

CANADA / JUDGMENT

Klassen v. Epp

2025 BCSC 2148

COURT

Supreme Court of British Columbia

DECIDED

30 October 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 2148 Klassen v. Epp

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Klassen v. Epp,

2025 BCSC 2148

Date: 20251030

Docket: S-244509

Registry: Victoria

Between:

Donna Marie Klassen

Plaintiff

And

Elmer Peter Epp

Defendant

Before: The Honourable Justice K. Wolfe

Reasons for Judgment on Costs

Counsel for the Plaintiff:

E. T. Kähns

Counsel for the Defendant:

J.C. Chandler

Written Submissions of the Defendant:

June 11, 2025

Written Submissions of the Plaintiff:

July 2, 2025

Place and Date of Judgment:

Victoria, B.C.

October 30, 2025

Table of Contents

Introduction.. 3

Issues. 4

Analysis. 4

Should the defendant be awarded special costs?. 5

Legal framework. 5

Discussion. 6

Are there reasons to limit or deny the defendant's entitlement to costs?. 11

Legal framework. 11

Discussion. 12

Should any portion of the costs award be payable by plaintiff's counsel personally?. 15

Legal framework. 15

Discussion. 17

Additional issue re: materials filed by plaintiff's counsel 18

Conclusion.. 20

Introduction

- [1] These reasons address costs after the defendant successfully applied to strike the entirety of the plaintiff's notice of civil claim, ending this litigation. The plaintiff and the defendant are former spouses. In reasons indexed as 2025 BCSC 1056 [Reasons], I found the plaintiff's claim for tort damages for an alleged sexual assault during the parties' relationship to be barred by the doctrines of res judicata and abuse of process. I will not repeat here the detailed background to this matter or the basis for my conclusion; this decision should be read together with the Reasons.

- [2] At para. 99 of the Reasons, I granted the parties leave to make further costs submissions in writing if they wished to do so; I also set a schedule and parameters for any such written submissions. Absent further costs submissions, I held the defendant would be entitled to his costs at Scale B.
- [3] The defendant provided his written costs submissions on June 11, 2025, seeking special costs to be paid in part by plaintiff's counsel personally. On June 17, 2025, plaintiff's counsel submitted a request for an oral hearing on the basis that the plaintiff could not adequately address special costs in writing. Defendant's counsel opposed the request for an oral hearing for two reasons. First, the Court had already established a specific, written process for costs submissions. Second, as plaintiff's counsel had advised the plaintiff lacked capacity to pay costs in any event, it would be inappropriate to incur the expense of a further hearing.
- [4] By memorandum to the parties dated June 23, 2025, I denied the plaintiff's request for an oral hearing, noting fairness does not necessarily require an oral hearing. Taking account of factors such as efficiency, cost-effective resolution of issues and proportionality, I confirmed the previously established written process would govern. The plaintiff provided her written costs submissions on July 2, 2025, as required.
- [5] The defendant says special costs are warranted where, as here, the Court strikes a claim because it is an abuse of process. The defendant also says the litigation conduct of plaintiff's counsel merits a portion of the special costs award being made against counsel personally. The plaintiff says the defendant should be denied any costs despite his success because of misconduct during the litigation and because of the nature and merits of the claim she sought to advance.

Issues

- [6] Given the positions of the parties, I frame the costs issues as follows:
- a) Should the defendant be awarded special costs?
 - b) Are there reasons to limit or deny the defendant his costs?
 - c) Should any portion of the costs award be payable by plaintiff's counsel personally?
- [7] An additional issue arises because of certain materials the plaintiff's counsel filed in support of her costs submissions. I will address that issue at the end.

Analysis

- [8] It is well-settled that the Court has a wide measure of discretion in awarding costs, but that discretion must always be exercised judicially and in accordance with established principles and the applicable rules: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 113.

