

CANADA / JUDGMENT

Marchetti v. Lane

2025 BCSC 716

COURT

Supreme Court of British Columbia

DECIDED

16 April 2025

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2025 BCSC 716 Marchetti v. Lane

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marchetti v. Lane,

2025 BCSC 716

Date: 20250416

Docket: E181603

Registry: Vancouver

Between:

Valentina Marchetti

Claimant

And

Thomas Frederick Lane

Respondent

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Claimant:

J. Desilets

The Respondent, appearing in person:

T. F. Lane

Place and Date of Hearing:

Vancouver, B.C.

March 6, 2025

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2025

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Introduction

- [1] This is a family law proceeding. The parties separated in 2018 after a three-year relationship. There is one child of the relationship born in May 2016 (the "Child").

- [2] The primary issue in dispute between the parties at the outset of the litigation concerned parenting arrangements for the Child. That issue was resolved by an arbitration award made in early 2023. The arbitration award has not been appealed.
- [3] There remain some issues between the parties. The claimant wishes to vary the arbitration award, to resolve property division by consent on the basis sought by the respondent in his pleadings, and to have costs assessed. That application is not presently before the Court.
- [4] In the present application, the respondent seeks thirteen orders. While I will address each order in more detail below, in a general way, these orders relate to:
- a) Orders to address various alleged "irregularities" in the proceedings.
 - b) Removal of claimant's counsel.
 - c) Waiver of the implied undertaking of confidentiality.
 - d) Orders mandating certain actions to address alleged breaches of an alleged obligation of confidentiality in respect of the arbitration award.
 - e) Orders mandating certain actions and permitting certain communications with respect to the Child's school file and record.
 - f) The appointment of counsel for the respondent.
 - g) Orders to restrain the claimant's ability to pursue her claims in court.
 - h) Costs.
- [5] At the hearing of this application, the respondent sought to adjourn his application in respect of certain relief sought.
- [6] All of the orders sought, including the adjournment, are opposed by the claimant.

Procedural History

- [7] I will not address all of the procedural steps and orders that have been made in this case since 2018 but will touch on those of some significance to this application.
- [8] On August 31, 2018, a consent order ("2018 Order") was made without a hearing. The 2018 Order addressed parental responsibilities, the provision of a report pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the appointment of a parenting coordinator, a transitional parenting schedule for the month of September 2018, a without-prejudice interim parenting schedule commencing October 1, 2018 and continuing until otherwise agreed or ordered by the court after delivery of the s. 211 report, a holiday parenting schedule during the course of the interim parenting schedule, occupancy of the parties' rented apartment, and the removal of certain property from that apartment. The 2018 Order also provided, in part:

Other Issues

[]

18. The division of all other family property and debts between the parties shall be referred for resolution pursuant to paragraph 19 of this Order failing agreement of the parties.
19. Any issues in respect of support for the benefit of the Child shall be referred for resolution pursuant to paragraph 19 of this Order failing agreement of the parties.

Dispute Resolution

20. By consent, any disputes that may arise under this Order, including the interpretation and implementation of this Order, shall be referred to the Parenting Coordinator for issues within his or her authority and otherwise to a qualified mediator at the shared cost of the parties. The parties shall use best efforts to agree on a mediator, failing which, a mutually acceptable third party or counsel for the parties shall select the mediator.
21. By consent. If the parties cannot resolve a dispute despite mediation, they will
 - a. request the mediator to certify that mediation has failed on the issue(s) in dispute, and
 - b. file the certificate with the Court,

whereupon the dispute may be referred to the Court for resolution.

[9] On April 25, 2019, the parties obtained a s. 211 report from Dr. England.

[10] In December 2019, the respondent filed a notice of trial to set a seven-day trial commencing March 29, 2021.

[11] The parties exchanged trial briefs. I have been provided with a copy of the trial brief prepared by the claimant in February 2021. According to this trial brief, the issues to be addressed at the trial included parenting arrangements, division of property, and a fine pursuant to s. 230 of the FLA.

[12] The parties entered into an arbitration agreement dated March 17, 2021 ("Arbitration Agreement").

[13] On March 24, 2021, a consent order was made ("2021 Order") that provided:

1. BY CONSENT the parties will remit all the matters scheduled to be adjudicated by a trial commencing March 29, 2021 to arbitration. The trial will be adjourned generally.
2. BY CONSENT the arbitrator will be Morag MacLeod, Q.C. (the "Arbitrator") and she will deal with all matters scheduled to be adjudicated by a trial commencing March 29, 2021.
3. BY CONSENT the arbitration will commence on March 24, 2021 for one day.
4. BY CONSENT the single issue of school choice will be adjudicated on March 24, 2021.

5. BY CONSENT the remaining matters will be arbitrated by the Arbitrator no later than July 1, 2021, subject to the availability of Dr. England, the Arbitrator and the parties.
 6. BY CONSENT the costs of the arbitration will be paid equally with the ultimate determination of costs to be referred to the Arbitrator.
 7. BY CONSENT any disputes related to the appointment of the Arbitrator or the arbitrator agreement will be referred to court.
 8. BY CONSENT the Arbitrator will apply the Family Law Act and the Rules of Court, which will be stipulated in the arbitration agreement.
 9. BY CONSENT unless agreed by both parties, no other mechanisms will be used to address any of the outstanding issues until arbitration is completed.
 10. BY CONSENT the parties will enter into an arbitration agreement prior to the trial being adjourned.
- [14] The parties attended the arbitration over six days in October, November, and December 2022. By agreement of the parties and counsel, the Arbitrator received evidence by way of affidavit with live cross-examination and live re-direct and rebuttal evidence. The principal witnesses were the parties. There were six other lay witnesses. Dr. England's s. 211 report, dated three years prior on April 25, 2019, was admitted as evidence. Dr. England was not called for cross-examination by either party.
- [15] On January 15, 2023, an arbitration award was made and a corrigendum was issued dated February 27, 2023 ("Arbitration Award"). The issues before the Arbitrator were:
- a) Parenting arrangements for the Child, including final decision-making and international travel;
 - b) Child support, including special and extraordinary expenses of the Child; and
 - c) Costs.
- [16] The Arbitration Award does not address property division as that issue was not advanced by the parties.

Findings of the Arbitrator

- [17] The Arbitration Award is final and binding on the parties: FLA, s. 19.16.
- [18] The FLA does not permit appeals from arbitration awards on pure questions of fact: FLA, s. 19.19. In any event, the Arbitration Award has not been appealed. The time limit for filing an appeal has long passed: FLA, s. 19.19(2).
- [19] The Arbitrator's findings are an important part of the factual matrix before me. With this in mind, it is worth setting out the Arbitrator's decision in some detail.

