

CANADA / JUDGMENT

McFetridge v. Buendia

2025 BCSC 2603

COURT

Supreme Court of British Columbia

DECIDED

15 September 2025

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2025 BCSC 2603 *McFetridge v. Buendia*

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McFetridge v. Buendia,

2025 BCSC 2603

Date: 20250915

Docket: E246580

Registry: Victoria

Between:

Natalie April *McFetridge*

Appellant

And

Leif Vladamir *Buendia*

Respondent

Before: The Honourable Justice Girn

Oral Reasons for Judgment

Counsel for the Appellant:

S. Tucker

Counsel for the Respondent:

R.G. Sherman

Place and Dates of Hearing:

Victoria, B.C.

June 24-27, 2025

Place and Date of Judgment:

Victoria, B.C.

September 15, 2025

- [1] These reasons have been edited for distribution.
- [2] THE COURT: As I had indicated to counsel, I would to give a mid-hearing ruling with respect to the fresh and new evidence that the appellant seeks to tender at the appeal. These are my reasons.
- [3] I will integrate more fulsome reasons with respect to the new and fresh evidence in my reasons for judgment on the appeal. But for now, I want to give you very brief reasons in terms of my decision on the new and fresh evidence.
- [4] The appellant, Natalie McFetridge, appeals the March 22, 2024, order of Judge Jamieson of the Provincial Court of British Columbia. She seeks to have the order set aside, and she also seeks to adduce new and fresh evidence on the appeal.
- [5] Very briefly, the issues on the appeal are whether the trial judge erred in his application of s. 37 of the Family Law Act by failing to do a proper s. 37 analysis in accordance with the analytical framework mandated under the Family Law Act, and specifically she points to certain sections of s. 37(2). She also says that the trial judge misapprehended the evidence and erred in law in failing to do a family law violence analysis under s. 37 of the FLA. Finally, there is also the issue of whether new and fresh evidence ought to be admitted on the appeal.
- [6] The respondent, Leif Buendia, opposes the admission of new and fresh evidence. He also submits that the appeal should be dismissed in its entirety.
- [7] During their submissions on the new and fresh evidence, the parties agreed that the court should provide a mid-hearing ruling with respect to the new and fresh evidence before the appeal is heard in its entirety. So we began that process and we have two days scheduled next week to deal with the rest of the appeal.
- [8] The reason for doing this is because, if the appellant is permitted to tender the new and fresh evidence, both viva voce as well as by way of affidavit, the parties agree that the respondent should be able to cross-examine those witnesses with respect to the new and fresh evidence.

- [9] Fresh evidence is evidence that was in existence at the time of the trial, while new evidence relates to evidence that occurred after the order under appeal was made.
- [10] The test for admission of both types of evidence is set out in *Barendregt v. Grebliunas*, 2022 SCC 22, in which the court stated that the same test applies to the admission of both new and fresh evidence, namely the criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. It is a four-part test:
- (i) the evidence could not, by the exercise of due diligence, have been obtained for the trial (provided that this general principle will not be applied as strictly in a criminal case as in civil cases);
 - (ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
 - (iii) [that] the evidence is credible in the sense that it is reasonably capable of belief; and
 - (iv) the evidence is such that, if believed, it could have affected the result at trial.
- [11] It is in the discretion of the appellate judge to accept fresh and new evidence. Fresh evidence should not be a means to remedy the deficiencies in trial evidence on appeal with the benefit and guidance of the trial reasons.
- [12] The fresh evidence that the appellant seeks to introduce mainly concerns evidence regarding family violence, which she submits was not completely before the trial judge. She seeks to tender audiotapes of recordings between her and the respondent, as well as evidence from witnesses who she says would have testified to the issues of family violence.
- [13] The new evidence that the appellant seeks to have heard on the appeal is twofold: (1) evidence of an alleged sexual assault that occurred after the trial; and (2) the evidence that the respondent's mother does not currently work from home.
- [14] The appellant submits that the fresh evidence was not adduced at trial on account of her trial counsel's decision, which was contrary to her instructions and expectations. She argues that it is not a lack of due diligence, but rather a factor outside her control. The appellant further submits that the evidence of family violence is clearly relevant for the best interests of the child; it is credible; and, had it been considered, it ought to have affected the result.
- [15] The respondent argues that the fresh evidence fails the first *Palmer* criteria and should therefore not be admitted. He submits that the evidence was fully available at trial and much of the evidence relating to family violence was before the court. The respondent further submits that the appellant is attempting to relitigate the issue from a different angle and more emphasis on family violence because she is dissatisfied with the result. As well, he argues that some of the evidence that the appellant seeks to tender would have been inadmissible at the trial in any event.

- [16] It must be remembered that the bar for admitting fresh or new evidence is high. The Palmer test, which is to be applied for both types of evidence, balances the principle of finality and order in the judicial process with reaching a just result in the context of the proceedings. The overarching consideration is the interests of justice. However, I acknowledge that the test for admission of this evidence is to be applied more flexibly in the family law context because the court is tasked with assessing the best interests of the child.
- [17] I have reviewed all the material, including trial transcripts, affidavits, and the reasons for judgment of the trial judge. In exercising my discretion as the appellate judge, I decline to admit the proposed fresh evidence on this appeal. The appellant has not met the Palmer test as set out in *Barendregt*. In my view, the appellant seeks to remedy deficiencies in the trial evidence at this appeal.
- [18] While I agree that some of the evidence that the appellant wishes to adduce may satisfy the second Palmer criterion, I would dismiss her application to adduce this evidence. I say this because the fresh evidence that might be relevant to an issue on appeal was available at the time of the hearing before the trial judge and, with due diligence, could have easily been presented at that hearing. The first criterion cannot be satisfied.
- [19] Further, I am of the view that the appellant is not able to satisfy the third and fourth criterion. In other words, I am satisfied that the evidence that might be capable of belief could not have affected the result at trial.
- [20] Finally, I am not persuaded that it is in the interests of justice to permit the fresh evidence on appeal. In my view, the evidence that the appellant seeks to adduce is simply an attempt to get a second kick at the can, which is not appropriate in these circumstances.
- [21] With respect to the new evidence, once again, in exercising my discretion, I decline to admit the proposed new evidence. I am of the view that the new evidence does not establish a concern respecting the appellant and the child. More importantly, the appellant can bring a variation application based on a change in circumstances. She has not done so but is rather attempting to address this on the appeal. As well, this new evidence that she seeks to adduce should properly be the subject of the review, as ordered by Judge Jamieson.
- [22] So those are my very brief reasons in declining to admit the new and fresh evidence as sought by the appellant.

"Girn J."

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