- [9] The general rule is that, unless the Court otherwise orders, the successful party is entitled to their costs of a proceeding, assessed as party and party costs in accordance with Appendix B to the Supreme Court Civil Rules [Rules]: R. 14-1(1) and R. 14-1(9). Rule 14-1(12) addresses costs of applications. In relevant part, it provides that unless the Court otherwise orders, a party who successfully brings an application is entitled to costs of the application if ultimately awarded costs of the proceeding. Under R. 14-1(1)(b), the Court may order that costs of a proceeding, or of an application or step in the proceeding, be assessed as special costs.
- [10] Under R. 14-1(13), costs become payable at the conclusion of the proceeding, subject to the Court's discretion to order otherwise. As the defendant's successful application to strike the plaintiff's claim ended the proceeding, costs of the strike application and the proceeding as a whole are to be decided.

Should the defendant be awarded special costs?

- [11] Having successfully applied to strike the plaintiff's notice of civil claim in its entirety, the defendant is presumptively entitled to his costs. Given the defendant's costs submissions, the first question is whether those costs should be assessed as special costs.

Legal framework

- [12] The defendant applied to strike the notice of civil claim under R. 9-5(1)(d) on grounds that it was an abuse of process. Rule 9-5(1)(d) expressly provides that costs of an application to strike a pleading as an abuse of process may be ordered to be paid as special costs. The Court retains discretion to make a different award.
- [13] Special costs are an extraordinary, discretionary remedy. They are punitive rather than compensatory, and are awarded when the Court seeks to disassociate itself from conduct in the course of the litigation that is reprehensible and "deserving of reproof and rebuke". Reprehensible conduct can range from "milder forms of misconduct" to "scandalous or outrageous conduct": *Smithies Holdings Inc.* at paras. 56-57, citing *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17, 1994 CanLII 2570 (C.A.).
- [14] Special costs awards are exceptional, and the cases are clear that the Court must exercise restraint in making such awards. There is a high threshold to establish that special costs are warranted. The party seeking special costs must demonstrate exceptional circumstances to justify such an order: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73; *Finness Yachting Inc. v. Menzies*, 2015 BCSC 2351 at para. 7.
- [15] Exceptional circumstances may exist where: there is evidence of improper motive; a party makes improper allegations of fraud or dishonesty; a party recklessly pursues a manifestly deficient claim; a party makes the resolution of issues far more difficult than it should have been; a party abuses the Court's process or misleads the Court; or a party persistently breaches the rules of court or of professional conduct in a manner that prejudices the costs

applicant: Westsea Construction Ltd. at para. 73; Mayer v. Osborne Contracting Ltd., 2011 BCSC 914 at para. 11.

[16] In *Smithies Holdings Inc.*, the Court of Appeal expressly addressed whether pre-litigation conduct should be considered in awarding special costs and if so, in what circumstances. After canvassing the existing divergent lines of authority, the Court of Appeal held, at para. 133, that special costs should only be awarded to punish reprehensible conduct in the litigation. The Court stated:

[134] In the result, I am of the view that a bright line can and should be drawn so that judges will be able to exercise their discretion in like cases in a like manner. Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation. Pre-litigation conduct should not be considered in determining whether such an award is appropriate. There are other suitable mechanisms to censure pre-litigation conduct.

[Emphasis added.]

[17] Consistent with the idea that pre-litigation conduct is not to be considered, conduct in separate proceedings is also not relevant when determining whether to award special costs: *Nazari v. El Assal*, 2024 BCSC 1018 at para. 11, citing *Sandhu v. Sun Life Assurance Company of Canada*, 2016 BCSC 1077 at para. 38. The Court must focus on conduct in the litigation in which special costs are sought.

Discussion

[18] The defendant relies on *Hollander v. Mooney*, 2017 BCCA 238 at para. 79, for the proposition that conduct that constitutes an abuse of the Court's process is "by its nature, reprehensible and deserving of rebuke". The defendant essentially says that because the Court found the plaintiff's notice of civil claim to be an abuse of process, that conclusion alone entitles him to an award of special costs.

[19] In *Hollander*, the Court of Appeal referred to its earlier decision in *Gonzalez v. Gonzalez*, 2016 BCCA 376, where Justice Bennett, writing for the Court, upheld an order striking pleadings as an abuse of process and awarding special costs against Mr. Gonzalez as the filing party. In *Gonzalez*, the Court of Appeal noted that the courts had already rendered two separate decisions denying Mr. Gonzalez's privacy arguments, before striking his third attempt to raise the same issue as an abuse of process (at paras. 31-37). Justice Bennett found no reviewable error in the lower court's conclusion that the pleadings were an abuse of process and held that because the abuse of process determination grounded the award of special costs, there was similarly no error in the costs award (*Gonzalez* at paras. 37-38). There is no in-depth analysis of the point.

