

CANADA / JUDGMENT

AllWest Insurance Services Ltd. v. Qiao

2021 BCSC 2351

COURT

Supreme Court of British Columbia

DECIDED

1 December 2021

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

2021 BCSC 2351 AllWest Insurance Services Ltd. v. Qiao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

AllWest Insurance Services Ltd. v. Qiao,

2021 BCSC 2351

Date: 20211201

Docket: S2010009

Registry: Vancouver

Between:

AllWest Insurance Services Ltd.

Plaintiff

And

Lu Qiao and Hui Qiu

Defendants

And

AllWest Insurance Services Ltd.

Defendant by Counterclaim

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff/Defendant by Counterclaim:

A.J. Swabuk

Counsel for the Defendants:

M.Sheard

T. Sanghera

Place and Date of Summary Trial:

Vancouver, B.C.

November 2, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2021

Table of Contents

I. Introduction.. 3

II. The Background Facts. 3

A. AllWest and its Business. 3

B. Mr. Qiao's Employment with AllWest 4

C. Events Leading to Mr. Qiao's Termination. 5

D. The Termination Meeting. 9

E. AllWest's Complaint to the Council 9

III. The History of the Litigation.. 11

IV. The Legal Test under Rule 9-7. 13

V. Discussion.. 16

A. Should the doctrine of issue estoppel be applied to bar AllWest's claim?. 16

B. Does the action otherwise lend itself to summary disposition?. 18

VI. Conclusion.. 20

I. Introduction

- [1] The defendant, Lu Qiao, is a licensed insurance broker who was formerly employed by the plaintiff, AllWest Insurance Services Ltd. ("AllWest"). On March 21, 2019, AllWest terminated Mr. Qiao's employment because it believed that he had improperly directed at least 39 of AllWest's home insurance customers to a competitor, where his wife Hui Qiu, the other defendant, was employed. AllWest has brought this action seeking damages for that alleged loss of business.
- [2] The defendants deny any wrongdoing. Indeed, Mr. Qiao has brought a counterclaim seeking damages for wrongful dismissal.
- [3] The defendants now apply under Rule 9-7 of the Supreme Court Civil Rules for judgment by way of summary trial. They seek an order dismissing AllWest's claim and awarding Mr. Qiao damages on his counterclaim. They say that AllWest has adduced no evidence of any wrongdoing on their part. Moreover, they say that the Insurance Council of British Columbia (the "Council") has already decided the matter in their favour and therefore that AllWest should not be allowed to relitigate it in this action.
- [4] AllWest opposes the application. It argues that a conventional trial is needed to resolve the many conflicts in the evidence on the central issues in dispute. In the alternative, AllWest seeks judgment in its favour.
- [5] For the reasons that follow, I have concluded that the matter should, with one exception, proceed to a conventional trial.

II. The Background Facts

A. AllWest and its Business

- [6] AllWest is an insurance agency with several offices in British Columbia. It acts as an intermediary between insurance providers and consumers to provide the latter with automobile, home and commercial coverage. AllWest generally markets those products through its customer service representatives ("CSRs") who are employed by AllWest and individually licensed with the Council under AllWest's license.
- [7] Whenever AllWest's customers purchase or renew insurance products from an affiliated insurance provider through one of AllWest's CSRs, AllWest receives a percentage of the premium paid to the insurance provider, typically 20%, which it shares with the CSR. In the case of automobile insurance, the CSR generally receives 47% of the gross commission on each new and renewed policy. In the case of home insurance, the CSR's share is 60% for new business and 30% for renewals.
- [8] Customers can change brokers by signing a document known as a "letter of brokerage" ("LOB"), which has the effect of appointing the new broker and notifying the previous one of the change.

