respondent Council of Film Unions made in a judicial manner?
4 Did the chambers judge misapprehend the facts in concluding that the appellant, Gordon **Langston** is not indigent and in awarding security for costs?

D. Discussion

24 The common thread between the two applications, and the focus of the appellant's submissions before this Court, was the chambers judge's assessment of the merits of the appeal. This factor must be considered in both applications.

25 Rule 56 of the *Court of Appeal Rule* s governs the indigent status application. It provides:

1 Despite anything in these rules, no fee is payable to the government by a person to commence, defend or continue an appeal or application if a justice, on application before or after the commencement of the appeal or application, finds that the person is indigent, unless the justice considers that the position being argued by that person

1 lacks merit,
2 is scandalous, frivolous or vexatious, or
3 is otherwise an abuse of the process of the court.

26 Section 24(1) of the *Act* provides the authority for granting an order for security for costs. It states:

> 24(1) A justice may order that an appellant pay to or deposit with the registrar security for costs in an amount and in a form determined by the justice.

27 The relevant factors to be considered in deciding whether an order for security for costs should be granted include:

> 1 the appellant's financial means;
> 2 the merits of the appeal;
> 3 the timeliness of the application; and
> 4 whether the costs will be readily recoverable or not.
>
> [Emphasis added.]

See *Ferguson v. Ferstay,* 2000 BCCA 592, 81 B.C.L.R. (3d) 554 at para. 7; *Lu v. Mao,* 2006 BCCA 560 at para. 6; and *Creative Salmon Company Ltd. v. Staniford,* 2007 BCCA 285 at para. 9.

28 If, as occurred in this case, the appellant was unable to establish to the chambers judge's satisfaction that he was indigent, then the burden fell to him to demonstrate why an order for security for costs should be not ordered: *Pearlman v. Lubin,* 2010 BCCA 161 at paras. 24-27; *Pearlman v. ICBC,* 2010 BCCA 49 at paras. 14-15; and *Ancheta v. Joe,* 2005 BCCA 232 at paras. 18-28.

29 The standard of review of a decision of a chambers judge is a high one. A review application is not a rehearing of the application before the chambers judge. Absent a demonstrated error of law, error of principle or misconception of the facts, a division of this Court may not interfere with or vary a discretionary decision of a chambers judge: *Frew v. Roberts*, [1990] B.C.J. No. 2175 (C.A.), *Haldorson v. Coquitlam (City),* 2000 BCCA 672 at para. 7, *Mullins v. Levy,* 2010 BCCA 294 at para. 4.

1 ***Indigent Status***

30 The appellant does not allege the chambers judge erred in law or erred in principle in his application of the test for granting indigent status. Rather, he seeks to reargue the submissions he advanced before the chambers judge in order to challenge the judge's findings of fact as to his financial circumstances and the chambers judge's assessment of the merits of his appeal.

31 The chambers judge's findings included: (i) that the appellant's affidavit evidence was insufficient to meet the burden on him to demonstrate that the payment of filing fees would deprive him of the necessaries of life or effectively deny him access to the courts; and (ii) there was no merit to his appeal because in his second judicial review application the appellant was effectively attempting to resurrect allegations of procedural unfairness and breaches of natural justice in regard to his first s. 12 complaint that had been dismissed and which he had failed to appeal by judicial review in a timely way.

32 The appellant's position before the chambers judge was that he was experiencing financial hardship because he had not been dispatched to any jobs by the Union and had not been successful in obtaining alternate employment. His affidavit material, however, provided little or no evidence of his attempts to find work, or of how he had managed to meet his daily needs and travel expenses (to and from Mexico) on his stated $250 per month.

33 The Union, in its memorandum of argument before this Court, denied that it had refused to dispatch the appellant, stating that he "was dispatched on November 9, 2009, and turned down work or was unavailable for dispatch on September 3, 4, 8, 13, 14 and 18, 2009 and October 1, 5, 6, 8, 13, 15 and 22, 2009" and "was unavailable for dispatch from November 25, 2009 until March 5, 2010 because he was away in Mexico."

34 The appellant, in his memorandum before this Court, submitted that he "does not deny he has the capability to earn income as a driver". He also stated that he was having difficulty finding work but acknowledged that he took a long winter vacation in Mexico where he lived "cheaply". These broad general assertions, however, are not sufficient to meet the burden on an applicant to establish indigent status. Specifics of attempts to obtain employment are required. In short, the appellant's evidence failed to address a host of unanswered questions on why he had gone on a trip to Mexico rather than pursue his search for employment and how he managed to live and travel on $250 a month.

