THE OPPOSITE PARTY RULE: AN INSTRUMENT OF JUSTICE OR OF ABUSE?

*By Darrell W. Roberts, Q.C.**

When the trial decision of Mr. Justice Lowry in *3464920 Canada Inc. v. Strother*[1] came down dismissing the plaintiff's case and criticizing the plaintiff's counsel in *obiter dicta* for calling the defendants Robert Strother and Paul Darc under the opposite party rule (Rule 40(17)–(20) of the *Rules of Court*), I strongly disagreed with the judge's criticism but decided to let it go by. I had been one of four counsel for the plaintiff at trial,[2] and any commentary might be seen as sour grapes. Moreover, the trial decision was soon under appeal, putting out of the question any commentary on this criticism.

Then, when the appeal was successful with judgment handed down on January 21, 2005,[3] setting aside the trial judge's dismissal of Monarch's claims against Mr. Strother, I continued in my decision to let the trial judge's criticism of the plaintiff's use of the opposite party rule go by.

However, four days later, on January 25, 2005, the Court of Appeal gave judgment in *Murao v. Blackcomb Skiing Enterprises Limited Partnership*,[4] the judgment of the court being delivered by Lowry J.A. In *obiter*, Mr. Justice Lowry referred to his trial decision in *Monarch* and criticized once again the use of the opposite party rule:

> 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 CSC 1179 [para.] 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.[5]

After reading the *Murao* appeal decision, a little research turned up the remarks of Mr. Justice Davies in *Russell v. Russell*,[6] wherein that learned judge also criticized the use of the opposite party rule:

> [30] While the process invoked by Ms. Basham on behalf of Mr. Russell is available under the Rules of Court, in my view this case demonstrates how the process may not only lead to unfairness but may also introduce unnecessary complexity into the trial process. It is also my view that such unfairness may arise even if counsel does not advance the "adverse inference" position taken by counsel for Mr. Russell in this case.
>
> [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 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

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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* (1983), 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).[7]

This was too much, and so despite the potentially distracting baggage of being trial counsel in *Monarch*, I felt I should chime in (to borrow from the language of Hamar Foster in "You Say Goodbye and I Say Hello").[8] So here goes.

THE OPPOSITE PARTY RULE

The present rule is found in Rule 40(17)–(20) of the Supreme Court Rules,[9] and for the sake of brevity, only Rule 40(17), (17.1), (17.2), (18) and (20) are set out here:

(17) Subrules (17.1) to (17.4) apply where a party wishes to call as a witness at the trial

(a) an adverse party, or

(b) a person who, at the time the notice referred to in subrule (17.1) is delivered, is a director, officer, partner, employee or agent of an adverse party.

(17.1) If a party wishes to call as a witness a person referred to in subrule (17), the party may deliver to the adverse party a notice in Form 40 together with proper witness fees at least 7 days before the day on which the attendance of the intended witness is required.

(17.2) Notwithstanding subrule (17.1), a party may

(a) call as a witness, without payment of witness fees or previous notice, an adverse party or a current director, officer, partner, employee or agent of an adverse party if the person called is in attendance at the trial, or

(b) subpoena an adverse party or a current director, officer, partner, employee or agent of an adverse party.

...

(18) For the purposes of subrules (17) to (17.3), "adverse party" means a party who is adverse in interest.

...

(20) A party calling a witness in accordance with subrule (17.1) to (17.2) is entitled to cross examine the witness generally on one or more issues. Cross-examination of the witness by counsel for the adverse party shall be confined to explanation of matters brought out in the examination-in-chief. Cross-examination of the witness by other parties may be general or limited, as the court may direct. Re-examination shall be confined to new matters brought out in cross-examination.[10]

BACKGROUND

A brief review of the development of the law of witness competence and compellability is essential to a reasoned understanding of the opposite party rule in civil litigation practice in this province.