B. Mr. Qiao's Employment with AllWest

- [9] AllWest hired Mr. Qiao as a CSR on September 8, 2008. At that time, he signed a written employment agreement containing the following terms, among others:
- a) Mr. Qiao was to perform his duties and discharge his responsibilities under the agreement faithfully, conscientiously, competently, and with the utmost integrity;
 - b) he was to act and conduct himself at all times in the best interest of AllWest;
 - c) he was to abide by AllWest's policies;
 - d) he agreed that the customers he serviced while working at AllWest were those of AllWest alone, unless designated as his in a schedule (and no such designation was ever made);
 - e) he was to protect the integrity of AllWest's confidential information;
 - f) he was prohibited during his employment and for 12 months after its termination from approaching or soliciting any AllWest client, with a view to conducting insurance-related business with such client or encouraging or persuading such client to transfer insurance business from AllWest to any other person or entity; and
 - g) AllWest could terminate his employment at any time for cause.
- [10] That agreement was later replaced with a revised one dated January 15, 2010. The revised version altered the commission structure but the terms summarised in the previous paragraph remained unchanged.
- [11] Within his first month of employment with AllWest, Mr. Qiao obtained a license permitting him to sell insurance. He worked in AllWest's North Vancouver office, initially as a "road agent" CSR specializing in automobile insurance. In that capacity, he earned an hourly wage as well as commissions for business conducted outside working hours. In 2009 or 2010 (the parties disagree about the precise date), he improved his qualifications by obtaining a Level 2 General insurance license. According to Mr. Qiao, the rate at which he was paid commissions increased when he did so from 40% to 46% in November 2009 and from 46% to 47% in March 2016.
- [12] In 2017, Mr. Qiao transitioned from being a "road agent" CSR to a "producer" CSR, which meant that he spent less time working at an hourly rate and had greater opportunity to earn additional income by way of commissions.

C. Events Leading to Mr. Qiao's Termination

- [13] The parties have presented conflicting versions of the events leading to Mr. Qiao's termination.

- [14] Mr. Qiao says that in September 2016, AllWest directed him to begin selling home insurance but offered him no additional training in that area. AllWest's Chief Operating Officer, James Beaulieu, denies this. His evidence is that Mr. Qiao was merely asked to inquire with his automobile insurance customers about their home insurance needs and, if the need arose, to refer them to a qualified home insurance CSR at AllWest.
- [15] In any event, Mr. Qiao says that he familiarised himself with home insurance products and procured a blank LOB form from AllWest so that he could bring in new customers on his own. He says that about 60% of his home insurance customers came to AllWest through his efforts alone, with no assistance from AllWest.
- [16] Mr. Qiao also says that in January 2018, he stopped selling home insurance through AllWest because he was receiving complaints from his customers about AllWest's "slow and frustrating process." When asked about this during his examination for discovery, he was unable to provide any details about those complaints, other than that some of his customers told him that it "takes so long [for AllWest] to respond to the clients".
- [17] Nevertheless, he testified that he relayed the complaints to Paul Zalesky (AllWest's Chief Executive Officer), Devina Zalesky and Mr. Beaulieu at AllWest but nothing was done about them. AllWest has adduced affidavits from Mr. Zalesky and Mr. Beaulieu asserting that Mr. Qiao never told them prior to being terminated that he had been receiving complaints from customers.
- [18] By coincidence, at the same time that Mr. Qiao decided to stop selling home insurance in January 2018, Ms. Qiu became licensed to do so. Moreover, she had just found employment with a competitor of AllWest, formally known as IC Financial Corporation, carrying on business as "InsureBC". Her focus was on home insurance.

[19] Mr. Qiao has deposed as follows as to what happened next:

After I ceased selling home insurance, some of the home insurance clients who had previously complained to me asked if my wife, Hui Qiu, could help them with their home insurance. These clients knew me personally, and many knew my wife had an insurance background.

I felt free to answer those questions honestly and I did so.

I informed my home insurance clients who complained [sic] the option of remaining with Allwest, finding another Brokerage, or working with my wife at InsureBC. I honestly discussed the pros and cons of each option with them. My contributions in those conversations did not always favour Allwest because the truth is Allwest had issues as these clients had identified.

