

CANADA / JUDGMENT

Manson v. Mitchell

2022 BCSC 617

COURT

Supreme Court of British Columbia

DECIDED

28 March 2022

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2022 BCSC 617 Manson v. Mitchell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Manson v. Mitchell,

2022 BCSC 617

Date: 20220328

Docket: S219805

Registry: Vancouver

Between:

Ian Craig Manson

Plaintiff

And

Jeffrey Adam Mitchell, Revelstoke Alpine School Inc. and

Association of Canadian Mountain Guides

Defendants

Before: The Honourable Justice Mayer

Oral Reasons for Judgment

In chambers

Counsel for Plaintiff (via videoconference):

J.G.M. Foster

Counsel for Defendants (via videoconference):

M. Gianacopoulos

Place and Date of Hearing:

Vancouver, B.C.

March 22, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 28, 2022

- [1] THE COURT: In the application before me the defendants, Jeffrey Mitchell, Revelstoke Alpine School Inc. and the Association of Canadian Mountain Guides (the "Defendants") seek an order pursuant to Rule 7-2 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, to compel the plaintiff, Ian Manson, to attend at a continuation of his examination for discovery conducted February 22 and 25, 2022 for a further seven hours, or alternatively, seek an order extending Mr. Manson's discovery for an additional seven hours.
- [2] The Defendants also seek orders adjourning a summary trial application set for hearing on March 31, 2022 to the earliest available date, to be agreed upon between counsel, after completion of the examination for discovery of Mr. Manson, for leave to file an amended response to the summary trial application - again, after completion of Mr. Manson's discovery, and for leave to file an amended notice of application filed on their own behalf on March 11, 2022.
- [3] Although the Defendants' notice of application also sought an order for dismissal of Mr. Manson's claim, as a result of his alleged failure to comply with his obligations to attend at discovery and answer questions put to him during his discovery, in the hearing before me the Defendants abandoned their application for this relief. As well the Defendants have withdrawn their application for special costs.

Background

- [4] The underlying action concerns a claim by Mr. Manson for personal injuries alleged to have been sustained by him when he and Mr. Mitchell fell during a rock-climbing excursion in Rogers Pass on July 15, 2021. Mr. Mitchell was acting as Mr. Manson's guide at the time and is the owner of Revelstoke Alpine School. The Association of Canadian Mountain Guides is a professional association of mountain guides.

- [5] In their defence of the claims advanced by Mr. Manson the Defendants, who are all represented by the same counsel, rely on a release of liability, waiver of claims and assumption of risks agreement signed by Mr. Manson on June 17, 2021 (the "Waiver"). It is not in dispute that the enforceability of the Waiver is of central importance in this proceeding.

Procedural History

- [6] Mr. Manson filed his notice of civil claim on November 9, 2021 and served it on the Defendants on November 16, 2021. Mr. Mitchell, Revelstoke Alpine School and the Association of Canadian Mountain Guides filed their respective responses on December 16, 2021.
- [7] On January 11, 2022, Mr. Manson filed a notice of application for summary trial on the issue of the applicability of the Waiver - with the application set for March 31, 2022. The Defendants contend that the March 31, 2022 hearing date was set unilaterally and without their consent. The Defendants filed their response on January 24, 2022, and on January 26, 2022 served an appointment to examine Mr. Manson for discovery on February 22, 2022.
- [8] Mr. Manson's examination for discovery commenced on February 22, 2022 but did not complete. By consent Mr. Manson's discovery continued on February 25, 2022. At approximately 14:09 Mr. Manson's counsel ended the discovery, taking the position that the seven-hour period for completion for discovery provided for in Rule 7-2 had elapsed.