[20] The Arbitrator held:

[11] Pursuant to a Consent Order of the Court, made August 31, 2018 (the "Consent Order"), the parties are each guardians of the Child, who lives with both parents under a without prejudice interim shared parenting arrangement as set out in the Consent Order. No issues concerning guardianship were advanced for arbitration. The central issues are the parenting arrangements, including final decision-making, international travel with the Child, and the parenting schedule.

[12] The parenting relationship between the parties has been fraught with conflict and appears to have deteriorated over the course of this family law dispute.

[13] The Family Law Act, S.B.C. 2011, c. 25 ["FLA"] requires the trier of fact not to consider the conduct of the parties, except to the extent that it is relevant to their parenting abilities or affects the factors that must be taken into account in determining the best interests of the Child. In this case, many aspects of the parties' conduct is relevant to their parenting abilities, affecting the factors that must be taken into account in determining the Child's best interests.

[21] The Arbitrator had significant reservations about the respondent's credibility and found the claimant to be, for the most part, credible and reliable. She explained as follows:

[23] With these general principles in mind, I have significant reservations about the credibility of the Respondent and the reliability of his evidence. I find that the Respondent has engaged in obstructionist and combative behaviour, particularly with the Claimant in the course of this family law dispute, but also with third party professionals whose only interests have been to provide assistance to this family. In contrast, I find the Claimant to be, for the most part, credible and her evidence reliable.

[24] Over the course of the hearing of this Arbitration, I observed that the relationship between the parties remains strained and marked by hostility, particularly on the part of the Respondent. He had significant difficulties with self-regulation, frequently dissolving into emotional outbursts and occasional weeping, and resorting to accusations, sarcasm, and personal attacks, all of which impeded the conduct of the case and added to the challenges of Counsel. On more than one occasion, the proceedings had to be paused to permit the Respondent time to compose himself.

[25] The hearing was conducted over six days, one of which had to be ended at 11:15 a.m. due to the Respondent's state of distress under cross-examination. It is important to note that both Counsel conducted themselves in a thoroughly professional manner when faced with the inability of the Respondent to continue on October 20, 2022. Counsel for the Respondent, who took on the representation of his client late in the arc of this case, advocated assiduously for him in the best traditions of the bar. Counsel for the Claimant dealt with inappropriate personal attacks by the Respondent on her firm, her reputation, and her professionalism with calm resolve, co-operating with opposing Counsel when the

Respondent was too distraught to proceed.

[]

[27] In contrast, I found the Claimant's testimony, although open to some question on certain points, to be calmly and rationally presented overall. I also found her evidence to be more consistent with the evidence of other witnesses and the documents, including email strings with third parties adduced in the evidence.

[Emphasis added.]

[22] As outlined above, the Arbitrator had concerns about the respondent's conduct in the proceedings. She explained:

[34] I acknowledge that several of the FLA ss. 38(d) and (e) factors considered by the Court in [T.M.H. v. P.J.H., 2020 BCSC 804] are present in this case, including:

[a] the Respondent's litigation conduct when self-represented which resulted in unreasonable delays and expense that could have been avoided, including the challenges he created for third party service providers engaged for the benefit of the Child;

[b] repeated court applications and threatened referrals to the police (unwarranted) when the Respondent did not get his way;

[c] refusal to adhere to expressed boundaries for inter-parent communication;

[d] the Respondent's demonstrated inability to control himself, or modify his behaviour, despite orders and arbitral awards made along the way when in pursuit of something that he wants and believes he is entitled to, and is not getting; and

[e] exposing the Child to the conflict created by his conduct and approach to the Claimant in this proceeding.

[Emphasis added.]

[23] The Arbitrator observed that the respondent had a "demonstrated and disproportionate fixation on the process aspects of this proceeding as opposed to the substance of resolving the parenting issues for the benefit of the Child".

[24] The Arbitrator found:

[36] I conclude that on the evidence before me, the conduct of the Respondent is not rooted in intentional, tactical coercive control, but is a product of:

[a] his lack of familiarity with, and hyper-sensitivity about, the legal processes for the resolution of family law disputes;

[b] his over-reaction to minor administrative errors by the Claimant [for example: her failure to include his address in a Vancouver School Board form which he characterized as a fraud worthy of the intervention of the police];

[c] his fear of the consequences to him of a finding of family violence; and

[d] his dis-regulated emotional state, well in evidence during the hearings.

[37] I find that, while the conduct of the Respondent in this proceeding has certainly negatively impacted the Claimant, the Child and the third parties engaged to assist this family, it was not the result of an intention to intimidate, coerce or control the Claimant. It was grounded in the Respondent's fears.

[Emphasis added.]

[25] The Arbitrator considered the s. 211 report that was before her and the respondent's arguments that the s. 211 report should be relied upon and deferred to. The Arbitrator rejected that argument:

[49] I respectfully disagree with Counsel for the Respondent. The circumstances are not what they were when the Section 211 Report was undertaken. The Child has been alive for three times as long as he was when Dr. England made her assessment and report. My findings and observations of the interactions of the parties indicate that Dr. England's anticipation, almost 4 years ago, that decision-making in the area of healthcare might have to go to one parent was prescient. Her optimism about the parties' ability to communicate and interact in the best interests of the Child has not borne out.

[50] On the evidence before me, the approach found to be appropriate by the Court in T.C, is not in the best interests of the Child in this case. The creation of such a circumstance as that highlighted on behalf of the Respondent, being that "shared parenting offers the best opportunity ... for the best interests of the children to be put first in all matters. Under such an arrangement, neither party can assert control and they can only be effective by working together", requiring the parties to "think objectively, to be determined to set aside their negative views of the other and to be determined to achieve a good outcome for the children" is simply not achievable in this case, at least at this time. The inability of the parties to communicate productively on significant decisions has important implications for the Child and places the consequences of failure on him, a burden to which he should not be subjected.

[Emphasis added.]

[26] Having considered all the factors set out in s. 27(2) of the FLA and, in particular those in ss. (a), (e), (f), (g) and (i), the Arbitration Award gives final decision-making with respect to the Child to the claimant. The Arbitrator concluded that the appointment of a parenting coordinator was not of assistance to this family. The Arbitration Award directed the parties to vary the 2021 Order to set out the claimant's right to final decision-making.

- [27] I will not address all of the issues dealt with in the Arbitration Award. However, because they are of some significance to the application before me, I note that, among other things, the Arbitration Award sets out that only the claimant will be the contact point for third-party service providers, including healthcare professionals and educators. The Arbitration Award also addresses s. 7 special or extraordinary expenses ("s. 7 expenses") and requires that the parties obtain the written agreement of the other party if they wish to travel internationally with the Child, failing which, the parties may proceed to court.
- [28] On March 23, 2023, the Arbitrator issued a costs award ("Arbitration Costs Award") in which the Arbitrator awarded the claimant double costs from May 31, 2021. The Arbitration Costs Award has not been appealed.

