
CANADA / JUDGMENT

Munro v. Winton

2021 BCSC 1615

COURT

Supreme Court of British Columbia

DECIDED

5 July 2021

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2021 BCSC 1615 Munro v. Winton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Munro v. Winton,

2021 BCSC 1615

Date: 20210705

Docket: M202495

Registry: New Westminster

Between:

James Alexander Stephen Munro

Plaintiff

And

Joyce Irene Winton

Defendant

Before: The Honourable Mr. Justice Coval

(via videoconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A.E.E. Attrell

Counsel for the Defendant:

C.V. Morcom

Place and Date of Hearing:

New Westminster, B.C.

June 29, 2021

Place and Date of Judgment:

New Westminster, B.C.

July 5, 2021

Introduction

- [1] This is an interlocutory application in a personal injury claim.
- [2] The plaintiff seeks:
 - a) Documents associated with four private investigator surveillance videos which the defendant disclosed and served on the plaintiff on February 10, 2020. Specifically the plaintiff seeks investigative reports, accounts and notes, and any additional video surveillance which the defendant had of the plaintiff and documents related to that surveillance as of February 10, 2020.
 - b) An amended list of documents listing the documents which are produced under A.
 - c) Further particularization of privileged documents currently listed on the defendant's list as P2, P4 to P8, and P10 to P13.

Procedural Background

- [3] The motor vehicle accident in issue occurred on August 17, 2016. The notice of civil claim was served in May 2018, claiming general damages. The response was served in July 2018, admitting liability.
- [4] February 18, 2020, a 10-day jury trial commenced, but a mistrial was declared soon after commencement due to lack of time to complete the trial. The trial is now scheduled to commence August 30, 2021, for 14 days.
- [5] Just before the original trial date, on February 10, 2020, defence counsel served a notice of evidence under Rule 20-5(10), listing four unedited surveillance videos from 2019 of the plaintiff's activity and functioning, totalling around 21 minutes of footage. The defendant also moved these DVDs in its list of documents from the privileged section to Part 1, the unprivileged section, and provided will-say statements from eight investigators regarding their observations of the plaintiff.

[6] Rule 12-5(10) says:

Opportunity to inspect exhibit

- (10) Unless the court otherwise orders or the parties of record otherwise agree, no plan, photograph or object may be received in evidence at the trial of an action unless, at least 7 days before the start of the trial, the parties of record have been given an opportunity to inspect it.

Waiver

- [7] The plaintiff says that, although these surveillance videos were privileged, by producing the four videos for use at trial the defendant has waived privilege over them, and therefore also waived, by implication, privilege over all documents relating to the subject matter of those videos. He therefore seeks production of those related documents, such as investigator's notes, logs, accounts and other video footage.
- [8] The plaintiff relies on *Chong v. Lee*, 2014 BCSC 734, which addressed the same situation. As in this case, the defendant served surveillance videos of the plaintiff under Rule 12-5(10) and gave notice of intention to call two investigators who made the videos. The plaintiff then applied for disclosure of the investigators' reports and accounts. The court accepted that, before being disclosed, the videos and related documents were litigation privileged. The court found that there had been a waiver of privilege regarding the videos by their intentional disclosure to the other side under Rule 12-5(10), and the waiver extended by implication to other materials dealing with the same subject matter as the videos.
- [9] In *Chong*, Pearlman J. followed the Nova Scotia Supreme Court in *Green v. Clarke* (1995), 143 N.S.R. (2d) 74, as follows:
- [14] I have endeavoured to find additional authority that might assist in resolving this issue and have had drawn to my attention the decision of Stewart J. of the Nova Scotia Supreme Court in *Green v. Clarke* (1995), 143 N.S.R. (2d) 74. That case involved an application for an order compelling the defendants to produce to the plaintiff copies of all of the video surveillance evidence and the reports arising from surveillance conducted on behalf of the defendants in that case by private investigators.
- [15] There, the court found that the surveillance videotapes and the accompanying reports were privileged. The court also found that some of the video evidence had been disclosed to the plaintiff's counsel by the defence, apparently for the purpose of attempting settlement. The court found that the disclosure of those videotapes constituted a waiver of privilege.
- [16] At para. 7, the court said this:

On the facts, I find the dominant purpose of the surveillance reports, in the instant, is for use in litigation, and they are, therefore, privileged from production. The same, however, cannot be said for the video tapes, given that when they were partially disclosed to the plaintiff, the

dominant purpose would then have been for purpose of settlement. I am satisfied the contents of the video surveillance tapes have been sufficiently divulged to the plaintiff to cause the litigation or solicitor's brief privilege to be waived. Manes and Silver, in their text *Solicitor-Client Privilege in Canadian Law* consider the issue of waiver where there is disclosure of part of a privileged communication. At p. 192 they state:

1.04 Unless the communication is severable because it deals with different subject matters, where there is a partial waiver of a privileged communication, the whole communication must be disclosed. Furthermore, a party is not entitled to disclose only those parts of a document which are to the party's advantage.