[20] The decision in *Hollander* is more complex. It involved, in relevant part, an appeal of the lower court's costs orders, as well as a non-party's application for special costs of the appeal. The non-party argued the appellants' request for relief against the non-party was a collateral

attack on one of the lower court's procedural rulings, and therefore an abuse of process. The Court of Appeal declined to interfere with the chambers judge's decision not to award special costs. However, the Court of Appeal found, as a matter of first instance, that the appellants' attempt to have the non-party reimburse their legal costs was a collateral attack; as an abuse of process, it warranted an award of special costs (at paras. 69-79).

- [21] Contrary to the defendant's apparent contention, I do not understand Gonzalez, Hollander or the Court of Appeal's recent decision in *Martyn v. Walton*, 2025 BCCA 223 at paras. 91-92, to mean that an award of special costs is automatic each time the Court finds an abuse of process. Nor would such an interpretation be consistent with the Court's obligation to exercise its discretion judicially and in accordance with established principles. In *Gonzalez and Martyn*, the Court of Appeal upheld the lower court's conclusion that there had been an abuse of process. Given the deference owed to costs orders on appeal, in both cases, the Court of Appeal saw no reason to disturb the lower court's exercise of discretion to award special costs. In *Hollander*, the Court of Appeal exercised its discretion, based on the facts before it, to award special costs as a matter of first instance.
- [22] Even where the Court finds an abuse of process, the cases confirm the Court must still determine if the conduct of the party against whom the award of special costs is sought requires rebuke or chastisement: *Woodward & Company Lawyers LLP v. The T'silhqot'in National Government*, 2021 BCSC 16 at para. 79; *Koskoski v. Russell*, 2025 BCSC 2065 at paras. 23-24, citing, among others, *Mayer* at para. 8. There are numerous cases where, despite striking or staying a pleading as an abuse of process, the Court nonetheless declined to order special costs: see, for example, *Lacharity v. University of Victoria Students' Society*, 2012 BCSC 1819 at paras. 36-37; *Chernen v. Robertson*, 2014 BCSC 1358 at paras. 33-36; *Stanford v. Beazley*, 2019 BCSC 671 at paras. 53-55; *Jones v. Bank of Nova Scotia*, 2025 BCSC 1425 at paras. 6, 31-34, 45; and *Robertson v. Lauchlin Enterprises Ltd.*, 2025 BCSC 1600 at paras. 41, 52-54.
- [23] Having considered the established principles and the relevant cases, I do not find this an appropriate case in which to order special costs. I did conclude that the plaintiff's notice of civil claim was barred based on the doctrines of *res judicata* and abuse of process [Reasons at para. 96]. But, in my view, the plaintiff's conduct in attempting to advance her tort claims for the alleged sexual assault did not rise to the level of egregious or reprehensible misconduct that is necessary to warrant an award of special costs.
- [24] I accept that when the plaintiff filed the notice of civil claim on January 10, 2024, the defendant wrote to the plaintiff the next day. In that letter, defendant's counsel set out the defendant's position, supported by case law references, that the notice of civil claim was barred by *res judicata* and its filing constituted an abuse of process. In effect, the defendant suggests, as did the defendants in *Stanford* at para. 53, that the plaintiff ought not to have persisted with her civil action after the defendant's express warnings that he would apply to strike the claim as an abuse of process and seek special costs as a result.

