

CANADA / JUDGMENT

J.A.T.P. v. H.M.

2024 BCSC 143

COURT

Supreme Court of British Columbia

DECIDED

17 January 2024

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2024 BCSC 143 J.A.T.P. v. H.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.A.T.P. v. H.M.,

2024 BCSC 143

Date: 20240117

Docket: E211620

Registry: Vancouver

Between:

J.A.T.P.

Claimant

And

H.M.

Respondent

Before: Associate Judge Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

R. McFee, K.C.

E. R. Janzen

Counsel for the Respondent:

T. R. Bell

R. Safartabar

Place and Date of Hearing:

Vancouver, B.C.

January 10, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 17, 2024

Introduction

- [1] THE COURT: This is a high conflict, high net-worth family action. The claimant applies to adjourn the trial, which is currently scheduled to begin on March 25, 2024, and is set for 30 days. Pursuant to the terms of a consent order which was pronounced on March 31, 2023, this trial date is peremptory on the claimant.
- [2] The respondent opposes the application.

Background

- [3] The parties disagree regarding the date they began to cohabit. The claimant says it was May 1, 2016. The respondent says it was March 1, 2017. They were married on October 29, 2017 and separated on June 30, 2021.
- [4] The parties have one child of their marriage, Z., who is 4-1/2 years old. He was conceived with the assistance of an IVF procedure which was carried out at a clinic in Colorado.
- [5] This is the claimant's first marriage and the respondent's second. The respondent has three children from his first marriage; ages 22, 20 and 18 years.
- [6] The claimant is a duly qualified lawyer who was called to the B.C. Bar in 2015. She last worked as an associate with the firm [redacted] in Vancouver. At present she is not employed but has maintained her Law Society membership. She is receiving monthly child and spousal support and other temporary financial support to which the parties have agreed pending trial.
- [7] The respondent is employed as [a senior executive] for [an investment firm]. His income varies from year to year, but in recent years has exceeded \$14 million per annum gross. He has assets which exceed \$100 million in value.

- [8] On July 7, 2021, the claimant filed her notice of family claim. At the time, she was represented by Tracey Jackson. Matters in dispute include parenting arrangements for Z., child support, spousal support, division of family property and debt, and various excluded property issues. One of the unusual property issues involves rights in respect of an embryo the parties created together, currently held by a clinic in Colorado.
- [9] On August 6, 2021, an interim without prejudice consent order was made by Master Elwood, as he then was, dealing with financial issues. In November 2021, the parties engaged Dr. Peggy Koopman to prepare a joint s. 211 report. The first trial date set was April 3, 2023, for 18 days.
- [10] The respondent complains that the claimant was responsible for that trial date being adjourned, including (without limitation) by delaying her engagement with the s. 211 report process, and later sending a large volume of documents and affidavit evidence to the author shortly before the report was to be finalized. As a result, the report was not ready in time for the then-scheduled trial.
- [11] On March 31, 2023, the parties entered into a consent order pronounced by Master Vos adjourning the trial and resetting it to March 25, 2024, for 30 days. That order specifies that the new trial date is peremptory on the claimant.
- [12] The claimant's lawyer withdrew in around March 2023. Claire Hunter, K.C., of Hunter Litigation Chambers assumed conduct and involved numerous other lawyers in that firm. Lindsey Cruickshank also came on as co-counsel.
- [13] On April 30, 2023, Dr. Koopman issued a 119-page s. 211 report.
- [14] On June 6-7, 2023, the parties appeared before me to speak to cross-applications regarding interim child and spousal support, amongst other issues. I issued reasons on August 24, 2023, which included orders that the respondent pay the claimant interim basic child support of \$15,000 per month, 100 percent of certain special and extraordinary expenses, and interim spousal support of \$50,000 per month. The respondent's application to sell a property and a yacht were dismissed.
- [15] On September 15, 2023, the parties entered into an interim without prejudice consent order which provided that the respondent would provide the claimant certain additional financial supports. The respondent says this was done to avoid the parties having to deal with an appeal of my August 24, 2023 order.
- [16] On October 18, 2023, the claimant applied for production of documents, which was heard by Master Scarth. Some documents were ordered produced, but the bulk of the relief sought was denied. The claimant says this was because her examination for discovery of the respondent had not yet been completed.

