



No. S238708  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROBERT DAVID BARKER

PLAINTIFF

AND:

CONSTRUCTION AND SPECIALIZED WORKERS' UNION, LOCAL 1611  
also known as LiUNA LOCAL 1611

DEFENDANT

Notice of Application

NAME(S) OF APPLICANT(S): The Plaintiff

TO: Construction and Specialized Workers' Union, Local 1611 also known as LiUNA Local 1611

AND TO: Frederick W. West

AND TO: Jennifer Farish

TAKE NOTICE that an application will be made by the Applicants to the presiding judge or associate judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia on December 3, 2024 at 9:45 a.m. for the orders set out in Part 1 below.

The Applicant estimates that the application will take 10 minutes.

☒ This matter is within the jurisdiction of an associate judge.

☐ This matter is not within the jurisdiction of an associate judge.

## Part 1: ORDERS SOUGHT

1. An order pursuant to Rule 7-1(18) of the *Supreme Court Civil Rules*, BC Reg 168/2009 (the “*Rules*”) that Frederick W. West (“Mr. West”) deliver to Plaintiff’s counsel, within 21 days of the date of the Order of this Court, copies of the following documents in his possession or control:
  - a. All notes made by Mr. West relating to counselling sessions attended by the Plaintiff Mr. Robert Barker (including counselling sessions attended jointly by Mr. Barker and Ms. Jennifer Farish) (the “Counselling Sessions”);
  - b. All summaries from the Counselling Sessions;
  - c. All communications between Mr. West and Mr. Barker regarding the Counselling Sessions or Mr. Barker’s mental state while he was a patient of Mr. West;
  - d. All reports prepared by Mr. West setting out his opinions or observations regarding Mr. Barker; and
  - e. Any other records relating to Mr. Barker’s mental state or wellbeing while he was a patient of Mr. West.

(collectively, the “Requested Documents”)
2. The Plaintiff shall pay the reasonable administrative and clerical costs and expenses incurred by Mr. West for delivery and production of the Requested Documents.
3. Such further and other relief as counsel may request and this Honourable Court deems just.

## Part 2: FACTUAL BASIS

### The Underlying Action

4. Mr. Barker is a former employee of the Defendant Construction and Specialized Workers' Union, Local 1611 also known as LiUNA Local 1611 (the "Union").
5. In his Amended Notice of Civil Claim, Mr. Barker claims that he was wrongfully dismissed by the Union. He also advances a claim for infliction of mental suffering as a result of the Union's conduct.
6. In particular, Mr. Barker advances a claim for infliction of mental suffering as a result of:
  - a. Mr. Barker's direct supervisor, Mr. Nav Malhotra, having an affair with Mr. Barker's then wife, Jennifer Farish, an employee of the international chapter of the Union (the "Affair");
  - b. Mr. Malhotra's denials of the Affair; and
  - c. The Union's failure to investigate and address the Affair and Mr. Malhotra's workplace misconduct.
7. Mr. Barker discovered the Affair in late 2019.
8. The Union in its Amended Response to Civil Claim acknowledges the Affair but denies that the Plaintiff has a valid cause of action as a result of it.

### Mr. West's Treatment of Mr. Barker

9. Mr. West is a licensed therapist in British Columbia and has been a Registered Clinical Counsellor since September 25, 1991.

10. In or around July and August 2020, Mr. West treated Mr. Barker (and his then wife, Jennifer Farish).
11. During the session(s) with Mr. West, Mr. Barker “presented as extremely distressed, displaying feelings of anger towards both his wife and his supervisor.”

### Plaintiff’s Request for Records from Mr. West

12. On or around October 10, 2024, counsel for the Plaintiff wrote to Mr. West, requesting the Requested Documents.
13. To date, counsel for the Plaintiff has not received the Requested Documents from Mr. West.

### Part 3: LEGAL BASIS

#### Legal Principles

14. Rule 7-1(18) provides:

If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties or record, may make an order for one of or both of the following:

- (a) production, inspection and copying of the documents;
- (b) preparation of a certified copy that may be used instead of the original.

15. The test for production from non-parties under Rule 7-1(18) is whether or not the requested documents are relevant. An applicant relying on Rule 7-1(18) must adduce some evidence for the production of third-party documents. The purpose of this evidentiary requirement is to prevent unwarranted fishing expeditions based solely upon *pro forma* pleadings.

*Kaladjian v. Jose*, 2012 BCSC 357;  
*Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673;  
*Harder v. Growers Supply Co.*, 2022 BCSC 746

16. The Court’s power to order production from non-parties emanates from “the fundamental proposition that everyone owes a duty to give evidence relevant to the matter before the court, so that the truth may be ascertained.”

*M. (A.) v. Ryan, 1997, [1997] 1 SCR 157 at para. 19.*

17. The Supreme Court of Canada has recognized that “[i]t is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation.”

*Carey v. Ontario, [1986] 2 SCR 637 at para. 22.*

## **Application of Legal Principles**

### ***Introduction***

18. Production of the Requested Documents will assist the Court in adjudicating Mr. Barker’s claim for mental suffering. The Plaintiff’s application is consistent with the objective of the Rules to secure the just, speedy and inexpensive determination of every proceeding on its merits. An order for production of the Requested Documents will allow the Court to have before it relevant evidence to decide the action on the merits, without unduly burdening Mr. West.

### ***The Plaintiff Has Established an Evidentiary Foundation for the Existence of the Documents***

19. Mr. West, as Mr. Barker’s treating counsellor in 2020, almost certainly has documents relating to his treatment of Mr. Barker after Mr. Barker discovered the Affair in late 2019.
20. Mr. West indicates that he has a “file” relating to Mr. Barker.

### ***The Requested Documents Are Relevant***

21. The Requested Documents will shed light on Mr. Barker’s mental state in 2020, after discovering the Affair.
22. As Mr. West notes in his October 2024 letter, Mr. Barker in July 2020 “presented as extremely distressed, displaying feelings of anger towards both his wife and his supervisor.”
23. Therefore, the Requested Documents will assist the Court in determining whether Mr. Barker was experiencing mental suffering at the time he was seen by Mr. West.

24. The Requested Documents will also assist the Court in deciding whether Mr. Malhotra's conduct or the Union's conduct caused or contributed to Mr. Barker's mental suffering.
25. Mr. Barker's mental state and mental suffering is a key issue in this litigation.
26. Therefore, documents relating to Mr. Barker's mental state after discovering the Affair are directly relevant.

#### **Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Mae Fernandez, made on November 18, 2024;
2. The pleadings in this action; and
3. Such further and other material as counsel may advise.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33;
- (b) file the original of every affidavit and of every other document, that
  - (i) you intend to refer at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

- (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: 19 November 2024

A handwritten signature in black ink, appearing to read 'Ivo Martinich', written over a horizontal line.

Signature of lawyer for Plaintiff  
Ivo Martinich

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this Petition

☐ with the following variations and additional terms:

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Date: \_\_\_\_\_

Signature of ☐ Judge ☐ Associate Judge



## Appendix

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts
- ☐ other