

CANADA / JUDGMENT

He v. Fan

2024 BCSC 1728

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1728 He v. Fan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

He v. Fan,

2024 BCSC 1728

Date: 20240918

Docket: E94111

Registry: Nanaimo

Between:

Yuxi He

Claimant

And

Bing Wu Fan and 0692925 B.C. Ltd.

Respondent

Before: The Honourable Madam Justice Sukstorf

Reasons for Judgment

Counsel for the Claimant:

D. Henderson

J. Li

Counsel for the Respondents:

S.K James Chen

Place and Date of Hearing:

New Westminster, B.C.

June 19, 2024

Place and Date of Judgment:

Nanaimo, B.C.

September 18, 2024

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I. Background

[1] The claimant, Yuxi He ("Ms. He"), is the former spouse of the respondent, Bing Wu Fan ("Mr. Fan"). They were married and divorced four times in China between May 9, 2012, and June 28, 2021.

- [2] During their relationship, they bought a number of Canadian Properties, of which one is located at 121 Bastion Street, Nanaimo, British Columbia, V9R 3A2 (the "Property"). This Property is the subject of the ongoing dispute.
- [3] The respondent, 0692925 B.C. Ltd. ("069"), a company duly registered under the laws of British Columbia, Canada, is the holding company for the Property. 069 owns and operates a hostel at the Property under the name Painted Turtle Guesthouse (the "Guesthouse").
- [4] According to Ms. He, the purchase of 069 was completed on September 9, 2019, while the parties were still married. The purchase price was largely funded by Ms. He's excluded property.
- [5] 069 has one business account, with CIBC (the "Business Account").
- [6] In September 2019, Ms. He was in China after giving birth to her youngest child and could not execute the completion paperwork in person. Therefore, Mr. Fan registered himself as the sole shareholder and director of 069.
- [7] On or around November 1, 2021, Ms. He also became a director of 069.
- [8] The parties were last divorced in China on June 28, 2021, by agreement (the "Divorce Agreement"). In their Divorce Agreement, Ms. He was to retain the Guesthouse as her property.
- [9] The Divorce Agreement was drafted under Chinese Law, and filed with the local government authority in Cangzhou, Hebei, China.
- [10] In July 2021, Mr. Fan breached the Divorce Agreement by refusing to transfer his interest in 069 to Ms. He.
- [11] On August 12, 2021, Ms. He commenced this family action to enforce the Divorce Agreement regarding the relevant assets in Canada.
- [12] On August 27, 2021, Ms. He obtained a Mareva Injunction Order and a Restraining Order prohibiting Mr. Fan from disposing of or transferring the business assets and funds related to 069.
- [13] In or about October 2021, the parties reached a settlement wherein Ms. He would vacate the injunctive orders and Mr. Fan would transfer 069 to Ms. He.
- [14] Although Mr. Fan added Ms. He as a director of 069 as of November 1, 2021, he refused to sign the share transfer documents and subsequently unilaterally removed Ms. He as a director in March 2023.
- [15] On May 15, 2023, Mr. Fan filed both a response to the family claim and a counterclaim. Mr. Fan disputed both the validity of the Divorce Agreement and Ms. He's right to 069.

[16] On or around May 18, 2023, the parties entered into a consent order (the "Consent Order") which reads as follows:

Pursuant to section 91 of the Family Law Act, S.B.C. 2011, c. 25, the Claimant, Yuxi He shall be restrained from disposing, transferring, converting, or exchanging to another form the property and liquid assets, and business income from the Respondent Corporation or the Painted Turtle Guesthouse in Nanaimo, British Columbia, other than for legitimate business expenses authorized in writing by the Respondent [Mr. Fan] or authorized by further order of the Court.

[17] On or around July 27, 2023, upon hearing parties' submission, Master Dick issued the following order (the "Jul/2023 Order"), inter alia:

1. Pursuant to section 222 and 227 of the Family Law Act S.B.C. 2011, c.25, an order that the Claimant, Yuxi He, is not to attend within 200 meters of the property at 121 Bastion St., Nanaimo, BC, V9R 3A2 and cease all activities in relation to the operations of 0692925 B.C. Ltd ("069") including but not limited to:
 - a. Receiving payments from 069's clients;
 - b. Offering services in 069's name;
 - c. Purporting to be an employee of 069;
 - d. Performing managerial and administrative duties for 069; and
 - e. Directly or indirectly communicate with the employees, manager, or agents of 069, including but not limited to those working at the Painted Turtle Guesthouse.

[18] Master Dick also ordered Mr. Fan to pay Ms. He monthly spousal support of \$2,000 from the Business Account, subject to further written agreement between the parties or a court order.

[19] In September 2023, Ms. He posted a photo of herself handling cash and another photo of her socializing with an employee of 069, Ms. Xiaoxian Long.

[20] On October 11, 2023, Mr. Fan brought a contempt application against Ms. He ("Mr. Fan's Contempt Application").

