

CANADA / JUDGMENT

Hutcheson v. British Columbia

2020 BCSC 1986

COURT

Supreme Court of British Columbia

DECIDED

16 December 2020

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2020 BCSC 1986 Hutcheson v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hutcheson v. British Columbia,

2020 BCSC 1986

Date: 20201216

Docket: 14054

Registry: Rossland

Between:

Sheldon Scott Hutcheson

Plaintiff

And

Her Majesty the Queen in right of the Province of British Columbia

and Minister of Public Safety and Solicitor General (British Columbia)

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

The Plaintiff, appearing in person:

S. Hutcheson

Counsel for the Defendant, Public Safety and Solicitor General (British Columbia),

appearing via telephone:

G. Hallson

Counsel for the Defendant, Her Majesty the Queen in right of the Province of British Columbia,

appearing via telephone:

F. De Lima

Place and Date of Hearing:

Rossland, B.C.

October 1, 2020

Place and Date of Judgment:

Rossland, B.C.

December 16, 2020

Introduction

- [1] At the hearing of this matter on October 1, 2020 I ordered that, by consent, the style of cause in these proceedings be amended to substitute the names of the defendants "Province of British Columbia" and "Office of Assistant Attorney General" for "Her Majesty the Queen in right of the Province of British Columbia" and that the party "Minister of Public Safety and Solicitor General (British Columbia)" be substituted for "RCMP (Attorney General of Canada)".
- [2] Each of the parties has an application before me. Her Majesty the Queen in right of the Province of British Columbia (the Province) seeks an order that the amended notice of civil claim filed by Mr. Hutcheson on November 25, 2019 (the ANOCC) be struck out without leave to amend and that the claim be dismissed against the Province in accordance with Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. The Minister of Public Safety and Solicitor General (British Columbia) (the Minister) seeks an order that Mr. Hutcheson's notice of civil claim and ANOCC be struck out without leave to amend.
- [3] Mr. Hutcheson applies for default judgment against both defendants and/or an order for disclosure by both defendants.

Background

- [4] Between February 25, 2017 and November 15, 2018, the following charges and informations were laid against Mr. Hutcheson under file number 21928 (the prosecution):
- a) telecommunication to lure child under 18 years of age contrary to s. 172.1(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46;

- b) telecommunication to lure a child under 16 years of age contrary to s. 172.1(1)(b) of the Code;
 - c) possession of child pornography contrary to s. 163.1(4) of the Code;
 - d) "peace bond" for fear of commission of sexual offence pursuant to s. 810.1 of the Code; and
 - e) failure to comply with an appearance, notice or summons contrary to s. 145(3) of the Code.
- [5] All of the charges were ultimately stayed by Crown counsel except the "peace bond" to which the plaintiff consented on November 15, 2018.
- [6] On April 15, 2019, the plaintiff filed a notice of civil claim (NOCC). He filed an amended notice of civil claim (first ANOCC) on April 16, 2019. On November 25, 2019, the plaintiff filed his second amended notice of civil claim (second ANOCC).
- [7] On April 1, 2020, the plaintiff wrote a letter to Amy Whelan of the BC Ministry of the Attorney General enclosing what is described as his "3rd Amended Notice of Civil Claim" which bore a date of March 18, 2020 (third ANOCC) as well as an excerpt from a report to Crown counsel. On April 7, 2020, Ms. Whelan acknowledged service of the amended notice of civil claim filed in the Rossland Registry on November 25, 2019.
- [8] On April 23, 2020, Graham Hallson, counsel for the Minister and the Attorney General of Canada (AGC) brought a series of preliminary issues to Mr. Hutcheson's attention concerning the validity of his first ANOCC and his second and third ANOCC.
- [9] Those issues were:
- a) Mr. Hutcheson had not filed his third ANOCC;
 - b) Mr. Hutcheson must obtain leave from the court under Rules 6-1 and 8-1 of the Supreme Court Civil Rules in order to file a second and/or third amended notice of civil claim prior to serving it on the parties. Mr. Hallson pointed out that these preliminary issues resulted in the second and third amended notice of civil claims being nullities.
 - c) Mr. Hallson also pointed out the difficulties with the style of cause.
- [10] Mr. Hutcheson served a Notice to Admit on the Province in June 2020. There was further communication between Mr. Hutcheson and Mr. Hallson.
- [11] On July 16, 2020, Mr. Hutcheson filed an Affidavit of Ordinary Service. He did not serve the Affidavit on the defendants. There was further communication between Mr. Hutcheson and Mr. Hallson.
- [12] On September 9, 2020, Mr. Hutcheson sent an email to Mr. Hallson attaching the preceding chain of communications, and a document entitled "2nd Amended Notice of Civil Claim". It is not identical to the second ANOCC.

