

CANADA / JUDGMENT

Punia v. Desrochers

2024 BCSC 2411

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2024 BCSC 2411 Punia v. Desrochers

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Punia v. Desrochers,

2024 BCSC 2411

Date: 20241018

Docket: M209785

Registry: New Westminster

Between:

Mandhir Punia

Plaintiff

And:

Tiagra Lee Desrochers

Defendant

Before: The Honourable Justice Dion

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff appearing

via videoconference:

D.G. Perry

Counsel for the Defendant appearing

via videoconference:

A. Pappin

Place and Date of Hearing:

New Westminster, B.C.

October 15, 2024

Place and Date of Judgment:

New Westminster, B.C.

October 18, 2024

- [1] THE COURT: On court file number 209785, these are my oral reasons on the application of Ms. Desrochers. The defendant, Tiagra Lee Desrochers, seeks an order compelling the plaintiff, Mandhir Punia, to attend and submit to a physical and cognitive functional capacity evaluation with occupational therapist Timothy Winter on October 22, 2024, and October 23, 2024. She also seeks costs of the application to be paid by the defendant in any event of the cause.
- [2] Mr. Punia seeks to dismiss the application. He also submits that the defendant ought to be required to produce related video surveillance after the defendant has waived privilege with respect to some of the screen shots in this matter.

Functional Capacity Evaluation

- [3] With respect to the background, on November 1, 2017, a car accident occurred in Richmond, British Columbia, resulting in a claim by Mr. Punia for pain, suffering, loss of enjoyment of life, loss of earnings, loss of income-earning capacity, loss of home maintenance capacity, and the cost of future care and treatment.
- [4] Mr. Punia alleges that the accident caused him injuries including to his neck, arm, fingers, shoulders, back, and hip. At an examination for discovery held August 27, 2021, Mr. Punia alleged additional injuries from the accident, including shoulder pain, headaches, difficulty concentrating, sleeping problems, and dizziness. The trial is set for 10 days commencing March 3, 2025. The 84-day deadline is December 6, 2024.
- [5] Mr. Punia was employed prior to the accident by the Province of British Columbia as an operations manager in the welfare fraud unit of the Ministry of Social Development. His annual income for 2016 was \$88,000. At the time of the accident, Mr. Punia was on a graduated return to work after being on short-term disability. Beyond his graduated return to work, Mr. Punia has not returned to work in any capacity since the accident since he has been receiving short-term disability, long-term disability, and CPP benefits.

- [6] Ms. Desrochers says since Mr. Punia has claimed inability to work, it appears that he has had many jobs since the accident, such as operating a business called Cresleigh Homes Ltd., working full time in 2020 as a project manager and then CEO of Medico Construction and Design, coaching the Richmond Strikers soccer team, as well as being a director of a soccer operations for Richmond United Soccer Club, and starting his own construction company called Medico Construction and Design Ltd. In 2023, a suit was filed against Mr. Punia, Medico Construction Design versus Punia et al. court file number NEW SS 249969, which indicates Mr. Punia is a businessman, and he performs services through his corporate vehicle, 1344778 BC Ltd.
- [7] Ms. Desrochers submits that Mr. Punia claimed as a result of the accident that he has been unable to coach his daughter's soccer team, spend time in his backyard, or take vacations. Notwithstanding that claim, Ms. Desrochers says there are numerous print and social media reports which show Mr. Punia continuing to coach his daughter's soccer team until at least 2022. She also says that he has been digitally recorded raking leaves in his yard for a protracted period of time. It also appears, she says, that he has taken vacations in 2018, 2019, and 2022.
- [8] In light of these apparent inconsistencies, which bear on causation and compensation, Ms. Desrochers says that she has arranged for Mr. Punia's attendance for the functional capacity evaluation. On approximately August 21, 2024, Ms. Desrochers advised Mr. Punia's counsel that the functional capacity evaluation had been arranged for him. That day, counsel for Mr. Punia advised that Mr. Punia would not agree to the functional capacity evaluation given he was not physically capable of that evaluation due to his severe pain.
- [9] Ms. Desrochers says the purpose of the functional capacity evaluation is to determine how Mr. Punia's functional capacity is affected, if at all, by a subjective claim of a pain. A claim of pain is, she says, sine qua non for the functional capacity evaluation. To date, Mr. Punia has attended one independent medical examination scheduled by the defendant. On March 9, 2023, Mr. Punia submitted to an examination by Dr. Scott Paquette, a neurosurgeon. His report is dated March 3, 2023. The defendant also has a report from an accident engineer which has been commissioned and obtained by the defendant. The report of Dr. Paquette was served on the plaintiff on October 12, 2023, which report was subsequently reserved on the defendant the following day.
- [10] The engineer accident report of Dr. Harvey West dated April 20, 2023, was also served on the plaintiff on October 12, 2023. Including Dr. Paquette's report, Mr. Punia has served the defendant with other expert reports, including a medical report of his treating internist, Dr. May Ong, dated June 26, 2023; an updated medical report of Dr. Ong dated September 10, 2024; and an independent medical examination report of Dr. Labonne [phonetic] dated July 27, 2023.