[21] On October 23, 2023, Justice Verhoeven issued an ex parte order (the "Oct/2023 Order") temporarily dispensing with the need for Ms. He's signature to authorize legitimate business expenses related to the operation of 069.

[22] On November 22, 2023, Mr. Fan applied to extend the dispensation order (the "New Dispensation Application").

[23] On October 25, 2023, Ms. He filed a cross application for contempt ("Ms. He's Contempt Application") based on Mr. Fan's alleged breaches of the Jul/2023 Order.

- [24] The three applications: Mr. Fan's Contempt Application, the New Dispensation Application, and Ms. He's Contempt Application were all scheduled to be heard together on December 4, 2023.
- [25] On December 4, 2023, Justice Marzari issued an order (the "Dec/2023 Order") stating all three applications were adjourned generally. The applications were adjourned due to the identification of a conflict of interest arising from Mr. Fan's counsel acting for both the respondents, Mr. Fan and 069. There were also allegations that Mr. Fan's legal counsel facilitated Mr. Fan's breaches of the Jul/2023 Order.
- [26] On December 4, 2023, Justice Marzari further ordered that both Ms. He and Mr. Fan must authorize, by signature, any expenditures for 069, thereby reversing the Oct/2023 Order.

II. Current Application

- [27] On May 28, 2024, Ms. He filed an additional notice of application which raises, again, a request for declarations that Mr. Fan is in contempt ("Ms. He's May 28/2024 Contempt Application"). As mentioned above, Ms. He's original Contempt Application was adjourned generally on December 4, 2023. Ms. He's May 28/2024 Contempt Application is complicated and she seeks a number of additional orders.
- [28] On May 30, 24, Ms. He filed an additional notice of application ("Ms. He's May 30/2024 Application") which requests, among other things, for Mr. Fan to disclose correspondence and banking records.
- [29] With respect to the allegations of contempt against Mr. Fan, Ms. He alleges that Mr. Fan intentionally disobeyed both the Jul/2023 Order and the Dec/2023 Order through various breaches. Ms. He further asserts that Mr. Fan intends to continue breaching these orders.
- [30] In Ms. He's May 28/2024 Contempt Application, Ms. He seeks a declaration that Mr. Fan is in contempt of terms 2, 4, and 6 of the Jul/2023 Order.
- [31] In Ms. He's May 28/2024 Contempt Application, she also seeks a declaration that Mr. Fan is in contempt of terms 2 and 4 of the Dec/2023 Order.
- [32] Pursuant to Rule 21-7(1) of the Supreme Court Family Rules, Ms. He seeks an order that Mr. Fan pay her a fine of \$1,000.00 for each breach of the above stated orders, within three business days of this Court making an order.
- [33] On June 7, 2024, Mr. Fan filed responses to Ms. He's two May 2024 applications ("Mr. Fan's June/2024 Response").
- [34] In Mr. Fan's June/2024 Response, Mr. Fan seeks to exclude all those statements he made to Ms. He's counsel, Mr. Jonathan Li, between March 5, 2024, and April 22, 2024, when he was a self-represented litigant without counsel (the "Self-Rep Period").

- [35] Mr. Fan argues that, during the Self-Rep Period, he provided certain evidence to Ms. He's counsel without being advised of his rights to retain and instruct counsel, to remain silent, and to be protected by the principles of fundamental justice under the Canadian Charter of Rights and Freedoms [Charter].
- [36] During this Self-Rep Period, Mr. Fan contends that Mr. Li, was in direct communication with Mr. Fan. It is Mr. Fan's position that Mr. Li obtained statements from him that were directly relevant to Ms. He's Contempt Application of October 25, 2023. Mr. Fan states that Mr. Li did not inform him that Ms. He was still actively pursuing the contempt proceeding, nor did he inform him that Mr. Fan was facing contempt proceeding with a fine and committal as possible consequences.
- [37] Mr. Fan further argues that Mr. Li knew or should have known that Mr. Fan had little or no knowledge of the English language, and that he was a temporary resident of Canada based on a visitor visa.
- [38] Mr. Li did not urge Mr. Fan to seek independent legal advice, nor did he advise Mr. Fan of his right to seek counsel and his right to remain silent.
- [39] Mr. Fan's Self-Rep Period between March 5 and April 22, 2024, was caused in part by the conflict of interest that Ms. He's counsel argued before the court on December 4, 2023.
- [40] Due to the above, Mr. Fan argues that the following sections of the affidavits, relied upon by Ms. He, contain evidence given by Mr. Fan during the Self-Rep Period in breach of his Charter rights:
- a) Affidavit #1 of Zipei Li dated May 14, 2024 (except Exhibit A);
 - b) Exhibit C of Affidavit #2 of Huiying Liao dated April 11, 2024 ("Liao Affidavit");
 - c) Exhibit D of Liao Affidavit; and
 - d) Exhibit E of Liao Affidavit.
- [41] Mr. Fan further asks the Court to stay the production of correspondence and bank accounts as sought in Ms. He's May 30/2024 Application.
- [42] Based on the Charter, Mr. Fan also seeks leave to cross-examine the following affiants:
- a) Zipei Li, a.k.a. Jonathan Li (if his Affidavit #1 is not excluded as sought at para. 18(a) above);
 - b) Yuxi He;
 - c) Dhiraj Kumar; and
 - d) Xiaoxian Long.
- [43] Both parties are seeking costs related to the above applications.