- [13] In a further email of June 29, 2020, Mr. Hallson pointed out to Mr. Hutcheson that his original notice of civil claim filed in April 2019 had not been served on any of the defendants in accordance with Rule 4-3(1) within 12 months of its being filed (Rule 3-2(1)) and accounting for the period between March 18, 2020 and May 28, 2020 when service timelines were suspended in accordance with the COVID-19 emergency. Thus the original notice of civil claim remained in force until June 26, 2020 in accordance with Rule 3-2(1) of the Supreme Court Civil Rules.

Positions of the Parties

- [14] The defendants seek an order that the notices be struck without leave to amend on the basis that they offend Rule 9-5 of the Supreme Court Civil Rules.
- [15] They also take the position that there is no valid notice of civil claim currently in effect. The NOCC filed April 15, 2019 was not served and has now expired. The second and third ANOCCs were filed without seeking leave from the court and are therefore nullities.
- [16] Mr. Hutcheson apologizes for the various notices of civil claim and appreciates that they have lead to "confusion and consternation". However, he takes the position that his claim is reasonable and he has provided overwhelming factual data to demonstrate that the charges against him were unfounded as they were based on false and misleading information volunteered to police by a third-party witness. He says that as a result he has been severely prejudiced including his loss of liberty, denial of access to the necessities of life, exposure to mental and emotional distress and anxiety, the prevention and interruption of his karate training, teaching, competition and study, Charter rights violations, privacy rights violations and human rights violations. Mr. Hutcheson is seeking damages and restitution in the amount of \$10 million.

Analysis

Striking the Plaintiff's Claims

- [17] Rule 9-5(1) provides:

At any stage of a proceeding, 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 proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- [18] In *Sahyoun v. Ho*, 2015 BCSC 392, Mr. Justice Voith extensively reviewed the law regarding striking pleadings under Rule 9-5(1).
- [19] Justice Voith noted that the primary purpose of a notice of civil claim is to clearly set out the issues of fact and law to be determined in an action. The plaintiff must define legal issues and set out a concise statement of material facts supporting each cause of action to meet its basic purpose. These requirements ensure both efficiency and fairness of litigation. A defendant is entitled to know the case to be met, particularly where serious allegations are presented. A party should not have to divine the claims made against them. Further, a proper pleading allows the parties to focus their resources on issues that matter, and ignore those that do not (at para. 72).
- [20] At para. 73, Voith J. emphasized the following requirements of a notice of civil claim (which are also set out in Rules 3-1(2) and 3-7):
- a) the need to be clear and concise;
 - b) the need to identify material facts [supporting each cause of action];
 - c) the prohibition on pleading evidence;
 - d) the need to set out, in some reasonable way, the relief claimed against each named defendant; [and]
 - e) the need to set out a concise summary of the legal basis for the relief sought
- [21] Referring specifically to Rule 9-5(1)(a), Voith J. stated at para. 57:
- The test on an application to strike an action under R. 9-5(1)(a), on the basis the pleadings do not disclose a cause of action, is whether it is plain and obvious the claim cannot succeed. It requires a conclusion that, assuming that the facts as stated are true, those facts disclose no cause of action and the pleadings disclose no arguable issue. If there is a chance that the action may succeed, then the action should be allowed to proceed; [citations omitted]
- [22] Regarding Rule 9-5(1)(b): a pleading also may be characterized as unnecessary, frivolous or vexatious where it is so confusing that it is difficult to understand what is pleaded: *Sahyoun* at para. 58.
- [23] Regarding Rule 9-5(1)(c): pleadings are also embarrassing where they are prolix, confusing and unintelligible. Where pleadings are constructed in such a way that it is impossible to provide a reasonable and concise response, they are embarrassing. A pleading may also be embarrassing where it contains irrelevant facts, argument or evidence: *Sahyoun* at para. 62.
- [24] Regarding Rule 9-5(1)(d): Abuse of process is a flexible doctrine that allows the court to strike claims where allowing them to proceed would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice: *Sahyoun* at para. 60. When pleadings fail to serve the purpose of pleadings at all, including making it difficult or impossible for the defendant to understand the claims against it and the case to be made

