IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McCaw v. JDS Energy & Mining Inc.,* 2025 BCSC 1450

Date: 20250403
Docket: S237384
Registry: Vancouver

Between:

Devon McCaw

Plaintiff

And

JDS Energy & Mining Inc.

Defendant

\- and -

Docket: S243738
Registry: Vancouver

Between:

JDS Energy & Mining Inc.

Plaintiff

And

Devon McCaw and Devon R. McCaw Consulting Inc.

Defendants

Before: Associate Judge Muir

Oral Reasons for Judgment

Counsel for Devon McCaw and Devon R. McCaw Consulting Inc.:	M. Nied
Counsel for JDS Energy & Mining Inc.:	P. Bychawski S. Rafieian
Place and Date of Hearing:	Vancouver, B.C. April 3, 2025
Place and Date of Judgment:	Vancouver, B.C. April 3, 2025

[1] **THE COURT:** This is quite an unusual application. The applicant, Mr. McCaw, seeks to delay a mediation that has been initiated by the defendant, JDS Energy & Mining Inc. ("JDS"), under the *Notice to Mediate (General) Regulation*, B.C. Reg. 4/2001 [*Regulation*]. The *Regulation* provides:

> **Applications to court**
>
> 23 On an application the court may direct that
>
> […]
>
> (b) The mediation be postponed to a later date on terms and conditions, if any, that the court considers appropriate […]
>
> **Scheduling of mediation session**
>
> 24 A mediation session must occur within 60 days after the appointment of the mediator but not later than 7 days before the date of trial unless a later specified date
>
> (a) is agreed on by all participants and that agreement is confirmed by the mediator in writing, or
>
> (b) is ordered by the court.
>
> **Court may postpone mediation session**
>
> 25 On an application for an order under section 24 (b), the court
>
> (a) must take into account all of the circumstances, including
>
> […]
>
> (ii) Whether the mediation will be more likely to succeed if it is postponed to allow the participants to acquire more information, and
>
> (iii) any other circumstances the court considers appropriate.

[2] Those sections of the *Regulation* have rarely been invoked. There were only two cases referred to me. The first in time was *Executive Inn Inc. v. Tan*, 2008 BCCA 93, where at para. 17, the Court of Appeal says:

> It is important to note that mediation undertaken pursuant to the Regulation is in the context of ongoing litigation. The mediation is an adjunct of a proceeding for which the court is responsible. I consider that s. 23 was enacted to ensure that a court in an appropriate case would be endowed with a broad power to make orders to ensure the efficacy of the mediation process. In the majority of cases, I would expect that the mediation process would proceed, as most do, without the necessity for any intervention by the court. However, in cases where the intervention of the court is thought requisite, s. 23 endows the court with a broad jurisdiction to make the orders necessary to ensure the mediation process is both effective and fair. I consider s. 23 might be described as in the nature of a broad discretionary provision, designed to be utilized only when necessary to assist in the mediation process. As I noted earlier, I should think the large

> majority of mediation proceedings would carry forward without the necessity of court intervention. I do not consider that in making the order she did, the chambers judge exceeded her jurisdiction. I would sustain the order and dismiss this appeal.

[3] The second decision was that of *0116064 B.C. Ltd. v. Alio Gold Inc.,* 2022 BCSC 1700, a decision of the Honourable Justice Shergill. And I will not deal with anything factually about that case. It is a different set of circumstances, but at para. 39, Shergill J. concluded:

> Thus, I conclude that an order for postponement of the mediation under s. 23(b) should be made when the court considers it necessary to ensure an effective and fair mediation process.

Background and Procedural Steps

[4] The background and procedural steps that have been taken in this action are set out quite fulsomely in reasons of Associate Judge Bilawich of October 2, 2024, cited as 2024 BCSC 1810. Given the urgency in the parties having an answer to their application, I will not deal with that other than in a cursory way.

[5] Mr. McCaw is an expert with extensive experience in providing drilling and blasting services.

[6] The parties entered into a letter of intent in 2021 (the “Letter of Intent”) that contemplated a joint venture with Mr. McCaw having a 49 percent interest and JDS having a 51 percent interest in a new drilling and blasting business.

[7] Mr. McCaw also entered into an employment agreement with JDS in June 2021 where he was named chief operating officer of a new drilling and blasting division.

[8] The relationship broke down, and in April of 2023, Mr. McCaw took the position he had been constructively terminated. He sues for, amongst other things, his alleged ownership interest in the drilling and blasting business and for wrongful dismissal.

[9] The notice of civil claim was filed in November 2023 and a response was filed in January 2024.

[10] Since then, there have been numerous procedural applications including regarding document production, particulars and the application before Bilawich A.J. to strike Mr. McCaw's notice of civil claim, which was unsuccessful. An appeal from that order has been brought and in the context of all of that, significant amendments have been made to the pleadings.

[11] Mr. McCaw basically says that, through counsel, he has been pursuing documents from JDS for a year since April 2024. He says that JDS has been resisting production and that the resistance has resulted in a series of applications and processes. That is, I should say, resisted by JDS who take the position that the series of applications in this action are more properly to be laid at the feet of the plaintiff.

[12] After the failed application to strike Mr. McCaw's notice of civil claim, JDS followed that by seeking to invoke a mediation. That was actually prior to the agreed date for completion of document production, which was at the end of February 2025.