Summary of the Positions of the Parties

- [9] The Defendants submit that either a continuation of Mr. Manson's examination for discovery or an extension of the time for his discovery is warranted. They say that they did not have an opportunity to ask questions concerning the execution of the Waiver by Mr. Manson and that additional discovery time is required to allow them to do so.
- [10] In addition, the Defendants contend that they were not provided with the requisite seven hours for discovery of Mr. Manson, mandated by Rule 7-2(2) of the Rules, for three reasons. First, they say that as a result of technical issues which arose during Mr. Manson's discovery by videoconference on February 22, 2022 the discovery was interrupted. Second, they say that as a result of Mr. Manson's conduct during his discovery that an extension is justified. Finally, they say that in any event, the evidence of the Court Reporter who attended at discovery on February 22 and 25, 2022, establishes that less than seven hours was provided for questioning.
- [11] Mr. Manson denies that his conduct justifies an extension of the time required for his discovery. He contends that the Defendants wasted time by asking open ended questions justifying a longer response time from him and asked questions concerning waivers signed by him on previous occasions which could have been dealt with through a notice to admit.

- [12] With respect to the Court Reporter's calculation of time for questioning, in the hearing before me, counsel for Mr. Manson conceded that less than seven hours was provided for his discovery if deductions are made for the time that the parties broke for lunch - totalling just over two hours on February 22 and 25, 2022. Mr. Manson contends that additional time should not be deducted for the periods when the parties took other breaks during the discovery on those dates.
- [13] Mr. Manson's counsel concedes that approximately 30 minutes of time was lost as a result of technical difficulties during Mr. Manson's discovery on February 22, 2022. Despite this concession and his concession concerning a deduction for lunch breaks, Mr. Manson submits that at most an additional 1 hour and 19 minutes should be provided for the continuation of his discovery.
- [14] The Defendants submit that if further discovery time is ordered it will be necessary to adjourn and reschedule the summary trial application set for March 31, 2022. Mr. Manson agrees.

Issues

- [15] The issues to be decided in this application include the following:
- (a) How much time was provided for the examination for discovery of Mr. Manson on February 22 and 25, 2022, and in particular should the amount of time taken for lunch and other breaks be deducted from the calculation of time used?
 - (b) Do the technical issues and the conduct of Mr. Manson during his discovery on those dates justify an extension of the discovery period, and if so, by how much?

Analysis

How much time was provided for Mr. Manson's discovery?

- [16] Rule 7-2(2) provides that unless the Court otherwise orders or the examinee consents, an examination for discovery of a party must not exceed seven hours in total. The period of time allowed for discovery in a fast track action is shorter, but this is not a fast track action.
- [17] The evidence of the Court Reporter, which is not challenged by Mr. Manson, is that the discovery which took place on February 22, 2022 commenced at 10:07 and was concluded at 15:02 - for a total of 4 hours and 55 minutes. A total of 1 hour and 52 minutes was utilized for breaks, consisting of 1 hour and 7 minutes for lunch and the balance, 45 minutes, for other breaks.
- [18] The Court Reporter's evidence, which again is not challenged, is that the discovery which took place on February 25, 2022 commenced at 10:11 and concluded at 14:09 - for a total of 3 hours and 58 minutes. A total of 1 hour and 20 minutes was utilized for breaks, consisting of 1 hour and 1 minute for lunch and the balance, 19 minutes, for other breaks.

- [19] As I have already stated, Mr. Manson concedes that it is appropriate to deduct the periods used for lunch from the calculation of time for discovery, but says that it is not appropriate to deduct time for other breaks. Counsel for Mr. Manson was not able to articulate a reason why only lunch breaks should be deducted, other than to say that allowing deduction for other breaks could create mischief in that the examining party may take an excessive number of breaks as a way to, in my words, extend the clock. Of course, in my view this same mischief could potentially occur if the party being examined takes excessive breaks as a way of "running down the clock".
- [20] I was not taken to any clear British Columbia authority in which this Court has considered the narrow issue of whether a deduction from the seven hours allotted for discovery should be made for lunch and other breaks. This is likely because in the vast majority of cases, reasonable counsel and parties will be able to resolve this issue without the requirement of marching to court. Unfortunately, this is not the case here.
- [21] Both parties rely upon the decision of Justice N. Smith in *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166, to support their position concerning deduction of time for breaks. I note that at para. 22 of his reasons Justice Smith stated as follows:

The transcript indicates that the discovery of Mr. Bonar lasted approximately four and a half hours, including over an hour in breaks. Mr. Moore has therefore used half of the seven hours permitted by Rule 7-2 (2).

