

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Schmegelsky v. Scansa Construction Ltd.*,
2026 BCSC 1386

Date: 20260724
Docket: S202876
Registry: Vancouver

Between:

Alan Schmegelsky

Plaintiff

And

Scansa Construction Ltd.

Defendant

Before: Associate Judge Robinson

Reasons for Judgment

Appearing in his own behalf:

A. Schmegelsky

Counsel for the Defendant:

J. Schwam

Place and Date of Hearing:

Vancouver, B.C.
July 16, 2026

Place and Date of Judgment:

Vancouver, B.C.
July 24, 2026

INTRODUCTION

[1] The defendant, Scansa Construction Inc., brings this application and seeks the following orders:

- 1) An order transferring this proceeding to the Victoria Registry for all purposes, or alternatively, for the purpose of trial;
- 2) An order striking portions of the plaintiff's notice of civil claim on the basis that those portions constitute claims outside of the jurisdiction of the court; and
- 3) Costs.

[2] The plaintiff opposes all of the orders sought.

BACKGROUND

[3] The within application arises in a wrongful dismissal claim. The plaintiff alleges that his employment was terminated on or about August 13, 2019, when he sought to return to work following an approved leave of absence.

[4] In this respect, the plaintiff alleges that in early July 2019, his son went missing. Thereafter, on or about July 22, 2019 media reports began to circulate which identified the plaintiff's son as a suspect in multiple murders. It was through these reports that the plaintiff learned that his son was the target of a "manhunt" initiated for his arrest.

[5] The following day, on July 23, 2019, the plaintiff sought to absent himself from his employment as the circumstances concerning his son were causing him distress and psychological unease. His immediate supervisor allegedly approved his request and assured the plaintiff that the defendant would "find other work for him".

[6] In early August 2019, while still absent from his employment, the plaintiff learned that his son had died. Subsequently, on or about August 13, 2019, the plaintiff says he contacted the defendant and disclosed a desire to resume his employment. The plaintiff asserts that upon expressing that desire, he was advised

that his employment was terminated. He contends that the termination occurred without notice or pay in lieu thereof.

[7] He then proceeded to initiate this proceeding on March 10, 2020.

[8] For its part, the defendant denies all liability and specifically denies that the plaintiff was dismissed from his employment. The defendant contends that the plaintiff repudiated his employment contract by failing to return to work and by filing a notice of civil claim.

[9] The background, as recited in the foregoing, does not and is not intended to constitute any factual determinations and is provided only for the purpose of placing the present application into context.

PRESENT APPLICATIONS

a) Change of Venue

[10] The court has discretion to order a proceeding be transferred to another registry pursuant to R. 23-1(13) which provides:

At any time after a proceeding is started, the court may on application order the proceeding to be transferred from the registry in which it is being conducted to any other registry of the court for any or all purposes.

[11] As a starting point, the oft-cited case of *Armstrong v. City of Revelstoke* (1927), 38 B.C.R. 253, is instructive. At para. 1, the court of appeal held:

... nothing short of a great or considerable preponderance of convenience and expense would justify the taking from the respondent the right which the law has given him to select his own place of trial.

[12] In addition to the preponderance of convenience, a change of venue may also be ordered where it satisfies the interests of justice. As stated by this court in *Dungate v. Dungate*, 2015 BCSC 2225 at para. 50:

... the court can exercise its discretion to change the venue if either the interests of justice or the preponderance of convenience would support the move. [emphasis in original]

[13] In applying these factors, it must be borne in mind that on an application to transfer a proceeding or to change the venue of trial, the party initiating the proceeding has the presumptive right to control the course of the litigation. The onus is on the party seeking a transfer to convince the court that the preponderance of convenience or interests of justice favor such a transfer, and that onus is onerous: *K.U.B. v. L.L.M.*, 2013 BCSC 39 at para. 31.