- [44] The parties were heard on June 19, 2024. However, due to time constraints, the Court only heard Mr. Fan's request for a voir dire. Based on the principles of *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193, 1996 CanLII 1005 (B.C.C.A.) [Vukelich], and pursuant to s. 24(2) of the Charter, Mr. Fan seeks a voir dire to determine the admissibility and/or exclusion of statements he made to Ms. He's legal counsel. Ms. He is relying on Mr. Fan's statements to advance her allegations of contempt.
- [45] In assessing whether to conduct a voir dire as requested, the Court reviewed and considered the written and oral submissions from counsel. In doing so, I assumed that the facts pleaded were true in determining whether there was a reasonable basis to find that a Charter breach had occurred, and if a breach had occurred, whether the breach could lead to the exclusion of the statements.

III. Legal Basis

A. Voir Dire

- [46] The test for whether a court should hold a voir dire is established in *Vukelich*, where the British Columbia Court of Appeal clarifies that a voir dire should only be granted if the party requesting can show a reasonable likelihood that it would assist in determining the issues before the court. The party must also show that the remedy sought could reasonably be granted. This principle is reinforced in *R. v. Cody*, 2017 SCC 31, which requires judges to exercise discretion in filtering out unnecessary evidentiary hearings.
- [47] The court in *R. v. Frederickson*, 2018 BCCA 2, nicely summarizes the principle that there is no absolute right to a voir dire. As highlighted by Justice Fisher:
- [26] There is no absolute right to a voir dire. The purpose of a *Vukelich* hearing is to filter out proposed pre-trial applications where the remedy sought could not reasonably be granted, as shown by submissions of counsel, assuming the allegations could be proven: M.B. at para. 45. Whether an appropriate foundation can be laid in any given case is contextual. Generally, to justify a voir dire alleging a breach of the Charter, the applicant must be able to demonstrate a reasonable basis on which the court could find a breach: *R. v. McDonald*, 2013 BCSC 314 at para. 18; *R. v. Malik*, 2002 BCSC 484 at para. 4.

B. The Law of Contempt

- [48] The broader powers of the court concerning contempt are generally found in the inherent jurisdiction of the court and in Rule 22-8 of the British Columbia Supreme Court Civil Rules. Rule 22-8 specifically provides the framework for contempt proceedings and sets out the procedures for bringing a contempt application. The court has the power to impose sanctions such as fines, imprisonment, or other orders necessary to ensure compliance.

- [49] Further, Rule 21-7 of the Supreme Court Family Rules governs contempt applications in the family law context. The leading case authority on contempt in family proceedings is *Carey v. Laiken*, 2015 SCC 17. At paras. 33-35, the Supreme Court of Canada (the "SCC") outlines the three elements that an applicant must prove beyond a reasonable doubt:
1. the order alleged to have been breached is clear;
 2. the party alleged to have breached the order had actual knowledge of it; and
 3. the party alleged to have breached the order must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.
- [50] In family law matters involving the non-payment of support, a fourth element, which is the ability to comply, must also be proven: *Swann v. Swann*, 2009 BCCA 335 at para. 10.
- [51] However, the court's power to hold someone in contempt should be exercised sparingly and not used routinely to enforce court orders: *Carey* at para. 36.
- [52] Given that the court has the power to impose imprisonment, contempt proceedings are considered quasi-criminal in nature, requiring both an *actus reus* (a wrongful act) and *mens rea* (a guilty mind) for a finding of guilt. The strictest interpretation of the law also applies. This means that the evidence presented in support of a contempt application must meet the standards of admissibility used in criminal trials. Consequently, affidavits submitted for contempt applications cannot contain hearsay, opinions, conclusions, or similar elements: *Heisler v. Heisler*, 2012 BCSC 753 at para. 125.
- [53] There is also a presumption of innocence. If the order alleged to be violated is unclear, the person accused of contempt is entitled to the most favourable interpretation. In short, Mr. Fan is presumed to be innocent and that presumption remains until, on the evidence before the court, the court is satisfied beyond a reasonable doubt that he is guilty.