- [25] First, I note that putting an opponent on notice that special costs will be sought is not a basis for a special costs order; it is the conduct itself that matters: *Paniccia v. Eckert*, 2013 BCSC 156 at para. 8. In respect of the plaintiff's conduct, as the Reasons make clear, the parties had diametrically opposed views about whether the parties' family law proceedings addressed and therefore settled the plaintiff's allegations of sexual assault, including because of the uncertain status of the plaintiff's amended counterclaim in the family law proceedings. Counsel had exchanged correspondence on this very topic, seemingly without express resolution. The plaintiff also viewed recent case law as supporting her ability to proceed with her civil claim despite the settlement of the family law proceedings (see Reasons at paras. 58, 73-75).
- [26] In my view, the plaintiff's claim, and more specifically, her attempt to advance it through a civil action after the conclusion of the family law proceedings, cannot be said to have been clearly or manifestly deficient from the outset in a way that might justify a special costs award. As noted at para. 55 of the Reasons, the merits of the plaintiff's allegations were not before me. The claim was struck on a technical or procedural basis, rather than on its merits.
- [27] Nothing in the materials before me leads me to conclude the plaintiff's claim was brought in bad faith. The plaintiff advanced a position she considered arguable (i.e. that she was entitled to bring a separate civil claim for the sexual assault). The fact that the Court did not ultimately agree with her is not, in and of itself, enough to warrant an award of special costs; there must be something more: *Vassilaki v. Vassilakakis*, 2024 BCCA 15 at paras. 46-49. As the Court of Appeal noted at para. 132 of *Smithies Holdings Ltd.*, at the end of the day, almost every unsuccessful litigant could be said to be deserving of reproof or rebuke in some way.
- [28] While the defendant contends that certain litigation choices by the plaintiff's counsel unnecessarily increased the time required for the hearing of the strike application, he relies on those points to support his request that plaintiff's counsel be made to pay a portion of the costs award, and not expressly as the basis for a special costs award. I will address those points below.
- [29] The defendant's written costs submissions also referenced two settlement offers the defendant says are "relevant" to the costs award. The defendant did not elaborate further on that statement or provide submissions on how the two offers ought to be considered by the Court. The plaintiff did not address the settlement offers in her written submissions.
- [30] Rule 9-1(4) permits the court to consider a settlement offer delivered in accordance with the requirements of R. 9-1(1) when exercising discretion in relation to costs. Rule 9-1(5) sets out options the Court may consider, including the option to award double costs of all or some of the steps taken after an offer was delivered or served. Rule 9-1(6) lists factors the Court may consider in deciding whether to make an order under R. 9-1(5), including whether the offer was one that ought reasonably to have been accepted, the relationship between the offer and the Court's final decision and the relative financial circumstances of the parties. In *Findlay*

v. George, 2021 BCCA 12, the Court of Appeal framed the key question as whether it was unreasonable for the receiving party to have refused the offer based on the circumstances at the time, rather than with the benefit of hindsight after judgment is rendered (at para. 95).

- [31] By letter dated March 20, 2024, which referenced the January 2024 correspondence and case law provided, the defendant offered to settle the litigation for \$5,000 in exchange for an executed consent dismissal order and release. On February 21, 2025, the date after the hearing of the strike application, the defendant sent a second offer to settle the litigation on a without costs basis. Both offers conform to the requirements of R. 9-1(1).
- [32] In the absence of more comprehensive submissions from both parties, I have done my best to consider the timing of the offers, the rationales provided, whether the offers bore some relationship to the claim and if they could be easily evaluated (see *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27). On the materials before me, I am unable to conclude that it was unreasonable for the plaintiff to have rejected the offers.
- [33] The first offer was made at an early stage of the proceedings. Although the defendant's January 2024 correspondence had set out his position in summary form, the offer was made before the defendant filed his more detailed application to strike. The offer itself was also likely viewed by the plaintiff to be a relatively nominal amount given the nature of the tort claims she sought to advance. The second offer was made after the hearing, but before the further exchange of written submissions permitted by the Court, meaning the strike application had not yet concluded. Forecasting an outcome in those circumstances would likely have felt premature.
- [34] Accordingly, I decline to award the defendant either special costs or double costs. Subject to my conclusions on the second and third costs questions below, I find the appropriate costs order is for the plaintiff to pay the defendant party and party costs assessed at Scale B.

Are there reasons to limit or deny the defendant's entitlement to costs?