Approximately thirty-six home insurance clients chose to transfer to my wife as broker at InsureBC. My wife provided a blank Letter of Brokerage from InsureBC to effect the transfers (the "Transfers") which I presented to clients for their signature. My wife did not present the Letter or [sic] Brokerage herself.

The home insurance clients who elected to take part in the Transfers informed me that they did not want to conduct further home insurance business with Allwest and explicitly requested my wife's contact information.

Despite the Transfers, the majority of my clients stayed with me at Allwest and I continued to have high numbers of renewals each month.

I also note that by referring unhappy customers to a better option, I maintained their trust. As such, I expect I prevented those customers from going somewhere else for all their insurance needs.

Conversely, if I had misled them in an effort to keep them with Allwest I don't think it would have worked because their concerns were well-founded and as far as I was aware Allwest had no plans to improve.

In sum, I very much dispute that I cost Allwest any money. Rather, I brought them as much money as I knew how to, which is 100% in keeping with the duties associated with my sales-oriented role.

I only ever effected the transfer of clients who requested it. I am aware of no obligation to do otherwise and in fact I do not believe I could responsibly have refused such requests either as a matter of professionalism or as a matter of ethics.

[20] During her examination for discovery, Ms. Qiu testified that she did not know where Mr. Qiao had obtained the blank LOB form. She was asked if it was true, as Mr. Qiao had deposed, that she herself had "provided a blank Letter of Brokerage from InsureBC to effect the transfers". Her response was that she did not have to prepare a blank LOB form because the form can be printed from InsureBC's website. She was then asked when she provided the blank form. She responded that she did not recall. She also could not recall having any discussions with Mr. Qiao about his commission earnings or his clientele at AllWest.

[21] AllWest disputes the defendants' account of events in various ways. For example, AllWest disputes Mr. Qiao's contention that most of his clients remained with him at AllWest throughout 2018 and that he "continued to have high numbers of renewals each month."

[22] Kellie Dale is AllWest's Vice President and General Manager. She has deposed that she noticed that Mr. Qiao's retention rate had dropped abruptly in 2018, leading to a reduction in his income by 30% that year. When she asked Mr. Qiao about this, he reportedly responded that he had recently lost a large source of referrals from a realtor because the realtor's wife had just become a home insurance agent and his referrals were now going to her.

[23] That explanation did not make sense to Ms. Dale, Mr. Zalesky or Mr. Beaulieu when they discussed the matter, because most of the customers who had transferred away from Mr. Qiao had begun as automobile insurance customers, making it unlikely that they would have been referred to him by a realtor. Mr. Beaulieu has deposed that in January 2019, he asked Mr. Qiao about this and received the same explanation.

- [24] This prompted Mr. Beaulieu to investigate the matter further. His investigation revealed that Mr. Qiao had recently lost 63 clients and 71 policies. 36 of those transfers appeared to have occurred by way of an LOB originating from the Olympic Village office of InsureBC. Mr. Beaulieu has deposed that on March 19, 2019, he received confirmation from a compliance officer at InsureBC that the 36 transfers had indeed gone to InsureBC's Olympic Village office. It was during that conversation that Mr. Beaulieu was told, for the first time, that Ms. Qiu, the recipient broker at InsureBC, happened to be Mr. Qiao's wife.
- [25] Mr. Beaulieu suspected that the defendants had arranged for the transfers to occur in this way because InsureBC was paying Ms. Qiu higher commissions for new business than AllWest was paying Mr. Qiao for renewals.
- [26] Mr. Beaulieu and Mr. Zalesky have deposed that later that afternoon, on March 19, 2019, they met with Mr. Qiao in AllWest's North Vancouver office and confronted him with their allegations. They say that Mr. Qiao then admitted to facilitating the transfer of AllWest clients to his wife. He also told them, they say, that he did this because he wanted to move away from selling home insurance and focus solely on automobile insurance.