In a much earlier time in the common law, it was the general rule that any person who had an interest in the outcome of a proceeding was lacking in credit as a witness and therefore was incompetent to testify.[11] However, in the early 1800s in England there was a shift away from interest being a disqualification to interest being a factor going to the credibility and weight to be given to a witness's evidence. This shift is reflected in the early case of *Clarke v. Saffrey*[12] where, on a trial of an issue from the Court of Chancery, the plaintiff was entitled to examine the defendant as a witness in the plaintiff's case.

In *Lord Denman's Act* of 1843[13] all interested persons apart from the parties themselves were made fully competent, and then in *Lord Brougham's Act* of 1851[14] the parties themselves and their spouses were made competent witnesses in civil cases.[15]

Turning to Canada, in Upper Canada an Act of 1851[16]

> enabled a party in a civil suit to be examined as a witness at the instance of the opposite party...but retained the incompetence of a party to be a witness on his own behalf.[17]

Then, in 1873[18] in Ontario, the parties and their spouses were made competent and compellable for either party in all civil cases, and gradually the other common law colonies (subsequently provinces) followed suit and made parties to civil actions fully competent and compellable. In all of the provincial evidence statutes, not content to simply rely on the general common law that once competent all witnesses are also compellable, the legislatures employed language to make it clear beyond dispute that the parties to an action are competent and compellable in the same way as any ordinary witness, including at the instance of the opposite party. For example, s. 8(1) the *Ontario Evidence Act*[19] provides:

> The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves *or of any of the parties*...[20] [emphasis added]

In the B.C. *Evidence Act*,[21] the equivalent provision that applies to our present discussion, s. 7(1), states:

> Except as provided by this Act, the parties to an action, suit, petition or other matter of a civil nature in any of the courts of British Columbia, and their wives and husbands, are competent as witnesses and compellable to attend and give evidence *in the same manner as they would be if not parties to the proceedings*, or wives of husbands of the parties.[22] [emphasis added]

The time-honoured method of securing the evidence of a witness has been the same everywhere in the common law world; it entails the serving of a subpoena on the witness, or where the witness is physically present in court (whether served with a subpoena or not), the calling of such person to the witness box to testify.

Today it is the law that the public and the parties in civil cases have the right to everyone's evidence, and a person served with a subpoena or physically present

in the courtroom is compelled to testify if called upon: see *R. v. Ayres*,[23] *W.(C) v. Manitoba (Mental Health Review Board*[24] and *Ontario (Securities Commission) v. Crownbridge Industries Inc.*[25]

Returning to *Clarke v. Saffrey*,[26] that case addressed the question, not of the right to call the opposite party (which was permitted in the Court of Chancery), but of the manner of eliciting the witness's evidence, that is, by non-leading questions or by leading questions in a cross-examination mode. It is in this context that the judgment of Best C.J. is reported:

> [T]here is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination; but if a witness called, stands in a situation which of necessity *makes him adverse to the party calling him, as is the case here, the counsel may, as matter of right, cross-examine him.*[27] [emphasis added]

In the same report there is a note of the case *Bastin v. Carew* in 1824, where it is stated: "where a similar objection was taken, and a cross-examination of an adverse witness allowed".[28]

This quite sensible approach became textbook law, as found in *Taylor on Evidence*[29] and *Roscoe on Evidence*.[30]

However, after the codification in England of the law relating to the impeachment of the credibility of a party's own witness where the court has a discretion whether or not to permit a cross-examination,[31] the English Court of Appeal in *Price v. Manning*[32] backed away from the holdings in *Clarke v. Saffrey* and *Bastin v. Carew* and held that whether or not the witness was an adversary, it was a matter for the discretion of the trial judge whether or not to permit that witness's examination-in-chief to be conducted as a cross-examination.[33]