- [22] From these reasons it is apparent that Justice Smith deducted 1 hour used for breaks from time calculation of the period of time for discovery. I note that Justice Smith's reasons do not indicate whether breaks included both lunch and other breaks. In any event, in my view his comments are in the nature of obiter.
- [23] The Defendants also refer to a decision of the Ontario Superior Court of Justice - J. & P. Leveque Bros. v. Ontario, 2010 ONSC 2312. In that case the court considered, amongst other issues, time to be deducted from the seven hour discovery period provided for in the Ontario rules of court: Courts of Justice Act, R.S.O. 1990, c. C. 43; Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 [Ontario Rules]. In that case the Court interpreted the seven hour discovery period limitation in the Ontario rules to mean:

seven hours of actual discovery on the record and that the time limit does not envisage inclusion of breaks, adjournments, or in addition to the conduct unreasonable interference in the questioning process by opposing counsel the effect of which interference is to unduly shorten the time available to the examining party.

Although this Ontario decision is not binding on this Court I consider it to be helpful.

- [24] In my view the seven hour discovery period set out in Rule 7-2(2) should be interpreted to refer to the period during which an examination for discovery remains on the record, when questions can be posed and answers provided. Discovery is a tiring and often stressful process for the party being discovered and, at times, for counsel asking the questions. In my

view, reasonable periods of time for lunch breaks and for other breaks, for example health purposes, to get a coffee or to consult with counsel, should not be included in calculating the seven hour discovery period.

- [25] The number and duration of breaks should be reasonable. What is reasonable will depend on the circumstances, not limited to the complexity of the case, and the needs of the party being examined and of examining counsel. In some cases an examinee may require numerous breaks and in others a discovery process may proceed with limited interruptions and great efficiency.
- [26] I note that in chambers and trial proceedings this Court normally takes a 15 minute break in the morning and afternoon and a 1.5 hour lunch break - for a total of two hours over a usual six hour sitting period. In my view this provides some basis for a finding that a discovery may be interrupted by reasonable breaks which should not be included in the calculation of a seven hour discovery period.
- [27] In the case of Mr. Manson's discovery, a total of 1 hour and 52 minutes was used for lunch and other breaks on February 22, 2022 and 1 hour and 20 minutes was used for breaks on February 25, 2022. Although more than one non-lunch break was taken on one or both of these days, I do not consider that the total time taken for breaks was excessive. As a result I consider that it is appropriate to deduct this time from the calculation of time provided for Mr. Manson's discovery.
- [28] In total, I find that 3 hours and 12 minutes should be deducted from the calculation of the period made available for Mr. Manson's discovery on February 22 and 25, 2022. As a result, I find that the Defendants are entitled to, as of right, an additional 1 hour and 19 minutes to complete Mr. Manson's discovery.
- [29] The remaining question is whether in the circumstances any additional time, as an extension, should be provided for Mr. Manson's discovery as a result of his conduct and delay arising from technical issues.

Does Mr. Manson's conduct and technical issues during discovery justify an extension?

- [30] Rule 7-2(3) provides that the Court must consider in deciding whether to grant an extension, the conduct of the party being examined, including, under subsection (a)(ii), their unresponsiveness to the questions put to them during discovery.
- [31] In this case I am satisfied that the conduct of Mr. Manson during his discovery on February 22, 2022 resulted in more time than should have been required being used for questions and answers on that day. I do not intend to review every incidence of delay suggested in the transcript of his examination that I was taken to by counsel. By way of example, I note the following:

- (a) In response to some questions Mr. Manson appeared to be evasive or to ask for unnecessary clarification. This included being evasive or arguably obstinate in answering questions regarding his place of residence, his marital status, and whether he had a "family doctor"; and
- (b) In addition, Mr. Manson required additional time before answering questions by writing some questions down before answering them as, in his evidence, he needed additional time to organize his thoughts before providing an answer. Although in my view it is unusual for an examinee to write questions down in discovery before answering them, and in my view such a practice should be discouraged, Mr. Manson has provided a reasonable explanation for doing so.
- [32] As I stated earlier, Mr. Manson contends that additional time should not be provided for his discovery because Defendants' counsel wasted time by asking open ended questions and unnecessary questions concerning previous waivers signed by him, which could have been included in a notice to admit. Mr. Manson has not provided an estimate of time wasted by such questions.
- [33] Having reviewed the transcripts of Mr. Manson's discovery I do not find that the questions asked were unnecessarily open ended. As well, I do not agree that simply because a party is able to seek admissions that they are precluded from asking relevant questions during an examination for discovery. It may be more logical that admissions be sought after discovery, depending on the discovery responses provided, and not before. I note that in response to a question from the Court, Counsel for Mr. Manson conceded that questions concerning previous waivers signed by Mr. Manson are relevant to the issue of voluntary assumption of risk - one of the defences raised in this case.
- [34] Although it is not possible to determine with certainty how much time was lost as a result of the conduct of Mr. Manson during discovery, I consider that it is reasonable to provide an additional one hour for discovery to account for delay.
- [35] With respect to delay resulting from technical issues, I note that Rule 7-2(3)(d) provides that in an application to extend a discovery period the Court must consider whether or not it was reasonably practical to complete an examination for discovery within seven hours. As stated above, Mr. Manson concedes that approximately 30 minutes of time was lost due to technical difficulties arising during his first appearance on February 22, 2022. In my view the delay resulting from technical difficulties falls within the factor described at Rule 7-2(3)(d) which the Court must consider in determining whether to extend a discovery. I find pursuant to this rule that an additional 30 minutes of time should be added for technical delays.

Conclusion

- [36] I order that Mr. Manson attend at a continuation / extension of his examination for discovery which I have rounded up to an additional three hours. Of this three hours, two hours is the time that should have been available to the Defendants as part of their right for a seven hour discovery. The balance of one hour is in respect of delay resulting from the conduct of Mr. Manson during his discovery.
- [37] Given the concession of Mr. Manson that if further discovery is required the summary trial application cannot proceed as scheduled, I order that the March 31, 2022 summary trial application be adjourned to the earliest available two day hearing date agreed upon by counsel or as ordered by this Court after completion of the examination for discovery of Mr. Manson.
- [38] As well, given that further relevant evidence may be obtained during the discovery, I order that the Defendants have leave to file an amended application response to Mr. Manson's summary trial application filed January 11, 2022 and as well to file an amended notice of application for summary trial on their own behalf, amending their application filed March 11, 2022.
- [39] (SUBMISSIONS ON COSTS)
- [40] In this case I am satisfied that the Defendants should have their costs. In my view, what occurred on February 25, 2022 was an exercise in "clock-watching", in that the plaintiff took the position, incorrectly, that seven hours of discovery time had been utilized over the period of time provided for discovery during February 22 and 25 2022. That was incorrect. First of all, the plaintiff did not include a deduction for any breaks, which was in my view unreasonable. In addition, the plaintiff did not take into consideration unexpected technical delays that occurred during the examination for discovery.
- [41] The plaintiff, through his counsel, made a basic calculation based on the time the discoveries commenced and the time that they concluded each day. As I said, I describe that as an exercise in "clock-watching".
- [42] In my view, that type of conduct should be discouraged. It was inappropriate, and the timing of the termination of the discovery as well is problematic, in that the Defendants were commencing a line of questioning with respect to the circumstances of the signing of the relevant waiver in this case. I am not going to say any more than that or suggest that the discovery was terminated only for that reason.
- [43] Although the Defendants did not obtain all of the relief they were seeking in this application, in that they were not provided with a further seven hours, they were provided with an additional period of time for discovery which was in excess of the amount that in submissions counsel for the plaintiff conceded should have been provided in any event.

[44] In my view this constitutes special circumstances justifying an award of costs in favour of the Defendants in any event of the cause, and I award costs on that basis.

"Mayer J."

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Prepared on 28 October 2026 · Esheria