Post-arbitration

- [29] The claimant alleges that there have been a number of difficulties in the wake of the Arbitration Award. I make no findings about these allegations. Her allegations include but are not limited to the following:
- a) The respondent has not cooperated with respect to varying the 2021 Order as required by the Arbitration Award;
 - b) The claimant has had to apply to court twice to enable travel to Rome, Italy, where she grew up and where her parents and sister reside; and
 - a) The respondent has not paid to the claimant his proportionate share of s. 7 expenses despite being provided with receipts as set out in the Arbitration Award.
- [30] In March 2024, the parties attended a pre-hearing conference in respect of the assessment of costs claimed by the claimant. Registrar Gaily ordered, among other things:
- 1. The Respondent is to prepare a written list of particularized objections to the Bills of Costs and the basis for these objections and to serve that on counsel for the Claimant by Wednesday May 15, 2024.
 - 2. In response to the particularized objections of the Respondent, the Claimant is to prepare affidavit(s) of justification and serve them on the Respondent by Friday May 31, 2024.
 - 3. The Respondent is to request any further documents to support the Bills of Costs and Disbursements from the Claimant by Wednesday May 15, 2024.
 - 4. The Claimant is to respond to requests for further documentation by Friday May 31, 2024.

[Emphasis added.]

- [31] The pleadings of both parties raise the issue of property division which was not addressed in the Arbitration Award. I was advised that Registrar Gaily determined that the claimant is unable to proceed with an assessment of costs that were awarded to her in the Arbitration Costs Award until the issue of property division is resolved.
- [32] In an effort to address her allegations of the issues that have arisen in the wake of the Arbitration Award, and also so that she could later proceed with an assessment of her costs, the claimant filed an application seeking to vary the Arbitration Award to provide her with, among other relief, the ability to travel without the consent of the respondent, payment of s. 7 expenses, and resolution of the property division issues. The hearing of the claimant's application was set for December 13, 2024.
- [33] On December 3, 2024, the respondent force-filed the present application, set to be heard on December 13, 2024. As noted, the respondent's application seeks 13 orders.
- [34] Neither application was ultimately heard on December 13, 2024 due to lack of court availability.
- [35] The claimant's application was adjourned and has yet to be reset.

Orders Sought

- [36] The respondent reset his December 3, 2024 application for 13 orders to be heard in one day on March 6, 2025. The orders sought include the following:
1. The Court will confirm that the Application Records provided to the Court for this hearing by the Claimant and the Respondent respectively are identical;
 2. Fiona Robin and all other lawyers at Basran Robin Allen & Desilets will be removed as Solicitors of Record for the Claimant, Valentina Marchetti;
 3. The implied undertaking of confidentiality for all documents and other information associated with this family law proceeding, including those associated with mediation and arbitration, will be waived so that these materials may be provided to the police and other authorities and may be used in other potential legal proceedings involving the same or similar parties;
 4. Any costs associated with acquiring any court transcripts or other documents needed to investigate irregularities in this family law proceeding will be shared equally by the parties.
 5. The unredacted, unfiled Arbitration Award dated January 15, 2023 provided by the Claimant to Lord Roberts Elementary School will be retrieved from Lord Roberts Elementary School and will be removed from [the Child's] school file and record;
 6. The parties will be directed to work together, without the intervention of legal counsel, to attempt to come to some agreement as to what should be in [the Child's] school file and record, including on the Student Information Verification form;

7. In the event the parties are not able to come to an agreement within 30 business days from the date of this order as to what should be in these files, the Respondent has the authority to inform the School Principal as to what should be in the school files and forms and the required action will be taken by the school to implement his decisions;
8. The Claimant will provide to the Respondent a list of third parties to whom she has provided the unredacted Arbitration Award dated January 15, 2023 and the implied undertaking of confidentiality will be waived for this list;
9. Any current court applications by the Claimant, including the one set to be heard on December 13, 2024 regarding the enforcement and variation of Arbitral Awards and those addressed in the Claimant's Costs Assessment documentation will be stayed until the irregularities in the proceeding to date have been addressed;
10. The Claimant will be restrained from continuing or initiating litigation in this family law proceeding without leave of the Court until such time as the irregularities in the proceeding to date have been addressed;
11. A lawyer, selected by the Respondent or designated by the Court, will be directed to work with the Respondent to assist him in ensuring that all necessary legal actions are taken and implemented correctly to protect [the Child's] best interests within a legal forum.
12. Such further orders as this Honourable Court deems appropriate consistent with its inherent jurisdiction to prevent abuses of process and miscarriages of justice.
13. Costs.

[37] The claimant responded to all of these issues in her application response.

[38] A very voluminous record was assembled by the respondent, which include two five-inch binders and one two-inch binder. The respondent aptly described the materials presented to the Court as "a dog's breakfast". Very little of this evidence was referred to in any way at the hearing. Despite the wordings of Order 1 as sought, no application record was prepared by the claimant.

[39] At the hearing of the application, the respondent sought to adjourn his application in respect of Orders 3, 4, 7, and 8. The respondent's request for an adjournment was opposed by the claimant.

Issues

[40] For the reasons that follow, I have determined that:

- a) An adjournment in respect of Orders 3, 4, 7, and 8 is not in the interests of justice.
- b) No factual or legal basis has been provided in respect of Order 1.

- c) No fair-minded and reasonably-informed member of the public would conclude that the proper administration of justice requires the removal of Ms. Robin or her firm from this case.
- d) The implied undertaking does not apply to the Arbitration Award. The respondent has not demonstrated, on a balance of probabilities, the existence of any public interest of greater weight than the values the implied undertaking is designed to protect, which would warrant waiver of the implied undertaking for all documents and other information associated with this family law proceeding.
- e) The confidentiality requirements in the Arbitration Agreement and the FLA do not provide a legal basis for the orders sought in respect of disclosure of the Arbitration Award to third party service providers.
- f) No legal basis was advanced for Orders 4, 6, 7, and 11.
- g) The claimant is not a vexatious litigant.
- h) The claimant is entitled to her costs of this application, in any event of the cause, assessed as special costs.

Analysis

An Adjournment of Orders 3, 4, 7, and 8 Is Not In The Interests of Justice

[41] A judge exercises discretion in deciding whether or not to grant an adjournment and on what terms. The interests of justice govern and this involves a balancing of the interests of the parties. A judge's discretion is guided by various factors including:

- a) The expeditious and speedy resolution of matters on their merits;
- b) The reasonableness of the request;
- c) The grounds or explanation for the adjournment;
- d) The timeliness of the request;
- e) The potential prejudice to each party;
- f) The right to a fair trial;
- g) The proper administration of justice; and
- h) The history of the matter, including deliberate delay or misuse of the court's process.

