

Take Five

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Back to the Barnyard!

Inside This Issue:

This month we have summarized what we consider to be the five most interesting cases from the BCCA in December.

As most of our “old” readers know, usually our case selection includes a wide variety of areas of law. This month, the cases largely involve personal injury matters. A word to our new readers in Ontario- this will certainly not always be the case, so if you don’t practice in personal injury, future issues will be of more relevance to you. In any case, you still may find the practice issues this month to be of interest.



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The respondent had commenced an action for damages for personal injuries allegedly sustained in a motor vehicle accident. The appellant argued that the respondent spent several hours at night on his computer using Facebook and that this activity caused, or contributed to, the alleged fatigue. The appellant sought a broad order that the respondent produce his hard drive. The chambers judge ordered that the respondent produce metadata from his computer in relation to his usage on Facebook but dismissed the application for production of all other metadata from the computer. The appellant sought leave to appeal.



Bishop v. Minicheillo, 2009 BCCA 555

Areas of Law: Personal Injury; Practice on Appeal
Under Appeal: Mr. Justice Melnick



Held: Application for leave dismissed.

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On an application for leave to appeal from a chamber judge's order, there are four factors for the court to consider. With respect to the first two factors, the parties agreed that the appeal would not hinder the progress of the action and that the point on appeal was of significance to the action itself. In considering whether the point on appeal was of significance to the practice, the Court held that the scope of electronic discovery was not the issue on appeal in this case. Rather, the question was whether the chambers judge's decision was supported by the evidence and whether he gave adequate reasons for judgment. The court concluded that this was a matter of settled law such that there was no significance to the practice. In determining the fourth factor, whether the appeal was *prima facie* meritorious, the court concluded that it was not. The court noted that the chambers judge gave lengthy reasons regarding the scope of production of electronic data. While the chambers judge did not adequately explain his reasons for dismissing the application for production of all other metadata, the court found that there was no evidentiary basis for allowing the production of electronic records beyond those related to Facebook.

Rindero v. Nicholson, 2009 BCCA 579

Areas of Law: Personal Injury; Civil Practice and Procedure
Under Appeal: Mr. Justice Meiklem

The appellant applied for indigent status and an extension of time to file his appeal. The appellant sought to appeal the trial judge's decision of his personal injury case. The trial judge had made an award for damages based on his findings that the appellant was already totally disabled by Post Traumatic Stress Disorder (PTSD) at the time of the accident and although the accident had aggravated the PTSD symptoms, it did not further affect his quality of life. Regarding the appellant's physical

injuries, the trial judge found that while his most serious injury was to his knee, the appellant's failure to reduce his weight contributed to the knee pain and amounted to a failure to mitigate.

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Held: Appeal dismissed on application for indigent status and extension of time to appeal.

In reviewing the various factors for determining whether to grant both indigent status and an extension of time to file the appeal, the court noted that the common question in both applications was whether there was any merit to the appeal. The appellant's grounds of appeal failed to identify any material error of law and instead disputed the trial judge's discretionary assessment of the medical evidence and of the quantum of damages. Accordingly, the court held that the appellant's proposed appeal lacked merit and refused indigent status and an extension of time to file the appeal.

Oberreiter v. Akmal, 2009 BCCA 557

Areas of Law: Personal Injury; Civil Practice and Procedure

The underlying action involved the assessment of damages arising from an accident in which the appellants' taxi collided with the respondent cyclist. After delivery of the verdict but before judgment was entered, it was discovered that additional surveillance evidence had not been shown to the jury during trial. The respondent applied successfully for a mistrial. The appellants applied for leave to appeal the mistrial order. The chambers judge dismissed the leave application, holding that the declaration of a mistrial was a discretionary decision to be exercised by the presiding trial judge, and in this case the appellants were simply seeking to challenge the merits of the judge's exercise of discretion.

Held: Appeal dismissed

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The appellants argued that the chambers judge erred by failing to consider whether the trial judge was entitled to declare a mistrial after the verdict had been rendered and the jury discharged. They further argued that he erred by declining to exercise his discretion to view the additional surveillance footage. In the court's view, it was settled law that until judgment is entered, a trial judge continues to have jurisdiction to hear a mistrial application. Regarding the second issue, the court noted that the chambers judge was correct in finding that a declaration of a mistrial was a discretionary order and there was no requirement to establish actual prejudice. The chambers judge had held that where there was a potential for trial unfairness and a possible miscarriage of justice, the trial judge would not have erred in law by declaring a mistrial. The court concluded that the chambers judge did not err in law or principle in declining to grant leave to appeal.





Chand v. ICBC, 2009 BCCA 559

Areas of Law: Motor Vehicle; Practice on Appeal Under Appeal: Mr. Justice Silverman

The underlying action involved a claim of indemnity by the respondent for the loss of her vehicle for which the appellant denied coverage. The respondent had applied for and obtained an order for production of certain documents. When canvassed, the appellant had taken no issue with the application and its counsel advised that he

would be in a position to provide the documents once the order was entered. Appellant's counsel then refused to comply with the order, asserting that the order did not defeat his claim of privilege. The respondent sought to strike the statement of defence on the basis of non-compliance with the production order. The master rejected the appellant's argument that privilege

survived the order and ordered that the statement of defence be struck, but stayed the enforcement of the order for 30 days to give the appellant an opportunity to take steps to rectify the problem. The appellant then unsuccessfully applied to vary the second order or alternatively to extend the time to appeal the order. At the time of the application, the second order had not yet been entered.

Held: Appeal allowed

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While the court held that the chambers judge ought to have directed the appellant to seek clarification of the unentered order, it noted that the order had since been entered and thus could be amended. In determining whether the order reflected the "manifest intention" of the court, the court found that the chambers judge treated the master's order as one that contemplated a singular course of action by the appellant. In reviewing the reasons, however, it was clear that the master intended for the appellant to cure the problem in any manner it saw fit, including compliance with the first order for the production of documents within the 30-day period. The court held that the chambers judge was also required to consider whether there would be any prejudice to the respondent if the order was corrected. The court concluded that the chambers judge failed to properly weight the interests of justice and erred in refusing the amendment to the order. The appeal was allowed, however, the respondent was awarded costs due to the appellant's careless conduct.



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