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Examinations For Discovery And Proper Objections In ICBC Injury Claims

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Reasons for judgement were released yesterday by the BC Supreme Court, Vancouver Registry, discussing examinations for discovery in ICBC Injury Claims and the proper way to frame objections.

In yesterday's case (Day v. Hume) the Plaintiff allegedly suffered a brain injury as a result of a serious motor vehicle accident. In the course of being examined for discovery the Plaintiff's lawyer '*intervened on several occasions and, in the end, terminated the examination after 50 minutes over (the objection of the ICBC defence lawyer).*'

As a result ICBC's lawyer brought a motion seeking to dismiss the Plaintiff's lawsuit on the basis that he unreasonably refused to answer questions put to him in discovery.

Madam Justice Smith of the BC Supreme Court declined to grant ICBC this relief and in doing so highlighted some points about the proper course of objecting to questions in examinations for discovery. I reproduce the highlights of the courts discussion below:

[20] The principles emerging from the authorities are clear. An examination for discovery is in the nature of cross-examination and counsel for the party being examined should not interfere except where it is clearly necessary to resolve ambiguity in a question or to prevent injustice. Intervention should not be in a form that suggests to a witness what a desirable answer might be. As stated by Garson J. in ***Forliti v. Woolley****, the proper conduct of counsel is to state the objection to the form of the question and the reasons for the objection, but it is not appropriate to make comments, suggestions, or criticism.*

[21] There was no real disagreement about the legal principles, except that Mr. Maryn submitted that it must be recognized that the practice has changed since ***Cominco*** *was decided in that it is now necessary to bring on an application in Chambers with respect to disputes about relevance or other matters at examinations for discovery. Mr. Maryn submitted that it is quite appropriate for counsel to have a discussion about what might make a line of inquiry relevant and he suggested that if counsel for the defendant had been more forthcoming in this case, some of the problems leading to this application might have been avoided.*

[22] Mr. Maryn also submitted that, in this case, where his client has suffered a brain injury and consequential memory loss, it was appropriate to remind him during the course of the examination for discovery not to make guesses. Mr. Duplessis's submission on that point was that it is not appropriate to remind a witness of such instructions and that any of Mr. Maryn'slegitimate concerns could be resolved through appropriate re-examination at the end of the examination for discovery.

[23] Looking at the transcript in this case, while possibly Mr. Maryn would have been justified in reminding his witness once not to guess or speculate and his initial comment to that effect was probably appropriate, his statement after question 39... went well beyond a reminder....

[24] There was also disagreement as to whether or not counsel for the party under examination for discovery can make statements for the record at the examination for discovery. Mr. Duplessis took the position that it is not open to counsel to state things for the record. I disagree. Although, as I have stated, counsel for the party under examination should not make comments unless they are clearly necessary, it may be appropriate for counsel making an objection to state briefly what the objection is based upon. First, that may lead to a resolution of the matter through discussion between counsel and avoid this kind of application. Second, it facilitates a

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determination of the issue by the court if there is an application to compel an answer. However, objections by counsel should be concise and to the point....