IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Derencinovic v. 7 West Homes Ltd.,*
2024 BCSC 2090

Date: 20241118
Docket: S1811892
Registry: Vancouver

2024 BCSC 2090 (CanLII)

Between:

John Derencinovic

Plaintiff

And

7 West Homes Ltd., Jaspal Johal, Harpreet Kaur Johal,
0786688 B.C. Ltd. and Kashmir Singh Johal

Defendants

\- and -

Docket: S196779
Registry: Vancouver

Between:

Manjit Nahal, Lakhvir Nahal,
Rajan Nahal and Peter Nahal

Plaintiffs

And

0786688 B.C. Ltd., Jaspal Singh Johal, Balbinder Johal, Tajinder Johal also known as Tajinder Kaur Johal, Gurbox Kaur Johal, Kashmir Johal also known as Kashmir Singh Johal, Jasvinder Kaur Johal, Harpreet Kaur Johal and 1258958 B.C. Ltd.

Defendants

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Dates of Trial:	Vancouver, B.C. October 7, 23-25, 30-31 and November 5-6, 2024
Place and Date of Judgment:	Vancouver, B.C. November 18, 2024

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Introduction

[1] At the start of the trial of two actions (VA S1811892 and VA S196779) ordered to be tried together as if consolidated, and just before the plaintiffs' openings were to begin, all of the defendants save 0786688 B.C. Ltd. applied for a direction that the cross-examinations of those defendants called to give evidence during the plaintiffs' cases pursuant to the Adverse Party Witness Rule, be limited to matters necessary to assist the plaintiffs in proving their respective cases.

[2] The plaintiffs intend to call many of the defendants as adverse witnesses at the start of their case before any other evidence is adduced. The applicant defendants ("defendants") told me they seek the declaration at this juncture to obtain clarity at the outset of the trial, to avoid delays during the trial arising from what they anticipate will likely be multiple objections during the course of cross-examination.

[3] The defendants argue that it would be manifestly unfair, highly prejudicial, and contrary to procedural fairness to allow the plaintiffs in their cross-examinations to go beyond what is necessary to prove their case, including questions intended to "gut" the merits of the defendants' case, before the defendants have an opportunity to make their opening statements and call their evidence-in-chief in the manner they determine appropriate.

[4] In order to allow the trial to get underway without any further delay, I gave the parties my ruling on November 6, 2024, dismissing the application, with reasons to follow. These are my reasons.

Adverse Party Witness Rule

[5] The Adverse Party Witness Rule is found in Rule 12-5(19)-(26) of the *Supreme Court Civil Rules* [*Rules*]. It permits a party, through service of a form of written notice ("Notice") prescribed by the *Rules*, to call as a witness at trial an adverse party or a person who, at the time the Notice was served, is a director, officer, partner, employee or agent of an adverse party: Rule 12-5(20). An adverse party is defined to mean a party who is adverse in interest: Rule 12-5(19).

[6] The Adverse Party Witness Rule was first enacted in this province in 1961 and is said to have been drawn from similar rules in Ontario and Manitoba. It marked a departure from the requirement in civil proceedings for a witness to be declared hostile or unresponsive before a party who called the witness could engage in cross-examination. Use of the Adverse Party Witness Rule is not confined to plaintiffs.

[7] The Notice must be served with conduct money at least seven days prior to the date on which the attendance of the intended witness is required, unless the adverse party is in the courtroom, in which case a Notice and conduct money are not required: Rule 12-5(21)-(22). I am told that the plaintiffs have served a Notice on all of the personal defendants, except for Kashmir Singh Johal who passed away last year.

[8] Compliance is mandatory unless the Notice is set aside, which may be done where hardship on the adverse party or the lack of necessity of the witness' evidence is established: Rule 12-5(23), (25). The defendants do not seek to set the Notices aside.

[9] Rule 12-5(26), excerpted below, provides specific provision for the cross-examination of an adverse party called under the Adverse Party Witness Rule. Of particular significance to the defendants' application is subrule (a) referring to cross-examination "generally on one or more issues":

> **Adverse party as witness may be cross-examined**
>
> (26) If, in accordance with subrule (21) or (22), a party calls as a witness a person referred to in subrule (20) (a) or (b), the following apply:
>
> (a) <u>the party calling the witness is entitled to cross-examine the witness generally on one or more issues</u>;
>
> (b) the adverse party must not cross-examine the witness except to obtain an explanation of matters brought out in the examination-in-chief;
>
> (c) other parties may cross-examine the witness generally on one or more issues, as the court may direct;
>
> (d) the party calling the witness must not re-examine the witness except in relation to new matters brought out in cross-examination.
>
> [Emphasis added]

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[10] “Issues” are defined by the pleadings: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362 at paras. 21-23 (there is no definition in the *Rules*).

[11] The defendants urge me to read into subrule (26)(a) the words “as necessary to prove the case of the party who served the Notice”, which here, would mean, necessary to prove the plaintiffs’ case. They say the Adverse Party Witness Rule is appropriately used when an admission from a defendant is necessary to prove a plaintiff’s case, for example, where the evidence is not available from a read-in of its examination for discovery evidence and there is no assurance that the defendant will be called to give evidence, or when an admission against interest made by one defendant to another is necessary to prove a plaintiff’s case against all defendants that is not possible through a read-in of examination for discovery evidence.