Legal framework

- [35] As noted above, the Court retains discretion not to award a successful party some or all of their costs if the Court considers there are reasons to "otherwise order". One such reason is if the Court finds the successful party engaged in misconduct in the course of the litigation: *Loft v. Nat*, 2014 BCCA 108 at para. 49.
- [36] An example of potentially disentiing conduct is where the successful party makes litigation choices that unreasonably lengthen the proceeding, imposing unnecessary additional costs on the other party: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2025 BCSC 2023 at paras. 48, 76. Another example is where a party deliberately and intentionally misleads the Court: *Cardwell et al v. Perthen et al*, 2007 BCSC 366 at para. 13. The party seeking to displace the usual rule that costs follow the event bears the onus: *LeClair v. Mibrella Inc.*, 2011 BCSC 533 at para. 10.

Discussion

- [37] The plaintiff says the Court should deny the defendant all costs in order to censure his misconduct. Summarizing the written submissions, plaintiff's counsel says the defendant deliberately and persistently breached the British Columbia Code of Professional Conduct, the Rules, and the Supreme Court Family Rules [Family Rules] in the context of the following alleged instances of misconduct:
- a) deliberately misleading the Court about the contents of the strike application record;
 - b) deliberately backtracking on his agreement to sign a consent order to allow the plaintiff to withdraw her amended counterclaim in the family law proceedings;
 - c) advancing inconsistent arguments in the present proceedings and the family law proceedings about whether the plaintiff's amended counterclaim in the family law proceedings was captured by the final consent order in those proceedings (alleged to constitute an abuse of process); and
 - d) failing to update his list of documents in the family law proceedings and using that failure to impede the plaintiff's discovery of the defendant in those proceedings.
- [38] Further and in the alternative, the plaintiff says the defendant should be denied his costs because the plaintiff's sexual assault claims were meritorious and there were exigent public policy reasons for bringing those claims forward as a separate civil action. I will address the plaintiff's allegations of misconduct before turning to the alternative argument.
- [39] The plaintiff's second and fourth allegations of misconduct concern the defendant's alleged litigation conduct in the separate family law proceedings. That conduct occurred prior to the plaintiff commencing her civil claim in January 2024. It is therefore both "pre-litigation" conduct, and conduct "in the course of" entirely separate litigation. The authorities canvassed above confirm such conduct is not relevant to any consideration of whether to award special costs in this litigation. In my view, pre-litigation conduct or conduct in separate proceedings equally cannot be relevant to whether the defendant engaged in conduct "in the course of this litigation" that should disentitle him from his costs of this litigation. While such conduct might have been relevant to the costs of the family law proceedings, these reasons only address costs of the present civil action. As I consider them irrelevant, they do not provide a basis on which to limit or deny the defendant's entitlement to costs.
- [40] I similarly reject the plaintiff's third contention that advancing inconsistent arguments constitutes an "abuse of process" that should disentitle the defendant from some or all of his costs. I accept that, depending on the context and circumstances of a particular case, a Court may find an abuse of process where a party advances inconsistent pleadings or attempts to pursue inconsistent rights, whether between two proceedings or within one matter. However, the cases cited by the plaintiff (and the ones on which they in turn rely) address instances where the Court struck the second claim (*Este v. Esteghamat-Ardakani*,

2018 BCCA 290) or refused to allow proposed defendants to be added (Pepper's Produce Ltd. v. Medallion Realty Ltd., 2012 BCCA 247) based on the inconsistency. The plaintiff did not provide any case authority in which a successful party was deprived of their costs because of having taken (allegedly) inconsistent positions in legal arguments made in two separate proceedings.