C. Contempt and the Charter

- [54] Mr. Fan's primary argument is that the statements he made during the Self-Rep Period to Ms. He's counsel, Mr. Li, violated his Charter rights, particularly his s. 10(b) right to counsel. He argues that the statements that are set out in the referenced affidavits should therefore be excluded.
- [55] In setting out the applicable legal framework, it is helpful to begin with a review of *Workers' Compensation Board of British Columbia v. Seattle Environmental Consulting Ltd.*, 2020 BCCA 365 [Seattle]. At para. 14, the Court of Appeal confirmed that Charter protections apply to contempt proceedings:

It is common ground that a contempt proceeding, even one involving civil contempt as in the present case, is quasi-criminal in nature, engaging the principles of fundamental justice and Charter protections. This is because civil contempt can attract criminal consequences, including a custodial sentence

[56] However, the application of specific Charter rights will depend upon the facts and context of the situation. Not all breaches of Charter rights will lead to an exclusion of evidence or of statements made.

[57] Mr. Fan asserts that Mr. Li breached his Charter rights by not advising him of his right to counsel. However, the s. 10(b) Charter right to retain and instruct counsel is only triggered when an individual is either arrested or detained. Section 10(b) reads as follows:

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right;

[Bold in original, underline emphasis added.]

[58] Section 10(b) of the Charter ensures that upon arrest or detention individuals are aware of their legal rights and can seek legal representation to navigate the complexities of the legal system effectively.

[59] In the event that an individual's s. 10(b) Charter right is breached, it can lead to the exclusion of evidence under s. 24(2) of the Charter. Section 24(2) allows a court to exclude evidence obtained in a manner that infringes on an individual's Charter rights if admitting that evidence would bring the administration of justice into disrepute. If an individual is not informed of their right to counsel or is denied access to legal representation during a period of arrest or detention, then evidence obtained as a result of the breach may be deemed inadmissible, as it undermines the fairness of the legal process and the integrity of the justice system. However, the s. 10(b) Charter right to counsel only becomes engaged when an individual has been placed under physical or psychological restraint or has been arrested. This is not the case here.

[60] In contrast, procedural rights that do not fall under the specific protections set out in the Charter, such as certain administrative or procedural guarantees, typically do not trigger the same exclusionary principles enumerated in s. 24(2) of the Charter.

[61] As stated in *Vale v. USWA Local 6500*, 2010 ONSC 3039 at para. 3, an alleged contemnor faced with civil contempt is traditionally afforded certain procedural protections, which have included the following:

(1) The right to be provided with particularized allegations of the contempt;

(2) The right to a hearing;

- (3) The right to be presumed innocent until such time as guilt is proved beyond a reasonable doubt;
 - (4) The right to make full answer and defence, including the right to retain and instruct counsel, the right to cross-examine witnesses and the right to submit or call evidence;
 - (5) The right not to be compelled to testify at the hearing.
- [62] The above recognized procedural rights relate to the conduct of hearings or to other processes that do not directly impact an individual's fundamental rights. Thus, any breaches in those areas are less likely to lead to the exclusion of evidence.
- [63] As explained in *Vale*, Mr. Fan is entitled to consult with legal counsel and have them represent him during the proceedings. This should not be confused with the s. 10(b) right to counsel that is specifically set out in the Charter which, if breached, may lead to a remedy under s. 24(2) of the Charter.
- [64] While both rights emphasize the importance of legal counsel, s. 10(b) focuses on the immediate rights related to arrest or detention, while the right to counsel during a hearing encompasses ongoing legal representation throughout the judicial process.
- [65] The distinction lies in the severity and nature of the rights involved. Breaches of s. 10(b) directly affect an individual's ability to defend themselves and uphold their legal rights, which warrants a more stringent response including potential evidence exclusion. Conversely, procedural breaches may not carry the same weight in compromising the fairness of the trial as the breach can often be resolved by adjourning the trial until an accused person can consult with counsel.

D. Statements Made Contrary to Charter Rights

- [66] Statements made by individuals are considered admissions, and, as such, may be admissible for the truth of their contents. When statements are made to ordinary persons such as friends, colleagues or family members, they are presumptively admissible without the necessity of a voir dire.
- [67] The appropriate process for evaluating the admissibility of a statement such as the statements identified by Mr. Fan, is set out in *R. v. Hodgson*, [1998] 2 S.C.R. 449, 1998 CanLII 798 [Hodgson], which the SCC had occasion to apply later in the case of *R. v. Grandinetti*, 2005 SCC 5. At para. 37 of *Grandinetti*, Justice Abella, described the appropriate process and test as follows:

In *Hodgson*, the Court delineated the process for assessing whether a confession should be admitted. First, there is an evidentiary burden on the accused to show that there is a valid issue for consideration about whether, when the accused made the confession, he or she believed that the person to whom it was made was a person in authority. A "person in authority" is generally someone engaged in the arrest, detention, interrogation or prosecution of the accused. The

burden then shifts to the Crown to prove, beyond a reasonable doubt, either that the accused did not reasonably believe that the person to whom the confession was made was a person in authority, or, if he or she did so believe, that the statement was made voluntarily. The question of voluntariness is not relevant unless the threshold determination has been made that the confession was made to a "person in authority".