[12] Counsel for two of the defendants, Jasvinder Johal and 1258958 B.C. Ltd., points out that he gave an undertaking to call his clients to give evidence in the defence of their case (no commitment or undertaking was given on behalf of the other defendants).

[13] To illustrate their point, the defendants say it is wholly inappropriate, and in any event irrelevant to proof of the plaintiffs’ case, to cross-examine them on their illegality defence (for details concerning that defence, see my reasons for judgment, indexed at 2024 BCSC 2032, concerning the defendants’ successful application to amend their response pleadings to allege the plaintiffs should be barred from any recovery because their claims are predicated on a money laundering scheme). The defendants submit that they should be able to present that defence in their cases in the manner they deem appropriate without it being upended through cross-examination.

[14] Alternatively, the defendants argue that I should invoke my trial management power (citing *R. v. Felderhof* (2003), 68 O.R. (3d) 481, [2003] O.J. No. 4819 (C.A.); *R. v. Samaniego*, 2022 SCC 9) or failing that, my inherent jurisdiction, to limit what they contend would otherwise be an abuse of the trial process (citing *Toronto (City)*

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v. C.U.P.E., Local 79, 2003 SCC 63; *Bear Creek Contracting Ltd. v. Pretium Exploration Inc.*, 2020 BCSC 1523).

[15] The plaintiffs disagree. They submit the language of Rule 12-5(26) is clear – they may cross-examine the defendants called as adverse witnesses generally on any issue in the case, whether legal, factual, or involving credibility. The plaintiffs argue the defendants in effect are asking me to rewrite the Adverse Party Witness Rule in a limiting manner that the Lieutenant Governor in Council (who is empowered to make the *Rules* by s. 1 of the *Court Rules Act,* R.S.B.C. 1996, c. 80) has thus far declined to do, despite ongoing judicial criticism of the potential adverse effects of the Adverse Party Witness Rule on the trial process.

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Judicial Criticism of the Adverse Party Witness Rule

[16] Decisions from this Court criticizing the Adverse Party Witness Rule were cited to me by the defendants. In each one, judges of this court and the Court of Appeal have remarked on the manner in which the Rule impairs the natural flow of a trial, the unfairness to the adverse party (who is typically a defendant), its susceptibility to abuse, and that its use fails to comport with what they view to be the proper purpose of the Rule, i.e., to prove a fact or facts that they cannot prove through other means.

[17] In *3464920 Canada Inc. v. Strother*, 2002 BCSC 1179, Justice Lowry (as he then was) discussed a previous version of the Adverse Party Witness Rule (Rule 40(17-20) of the *Rules of Court*), which was substantively the same as the current Rule. Justice Lowry identified what he considered the purpose of the Adverse Party Witness Rule – to prove a fact or facts that cannot otherwise be proven – and that it was susceptible to abuse from unrestricted cross-examination:

> [41] Although Monarch was given counsel's assurance that Mr. Darc and Mr. Strother would be called to testify in their own defence, it took the unusual step of calling both under the Adverse Party Rule as its first witnesses. Their examinations in chief were actually long cross-examinations which together lasted four days. In its turn, the defence called them to testify and again counsel for Monarch cross-examined them. Their second cross-examinations occupied four more days. At the end of Monarch's case, counsel took the position that the first cross-examinations were needed to obtain admissions,

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> although no explanation was given as to what those admissions were, why they were not obtained during the course of the eight days Mr. Darc and Mr. Strother were examined for discovery, and why they could not be obtained when both were called to testify in their own defence.
>
> [42] While all counsel appear to accept that the *Rules of Court* (Rule 40(17-20)) permit Monarch to proceed as it did, I do not consider that the intent of the Rule was to give a plaintiff two extensive cross-examinations of each of two personal defendants. The obvious purpose of the Rule is only to permit one party to call another (or a witness employed by another) to prove a fact or facts which cannot otherwise be satisfactorily proven. In my view, the use of the Rule should be limited accordingly. Where the Rule is used for any broader purpose, it is susceptible to abuse.
>
> [43] Trials are to be conducted fairly and I see little fairness in a plaintiff being afforded two extensive cross-examinations. The Rule would not appear to afford a defendant the same advantage. While I intend no imposition of any procedural limitation, I do have difficulty seeing why the Rule should be permitted to be invoked as a matter of right where assurance has been given that the parties will be called in their own defence. Further, as I see it, a strong case is not one that needs to be buttressed by invoking the Rule for more than its intended purpose.

[18] After he was appointed to the Court of Appeal, Justice Lowry again criticized the adverse effects of an unrestricted use of the Adverse Party Witness Rule in *Murao v. Richmond School District No. 38*, 2005 BCCA 43:

> [21] It is now said that permitting the Board's counsel to ask leading questions of the teacher who was the Board's principal witness gave the Board an unfair advantage, one for which the Rule does not provide. I disagree. The greater unfairness lay in the Board being deprived of the opportunity to have Mr. Phipps testify before the jury, and to give his account of the events, before he was subjected to cross-examination.
>
> [22] The Rule exists to permit a party to adduce evidence from an adverse witness as part of its case that cannot be satisfactorily tendered in any other way. It is a rule that I have had occasion to consider susceptible to abuse: *3464920 Canada Inc. v. Strother* (2002), 26 B.L.R. (3d) 235, 2002 BCSC 1179 ¶ 41-43. Apart from a perceived tactical advantage it may be thought to give a plaintiff, I see little place for calling an adverse witness when, as here, there has been full discovery of the witness which can be read in and an undertaking has been given that the witness will be called.

