

CANADA / JUDGMENT

Akerberg v. Cheng

2025 BCSC 382

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 382 Akerberg v. Cheng IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Akerberg v. Cheng, 2025 BCSC 382 Date: 20250306 Docket: E66624 Registry: New Westminster Between: Lars Olof Rikard Akerberg Claimant And Michelle Arts Cheng Respondent Before: The Honourable Justice MacNaughton Reasons for Judgment The Claimant, appearing in person: L. Akerberg Counsel for the Respondent: T. Affoo Place and Date of Hearing: New Westminster, B.C. January 23, 2025 Place and Date of Judgment: New Westminster, B.C. March 6, 2025 Table of Contents Introduction.. 3 The Application. 3 The Parties and Their Relationship. 3 Procedural Background.. 4 Application to Strike the Defamation and Breach of Privacy Claims. 6 Legal Principles. 6 Analysis. 7 Application to Withdraw an Admission.. 9 Legal Principles. 9 Analysis. 12 Costs. 12

Introduction

The Application

- [1] On January 7, 2025, Michelle Cheng filed an application seeking an order, pursuant to R. 11-2 of the Supreme Court Family Rules, to strike out certain paragraphs of Lars Akerberg's amended notice of family claim filed on April 15, 2024. She submits that the paragraphs disclose no reasonable cause of action. Mr. Akerberg opposes the relief sought.
- [2] Mr. Akerberg and Ms. Cheng never married. Mr. Akerberg says that they began living in a marriage-like relationship on December 18, 2018. Ms. Cheng disputes the December date and says that their marriage-like relationship began on January 6, 2021.
- [3] When the parties separated has also become an issue of dispute. In her response to family claim, Ms. Cheng admitted that the parties separated, as pled by Mr. Akerberg, on July 12, 2021. In this application, she also seeks to withdraw that admission to plead a separation date of May 31, 2021. The Parties and Their Relationship
- [4] The parties are the parents of one child, born on January 28, 2021. This proceeding does not involve parenting issues as those are being dealt with in the Provincial Court.

- [5] Ms. Cheng is currently employed as a teacher in a Lower Mainland school district. After their separation, Mr. Akerberg returned to Sweden. In his affidavit filed in this application, he says that he is employed as a senior electrical installer.
- [6] On or about March 1, 2019, the parties incorporated BC1199483, operating as Top Line Holdings Ltd. ("Top Line"). The company is a fishing charter business operated by the parties. It has 101 common shares. One share is allocated to Kerfoot Burroughs LLP, 51 shares are allocated to Ms. Cheng, and the remaining 49 shares are allocated to Mr. Akerberg. Ms. Cheng is the sole director of Top Line. Mr. Akerberg worked for Top Line until July 21, 2021. According to Ms. Chen, Top Line has not generated any profit since 2019.
- [7] The parties' relationship and separation is governed by a cohabitation agreement dated December 21, 2020 (the "Cohabitation Agreement"), signed by both parties and witnessed by their respective legal counsel.
- [8] The issue before me is solely with respect to the pleadings. As a result, except to the extent necessary, I have not set out many of the allegations each party makes against the other. Those issues will be addressed at trial, if the parties are unable to resolve their disputes. Suffice it to say that both make allegations of violence against the other, and their disputes have resulted in police and the Ministry of Child and Family Development involvement. Ms. Cheng obtained two protection orders against Mr. Akerberg, one on June 18, 2021, and the other on August 3, 2021. Ms. Cheng was charged with assaulting Mr. Akerberg's former partner. Procedural Background
- [9] On January 3, 2023, Mr. Akerberg filed a notice of family claim seeking equal division of family property and debt, spousal support, and other orders.
- [10] On March 20, 2023, Ms. Cheng filed her response.
- [11] On January 26, 2024, Ms. Cheng provided a financial statement. Ten days later, at a judicial case conference before Associate Judge Bilawich on February 5, 2024, Mr. Akerberg filed an incomplete financial statement. Associate Judge Bilawich ordered him to file an amended financial statement within 60 days. He also ordered the parties to exchange lists of documents within 60 days and to set a trial date.
- [12] Ms. Cheng says that she complied with Associate Judge Bilawich's order, but Mr. Akerberg did not. A trial of this matter is scheduled for eight days, starting on June 30, 2025.
- [13] On April 15, 2024, Mr. Akerberg filed an amended notice of family claim ("ANFC") which adds a broad range of further relief. This application relates to some of that relief.
- [14] On May 27, 2024, Mr. Akerberg filed a notice of intention to act in person.