- [17] The claimant says on or about November 20, 2023, Ms. Hunter and Ms. Cruickshank informed her they would be withdrawing as counsel due to a breakdown in the solicitor-client relationship. The claimant says this was unexpected and not something she wanted. She immediately began contacting other local senior family law practitioners about assuming conduct of her case. She made extensive efforts, reaching out to about 18 counsel/firms who she believed would be suitable to take on a case of this scope. Unfortunately, she was not able to find counsel who was available for the current trial date and/or able to get up to speed in time, due to their other commitments.
- [18] On November 23, 2023, the claimant was told Ms. Cruickshank was withdrawing as counsel immediately and that Ms. Hunter would continue assisting with preparations for a mediation that was scheduled with Lisa Hamilton, K.C. for December 12, 2023, but she discontinued certain trial preparations she had been working on. As a result, several aspects of essential trial preparation, including completing examination for discovery of the respondent, preparation and service of several expert reports prior to the expert report deadline (December 29, 2023) and potential pleadings amendments were not advanced.
- [19] On December 12, 2023, the parties took part in a second day of mediation, but unfortunately it was not successful.
- [20] The claimant says on or about December 5, 2023, she received confirmation from Kevin Heinrichs that he and his firm were prepared to come on board as her counsel, contingent upon the current trial date being adjourned. He has existing trials scheduled during the weeks of April 15 and 25, 2024, which fall within the six weeks reserved for the trial of this action. He says his trial calendar is flexible during most of the latter half of 2024. The claimant noted that the court's website has numerous dates posted for lengthy family trials as early as mid-2024.
- [21] Several other counsel mentioned in the claimant's affidavit material also indicated their willingness to take on her case if the current trial date was adjourned.
- [22] On December 13, 2023, Ms. Hunter filed a notice of intention to withdraw as lawyer. On December 21, 2023, she filed a notice of withdrawal of lawyer.
- [23] The claimant retained Mr. McFee for the limited purpose of assisting her with this application to adjourn the trial only. His practice does not include family law.

Position of the Parties

Claimant's Position

- [24] The claimant says this application was made in a timely manner after her counsel withdrew. The notice of intention to withdraw was filed December 13, 2023, and this application was filed December 22, 2023. The application has been made sufficiently in advance of the scheduled trial date, such that intensive trial preparation is not yet underway, meaning costs thrown away are minimized or avoided.
- [25] The claimant says she would suffer prejudice if she is required to self-represent in the period leading up to and during trial. Although she is a lawyer, she has only modest practice experience and none in the field of family law. This is not a situation in which she chose to self-represent and only opted to seek counsel on the eve of trial. The complexity of the issues and the amounts at stake make it inadvisable for the claimant to represent herself.
- [26] The claimant says the prejudice to her of having to proceed to trial and self-represent far outweighs any prejudice to the respondent due to an adjournment of the trial, as set out in Navarro, which will be addressed below. Only non-compensable prejudice is relevant. Withdrawal of counsel has been found to be exceptional circumstances which warrants adjournment of trial that has been set peremptorily: see for example, Igbinosun (para. 48), referred to below.
- [27] The claimant argues that the breakdown of her relationship with her counsel could not have been anticipated when the peremptory date was set/ Given that the withdrawal is due to breakdown of the solicitor-client relationship, the court cannot inquire further into the reason for the withdrawal. In order for there to be a fair trial on the merits, an adjournment is necessary and in the interests of justice.
- [28] The factors the claimant highlights as indicating the case is not and cannot be ready for trial on the currently-scheduled trial date include that the respondent has not yet been discovered on financial issues. Her previous counsel had scheduled a continuation of the examination for December 19, 2023, but that had to be adjourned due to counsel withdrawing. It is currently reset for February 1, 2024.
- [29] The deadline to serve expert reports was December 29, 2023. Two of the parties' joint expert reports had not yet been finalized at the time she filed her application. One was the report of Paul McEwen, a forensic financial expert. The second is a report of Anthony Rivard, who is preparing joint appraisals of four properties in issue, which include two strata properties at the Fairmont Pacific Rim, and two residential properties in West Vancouver.
- [30] After her counsel withdrew, the parties received one further report from a joint expert regarding appraisal of recreational property on the Sunshine Coast that is registered in the claimant's name. She says its appraised value ended up being significantly lower than other recent appraisals and she needs assistance of counsel to understand the impact of the appraisal and her options to respond to it.