35 The appellant's dispute is not with the chambers judge's apprehension of the evidence but with the adverse inferences of fact that he drew from the paucity of evidence provided by the appellant. The chambers judge weighed the limited evidence provided by the appellant on this issue and found that the appellant had not met the burden of proof in establishing that he was indigent. In my view, the chambers judge's determination on this issue is not reviewable.

36 I am also unable to find any reviewable error on the chambers judge's assessment of the merits of the appellant's appeal. As may be seen from the grounds of appeal, the core of the appellant's complaint is that he was denied procedural fairness and natural justice by the Board in regard to his first s. 12 complaint because: (i) he was not provided an oral hearing; and (ii) he was misled into believing that if he could not obtain a remedy for his complaint by exhausting all of his internal appeals, he could then renew his s. 12 complaint before the Board. That submission may or may not be correct. However, I agree with the chambers judge's observation that it was unnecessary for Sewell J. to engage in an analysis of the merits of the Board's application of the principle of *res judicata* in regard to the appellant's second s. 12 complaint as the issues were moot when the appellant failed to file his application for judicial review of Greyall J's decision in a timely way.

37 The only issue to be determined by the chambers judge was whether the appellant had an arguable appeal from the order of Sewell J. dismissing his second judicial review proceeding. The chambers judge correctly found, in my view, that the appellant had no possibility of succeeding in his appeal. When Greyall J. dismissed the appellant's application for an extension of time to file his first judicial review petition, any opportunity for the appellant to have the issues he sought to raise out of the Board's

decisions in regard to his first s. 12 complaint came to an end. The appellant, in choosing the forum of the Board to try and resurrect those issues through the filing of a second s. 12 complaint, made his choice of forum and is now bound by that decision. Having failed in that forum he cannot now turn to the courts in another attempt to have those issues addressed.

38 In this regard, the comments of Madam Justice Southin, writing for the Court in *Speckling v. Communications, Energy and Paperworker's Union of Canada, Local 76 et al.,* 2006 BCCA 203, 54 B.C.L.R. (4th) 88, 1v. to appeal dismissed, [2007] S.C.C.A. No. 221, capture the essence of the appellant's situation:

> [43] Is it an "abuse of process" to bring an action alleging one is a member in good standing of a union, if one has brought and failed in an application under s. 12 of the *Labour Relations Code*, in which the allegations are essentially the same as in the statement of claim?
>
> [44] ... At its highest, [Ben Speckling's] right was to choose a forum: either the Labour Relations Board or the court. When a litigant has a choice of forum, by choosing one forum, he elects, in my opinion, to accept the decision of that forum as concluding the issues.
>
> [45] Having compared the assertions or allegations made by the plaintiff in his application under s. 12 and the powers of the Labour Relations Board on such applications with the statement of claim, including the prayer for relief, in this action, I am of the opinion that the central issues are essentially the same in both, and that being so, this action may be dismissed as an abuse of process.

39 Nor can the appellant succeed, in my view, in his attempt to distinguish between the first and second s. 12 complaints by joining the Council as a party to the second complaint. The Board in B38/2007 dealt with this issue, as did Sewell J. in his reasons at para. 29. Adding the Council as a party to his second s. 12 complaint did not change the nature of the complaint, which was about the Union's alleged misconduct. The appellant had a contractual relationship with the Union by reason of his membership. He had no legal relationship with the Council, which was merely the certified bargaining agent for the Union. I see no merit in the appellant's submission on this point.

1 *Security for Costs*

40 It follows that, based on the findings of the chambers judge as to the merits of the appeal, the appellant cannot meet the test for discharging or varying the chambers judge's order requiring the appellant to post security for costs.

41 As previously noted, the relevant considerations on an application for security for costs include: (i) the appellant's financial means; (ii) the merits of the appeal; (iii) the timeliness of the application; and (iv) whether costs will be readily recoverable. The appellant, against whom the order is being sought, bears the onus of showing why the security should not be required. He clearly failed to meet that burden.

42 Given the findings of the chambers judge that the appellant's appeal is without merit and given the lack of evidence provided by the appellant of any financial means by which he might be able to pay the respondents' costs if unsuccessful on appeal, the chambers judge, in my view, was correct to order the appellant to post security for costs of the appeal. Indeed, the amount of the security ordered by the chambers judge was modest given that it was to be shared equally between the three respondents.

E. Conclusion

43 In the result, I am unable to find any error of law, error of principle or misapprehension of the facts that would support this Court's interference with the chambers judge's order to dismiss the appellant's application for indigent status and his order requiring the appellant to post security for costs of the appeal.

44 I would dismiss the application.

D.M. SMITH J.A.
M.V. NEWBURY J.A.:-- I agree.
C.E. HINKSON J.A.:-- I agree.

cp/e/qlrds/qljxr/qlbdp/qljyw/qlcas