- [15] On or about August 8, 2024, Mr. Akerberg brought a without notice application to add Top Line as a party to this family law matter, for disclosure of documents, and for third-party disclosure of documents. On September 17, 2024, his application to add Top Line as a party was dismissed, and the two disclosure applications were either dismissed or adjourned generally.
- [16] Apparently, Ms. Cheng returned Mr. Akerberg's dog to the breeder after he left Canada. He sued her for this sometime in late 2021, or early 2022, but abandoned the action in February 2022.
- [17] In the ANFC, in "Schedule 4-Property", at para. 1(B), Mr. Akerberg sets out "Other Property Claims". Included in the list of his other property claims are many items that are later repeated in "Schedule 5-Other Orders" to the ANFC, namely:
- a) lost income which he says he could have generated at Top Line;
 - b) \$4,521.42 that he alleges Ms. Cheng removed from his accounts without his consent. This claim is duplicative of para. 1(B)(f) in Schedule 4;
 - c) expenses related to retrieving his dog after Ms. Cheng allegedly gifted the dog out without his consent. This claim is duplicative of para. 1(B)(i) in Schedule 4;
 - d) his property not returned by Ms. Cheng;
 - e) alleged breaches of his privacy; and
 - f) an interlocutory and permanent injunction to prevent Ms. Cheng, her agents, or otherwise, from any publication of defamatory statements or any substantially similar defamatory expressions to the same effect, either directly or indirectly;
- [18] At paras. 18-32 of Schedule 5, Mr. Akerberg purports to set out a pleading in defamation. At para. 33-35 of Schedule 5, Mr. Akerberg pleads an action for breach of privacy.
- [19] Ms. Cheng's application deals with striking only some of the paragraphs set out in the ANFC. In the alternative, she submits that the ANFC should be struck as an abuse of process or as frivolous, scandalous, unnecessary, and/or vexatious. Application to Strike the Defamation and Breach of Privacy Claims Legal Principles
- [20] Rule 11-2 provides: Scandalous, frivolous or vexatious matters
- (1) At any stage of a family law case, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the family law case, or

- (d) it is otherwise an abuse of the process of the court, and the court may pronounce judgment or order the family law case to be stayed or dismissed and may order the costs of the application to be paid as special costs. Admissibility of evidence
- (2) No evidence is admissible on an application under subrule (1) (a).
- [21] What constitutes a "family law case" is set out in R. 1-1(1) of the Rules: "family law case" means a proceeding in which one or more of the following orders is sought:
 - (a) an order under the Divorce Act;
 - (b) an order under the Family Law Act; (b.1) a FHRMIRA [Family Homes on Reserves and Matrimonial Interests or Right Act] order;
 - (c) an order for annulment of marriage;
 - (d) an order,
 - (i) based on unjust enrichment or other trust claims, for an interest in property, or (ii) based on unjust enrichment, for compensation if the claim for the interest or compensation arises out of a marriage-like relationship;
 - (e) an order for adoption,
- [22] Rule 3-1(5) deals with joining claims and parties to a family law case: Joining claims and parties
- (5) A claim that, on its own, would not be the subject matter of a family law case may be brought in a family law case, and a person by or against whom any such claim is made may be added as a party in that family law case, if
 - (a) relief referred to in paragraph (a), (b), (c), (d) or (e) of the definition of "family law case" in Rule 1-1 is being sought in the family law case, and
 - (b) the claim is related to or connected with any of that relief.

Analysis

- [23] Although the term "Defamatory Statements" is capitalized in the ANFC it is not a defined term. The particulars of the pleading and the alleged defamatory statements are set out in paras. 18-32 of the ANFC.
- [24] Mr. Akerberg's only factual pleading in Schedule 5 in respect of his defamation claim is:
 - 18. The Respondent conducted the following actions:
 - a. Telephone calling the Claimant's friends and stating false allegations about him, such as falsely alleging that the Claimant sexually assaulted her and abandoned her with their child;