- [11] The other report served on the defence was a past and future lost income, loss/future care report dated October 12, 2023. Ms. Desrochers says that there has been no functional capacity evaluation report prepared or served by either party in this action. She says that Dr. Paquette's assessment did not include a comprehensive functional capacity examination to measure Mr. Punia's functional capabilities and limitations in the context of occupation demands.
- [12] Dr. Paquette's opinion is that Mr. Punia's inability to work is due to chronic persistent back pain, acknowledging that Mr. Punia's back pain is subjective with no objective evidence of neurological issues. Ms. Desrochers says that Dr. Paquette's report does not provide to what extent, if any, the plaintiff is impaired from performing specific tasks at his job, thereby being unable to work as he claims.
- [13] Dr. Timothy Winter will conduct the functional capacity evaluation, which will examine the functional consequences of specific impairments and specific occupational demands. The assessment will entail Mr. Punia's specific physical and neuropsychological capabilities and his work endurance and compare data to the capacity required for his pre-accident occupation according to occupational classifications. The therapist may also provide recommendations for the adaptations or aids to assist Mr. Punia with his work and/or other future care recommendations.
- [14] Ms. Desrochers also says that Dr. Ong, as the treating physician for Mr. Punia, is an advocate for him as her patient. Not only is he her patient but she has also advocated, Ms. Desrochers says, for his indefinite benefits. The report, they say, is not objective, and therefore she cannot be seen as providing an objective expert report. In her report dated September 10, 2024, Dr. Ong advises Mr. Punia against my activity which will exacerbate his pain. She doubts there are any meaningful gains from placing him under physical activity, which will exacerbate his chronic pain and disability.
- [15] In response, Mr. Punia says scheduling him to attend at the functional capacity evaluation on October 21 and 22, 2024, is the second attempt of defence counsel to have Mr. Punia attend for such an evaluation. The first functional capacity evaluation was arranged for September 10 and 11, 2024. Counsel for Mr. Punia advised counsel for the defendant that having Mr. Punia attend the assessment would aggravate Mr. Punia's chronic pain. They point to Dr. Ong's opinion dated September 2024 in support.
- [16] They also submit that the defendant is unhappy with Dr. Paquette's report and therefore seeks the proposed functional capacity evaluation. For the defendant is an affidavit of Kazuyo Sugiyama dated September 25, 2024, which includes a number of exhibits, D to L, those being various surveillance screen shots taken of the plaintiff. Exhibit D dated October 29, 2022, appears to show Mr. Punia raking leaves at his home. Exhibit E dated November 1, 2022, appears to show Mr. Punia at a work site in Vancouver, British Columbia. Exhibit F dated November 17, 2022, appears to show Mr. Punia placing signage at the entrance of a work site in Vancouver.