[19] Justice Davies raised similar concerns in the context of a family law case, *Russell v. Russell*, 2002 BCSC 1233:

> [31] The adverse party witness process under Rules 40(17) to (20) puts a defendant at a disadvantage because, as a practical matter, a similar tactical advantage is not available to a defendant. Further, as in this case, the

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> process may result in evidence that is later advanced by the plaintiff on the "issues" defined under Rule 40(20) not being put to the defendant as part of the cross-examination under that Rule. The result is the failure of the plaintiff to comply with the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L). Non-compliance with the rule in *Browne v. Dunn* gives rise to diminished opportunity for the defendant to test the credibility of the plaintiff on central issues. That may result either in the plaintiff's evidence being given less credit or in the defendant being prejudiced by having to again be subject to cross-examination on an issue that was not fully canvassed. In practical terms the trial process, the natural unfolding of the narrative and the proper joinder of issues are all disrupted.
>
> [32] I am accordingly of the opinion that the use of Rules 40(17) to (20) should be discouraged except to the extent that the calling of an adverse witness is necessary to establish an aspect of the plaintiff's case that cannot otherwise be appropriately established. It seems to me that is the intended purpose of these Rules. More specifically, I am of the view that if counsel for the defendant undertakes to call the defendant as a witness in the defence of the case, there is little need for even that limited use of Rules 40(17) to (20).
>
> [33] Notwithstanding my general concern about the use of these Rules in this case, I have not made any adverse findings against either Mr. or Mrs. Russell arising from the process invoked. I have decided this case solely on the basis of the totality of the evidence including my assessment of the credibility of the parties, without any reference to questions of tactical or procedural advantage.

[20] In *Dawson v. Tolko Industries Ltd.*, 2010 BCSC 1384 at para. 16, Justice Butler (as he then was) also agreed that the Rule could impact "the natural unfolding of the narrative" at trial and that it may also unnecessarily prolong the trial.

[21] Justice Voith (as he then was) amplified many of the above-noted concerns in his reasons in *Concord Pacific Acquisitions Inc. v. Oei*, 2018 BCSC 1925, where he pointed to prejudice, trial unfairness, disruption to a level playing field, and strategic advantages that may be garnered by a party calling an adverse witness. His reasons are the most recent and vocal judicial criticism of an unrestricted use of the Rule.

[22] Justice Voith's concerns over strategic advantages and disruption of the normal unfolding of narrative at trial are contained in the passages below:

> [13] I would add my voice to these expressions of concern. Before doing so, I wish to emphasize the distinction between the substantive need to call an adverse witness and the strategic advantage that a plaintiff may enjoy by doing so. There will be cases where it is necessary for a plaintiff to call a defendant or another witness as an adverse witness. The plaintiff may not be able, for example, to make out its case without the evidence of that witness or

> the plaintiff may be uncertain about whether a witness for the defendant will be called. None of the expressions of concern that are found in the cases I have referred to, and that pertain to the ambit or application of R. 12-5(21), apply in such cases.
>
> [14] Instead, those concerns arise in cases where a defendant or other witness is called as an adverse witness for strategic purposes. It is here that expressions of concern over the lack of a level playing field for plaintiffs and defendants resonate. In the criminal context, there are good and obvious reasons for the evidential, substantive, and constitutional protections that are afforded an accused. In the civil context, however, there is no principled basis for either the Rules of Court or the court itself to either insulate or assist a plaintiff or a defendant. Indeed, much of the work of a trial judge in a civil case is directed to ensuring that the parties are treated fairly and carefully weighing the potential prejudice to each of them when making various determinations.
>
> [15] Rule 12-5(21), when used for strategic purposes, can, for no apparent good reason, assist a plaintiff and disadvantage a defendant. This can arise in different ways. At its simplest, the direct examination of a witness by his or her own counsel will often allow that witness to relax and to become somewhat comfortable with the court setting. This is often important because, for many witnesses, the courtroom is an alien and daunting environment. Cross-examining a witness from the outset may prevent this from occurring. More fundamentally, calling a defendant as an adverse witness prevents that defendant from giving their evidence in a coherent way and in the manner that they choose. The process of allowing a witness to first give their evidence in their own words is important to the fact-finding and truth-seeking functions performed by courts. Furthermore, when called as an adverse witness, a defendant must then, in its own case, cobble together the evidence that was not addressed in their initial cross-examinations and that is nevertheless important to their case. They will often have to do this mid-trial and are therefore denied the benefit of preparation that a plaintiff enjoys.
>
> [16] These various realities can disrupt and undermine a defendant's case. The present case is a good example. The plaintiff, as I said, intends to call six witnesses, four of whom will be adverse witnesses. Counsel for the plaintiff candidly admits that each of these witnesses is being called for strategic reasons. In saying this, I intend no criticism of counsel for the plaintiff. Conduct which is permitted by the Rules is not wrong and it is unlikely to be abusive. That being said, it will be readily apparent how disruptive and, in a sense, unfair this is likely to be for the defendants. It appears from the defendants' trial brief that there is only one remaining witness who they intend to call, for less than half a day, and who will not already have been called by the plaintiff.