[17] Stewart J. went on to say this at para. 9:

Given the waiver of privilege, full disclosure of the video tapes is now required under the rules and they are to be produced for the plaintiffs' inspection.

And at para. 10:

The three reports prepared contemporaneously with the video tapes also form part of the documents that are to be produced by virtue of the waiver of the privilege. In *Nickerson (H.B.) Limited v. Sommerville Belkin Industries Ltd.* (1985), 72 N.S.R. (2d) 289 (T.D.), Nathanson, J. dealt with waiver of privilege with respect to one document affecting another document at p. 292:

...Waiver of the privilege with respect to one document may affect the privilege covering other relevant documents. Phipson on Evidence (13th ed.), page 306, states:

"If privilege is waived for one record of a particular transaction, it is waived for all other relevant documents, whether of prior or subsequent date, unless some further ground of privilege arises."

[18] In the result, the court in *Green v. Clarke* dealt with the issue in this way at para. 11:

To the extent the contents or any portion of the contents of the three reports may raise a separate or independent basis for privilege, other than that associated with the waived privilege in respect to the video tapes, that portion need not be produced, unless this new basis for privilege has itself also been waived. In addition, to the extent the reports may contain material unrelated to the tapes and, therefore, to the privilege that was waived, they also need not be produced.

[10] Justice Pearlman then held:

[19] Here, there has been a waiver of privilege with respect to the videotapes. The video surveillance reports deal with the same subject matter as the videotape and, in my view, they are subsumed within the waiver of privilege.

[20] The video surveillance reports and the statement of account of the videographers should be produced to plaintiff's counsel. However, if there are any portions of the surveillance report or the statements of account that deal with matters unrelated to the video surveillance of the plaintiff, those portions of the reports may not be produced.

- [11] As indicated in Chong, the underlying principle regarding implied waiver of privilege, over documents relating to the same subject matter as documents over which privilege has been explicitly waived, is that justice is not served by allowing a party to cherry-pick production of favourable evidence regarding a particular transaction or subject matter while maintaining privilege over the less favourable. Doing so creates risk of an unfair or inaccurate impression regarding the subject matter in question as a whole. The reports and accounts were therefore ordered produced, except for any portions unrelated to the video surveillance over which privilege had been waived.
- [12] For the principle that disclosure under Rule 12-5(10) is a waiver of privilege, the plaintiff relies as well on *Oates v. Burton*, 2016 BCSC 1428. There, Voith J., as he then was, citing Chong, said:
- [9] In practical terms, R. 12-5(10) requires counsel for a party to decide whether he or she wishes to waive the privilege associated with a "plan, photograph or object" and make it available for inspection at least seven days before trial so that it can be used at trial
- [13] I disagree, respectfully, with the defendant counsel's submission that this statement is obiter. In hearing an appeal of a master's decision, Voith J. was assessing a master's reliance on Rule 12-5(10) as a basis for denying production of an allegedly privileged video and report. This analysis of Rule 12-5(10) was therefore part of the reasoning in Voith J.'s decision.
- [14] The plaintiff relies as well on *Cromb v. Bouwmeester*, 2014 ONSC 5318, which follows some of the same authority as Chong and adopts the same approach. In coming to the same conclusion, it held that the defendants' intentional disclosure of two videos of the plaintiff and associated reports was a waiver of privilege which by implication extended to a third undisclosed video of the plaintiff and reports regarding that video.
- [15] The defendant says production under Rule 12-5(10) is not a voluntary waiver of privilege and so does not amount to a waiver of privilege of related documents. Videos, it says, were not disclosed voluntarily but pursuant to an obligation under the rules of court.
- [16] To support this approach, counsel relies on *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. No. 1499. The defendant argues that production of the videos under Rule 12-5(10) is not a waiver of privilege, and, even if it were, it is not a waiver of related undisclosed documents because the rule does not require the opportunity for inspection of those related but undisclosed documents.
- [17] Unlike the plaintiff's case, however, *S. & K.* was not a case about waiver of privileged documents under Rule 12-5(10), nor about the effect of waiver of surveillance videos on documents related to that surveillance. Instead it dealt with s. 11 of the Canada Evidence Act, R.S.C. 1985, c. C-5, which states:

11 Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

- [18] The defendant also relies on *Henderson v. Lodge*, [1993] B.C.J. No. 610, for the proposition that documents associated with an expert's report are producible only if and when the expert takes the stand, which, it says, would apply to the investigators in this case.
- [19] Both these cases deal with a different issue than in this application, namely, production of an expert's opinion and the related file materials under the Canada Evidence Act, not production of a document under Rule 12-5(10) and implied waiver of privilege over related documents. They do so as well regarding the former regime regarding expert reports under the Canada Evidence Act rather than the current approach to such documents under Rule 11-6(8), which requires production of the expert's entire file before trial.
- [20] In my view, Chong is on "all fours" with the plaintiff's application, and is therefore governing authority for the conclusion that the defendant has impliedly waived privilege over all documents related to the video surveillance of the plaintiff's activities and functioning which it has now served under Rule 12-5(10).
- [21] The implied waiver applies to all documents not yet produced regarding the surveillance videos, including surveillance reports, accounts and additional such video surveillance.
- [22] The defendant also relies on the principle that, in some circumstances, privileged documents that a party wishes to use to test the opposing party's credibility can be used at trial despite not being previously disclosed. Under the current law such tactical non-disclosure carries with it the risk that the need to use the document will not be granted.
- [23] In my view, the defendant has not demonstrated that this principle applies to the documents in question. As the defendant presented its position in the application, the documents on which it wishes to rely at trial are in fact those very videos which it has now produced rather than the documents over which it still seeks to claim privilege.

