IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walstrom v. Markus (SCG Performance),* 2024 BCSC 1470

Date: 20240813
Docket: S02584
Registry: Abbotsford

Between:

Carl Owen Walstrom and
Brennan Owen Walstrom

Plaintiffs

And

Neil Brandon Markus doing business as SCG Performance

Defendant

Before: The Honourable Justice Caldwell

Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	B.J. Lorimer
Counsel for the Defendant:	J.N. Halperin
Place and Date of Hearing:	Abbotsford, B.C. April 3, 2024
Place and Date of Judgment:	Abbotsford, B.C. August 13, 2024

[1] The defendant applies for an order to have the two plaintiffs excluded from each other's examination for discovery; an order specifying the sequence of such examinations; an order enjoining the plaintiffs or their lawyer from discussing or disclosing what was said or what occurred at such examinations until both are complete; and an order enjoining the plaintiffs from ordering or receiving transcripts of such examinations until they are complete.

[2] The plaintiffs are father (Carl) and son (Brennan). They are both represented by the same counsel.

[3] The defendant provided certain high-performance automotive services in regards to a car owned by the plaintiff Brennan. The plaintiffs say that the work was faulty and that they have suffered damage. They have expressed displeasure with the defendant in words and ways which the defendant alleges are defamatory.

[4] The defendant says that a large portion of his intended examination for discovery of the plaintiffs will likely cover very similar matters or lines of questions, both as to their claims against him and regarding his counterclaim. He submits that if the plaintiffs are present at each other's examinations, there is a high likelihood that familial or parental loyalty could lead to tailoring or parroting of evidence.

[5] There is no significant disagreement on the basic law applicable to such situations:

- parties to a matter have an inherent right to be present at the trial of their matter and at other proceedings or steps in such litigation—see *Sissons v. Olson,* [1951] B.C.J. No. 77, 1951 CanLII 480 (C.A.); and

- the court retains the jurisdiction to physically exclude a party if a violation of an essential of justice occurs or is threatened if exclusion is not directed—see *Sissons; Sweet v. British Columbia Electric Railway Company*, [1953] B.C.J. No. 64, 1953 CanLII 520 (S.C.); and *O'Neal v. Murphy*, [1964] B.C.J. No. 49, 1964 CanLII 847 (S.C.).

[6] The problem appears to arise in determining the appropriate interpretation of the Court of Appeal reasons in *Sissons*, a 2-1 decision of that Court.

[7] Simply put, O'Halloran J.A. held as noted in the bullets above.

[8] Sidney Smith J.A., in dissenting reasons, commented that he did not think that the onus of showing cause regarding a violation of an essential of justice occurring or being threatened was a heavy onus and was even less regarding exclusion of a party at discovery than at trial.

[9] Bird J.A. agreed with the reasons of O'Halloran J.A.

[10] Some of the subsequent cases have expanded what can be seen as constituting a violation of an essential of justice beyond the specific types listed by O'Halloran J.A. (acting in a manner to disturb the judicial conduct of the trial or proceedings, or persisting in failure to conform to accepted rules and procedure).

[11] Other cases have viewed such expansion as wrongly following the reasons in Sidney Smith J.A.'s dissent regarding the overall onus on the applicant, and the lesser onus in situations of discovery as compared with trial. Such cases have found that approach and reasoning to be wrongly decided.

[12] Of particular note is the decision of Justice Goepel (as he then was) in *Bronson v. Hewitt*, 2007 BCSC 1477. At paras. 17–23, he comments:

> [17] In ***Sissons***, the majority held that the court does have a limited jurisdiction to exclude a party from a discovery. They stated that exclusion was only appropriate if necessary to ensure the fair and proper judicial conduct of the action. Nothing in their reasons suggests that the onus of showing cause for exclusion is lighter on discovery than at a trial.
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> [18] The majority did not accept that a common interest between parties is sufficient reason for exclusion. This is clear from their reference to ***Bird v. Veith*** (1899) 7 B.C.R. (C.A.). In ***Bird***, a party had been excluded from a portion of the trial. The Court of Appeal ordered a new trial and noted at p. 32:
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> > In our judgment the parties to an action have the right to be present during the trial, unless some good reason is shewn why any of them should be excluded, and the mere circumstance that these