- [331] The claimant says she also requires assistance of counsel to finalize several solo expert reports. Around the time her counsel withdrew, the respondent produced an 8th amended list of documents. She forwarded these documents to her unnamed expert, who subsequently indicated on December 21, 2023 that she would not be able to complete her report by the service deadline.
- [32] The claimant also retained Dr. Korpach to prepare a report critiquing Dr. Koopman's s. 211 report. She says there were delays in obtaining disclosure of Dr. Koopman's file, which delayed finalization of Dr. Korpach's report. She says that without counsel, she is not able to properly instruct the various experts regarding completion of the reports by the service deadline.
- [33] The pleadings amendment issue relates to the embryo the parties created, which is currently being held by a clinic in Colorado. The parties have a written agreement with that clinic. Claimant's counsel suggests there are complex legal issues regarding assisted reproduction and conflict of laws, which trial counsel will need to consider and potentially address via amendments to the claimant's pleadings. In particular, there was a recent Ontario case in which the court concluded it did not have jurisdiction to deal with an embryo which was being held in the United States. The claimant is considering whether to take the position that the B.C. court does not have or should decline jurisdiction to deal with embryo-related issues in this case.
- [34] Finally, in September 2023, the Court of Appeal heard the claimant's appeal from an order dismissing her application for a Norwich order in a separate civil action. She has been seeking information about the identity of persons who sent anonymous messages which were received by the respondent's ex-wife. The claimant believes the messages contain defamatory, confidential and sensitive information about her father and her family dynamics. She believes the respondent was involved in some manner with the messages, which he has flatly denied. The claimant is concerned that dissemination of confidential information regarding her father's identity in connection with her could constitute a safety risk for herself and Z. The appeal is currently under reserve. She suggests that if the appeal were to be allowed, material she hopes to obtain through the execution of a Norwich order against the respondent's ex-wife may generate documents relevant to issues in dispute in this action.

Respondent's position

- [35] The respondent is concerned that Z. has been living in a high-conflict environment. The parties never see each other face to face. He is concerned that Z. is being led to believe the respondent is a "bad man" who poses a threat to his and his mother's safety. He believes there is an imminent threat that Z. will become estranged or alienated from him. Z.'s long-term mental health will be directly impacted by how quickly hotly-contested parenting issues can be addressed.

- [36] The respondent says Dr. Koopman's s. 211 report contains findings that restrict the visitation rules that are currently imposed by the respondent through the various agreements and consent orders that are detrimental to Z. and ought to be removed. She concluded there was no evidence Z. had been harmed or was in danger while in the respondent's care. She raises a concern that the claimant is not engaging in appropriate separation from Z. due to her own psychological issues and that it is adversely affecting his development and is harmful to his overall sense of security and independence. Dr. Koopman recommends that a psychologist or psychiatrist be appointed to assist the claimant with underlying issues. She recommends the parties continue to share joint guardianship of Z., and that they share custody 50/50, with the respondent's physical custody being achieved gradually over a period of two or more years.
- [37] The respondent is prepared to accept Dr. Koopman's recommendations in their entirety and has sought to have certain provisions in the existing court-ordered arrangements vacated by consent. The claimant disputes Dr. Koopman's report and conclusions. The respondent says he attempted to schedule an application to vary the parenting arrangements based on Dr. Koopman's report. The claimant insisted that Dr. Koopman's file be produced and that she be able to cross-examine Dr. Koopman prior to any such application being heard. By the time file production issues were resolved in September 2023, counsel were not able to find a mutually available long chambers date for an application to vary parenting arrangements. The respondent said he opted to resile himself to the current arrangements continuing until the trial in March 2024.
- [38] At present, the respondent says he has very limited parenting time with Z. over a two-week cycle. All of the respondent's parenting time occurs in the presence of one of Z.'s nannies and thus is effectively supervised parenting. Pickups and drop-offs occur at the claimant's home in an area of the house which is monitored by video. The claimant has retained a retired police officer as a security consultant to be present in the home, albeit on a different floor, during any times the respondent attends. The respondent says these arrangements send harmful messages about him to Z.
- [39] The respondent also says the claimant's conduct has been problematic. This includes:
- a) Delaying the respondent's ability to schedule his application to vary the financial provisions in the Elwood order;
 - b) Delaying her participation in the joint s. 211 report process and providing the prohibitively large volume of documents late, making it impossible for the report to be ready in time for the April 2023 trial;
 - c) Reporting safety concerns to the Vancouver Police Department indicating she was afraid of the respondent and that he posed a danger to her. This made it necessary for the police to investigate and for Dr. Koopman to address the concerns. He says Dr. Koopman ultimately concluded they had no merit;