D. The Termination Meeting

- [27] Mr. Beaulieu and Mr. Zaleski have deposed that they met with Mr. Qiao at the North Vancouver office again two days later, on March 21, 2019. On that occasion, they advised him that he was being terminated for cause because he had improperly facilitated the transfer of AllWest's customers to a competitor and disclosed confidential information of AllWest to Ms. Qiu. They then presented him with a termination letter, which he signed without objection.
- [28] Mr. Qiao has a different version of those events as well. He has deposed that the termination meeting occurred on March 25, 2019, although at his examination for discovery he testified that it occurred on March 21, 2019, and that he could not remember what was discussed. Nevertheless, Mr. Qiao has deposed that he does remember informing Mr. Beaulieu and Mr. Zalesky, when they asked, that he had arranged the transfers at the request of 34 of his customers and that the rest of his customers had chosen to remain with him at AllWest.
- [29] Mr. Qiao says that he asked for time to read the termination letter when it was presented to him, but Mr. Zalesky told him that he had to sign it immediately and would not be permitted to leave without having done so. Mr. Qiao has also deposed that they promised him at the meeting that AllWest would not sue him if he promised not to go to work for a competitor.
- [30] Mr. Beaulieu and Mr. Zalesky deny that they forced Mr. Qiao to sign the termination letter or that they made the promise that he attributes to them.

E. AllWest's Complaint to the Council

- [31] After terminating Mr. Qiao, AllWest made a complaint to the Council about the conduct of Mr. Qiao and Ms. Qiu. In particular, AllWest's complaint included the following allegations:

- a) Mr. Qiao had "provided confidential information on [AllWest] clients (the "Clients") to [Ms.] Qiu so that she could create letters of brokerage ("LOBs") to enable the transfer of the Clients' insurance business to her employer IC financial Corporation ("IC") thus potentially violating Council's Client Confidentiality Guidelines from Appendix B of Council's Code of Conduct"; and
- b) Mr. Qiao had "forged the signature of [a client] on Insurance Corporation of British Columbia Autoplan documents".

[32] By letter dated April 24, 2020, the Council's investigator, Robert Craig, informed AllWest that the matter would not be pursued further because:

- a) the Council had "concluded that the Clients' confidentiality was not violated by [Mr.] Qiao, and there was insufficient evidence to suggest a breach of Council Rules and/or Council's Code of Conduct had occurred"; and
- b) the Council was unable to substantiate the allegation of forgery.

[33] The letter stated that in answer to AllWest's first complaint about disclosure of confidential client information, Mr. Qiao had responded as follows:

[Mr.] Qiao advised Council that he had the Clients sign the LOBs transferring their insurance business to IC and then provided the LOBs to Qiu. [Mr.] Qiao advised that he had the Clients' permission to do this.

[34] Mr. Craig added that "[a]ll other matters brought forth by [AllWest] appear to be a contractual issue between [Mr.] Qiao and [AllWest], which does not fall within Council's mandate and purview."

[35] Mr. Craig also sent another letter on the same day (April 24, 2020) to Mr. Qiao advising him of the result of the investigation. After advising Mr. Qiao that the Council had opted not to pursue the matter further, Mr. Craig stated as follows:

You did, however, admit to helping facilitate the transfer of Allwest client insurance business to a competitor, which could bring into question whether you acted in a trustworthy manner or in good faith. We therefore advise you to review sections 3 and 4 of Council's Code of Conduct regarding concerns that you may not have acted "in a manner which is consistent with your client's or principal's best interests, remaining faithful to your duties and obligations as an insurance licensee", or may have acted "knowingly prejudicing the interests of a client or principal for personal gain".

[Italics in original.]

III. The History of the Litigation

[36] AllWest commenced this action on October 7, 2020.