- [41] Instead, the cases cited by the plaintiff appear to suggest that the appropriate "remedy" for any such abuse of process (if found) would be to strike out or disregard the second and therefore inconsistent argument. In this case, that would have meant striking the defendant's argument that, under R. 21-5 of the Family Rules, the plaintiff's amended counterclaim was an irregularity not a nullity: Reasons at paras. 88-93. However, I did not ultimately decide or rely on that aspect of the defendant's argument in reaching my conclusion: Reasons at para. 93. Unlike in the cases cited by the plaintiff, striking that argument would not have affected the outcome. Further, the defendant only advanced that argument in reply to the plaintiff's assertion that her amended counterclaim was a "nullity": Reasons at para. 50. In the circumstances, I am unable to conclude that replying to the plaintiff's own argument by reference to a relevant provision of the Family Rules amounts to disentitling misconduct.
- [42] The plaintiff's first allegation of misconduct relates to a particular application response filed by the defendant in the family law proceeding. Plaintiff's counsel asserts defendant's counsel deliberately omitted that document from the strike application record, in contravention of the requirements of R. 8-1(5). To a large extent, this submission repeats the substance of the letter plaintiff's counsel sent on March 4, 2025, which I addressed at para. 54 of the Reasons. I did not find the alleged omission material to the issues on the strike application and I am not persuaded it is material to whether the defendant should be entitled to his costs now.
- [43] The alleged "omission" of that document from the application record was addressed before me at the hearing of the strike application; I was aware the document had not been included. But as noted at para. 54 of the Reasons, plaintiff's counsel had reproduced the salient points from the document in question in his written submissions. As the necessary content was before the Court, the omission of the physical document from the record had no practical impact on the proceedings. In my view, no further explanation was required.
- [44] Plaintiff's counsel's repeated pursuit of this issue, through his March 4, 2025 letter and again through the costs submissions, is disproportionate. This is not the first time materials have been left out of an application record, and it will not be the last. As the Court noted at para. 11 of LeClair, the Court's discretion to depart from the usual rule that the successful party is entitled to their costs

is not intended to provide an unsuccessful party with an opportunity to parse through the litigation conduct of the opposing party searching for behaviour that might be criticized. I do not say that the discretion which is conferred in Rule 14-1(9) is limited to exceptional cases. The Rule is not, however, intended to address imperfect or less than optimal conduct. It is generally not intended to address questionable judgment. Instead it provides the court with an objective means of communicating its censure in relation to conduct that manifestly warrants rebuke.

[Emphasis added.]

[45] I reject the plaintiff's contention that the omission of the document from the application record is litigation misconduct manifestly worthy of censure or rebuke.

[46] I must address one more point before leaving this issue. In support of the argument that this "omission" was "worthy of the Court's concern", plaintiff's counsel invited me to compare the conduct of defendant's counsel on this issue to plaintiff's counsel's own conduct in a separate file before the Provincial Court in 2017 that apparently caused that court concern. I do not find the invited comparison, or the portions of the affidavit material provided by plaintiff's counsel in support of it, to be helpful to my consideration of these issues. I have disregarded them.

[47] Finally, I am unable to accept the plaintiff's contention that the merits of her claim, and the public policy reasons for attempting to raise those claims outside the family law proceedings, warrant denying the defendant his costs. As noted above, and at para. 55 of the Reasons, the question of the merits of the plaintiff's civil sexual assault claim was not before me. Nor do I understand the plaintiff to have advanced her civil claim on a public interest litigation basis, as that concept has been established in the jurisprudence. These are not bases on which to deprive the defendant of his costs of successfully striking the claim.

[48] I am not persuaded there are reasons to limit or deny the defendant's entitlement to his ordinary costs.

Should any portion of the costs award be payable by plaintiff's counsel personally?

Legal framework

[49] The final question is whether any of the costs award should be made against plaintiff's counsel personally. There are two possible bases on which the Court can make such an award: under the Court's inherent jurisdiction or under the Rules: *Walsh v. Muirhead*, 2020 BCCA 225 at paras. 24-27.

[50] The Court's inherent jurisdiction to award costs against counsel flows from the courts' right and duty "to supervise the conduct of lawyers who appear before them and to note, and sometimes penalize," any conduct that frustrates or interferes with the administration of justice: *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at para. 18. While the power exists, it is rarely exercised and the threshold is very high. The Court must find the lawyer engaged in "conduct that represents a marked and unacceptable

departure from the standard of reasonable conduct expected of a player in the judicial system": Jodoin at para. 27. The conduct in question must at least constitute gross neglect or inaccuracy; a mere mistake or error of judgment is not sufficient: Jodoin at para. 27.