In terms of the adversary system, *Price v. Manning* (to the author's mind) makes no sense at all. Cross-examination, "the greatest legal engine ever invented for the discovery of the truth",[34] is the mode for examining one's adversaries. The whole purpose of the procedure in s. 16 of the B.C. *Evidence Act* with respect to one's own witness is to determine whether or not that witness is adverse so as to permit a cross-examination. But, if a witness is the opposite party, then by definition he is adverse. Thus, counsel for the party opposite to the witness should be allowed to cross-examine that witness whether the witness is in the witness box at the instance of his own counsel (where the right to cross-examine is unchallenged) or at the instance of the opposite party. The right of cross-examination in this circumstance is underscored by Sopinka, Lederman and Bryant in their book *The Law of Evidence in Canada*:

> Parties adverse in interest have the right to cross-examine, a right of fundamental importance.[35]

Perhaps as well, this is why the practice in the United States in both federal and state courts, not having to follow *Price v. Manning*, is to permit as part of their law of evidence any party called by the opposite party to be cross-examined (see *infra*).

In 1961, B.C. adopted an opposite party rule[36] borrowed from Ontario[37] and Manitoba:[38]

25A. (1) A party who desires to call as a witness at the trial an opposite party who is within the jurisdiction may either subpoena him or give him or his solicitor at least five days' notice of the intention to examine him as a witness in the cause, paying at the same time the amount proper for conduct money; and if such opposite party does not attend on such notice or subpoena, judgment may be pronounced against him, or the trial of the action may be postponed. A party may call an opposite party as a witness at the trial without previous notice if such opposite party is in attendance at the trial. (Ont. r. 275, am.)

(2) Where on the trial of an action a party thereto calls an opposite party as a witness, he shall be entitled to treat such opposite party as a hostile witness. Cross-examination of the witness by his own counsel shall be confined to explanation of matters brought out in the examination-in-chief. Cross-examination of the witness by other parties opposed to the party so called and to examining party may be general or limited, as the Court may direct. The right of re-examination on new matter brought out in cross-examination shall be confined to parties adversely affected by the new matter.

(3) For the purpose of this Rule, "opposite party" means a party who is opposite on the record and adverse in fact. (Man., r. 237.)[39]

The first reported case in British Columbia on this rule is *Napier v. Napier*.[40] In *Napier* the plaintiff brought an application to require the defendant Parker to answer certain questions on his examination for discovery to prove that he had committed adultery. Ruttan J. declined to follow *Redfern v. Redfern*,[41] a case in England based upon interrogatories which had been followed for some 30 years in British Columbia, wherein such questions could not be put either on examination for discovery or in open court. In reaching this decision Ruttan J. pointed to the 1961 revised Supreme Court Rules, which required divorce proceedings to be brought by way of a writ of summons as an ordinary action, and held that no distinction should be made between the defendant witness in court who could be cross-examined and the same defendant witness testifying on discovery. In this context Ruttan J. referred to the new opposite party rule:

> *The defendant witness could always be subpoenaed as a witness by his adversary*, but once presented in Court could not, of course, be cross-examined as an adverse witness. Now, however, under O. 37, R. 25A(2) (M.R. 507a), of the 1961 Supreme Court Rules, the adverse party can be cross-examined in open Court as a hostile witness. It reads as follows:
>
> 25A(2) Where on the trial of an action a party thereto calls an opposite party as a witness, he shall be entitled to treat such opposite party as a hostile witness...
>
> A party defendant may therefore be examined in open Court in exactly the same manner as he may be examined on discovery.[42] [emphasis added]

This observation of Mr. Justice Ruttan underscores the history of witness competence and compellability, as above, and the proposition that there is no property in a witness. Even a party to a lawsuit has no property interest in that party's own capacity as a witness, and indeed, the first instance in both the common law and statute law of a party being competent as a witness was when called as a witness by the opposite party: see *Clarke v. Saffrey, supra*, and the Upper Canada Act of 1851, *supra*. This fundamental principle of there being no property interest in one's capacity as a witness, as codified in British Columbia in s. 7(1) of the B.C. *Evidence Act*, goes hand in hand with another fundamental principle at common law, again captured by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada*:

> At common law counsel have wide latitude to determine what witnesses to call, in what order, and what evidence to adduce from them.[43]