[37] The Notice of Civil Claim advances the following causes of action:

- a) against Mr. Qiao, for having breached the terms of his employment agreement and common law duties, by the following means:
 - i. providing AllWest client contact information to Ms. Qiu;
 - ii. referring AllWest clients to Ms. Qiu; and
 - iii. contacting AllWest clients personally for the purpose of soliciting their business for the benefit of Ms. Qiu;
- b) against Ms. Qiu, for having wrongfully induced Mr. Qiao to breach his employment agreement by those means; and
- c) against both defendants, for:
 - i. intentional interference with AllWest's contractual relations with its customers;
 - ii. unlawful interference with AllWest's business and economic interests; and
 - iii. unjust enrichment.

[38] AllWest seeks compensatory, punitive and aggravated damages, or alternatively, an accounting and disgorgement of the profits or benefits derived by the defendants from that conduct.

[39] In their Response filed November 20, 2020, the defendants deny, among other things, that they acted wrongfully. They also plead in paragraphs 32 and 37 that:

The issues have largely been adjudicated once (by the Insurance Council of BC) at the Plaintiff's request. It lost.

The Plaintiff attempts to re-litigate issues which have been adjudicated by the Insurance Council of British Columbia. It should be estopped from doing so pursuant to common law principles.

[40] Mr. Qiao also filed a counterclaim on November 12, 2020 in which he alleges that AllWest breached his employment agreement and has acted in bad faith. He seeks damages for wrongful dismissal as well as aggravated damages.

[41] On December 7, 2020, AllWest filed a Reply in which, among other things, it denied that it was attempting to re-litigate matters determined by the Council.

[42] AllWest responded to Mr. Qiao's counterclaim on January 12, 2021, denying any breach of contract or bad faith on its part and disputing the damages sought.

[43] AllWest conducted examinations for discovery of Mr. Qiao on August 3, 2021 and of Ms. Qiu on August 9, 2021 and October 5, 2021. The parties have exchanged documents but AllWest says that there remain outstanding requests for further information from the defendants.

- [44] On July 15, 2021, Master Dick ordered InsureBC to produce a list of customer names, insurance policy type and renewal dates for all clients serviced by Ms. Qiu from January 15, 2010 to March 19, 2020. InsureBC complied with the order by providing the list on August 11, 2021.
- [45] This application was filed on July 27, 2021. It was originally set to be heard on August 16, 2021 but did not proceed on that day due to court constraints.
- [46] A trial has not yet been scheduled.

IV. The Legal Test under Rule 9-7

- [47] The test to be applied in determining whether an action lends itself to summary adjudication under Rule 9-7 was summarised conveniently in *Gichuru v. Pallai*, 2013 BCCA 60, where D. Smith J.A. writing for the Court, stated as follows:
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
- [32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275:

[34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R. 18A motion.

[Emphasis added by D. Smith J.A.]

[48] On an application of this kind, the burden of proof remains on the plaintiff to prove its claim, even where, as here, it is the defendant applying for summary disposition. As D. Smith J.A. wrote in *Gichuru*:

[35] The authorities are also clear that a summary trial, although heard on affidavits in chambers, remains a trial of the action for which the plaintiff (even if not the applicant) retains the onus of proof of establishing his or her claim(s) and the defendant (even if not the applicant) retains the burden of establishing any defence that is raised. Mr. Justice Wood, writing for the Court in *Miura v. Miura* (1992), 66 B.C.L.R. (2d) 345 (C.A.), clarified this issue (at page 352):

There is no reason why the onus should be reversed simply because the defendant moves for judgment under Rule 18A, thus requiring the plaintiff to prove her case in a summary trial proceeding. ...

... the onus of proof does not shift simply because a trial is conducted summarily under rule 18A [now R. 9-7]. As in an ordinary trial, the party asserting the affirmative of an issue must prove it on a balance of probabilities. I believe that such a result is also consistent with what was said by McEachern, C.J.B.C. in *Inspiration Management et al. v. McDermid et al.* [citation omitted] at page 215 of the report:

The test for R. 18A, in my view, is the same as on a trial. Upon the facts being found the chambers judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to the law unless he has the opinion that it will be unjust to give such judgment.