- [68] This two-step test is often referred to as the confessions rule. If it is determined that the recipient of the statement is a person in authority then the prosecution or, in this case, the party raising the contempt application, bears the burden of proving the voluntariness of the statement beyond a reasonable doubt. Ms. He therefore bears the burden on proving voluntariness in this case.
- [69] The common law rule for the determination of voluntariness is defined by the Supreme Court of Canada in *R. v. Oickle*, 2000 SCC 38 [Oickle].
- [70] Oickle holds that in order for a statement made to a person in authority to be admissible the Crown must establish beyond a reasonable doubt that the statement was voluntary. As stated at para. 15, a statement is voluntary only if it was made without the influence of "either 'fear of prejudice' or 'hope of advantage' held out by a person in authority." The statement must also be made by an operating mind, and per para. 69 there must not be "police trickery that unfairly denies the accused's right to silence."
- [71] The voluntariness of a statement is determined almost entirely by context. Because of the complex interplay of circumstances that could vitiate voluntariness, a trial judge must consider all the circumstances surrounding the statement and ask whether they raise a reasonable doubt of the voluntariness of the statement

E. Is there any other authority whereby Mr. Fan's statements could be excluded?

- [72] Hodgson recognizes that there may be discretion for judges to exclude statements made to private citizens, even if the individual receiving the statement does not meet the "person in authority" requirement of the common law confessions rule.
- [73] In Hodgson, notwithstanding the Court's expressed views on who is a person in authority, the SCC held at para. 30 that statements obtained through oppression or threats of violence by a private citizen (i.e. not a person in authority) are admissible, but should be accorded very little weight, if any, by the trier of fact.
- [74] In *R. v. Wells*, 2003 BCCA 242 [Wells], the British Columbia Court of Appeal also indicates that it would have been open to the trial judge to exclude the appellant's confession from evidence on common law principles, based on the potential prejudicial effect of the unreliable confession outweighing its probative value.

[75] In Wells, the court states that evidence may be excluded pursuant to the court's common law discretion to ensure a fair trial, or under section 24(1) of the Charter, if the admission of the evidence would violate the accused's right to a fair trial under s. 11(d) or the principles of fundamental justice under s. 7 of the Charter.

IV. Issue

[76] The determination as to whether a voir dire should be held to determine the admissibility of the statements in question is based on the oral and written submissions of counsel: R. v. Orr, 2021 BCCA 42R at paras. 57-58.

[77] My assessment is based strictly on whether there are reasonable grounds that the Court could find a breach of the Charter that would lead to the exclusion of the statements sought.

[78] In deciding on this narrow issue, I reviewed the following questions:

- a) Was Mr. Li a person in authority or a person that Mr. Fan reasonably believed could influence or control the proceedings against him? If the Court determines that the statement was not made to a person in authority, then as set out above, the statements are presumptively admissible.
- b) If the court determines that Mr. Li was a person in authority or Mr. Fan reasonably believed that he could influence or control the proceedings against him, were the statements voluntary? In assessing whether the statements were voluntary, the court must hold a voir dire.
- c) Were the statements obtained in violation of a Charter or other common law right such that their admissibility would bring the administration of justice into disrepute?

V. Analysis

A. Was Mr. Li a person in authority or a person that Mr. Fan reasonably believed could influence or control the proceedings against him?

[79] The essence of Mr. Fan's position is that the statements he made to Ms. He's lawyer, Mr. Li, violated his Charter rights and must not be used against him. His argument is based on the suggestion that Mr. Li was a person in authority and since Mr. Li did not advise Mr. Fan of his right to counsel while Mr. Fan was self-represented, the statements made to Mr. Li should be excluded.

[80] Under Hodgson, a person in authority is generally someone involved in the detention, arrest, interrogation, or prosecution of the accused. Typically, this refers to police officers or state actors, not private counsel in civil proceedings.

- [81] The test to determine if an individual is a person in authority has both an objective component, focused on the person's formal role, as well as a subjective component, which considers the accused's reasonable belief about that person's authority: Hodgson at para. 48. This balances the competing principles underlying the confessions rule.
- [82] The first step is to examine the objective status of the person to whom the statement was made. This person must be formally engaged in the arrest, detention, examination, or prosecution of the accused. This includes formal representatives and agents of the state.
- [83] To support the position that Mr. Li was a person in authority Mr. Fan relies upon the Article 2.1 of the Law Society of British Columbia Code of Professional Conduct for British Columbia that says "A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession."
- [84] However, in general, lawyers are independent from the state and consequently, cannot be agents of the state except if expressly retained by the state, such as Crown counsel. In *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, the SCC affirms the independence of the legal profession from the state, establishing that they are not part of the state apparatus nor are they persons in authority on behalf of the state. At para. 98-99, the SCC endorses that an "independent bar" is "one of the hallmarks of a free society" and lawyers must be "free from state interference, in the political sense, with the delivery of services to the individual citizens."
- [85] Mr. Li is not Crown counsel and although he is an officer of the court, he holds no prima facie or direct role as an agent of the state or a person in authority. Nonetheless, appreciating the unique facts with respect to the offence, I considered the degree of Mr. Li's involvement and his authority in the quasi-criminal contempt proceeding before the Court.
- [86] Mr. Li represents Ms. He who is the party initiating the proceedings against Mr. Fan to enforce the court order. Mr. Li's role includes advising Ms. He on the merits of her contempt claim, gathering evidence, filing the necessary documents, and advocating for Ms. He's interests in court.
- [87] As Ms. He's lawyer, Mr. Li has a fiduciary duty to act in her best interests, providing competent and diligent representation. This includes maintaining confidentiality, avoiding conflicts of interest, and communicating effectively. Mr. Li acts as an advocate. His authority is limited to legal representation and ensuring that Ms. He's position is effectively communicated to the Court.
- [88] In representing Ms. He in the civil contempt proceeding, Mr. Li does not have the power to enforce compliance of a court order. The court is the authority that determines whether contempt has occurred based on the evidence presented.

