

CANADA / JUDGMENT

A.B. v. C.D.

2025 BCSC 647

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 647 A.B. v. C.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.B. v. C.D.,

2025 BCSC 647

Date: 20250312

Docket: E232132

Registry: Victoria

Between:

A.B.

Claimant

And:

C.D.

Respondent

Corrected Judgment: The judgment was further anonymized
throughout on February 19, 2026

Before: The Honourable Justice K. Wolfe

Oral Ruling re: Admissibility of Recording of
Marriage Counselling Session

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Place and Date of Hearing:

Victoria, B.C.

March 11, 2025

Place and Date of Judgment:

Victoria, B.C.

March 12, 2025

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Overview

- [1] This is a mid-trial oral ruling about the threshold admissibility of certain evidence. Should either party order a transcript or should I decide to publish this ruling, I reserve the right to edit for grammar, clarity, style and case references, but the substance of my ruling will not change.
- [2] In the midst of the trial of this complex family law matter, while the claimant remains under cross-examination, the respondent seeks to introduce into evidence a recording of a marriage counselling session between the parties that occurred on November 10, 2020 (the "2020 Recording"). There is no dispute the 2020 Recording was made by the claimant without the knowledge or consent of either the respondent or the marriage counsellor. There is no transcript of the 2020 Recording. Rather, it exists as an audio file of just under two hours in length, which the respondent seeks to play in its entirety for the Court before asking the

claimant certain questions about it on cross-examination.

- [3] The 2020 Recording is not the only recording of such a session made by the claimant. In her direct examination, the claimant admitted that she surreptitiously recorded several of the counselling sessions attended by the parties on her cell phone. The claimant says she did so to have a record of what was discussed for her own purposes, and not for any other reason. Notably, the claimant also recorded a session on June 12, 2023 (the "2023 Recording"), for which a transcript has been produced. As explained further below, the parties agree the Court should at least receive both the transcript and the audio file of the 2023 Recording, subject to the parties' future submissions about how the 2023 Recording can or should be used. However, the claimant objects to the threshold admissibility of the 2020 Recording.
- [4] In the absence of a transcript, and instead of conducting a voir dire during which the lengthy 2020 Recording would be played in its entirety, the parties made legal submissions as part of an in-trial evidentiary application. As a result, and although the parties have described the topics covered at a high level, in making this ruling, the Court has not yet heard the 2020 Recording. The cross-examination of the claimant has effectively reached the point where this ruling is required so that it may continue and complete.
- [5] The claimant says the 2020 Recording is not admissible due to the statutory prohibition under s. 10(5) of the Divorce Act, R.S.C., 1985, c. 3, which provides that evidence of anything said or of any admission or communication made in the course of "assisting spouses to achieve a reconciliation" is not admissible in any legal proceeding. However, for a variety of reasons (including divergence in the caselaw), the claimant accepts the Court may prefer to leave the analysis of s. 10(5) for the ultimate ruling in the trial after receiving further submissions (including in respect of the possible application of s. 10(5) to the 2023 Recording). Accordingly, the claimant says the 2020 Recording is also inadmissible based on the Wigmore common law privilege factors.
- [6] The respondent says s. 10(5) of the Divorce Act does not apply to the 2020 Recording. Since the parties were not separated in November 2020, they were not engaged in the process of "reconciliation", but were instead simply working through some issues while in the relationship. The respondent says the correct analytical framework is therefore the test for admission of surreptitious recordings, and under that test, the 2020 Recording should be admitted. The respondent accepts that if the 2020 Recording is admitted, it will remain open to both parties to make further submissions about what weight, if any, that evidence should be accorded, and the uses to which that evidence may be put.
- [7] For the reasons that follow, I find the 2020 Recording admissible, without prejudice to the parties' ability to make further arguments about weight or use.

Legal frameworks

- [8] As noted, there are three possible legal frameworks.