See *Navarro v. Doig River First Nation*, 2015 BCSC 2173, at para. 20.

[42] For the reasons that follow, I reject the respondent's request for an adjournment of the adjudication of the application for Orders 3, 4, 7, and 8.

- [43] As I have set out above, the respondent's application was force-filed on December 3, 2024 and set for the same date as the claimant's application to be heard on December 13, 2024. On that date, however, there was insufficient court time and neither application was heard.
- [44] The claimant has yet to reset her application. If the respondent's application is not adjudicated, it will likely be reset on whatever date the claimant secures for her application. Doing so will likely result in that application getting bumped from the court list again. An adjournment of Orders 3, 4, 7, and 8 would therefore have a negative impact on the expeditious resolution of the remaining matters in this case on their merits.
- [45] Very few grounds were offered by the respondent in favour of the requested adjournment.
- [46] With respect to Order 3, the respondent's submission was that the claimant had acceded to his requested use of the documents in question. That is not an accurate statement of the claimant's position. No other explanation for the requested adjournment was offered.
- [47] With respect to Orders 4, 7, and 8, the respondent simply stated that he was not pursuing this relief at this time.
- [48] The respondent's request for an adjournment was not timely. It was made orally at the hearing of the application which had been set down for the second time in long chambers. It was also made after a full response had been prepared by the claimant.
- [49] I have already alluded to one aspect of the prejudice to the claimant of granting the adjournment, which is, that the issues raised on this application will likely be raised again when she attempts to reset her application, frustrating her ability to secure sufficient court time to resolve the limited issues that remain extant between the parties. There is also prejudice to the claimant in the lost costs associated with preparing for an application only to have it abandoned orally at the hearing, and then the likely requirement of additional costs to prepare a second time.
- [50] The prejudice to the respondent of not adjourning these issues is that he did not pursue oral argument in respect of them. He has, however, had several months to prepare such arguments since the initial filing of his application in December 2024.
- [51] The history of the proceedings which I have outlined above, the Arbitrator's findings that the respondent has been somewhat an "obstructionist", and the respondent's litigation conduct that has resulted in unreasonable delays, expense, and repeated court applications, raise a concern that the adjournment application may be serving as a means to delay the court's process from resolving.
- [52] Having considered the interests of both parties, I conclude that the interests of justice do not favour the requested adjournment of Orders 3, 4, 7, and 8.

Order 1: Verification of Chambers Records

[53] With respect to Order 1, the Court was presented with only a single application record on this application which was prepared by the respondent. There being no legal or factual basis presented in favour of this order, the application for Order 1 is dismissed.

Order 2: Removal of Counsel

Position of the Parties

- [54] The respondent amended Order 2 as sought during the March 6, 2025 hearing, arguing that Ms. Robin and any lawyer at the firm Basran Robin Allen & Desilets (the "firm") should be removed as counsel of record and, otherwise, be prevented from representing the claimant in any way in this action or any related proceeding.
- [55] The main argument advanced for this request is that Ms. Robin and other members and staff at her firm are witnesses who have given evidence and who will need to be cross-examined. Specifically, the respondent is concerned with an affidavit of Ms. Robin that was filed on May 31, 2024 as well as other affidavits made by individuals associated with the firm may be described as "administrative" in nature.
- [56] Secondly, the respondent argues that counsel should be removed because of what he says are "multiple irregularities" in the proceedings to date.
- [57] The claimant argues that none of the affidavits given in evidence would preclude Ms. Robin or her firm from carrying on as counsel. The claimant argues the alleged irregularities are also no basis to remove Ms. Robin or her firm as counsel.

Legal Principles

- [58] The source of the court's power to remove counsel of record arises from its inherent jurisdiction to control the litigation process. The Supreme Court of Canada in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, explained it as follows:
- [13] Courts of inherent jurisdiction have supervisory power over litigation brought before them. Lawyers are officers of the court and are bound to conduct their business as the court directs. When issues arise as to whether a lawyer may act for a particular client in litigation, it falls to the court to resolve those issues. The courts' purpose in exercising their supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the reputation of the administration of justice, not to discipline or punish lawyers.
- [59] The test for when a court should remove counsel of record was summarized recently by this court in *Victoria and District Cricket Association v. West Coast Cricket Organization*, 2024 BCSC 65:

- [97] It is well established that the client's right to counsel of choice in civil matters is an important principle that must be safeguarded. Consequently, the court is required to exercise a high degree of restraint before it interferes with this choice: *Kaiser (Re)*, 2011 ONCA 713 at para. 21.
- [98] The right to counsel of choice should only be impinged on "when some real and identifiable public interest intervenes that such a relationship must yield under an impropriety or 'appearance of impropriety' concern": *Alberta Treasury Branches v. Leahy*, 1998 ABCA 286 at para. 5.
- [99] The decision to remove counsel requires a balancing of competing values - the client's right to choose their own counsel versus maintaining the high repute of the legal profession and the administration of justice.
- [100] The court must ask whether a fair-minded and reasonably informed member of the public would conclude that the proper administration of justice requires the removal of the solicitor: *Beacon Hill Service (2000) Limited v. Esso Petroleum Canada*, 2011 ABQB 138 ("Beacon Hill ABQB") at para. 35, aff'd 2012 ABCA 269 ("Beacon Hill ABCA").
- [101] The balancing of interests is rooted in the particular facts of the case and must be based on the "realities of the situation": *Beacon Hill ABCA*, at para. 3.
- [102] Removal of counsel of choice is an extreme remedy and should only be granted in the clearest of circumstances: *Antongiovanni v. Phung*, [2001] O.J. No. 4569, 20 C.P.C. (5th) 77 at para. 58.
- [60] Citing *Victoria and District Cricket Association* at para. 160, the respondent says one such clear circumstance arises in this case because a lawyer cannot act as both witness and advocate in the same matter.
- [61] However, there is no general rule that solicitors cannot swear affidavits in which they or their firm are counsel. To the contrary, the professional guidelines permit such a practice within limits: *BC Code of Professional Conduct*, B.C. Reg. 205/98, R. 2.1-3(k), 5.2-1. The case law also indicates that counsel is legally competent to swear an affidavit, even in relation to matters in dispute, although that practice is to be discouraged: *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2011 BCSC 503 at para. 15.
- [62] As Justice Harris, as he then was, explained in *The Los Angeles Salad Company Inc.*:
- [16] The Canadian Bar Association Code of Professional Conduct qualifies its statement of principle about lawyers swearing affidavits by referring to local rules or practice authorizing lawyers to do so. In British Columbia it is the practice for counsel to swear affidavits, on occasion, particularly in respect to uncontroverted matters or matters relevant to the interlocutory issue before court. The practice obviously carries risks, not least that a solicitor may be cross-examined on the affidavit, waive privilege or may succeed inadvertently in putting his or her credibility in issue. There are many good reasons for

counsel to take great care in swearing affidavits in cases in which they are counsel.