Following these developments in the law, Mr. Justice Ruttan in *Napier v. Napier* is obviously right about what could always be done at common law, at least since 1851, that is, one party calling the opposite party as an adverse witness. Hence, the criticisms of Justices Lowry and Davies in *Monarch, Murao* and *Russell* in laying blame on Rule 40(17)–(20), for allowing a plaintiff's counsel to call the defendant adversary in the plaintiff's case, are in the author's opinion wrong in law and off the mark. This could always be done. Indeed, it would seem to be a hallmark of the adversary system to challenge one's adversary. All that the specific new rule in 1961 did was to clarify a point of contention in procedural law as to how that challenge could proceed. It overcomes the restriction in *Price v. Manning* in stating that the calling party is "entitled to treat such opposite party as a hostile witness"[44] and therefore to cross-examine him (or her).

APPLICATION OF THE OPPOSITE PARTY RULE IN B.C.

In *Guaranty Trust Co. of Canada v. Mid County Holdings Ltd.*[45] the plaintiff sought an order to examine a defendant, David McNair, in San Francisco under Rule 38 of the Rules of Court (commission evidence where a witness may be unavailable to testify at trial). Plaintiff's counsel sought as well an order to treat McNair as a hostile witness pursuant to the opposite party rule. In acceding to the plaintiff's argument, Proudfoot J. held that

> the plaintiff should be entitled to cross-examine McNair, and that the plaintiff should be placed in no worse position than he would be if McNair were at the trial.
>
> ...[I]n the case at bar justice requires that Rule 38 be read in conjunction with Rule 40(14) (the opposite party rule at that time). Accordingly, I grant the plaintiff's order as requested in the second portion of his Notice of Motion.[46]

Other cases holding that the examination of the adverse party under the rule is a cross-examination are *British Columbia Lightweight Aggregate Ltd. v. Canada Cement LaFarge Ltd. et al. (No. 4)*, and *Litwin Construction (1973) Ltd. v. Kiss.*[47] In *Litwin*, the trial in progress before Macdonald J. (as he then was) involved some 23 actions where the plaintiff called each investor/defendant as an adverse witness. His Lordship held that

> [u]nder the provisions of R. 40(14) of the Rules of Court, the plaintiff has called each investor/defendant as an adverse witness in its case against that investor. Rule 40(17) entitles the plaintiff to treat such witnesses as hostile and thus to cross-examine them.[48]

Later in 1990 Macdonald J. tried the case of *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.*,[49] where the plaintiff called an actuary as agent of the adverse party under the opposite party rule who had been consulted in the course of negotiations between the parties during 1986 for the sale and purchase of the Celgar Pulp Mill. There, his Lordship held:

> While the party utilizing the rule is entitled to "treat him as hostile", the court retains the discretion to determine whether or not he can be cross-examined.

> Needless to say, because the plaintiffs are entitled to treat Mr. Taylor as hostile, I will be quick to change my ruling on any indication that Mr. Taylor is "unwilling or unable to give responsive answers" despite his professional status.[50]

This ruling of Macdonald J. in *Power Consolidated* appears to recognize the overall discretion of the court at common law as to the mode of examination of witnesses, that is, that such discretion is not wholly supplanted by the rules of court. The reasoning in this case is that there ought to be real adversity on the issues between the party of examining counsel and the witness for the right to cross-examine to be exercised, as would be the case if the witness were the defendant himself rather than the defendant's actuary. This view appears to be endorsed by Huddart J. (as she then was) in *Mooney v. Orr, Jr.*[51] In commenting on the extension of the original 1961 rule in 1976 to include agents, Huddart J. wrote in *Mooney*:

> The words extending its ambit to their agents, *inter alia*, should not be interpreted so liberally as to extend the reach of the rule to those whom experience suggests could not have been intended to be included, because they are not necessarily unfriendly, when there is no provision for the friendly "adverse witness".[52]

However, in considering the *Power Consolidated* case and other authorities, Huddart J. drew a distinction between former agents and directors and current agents and directors. With respect to the latter, she wrote:

> In cases where the witness called under Rule 40(17) is an adverse party or a *current* officer, director, employee or agent, there will be little, if any, need to reconcile the two approaches. Such witnesses will, of necessity, be adverse. It is fair to presume that they will be unfriendly, or even hostile. Rare would be the circumstance that would persuade a judge to impose greater limits on the right to cross-examine than those imposed by the requirement for relevancy.[53]

In 1989 in *Skender v. Barker*,[54] the B.C. Court of Appeal overruled Bouck J. in a 1987 decision[55] in the same proceeding which held that a party calling an adverse party witness under the opposite party rule nevertheless vouched for that adverse witness's credibility. The Court of Appeal disagreed and, referring to an article of the author, held:

> The whole purpose of the plaintiffs calling Mr. Barker was to challenge his defence that he was not in a solicitor-client relationship with the plaintiffs and owed them no fiduciary duty. Subrule (17) expressly permits cross-examination of the witness. That being so, examining counsel cannot be taken to vouch for the credibility and guarantee the trustworthiness of the evidence of the witness. That I take it is the purport of the comment by Mr. Darrell W. Roberts which appears in (1988) 46 The Advocate 543; see especially at pp. 547–550.[56]

There are two cases in 1996 in which Southin J.A. has commented on the opposite party rule. In *Redlack v. Vekved*,[57] her ladyship, for the panel, allowed the appeal of the plaintiff in a motor vehicle negligence case where the trial judge had held that the plaintiff's counsel in calling the defendant under the opposite party rule was not entitled to cross-examine him. The trial judge had held that with respect to such examination the plaintiff still had to meet the requirements of Rule 40(21), a rule of general application, which provides:

> Where a witness appears unwilling or unable to give responsive answers or is hostile, the court may permit the party calling the witness to examine the witness by means of leading questions.[58]

Southin J.A. held s. 21 did not apply to an opposite party witness:

> 9. Was the learned judge correct in this ruling? No. Upon its true construction, Rule 40(21) does not govern the examination of witnesses called under Rule 40(17). Such a witness is not to be treated as a witness who has been called by the examining party.
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> ...
>
> 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.
>
> 13. If it were not, as will appear hereafter, that I am persuaded that the appellant ought to have succeeded in the court below, I would order a new trial because the appellant was deprived of his right to cross-examine the respondent.[59]

Of course the "right to cross-examine the respondent" in *Redlack* is conferred by the opposite party rule, as found in Rule 40(17)–(20) of the *Rules of Court*.

In the second 1996 decision, *Doman v. British Columbia (Superintendent of Brokers)*,[60] Southin J.A. in Court of Appeal chambers held on an application for leave to appeal that in proceedings before the B.C. Securities Commission it was appropriate for the subject adverse persons on an inquiry before that commission to be cross-examined by the superintendent or the superintendent's counsel. Southin J.A. held:

> In my opinion, the Commission was doing no more than adapting a procedure sanctioned by the Supreme Court Rules (Rule 40(17) and 40(20)). So 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.[61]

OTHER JURISDICTIONS IN CANADA

Alberta, Northwest Territories and Yukon

Rule 292 in the Alberta rules[62] provides for five days' notice to the opposite party's solicitor of an intention to examine the opposite party as a witness in the cause. There is no provision in the Alberta rule as to the mode of this examination, and thus it appears to be left to be determined at common law.

The Northwest Territories rule[63] is a model of brevity and follows the Alberta rule. Again, the mode of interrogation is left to the common law.