[23] Disruption to trial management and trial fairness from the Rule is also discussed in Justice Voith’s reasons:

> [17] There are further concerns with R. 12-5(21). Its structure contemplates that adverse witnesses will often be called twice and will be

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> cross-examined twice. This is the concern that was identified by Lowry J. in the *Strother* decision. This is likely to give rise to difficulty, from a trial management perspective, with issues arising in relation to whether particular evidence or topics were raised when the witness was first called, and whether those same issues or similar issues can be revisited by one or the other party. Still further, calling the same witness twice will generally extend the length of the trial. This is certainly likely if it is done with several witnesses.
>
> [18] Thus, R. 12-5(21) can give rise to difficulty from a trial fairness, trial management, and trial efficiency perspective. With all that said, R. 12-5(21) has been interpreted as allowing a plaintiff to do what Concord, broadly speaking, proposes to do. This is apparent in the fact that counsel for the defendants does not, as I have said, object to Messrs. Oei and Chu being called as adverse witnesses. Instead, he argues it is wrong or inappropriate or abusive that they be called by the plaintiff for as long as is being proposed. To be specific, counsel for the defendants accepts that if Mr. Oei, for example, was only being called by the plaintiff for a day or two rather than for the approximately five days that are being proposed, this application would not have been brought.

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[24] I will conclude this section with my observation that in none of those cases was the presider called upon to decide the point raised by the defendants on the instant application. Nor did the presiders formally prescribe a rule limiting cross-examination in spite of their criticism of the Adverse Party Witness Rule.

Judicial Criticism Remains *Obiter Dicta*

[25] In each of the cases discussed in the preceding section, the court ultimately backed away from promulgating a specific rule of limitation. Judicial expressions of concern in those cases are *obiter dicta*.

[26] In *Canadian Bedding Company Ltd. v. Western Sleep Products Ltd.,* 2008 BCSC 1444, referred in the excerpt from his reasons in *Dawson* at para. 17, Justice Butler (as he then was) specifically declined to determine whether the restricted application of the Adverse Party Witness Rule described by Justices Lowry and Davies was correct. The issue before him was whether to set aside the Notice as unnecessary, pursuant to what was then Rule 40(17.3) and is now Rule 12-5(23) (Justice Butler did not strike the Notice): see paras. 23-24. Instead, Justice Butler characterized the restricted application of the Adverse Party Witness Rule discussed by Justices Lowry and Davies as their “interpretation” of the Rule as opposed to a holding or fixed rule:

> [22] Western conceded that both of these statements are obiter but says that they are persuasive as the *Murao* comments represent the views of the full panel in that case.
>
> [23] It will be evident from my conclusion that there is a broader discretion under Rule 40(42) than under Rule 40(17.3) that I am inclined to the view that procedural necessity cannot be taken into account on this application. However, in this case, I did not need to determine if the restricted interpretation of the rule favoured in *Strother* and *Murao* is correct. This is because the present case falls within the limited class of cases described by Lowry J. A. in both *Strother* and *Murao* where the notice should not be set aside because the facts may not be satisfactorily proven in other ways.
>
> [Emphasis added]

[27] In *Dawson*, Justice Butler noted that in *Strother*, Justice Lowry declined to impose any procedural limitation in spite of his description of the purpose of the Adverse Party Witness Rule and his criticism of an unrestricted use of it:

> [20] In arriving at his conclusion in *Strother*, I also note that Lowry J.A. specifically stated at para. 43 that he intended "no imposition of any procedural limitation." If I were to accede to Mr. Mercier's interpretation of the adverse party witness rule, it would add a gloss that does not appear in the current Rules. It would impose a procedural limitation which does not appear in the adverse party witness rule.
>
> [Emphasis added]

[28] To that I would also add that Justice Lowry declined to impose any limitation on cross-examination, even though counsel for the adverse party defendants assured plaintiffs' counsel that the defendants served with the Notice would be called to testify in their own defence: *Strother* at para. 41.

[29] In *Dawson*, Justice Butler also characterized as *obiter* Justice Lowry's comments in *Murao* that the use of the Adverse Party Witness Rule should be limited to situations where the evidence cannot be satisfactorily tendered in other ways. At para. 15 of his reasons, Justice Butler said, "Once again, the comments were clearly *obiter*" (a point noted by Justice Voith in *Concord Pacific* at para. 19).

[30] Although Justice Butler agreed in *Dawson* that the natural unfolding of the narrative at trial can be impacted by the use of the Adverse Party Witness Rule, he disagreed that it is intended to be limited to situations where the evidence cannot be

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satisfactorily tendered in any other way, and also said using the Rule may be an effective way to prove a party's case:

> [16] I agree that the natural unfolding of the narrative can be impacted by use of the adverse party witness rule and that the use of the rule may unnecessarily prolong the trial. However, I do not agree that the adverse party witness rule was intended to be limited to situations where the evidence sought to be elicited cannot be satisfactorily tendered in any other way. The use of an adverse party witness may, in certain circumstances, be an effective way to prove a party's case. Counsel should not be deprived of that option when the language in the adverse party witness rule does not contain that limitation.
>
> [Emphasis added]

[31] Likewise, in his prior decision in *Canadian Bedding*, Justice Butler did not construe the Adverse Party Witness Rule to limit cross-examination to matters necessary to prove the opposite party's case. He said the party calling the adverse witness is entitled to question the witness generally on one or more issues and the witness is obliged to respond to questions that may elicit relevant evidence. He did not confine relevance to proof of a party's case:

> [9] Once an adverse party witness takes the witness stand, the scope of the examination is determined by Rule 40(20) and is the same no matter which of the three methods was used to compel the adverse party witness to testify. The party calling the witness is entitled to cross-examine the witness generally on one or more issues.
>
> [10] Depending on the way in which the witness is compelled to take the witness stand, the applicable rules place different limits on the ability of an adverse party witness to avoid testifying. The adverse party witness who is in attendance at trial has no ability to avoid taking the witness stand. The absence of any specific provision in the *Rules* dealing with this situation means that the witness will be compelled to testify subject to the court's inherent jurisdiction to control its process. The witness will be required to respond to questions that may elicit relevant evidence.
>
> [Emphasis added]

[32] In *Alnoor v. Colgate-Palmolive Canada Inc.*, 2012 BCSC 1342, a case involving an application to strike a Notice based on lack of necessity per subrule 23(b), Justice Wedge struck the Notice on the basis that the evidence of the witness was not relevant. Although earlier in her reasons (at para. 34), Justice Wedge referred to necessity in relation to proof of the party's claim, when summing

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up, she said she dismissed the Notice as the evidence was not relevant to the issues in the lawsuit:

> [37] In short, the evidence Ms. Alnoor intends to elicit from Mr. Jeffery is not relevant to the issues in the lawsuit. Irrelevant evidence is not admissible. It is unnecessary evidence within the meaning of the Rule.
>
> [Emphasis added]

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[33] I took part of the defendants' submissions on the instant application to incorporate a necessity argument, even though they did not pursue what they initially advised the plaintiffs would be an application to set aside the Notices based on lack of necessity (per subrule (23(b)).

[34] The plaintiffs drew my attention to Justice Butler's decision in *Dawson* not to second guess the assessment of counsel where (similar to the case at bar) the plaintiffs and defendants had brought significant resources to the litigation:

> [23] I agree that the current Rule 12-5(24) does broaden the matters that can be taken into account when exercising the discretion under subrule (23). The current Rule differs from the former Rule 40(17.4) which provided only that on an application to set aside a notice "the court may make any order it thinks just including, without limitation, an order adjourning the trial." In some cases, consideration of the object of the *Rules* will be relevant to the exercise of the discretion under subrule (23). It is not hard to envision circumstances where that may occur. However, the present case does not raise those concerns. Here, the plaintiffs and defendants have brought significant resources to the litigation. All parties have teams of experienced counsel. The trial is now scheduled for 40 days. Whether Mr. Mercier is cross-examined under the adverse party witness rule or testifies in the usual course as part of the defence case will have no impact on the just, speedy and inexpensive determination of the proceeding on its merits. In these circumstances, there is no reason to interfere with the judgment of experienced counsel who has decided that the best way to prove the plaintiffs' case is through use of the adverse party witness rule.
>
> [Emphasis added]

[35] The plaintiffs also reminded me that Notices in this case were served on the adverse parties well within the time limits prescribed by the *Rules* (some were served approximately five months ago) and in sufficient time to allow the defendant adverse witnesses and their counsel to prepare for the cross-examination and for counsel to design their trial strategy. The plaintiffs also pointed to the defendants'

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stated rationale to amend their response pleadings at the start of trial – to allege the plaintiffs' claims are founded on a money laundering scheme – was to give the plaintiffs notice of that defence because they were calling defendant adverse witnesses at the start of their case (see my reasons indexed at 2024 BCSC 2032). The plaintiffs also told me they have invited the defendants to make their openings at the conclusion of the plaintiffs' openings to ameliorate the concerns identified in some of the case authorities about the disruption to the narrative at trial caused by the Adverse Party Witness Rule.

[36] In *Concord Pacific*, Justice Voith took the same view that judges should be reluctant to interfere with judgments and assessments of counsel:

> [24] Second, and more importantly, Butler J. in *Dawson* emphasized that judges should be reluctant to interfere with the measured assessments or judgments of counsel for the plaintiff: …

[37] In spite of his explicit concerns over the impact of the Adverse Party Witness Rule, Justice Voith also declined to order any limits to the use of the Rule, noting the limited discretion judges have to control the extent and circumstances of its use:

> [26] I do not consider that it would be appropriate or prudent to question the assessments that were made by counsel for Concord. The concerns that I have expressed arise, in the main, from the language of R. 12-5(21) and from the fact that the Rule provides judges with limited discretion to control the extent or circumstances of its use. As Messrs. Oei and Chu can properly be called as adverse witnesses, I do not believe that I should interfere with how, or for how long, this is done.
>
> [Emphasis added]

[38] Similarly, in *Lam v. Chiu*, 2012 BCSC 441, Justice Gray remarked on the court's limited discretion to interfere:

> [24] In my view, I have a discretion to restrict evidence being tendered at trial, but it is a very limited discretion, directed towards ensuring that there is a fair trial procedure. Where the *Rules* provide for a specific procedure, in my view, I could only interfere where allowing the procedure would be abusive or clearly unjust. So I then ask, is it abusive or clearly unjust in this case to allow the plaintiff to call Ms. Chiu as a witness?
>
> [25] I will say that as a judge, I might prefer to see each party testify in direct evidence on examination by his or her own lawyer first before being cross-examined. That seems from a judicial perspective to be a relatively