[9] Section 10 of the Divorce Act provides:

Duty of court -- reconciliation

10 (1) In a divorce proceeding, it is the duty of the court, before considering the evidence, to satisfy itself that there is no possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

Adjournment

- (2) Where at any stage in a divorce proceeding it appears to the court from the nature of the case, the evidence or the attitude of either or both spouses that there is a possibility of the reconciliation of the spouses, the court shall
- (a) adjourn the proceeding to afford the spouses an opportunity to achieve a reconciliation; and
 - (b) with the consent of the spouses or in the discretion of the court, nominate
 - (i) a person with experience or training in marriage counselling or guidance, or
 - (ii) in special circumstances, some other suitable person,
- to assist the spouses to achieve a reconciliation.

Resumption

- (3) Where fourteen days have elapsed from the date of any adjournment under subsection (2), the court shall resume the proceeding on the application of either or both spouses.

Nominee not competent or compellable

- (4) No person nominated by a court under this section to assist spouses to achieve a reconciliation is competent or compellable in any legal proceedings to disclose any admission or communication made to that person in his or her capacity as a nominee of the court for that purpose.

Evidence not admissible

- (5) Evidence of anything said or of any admission or communication made in the course of assisting spouses to achieve a reconciliation is not admissible in any legal proceedings.

[10] With respect to s. 10(5) specifically, there is a divergence in the caselaw. Some courts have interpreted the statutory prohibition narrowly, such that it only applies to attempts to assist spouses with reconciliation after the start of divorce proceedings. Other courts have adopted a broader interpretation, treating s. 10(5) as protecting confidential communications made during all attempts to "salvage a marriage", not only those after divorce proceedings have been filed: see cases discussed in *L.M.B v. I.J.B*, 2005 ABCA 100 at paras. 15-23. Notably, the broader interpretation favoured by certain courts in Alberta and Ontario has not yet been

applied in British Columbia. In fact, the most recent treatment of s. 10(5) in British Columbia is even more prescriptive than the narrow approach, finding the prohibition only applies to counselling undertaken after the Court adjourns a divorce proceeding under s. 10(2) to provide an opportunity to the spouses to achieve a reconciliation: *Gerth v. Gerth*, 2007 BCSC 488 at para. 9.

- [11] The Wigmore factors for determining admissibility of evidence potentially subject to common law privilege are well-settled. In fact, Associate Judge Harper addressed them at para. 19 of a previous decision in this matter, indexed as 2024 BCSC 646, which dealt with a contested application for production of the medical records of the parties' children. The Wigmore factors are:
1. The communications must originate in a confidence that they will not be disclosed.
 2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
 3. The relationship must be one which in the opinion of the community ought to be sedulously fostered.
 4. The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
- [12] Finally, the test for admission of surreptitious recordings was recently addressed in the family law context in *Fleury v. Budd*, 2023 BCSC 1749. At para. 25 of *Fleury*, Justice Hughes wrote:
- [25] The test set out in [*Finch v. Finch*, 2014 BCSC 653] and summarized in [*C.C. v. S.P.R.*, 2022 BCSC 1057] at para. 31, requires that the following four criteria be met to admit surreptitiously obtained recordings:
- a) the recording must be relevant;
 - b) the participants must be accurately identified;
 - c) the recordings must be trustworthy; and
 - d) the court must be satisfied that the probative value of the recordings outweighs its prejudicial effects.
- [13] The same test is also applied to address surreptitious recordings in general civil proceedings: see *Four Top Hospitality Group Ltd. v. Olde Towne Developments Ltd.*, 2024 BCSC 2279 at para. 229.