- [17] Exhibit G dated November 17, 2022, appears to show Mr. Punia carrying a ladder at a work site in Vancouver. Mr. Punia is using his right arm alone, which he, according to Ms. Desrochers, has claimed was injured in the accident. Exhibit H is dated April 11, 2023. It appears to show Mr. Punia carrying two large plastic bins, one in each hand, at his home in Richmond, British Columbia. Exhibit I dated April 11, 2023, appears to show Mr. Punia crouching down to reach for an item on the bottom shelf at Home Depot in Richmond, British Columbia. Exhibit J dated April 11, 2023, appears to show Mr. Punia bending at the waist to reach for an item on or near the bottom shelf at the Home Depot in Richmond.
- [18] Exhibit K dated July 22, 2023, appears to show Mr. Punia operating a leaf blower and manipulating a lawnmower simultaneously while balancing on one foot at his residence in Richmond. Exhibit L dated July 22, 2023, appears to show Mr. Punia operating a leaf blower at his residence in Richmond. The leaf blower is in the plaintiff's fully extended right arm alone. Ms. Desrochers says it is his right arm that Mr. Punia claims was injured or exacerbated in the accident.
- [19] Also attached as an exhibit to this affidavit is Exhibit M. It is the independent medical examination report of Dr. Paquette dated March 31, 2023. The letter of instructions is found at pages 10 to 15, and his CV is also included. Ms. Desrochers says no request was made of Dr. Paquette to evaluate the plaintiff's physical or cognitive functional capacity. Nor did he do so. Moreover, she says Dr. Paquette's CV indicates that he has no qualifications to perform such an evaluation.

Submissions of the Plaintiff

- [20] With respect to the plaintiff's submissions, Mr. Punia submits that Ms. Desrochers does not like her own expert report. At page 6 of Dr. Paquette's independent medical examination, he notes that Mr. Punia has been through extensive investigations and that he has seen the best specialists in the province to manage his spine and pain.
- [21] Also Dr. Paquette notes he does not believe Mr. Punia has missed out on any attempts to mitigate his pain, having involved himself with the best clinics here. Counsel for Mr. Punia points to Dr. Ong's report, which clinics have been unable to find a pain source, which could be either modified or treated. Dr. Paquette then says in his report Mr. Punia's inability to work is due to his chronic persistent back pain and that he has returned to work without success.

Submissions of the Defence

- [22] Turning now to the submissions of the defence. In *Tran v. Abbott*, 2018 BCCA 365, the Court of Appeal said that the purpose of Rule 7-6, which was the rule under which I am being asked to make this order, is to put parties on an equal footing. It is meant to balance the plaintiff's advantage in obtaining expert opinion by providing the defence with access to the plaintiff. The rule is consistent with the modern philosophy that procedural rules should

work to promote settlement before trial and ensure speedy and inexpensive determination of each case.

- [23] Ms. Desrochers says at present there is a significant imbalance in expert reports, and therefore currently there is no incentive for the plaintiff to want to settle. The plaintiff has served the reports on the defendant, and as I noted, the report of Dr. Paquette served by the defendant was served back by the plaintiff. Ms. Desrochers says given the significant imbalance in expert reports between the parties, this factor weighs in favour of the application succeeding before me.
- [24] Second, Ms. Desrochers says that subsequent examination may be appropriate where there is some question that could not have been dealt with in the first examination. The defence has only an accident engineer report that is uniquely Ms. Desrochers'. The functional capacity evaluation report could not have been done by an engineer who was not qualified to do such an evaluation. Nor did the writer meet with Mr. Punia.
- [25] Moreover, Dr. Paquette is a neurosurgeon, and he did not provide an independent medical examination or evaluation report to the defendant. However, that report is no longer the report a defendant's report because it has been served back on them, as indicated. As well, even if that were not the case, Dr. Paquette was not asked to assess Mr. Punia's physical or cognitive capacity. Nor did he comment on it in his report. Dr. Paquette has no training to provide functional and medical evaluations. Nor was he asked to do so. Because the functional capacity could not have been done or addressed by the defendant's engineer or even by Dr. Paquette, whose report is no longer that alone of Ms. Desrochers, they say this factor, that being the second found in Tran, supra, also weighs in their favour in their application succeeding.
- [26] Respecting the third factor, multiple examinations may be appropriate, Ms. Desrochers says, where a variety of injuries are alleged, and the etiology of the injuries are not straightforward. The plaintiff alleges various injuries, both physical and psychological/cognitive. At the time of the accident, Mr. Punia was working reduced hours due to pre-existing psychological and cognitive problems, including neck pain, back pain, right arm pain, lack of sleep, blurry vision, nausea, and irritability.
- [27] His arm pain goes back, Ms. Desrochers says, to 2010, pain so severe he reported it as a level 7 to 8 out of 10, and poor to non-existent sleep. Mr. Punia has had surgeries in 2011 and 2012 to decompress his C6 nerve root, which according to the plaintiff were both successful. In 2013, he reported constant aching in his back with a pain level of 7 out of 10. By 2014, medical records note a concentration and memory impairment due to his pain. Virtually all of the plaintiff's claims of injury pre-existed the accident, according to Ms. Desrochers.