- [51] Rule 14-1(33)(c) expressly authorizes the Court to order that a lawyer be personally liable for all or part of any costs that lawyer's client has been ordered to pay to another party. The Court may exercise that discretion where the Court considers that a party's lawyer has "caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault": R. 14-1(33). The Rules expand the scope of conduct which might support a costs order against a lawyer personally beyond simply cases of "serious misconduct"; in some circumstances, mere delay and mere neglect may be sufficient: Walsh at para. 26, citing *Nazmdeh v. Spraggs*, 2010 BCCA 131 at paras. 101-102 (which addressed the predecessor to R. 14-1(33)).
- [52] Despite the expanded scope under the Rules, the Court of Appeal has confirmed that regardless of which authority the Court relies on, the Court must exercise the power to award costs against counsel personally "sparingly" and "only in rare or exceptional cases": Walsh at paras. 29-31, citing *Nazmdeh* at para. 103 and Jodoin at para. 26. This need to exercise "restraint and caution" stems in part from recognition of a lawyer's duties to "bring forward with courage even unpopular causes": *Young v. Young*, [1993] 4 S.C.R. 3 at 136.

Discussion

- [53] The defendant contends that plaintiff's counsel engaged in conduct during the hearing of the strike application that unnecessarily increased the time required for the hearing. In particular, the defendant refers to:
- a) plaintiff's counsel repeatedly interrupting the Court, which continued despite the Court's cautions;
 - b) plaintiff's counsel spending considerable time impugning the conduct of defendant's counsel in the family law proceedings, and in relation to the missing document in the application record, none of which was relevant to the issues to be decided by the Court;
 - c) the time spent arguing about whether or not a separate agreement had been reached on the plaintiff's request to withdraw her amended counterclaim in the family law proceedings.
- [54] The defendant also takes issue with the decision by plaintiff's counsel to file the notice of civil claim, despite being fully aware of what had transpired in the family law proceedings; he asserts it is conduct worthy of sanction through an order of costs.
- [55] I have considered the case of *Padda v. Lalli*, 2018 BCSC 21, referenced by the defendant, and the cases it cites. I have also considered the decisions of Justice Veenstra in *L.L.L. v. S.T.*, 2024 BCSC 1028 (which cited *Padda*), and the Court of Appeal in *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325. The reality is the Court must undertake a contextual and fact-specific assessment of whether a particular counsel's conduct in a

particular file has caused costs to be incurred without reasonable cause or wasted through neglect or some other fault.

- [56] I have carefully considered the conduct of plaintiff's counsel in this matter. I agree that, in certain respects, the focus of plaintiff's counsel was misguided, despite the Court's efforts to redirect counsel to issues on which the Court required assistance. I accept that the result was to expand the time required for the hearing beyond the parties' initial time estimate, and to necessitate the exchange of further written submissions. That said, the hearing length did not extend to a second day or balloon as occurred in *L.L.L.* Nor were there missed court dates or matters that did not proceed, as was the case in *Padda* and the decisions it cites. In those instances, the wasted costs of those specific failures could be easily determined. With respect to the filing of the notice of civil claim, given the dispute between the parties about what had been settled by the family law proceedings, I do not consider that decision to have caused costs to be incurred "without reasonable cause."
- [57] Considered in totality, while I do not endorse the approach taken by plaintiff's counsel to this matter, including in his dealings with the Court and with opposing counsel, I am not satisfied his actions undermined the authority of the Court or interfered with the administration of justice in a manner that makes this one of the rare or exceptional cases in which costs should be ordered against counsel personally. Bearing in mind the restraint counselled by the jurisprudence, I decline to exercise my discretion to order plaintiff's counsel to pay any portion of the costs to which the defendant is entitled.