- [89] In addition, there is no evidence before me to suggest that Mr. Fan ever believed that Mr. Li could influence or control the proceedings against him. Mr. Fan received Ms. He's Contempt Application in October 2023, when he was represented by legal counsel. As a result, he either knew, or ought to have known, of Mr. Li's role as an advocate for Ms. He.
- [90] Further, I note that at bottom of one of the first email exchanges between Mr. Li and Mr. Fan most of which is written in both English and Mandarin that Mr. Li includes at the bottom of his March 12, 2024 email, "We only represent Ms. He's interest and encourage you to hire a new lawyer as soon as possible, as the Judge told you yesterday. Thank you."
- [91] In this context, I find that, in British Columbia family law civil contempt proceedings, the lawyer for the opposing party does not qualify as a "person in authority" under the confessions rule. The "person in authority" test should not be overly broad or subjective, as that could undermine the principles behind the confessions rule.
- [92] The underlying rationales for the confessions rule involve ensuring reliability and preventing unfair state coercion. These underlying rationales are less engaged when the statement is made to a private party's lawyer in a civil contempt proceeding. This distinction is important for applying the confessions rule appropriately.
- [93] Mr. Fan has failed to prove either objectively or subjectively that Mr. Li is a person of authority as both formal state involvement and Mr. Fan's reasonable perception of Mr. Li's authority are absent.
- [94] Even if the court did determine that Mr. Li was a person in authority, the court would then proceed to assess the voluntariness of the statements.

B. If the court determines that Mr. Li was a person in authority or Mr. Fan reasonably believed that he could influence or control the proceedings against him, were the statements voluntary? In assessing whether the statements were voluntary, the court must hold a voir dire.

- [95] As explained above, unless there has been a threshold determination that the statements were made to a "person in authority," the question of voluntariness is not relevant, and a voir dire is not required. I have determined that Mr. Li was not a person in authority, but I think it is helpful to explain that, even if I erred, Mr. Fan's statements would still be admissible.
- [96] The voluntariness of a statement is determined almost entirely by context. Because of the complex interplay of circumstances that could vitiate voluntariness, a trial judge must consider all of the circumstances surrounding the statement and ask whether they raise a reasonable doubt.
- [97] If I had determined that Mr. Li was a person in authority, the onus would have been on Ms. He to prove beyond a reasonable doubt that Mr. Fan's statements were made voluntarily. Proving the voluntariness of a statement is most often done by introducing evidence of witness testimony, documents, video recording, or audiotaped recording. The purpose of this evidence is to prove that the person giving the statement had an operating mind and

was not tricked, unduly influenced by inducements or oppression, under duress, coerced, or the subject of improper influence.

- [98] However, given that I found that Mr. Li was not a person in authority, and most of the statements made by Mr. Fan were in emails, written in both English and Mandarin, I find no evidence that might suggest that Mr. Fan's statements made to Mr. Li were not made voluntarily.
- [99] The context of Mr. Fan's communication with Mr. Li indicate that Mr. Fan was not under any psychological or physical restraint when communicating with Mr. Li., and that Mr. Fan was not arrested or detained. The submissions of counsel do not suggest evidence that Mr. Li improperly induced, coerced, or tricked Mr. Fan into making any statements. Without such evidence, there is no basis to argue that the statements should be excluded.
- [100] It is also Mr. Fan's position that since he had little or no knowledge of the English language and was a temporary resident of Canada on a visitor visa that the statements were not made voluntarily. I considered this argument and find that Mr. Fan's limited English language skills is insufficient to suggest that there is a reasonable prospect of success in proving that there was duress, coercion, or improper influence. In addition, I note that at the time the email statements were made to Mr. Li, that most of the email communication was written in Mandarin, Mr. Fan's native language.

C. Were the statements obtained in violation of a Charter or other common law right such that their admissibility would bring the administration of justice into disrepute?