out, a pleading is an abuse of the court's process. The pleadings must enable the court to find the cause of action and the material facts on which each cause of action is based within a reasonable period of time: *Jensen v. Jackman*, 2010 BCCA 6 at para. 26.

- [25] I have carefully reviewed Mr. Hutcheson's NOCC and his ANOCC.
- [26] They do not meet the test of being clear and concise. They contain bald factual allegations, conclusions of law, irrelevant facts and argument. The plaintiff has not set out a clear legal basis for the relief sought and how they are linked to any of the causes of actions.
- [27] The pleadings do not disclose a reasonable cause of action. The plaintiff has not constituted any complete and identifiable cause of action, including material facts supporting each requisite legal element of such a cause of action.
- [28] Three themes can be teased out of the NOCC and the ANOCC, in combination with the submissions that Mr. Hutcheson made in the hearing of this matter. They relate to the actions of Crown counsel and to malicious prosecution. I will address these specifically in the context of whether the pleadings disclose a reasonable claim.
- [29] The pleadings appear to suggest that Crown counsel and the RCMP pursued the criminal charges against Mr. Hutcheson when they should not have and that is a basis for relief to be granted to Mr. Hutcheson. Such a claim against either Crown counsel or the RCMP cannot be made and does not disclose a reasonable cause of action.
- [30] In British Columbia, Crown counsel conduct criminal prosecutions as designated by the Assistant Deputy Attorney General of British Columbia. The functions and responsibilities of Crown counsel are set out in s. 2 of the Crown Counsel Act, R.S.B.C. 1996, c. 87:
- (a) to approve and conduct, on behalf of the Crown, all prosecutions of offences in British Columbia;
 - (b) to initiate and conduct, on behalf of the Crown, all appeals and other proceedings in respect of any prosecution of an offence in British Columbia;
 - (c) to conduct, on behalf of the Crown, any appeal or other proceeding in respect of a prosecution of an offence, in which the Crown is named as a respondent;
 - (d) to advise the government on all criminal law matters;
 - (e) to develop policies and procedures in respect of the administration of criminal justice in British Columbia;
 - (f) to provide liaison with the media and affected members of the public on all matters respecting approval and conduct of prosecutions of offences or related appeals;
 - (g) any other function or responsibility assigned to the Branch by the Attorney General.
- [31] In *Krieger v. Law Society of Alberta*, 2002 SCC 65, the Court stated:

42 In making independent decisions on prosecutions, the Attorney General and his agents exercise what is known as prosecutorial discretion. This discretion is generally exercised directly by agents, the Crown attorneys, as it is uncommon for a single prosecution to attract the Attorney General's personal attention.

43 "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

45 As discussed above, these powers emanate from the office holder's role as legal advisor of and officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.

46 Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the Criminal Code, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: [citation omitted]; and (e) the discretion to take control of a private prosecution: [citation omitted]. While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

[32] Mr. Hutcheson challenged the decision of Crown counsel to proceed with charges and then to stay them. As the Supreme Court of Canada pointed out, this is the exercise of prosecution discretion and cannot be the basis of a cause of action against the Province. Mr. Hutcheson disagrees with the discretion exercised by Crown counsel in the prosecution, but this is not a basis for a civil claim.

[33] The RCMP in British Columbia do not approve charges or conduct criminal prosecutions, and thus there is no basis for such a claim against the Minister.

[34] The second theme appears to be malicious prosecution. Mr. Hutcheson appears to base this on his assertion that a third-party witness volunteered false or misleading information to police.