- [17] Nonetheless, there are occasions when the use of counsel affidavits is justified as a matter of practice. Sometimes, at least in respect of interlocutory matters, the evidence of counsel may be the best evidence available. It may often be economical and timely to have counsel swear an affidavit in support of interlocutory application. Introducing a legal rule that upset this practice would defeat the object of the Supreme Court Civil Rules to secure the just, speedy and inexpensive determination of every proceeding on its merits including conducting the proceeding in ways proportionate to the amount involved in the proceeding, the importance of the issues in dispute and the complexity of the proceeding.
- [63] One such exception is when lawyers are asked to justify costs and disbursements in the course of a taxation of a bill of costs. That is precisely what occurred in this case.
- [64] In respect of Ms. Robin, the circumstances surrounding the filing of her affidavit are the following.
- [65] As noted above, the Arbitration Costs Award awarded the claimant double costs starting in May 2021.
- [66] The claimant attempted to have an assessment of those costs.
- [67] In March 2024, the parties attended a pre-hearing conference in respect of the assessment of costs claimed by the claimant.
- [68] Registrar Gaily ordered, among other things, that the claimant prepare affidavits of justification and serve them on the respondent by May 31, 2024.
- [69] On May 31, 2024, Ms. Robin filed an affidavit of justification addressing objections and requests made by the respondent in correspondence dated May 14, 2024.
- [70] Despite the many demands and assertions contained in the respondent's correspondence, Ms. Robin's affidavit is limited to responding to matters addressing the costs sought by the claimant. Ms. Robin's affidavit addresses steps taken in the litigation, documents relevant to steps taken in the litigation, orders made by the court, and correspondence between the parties. She provides supporting documents such as correspondence, court orders, court forms, court summary sheets, a bill of costs, disbursement ledgers, examination for discovery documents, arbitration documents, a trust cheque, and a statement of account.
- [71] Ms. Robin, having been counsel for the claimant for several years, is best positioned to provide this evidence. The affidavit was made after the resolution of the primary issues in this case at arbitration, being the issues relating to parenting arrangements for the Child.

- [72] The respondent argues that the affidavit evidences numerous irregularities in this proceeding. For example, it is argued that a certificate of non-appearance was sent to the respondent that was unsigned. The certificate of non-appearance attached to Ms. Robin's affidavit is signed. The respondent says at the least this is misleading but it may be far worse. He says it may be an example of fraud.
- [73] Another example is that the respondent argues that an individual at Charest Reporting told him an examination for discovery had been cancelled. The claimant's position, expressed in Ms. Robin's affidavit, is that an individual at Charest Reporting advised her that the respondent had not been told it was cancelled. The respondent says either the individual he spoke to at Charest Reporting is lying or Ms. Robin is misrepresenting what was said. Again, he argues this is misleading or subterfuge and fraud.
- [74] While the respondent has been granted leave to cross-examine Ms. Robin on her affidavit, that does not mean that Ms. Robin or her firm should be disqualified from acting for the claimant. There is no evidentiary basis on which I can conclude that Ms. Robin's has engaged in fraud.
- [75] An order removing Ms. Robin as counsel would impose significant prejudice on the claimant in the particular context of this case, which has a long and voluminous procedural history. To deprive the claimant of her counsel of choice, who has an institutional knowledge of the long arc of this case, would be to impose a colossal and unnecessary expense upon her. A fair-minded and reasonably-informed member of the public would not conclude that the proper administration of justice requires the removal of Ms. Robin and her firm as counsel for the claimant. Indeed, such a person would likely reasonably conclude that Ms. Robin's removal would impede the proper administration of justice.
- [76] The other affidavits in the record before me that have been made by individuals associated with the firm may be described as "administrative" in nature. The purpose of these affidavits is to put important documents before the Court by including them as attachments to the affidavits, and to inform the Court of steps taken in the proceedings to date.
- [77] For example, there is an affidavit from a legal assistant of the firm which simply attaches the Arbitration Agreement, various court orders, the Arbitration Award, the Arbitration Costs Award, correspondence, recent income tax returns and notices of assessment of the parties, and the pleadings. The legal assistant also describes what steps, if any, have been taken at various points in time and describes positions taken and results of hearings. It also provides an estimate of costs.
- [78] There is another affidavit made by a legal assistant of the firm, which, again, attaches correspondence, a court order, and reasons for judgment. This affidavit again describes what steps have and have not been taken and a particular point in the litigation.

- [79] Finally, there is an affidavit of a legal assistant of the firm from 2020 which describes efforts made to obtain the clinical file of Dr. England as it relates to the preparation of the s. 211 report and also communications concerning amendment of the notice of family claim. The affidavit attaches correspondence related to those issues and describes communications between the parties relating to these issues.
- [80] There is no bar to a law firm carrying on as counsel after having filed affidavits of this nature. This is common practice in British Columbia. A fair-minded and reasonably-informed member of the public would not conclude that the proper administration of justice requires the removal of the lawyer or law firm in the face of evidence such as this. Rather, they would conclude that is an extreme remedy that would likely impose unwarranted, additional costs on the parties and delay the orderly resolution of litigation.
- [81] With respect to the alleged "multiple irregularities" in the proceedings to date, none of the issues identified support the removal of Ms. Robin or the law firm in question.
- [82] For example, the respondent argues that:
- a) A digital order made by the court did not comply with the BC Government Cryptographic Standards for Information Protection;
 - b) There are various irregularities on the court summary sheet such as orders that the respondent cannot access and a certificate of pleadings which suggests this is an undefended family law proceeding;
 - c) Counsel have shredded evidence after a hearing;
 - d) Counsel have repeatedly personally threatened him;
 - e) Counsel have made repeated requests that the respondent break the law; and
 - f) The respondent was not served with his own counsel's application to withdraw as counsel.
- [83] With respect to the digital order, the respondent argues that a letter sent to the court by Ms. Beebe (an associate of the firm) amounts to an affidavit in respect of a hearing at which Ms. Beebe was not present. That letter attaches the respondent's own correspondence to the court, outlining his concerns about the digital order. Ms. Beebe's letter responds to that correspondence by:
- a) noting that the firm is not in a position to comment on the court's administrative process for entering submitted orders other than to confirm their understanding that the Registrar's signature was applied in the court's ordinary course of business;
 - b) disputing the respondent's allegation that the entered order is inconsistent with the Court Summary Sheet but, nevertheless, consenting to an amendment to the order in question; and
 - c) confirming that the order had been provided to the respondent.

[84] Ms. Beebe's letter is not an affidavit. Even if it were an affidavit, nothing in this communication warrants removal of Ms. Robin or her firm as counsel. It is appropriately responsive to the communications sent by the respondent. It relies upon records prepared in the ordinary course of the court's business.