In the Yukon, the B.C. Supreme Court rules of practice, that is, *The Rules of Court*, apply.[64]

Saskatchewan[65]

The evidence and procedural law of Saskatchewan has been examined, and no codified opposite party rule of any kind could be found. Thus Saskatchewan appears to proceed according to the fundamental principles at common law and that province's evidence statute, which make the parties both competent and compellable at the instance of any party. The mode of examination when the adverse witness is called

will be in the discretion of the judge according to fundamental principles, perhaps including the principle stated in the evidence text of Sopinka, Lederman and Bryant: "parties adverse in interest have the right to cross-examine".[66]

Manitoba, Ontario, New Brunswick and Prince Edward Island

The Manitoba opposite party rule was originally one of two sources of Rule 25A enacted in B.C. in 1961.[67] The other source was Ontario.[68] They both originally provided simply for the manner of calling the adverse party by a direct subpoena or by notice to his or her solicitor, or by calling the opposite party without notice if present in the courtroom. They provided as well that upon such examination the examining party "shall be entitled to treat such opposite party as a hostile witness".[69]

Both Manitoba and Ontario have since made changes broadening the rule to include an officer, director, partner and, in Ontario, an employee of an adverse party, but also restricting the use of the rule as follows:

> 53.07(4) A party may call a witness referred to in subrule (1) as a witness unless,
>
> (a) the person has already testified; or
>
> (b) the adverse party or the adverse party's counsel undertakes to call the person as a witness.[70]

This provision is found in virtually identical language in the rules of Manitoba,[71] and in similar language in the rules of Prince Edward Island[72] and New Brunswick.[73]

In Ontario, when this restriction was first enacted it was contained in a subrule directed at the opposite party being attendance at trial otherwise than under subpoena. Isaac J. gave a literal construction to the subrule in *Caron et al. v. Tholheimer et al.*,[74] and confined its application to this circumstance. In *Caron* the plaintiff had actually subpoenaed the opposite party, and Isaac J. held this permitted the plaintiff to call that party under the opposite party rule notwithstanding an undertaking apparently given by defence counsel to call the defendant as a witness in the defence case.

However, this ruling is at odds with *Crutchfield v. Crutchfield*,[75] and the rule in Ontario has been further amended to provide that where an undertaking is given by the adverse party or his counsel to call the adverse party in his case, then the opposite party will be denied the right to call and cross-examine the adverse witness.[76]

In the result, it would appear that for Ontario, Manitoba, Prince Edward Island and New Brunswick, what began as a clarification of the right to cross-examine an adverse party when called as a witness by the other party—a clarification demanded in the interests of justice as part of the adversary system—has become a procedural bar to the very calling of the opposite party as a witness where the adverse party or his counsel gives the stipulated undertaking. Ironically, it was the "interest" of the party when called in his own case that had been the basis for the original common law rule of incompetence. Now, in these four provinces, the interest of the defendant in the tactical advantage of having the defendant's evidence-in-chief put before the court before cross-examination ensues is favoured over the plaintiff's use of the opposite party rule. This would seem to be a perversion of the purposes of the opposite party rule, which began

as an exception to the original common law rule of exclusion of interested parties, and is at odds with the fundamental constructs of the adversary system.

The cases in these provinces do not reflect on this fundamental change to the common law or the apparent conflict with their evidence statutes, all of which contain a provision similar to s. 7(1) of the *B.C. Evidence Act*, making parties to civil actions competent and compellable not simply on their own behalf but at the instance of other parties.

Nova Scotia and Newfoundland

Nova Scotia's opposite party rule provides:

> (3) A party may call an adverse party or an officer, director, or managing agent of a public or private body corporate or of a partnership or association that is an adverse party, *and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party*, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, but may be cross-examined by the adverse party only upon the subject matter of the examination in chief.[77] [emphasis added]

This rule is similar to B.C. Rule 40(17)–(20). There is no undertaking-by-the-defendant restriction.

The Newfoundland opposite party rule[78] is identical to the Nova Scotia rule. Again, there is no undertaking-by-the-defendant restriction in the rule.

Quebec

There are no detailed procedural rules governing the compellability of the adverse party in civil proceedings, but in the *Code of Civil Procedure*[79] all persons are made competent and compellable (unless unfit by physical or mental condition), and the *Code* then provides:

> The witness is examined by the party producing him or by his counsel. The questions must deal with the facts in issue only; they must not be put in such a way as to suggest the desired answer, unless the witness evidently attempts to elude a question or to favour another party, or unless, *being himself a party to the suit, he has interests opposed to the party who is questioning him*.[80] [emphasis added]

Federal Court[81]

The rules of trial procedure of the Federal Court of Canada simply provide for a direction to be served on an adverse party six days before the day of the proposed examination.[82] There does not appear to be any provision as to the mode of examination, and the rules themselves imbue the court with discretion as to how any of the rules are to be exercised.

