ICBC Claims, Surveillance Video And Disclosure

November 19th, 2008

Reasons for judgment were released today by the BC Court of Appeal dealing with the timing of disclosure of non-privileged video surveillance of a Plaintiff involved in a tort claim.

In this case the Plaintiff sued for damages as a result of 2 motor vehicle collisions. The Defendants insurer retained a private investigator to conduct surveillance of the Plaintiff.

In the course of the lawsuit the Plaintiff triggered Rule 26 (which, when complied with, requires the opposing party to provide a list of documents relevant to the action). The Defendants listed the video surveillance as non-privileged but refused to produce the tape of the Plaintiff until after her examination for discovery claiming that Rule 26(1.2) permits them to delay production of this document because the credibility of the Plaintiff was a central issue of this claim and if the supposedly damaging tape was disclosed prior to discovery that would somehow compromise the defendants ability to examine her for discovery.

The Plaintiff applied to court for production of the tape and succeeded. The Defendants took the case up to the Court of Appeal.

The Court of Appeal dismissed the appeal and gave the following insightful reasons discussing the intent of Rule 26(2.1)

[22] Generally speaking, the burden of proof is on the party making an application. That burden is to the standard of a balance of probabilities. I see no principled reason why an application under R. 26(1.2) should be treated any differently. In this case, the appellants are the applicants seeking a postponement of production of the Investigative Report. In my view, they have the burden of establishing the grounds for such an order on a balance of probabilities.

[23] Both sides contend that Blank, the seminal decision on the scope of the exemption for litigation privilege, supports their respective positions that the trend in disclosure of documents favours broadening (the appellants) or restricting (the respondent) of the exemption. With respect, I do not find these submissions offer assistance in this appeal. The circumstances of this case do not involve a request for disclosure of a privileged document but, rather, a request to postpone production of a relevant, non-privileged document. In my view, the issue raised in this appeal requires an inquiry into what factors might negate the mandatory production of relevant, non-privileged documents in an action…..

[37] I am not persuaded these authorities support the appellants' position that the common law permits the postponement of non-privileged documents in order to permit a party to challenge the credibility of the opposing party. On the other hand, neither am I persuaded that the policy considerations relied upon by the chambers judge, namely that prior disclosure may save the cost of discoveries as well as court time, preclude trial by ambush, or advance settlement, are relevant considerations. In my view, the scope of R. 26(1.2) must be decided by reference to the legislative intent of its drafters and a principled application of the competing rights provided by the Rules of Court to parties in an action.

[38] The express wording of R. 26(1.2) allows for exclusion from compliance with R. 26(1), not the postponement of its compliance. To read in language importing a temporal factor is not, in my view, in keeping with the approach to statutory interpretation adopted in Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] S.C.R. 559 at 26, where the Court endorsed the modern approach to statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". In determining the scope of the exemption provision in R. 26(1.2), I am of the view the Court must consider only those circumstances in which

valid policy concerns might support the decision to exclude (not postpone) production of a relevant, non-privileged document. …

[45] There has been much debate over the broad scope of the Peruvian Guano rule, which stated in Murao at para. 12 requires disclosure of "every document … which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit [making the demand] either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a chain of inquiry which may have either of these consequences". In my view, it is the extensive scope of this common law disclosure rule that created the need for reasonable limitations. Stated in another way, it is the "slavish" application of R. 26(1) which informs the scope of R. 26 (1.2).

[46] The appellants seek to distinguish these decisions under R. 26(1.2) on the basis that they do not involve a key issue of credibility. They submit that, in this case, an order postponing the production of the surveillance videotapes would give them the opportunity to test the willingness of the respondent to lie about her claim. They argue that, in the absence of such an order, the respondent might tailor her evidence to fit the scenario depicted in the videotape.

[47] With respect, I do not accept this argument as representing a valid purpose for an application of R. 26(1.2). In this case, there has been no factual determination regarding the respondent's truthfulness, or lack thereof. This is the appellants' theory of liability, and it is for them to establish in the course of the trial. Nor am I persuaded that the Rules of Court were intended to be used in a manner that would displace a right of a party granted under them, in favour of creating an opportunity for an adverse party to advance their theory of a fact in issue.

[48] The court in Bronson v. Hewitt, 2007 BCSC 1477, 52 C.P.C.(6th) 116 reached a similar conclusion in dismissing an application for the exclusion of the defendants from one another's examination for discovery over concerns they might tailor their evidence to fit the evidence of the other. Credibility was a key issue in that case. Citing Sissons v. Olson (1951), 1 W.W.R. (N.S.) 507 (B.C.C.A.), Goepel J. stated at para. 17 that "exclusion was only appropriate if necessary to ensure the fair and proper judicial conduct of the action."

[49] Another similar conclusion was reached in McGarva v. British Columbia, 2003 BCSC 909. That case involved a damages claim for breach of fiduciary duty against the Crown by a plaintiff who had been abused while in foster care. The plaintiff sought disclosure of similar fact evidence from the Crown. The Crown, in turn, applied for a postponement of disclosure of that evidence in order to avoid the potential of the plaintiff tailoring her evidence to fit the similar fact evidence. Credibility was a key issue in the action. Madam Justice Gray declined to impose such a term on the disclosure of the relevant documents, stating that there was no basis for her to restrict the plaintiff's receipt of this information. In her view, the Crown's position was not prejudiced because it would remain open to the Crown to argue, at trial, that the plaintiff had tailored her evidence to conform to any similar fact evidence disclosed to her before her examination for discovery (para. 17).

[50] The final submission by the appellants is that, in our adversarial system, the right to cross-examination is sacrosanct and should not be trumped by disclosure. However, this argument mischaracterizes the issue. Rule 26(1.2) does not limit the appellants' right to cross-examine the respondent. The respondent's credibility may be challenged in any number of ways, including the use of a prior inconsistent statement on cross-examination, the lack of adequate explanation for any apparent discrepancies between the respondent's actions in the surveillance videotape and her reported disability, and by other evidence tendered at trial that might dispel the legitimacy of her claims.

[51] In summary, I am not persuaded that R. 26(1.2) was intended for the purpose of restricting the right of a party, at an examination for discovery, to prior knowledge of all relevant and non-privileged documentation in the

examining party's possession and control, in order to permit the latter to advance its theory of the case where credibility of the former is a key issue in the litigation.

[52] I would dismiss the appeal and award costs of the appeal to the respondent in any event of the cause.

I should point out that this case does not address the more typical fight about the release of surveillance video in a tort claim that is supposedly privileged. In this case it was agreed that the tape was not privileged. This case is useful, however, because the Court of Appeal references many precedents addressing the issue of litigation privilege and the disclosure of video surveillance.