[85] Neither the digital signature nor the Court Summary Sheet was prepared by Ms. Robin or her firm. Even if there were irregularities in those documents, and I make no finding that there are, that would not be a basis to remove Ms. Robin or her firm as counsel for the claimant.

[86] With respect to the allegation that counsel shredded evidence, I have been referred to the transcript of a proceeding in this court on June 2, 2023. On that date, Ms. Robin handed up two copies of a vetted order to be signed on the bench. The Court signed the order and returned Ms. Robin's materials to her. The transcript reads:

THE COURT: Excellent. All right.

I have signed your order, and I will hand back your materials. You don't need the extra copy of the arbitration order -

CNSL F. ROBIN: I do not -

THE COURT: -- do you? I can - I can have that shredded. All right. Thank you, counsel.

[87] It is apparent from the transcript that it was the court, not counsel, who had a document shredded. The document was an extra copy of the arbitration order. The respondent was represented by counsel at the hearing who raised no objection to the course of action proposed by the court. This is no basis to remove Ms. Robin or her firm from the case.

[88] With respect to the allegation that claimant's counsel have threatened the respondent and have "requested that he break the law", the example that was provided was the following.

[89] In 2023, it is alleged that the respondent was the victim of an incident of family violence with a third party. The incident did not involve the claimant. The Ministry of Children and Family Development ("MCFD") became involved. The respondent had to vacate his home with the Child. The respondent alleges that the MCFD told him that he must keep their discussion and recommendation confidential and not share information about the incident with the claimant because the involved parties were not parties to this litigation. Claimant's counsel inquired on multiple occasions about this incident.

[90] I was referred to one such letter dated November 8, 2023. The respondent attached a partially redacted copy of that letter to one of his affidavits. The letter is addressed to respondent's then counsel. It refers to the fact that multiple inquiries had been made in respect of the involvement of MCFD and that respondent's counsel had apparently not replied to those inquiries. It asks that the respondent not communicate directly with claimant's counsel while he is represented. It asks that the respondent provide "a fulsome explanation of what transpired". The letter states:

Further, your client sent an email to my client attempting to warn her off making inquiries by stating that MCFD said that "it was inappropriate for your lawyer to be involved" and that "your lawyer shouldn't be involved in these requests."

I do not accept the assertion that MCFD made these comments. If your client does not want me to dig into this on behalf of my client, he will have to be more forthcoming.

[redaction]

It should not have been necessary for me to have written to seek information related to the VPD and MCFD intervention. [redaction]

I will ask again that you provide me, on behalf of your client, all information to his knowledge related to:

1. The attendance of officers from the VPD on October 6
2. The subsequent investigation of MCFD

both of which pertain to [the Child] and to which the other joint guardian is entitled to be aware.

Lastly, I am aware from other sources that the investigation of MCFD is continuing. I put your client on notice that he is expected to disclose to my client any recommendations made by MCFD. Any failure to do so will result in further steps being taken by my client with respect to your client continuing to share joint guardianship with her.

[Emphasis added.]

[91] I was also referred to a letter dated November 9, 2023 in which the MCFD confirmed that the respondent was a protective parent and that there were no concerns regarding the safety and well-being of the Child when in his care. The November 9, 2023 letter confirmed that the file with MCFD was closed and that the results of this inquiry would be kept strictly confidential.

[92] The statements in the November 8, 2023 letter do not constitute unlawful threats against the respondent. They simply seek a response and set out the claimant's then litigation plan failing receipt of such a response. It is not at all surprising or inappropriate that counsel for the claimant would inquire about an incident involving an allegation of family violence that related in any way to the Child and suggest follow up failing such a response. The claimant is a joint guardian of the Child. Such an inquiry does not favour removing counsel or her firm from this case.

- [93] The respondent also argues that claimant's counsel's November 8, 2023 letter suggests that she has personal contacts who are informing her about ongoing investigations at the MCFD and the Vancouver Police Department. In my view, the respondent reads too much into the November 8, 2023 letter. Claimant's counsel refers to "other sources" in respect of MCFD. She does not clarify what sources those are. She does not purport to have any sources at the Vancouver Police Department.
- [94] The respondent also alleges that claimant's counsel "requested that he break the law" when, in February 2023, claimant's counsel sent an e-mail to respondent's then counsel asking that the respondent endorse the Child's passport application.
- [95] The passport application was sent by e-mail and forwarded to the respondent by e-mail. The materials sent to the respondent did not include the documents submitted to support the application, including the Child's photo.
- [96] The respondent advised his counsel that the endorsement he was being asked to make required him to declare that all statements made in the application, as well as all documents submitted to support the application, including the Child's photos were unaltered and true. He noted that it would be misleading to sign for documents that he had not seen. His counsel offered to follow up. The respondent advised that he went to claimant's counsel's office to sign the Child's passport application, and the clerk at the office would not allow him to see the supporting documentation until he insisted. He says this initial refusal was "a demand that he break the law".
- [97] I find this was a minor administrative error by both claimant's counsel and the staff at her firm. The respondent's argument here is an example of what the Arbitrator found to be an "over-reaction to minor administrative errors". It is not a reason to remove claimant's counsel or the firm from the case.
- [98] The respondent further argues that he was not served with an application by his own counsel to withdraw in November 2023. There is an affidavit of service of the withdrawal application in the record but the respondent disputes the accuracy or veracity of that affidavit.
- [99] Even if the respondent had not been served with this application, and I make no finding that this is the case, that would not be a reason to remove claimant's counsel from the case. Questions about the accuracy and veracity of the service affidavit would be an issue between the respondent and his former counsel.
- [100] All of these alleged irregularities are a continuation of what the Arbitrator found to be the respondent's "demonstrated and disproportionate fixation on the process aspects of this proceeding as opposed to the substance of resolving the parenting issues for the benefit of the Child". None of them support removal of claimant's counsel from the record.

Orders 3, 5, and 8: Implied Undertaking

[101] The respondent asks for various orders to address his interpretation of the implied undertaking of confidentiality. In particular, his concern that:

- a) The claimant has provided copies of the Arbitration Award to the Child's school and other third parties.
- b) The respondent wishes to be released from the implied undertaking of confidentiality for all documents and other information associated with this family law proceeding, including those associated with mediation and arbitration, so that these materials may be provided to the police and other authorities and may be used in other potential legal proceedings involving the same or similar parties.

[102] With respect to the Arbitration Award, the respondent's reliance on the implied undertaking of confidentiality rule is misplaced. In *Juman v. Doucette*, 2008 SCC 8, the Supreme Court of Canada summarized the principles governing the implied undertaking rule. The rule holds that evidence compelled during pre-trial discovery from a party to civil litigation can be used by the parties only for the purpose of the litigation in which it was obtained. The foundation of the rule is the statutory compulsion to participate fully in pre-trial discovery. The rule is designed to encourage open and generous discovery by assuring parties being discovered of confidentiality. It recognizes that the public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but that the latter is nevertheless entitled to a measure of protection: *Juman* at paras. 1, 20, 25, 38.