- [101] While the common law confessions rule does not typically require the exclusion of statements made to private citizens, judges have discretion to exclude such statements if their procurement would result in an unfair trial. This discretion may be exercised based on either common law principles or Charter protections, particularly where the prejudicial impact of the evidence outweighs its probative value.
- [102] In this case, although Ms. He is not seeking Mr. Fan's incarceration, the contempt proceedings still carry quasi-criminal consequences, which include the potential for imprisonment. This raises the question of whether certain Charter protections should apply in this context and what remedies exist if his rights were violated.
- [103] In supporting his argument that the evidence should be excluded because his Charter rights were breached, Mr. Fan relies upon the following para. from *Hayes Forest Services Ltd. v. Forest Action Network*, 2003 BCSC 1444 [Hayes]:

- [82] An alleged contemnor therefore must be treated fairly and accorded the equivalent of his or her Charter rights and protections. These protections include, not necessarily in the order of importance: the presumption of innocence; the right to know specifically what is alleged by way of the contempt; the right to counsel; the right to cross-examine witnesses, if any; the right to give evidence or to refuse to testify; the right to call witnesses; the right to make submissions on guilt and punishment; and proof beyond reasonable doubt.
- [104] In Hayes, the alleged contemnor was granted Charter-equivalent protections, such as the right to counsel and the presumption of innocence. However, Hayes involved criminal contempt, where the contemnor was repeatedly arrested, detained, and imprisoned for violating court orders. The heightened Charter protections applied in Hayes were due to the state's involvement in arresting and detaining the contemnor.
- [105] In contrast, Mr. Fan has never been arrested or detained. The contempt proceeding initiated by Ms. He is civil in nature and does not automatically trigger the full spectrum of Charter protections available in criminal contempt cases. Mr. Fan's Self-Rep Period does not meet the legal threshold of arrest, detention, or imprisonment that would invoke these protections.
- [106] Relying on the case of *R. v. Sinclair*, 2010 SCC 35 [Sinclair], Mr. Fan argued that in speaking to Mr. Li, he should have been instructed on his right to remain silent and his right to counsel. However, Sinclair dealt with an accused detained by the police, which is a clear state authority, and Mr. Sinclair's detention automatically triggered his section 10(b) Charter rights. In the facts of this case, Mr. Li is not a state actor and Mr. Fan was not arrested or detained. The facts are simply not comparable.
- [107] More interestingly though, Sinclair confirms that while an accused's has the right to remain silent, this right does not mean that the person has a right not to be spoken to at all.
- [108] In Sinclair, Mr. Sinclair had the opportunity to speak to a lawyer following his arrest. After speaking to the lawyer, Mr. Sinclair was interviewed by the police for about five hours and repeatedly stated that he had nothing to say and wanted to speak to his lawyer again. His requests were refused. During interrogation, Mr. Sinclair eventually confessed to the murder. Mr. Sinclair was then placed in a cell with an undercover officer, where he made further incriminating statements. At trial, the judge ruled that Mr. Sinclair's statements, including the confession, were admissible as there was no breach of Mr. Sinclair's s. 10(b) Charter right to counsel.
- [109] On appeal, the majority at the SCC held that s. 10(b) of the Charter does not require the continuous presence of a lawyer during custodial interrogation. The majority concluded that Mr. Sinclair's s. 10(b) right to counsel was not violated, as the initial opportunity to consult a lawyer was sufficient, and there were no changes in circumstances that would warrant an additional discussion with counsel.

- [110] What is relevant to Mr. Fan's case is the guidance from the SCC in *Sinclair* which confirms that there are limitations to the right to counsel and that the right to counsel is not a continuous right, even when a person is under detention.
- [111] The submissions before me suggest that Mr. Fan had legal counsel up until the Self-Rep Period, but most importantly, he consulted and was represented by counsel when Ms. He's Contempt Application was originally filed against him. He understood the jeopardy he was facing. The submissions also suggest that Mr. Fan filed his own contempt application (Mr. Fan's Contempt Application) prior to Ms. He filing her cross application.
- [112] Consequently, based on the submissions, I can infer that Mr. Fan had been informed of the allegations of contempt against him and had the opportunity to discuss the implication of the contempt application with his counsel. Given the multiple proceedings that unfolded in 2023, there could have been no mistake that Mr. Li was representing Ms. He and that Mr. Li received his instructions from her.
- [113] While contempt proceedings can engage Charter rights due to their quasi-criminal nature, the application of these rights is highly contextual and varies depending on the circumstances of the case. The fact that Mr. Fan was a self-represented litigant does not meet the legal threshold required to invoke s. 10(b).
- [114] In this case, Mr. Fan not only had counsel both prior to and after the Self-Rep Period, there is no evidence to suggest that he was restrained from seeking legal representation during the Self-Rep Period. The absence of legal representation during the Self-Rep Period does not amount to a Charter breach.
- [115] Mr. Fan also raised the argument that his right to silence under s. 7 of the Charter was violated.
- [116] In *R. v. Singh*, [2007] 3 S.C.R. 405 [Singh], the SCC clarifies the scope of the right to silence under s. 7 of the Charter. *Singh* focuses on the intersection between s. 7 as defined in *R. v. Hebert*, [1990] 2 S.C.R. 151, and the common law voluntary confessions rule as restated in *Oickle*. In *Hebert*, the SCC outlines the s. 7 right to silence and confirms that as long as the police are not posing as undercover officers and the accused chose to volunteer information, there will be no Charter violation. As long as police persuasion does not deny the suspect the right to choose or deprive him of an operating mind, it does not breach the right to silence.
- [117] In *Singh*, the majority emphasizes that when comparing the common law confessions rule to the s. 7 right to silence, a finding of voluntariness is decisive to resolve a s. 7 claim. If the Crown can establish beyond a reasonable doubt that the statement was voluntary, there is no Charter violation of the right to silence concerning that statement. The majority also held that the decision in *Oickle* enhances rather than overrides the s. 7 right to silence. The SCC also notes that, under common law, the confessions rule safeguards against potential state abuse of a detained suspect, which is also a concern under the Charter.