- d) Having a breakdown of her relationship with her first lawyer, Ms. Jackson, which contributed to the adjournment of the April 2023 trial;
- e) Telling Z. inappropriate things about the respondent and attempting to alienate the child from him; and
- f) Having a second breakdown of her relationship with counsel, this time Ms. Hunter and Ms. Cruickshank, which she is now relying on to adjourn the second trial date.

[40] The respondent argues that where an adjournment is sought for a peremptory trial, one must first determine whether the applicant satisfies criteria for adjourning the trial. If so, there must also be exceptional reasons to disregard the peremptory nature of the trial date. In order to satisfy the requirement for exceptional reason, the claimant should be required to demonstrate she has made exceptional efforts to retain new counsel who is available for the scheduled trial date.

[41] The respondent says there are several factors which militate against an adjournment and that there are no exceptional circumstances which warrant disregarding the peremptory nature of the current trial date:

- a) This is the claimant's second request to adjourn a trial date. As part of the resolution of her first request, she consented to the date being peremptory on her;
- b) The claimant has not been diligent in her efforts to secure new counsel and cannot rely on this as a basis for an adjournment request. Counsel conducted his own search of the Canadian Bar Association-BC website, which indicated there are 139 lawyers who practise family law within a 50-kilometre radius of Vancouver, and 26 lawyers within a 26-kilometre radius of Kelowna. This does not include all lawyers who actually practise family law in these areas. The claimant has also had other senior counsel, namely Maureen Lundell, K.C. of Harper Grey LLP, on her legal team and has not explained why she or someone else with that firm is unable to act. The respondent has also waived conflict of interest with the firm Clark Wilson LLP, meaning any lawyer with that firm could act for her. The lawyers the claimant has sought out are either very senior or K.C.'s. It is not appropriate for the claimant to limit her inquiries to such top-tier family counsel. She should be prepared to retain less capable counsel to assist her, in view of the peremptory nature of the trial date. The claimant is also able to represent herself;
- c) Amendment of pleadings issue is a red herring. The parties have a written agreement with the Colorado clinic. In this action, the claimant has pled issues relating to the embryo in her amended notice of family claim and has taken the position that these are time sensitive. The respondent takes the position that the claim has attorned to the BC court dealing with this issue. She also has not filed a jurisdiction response or otherwise taken steps to challenge jurisdiction. Counsel also argues that the Ontario authority referred to in argument was distinguishable on its facts;