[103] The implied undertaking rule does not apply to the Arbitration Award as it was not evidence compelled during pre-trial discovery.

[104] With respect to the request to be released from the implied undertaking for "all documents and other information associated with this family law proceeding, including those associated with mediation and arbitration", the respondent is correct that an undertaking of confidentiality applies to at least some of those documents, but he has not met his burden of proof for waiver of the undertaking. As the Supreme Court of Canada explained in *Juman* at para. 32:

[32] An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended

purpose.

[Emphasis added.]

- [105] Each case is fact-specific and determined by weighing various factors against the examinee's privacy interest and the complete and candid discovery process. By way of non-exhaustive example, those factors may include: the seriousness of the offence alleged, the evidence or admissions said to be revealed in the discovery process, the use to which the applicant or police may put this material, and whether there is evidence of malice or spite on the part of the applicant: *Engineers and Geoscientists Act*, R.S.B.C. 1996, c. 116 (Re), 2022 BCSC 361 at paras. 76, 78.
- [106] On this application, no detailed submissions have been advanced that would permit this Court to engage in a weighing of those factors. The documents in question have not been identified with any precision, no information is provided about what they contain, and no specific information is provided about what allegations are to be made to the police or other authorities or what use the specific documents may be put to.
- [107] Without any of those details, I am concerned that this application may seek to lay the ground work for an escalation and continuation of a pattern of conduct described by the Arbitrator as the respondent's "repeated court applications and threatened referrals to the police (unwarranted) when the respondent did not get his way".

Orders 5 and 8: Confidentiality

- [108] It is also alleged that the claimant breached confidentiality more generally in providing the Arbitration Award to the Child's school and unknown third parties. As a result, the respondent asks to have the Arbitration Award removed from the school file as well as to be provided with a list of third parties to whom the claimant has provided the Arbitration Award.
- [109] The claimant's position is that she had to provide the Arbitration Award to third parties to demonstrate her decision-making authority. She says this was necessitated in part by the respondent's refusal to sign an order to confirm the claimant's authority. On this application, the respondent's position is that the claimant's application for such an order should not proceed until various irregularities he has alleged are addressed.
- [110] Although the Arbitration Agreement has some specific provisions addressing confidentiality, it does not prohibit showing the Arbitration Award to third parties.
- [111] The Arbitration Agreement provides that the arbitration would be conducted pursuant to FLA's Part 2 (Resolution of Family Law Disputes) - Division 4 (Arbitration). Division 4 of the FLA provides (in relevant part):

Arbitration award binding

19.16 Subject to this Act, an arbitration award is final and binding on all the parties to the award.

[]

Appeal

19.19 (1) A party to an arbitration may appeal to the Supreme Court an arbitration award on any question of law or on any question of mixed law and fact.

(2) The time limit for starting an appeal is 40 days, beginning on the day after the arbitration award is received by the party.

[]

Enforcement of arbitration awards

19.20 (1) Subject to this Act, if an arbitration award is filed in the court, the award is enforceable under this Act as if it were an order of the court.

(2) Despite any agreement of the parties to a family law dispute, a provision of an arbitration award that is inconsistent with this Act or the Divorce Act (Canada) is not enforceable.

[]

Confidentiality

19.22 (1) Subject to this Act and any agreement of the parties, the parties and the arbitrator must not disclose proceedings, evidence, documents and information in connection with the arbitration that are not otherwise in the public domain.

(2) Subsection (1) does not apply if disclosure is

(a) required by law,

(b) required for the purposes of a proceeding under this Act, or

(c) authorized by a court order.

[112] As noted above, the Arbitration Award is final and binding on the parties. No appeal of the Arbitration Award has been filed.

[113] In October 2024, the Arbitration Award was filed with the court pursuant to s. 19.20 of the FLA. The claimant is therefore entitled to rely upon it for the purposes of enforcement.

[114] The lingering question is whether it was a breach of s. 19.22 of the FLA to provide a copy of the Arbitration Award to the Child's school (or any other third party service provider) before it was filed with the court. For reasons I will explain, I conclude it was not.

[115] As noted, s. 19.22 of the FLA provides:

19.22 (1) Subject to this Act and any agreement of the parties, the parties and the arbitrator must not disclose proceedings, evidence, documents and information in connection with the arbitration that are not otherwise in the public domain.

- (2) Subsection (1) does not apply if disclosure is
- (a) required by law,
 - (b) required for the purposes of a proceeding under this Act, or
 - (c) authorized by a court order.

[Emphasis added.]

[116] I have not been referred to any reported decision considering the scope of s. 19.22. None of the key terms in that provision (i.e., "proceedings, evidence, documents and information in connection with the arbitration") are defined in the FLA or the Family Law Act Regulations, B.C. Reg. 347/2012. However, the arbitrator's decision is referred to in the FLA as the "arbitration award" (for example, see ss. 19.16, 19.20). If the legislature intended for s. 19.22 to include arbitration awards, it would have said so. Instead, the term "arbitration award" is notably lacking from s. 19.22.

[117] I am reinforced in this view by comparing s. 19.22 of the FLA to s. 63 of the Arbitration Act, S.B.C. 2020, c. 2. Section 63 of the Arbitration Act is also a confidentiality provision, and its wording is almost identical to s. 19.22 of the FLA except that in s. 63(2)(b), there is an additional prohibition on disclosing "an arbitral award". With that context, the fact that the legislature chose to omit the term "arbitration award" from s. 19.22 of the FLA strengthens my view that the legislature did not intend for the confidentiality requirement in s. 19.22 to apply to arbitration awards.

[118] In any event, there would be no point in requiring the unfiled Arbitration Award to be removed from the Child's school record (or from any other third party service provider) given that the Arbitration Award has now been filed with the court and the claimant is therefore entitled to rely upon it for enforcement.

Orders 4, 6, 7, and 11: No Legal Basis

[119] With respect to Orders 4, 6, 7, and 11, the respondent's notice of application does not comply with the Supreme Court Family Rules [Rules]. The Rules require the notice of application to include a "Legal Basis" section, which sets out a summary or concise statement of the arguments in favour of the applicant's position. It is not sufficient to simply list the enactments and rules relied upon without any analysis of how those provisions relate to the facts and how they lead to the conclusion the applicant wishes the court to reach: *Hamel v. Dumville*, 2023 BCSC 1805 at para. 8.