- [28] Mr. Punia has worked numerous jobs since the accident while claiming to be totally disabled. Ms. Desrochers says that the etiology of these claimed injuries is clearly not straightforward. She says therefore, the number and variety and questionable etiology of Mr. Punia's injuries are all factors also weighing in favour of the applicant succeeding.
- [29] Fourth, the court must consider the effect of refusing the order being sought here. The defence says without the requested order, Ms. Desrochers would need to go to trial gravely handicapped by the lack of expert opinion based on a personal assessment of the plaintiff. Moreover, there are two other separate civil claims against the defendant. If she is refused an order sought under this application, the plaintiff's injuries claim will effectively go unchallenged.
- [30] Mr. Punia's claimed income loss alone as calculated by his expert economist greatly exceeds the defendant's insurance policy limits. Given the defendant is a young person of modest financial means, such an outcome would be financially devastating to her. This factor, she says, weighs in favour of her application succeeding.
- [31] Fifth, a subsequent independent evaluation may be needed to consider alternative sources of Mr. Punia's symptoms. Except for the accident engineer Mr. West, all other experts in this action have based their opinion at most almost exclusively on Mr. Punia's subjective claims alone. Ms. Desrochers submits that this is not surprising since the plaintiff sustained no objective injuries in the accident and that the Supreme Court of Canada has held that opinion evidence as to someone lying is impermissible. *R. v. Marquard*, 1993 CanLII 37 (SCC), [1993] 4 SCR 223, at para. 49.
- [32] Since the plaintiff's pre- and post accident injuries overlap to a large degree and what he has claimed to be disability inconsistencies with his observed capabilities, alternate sources of his injuries such as exaggerations, feigning, malingering, and understating the benefits of surgeries and medication should also be explored. Validity testing by an occupational therapist during a functional capacity evaluation is the most effective way to address such matters. So then the defence submits this factor also weighs in favour of the application succeeding.
- [33] Sixth, if the proposed independent evaluation would overlap with the evaluation already completed, the applicant must establish the necessity for the subsequent evaluation. The only expert report that is uniquely that of the defence is the accident engineer's report. No aspect of that report could have considered Mr. Punia's functional capacity since the engineer never met with him. The neurosurgical report has now been claimed by the plaintiff as his own, and it did not opine on the plaintiff's functional capacity. Had it done so, it would have been at most an incidental overlap with what is now being sought.
- [34] A functional capacity report could not, Ms. Desrochers says, bolster the neurological report for two reasons. First, there is no opinion provided in Dr. Paquette's report regarding the plaintiff's physical and cognitive ability to do his job as a public servant. Second, even if Dr. Paquette had provided such an opinion, it would have been unhelpful to the defence as

evidenced by the fact that Mr. Punia served the report back on the defence. Ms. Desrochers says it would be illogical for the defence to bolster an unhelpful report given that a functional capacity evaluation report could not bolster the defendant's expert report. This factor, she says, also weighs in favour of the application succeeding.