- d) Incomplete joint expert reports are ready to be finalized and issued. The claimant gave instructions to one of the joint experts, Mr. McEwen, asking that he engage in certain tracing. The respondent does not agree this tracing exercise is necessary or falls within the scope of the joint expert referral. The claimant has also not sought leave to rely on the unnamed forensic accountant expert nor the financial expert mentioned in her application;
- e) With regard to the claimant's decision to retain Dr. Korpach to prepare a critique report of Dr. Koopman's s. 211 report, the respondent takes no issue with this report being served late. He reserves the right to object to admissibility of the report on other grounds. Counsel argues critique reports are not admissible, citing *Hejzlar v. Mitchell-Hejzlar*, 2010 BCSC 1139;
- f) The respondent says it is purely speculative whether obtaining production of documents via a Norwich order would be relevant to issues in this action. The respondent has denied any involvement in the anonymous messages. The claimant has not tendered any evidence which supports her stated suspicions;
- g) The respondent's document disclosure in this proceeding has been exceptional. His 8th supplemental list of documents was delivered December 11, 2023, consisting of 362 documents and 8,900 pages;
- h) The parties have already had two days of examination for discovery of each other. The respondent agreed to a third day, which was originally to be held in November 2023. It was later rescheduled to December 2023 at claimant's request. At present, the additional day has been re-scheduled for February 1, 2024 and Mr. Heinrichs has apparently been helping with preparations for that;
- i) Most importantly, it is in Z.'s best interests to have parenting issues resolved as quickly as possible. He has lived most of his life in the middle of family conflict. The current parenting arrangements are completely inequitable. Z. has made comments to the respondent which suggest the claimant has been inappropriately exposing him to this litigation and adult issues; and
- j) If the trial is adjourned, the claimant will presumably require that an updated s. 211 report be prepared. Given the claimant's past conduct in relation to delays of the s. 211 report, the update process is likely to be equally onerous.

Applicable Law

[42] Rules 14-2(8) and 22-1(1) of the Supreme Court Family Rules, B.C. Reg. 168/2009 provide the court discretion to adjourn a trial.

Adjournment of Peremptory Hearings

[43] The parties agree that a peremptory hearing does not mean "mandatory". The court retains jurisdiction or discretion to grant a further request for an adjournment, having regard to all the facts and the circumstances.

- [44] In *Law Society of Upper Canada v. Igbinosun*, 2009 ONCA 484 [Igbinosun] at para. 43, the Ontario Court of Appeal noted as follows:
- [43] One of the purposes of making a hearing date peremptory is to further the public interest in the administration of justice by preventing delay and wasted costs. However, judicial discretion must still be exercised depending on the facts and circumstances of each case, as the overarching purpose of marking a date peremptory is to serve the interests of justice
- [45] Also see *Re Conway*, 2016 ONCA 918 at paras. 24-25:
- [24] In the case before us, the Board denied Mr. Conway's request for an adjournment to retain counsel for the sole reason that the hearing date had been designated peremptory. Refusing an adjournment for that reason alone amounted to an error in principle. Although the dictionary definition of peremptory - irreversible, binding, conclusive - suggests that a hearing marked "peremptory" must proceed, our court, sensibly, has held otherwise. In *Igbinosun v. Law Society of Upper Canada*, 2009 ONCA 484, 96 O.R. (3d) 138, at para. 43, Weiler J.A. wrote:

One of the purposes of making a hearing date peremptory is to further the public interest in the administration of justice by preventing delay and wasted costs. However, judicial discretion must still be exercised depending on the facts and circumstances of each case, as the overarching purpose of marking a date peremptory is to serve the interests of justice. [Footnotes omitted.]

- [25] In other words, peremptory in this context does not mean mandatory. It does not remove the Board's discretion. Although the peremptory designation will be an important consideration in the Board's decision, the Board must still exercise its discretion by taking into account other relevant considerations, especially any prejudice to the NCR accused from refusing an adjournment.
- [46] In *Santelli v. Trinetti*, 2017 BCSC 822 [Santelli] at para. 20, Justice Sharma held that where a trial date is peremptory and an adjournment is sought, the proper analysis is to first determine whether the applicant can meet the test at common law for an adjournment, and then whether there are exceptional circumstances which warrant disregarding that the trial date was peremptory.

Adjournment of Trial

- [47] The legal test applied when deciding whether to adjourn a trial is set out in *Navarro v. Doig River First Nation*, 2015 BCSC 2173 [Navarro] at paras. 18-21:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 1992

CanLII 1815 (BC CA), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (Sidoroff)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (Sidoroff at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (Sidoroff at para. 11; *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 at para. 36 (*Toronto-Dominion Bank*)).

[19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).