Further Description of Privileged Documents

- [24] Turning then to the second application. In the defendant's list of privileged documents, the eight documents in issue are currently described as "investigative work product" with their dates and "dominant purpose of litigation" as the stated ground of privilege.

[25] Under Rule 7-1(6) and (7), privileged documents must be listed and described so that without revealing privileged information, the opposing party can assess the validity of the privilege claim. The plaintiff says to satisfy this the defendant should disclose the subject matter and description of the document and its enclosures.

[26] The Court of Appeal in *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259, says that the specific requirements for listing under Rule 7-1(7) vary from case to case depending on the circumstances. The baseline rule, however, is that a privileged document must be described so as to enable the other party and the court to assess the validity of the privilege claim, but the description need not of course go so far as to reveal privileged information. The Court of Appeal found as sufficient in that case the description:

Letter from third party to Davis LLP dated August 20, 2007 responding to August 15, 2007 letter regarding *Gichuru v. Law Society of BC*.

[27] The court provided the following general guidance on the information expected in a privileged list:

[43] It is impossible to express a general test that would describe the level of detail in an affidavit or document list necessary to establish a claim to litigation privilege. However, to the extent that a description can be provided without jeopardizing the confidentiality of the privilege, it ought to be. If doing so could jeopardize the privilege, then the adjudicator or judge may be required to examine the document. I would expect that such a claim to privilege would usually be supported by: (1) a description of the litigation; (2) the dates of the litigation; (3) a description of the party to whom the correspondence is written to, or received from, or at least a description of the role of the party, (such as medical expert, potential witness, client); (4) a description of an enclosure where relevant; and (5) some particulars as to the purpose of the document. I do not mean this to be an exhaustive list. Sometimes this level of detail may reveal privileged information, and could not be given.

[28] The plaintiff says the current description is too generic to allow assessment of the privilege claim's validity because it says nothing except that the document relates to investigation and provides its date.

[29] The defendant says that, in the circumstances, the description allows the requisite assessment and establishes the document's privilege. The dates indicate that all documents were created after the litigation commenced. There are no issues between the parties other than this litigation, for example no issue regarding Part 7 benefits. So the description indicates the document is an investigative report of some sort produced during litigation, which, the defendant says, is sufficient to establish that it is privileged. Moreover, additional description of the type of report would disclose privileged information about the defendant's investigation.

- [30] Taking, as an example of the defendant's point, video surveillance of a plaintiff in a personal injury case such as this, one can see the difficulty of providing more than a date and generic description without disclosing the privileged information that the defendant was using a private investigator to monitor the plaintiff's function. But, in my view, in that case even a description such as "investigator work product for counsel" provides more useful information for an assessment of privilege than the defendant's current description, "investigative work product," which gives no idea of the type of document involved.
- [31] I have some sympathy for the defendant's position. In the circumstances of this case, despite the vagueness of "investigative work product," anything falling within that description created after the litigation commenced would be privileged. At the same time, however, in my view Gichuru calls for a more detailed description to the extent possible without revealing privileged information. Therefore, such further description is ordered for the documents as sought in the plaintiff's application.
- [32] Counsel, those are my reasons. In terms of the order, I would grant the orders sought by the plaintiff, although change the time limits for all three orders to 14 days from today.
- [33] So subject to any more submissions or questions or concerns, those are the reasons.
- [34] CNSL A. ATTRELL: Just the matter of costs, My Lord. The plaintiff seeks costs in any event of the cause for the application on the basis that the plaintiff was wholly successful on this application.
- [35] THE COURT: Mr. Morcom.
- [36] CNSL C. MORCOM: Yes, My Lord. I guess with costs there has been a change to the time, and as you indicated in your reasons with respect to the ordering of the changing of the descriptions of the surveillance or the investigative work product documents, that the defendant would say each party bear their own costs.
- [37] THE COURT: All right. I am going to order costs to the plaintiff in any event of the cause regarding document disclosure. In my respectful view, I think Chong is clear authority on that application. I am not certain there is much practical use to the second application, but the plaintiff was successful, so I am just going to award the plaintiff costs in the cause for the particulars application.
- [38] All right, counsel. Thank you very much.
- [39] CNSL A. ATTRELL: Thank you, My Lord.
- [40] CNSL C. MORCOM: Thank you, My Lord.

"Coval J."

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