- [120] To the extent the respondent has pled the FLA, he relies on s. 37 (best interests of the child) and Division 4 (Arbitration); neither of which support the relief sought in Orders 4, 6, 7, or 11 of the respondent's notice of application.
- [121] With respect to Order 4, I have addressed the various irregularities identified by the respondent above. None of these alleged irregularities warrant the cost of acquiring court transcripts to investigate. I have a further concern, already highlighted by the Arbitrator, that this request demonstrates the respondent's ongoing "fixation on the process aspects of this proceeding" as opposed to the substance of resolving the issues between the parties. The respondent, in this application, attempts to impose the cost of that unreasonable fixation on the claimant. There is no reasonable basis to do so.
- [122] With respect to Order 6, I have already dismissed the respondent's application to remove claimant's counsel of choice. There is also no basis to curtail those matters upon which the claimant is entitled to legal assistance, particularly as it relates to parenting arrangements which have been at central to this file.
- [123] With respect to Order 7, the suggested order is contrary to the Arbitration Award which gives final decision-making authority to the claimant and also makes the claimant the contact point for third party service providers for the Child, including educators. As noted, the Arbitration Award is final and binding on the parties and has not been appealed.
- [124] The respondent has provided no legal basis for his request for legal counsel at Order 11 of his notice of application. The respondent is also not impecunious. As noted in the Arbitration Award, he is the Program Head of Computer Information Technology at British Columbia Institute of Technology with an agreed guideline income of \$111,430 for the purposes of child support.

Order 9 and 10: Vexatious Litigant

- [125] The respondent asks that the claimant be restrained in various ways from advancing her claims in this or other litigation.
- [126] The only legal authority cited is s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443, which addresses vexatious litigants.
- [127] For reasons I will explain, I dismiss this application having concluded that the claimant is not a vexatious litigant.
- [128] As this court has explained in *Bryfogle v. School District No. 49 et al*, 2007 BCSC 457 at para. 62, the following are the hallmarks of vexatious conduct in legal proceedings:
- [62] []
- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was [sic] originally a good cause of action;
- (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
- (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[129] Having regard to these factors, I have determined that:

- a) the claimant has not brought multiple actions.
- b) the claimant was successful at the arbitration which has not been appealed.
- c) the claimant has not brought this action for an improper purpose, nor is any improper purpose alleged by the respondent.
- d) the respondent has not alleged that grounds and issues raised have been rolled forward into subsequent proceedings and repeated and supplemented by the claimant.
- e) looking at the whole history of the matter, the claimant has been the predominantly successful litigant in this proceeding.
- f) There is no allegation that the claimant has failed to pay costs of any unsuccessful proceeding, nor even that she has been ordered to pay costs.
- g) There is no allegation that the claimant has taken any unsuccessful appeals from any decisions in this proceeding.

Costs

[130] Rule 16-1 of the Rules states that unless the court otherwise orders, costs of a family law case must be awarded to the successful party. In the normal course, if an application such as this one is refused, the party who brought the application is not entitled to costs of the

application even if that party is awarded costs at trial, but the party opposing the application is entitled to costs if that party is awarded costs at trial. Ordinarily, those costs are assessed in accordance with Appendix B to the Rules and are payable on the conclusion of the family law case, but the court may order otherwise.

[131] Departing from the usual rules on costs is a mechanism the court can use to control its processes. In *Banke Electronics Ltd. v. Olvan Tool & Die Inc.* (1981), 32 O.R. (2d) 630 (H. Ct. of J.), 1981 CanLII 1920 at 2 (O.N.S.C.), Justice Cory explained as follows:

Costs may be used by the Court in order to control its processes. By withholding costs or by the award of costs, it may discourage unnecessary interlocutory proceedings. For example, by directing that costs be payable forthwith in any event of the cause, the Court will discourage interlocutory applications which are frivolous and without merit. Such an award of costs will no doubt be made sparingly. It must be remembered that a requirement that costs of an interlocutory application be paid forthwith may prevent a meritorious action from coming to trial. A less important but not insignificant factor that should also be considered is that it is preferable if there is only one taxation of costs. At that time all aspects of the litigation can be considered and weighed by the Taxing Officer.

[132] Special costs may be payable for conduct worthy of reproof and rebuke: *Chances Housing Cooperative v. Progressive Homes Ltd.*, 2000 BCSC 596 at para. 20; *T.K.H. v. M.D.H.*, 2023 BCSC 99 at paras. 24-25.

[133] I conclude that the claimant is entitled to an order for costs, in any event of the cause, assessed as special costs. The award of costs on this application is intended to indemnify the claimant and to control the court's process by deterring unreasonable conduct in the balance of the proceedings.

[134] I make this order because I find the conduct of the respondent to be worthy of reproof and rebuke.

- a) The respondent's application to remove claimant's counsel was premised on personal attacks on claimant's counsel. The allegations were serious and scandalous and included that counsel had committed fraud. I have found those allegations to be baseless.
- b) I have dismissed the application to restrain the claimant's conduct in this litigation having found that the claimant is not a vexatious litigant. While I make no finding that the respondent is a vexatious litigant as no such application is before me, I do find that several of the factors that inform such a finding are applicable to the respondent on this application:

- i. The respondent's desire to waive the implied undertaking in respect of "all documents and other information associated with this family law proceeding" so that those documents may be provided to "police and other authorities and may be used in other potential legal proceedings involving the same or similar parties", suggests an intention to bring multiple actions relating to the same subject matter. It suggests an intent to continue what has already been found to be an inappropriate pattern of conduct by the Arbitrator.
- ii. It was obvious that this application could not succeed and no reasonable person would have expected to obtain the relief sought.
- iii. The fact that this application was force-filed and set on the same date as the claimant's application, and the volume of materials filed on this application, suggest it may have been brought in an effort to frustrate the claimant's ability to have her issues resolved by the court.
- iv. The respondent's fixation on alleged "irregularities" is an issue that was first raised at the arbitration and is now being rolled forward into this application. It is also indicative of the continuation of a pattern of behaviour that has already been found to be inappropriate by the Arbitrator. Likewise, the attacks levelled on claimant's counsel in this application appear to be the continuation of an inappropriate pattern of conduct from the respondent upon which the Arbitrator has already commented. The Arbitrator characterized similar attacks as "inappropriate personal attacks by the respondent on her firm, her reputation, and her professionalism". Like this court, the Arbitrator found such attacks to be baseless.
- v. The respondent's assertions that the validity of the Arbitration Award is questionable and has not been addressed is clearly wrong as no appeal has been brought in respect of that award.
- c) The respondent's failure to comply with the Rules in terms of identifying any legal basis for many of the orders sought also has a bearing on the result of this application, including costs: Hamel at para. 11.

Conclusion

[135] The respondent's application is dismissed.

[136] The claimant is entitled to an order for special costs in any event of the cause.

"Latimer J."

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Prepared on 28 October 2026 · Esheria