[20] Other factors or considerations include (in no particular order of priority):

- the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); Sidoroff at para. 10);
- the reasonableness of the request (*Dhillon* at para. 16);
- the grounds or explanation for the adjournment (*Dhillon* at para. 16; *Toronto-Dominion Bank* at para. 38);
- the timeliness of the request (*Dhillon* at para. 16);
- the potential prejudice to each party (*Dhillon* at paras. 16-17);
- the right to a fair trial (*Dhillon* at para. 16);
- the proper administration of justice (*Dhillon* at paras. 16 and 39; *Toronto-Dominion Bank* at para. 36);
- the history of the matter, including deliberate delay or misuse of the court process (*Toronto-Dominion Bank* at para. 38); and
- the fact of a self-represented litigant (*Toronto-Dominion Bank* at para. 39).

[21] Securing a fair trial on the merits of the action is the ultimate goal. This requires consideration of the nature of the claim. If the claim is novel, then the prospect for success is one factor to consider (*Sangha v. Azevedo*, 2005 BCCA 184 at para. 15 (*Sangha*)). However, the prospect for substantive success should not be the sole basis for refusal of an adjournment (*Toronto-Dominion Bank* at para. 41).

Withdrawal of Counsel

- [48] The claimant's application is based on her co-counsel withdrawing due to a breakdown in the solicitor-client relationship. Where counsel seeks to withdraw for ethical reasons, the court is not supposed to inquire further or order the solicitor to continue acting. Ethical reasons include circumstances which have resulted in a breakdown of the solicitor-client relationship: see *R. v. Cunningham*, 2010 SCC 10, [Cunningham] at paras. 48-49 and 59:
- [48] Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations (see, e.g., *Law Society of Upper Canada*, r. 2.09(7)(b), (d); *Law Society of Alberta*, c. 14, r. 2; *Law Society of British Columbia*, c. 10, r. 1), or if the accused refuses to accept counsel's advice on an important trial issue (see, e.g., *Law Society of Upper Canada*, r. 2.09(2); *Law Society of Alberta*, c. 14, r. 1; *Law Society of British Columbia*, c. 10, r. 2). If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.
- [49] If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see *C. (D.D.)*, at p. 328, and *Deschamps*, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be required to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.
- ...
- [59] In sum, a court has the authority to control its own process and to supervise counsel who are officers of the court. The Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. This jurisdiction, however, should be exercised exceedingly sparingly. It is not appropriate for the court to refuse withdrawal where an adjournment will not be necessary, nor where counsel seeks withdrawal for ethical reasons. Where counsel seeks untimely withdrawal for non-payment of fees, the court must weigh the relevant factors and determine whether withdrawal would cause serious harm to the administration of justice.
- [49] See also *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2014 BCCA 521 [American Creek].

Analysis

[50] I turn now to consider relevant factors referred to in Navarro.

Expeditious and speedy resolution of matters on their merits

- [51] The claimant started this action in July 2021. The first trial date had to be adjourned, in part due to the s. 211 report not being completed, in part due to breakdown in the claimant's relationship with Ms. Jackson and in part due to the parties needing substantially more days for trial than had been reserved. The parties agreed to increase the original 18 days to 30 days.
- [52] If the current trial date is adjourned, Mr. Heinrichs has indicated he has a flexible calendar for the second half of 2024. Mr. Bell has indicated he is not available during this period due to previous trial commitments in other cases. Realistically, any new trial would likely end up falling sometime in 2025. This timing is not ideal, but it is not beyond the typical ranges for a case of this scope and complexity and involving busy counsel.