- b. On March 14, 2023, the Respondent sent out an email to the whole Vancouver Salmon Fishing Guides Association (hereinafter referred to as the VSFGA) and made-up false allegations about the Claimant and telling the members not to assist the Claimant; and
 - c. During the Spring of 2022, the Respondent told a top client that was attempting to book a charter that the Claimant had abused her and left her.
- [25] Mr. Akerberg's only factual pleading in Schedule 5 in respect of his breach of privacy claim is:
33. The Respondent further intentionally acted in a manner that she ought [to] have known violated the Claimant's privacy in the following ways:
- a. On July 12, 2021, the Respondent logged into the Claimant's online banking account and emptied his checking account;
 - b. On July 12, 2021, the Respondent closed a joint bank account with HSBC that the Claimant had access to;
 - c. On July 12, 2021, the Respondent made withdrawals from the Claimant's credit card;
 - d. On July 14, 2021, the Respondent signed off as the Claimant on a ICBC gift form; effectively gifting his car away to herself;
 - e. On July 16, 2021, the Respondent cancelled the Claimant's Rogers cell phone plan;
 - f. On July 20, 2021, the Respondent deleted the Claimant's company email address and locked him out of all business-related log ins;
 - g. On July 23, 2021, the Respondent took over the Claimant's Gmail account and locked him out; and
 - h. On July 23, 2021, the Respondent logged in via DocuSign at the fertility clinic where the Claimant stored his frozen sperm; booked an appointment for insemination; and then signed off as the Claimant.
- [26] The applicable test for striking a pleading on the grounds that it does not disclose a reasonable cause of action was set out in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17 [Imperial Tobacco]. A claim will only be struck if, assuming the facts pleaded to be true, the pleading discloses no reasonable cause of action. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial: *Imperial Tobacco* at para. 21.
- [27] The issue in this case is whether Mr. Akerberg's claims that Ms. Cheng libelled or slandered him, or that she breached his privacy, plainly and obviously do not disclose a reasonable cause of action.

- [28] I accept that as currently pled, Mr. Akerberg's pleading of defamation is deficient in a number of ways. For example, the words and/or writing complained of have not been specifically pled.
- [29] I also accept that Mr. Akerberg's breach of privacy claim, a tort, is not properly pled and that some of the conduct he complains of is not, in fact, a breach privacy.
- [30] However, the application before me is not to strike or to force an amendment of certain pleadings but to strike the causes of action as a whole under R. 11-2. I have concluded that Mr. Akerberg's claims of defamation and breach of privacy are ones that may be made in this action because they are related claims that may be joined under R. 3-1(5) involving the same parties. As pled, they may relate to Mr. Akerberg's ability to earn an income and to his claims for division of property. In any event, there is good reason to have all the issues alleged between the parties to this marriage dealt with in one proceeding. This is the case with pleadings in family cases that have included claims for compensation for injuries suffered as a result of family violence.
- [31] I cannot conclude that Mr. Akerberg's defamation and breach of privacy claims should be struck because they do not disclose a reasonable cause of action. I note that both such were successfully brought in *Nesbitt v. Neufeld*, 2010 BCSC 1605, aff'd 2011 BCCA 529, and a breach of privacy claim was brought in conjunction with family law litigation in *Bradford v. Bradford*, 2023 BCSC 877.
- [32] There are, however, pleading deficiencies. The family law action in this case is scheduled to go to trial in June of this year. The addition of the defamation and breach of privacy claims may well mean that the trial will not proceed as scheduled. As currently pled, these claims are deficient, and amendments may be sought. A responsive pleading will also have to be filed. The parties are encouraged to resolve these issues to preserve the trial dates.
- Application to Withdraw an Admission Legal Principles
- [33] Rule 9-6(6) of the Rules governs the withdrawal of admissions. It provides: Withdrawal of admission
- (5) A party is not entitled to withdraw
 - (a) an admission made in response to a notice to admit,
 - (b) a deemed admission under subrule (2), or
 - (c) an admission made in a pleading, petition or response to petition except by consent or with leave of the court.
- [34] The test for withdrawal of pleadings is set out in *Munster & Sons Developments Ltd. v. Shaw*, 2005 BCCA 564 at para. 10, citing with approval *Hamilton v. Ahmed*, 28 C.P.C. (4th) 139, 1999 CanLII 7029 (B.C.S.C.):

[10] The principles to be drawn from the authorities that govern an application to withdraw an admission of fact are perhaps best set out in *Hamilton v. Ahmed* (1999), 28 C.P.C. (4th) 139 (B.C.S.C.) ¶ 11:

1. That the test is whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact.
2. That in applying that test, all the circumstances should be taken into account including the following:
3. That the admission has been made inadvertently, hastily, or without knowledge of the facts.
4. That the fact admitted was not within the knowledge of the party making the admission.
5. That the fact admitted is not true.
6. That the fact admitted is one of mixed fact and law.
7. That the withdrawal of the admission would not prejudice a party.
8. That there has been no delay in applying to withdraw the admission.