[14] In seeking to discharge its onus on this application, the defendant places primary reliance on the anticipated additional costs associated with the litigation continuing in Vancouver. In this regard: the defendant is based in Victoria; many (if not most) of the defendant's witnesses reside in or proximate to Victoria; and counsel for the defendant is based in Victoria.

[15] It is submitted that a 4-day trial in Vancouver will require the defendant to incur disbursements of more than \$3,000 which would not otherwise arise if the proceeding were transferred. In addition, since many of the defendant's anticipated witnesses are its employees, the defendant would be required to bear the additional expense associated with their travel (and associated loss of productivity) if they are required to attend trial in Vancouver.

[16] While the defendant has raised valid concerns, they do not, in my view justify a transfer of this proceeding. Some of the costs the defendant wishes to avoid may be avoidable by an order permitting witnesses to attend trial and testify via video conference. This is an increasingly common feature in many trials. Moreover, while a transfer may result in certain cost savings to the defendant, it will create additional expenses for the plaintiff. He resides in Vancouver and will be faced with travel and accommodation costs.

[17] Additionally, and importantly, the plaintiff has taken out a notice of trial in this action. The trial is scheduled for Vancouver, beginning on January 4, 2027. Were this proceeding to be transferred, the trial would need to be rescheduled and would almost certainly take place on a much later in 2027 (or perhaps even 2028).

[18] While counsel for the defendant indicated an intention to seek an adjournment of the trial, no steps have been taken in furtherance of that intention and as matters stand, the trial is scheduled to proceed in less than six months.

[19] Finally, the plaintiff expressed concerns about his safety if he is required to travel to Victoria. He submitted that the circumstances surrounding his son attracted significant notoriety and he fears that a return to Victoria, where he was resident in 2019 and more widely known, could expose him to physical harm by persons seeking retribution. Irrespective of whether the plaintiff's concerns are justified, I accept that he has concerns and should not be required to travel and stay in a location where he feels unsafe unless there are compelling reasons for doing so.

[20] In short, neither the interests of justice nor the preponderance of convenience justifies a transfer of this proceeding generally or for the purposes of trial. The defendant has failed to discharge its onus of disturbing the plaintiff's presumed right to control the course of the litigation. This aspect of the defendant's application is dismissed.

(b) Application to Strike Pleadings

[21] In seeking to have portions of the plaintiff's notice of civil claim struck, the defendant relies on R. 9-5(1)(a) and (b) which provide:

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious.

[22] A claim is subject to being struck pursuant to R. 9-5(1)(a) only where it is plain and obvious, assuming the pleaded facts to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17.

[23] For the purposes of R. 9-5(1)(b), a pleading is unnecessary or vexatious in circumstances where the pleading does not go to establishing the plaintiff's cause of

action or where the pleading fails to advance a claim known in law: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, 1999 CanLII 5860 (BC SC), at para. 47.

[24] In the present case, the defendant contends that certain pleadings raised by the plaintiff are susceptible to being struck pursuant to the foregoing rules because they constitute claims within the exclusive jurisdiction of the Workers' Compensation Board.

[25] In this respect, the notice of civil claim pleads:

- a) The plaintiff's employment was terminated at "the lowest time" in the plaintiff's life and caused immense psychological injury;
- b) The defendant undermined the dignity of the plaintiff without lawful excuse;
- c) The plaintiff has suffered and will continue to suffer as a result of the timing of his dismissal and the undermining of his dignity; and
- d) The defendant's conduct before and during the termination of the plaintiff's employment constituted a fundamental breach of the duties of good faith and honest performance owed to the plaintiff which caused, *inter alia*, psychological injury and entitling the plaintiff to compensatory damages.

[26] In contending that the foregoing pleadings constitute a claim within the exclusive jurisdiction of the Workers' Compensation Board, the defendant relies on s. 127 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 (the "WCA") which provides:

127 (1) Subject to subsection (2),

(a) the compensation provisions are in place of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker or a dependant or family member of the worker is or may be entitled against

- (i) the employer of the worker,
- (ii) an employer within the scope of the compensation provisions, or
- (iii) any other worker,

in respect of any personal injury, disablement or death of the worker arising out of and in the course of employment, and

- (b) no action lies in respect of such an injury, disablement or death.