Reasonableness of the request, grounds, or explanation for the adjournment

- [53] The claimant's primary reason for requesting the adjournment is withdrawal of counsel caused by a breakdown of the solicitor-client relationship. As per Cunningham and American Creek, the court cannot inquire further into the reason for counsel's decision to withdraw in these circumstances. The claimant says this withdrawal of counsel was unexpected and not something she desired. This is the second time counsel has opted to withdraw as a trial date is approaching.
- [54] The claimant points to a number of factors in support of her argument the case is not ready for trial, including joint and solo expert reports not being ready prior to the 84-day service deadline. The respondent says the joint expert reports are ready to be finalized and he is prepared to consent to late delivery of Dr. Korpach's critique of Dr. Koopman's report. I suspect that many of the expert report issue could be resolved prior to March 25, 2024, if the claimant had new trial counsel in place to help manage that process. Counsel for the respondent argues that the solo expert reports the claimant has been pursuing would have limited use as aids for cross-examination of joint experts, so timing and completion of such reports is not critical. Mr. Heinrichs has been helping the claimant prepare for upcoming discovery of the respondent and possibly other issues, but the uncontested evidence is that he is not available for the current trial dates. No other specific trial counsel has been identified who is available to assist the claimant should the trial proceed as currently scheduled.
- [55] While the claimant is a lawyer, her evidence is that she only practised full-time for roughly two years and briefly thereafter on a part-time basis. None of her work experience was in the field of family law. I agree that, at this stage, it is not reasonable to expect her to prepare for and conduct the trial of this matter without the assistance of experienced family law

counsel. Further, I agree it is reasonable, given the complexity and intensity of this litigation, that the claimant has been focusing her search to senior family counsel who has a broader pool of firm resources available to assist.

- [56] Having said that, I also have concerns that some issues that Dr. Koopman has identified in her report regarding Z. do appear to require attention. I agree that any significant delay may potentially have adverse consequences and not be in his best interest. The respondent notes in his material that he made efforts to schedule an interim application to vary the existing arrangements, consistent with recommendations made in Dr. Koopman's report. He suggests his efforts were frustrated by the claimant's insistence that Dr. Koopman's file be produced and made available to Dr. Korpach, and her insistence on being able to cross-examine Dr. Koopman in advance of any such application.
- [57] The file production issues have been addressed. It is not clear whether the parties reached any agreement about a possible pretrial/pre-application cross-examination of Dr. Koopman. In any event, it should be possible to sort those issues out and for an interim application to vary to be scheduled should the trial be adjourned.

Timeliness of the request

- [58] The claimant made her application to adjourn the trial within a reasonably timely manner after learning that Ms. Hunter and Ms. Cruickshank were withdrawing as counsel. The application was heard with sufficient lead time that costs thrown away for trial preparations appear to be minimized.

Potential prejudice to each party

- [59] The prejudice to the claimant if the trial is not adjourned is she will be forced to proceed to trial, potentially without counsel to assist her in a complex, high-value, highly-contested trial involving expert evidence from numerous experts and extensive document production.
- [60] The prejudice to the respondent if the trial is adjourned is that parenting issues relating to Z. would be significantly delayed. Determination of contested child and spousal support and property division issues would be also delayed. It is likely that updated appraisals will be needed for the five properties involved and an update of Dr. Koopman's s. 211 report would be necessary for a new trial date. Legal expenses will also continue to accrue. The respondent estimates that between the parties, he believes they have spent about \$1.5 million on this litigation since its inception.
- [61] I note however that the amount of family property in issue appears to be more than adequate to accommodate any adjustments in the event the trial judge determines those appropriate to account for these issues. The trial judge will also be in a position to address some of these issues through an appropriate award of costs after trial.

Right to fair trial

[62] I am concerned that the trial may not be fair if the claimant is forced to proceed to trial on March 25, 2024 without appropriate trial counsel.

Administration of justice

[63] I do not consider this factor to be a substantial concern in this particular application.

History of the matter, deliberate delay, or misuse of the court process

[64] The respondent argues that the claimant has demonstrated a pattern of delay in dealing with Dr. Koopman's s. 211 report and caused the first trial to be adjourned due to late delivery of voluminous materials. He also argues she delayed his efforts to get his application to vary the financial terms of Master Elwood's order scheduled and his efforts to apply to vary parenting arrangements for Z.

[65] The claimant notes that the current parenting arrangements and the arrangements which preceded them were all subject of agreements and consent orders to which the respondent expressly agreed. She also notes there was a period of time in which she was in Toronto reconnecting with and supporting her father, who was in the process of dying. She says the respondent supported her making those trips and even accompanied her out there on at least one occasion.