> even playing field, although it is true that because one party must go first, there cannot be a complete equality in how the case proceeds. That is, the defence can listen to the plaintiff's evidence because the plaintiff must go first. I will also say that I think the considerations might be different if a jury were present, because the jury would not be familiar with the different potential procedures, and the jury might not appreciate the different method of evidence being provided.
>
> [26] So in this case, is it abusive or clearly unjust that Ms. Chiu be required to testify at the request of the plaintiff? In my view, I cannot say that it is abusive or clearly unjust. I should not interfere with the choice of witnesses made by counsel.
>
> [Emphasis added]

[39] Although the defendants submit that courts should not condone use of the Adverse Party Witness Rule for tactical purposes, I have not been taken to any authority where a court struck a Notice on that basis. To the opposite, the plaintiffs referred me to Justice Verhoeven statement in *McGrail v. McGrail*, 2016 BCSC 583, (at para. 27), that its use can not only be an effective way to prove a party's case but "can also be an effective tactic".

The Scope of Cross-Examination Under Rule 12-5(26)

[40] The defendants contend that even though there is no case directly on point stating that I can issue the direction they seek, there is also no case stating I cannot.

[41] The only case I have been taken to where a judge of this court placed limits on cross-examination is the decision of Justice Macdonald in *Litwin Construction (1973) Ltd. v. Kiss* (1985), 64 B.C.L.R. 330, 1985 CanLII 513 (S.C.). However, none of the issues and arguments raised on this application and in the case authorities summarized above are mentioned in Justice Macdonald's reasons. The order was made without any analysis and appears to have been made on the court's own motion, prescribing the parameters of cross-examination of an adverse witness to issues relevant in the action as defined by the pleadings. If there was any objection to the order limiting cross-examination, it is not mentioned in the reasons.

[42] The plaintiffs submit the decision of Justice Southin in *Redlack v. Vekved* (1996), 82 B.C.A.C. 313, 1996 CanLII 3089, is dispositive. In that case, the plaintiff

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sued his wife for damages for injuries he sustained in a motor vehicle accident and sought to call her as an adverse party witness. Justice Southin rejected the defence submission that the parties were not adverse in interest because the defendant stood to gain from the plaintiff's award. Justice Southin determined the judge below was in error in accepting the defence's submission; "it is not open", she said at para. 11, "to this Court on the Rules as they are to go behind the record."

[43] Justice Southin was faced with the predecessor rule to Rule 12-5, Rule 40(17)-(20). Unlike the wording in the current rule, Rule 40(20) included language that said a party calling the adverse witness is entitled to treat them as hostile, thus abrogating the need to obtain the declaration to that effect required under the common law.

[44] In overturning the trial judge, Justice Southin said the scope of the cross-examination permitted of an adverse party witness was unrestricted, as if the witness was called to testify in their own case. Apposite for the issues raised on the defendants' application is this extract from her reasons:

> 12. The learned judge ought to have permitted counsel for the appellant to cross-examine the respondent to the same extent as would have been appropriate if she had been called by her own counsel as part of the case for the defence.
>
> [Emphasis added]

[45] Those remarks were cited, albeit on the point of whether the parties were adverse in interest, in *Dhaliwal v. Kublick*, 2019 BCSC 1285 at para. 43.

[46] In *Redlack*, Justice Southin determined, at paras. 8 and 13, that the error was significant enough to order a new trial.

[47] Insofar as the defendants' contention that an unbridled scope of cross-examination under the Adverse Party Witness Rule violates procedural fairness, some guidance comes from another decision that Justice Southin issued in the same year as *Redlack*. In *Doman v. British Columbia (Superintendent of Brokers)* (1996), 31 B.C.L.R. (3d) 357, [1996] B.C.J. No. 2631 (C.A.), although dealing with

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the right of the Superintendent to compel a party facing sanctions under the *Securities Act*, S.B.C. 1985, c. 83, Justice Southin said (at para. 47), "[s]o far as I am aware, it has never been held that the *Supreme Court Rules*, insofar as they permit the calling of the opposite party and his cross-examination, are in any way a breach of the concept of procedural fairness. If such a procedure is acceptable in the civil courts, *a fortiori* it is acceptable before a regulatory tribunal."

[48] The plaintiffs pointed out in oral submissions that Justice Southin's interpretation of the scope of cross-examination under Rule 40(20) was in effect a determination of the scope available under the common law; moreover, they point out that when the *Rules* were amended to their present form, the Adverse Party Witness Rule incorporated Justice Southin's holding when it dropped the reference to hostile and modified the language in subrule (26)(a) to provide, "the party calling the witness is entitled to cross-examine the witness generally on one or more issues."

[49] During oral submissions, the defendants pointed out that Justice Southin sat on the panel in *Murao* and penned her agreement with Justice Lowry's reasons which, as noted above, are highly critical of the Adverse Party Witness Rule; she did not issue concurring reasons taking a different view of the Rule.

[50] In response, the plaintiffs made this apt observation: if it is the case that Justice Southin agreed with Justice Lowry's criticisms of the Rule, she did not go so far as to comment on, let alone reverse, her holding in *Redlack*.