- [35] Seventh, the greater the overlap, the greater the obligation of justification. Here, Ms. Desrochers says this principle acknowledges even if a proposed expert report might opine on an overlapping issue, this does not mean the plaintiff should not be compelled to attend the evaluation. It simply increases the burden on the applicant to justify the subsequent independent evaluation. Given that there is no overlap or even the potential of overlap, Ms. Desrochers says if Mr. Punia were to attend the functional capacity evaluation, this factor also weighs in favour of her application succeeding.
- [36] Finally, she says there is no entitlement to match expert for expert. No party has an expert report which addresses the plaintiff's physical and cognitive capacity. Therefore, there is no issue matching expert to expert. Consequently, this factor also weighs in favour of the applicant succeeding here.

The Law

- [37] Pursuant to Rule 7-6 of the Supreme Court Civil Rules, the court has discretion to order a subsequent medical evaluation. That section reads:

Order for medical examination

- (1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make
 - (a) an order respecting any expenses connected with the examination, and
 - (b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record.

Subsequent examinations

- (2) The court may order a further examination under this rule.
- [38] As noted above in *Tran*, supra, the Court of Appeal indicated that this rule is a rule of discovery. It is designed to balance the plaintiff's advantage in obtaining expert opinion by providing the defendant with access to the plaintiff for such prior to trial.
- [39] *Tran*, supra also provides that in legal proceedings, there is an overriding principle to secure a just determination of every proceeding on its merits, to ensure full disclosure, and ensure reasonable equality between the parties in preparation of trial. In order to find in favour of Ms. Desrochers, I would have to find that she has satisfied all of the factors set out in *Tran*, supra in order to exercise my discretion pursuant to Rule 7-6.

- [40] Turning now to the case law provided in this application. Mr. Punia relies on three cases in support of his opposition to him being compelled to attend the functional capacity evaluation: *Marcon v. Lacasse*, 2021 BCSC 1053; *Anderson v. Steffen*, 2021 BCSC 252; *Zhao v. Yip*, 2023 BCSC 1290.
- [41] In addressing the plaintiff's application response, counsel for the defence submits that the cases relied on by the plaintiff are distinct. First, they say that Mr. Punia is relying on three cases to support his position, and those cases are not applicable to the matters in this application. They also say with respect to the issue of surveillance, which I will speak to more later in these reasons, they object to that suggestion. What Ms. Desrochers says is that neither of these bases provide a foundation for refusing the order sought by her. Under the first approach, the case law cited by the plaintiffs have no application for a further independent evaluation because those applications if those three cases failed.
- [42] With respect to the first case referred to by the plaintiff, *Marcon*, supra, Ms. Desrochers says that case has no similarities to the within action. In *Marcon*, supra, the defence had already obtained an independent medical report from an orthopedic surgeon who has carried out a comprehensive functional capacity evaluation of the plaintiff. A functional capacity evaluation by an occupational therapist was held to be impermissibly duplicative. Ms. Desrochers says that these facts therefore do not apply to the within action.
- [43] With respect to the second case relied on by the plaintiff, *Anderson v. Steffen*, 2021 BCSC 252, Ms. Desrochers says that that case also has no similarities to this one. *Anderson*, supra involved a decision of a master who had ordered the plaintiff to attend for a functional capacity evaluation. The master's order was made before the report from an earlier independent medical evaluation by a physiatrist was available. The master made the decision based on an assumption that the occupational therapist would ask questions distinct from the physiatrist, even though the master had not seen the physiatrist's report. On appeal, Justice Milman did not find that the master's assumptions were erroneous. Rather, he found it should not have been the foundation for his decision since the facts were unknown when his decision was made. Ms. Desrochers says none of the facts in *Anderson*, supra apply to the within application.
- [44] The final case relied on by the plaintiff is *Zhao v. Yip*. There the defendant had four independent medical reports from medical specialists, and they were seeking a fifth report from an occupational therapist. Master Bilawich found that the functional capacity evaluation would have to be markedly different or unique from what would be provided by assessment by one or more of the physicians who had previously prepared independent medical evaluations.

