BC Injury Claims And Your Choice Of Counsel

If you are advancing an ICBC or other BC Personal Injury Claim you have the right to hire whatever lawyer you want. What if you live in a smaller community in BC and don't have access to a lawyer who can take on your case? What if you live in a larger centre in BC but want to be represented by a specific lawyer from another community? Is it convenient or cost effective for a lawyer from another city to advance a personal injury claim on a contingency basis in these circumstances?

The answer is often yes because in British Columbia a lawyer can file a claim in a BC Supreme Court registry which is convenient for them and set down the trial in a registry that is convenient for you. Practically speaking this provides personal injury victims meaningful and Province-wide access to their top choice of lawyers regardless of where that lawyer primarily resides.

Reasons for judgement were released last week by the BC Supreme Court discussing this practice of lawsuits being launched out of one registry for the convenience of the lawyer and set for trial in anther registry for the convenience of the parties/witnesses involved.

In last week's case (Cooper v. Lynch) the Plaintiff was involved in a Vernon, BC Car Crash. She lived in Salmon Arm. In advancing her personal injury claim she hired a lawyer who practices in Victoria.

The Lawyer launched a lawsuit in the BC Supreme Court. As a matter of convenience the lawyer started the lawsuit in the Victoria Registry and set the place of trial at a location convenient for his client (Kelowna, BC).

The Defence lawyer brought an application to have the case moved to Kelowna for all purposes. The Defendant relied on Rule 64(13) which holds that:

At any time after a proceeding is commenced, the court may on application order it to be transferred from the registry in which it was commenced to any other registry of the court for any or all purposes.

At the initial hearing the Master who presided agreed with the defence lawyer and transferred the entire file to Kelowna holding that since the place of trial was to be Kelowna, BC the entire matter should proceed out of the Kelowna registry.

The Plaintiff's lawyer appealed the Master's decision and succeeded. In overturning the Master's decision Mr. Justice Barrow held that there was nothing wrong with a lawyer in a BC Personal Injury Claim filing out of one registry for the convenience of pre-trial applications and to have the trial itself in a different registry for the convenience of the parties and witnesses who will testify. Specifically Mr. Justice Barrow summarized and applied the law as follows:

[9] It is appropriate first to identify the practical significance of the master's decision. It is that, by operation of Rule 44(10), interlocutory and pre-trial applications will generally be heard in Kelowna. There are exceptions to this rule. Rule 44(14) permits a registrar, in some situations including to accommodate the convenience of the parties, to allow a chambers application to be heard elsewhere than in the location that Rule 44(10) would otherwise require. In the proceeding at hand, the effect of moving the file to Kelowna for all purposes will be that, absent agreement or an order under Rule 44(14), interlocutory and pre-trial applications will be heard in Kelowna, where neither counsel practice.

[10] The test to be applied to an application to transfer a file for all purposes under Rule 64(13) is the same as the test that governs an application to change the place of trial under 39(7) (see Nicholls v. McLean, [1996] B.C.J. No. 1160 (S.C.) and Roberston v. Zimmer, 2001 BCSC 1067, 12 C.P.C. (5th) 131 (B.C. Master)). An early and often cited expression of the test is found in Armstrong v. Revelstoke (City) (1927), 38 B.C.R. 253, [1927] 2 W.W.R. 245

(C.A.). In Armstrong, the chambers judge dismissed an application to move the place of trial. The Court of Appeal dismissed an appeal from that decision. McDonald C.J.A. wrote at p. 256:

...There is a preponderance of convenience in favour of a change of venue, but nothing short of a great or considerable preponderance of convenience and expense would justify the taking from a respondent the right which the law has given him to select his own place of trial.

In McPhatter v. Thorimbert (1966), 56 W.W.R. 497, Kirke Smith L.J.S.C. (as he then was) adopted this statement of the law. He also adopted the rationale for it as set out inMcDonald v. Dawson (1904), 8 O.L.R. 72, namely that the plaintiff, as the dominant litigant, has the right to control the course of the litigation. Controlling the course of the litigation extends to choosing the place of trial and choosing the registry out of which proceedings are taken. The right is not absolute, however, as the Rules of Court make plain but overriding the plaintiff's decisions as to the course of the litigation by, for example, changing the place of trial or moving the proceeding from one registry to another, is only to be done where the "great preponderance" of convenience supports doing so.

[11] Although the test is the same whether considering moving the place of trial or changing the registry out of which proceedings are taken, the application of the test in these two contexts will not always yield the same result. That is so because circumstances which may prove inconvenient or greatly inconvenient for purposes of trial may be inconsequential for purposes of pre-trial applications. The most obvious example involves witnesses. The degree to which one place or another is convenient for purposes of trial will be affected by where the bulk of the witnesses reside. On the other hand, where the witnesses reside will usually have little bearing on whether it is appropriate to move a proceeding. That is so because generally witnesses are not required and rarely attend pre-trial or interlocutory applications.

[12] In Okayasu v. Poulsen, 2001 BCSC 729, Cullen J. heard an application by the defendants to transfer a file from the Vancouver registry to the Kamloops registry for all purposes, including trial. He ordered that the trial take place in Kamloops but declined to order that the file be transferred to the Kamloops for other purposes. He reached that conclusion, at least in part, because the circumstances that warranted a change in the place of trial were less significant in the assessment of the preponderance of convenience of pre-trial and interlocutory matters.

[13] In Smith v. Shabutura, the master observed that most pre-trial proceedings involve only lawyers. He concluded that the action was entirely connected to Kelowna (save for the fact that plaintiff's counsel practiced in Victoria) and concluded that the circumstances that favoured holding the trial in Kelowna also militated in favour of the file being transferred to the Kelowna registry for all purposes. In so concluding, it seems to me that he conflated the effect on the trial of the various circumstances to be weighed in the balance with the effect of those same circumstances on pre-trial and interlocutory matters.

[14] It remains to be determined whether the master was clearly wrong in concluding that the great preponderance of convenience favoured moving this proceeding to the Kelowna registry for all purposes. In my view, and with the greatest of respect, I think he was. There is nothing in the record to suggest that the defendant, or the plaintiff for that matter, would be so interested in pre-trial or interlocutory matters as to wish to attend the hearing of them. Moreover, should that prove to be the case with respect to any particular application, it is open to counsel to apply to have that application heard elsewhere than in Victoria. There is no doubt some administrative convenience to having the file located where the trial will take place. Further, transferring the file to Kelowna has the effect of distributing or dividing the burden of travel as between counsel, given that neither resides nor practices in Kelowna. These circumstances whether taken individually or in combination do not support the conclusion that the great preponderance of convenience favours moving the proceeding or file from Victoria.

The practical consequence of this decision is that it makes it easier for British Columbians to hire their choice of lawyer in personal injury claims. This is a great result advancing consumer rights by making it easier for all British Columbians to hire a lawyer that best suits their needs whether or not that lawyer resides in their community.

As readers of this blog may know, whenever possible I am referencing the current BC Supreme Court Rules with the New Rules which will take effect on July 1, 2010. I am doing this to get a head start in determining which BC Supreme Court cases ought to retain their value as precedents under the soon to be in force overhauled Rules.

The rule relied on and interpreted in today's case (Rule 64(13)) remains largely intact under the new Rules. The rule can be found at section 23-1(13) of the New Civil Rules and reads almost identically to the current rule. Specifically the new rule reads as follows:

(13) At any time after a proceeding is started, the court may on application order the proceeding to be transferred from the registry in which it is being conducted to any other registry of the court for any or all purposes.

Given the minor changes between the current rule and the new rule today's case will likely retain its value as a guiding precedent after July 1, 2010.