[51] I would add to that comment that Justice Lowry in *Murao* did not restrict the scope of cross-examination. Instead, he said the Rule permits it:

> [19] Although the Board undertook to call Mr. Phipps, the teacher who organized the Blackcomb outing for the Ski Club, counsel for Mr. Murao called him as a witness in the plaintiff's case. He proceeded to cross-examine Mr. Phipps broadly and at length as is permitted by Rule 40(2) of the ***Rules of Court*** …
>
> [Bold in original; underlining emphasis added]

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[52] Viewed together, *Redlack*, *Doman*, and Justice Lowry's comments in *Murao* at para. 19 stand as authority for the point that the scope of cross-examination of an adverse party under the Adverse Party Witness Rule is the same as if the witness had been called by its own counsel as part of its case and is, in this respect, not a breach of procedural fairness.

[53] The defendants submit that allowing unrestricted cross-examination ignores a purposive interpretation of the *Rules*, which set as their object in Rule 1-3, "to secure the just, speedy, and inexpensive determination of every proceeding on its merits," having regard to the amount involved, the importance of the issues, and the complexity of the proceeding. The difficulty I have in accepting that submission is that the relief sought by the defendants would likely work to the opposite effect at trial, given what I take from counsel's submissions to be the absence of any appreciable bright line between what is and what is not necessary to prove the plaintiffs' case. Although the defendants submit that this line could be discerned as the cross-examinations unfold, the spectre of multiple objections raised on a question-by-question basis looms large in this complex litigation involving allegations of breach of fiduciary duty, theft of funds from real estate development ventures, knowing assistance and knowing receipt, oppression, fraud, misrepresentation, and that the funds injected into the ventures were derived from criminal activity.

[54] Construing the Adverse Party Witness Rule in context, the scope to cross-examine on "any one or more issues" is a right of the party calling the witness, as opposed to a matter falling under the control and discretion of the court. This is illustrated by the discretionary language used in subrules (23), (24), (25), and (29), seen from the extracts below:

> **Application to set notice aside**
>
> (23) The court may set aside a notice served under subrule (21) on the grounds that …
>
> **Court may make order**
>
> (24) On an application under subrule (23), the court may make any order it considers will further the object of these Supreme Court Civil Rules, including, without limitation, an order adjourning the trial.

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> **Refusal to comply with notice**
>
> (25) If a person called as a witness in accordance with subrule (21) or (22) refuses or neglects to attend at trial, to be sworn or to affirm, to answer a proper question put to the person or to produce a document that the person is required to produce, the court <u>may</u> do one or more of the following: …
>
> **Examination of witnesses**
>
> (29) The court <u>may</u> permit a party
>
> (a) to examine a witness, either generally or with respect to one or more issues,
>
> (i) by the use of leading questions,
>
> (ii) by referring the witness to a prior statement made by the witness, whether or not made under oath,
>
> (iii) respecting the interest of the witness, if any, in the outcome of the proceeding, or
>
> (iv) respecting any relationship or connection between the witness and a party, or
>
> (b) to cross-examine a witness, either generally or with respect to one or more issues.
>
> [Emphasis added]

[55] In contrast, the subrule in issue on this application, (26), provides that the right of cross-examination is the right of the party calling the adverse party witness:

> **Adverse party as witness may be cross-examined**
>
> (26) If, in accordance with subrule (21) or (22), a party calls as a witness a person referred to in subrule (2)(a) or (b), the following apply:
>
> (a) <u>the party calling the witness is entitled</u> to cross-examine the witness generally on one or more issues; …
>
> [Emphasis added]

[56] Unlike subrule (24), there is no language in subrule (26) authorizing the court to make orders it considers will further the object of the *Rules*. There is also no overt connection between the power of the court in subrule (29) to permit a party to examine a witness in the specific circumstances provided (e.g., through leading questions) and the right of a party in subrule (26) to cross-examine an adverse party witness it called in accordance with Rule 12-5. There is no language in subrule (26) empowering the court to limit the cross-examination to matters necessary to prove the case of the party calling the adverse party wtiness.

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[57] I cannot discern any basis to imply a limitation on the right of cross-examination under subrule (26). In this respect, I rely on the point made by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014) at para. 8.90, extracted below, cited with approval in *Goy v. District of Sechelt,* 2020 BCSC 1242 at para. 43 [*Rai SC*], rev'd, *Rai v. Sechelt (District),* 2021 BCCA 349 (although the passage from *Sullivan* was referred to without criticism at para. 30):

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it, "legislative exclusion can be implied when an express reference is expected but absent"… The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

[58] Despite ongoing judicial criticism of the potential problems caused by the Adverse Party Witness Rule, the Lieutenant Governor in Council has not amended the *Rules* to place limitations on the scope of cross-examination (unlike other jurisdictions where use of the Rule has been constrained by amendments to provincial rules of practice; see, e.g., *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, R. 53.07, where the rule now includes a restriction which says that the adverse party rule is not available if (a) the person has already testified, or (b) the adverse party or the adverse party's lawyer undertakes to call the person as a witness.

[59] I share some of the concerns expressed in the case authorities cited above, particularly disruption to the natural unfolding of the trial narrative, potential issues arising from the rule in *Browne v. Dunn*, and depending on how the subsequent examinations of the witness unfolds, the potential for the party calling the adverse witness to garner opportunities to cross-examine the witness on the same or related matters more than once.

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[60] Nonetheless, and as recognized in the authorities critical of the Adverse Party Witness Rule, the Rule allows counsel who engages the Rule to cross-examine the witness as if the witness had been called to testify in its own case. Despite judicial criticism, no court has imposed the restriction sought by the defendants and there is no authority from this province or the Supreme Court of Canada departing from or overturning Justice Southin's holding in *Redlack*.