[13] All of that has led Mr. McCaw to wonder what the hurry is and to suspect that there are significant things missing in the production or that are being hidden from him.

<u>Positions of the Parties</u>

[14] Mr. McCaw argues that the discovery process has to be completed in order to answer the outstanding questions he has with respect to the document disclosure and the circumstances around the ownership contemplated in the Letter of Intent and his employment.

[15] Counsel submitted that Mr. McCaw was not opposed to a mediation, but it was premature at this point as it would not be effective without document disclosure and that, at present, Mr. McCaw would be sitting in the mediation effectively blindfolded.

[16] Whether it is deemed acceptable by Mr. McCaw, there is no question that extensive document production has taken place. Mr. McCaw has been offered two full days of access to the accounting system of JDS, significant financial disclosure has been made, including from JDS's related companies. As well, a document

affidavit has been offered, and a further application for documents is scheduled for April 7. Examination for discovery of a representative of JDS has been offered for May 5, 2025.

[17] Counsel for Mr. McCaw says he cannot really do an examination for discovery effectively until document disclosure is completed. Further, that he may need more than one day of examination for discovery or even discovery of a second representative.

[18] He also points out the requests left on the record may not be able to be answered prior to a scheduled mediation and that the mediation should be delayed for perhaps only a few months to allow this process to unwind.

[19] JDS argues that disclosure and discovery should not be a prerequisite to a mediation proceeding and that, to so order, would give an automatic carve out from the *Regulation* any time a party asserted there was insufficient disclosure. Further, JDS points out that the mediation cannot proceed until June 2025 at the earliest in accordance with the notice to mediate timetable. The scheduling of a mediation is not a stay and Mr. McCaw can pursue his remedies in the meantime.

Discussion

[20] It is trite that there is no binding resolution on a mediation, and I note that, under the *Regulation*, only one mediation can be set. To proceed with a mediation when one party has significant concerns regarding disclosure is likely a recipe for an unsuccessful mediation; however, the courts have repeatedly commented that even an unsuccessful mediation has benefits.

[21] In *Matsqui First Nation v. Canada (Attorney General)*, 2015 BCSC 1409, Mr. Justice Kent pointed out:

> [16] The *Kossovan* [*IBM Canada Limited v. Kossovan*, 2011 ABQB 621] case, also made various observations about the alternative dispute resolution process which may be apposite here [My editing in parenthesis.]:
>
>> […]
>>
>> [43] Even if the parties are unable to reach a settlement, this does not mean that attendance at the [mediation] has been "futile." Multiple other benefits may be obtained. ... The parties may be able to narrow down or agree [on issues] during the [mediation] process. At the very least, getting together to refine the legal issues and plan the next court steps can also result in time and cost savings. A good

> faith commitment to a process that may ultimately resolve the dispute, or shorten trial time and reduce heavy trial costs is never a futile endeavor.
>
> [Kent J.'s editing in parenthesis.]

> […]
>
> [18] The beauty of mediation lies in its confidentiality and flexibility. With the assistance of a skilled mediator, the parties are free to speak to each other directly and to frankly express their concerns and interests without fear of prejudicing the litigation should the matter not settle. That is to be encouraged. Empathy and apology can and often does play a powerful role. Seemingly intractable positions become less so. The legal issues framed in the pleadings frequently do not reflect the real interests or concerns motivating the litigants. Creative remedies not available to the court can be forged to bridge differences. Important relationships can be repaired.

[22] Although I hear the concerns of Mr. McCaw, I am not convinced. To suggest that the mediation not proceed until after some or all discovery processes have been completed is essentially to put the mediation off indefinitely. There will probably always be questions for which Mr. McCaw does not feel he has proper or sufficient answer.

[23] Further, I note that there are safeguards in the *Regulation* process. For example, in s. 13 of the *Regulation*, it provides that:

> **Pre-mediation conference**
>
> 13 At a pre-mediation conference, the mediator must endeavour to have the participants consider all organizational matters including the following:
>
> (a) whether the pleadings are final and complete;
>
> (b) the issues that are to be dealt with during the mediation process;
>
> (c) pre-mediation exchange of information;
>
> (d) exchange of documents;
>
> (e) obtaining and exchanging expert reports;
>
> (f) scheduling;
>
> (g) time limits.

[24] In addition, s. 26 of the *Regulation* provides:

> **Pre-mediation exchange of information**
>
> At least 14 days before the mediation session is to be held in relation to an action, each participant must deliver to the mediator a Statement of Facts and Issues in Form 2 setting out the factual and legal basis for the party's claim or opposition to the relief sought in the action.

[25] I note that the court can oversee that process if it is necessary. These safeguards, combined with the pending document production application, the offered examination for discovery of a representative of JDS, the document disclosure that has been made, the financial information that has been provided, and the access to JDS's accounting system that has been offered are sufficient, in my view, to allow Mr. McCaw to participate fairly in a mediation.

[26] It may not be successful, but it may well allow the issues to be narrowed such that the parties can stop the repetitive trips to chambers that have highlighted this action so far and that, in the words of Kent J., is to be encouraged.

[27] Thus, I am going to dismiss the application and I will hear you on costs.

[SUBMISSIONS ON COSTS]

THE COURT: All right. Costs in the cause, and I will return your binders.

"Muir A.J."