[49] The mere fact that there is conflicting evidence in the record on the application is not sufficient reason to refuse to decide the case summarily. In *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, the Court stated as follows:

- [22] The principles relating to the applicability of the summary trial procedure are not in dispute. It should be noted that the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.
- [50] The question to be determined when confronted with conflicting evidence on an application of this kind is "whether there are conflicts in the evidence on essential issues that cannot be resolved on the evidence": *Charest v. Poch*, 2011 BCSC 1165 at para. 60.
- [51] More recently, the relevant principles were summarised as follows in *Davies v. Canada Shineray Suppliers Group Inc.*, 2016 BCSC 1853:
- [32] *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) remains the leading authority on the principles to be applied in deciding the issue of suitability for summary trial. Chief Justice McEachern, writing for the Court of Appeal, identified some of the factors the court may consider in determining whether it would be unjust to give judgment, including the amount involved, the complexity and urgency of the matter, any prejudice likely to arise by reason of delay, the cost of taking the case forward to conventional trial, and the course of the proceedings to date. Other factors include whether the summary trial would take considerable time, whether credibility is a critical factor and has cross examination occurred, and whether the summary trial may create unnecessary complexity in the resolution of the dispute or "result in litigating in slices": *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, *aff'd* 2006 BCCA 369.
- [33] On the question of suitability more broadly, the jurisprudence makes it clear that even significant conflicts in the affidavit evidence do not inevitably lead to the conclusion that the necessary facts cannot be found. Other admissible evidence, including discovery evidence, may permit the court to conclude that the evidentiary conflict can be addressed and the matter resolved without simply preferring one version of events over the other: see e.g. *Charest v. Poch*, 2011 BCSC 1165 at paras. 54-67. In *Mayer v. Mayer*, 2012 BCCA 77 at paras. 82-83, the Court of Appeal noted, however, that where issues of credibility arise, it may well be unjust to proceed under the summary trial procedure without permitting a party to develop their case through to a conventional trial.

V. Discussion

A. Should the doctrine of issue estoppel be applied to bar AllWest's claim?

- [52] The defendants argue that the essential subject matter of the dispute between the parties has already been decided by the Council, and therefore that AllWest's claim against them should not be allowed to proceed for a second time in this action.

- [53] In *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457, Saunders J.A., writing for the Court, conveniently summarised the legal principles to be considered when a court is called upon to apply the doctrine of issue estoppel in an administrative context, stating as follows:
- [66] The considerations that govern the application of *res judicata* are discussed in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, which lists as the three preconditions to issue estoppel: the same question has been decided; the judicial decision said to create the estoppel is final; and the parties to the judicial decision or their privies are the same persons who are the parties or their privies in proceedings where the estoppel is raised.
- [67] Justice Binnie further explained with respect to administrative tribunals:
- 21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.
- [68] The principles of *Danyluk* were affirmed in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, with additional discussion of the discretionary nature of *res judicata* and its role in the interests of justice:
- [30] The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice": *Danyluk*, at para. 1; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 52-53.
- [31] Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."

- [72] In Danyluk the court conveniently set out a non-exhaustive list of factors that may be relevant in determining how the residual discretion of the decision-maker should be assessed. In Penner the court clarified the correct approach:
- [38] The list of factors in Danyluk merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis.
- [39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.
- [54] I am not persuaded that the essential preconditions for an issue estoppel are present in this case, or even if they were, that it would be appropriate to apply the doctrine in this context.
- [55] First, the complaints that the Council addressed are not the same as the allegations that are before the Court in this action. In particular, the Council's mandate was understood to be restricted to matters of professional misconduct and regulatory compliance. At issue before the Council was whether Mr. Qiao had, contrary to the Council's Rules or Code of Conduct:
- a) improperly disclosed confidential information of the customers; and
 - b) forged a signature.
- [56] The Council did not have before it the issue, central to this action, of whether Mr. Qiao had, by those means or otherwise, breached one or more of the terms of his employment agreement. On the contrary, Mr. Craig expressly stated in his letter to AllWest that it was not part of the Council's mandate to consider the "contractual issues" between the parties that AllWest had raised. In addition, Mr. Craig's letter to Mr. Qiao expressly left open the questions of whether Mr. Qiao had acted in a manner that was inconsistent with his principal's best interests or that prejudiced his principal for personal gain. Those are among the questions to be addressed squarely in this action, however.
- [57] A second reason for not applying the doctrine of issue estoppel here is that the process before the Council was a very attenuated one, with the parties' themselves having been given limited rights of participation and no hearing.
- [58] For those reasons, I have concluded that the defence of issue estoppel has no chance of success and therefore that the paragraphs in the defendants' Response raising it, namely paras. 32 and 37, should be struck.