[35] In *Sidhu v. Hothi*, 2014 BCCA 510, the Court modified the test as follows:

[25] Turning, then, to what I regard as the real issue in this case - whether the chambers judge erred in concluding that most of the *Hamilton* factors weighed in favour of the defendants - I would suggest it would be preferable to frame items 3-8 of the *Hamilton* test not as conditions that must be met, but as factors that should be considered in determining what result is in the interests of justice. Thus I would reframe items 3-8 as follows:

- (a) whether the admission was made inadvertently, hastily, or without knowledge of the facts;
- (b) whether the "fact" admitted was or was not within the knowledge of the party making the admission;
- (c) where the admission is one of fact, whether it is or may be untrue;
- (d) whether and to what extent the withdrawal of the admission would prejudice a party; and
- (e) whether there has been delay in the application to withdraw the admission and any reason offered for such delay. I have omitted item 6 of the original list (that the fact admitted be one of mixed fact and law), since in most cases, including *Hamilton* itself, this has been held to be irrelevant provided a triable issue is raised (see also [*Nesbitt v. Miramar Mining Corp.*, 2000 BCSC 187] at para. 56.)

[36] Rule 8-1(1) of the Rules permits a party to amend its pleadings after a notice of trial is served with leave of the court. This rule is relevant because the admission Ms. Cheng seeks to withdraw is contained in her response to family claim. As explained by Justice Butler in *G.G. v. M.A.*, 2013 BCSC 1834:

- [12] Pursuant to Rule 6-1(1) [now 8-1], a pleading may be amended after the issuance of a notice of trial only with leave of the court or by consent. The jurisprudence which developed under the former rule remains applicable to the current rule. Amendments should be allowed if they disclose a reasonable cause of action or defence unless reason exists for exclusion such as undue prejudice or delay: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.) at 27. Amendments should be granted liberally in order to enable the real issues to be determined and tried, unless actual prejudice can be demonstrated or the amendment would be useless: *Langret Investments S.A. v. McDonnell* (1996), 21 B.C.L.R. (3d) 145 (C.A.).
- [37] In *G.G.*, Justice Butler permitted the respondent to amend after he concluded his arguments at trial.
- [38] In *Cantelon v. Wall*, 2015 BCSC 813, the Court wrote:
- [6] Rule 8-1 of the Supreme Court Family Rules dictates this particular application and gives the court the discretion to allow an application to amend pleadings, and in this particular case the claimant's notice of family claim. When determining whether the court should exercise its discretion to permit such an amendment, the principles are well settled and have been so, in my view, since the decision in *Teal Cedar Products* (1996), 19 B.C.L.R. (3d) 282. That is, in determining whether it would be just and convenient to allow the amendment, all of the relevant factors and circumstances of the particular case are to be considered. As counsel for the claimant on this application has submitted, no one single factor is necessarily determinative of the issue and that the significant considerations are the length of delay, the reasons for the delay, and prejudice to the defendant.
- [7] Also, parties seeking to amend pleadings need to show that there is a reasonable cause of action if the amendment were granted. I agree that it is well settled that this is a low threshold.

Analysis

- [39] In her application, Ms. Cheng seeks to amend her position regarding the date of separation. Her admission is with respect to a question of mixed fact and law. I accept that Ms. Cheng believed that the date of separation was the date on which Mr. Akerberg left Canada for Sweden. I also accept that she now is aware that the separation date might be earlier when the police removed Mr. Akerberg from her home.
- [40] I am satisfied that Ms. Cheng should be permitted to withdraw her admission. In all the circumstances of this case, I conclude that there is a triable issue on the separation date which ought to be tried in the interests of justice. In this case, there are a number of different dates on which a separation might have occurred. It is not unusual for the date of separation to be determined in family proceedings when there is a dispute. It is a determination of mixed fact and law made by the trial judge, absent an agreement between the parties.

- [41] I accept that Ms. Cheng's admission as to the separation date was not made inadvertently but rather without a clear understanding that the date of separation might have been earlier. Although the test in British Columbia for the withdrawal of an admission does not focus on inadvertence or haste, it is a relevant factor. Ms. Cheng has had an opportunity to seek specific advice about the separation date and now understands that it may have been earlier. She should be permitted to make submissions and to ask the trial judge to determine the separation date, based on her amended pleading.
- [42] There is no prejudice to Mr. Akerberg by allowing the amendment sought by Ms. Cheng. He will be able to give evidence and make submissions about the separation date at trial. Costs
- [43] I did not hear submissions on costs. I would be inclined to make an order for costs in the cause for two reasons. First, there was mixed success on the application. Second, even though I have permitted Mr. Akerberg's pleadings in defamation and in breach of privacy to stand, amendments will be required, and the legal issues may not be determined in his favour.
- [44] I have not dealt with the other specific additions to the ANFC because no specific submissions were made with respect to them and because they are issues that will likely be considered in the division of property to be addressed at trial. "MacNaughton J."

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