> defendants would, or might, be called as witnesses did not entitle the plaintiffs to require their exclusion.
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> [19] [Sidney Smith J.A.] obviously felt differently. It is clear from his comments that he disagreed with the result in ***Pam v. Gale***, [1950] 2 W.W.R. 802 (Man. K.B.) where it was held that identity of interests was not a sufficient reason to exclude a party.
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> [20] Since ***Sissons***, the weight of authority indicates that there is a heavy onus on an applicant seeking to exclude a party from an examination for discovery: ***Benson v. Westcoast Transmission Co.*** (1974), 49 D.L.R. (3d) 292 (B.C.S.C); ***United Services Fund v. Alotta Resources Ltd.***, [1986] B.C.J. No. 2833 (S.C.); ***MacMillan Bloedel Ltd. v. Galiano Island Trust Committee***, [1992] B.C.J. No. 2924 (S.C.); ***Fletcher Challenge Canada Ltd. v. Miller***, [1993] B.C.J. No. 693 (S.C.); ***Gates v. Bolen*** [1995] B.C.J. No. 2257 (S.C.); ***Greidanus v. Pedersen*** 2004 BCSC 1451.
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> [21] In some subsequent decisions, however, the comments of Smith J.A. have provided the foundation for orders to exclude parties from attending examinations for discovery in circumstances where credibility was in issue and where there were concerns expressed about parties tailoring their evidence: ***Sweet v. B.C. Electric Railway Co.*** (1953), 9 W.W.R (N.S.) 572 (B.C.S.C); ***O'Neal v. Murphy*** (1964), 50 W.W.R. 252 (B.S.S.C.); ***Rogers v. Bank of Montreal*** (1985), 64 B.C.L.R. 385 (S.C.); ***Gonzalez v. Mak***, [1998] B.C.J. No. 2428 (S.C.); ***Plessis v. Plessis*** 2002 BCSC 916.
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> [22] With respect, I think those decisions which have relied on the comments of [Sidney Smith J.A.] to exclude parties from an examination for discovery are contrary to the majority reasons in ***Sissons*** and, thus, are wrongly decided. A party cannot be excluded from a trial because credibility is in issue or there is a concern that evidence may be tailored. Nor, in my opinion, can that properly be the basis for excluding a party from attendance at an examination for discovery.
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> [23] In this case, the plaintiffs seek to exclude the defendants from attending each others' discoveries because of concerns that the discoveries will cover the same ground and there is a risk that the defendants will tailor or marshal their evidence to fit the evidence given by other defendants. Such concerns are common in any multi-party litigation in which defendants may have an identity of interests and credibility is an issue. Those concerns are not, however, sufficient to displace a party's fundamental right to be present at an examination for discovery at which his or her interests may be affected. Otherwise exclusion of parties would follow as a matter of course in most proceedings. This is the very proposition the majority rejected in ***Sissons***.

[13] The most recent assessment of *Sissons*-based reasoning cited to me was that of Justice Thompson in *Saltman v. Sharples Contracting Ltd.*, 2018 BCSC 883. In that decision, he reviews extensive authorities, including *Bronson*, and refers to various decisions from other provinces of Canada.

[14] While disagreeing with at least some of the reasoning of Goepel J. in *Bronson*, he ultimately decides, in any event, that the onus on the applicant is the same regarding exclusion for discovery or for trial and he further finds that on the evidence before him, the applicant met the heavy onus of establishing that a violation of an essential of justice would be threatened if exclusion was not directed.

[15] With respect, I agree with the reasoning of Goepel J. in *Bronson*. In *Sissons*, the Court of Appeal, in a majority decision, made a clear statement of law regarding applications to exclude a party from a portion of the litigation process. The onus on the applicant is a heavy one. Evidence must establish that a violation of an essential of justice would be threatened if exclusion is not directed. No authority from the Court of Appeal has been cited to me which, in any way, alters that statement of law, lessens that onus or expands the ways in which such threats may be manifest.

[16] The precise evidence regarding the threat to justice will obviously vary from case to case and it will be up to the judge in the particular case to apply this measuring stick to those facts. The categories of potential threats are, in my view, not a closed set, limited to only those listed by O'Halloran J.A. in *Sissons*. However, extreme caution should be exercised by this Court in expanding the types of situations and related evidence which constitute such threat. This is particularly so in light of the basic and well accepted concept that parties are entitled to be present and to actively participate in the prosecution and defence of their litigation.

[17] In the present case, there is no evidence to support the presence of any such threat in the context of the concerns raised by Goepel J. in *Bronson*. The applicant simply relies on the affidavit of his legal assistant attaching a letter citing the *Saltman* decision in general, and a second letter simply citing para. 44 of that decision.

[18] The implication seems to be that because there are two plaintiffs and that they are related, there is a threat to an essential of justice. For the court to draw such an inference, absent an evidentiary foundation arising in the particular case and circumstances, would in my view be improper. It would essentially place the respondent in a reverse-onus position or, at the very least, a rebuttable presumption

position, favouring exclusion. Such change of the law must, in my view, find its genesis in changes to legislation, the *Supreme Court Civil Rules* or by way of further direction from the Court of Appeal.

[19] The application is dismissed. The plaintiffs are both represented by the same counsel and thus are entitled to their costs as one set of costs at Scale B.

"Caldwell J."