[35] To constitute a claim for malicious prosecution, a plaintiff must prove that there be: a) a prosecution initiated by the defendant, b) terminated in favour of the plaintiff, c) undertaken without reasonable and probable cause, and d) motivated by malice or a primary purpose other than carrying the law into effect: *Watchel v. British Columbia*, 2019 BCSC 1087 at para. 21, *aff'd* 2020 BCCA 100.

- [36] Mr. Hutcheson has not disclosed any facts supporting that there was a lack of reasonable or probable cause for the prosecution nor that there was any form of malice by any of the defendants.
- [37] The third theme appears to be fraud.
- [38] As noted in *Owimar v. Stewart*, 2019 BCSC 1198:
- [13] Rule 3-7 governs pleadings generally. Rule 3-7(1) states that: "A pleading must not contain evidence by which the facts alleged in it are to be proved." In respect of a claim that relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, Rule 3-7(18) requires that full particulars, with dates and items if applicable, must be stated in the pleading.
- [14] The plaintiff alleges in the Claim that he was the victim of fraud. All material facts related to the fraud must be scrupulously pleaded: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 19, leave to appeal ref'd [2012] S.C.C.A. No. 120.
- [39] Mr. Hutcheson's NOCC and ANOCC do not provide a factual basis to a claim for fraud. His oral submissions do not either.
- [40] Similarly, where Mr. Hutcheson refers to other potential causes of action, such as "defamatory libel" (ANOCC para. 5), "illegal search" (ANOCC para. 6), "false arrest" (ANOCC para. 10) and various Charter violations (ANOCC paras. 6-8), these also have not been articulated to any meaningful degree or supported by sufficient material facts.
- [41] I find that Mr. Hutcheson's NOCC and ANOCC must be struck on the basis that they do not disclose a reasonable cause of action and that they cannot be cured by amendments.
- [42] I also strike the pleadings under Rule 9-5(1)(b)-(d) because they are prolix, confusing and unintelligible.
- [43] The pleadings are vexatious, unnecessary and frivolous under Rule 9-5(1)(b) because they merely vaguely assert wrongdoing against the defendants in connection with a concluded criminal proceeding rather than advancing any clear, legitimate cause of action. The complex web of bare assertions, legal conclusion and argument make it impossible for the defendants to discern what the claim is against them.
- [44] The pleadings are also embarrassing under Rule 9-5(1)(c). They do not allow the defendants to know the case to be met, or to provide any form of concise or reasonable response.
- [45] The pleadings are an abuse of process under Rule 9-5(1)(d) on the basis that the defendants are unable to identify each cause of action and the material facts on which they are based within a reasonable period of time or review.
- [46] The NOCC and the ANOCC are struck out, without leave to amend and the claims against each of the defendants are dismissed.

Serving and Filing Pleadings

- [47] Rule 3-2(1) of the Supreme Court Civil Rules provides that an original notice of civil claim must be served on the defendants named in it within 12 months of it being filed or it no longer remains in force.
- [48] In accordance with Rule 6-1, a plaintiff may amend his pleadings once, without the leave of the court. Any subsequent amendments must be made with leave of the court.
- [49] The original NOCC and the ANOCC were not served upon any of the defendants within 12 months of the filing of either of them, which adjusted for COVID-19 timeline suspensions, was on or before June 26, 2020.
- [50] Mr. Hutcheson did not seek to renew his NOCC or his ANOCC within 12 months of it being filed. He did not seek leave of the court to file his second ANOCC or his third ANOCC and they are therefore nullities. His third ANOCC is not revived by the acknowledgement of service by Ms. Whelan on April 7, 2020.
- [51] Because of the lack of service within the timelines prescribed by the Rules, and because the second and third ANOCC are nullities, the NOCC and first ANOCC are struck.

Conclusion

- [52] The NOCC and ANOCC are struck in accordance with Rule 9-5(1), without leave to amend.
- [53] The NOCC and ANOCC are struck and the second and third ANOCC are nullities for non-compliance with the Supreme Court Civil Rules.
- [54] Because the action is struck, I am not addressing Mr. Hutcheson's applications.

"Gropper J."

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