Analysis

- [14] At an overly simplified level, the issues the Court is asked to determine on this trial include: guardianship, parental responsibility and decision-making, parenting time, child support, spousal support and division of family property and debt. In the course of deciding those issues, the Court will need to assess the best interests of the parties' children and address allegations of family violence and abuse. There are also concerns with respect to mental health and parental alienation. As in many family law cases, there are very significant conflicts in the parties' narratives with respect to their relationship and the family dynamic. This will require the Court to assess credibility and reliability, not just of the principal parties, but of others who provide evidence at trial.
- [15] As relevant background to this ruling, the parties jointly engaged a professional to prepare a report under s. 211 of the Family Law Act, S.B.C. 2011, c. 25. It was completed February 20, 2024 (the "211 Report"). With the consent of both parties, the author spoke with the parties' marriage counsellor in the course of conducting their assessment. The events of the June 12, 2023 counselling session are addressed in the 211 Report, and relied on by the author in formulating her conclusions and recommendations. At the time when the parties attended the June 12, 2023 counselling session, it appears to be agreed that the parties' marriage was on shaky ground and the claimant at least considered the parties to be separated.
- [16] The claimant intends to challenge the 211 Report at trial, including on the basis that the author's understanding of the June 12, 2023 counselling session was flawed and is directly contradicted by the 2023 Recording. The claimant says the centrality of the June 12, 2023 counselling session to the 211 Report's conclusions necessitates the Court's review of the 2023 Recording in some fashion. The respondent agrees the Court should have the 2023 Recording (transcript and audio file), but seemingly for reasons that go beyond just the 211 Report. While those arguments will be made at the conclusion of the trial, the claimant says, regardless of the parties' agreement, the Court will need to be satisfied the statutory prohibition in s. 10(5) of the Divorce Act does not apply to preclude the admission of the 2023 Recording.

Section 10(5) of the Divorce Act

- [17] Relying on the broader interpretation of s. 10(5) accepted by the Ontario and Alberta courts, the claimant says the 2020 Recording also engages the statutory prohibition on admission. The claimant characterizes the 2020 Recording as a communication made in the course of assisting the parties to reconcile disputes, and maintains the statutory prohibition is not limited to reconciliation attempts that occur after separation, but rather extends to any and all such attempts, including during the relationship.
- [18] The respondent disputes that s. 10(5) has any application to the 2020 Recording, noting that the provision addresses reconciliation in the context of separation and divorce proceedings and there is no claim that the parties were separated in November 2020. While it is agreed

that the parties' relationship was tumultuous and there were periods of time when the respondent was absent from the family home for non-work-related reasons, including at the date of the November 10, 2020 counselling session, there is no allegation in these proceedings that the parties had "separated" or were engaged in "reconciliation" before 2023. That would likely require an amendment to the pleadings.

- [19] In support of her interpretation, the claimant relies first on the Ontario case of *Joseph v. Molnar*, 2012 ONSC 4432. The analysis of s. 10(5) in that case is cursory at best, occupying only two paragraphs of substance. Further, the facts are distinguishable; Joseph concerned an application for production of the entirety of the marriage counsellor's file from 2016 to 2019, where there was a dispute between the parties about whether they separated in 2017 or 2019. The dispute with respect to the date of separation in this case is a matter of weeks in 2023, not years. I agree with the respondent that there is no suggestion in any of the pleadings that the parties were separated, as that term is used in a legal sense, in 2020. Nor did the claimant advance that position in her evidence in chief.
- [20] The claimant also relies on the Alberta Court of Appeal decision in *L.M.B.* In my view, the language of *L.M.B.* does not support as broad an interpretation of s. 10(5) as the claimant urges. The argument the majority addressed in *L.M.B.* was whether the statutory protection for marriage counselling only exists after formal divorce proceedings are instituted. While Berger J.A. concludes that s. 10(5) renders inadmissible all communications made in the course of assisting spouses to reconcile "whenever they occurred" (at para. 21), there was no dispute that the marriage counselling sessions at issue in that case were undertaken with a view to "reconciliation" of the parties' relationship (at paras. 2 and 11). In fact, the majority speaks repeatedly about "attempting to salvage broken marriages", which suggests something more than disputes within the course of a relationship before separation is even contemplated. I note as well that the concurring reasons of Justice McFayden took a much more limited view of what s. 10(5) protects, in line with the most recent British Columbia decision in *Gerth*. Further, the *L.M.B.* decision has not been referenced or approved of in any British Columbia jurisprudence. In any event, as the claimant recognizes, the Court in *L.M.B.* also held the counselling records were inadmissible under the Wigmore test.
- [21] I do not consider it appropriate to analyse the admissibility of the 2020 Recording under the rubric of s. 10(5) of the Divorce Act. Unlike in the cases I was referred to, there is no agreement and no evidence the parties were separated or contemplating separation in November 2020. As a result, I am not satisfied it has been established that the marriage counselling session the parties attended on November 10, 2020 was aimed at "reconciliation" as that term is used in s. 10(5). Despite its divergences on other points, the jurisprudence consistently suggests it is a necessary precursor to reliance on s. 10(5) that the parties are engaged in "reconciliation". I turn then to the other possible legal frameworks for analysis.