B. Does the action otherwise lend itself to summary disposition?

- [59] As I noted earlier, the central issue in dispute in this action is whether Mr. Qiao breached one or more of the terms of his employment agreement in a manner that:
- a) justified his termination for cause; and
 - b) caused a compensable loss to AllWest.
- [60] The defendants argue that AllWest has advanced only bald allegations and has failed to meet its burden to present an evidentiary basis for its claim. In particular, they say that AllWest was required to adduce direct testimony, such as from one or more of the transferring customers, to the effect that it was one or both of the defendants who had solicited the transfers, rather than the customers themselves.
- [61] I disagree. As can be seen from my discussion of the background facts, there is a great deal of conflicting evidence before the Court on that central issue. AllWest's claim may succeed if its version of events is accepted, even in part. Contrary to the defendants' submission, AllWest's case does not depend on its ability to garner evidence directly from the departing customers. AllWest may also be able to prove its case in other ways, including circumstantially.
- [62] For example, the defendants argue that the loss of 39 customers does not suggest any wrongdoing on their part, but merely reflects the normal rate of attrition in the insurance business. What may not be normal, however, is for that attrition to occur all at once and from a trusted employee who has access to confidential information, to his wife, who had just begun working for a competitor at the time. The coincidence calls for an explanation. The adequacy of the explanation that the defendants have offered turns largely on their credibility.
- [63] In that regard, one of the pivotal facts in dispute is whether Mr. Qiao ever relayed the customer complaints that he says he was hearing to someone in authority at AllWest. If, as AllWest says, he did not, but instead sent those clients elsewhere, or even allowed them to go on their own, without giving AllWest an opportunity to address the problem, that fact could, by itself, form the basis of a judgment in favour of AllWest.
- [64] AllWest's circumstantial case will be strengthened further if the trial judge accepts its account of how Mr. Qiao had initially lied about what had occurred but later confessed to having facilitated the transfers himself. Such a lie might also suffice, by itself, to justify his termination for cause.
- [65] Even on Mr. Qiao's own evidence, there is some support for the suggestion that he facilitated the transfers in breach of his employment agreement. Mr. Qiao acknowledges having presented the LOBs to the transferring customers himself. Mr. Craig appears to have taken that acknowledgment as an admission that Mr. Qiao had helped "facilitate the transfer of AllWest client insurance business to a competitor". In his examination for discovery, Mr. Qiao denied having made any such admission, but it would certainly be open to the trial judge to conclude that he had indeed facilitated the transfers by that means and perhaps

others as well.

[66] In summary, the outcome of the claim and counterclaim, both on liability and damages, will depend to a significant degree on which version of events is ultimately accepted. I find that I am unable to reach any definitive conclusions in that regard, given the conflicting evidence before me on this application.

[67] I have therefore concluded that it would be inappropriate and unjust to resolve the claim and counterclaim summarily. The matter is instead remitted to the trial list.

VI. Conclusion

[68] The application is dismissed, except that I am ordering that paragraphs 32 and 37 of the defendants' Response be struck.

[69] As the successful party, AllWest is entitled to its costs of the application in the cause.

"Milman J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/23/2021BCSC2351.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/allwest-insurance-services-ltd-v-qiao-2021>

Prepared on 28 October 2026 · Esheria