[118] Based on my assessment of the voluntariness of Mr. Fan's statements, I find that Mr. Fan's Charter claim asserting that his statements were obtained in violation of his pre-trial right to silence under s. 7 has no reasonable chance of success.

[119] The case of *Lessard v. Mahoney*, 2019 BCSC 551, which deals with contempt in the family law context is instructive to Charter claims in the civil contempt context. In *Lessard* the Court adjourned the application to find Mr. Mahoney in contempt of child support orders. At para. 106, relying on *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 at para. 35, and *Potratz v. Potratz*, 2015 BCSC 1608 at paras. 142-148, the Court noted that:

criminal law protections are afforded to a party against whom a contempt order is sought. These protections include the right not to be compelled to be a witness against oneself when charged with contempt where there is the possibility of incarceration - i.e. the right to stay silent -- as set out under s. 11(c) of the [Charter].

[120] At paras. 112-112, the Court in *Lessard* also found that the parties failed to address whether "Mr. Mahoney's s. 11(c) rights are engaged in this proceeding; whether he was or was not compelled as a witness; whether his right to remain silent in the face of this contempt application has been infringed." In light of these shortcomings, the Court decided that "as a matter of fairness", it could not proceed on the contempt application. Importantly, in *Lessard*, the remedy awarded was an adjournment, not an exclusion of evidence. In light of the Charter concerns raised, the contempt allegations against Mr. Mahoney were adjourned generally, with liberty for to reapply.

[121] In this case, Mr. Fan could invoke his right to remain silent if compelled to give self-incriminating evidence at his hearing. However, this right primarily applies to formal proceedings, and ensures that he would not be compelled to testify against his will.

[122] In summary, the Court was asked to exclude the statements that Mr. Fan gave voluntarily to the opposing party, through Ms. He's counsel during the Self-Rep Period. The statements were not made during any judicial proceedings and Mr. Fan was not compelled when he made the statements. The right to remain silent protects against compelled testimony during judicial proceedings, not voluntary out-of-court statements given to an opposing party's lawyer. Mr. Fan's right to silence does not mean that he has a right not to be spoken to at all.

VI. Conclusion

[123] To determine if a voir dire should be held to hear Mr. Fan's cross application, I considered the written and oral submissions of counsel. The onus was on Mr. Fan to justify the need for a voir dire to address the alleged breaches of the Charter. I find that Mr. Fan has not discharged this burden.

[124] I find that Mr. Li was not a person in authority, and there is no reasonable basis for believing that Mr. Fan's statements were coerced or involuntary.

- [125] Since Mr. Fan was not arrested or detained Mr. Fan's section 10(b) right to counsel was not engaged and there is no violation of his right to counsel under either s. 10(b) or s. 7 of the Charter. The statements made to Mr. Li were therefore not obtained in violation of Mr. Fan's Charter rights.
- [126] Without a Charter breach, Mr. Fan cannot meet the standard required to exclude evidence under s. 24(2). Courts will only exclude evidence if its admission would bring the administration of justice into disrepute, and there is no evidence that this standard is met here.
- [127] In summary, Mr. Fan's application for a voir dire fails to meet the threshold required under Vukelich because the evidence in this case does not establish a reasonable likelihood of success. Given the absence of a reasonable likelihood that the voir dire would assist in determining the issues, or that the remedy sought could be granted, the Court dismisses that portion of Mr. Fan's application.
- [128] As it relates to costs, the respondent, Mr. Fan, has not been successful in his Charter application to have his statements to Mr. Li excluded. Ms. He has asked for special costs. Based on my review of the case, I do not find special costs are warranted, but I do find that Ms. He is entitled to her costs of this application pursuant to the Supreme Court Family Rules, Appendix B, as a matter of ordinary difficulty payable forthwith after assessment by the Registrar.

"Sukstorf J."

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