Admissibility under Wigmore or surreptitious recordings tests

- [22] Beyond s. 10(5) of the Divorce Act, the parties disagree about whether the admissibility of the 2020 Recording should be addressed as an issue of common law privilege under Wigmore, as the claimant asserts, or as a question of surreptitious recordings, as the respondent urges. Questions regarding the production of records, or the introduction of evidence, from marriage counselling sessions have regularly been addressed under the Wigmore factors. Questions about surreptitious recordings in family and other civil cases are addressed under a separate test. The challenge here is that the facts are unique and layered. The 2020 Recording, which has already been disclosed, is both a marriage counselling record and a surreptitious recording. I was not referred to, nor was I able to find on this short timeline, an analogous situation in the jurisprudence.
- [23] I do not consider it necessary to definitively determine which of the two tests is more properly applicable. The legal tests are not that dissimilar, and the points in dispute between the parties are not the ones where the tests differ materially. Under the test to admit surreptitious recordings, there is no real dispute that the participants are accurately identified in the 2020 Recording or that the recording is trustworthy. Both parties seek to have the Court admit the 2023 Recording, which involved the same participants and which the claimant recorded in exactly the same fashion. I have not been alerted to anything about the 2020 Recording that would suggest it should be treated differently with respect to those elements of the test. Further, as I understand the 2020 Recording is a complete recording of the session, rather than an excerpt, the concerns about "selective recording" that arise in certain surreptitious recording cases are not present here.
- [24] With respect to the Wigmore test, there is equally no real contest that the communications during marriage counselling sessions generally originate in confidence and that the relationship between parties and their counsellors is one which should be sedulously fostered. The respondent accepts that, in general, confidentiality is an essential part of the therapeutic counselling relationship, but notes that, in this case, it is the party who is seeking to prevent the 2020 Recording from being admitted that breached confidentiality by making the recording.
- [25] What is left in dispute under each of the tests is whether the relevance or potential relevance of the 2020 Recording to the litigation is such that its probative value outweighs the potential prejudice of admitting it in this specific case.
- [26] The claimant says the 2020 Recording lacks sufficient probative value to outweigh the prejudice that will result if the confidentiality of the marriage counselling session is breached by its admission before the Court. The claimant says the evidence must have "extraordinary probative value" before it can be admitted; it is not sufficient that the parties discussed issues that arise in the family law proceedings since that would establish too low a threshold. I was not referred to any authority for that proposition. With respect to prejudice, the claimant did not identify any specific prejudice to herself. Instead, she points to the

societal interest in ensuring evidence of confidential marriage counselling sessions remains generally inadmissible in litigation to avoid negative impacts on the candour with which parties' engage in such counselling.