[66] I am also mindful of the fact that the adjournment of the first trial date was likely inevitable, given that only 18 days had been reserved, but the parties subsequently agreed that 30 days would be necessary. In those circumstances, an adjournment of the first trial cannot entirely be attributed to the claimant. It appears the scope of this dispute has expanded substantially over time and one party alone cannot be blamed for that particular development.

[67] While I do have some reservations about the claimant's timing in terms of providing a large volume of documents to Dr. Koopman shortly before the April 2023 trial, I do not consider that the claimant has otherwise demonstrated overt attempts to delay the matter or misuse court processes. Many of the parties' past interim parenting and financial arrangements have gone by way of consent orders. The claimant cannot be faulted for the decision of Ms. Hunter and Ms. Cruickshank to withdraw. The claimant has provided some evidence indicating she made significant efforts to secure new counsel to replace them and brought this application forward in a reasonably timely manner in all the circumstances.

Fact of a self-represented litigant

[68] As noted, the claimant is not a typical self-represented litigant. She is a lawyer herself, albeit a relatively junior one in terms of actual experience. She appears to have had the benefit of a large team of lawyers in the past which includes one at Clark Wilson LLP who may have been consulted about embryo-related issues, and Ms. Lundell, who is described as semi-retired. It also appears Mr. Heinrichs has been assisting the claimant with various

issues, despite not yet being officially retained as trial counsel. It appears the claimant has resources necessary to secure legal assistance for some pretrial preparation at this point, but the real issue is lack of appropriate counsel to represent her at trial. It is a concern that the claimant has been unable to secure new trial counsel and the closer that trial date is, the likelihood of her doing so decreases. This factor weighs in favour of adjourning the trial.

Are there exceptional circumstances which warrant disregarding that the trial date is peremptory

- [69] Weighing all of the Navarro factors considered above, my normal conclusion would be that this is an appropriate case in which to adjourn the trial scheduled for March 25, 2024. As set out in Santelli, I must now consider whether there are exceptional circumstances which warrant disregarding the fact that the March 25, 2024 trial date is peremptory.
- [70] The respondent argues that the claimant's search for replacement counsel was unduly narrow and limited. Rather than searching for senior, experienced family law counsel, she ought to have expanded her search to include all lawyers who hold themselves out as practising family law in the Vancouver and Kelowna areas. She only contacted 18 leading firms and says she was aware that two other candidates were conflicted out.
- [71] With respect, at this stage I disagree with the suggestion that the claimant was obliged to canvass all self-described family lawyers without regard to their experience, relative ability and base of support to handle a case of this scope. If in future the claimant were to continue a pattern of losing counsel due to breakdown in solicitor-client relationship shortly before trial, one might eventually become skeptical. That is not the case in the circumstances of this particular application.
- [72] I agree that the withdrawal of Ms. Hunter and Ms. Cruickshank as counsel in the circumstances do qualify as exceptional circumstances which warrant adjourning the trial set for March 25, 2024, despite the fact that this date is peremptory on the claimant.

Conclusion

- [73] The trial set for March 25, 2024 is adjourned generally. The parties are to schedule the earliest mutually convenient trial date, for 30 hearing days, or such other length as is appropriate. The new trial date will be peremptory on the claimant.
- [74] I also order that the parties cooperate with scheduling a timely interim application to vary parenting arrangements in respect of Z. If the parties agree that pre-application cross-examination of Dr. Koopman is appropriate, arrangements for that should be made promptly, subject to counsel and Dr. Koopman's availability.

- [75] With respect to costs, the claimant has been successful. However, the trial date was peremptory on her, so it was not unreasonable for the respondent to oppose the adjournment. Subject to possible submissions, my inclination at this stage is to have the parties bear their own costs of the application.
- [76] CNSL T. BELL: Your Honour, on behalf of the respondent, I have no further submissions on costs, but in the event a transcript is ordered, given that there's a four-year-old child in play, as you did in the earlier reasons, I would ask that the pleadings be anonymized, initials be used.
- [77] CNSL R. McFEE: And on behalf of the claimant, I have no further submissions on costs. I take no issue with the costs order you have suggested, and I agree that the transcript be anonymized.
- [78] THE COURT: All right. Thank you.

"Associate Judge Bilawich"

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