- [45] Ms. Desrochers says such a requirement is not found in the Tran, supra decision of the BC Court of Appeal. Rather, it is counter to the principle of permissible overlap. Ms. Desrochers submits given that the application before the court is not one for supernumerary independent evaluation and the defence has no report that opines on the functional capacity of Mr. Punia, the facts of this case do not apply.
- [46] The defence also says that the plaintiff has made no submissions connecting the cases relied on to the facts on the application before this court because none of those cases have similar facts to the application. Unlike those cases of the plaintiff, Ms. Desrochers says that Johal v. Singh, 2017 BCSC 2431, is directly on point. They say in Johal, supra, the plaintiff had already attended an independent medical examination with a neurosurgeon. The defendant then sought an order to compel the plaintiff to attend a functional capacity evaluation with Mr. Timothy Winter, who is also the proposed occupational therapist in the application before the court here.
- [47] Master Vos noted that Mr. Winter would provide important and relative information beyond of that of the neurosurgeon's report. He noted a functional capacity evaluation would allow the defendant to obtain opinion evidence on the plaintiff's functional abilities, his employment capabilities, and any recommended treatment relating to potential returns to full-time employment. These are matters that could relate to the plaintiff's claim for damages and future loss of earning capacity. They differ from the neurosurgeon's independent medical report, which was focused on an assessment of the plaintiff's injuries and symptoms.
- [48] Master Vos also noted that the plaintiff's loss of future capacity claim could apply for a long period of time and therefore could be significant, making it a main issue at trial. Master Vos held when preparing a case for trial, the defendant should have the benefit of expert assistance in considering and assessing matters related to the plaintiff's alleged employment restriction. Mr. Winter, Ms. Desrochers says, was held to be the appropriate expert in Johal, supra.
- [49] Like Master Vos, I find that these are matters that would relate to Mr. Punia's claim for damages and future loss of earning capacity. I also find that in the preparation of a case such as this one for trial, the defendant should have the benefit of expert assistance in considering and assessing matters related to the plaintiff's alleged employment restrictions. With respect to the plaintiff's submissions regarding what they say to be non-disclosure of further surveillance, I agree with Ms. Desrochers that this is not a matter that I ought to address here.
- [50] With respect to the eight factors and the reports available, I find that the engineer's accident report does not relate to Mr. Punia's claim, as that report was not intended to do so. I also agree with Ms. Desrochers that the Anderson, supra and Zhao, supra cases are distinguishable, as is Marcon, supra, on the facts and therefore have no application. I find that the case before me that is most closely aligned is Johal, supra.

- [51] With respect to the report Mr. Winter will provide relates to important information beyond Dr. Paquette's report, which I find is no longer Ms. Desrochers's own report. The proposed functional capacity evaluation would allow the defendant to obtain opinion evidence on Mr. Punia's functional abilities, his employment capacities, and any recommended treatments relating to potential return to full-time work.
- [52] I am satisfied that Ms. Desrochers has met all of the requirements set out in *Tran*, *supra*.