- [27] The respondent says the probative value of the 2020 Recording is significant, particularly given the statements made by the claimant in her direct testimony regarding particular events at this time, how the parties interacted with each other, and allegations of family violence, including instances of being "blocked in" to the driveway at the former residence and of the respondent's temperament and conduct. The respondent says the 2020 Recording provides contemporaneous insight into the parties' dynamic that may be informative for the Court's fact finding, assessment of family violence allegations, determinations of credibility and ultimately the Court's decisions respecting (at least) the best interests of the children, parenting and support. The respondent notes the claimant did not provide evidence of any prejudice to herself personally, and emphasizes that, unlike in other cases, despite being the person who was recorded without his permission or knowledge, he is not the one alleging prejudice.
- [28] At paras. 32 and 37 of the decision in C.C., Justice Gibb-Carsley noted that in British Columbia, courts dealing with the admissibility of surreptitious recordings start from the perspective that there is a limited discretion of a trial judge to exclude relevant evidence, despite potential policy concerns. Courts in Ontario have taken a different approach which supports a more robust exclusionary discretion on the basis of presumed prejudice to the administration of justice if such recordings are admitted. But that has not been the British Columbia approach.
- [29] The claimant maintains that what parties said at a counselling session is of limited probative value; the respondent disputes this. However unlike in many situations where the Court holds a voir dire, I have not yet heard the evidence. As a result, I lack an evidentiary basis on which to draw an informed conclusion that the evidence has little or no relevance. In the absence of having heard the evidence in its entirety, and in the absence of compelling evidence about significant prejudice that is not policy-based, I am not satisfied that I can reach that conclusion.
- [30] In C.C. (which I appreciate did not involve a recording of a confidential marriage counselling session), the party who had recorded snippets of exchanges with the unsuspecting party sought to adduce them in evidence. The Court found at para. 47 that given both parties' allegations that the other party was aggressive and verbally abusive, the snippets of conversations were relevant because they demonstrated the parties' interactions with each other. I find the Court's comments at para. 5 instructive; the Court held that three of the four recordings:

provide insight into the circumstances of the parties' relationship with each other and their child that has some relevance to the issues at trial. Secret recordings are often one-sided "snippets" that lack meaningful context and are prone to selectivity by the party making the recording. As such,

caution should be exercised in ascribing weight to the recordings. However, admissibility and weight are distinct concepts. The nature and content of three of the recordings, primarily that they show behavior and language that does not require context for interpretation, satisfies me that they should be admitted as their probative value outweighs their prejudicial effect.

- [31] This conclusion was reached despite the Court's clearly expressed concerns that admitting surreptitious recordings into evidence in family law disputes risks undermining the objectives of family law and rewarding behaviour that should be deterred (see, for example, C.C. at paras. 4, 28-30, 40, 69).
- [32] In the present case, based on counsel's submissions, the 2020 Recording is said to address events that are at issue between the parties, about which testimony has already been given. The 2020 Recording is also said to capture contemporaneous discussions between the parties about those events in a manner that may be more probative and reliable than their memories some four and a half years removed from those events.
- [33] I also have the somewhat unique situation where another surreptitious recording of a counselling session involving the same people is going to be placed before the Court by the consent of the parties, subject to the Court's ultimate decision about whether there are statutory or other concerns with doing so. In my view, the 2023 Recording is, at least as I understand the evidence at present, potentially more likely to fall within the statutory rule of evidence under s. 10(5) of the Divorce Act. I appreciate the claimant's submissions that it is the interaction with the 211 Report that makes the 2023 Recording more critical, but as the author of that report recognized, there are a great many things addressed in that report which are properly for the Court to decide, some of which are asserted to be discussed or demonstrated directly in the 2020 Recording. At this point in time, there does not appear to be a principled basis on which to treat the two recordings differently.
- [34] I am also conscious that the laws of evidence in family law cases are sometimes applied more flexibly to ensure the Court has access to information that may properly inform the various issues it must decide. In that regard, I note the comments of the British Columbia Court of Appeal in *Dosanjh v. Liang*, 2015 BCCA 18, where at para. 59, the Court quoted with approval from para. 65 of the decision of Justice Kent in *Walker v. Maxwell*, 2014 BCSC 2357:
- [65] Evidence in family law cases is subject to the same rules applicable to any other area of civil law. In reality, however, the technical yields to the practical and the strict rules of evidence are often ignored or accorded only slight deference.
- [35] Given the issues before me, I am satisfied the proper approach is to err on the side of admitting the 2020 Recording. I am not convinced that in this particular case, the admission of this one recording will create negative precedent or have any bearing on future cases. I certainly do not intend this decision to have that kind of precedential effect. At the end of the day, I may decide that the 2020 Recording ought to be given no weight, or that it cannot be used for a purpose for which one party seeks to use it. However, as the Court said in C.C., those are considerations that go to weight and not admissibility.

[36] I therefore find the 2020 Recording to be admissible in evidence in this proceeding, subject to the parties' further submissions on weight and use.

"K. Wolfe J."

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