[61] There are risks to all parties when the Adverse Party Witness Rule is used. Many of those faced by an adverse party required to testify are identified in the authorities critical of the Rule. There are risks to the party calling the adverse witness as well. For example, a defendant called as an adverse party witness by a plaintiff may damage the plaintiff's case if its evidence is found by the trial judge to be credible on key issues, and if found to be dispositive, it could gut the plaintiff's case altogether. Another example is where counsel for a plaintiff who called the adverse party witness to give evidence before the plaintiff does, fails to put a proposition to the witness that should have been on account of testimony subsequently given by the plaintiff, which may give rise to a *Browne v. Dunn* argument concerning the weight to be given to the plaintiff's testimony.

Trial Management Power

[62] Despite the potential problems with the Adverse Party Witness Rule, I would not, as the defendants ask me to do, rely on my trial management powers to curtail the scope of the cross-examination of the defendants called as adverse witnesses.

[63] Judges may intervene to restrict cross-examination that is unduly repetitive, rambling, argumentative, misleading, or irrelevant. That power, sometimes said to arise from the court's inherent jurisdiction to control its own process, must however be exercised with great care, recognizing that trial judges must not enter the fray and second-guess counsel's assessments comporting with the *Rules* and case authorities. The right of cross-examination is recognized as an essential element of the truth-seeking function and a right that must be jealously protected and broadly construed, so long as it is not abused. The power to require a party to call its

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evidence in a particular way to prevent disruption of the effective and orderly management of the trial is to be used only in exceptional circumstances: *Samaniego* at paras. 19-22; *Felderhof* at paras. 36, 45; *Katz v. Zentner*, 2022 BCCA 371 at para. 39; *R. v. Lyttle*, 2004 SCC 5 at paras. 44-45; *R. v. Dalen*, 2008 BCCA 530 at paras. 50-54; *R. v. Hart*, 2024 BCCA 181 at paras. 20-25, 44-49; *Ker v. Sidhu*, 2023 BCCA 158 at paras. 80-81; *The Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2024 BCSC 1891 at para. 6.

[64] In view of the case authorities recognizing that the Adverse Party Witness Rule permits a broad scope of cross-examination even where it is used as a tactical strategy, the absence of any authority going so far to promulgate a specific rule of limitation despite overt judicial criticisms of the Adverse Party Witness Rule, coupled with the absence of surprise to the defendants, there are no grounds to find exceptional circumstances exist. Further, given that the Rule permits cross-examination on any one or more issues in the action, which are defined by the pleadings, it cannot be said that permitting the plaintiffs to do so in this case is, of itself, an abuse of the court's process. Parties should generally be able to present their cases as they think fit: *Samaniego* at para. 22; *The Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2024 BCSC 2014 at paras. 2, 5 [*Conseil* 2014].

[65] Nor should I attempt to rely on my trial management power at this early stage of the trial, prior to openings and any questions having been asked, since it would require me to contemplate in a vacuum potentially irrelevant, prejudicial, harassing, or otherwise abusive questions (e.g., as discussed in *Samaniego* at para. 22 and *Lyttle* at paras. 44-45), a circumstance that Justice Rosenberg cautioned against in *Felderhof* at para. 56 and remarked upon in *Conseil* 2014 (concerning limiting some of the evidence at trial to affidavits) at para. 4. In *Redlack*, Justice Southin criticized the trial judge's ruling on questions before they were asked:

> 8 It is unfortunate that the course of cross-examination appears to have been anticipated by the learned judge. There is nothing in the transcript to show that he was ruling on any questions which had already been posed. It

> would have been better if there were some questions to which the Court could address itself. …

[66] There is no basis to engage inherent jurisdiction as there is no gap in the legislation: *Evans v. Jensen*, 2011 BCCA 279 at para. 39, cited in *Rai SC* at para. 42.

[67] Whether any of the questions put to the defendant adverse party witnesses called in this case offend the strictures concerning proper cross-examination is a matter that should be addressed if and when the occasion arises.

<u>The Procedure to be followed under the Adverse Party Witness Rule</u>

[68] The procedure under the Adverse Party Witness Rule is as follows.

[69] The party calling the adverse witness may cross-examine the witness on any one or more issues raised on the pleadings. There is no restriction limiting cross-examination to matters necessary for the party calling the witness to prove its case. The witness may be called even where an undertaking is provided that the witness will be called to testify in its own case. Once the cross-examination of the adverse party concludes, counsel for that party witness is entitled to conduct its own cross-examination, although it is limited to matters raised in the cross-examination. Leading questions are permitted: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 444 at para. 22. Other parties may cross-examine the adverse party witness as well: Rule 12-5(26)(d). Counsel calling the adverse party is entitled to re-examine the witness, as Justice Steeves said in *Cambie Surgeries* (at para. 24), "in the sense of repeating the use of leading questions as was done at the beginning of the examination of the witness." Re-examination is limited to new matters not raised in the initial cross-examination: *Cambie Surgeries* at para. 45(n).

<u>Disposition</u>

[70] The Adverse Party Witness Rule permits the party calling the witness to cross-examine them on any one or more issue raised on the pleadings. Cross-

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examination is not restricted to matters necessary to prove the case of the party calling the adverse witness.

[71] There are no grounds in which to engage my trial management power or inherent jurisdiction to restrict cross-examination in the manner sought by the defendants.

[72] The defendants' application is dismissed.

"Walker J."

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