Waiver of Privilege

- [53] I am turning now to the issue of the waiver of privilege that Mr. Punia has raised. Mr. Punia argues that the defence has included screen shots from surveillance under part 4, privileged documents, listed in the defendant's list of documents as part of the within application. Mr. Punia argues that these surveillance videos and reports should be provided to the plaintiff as privilege has been waived. The plaintiff relies on *Chong v. Lee*, 2014 BCSC 734, where at para. 20, Justice Pearlman found that video surveillance reports and the statement of accounts of the videographers should be produced to plaintiff's counsel except portions unrelated to the action.
- [54] In *Chong*, *supra*, the defendant intended to lead videotape surveillance evidence and call to private investigators to give evidence with respect to video surveillance of the plaintiff. The plaintiff served notice of her intended opposition to the admissibility of the video evidence on the basis that it did not meet the three-part test set out in *Regina v. Creemer and Cormier*, [1968] 1 CCC 14 NSCA.
- [55] In *Chong*, *supra*, the plaintiff applied for disclosure of the surveillance reports in advance of a *voir dire* to determine an admissibility of the video evidence, thereby raising the issue of whether the reports were privileged and whether limited disclosure here, in this case the screenshots, waive privilege over all of the surveillance footage. The defendant in *Chong*, *supra* resisted that disclosure in advance of witness testimony. In *Chong*, *supra*, the video surveillance evidence was commissioned by the defendants for the purpose of litigation and not for the purposes of Justice Pearlman's ruling on that specific issue before him.
- [56] With respect to the plaintiff's second approach, that the defendant should release more evidence that is currently privileged, Ms. Desrochers says that there is no basis or utility in that approach to the application before the court. She says that the plaintiff has not provided any reason why additional evidence ought to be released with respect to the application here. Moreover, there is no challenge to the utility of the surveillance screenshots entered in support of this application.

- [57] As well, Ms. Desrochers says the plaintiff does not deny that the screenshots accurately depict the plaintiff performing numerous physical activities. Nor does the plaintiff deny the screenshots appear to show that his pain, if any, is not debilitating. Ms. Desrochers submits that if Mr. Punia wishes more disclosure of the surveillance footage, he may bring his own application, which he has not done. The application before the court, Ms. Desrochers says, is not the forum for such a complex argument.
- [58] Further, Ms. Desrochers argues this second approach of the plaintiff is also extraneous to the application and has no validity or merit as a basis for not issuing the order sought by her. Ms. Desrochers says that they have shown that the proposed functional capacity evaluation would satisfy all eight requirements for this court to exercise its discretion to order a subsequent independent evaluation under Rule 7-6 as enumerated in *Tran*, supra and subsequent cases such as *Walsh v. Riley*, 2023 BCSC 135. See also *Dyer v. Harris*, 2022 BCSC 836.
- [59] Ms. Desrochers also said that the plaintiff has not challenged the main argument advanced by her that she has met all eight of the requirements set out in *Tran*, supra. Furthermore, she argues that the plaintiff defends the application by three cases with no real relevance, with entirely different fact patterns to this application. Furthermore, she says that the plaintiff appears to defend against this application by asking for the release of additional privileged information. This, she says, is a red herring.
- [60] In his submissions, counsel for the petitioner said that the defendant cannot cherry pick what they can disclose since they have impliedly waived privilege over some of the surveillance footage pursuant to Rule 12-5(10). The plaintiff has not brought an application in respect of the remainder of the surveillance. I do not know if there exist any reports that may be in possession of the defendant. There was no immediate calling of witnesses, as was the specific issue raised in *Chong*, supra that Justice Pearlman had to deal with.
- [61] While it may be that the plaintiff is entitled to other surveillance that the defendant may have, the within application is in respect of whether they may require Mr. Punia to attend the functional capacity evaluation based primarily on their lack of an expert. I do not find that Dr. Paquette's report, as I indicated earlier, is a report that Ms. Desrochers can rely on uniquely for herself. Therefore, the lack of an expert report about Mr. Punia's physical and cognitive capabilities is lacking.
- [62] Moreover, the raising of an issue respecting privilege of documents is not a defence to this application. If the plaintiff seeks disclosure on related surveillance of Mr. Punia, he may bring that application, where the court may receive more fulsome submissions on that issue.

[63] Therefore, for the reasons above, I conclude that Ms. Desrochers has satisfied, as I indicated, the eight requirements set out in Tran, supra. I therefore exercise my discretion pursuant to Rule 7-6 and order that the plaintiff, Mr. Punia, attend and submit to a physical and cognitive functional capacity evaluation with occupational therapist Timothy Winter on October 21, 2024, and October 22, 2024.

[64] Ms. Desrochers also sought costs, and she is entitled to those costs in any event of the cause. "Dion, J."

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