(2) Subsection (1) applies only if the action or conduct of

- (a) the employer or the employer's servant or agent, or
- (b) the other worker,

that caused the breach of duty of care arose out of and in the course of employment within the scope of the compensation provisions.

[27] The defendant says that the foregoing constitutes a statutory bar to the exercise of the court's jurisdiction to adjudicate personal injury claims where the claim is brought by a worker against an employer and where the alleged injury arises from or occurred in the course of the worker's employment. That is not a contentious proposition and arises from the plain reading of the *WCA*.

[28] In analogous circumstances, the court in *Chestacow v. Mount St. Mary Hospital of Marie Esther Society*, 2024 BCSC 783 struck a plaintiff's pleadings related to a claim for mental disorders allegedly caused or exacerbated by the conduct of her employer and her co-workers. In doing so, the court held at para. 30:

... a civil action cannot be brought in respect of injury or disablement arising out of and in the course of employment. Any dispute about an allegation of such injury or disablement must go to WorkSafe and then the WCAT. The Court's role is restricted to judicial review of a WCAT decision.

[29] While the foregoing is undoubtedly correct as a legal pronouncement, I am unable to accede to the defendant's position in the present application. This is because although the Workers' Compensation Board has been given exclusive jurisdiction to adjudicate claims for personal injury arising out of and in the course of employment, the *WCA* also provides that the Workers' Compensation Board has exclusive jurisdiction to determine *whether* an injury arises out of or in the course of employment.

[30] Specifically, s. 122 of the WCA provides:

122 (1) Subject to sections 288 and 289 *[appeals to appeal tribunal]*, the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined under the compensation provisions, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court.

(2) Without restricting the generality of subsection (1), **the Board has exclusive jurisdiction to** inquire into, hear and **determine** the following:

(a) **whether a worker's injury has arisen out of or in the course of an employment** within the scope of the compensation provisions...
[emphasis added]

[31] The defendant's position requires me to accept that the plaintiff's claims for compensatory damages constitutes a claim within the exclusive jurisdiction of the Workers' Compensation Board. This necessitates a determination that the claim arises from an injury arising out of or in the course of the plaintiff's employment. That determination is expressly within the exclusive purview of the Workers' Compensation Board. In other words, to accede to the defendant's position would be to exceed this court's jurisdiction and to usurp the authority of the Workers' Compensation Board.

[32] It does not appear that s. 122 was brought to the court's attention in *Chestacow*.

[33] The WCA sets out the process to be followed by a defendant who contends that a claim arises from an injury arising out of or in the course of employment. Specifically, s. 311 provides:

311 (1) If a court action is commenced based on

- (a) a personal injury,
- (b) death, or
- (c) a disability caused by occupational disease,

the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.

(2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether

- (a) a person was, at the time the cause of action arose, a worker,
- (b) a worker's injury, death or disability arose out of, and in the course of, the worker's employment,
- (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
- (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of the compensation provisions.

[34] An application to strike under R. 9-5 is not an alternative to the foregoing process. This is not a matter in which the Court shares any concurrent jurisdiction.

[35] In summary, the defendant's application is, at best, premature. Unless and until the Workers' Compensation Appeal Tribunal determines that the plaintiff's claim for compensatory damages arises from an injury arising out of or in the course of his employment (a determination that can *only* be made by the Workers' Compensation Appeal Tribunal) it cannot be said that the claim is plainly or obviously bound to fail nor can it be said that the claim is unknown at law.

[36] For these reasons, this aspect of the defendant's application must also be dismissed.

CONCLUSION

[37] The defendant's application is dismissed. As the successful party, the plaintiff shall receive his costs of this application, in the cause.

"Associate Judge Robinson"