Additional issue re: materials filed by plaintiff's counsel

- [58] As indicated above, there is an additional issue I must address because of certain materials filed by plaintiff's counsel. In support of the plaintiff's costs submissions, plaintiff's counsel filed an affidavit of Jennifer Fouracres, a legal assistant at counsel's previous law firm. The affidavit was sworn and filed July 2, 2025 and attaches five exhibits. Although labelled as "Affidavit #1", it is the second affidavit of Ms. Fouracres filed in this proceeding (the "July 2025 Affidavit"). Paragraphs 2 to 5 of the July 2025 Affidavit address the first four exhibits, all of which relate to the litigation history of this proceeding, including correspondence exchanged between counsel.
- [59] In para. 6 of the July 2025 Affidavit, the legal assistant relates what she was advised by plaintiff's counsel about counsel's rationale for sending the correspondence I addressed at para. 54 of the Reasons - correspondence I did not consider appropriate or material to the issues before me on the strike application. The legal assistant attaches as Exhibit "E" a copy of a confidential letter written by plaintiff's counsel in 2017 in a completely different context, namely, a Law Society disciplinary investigation arising from an unrelated Provincial Court file. As indicated above, I do not consider the further explanation relayed by the legal assistant or the attached Exhibit "E" to be helpful to the costs analysis and I have not considered it for those purposes.

- [60] However, I have independent concerns that the confidential letter has been attached as an exhibit to an affidavit filed in this Court, making it public. In my view, the letter attached as Exhibit "E" contains confidential and private information not just about plaintiff's counsel, but also about another member of the legal profession. The letter identifies the Provincial Court matter by name and file number, which would allow the other counsel who was involved in that matter, and therefore the resulting investigation by the Law Society, to be identified.
- [61] It may be that plaintiff's counsel can choose to disclose confidential information about his own professional history if he considers it necessary or relevant to do so. However, even if plaintiff's counsel has that ability, as noted, the letter attached as Exhibit "E" to the July 2025 Affidavit does not concern just plaintiff's counsel; it implicates a third party and their involvement in what is understood to be a confidential process. There is no indication the other individual has provided consent for plaintiff's counsel to disclose confidential information about that individual's professional history in the context of a wholly separate proceeding before this Court, or, in fact, at all.
- [62] In these unusual circumstances, I find it necessary to take steps on my own initiative to protect the privacy and confidentiality of the information pertaining to the third party in question, and thereby to maintain public confidence in the proper administration of justice. Bearing in mind the governing principles from *Sherman Estate v. Donovan*, 2021 SCC 25, I have considered how best to balance the open court principle with the important public interests at stake (protecting the privacy of sensitive third-party personal information related to a confidential process that is not relevant to the matters to be decided). I am conscious I am dealing primarily with one exhibit attached to a filed affidavit. I am also conscious that any order made by the Court must be sufficiently clear and able to be acted on by Registry staff.
- [63] If this matter were continuing, I would likely have sealed the July 2025 Affidavit in its entirety and required plaintiff's counsel to file a version with certain statements in para. 6 and the entirety of Exhibit "E" redacted. However, because this costs decision ends the matter before the Supreme Court, and I am conscious there are concerns about the plaintiff's financial circumstances, I do not consider it proportionate to require the plaintiff to prepare and file any additional materials at this stage. Instead, I will order that the July 2025 Affidavit be sealed in its entirety until further order of the Court, without the need to file a redacted version.

Conclusion

- [64] In summary, I order the plaintiff to pay the defendant's costs of the strike application and the claim as a whole, to be assessed as party and party costs in accordance with Appendix B of the Rules, and fixed at Scale B.

- [65] While the defendant did not succeed in obtaining an order for special costs against the plaintiff, or an order that plaintiff's counsel pay some of the costs award personally, the defendant successfully defended against the plaintiff's position that he should not be entitled to any costs. Accordingly, I also award the defendant his ordinary costs at Scale B in relation to the costs issues, which were addressed through written submissions.
- [66] I also order that the Affidavit #1 of Jennifer Fouracres, sworn and filed July 2, 2025, be sealed in its entirety until further order of the Court. The plaintiff is not required to file a redacted version. Access to the sealed affidavit is restricted to the parties and counsel of record for the parties. I direct the Registry to draft the necessary sealing order in the format required by Practice Direction 58 (PD-58) as a separate form of order from the costs order. The sealing order is to be sent to my attention for approval. As the sealing order has been made on my own initiative, I dispense with the need for both counsel's signatures on the sealing order.

"K. Wolfe J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/21/2025BCSC2148.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/klassen-v-epp-2025-bcsc-2148>

Prepared on 28 October 2026 · Esheria