UNITED STATES

The opposite party rule appears to flourish unrestrictedly in the United States. To understand U.S. law of evidence and civil procedure, it is necessary to know that there are both federal rules of civil procedure and evidence, and separate rules of procedure and evidence in each of the states. However, all of the states have modern, comprehensive codes of evidence, something not attempted anywhere in Canada, and most are modelled closely on the *Federal Rules*. A good summary statement of the United States law on this subject is set out below:

Following years of study, California enacted a comprehensive and influential code of evidence rules in 1965. That same year, an Advisory Committee of judges, lawyers and law professors appointed by the Supreme Court began drafting federal rules of evidence, much as similar committees earlier had worked out the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. The result was the Federal Rules of Evidence, which were endorsed by the Supreme Court, in 1972, enacted by Congress (with significant amendments) in 1974, and signed into law in 1975. Most states now have evidence codes modelled closely on the federal rules. California has retained its own code, though, and in a few states...New York, for example...evidence law remains uncodified.[83]

Thus, where the *Federal Rules* provide:

Rule 611. Mode and Order of Interrogation and Presentation

(c) Leading questions

When a party calls a hostile witness, *an adverse party*, or a witness *identified with an adverse party, interrogation may be by leading questions.*[84] [emphasis added]

the same rule appears in many of the rules of evidence and procedure in many of the states. For example:

Arkansas

Rule 611. Mode and Order of Interrogation and Presentation

(c) Leading questions...

Ordinarily leading questions should be permitted on cross-examination. *Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.*[85] [emphasis added]

California

Examination of adverse party or witness

(a) *A party to the record of an civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party* at any time during the presentation of evidence by the party calling the witness.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but, subject to subdivision (e), the witness may be examined only as if under redirect examination by:...[86] [emphasis added]

Massachusetts

Cross-examination of adverse party; corporations agent as adverse party

Section 22. *A party who calls the adverse party as a witness shall be allowed to cross-examine him.* In case the adverse party is a corporation, an officer or agent thereof, so called as a witness, shall be deemed such an adverse party for the purposes of this section.[87] [emphasis added]

Pennsylvania

Rule 611

(c) Leading Questions...*When a party calls* a hostile witness, *an adverse party or a witness identified with an adverse party, interrogation may be by leading questions*; a witness so examined should usually be interrogated by all other parties as to whom the witness is not hostile or adverse as if under redirect examination[88] [emphasis added]

Texas

Rule 611 Mode and Order of Interrogation and Presentation[89]

(same as the Federal practice rule and the States of Arkansas and Washington)

Washington

Rule 611[90]

(same as the Federal practice rule and the States of Arkansas and Texas)

What is striking about the United States provisions is that they are simply a codification of the common law, as laid down by Best C.J. in 1824 in *Clarke v. Saffrey*[91] and as summarized by *Wigmore* on *Evidence*.[92] Wigmore, citing *Clarke v. Saffrey* and a number of other cases both in England and the United States, writes:

> Leading questions, witness hostile, biased or unwilling. A similar situation arises where the witness, though called by the party examining, is in fact *biased against his cause* and is thus indisposed to favour it by accepting suggestions of desired testimony. Here a question cannot be objectionable as leading. The U.S. cases supporting this position are too numerous to mention all of them, but one of them, *Union Pacific Railway v. Ward* 230 e.2nd 287 at 290 (10th Circuit 1956) wherein it was held that although the witness did not appear to be hostile, leading questions were held proper since *he was an employee of the opponent and was an unwilling witness for the plaintiff*.[93] [emphasis added]

In the opposite party rule in the United States there is no attempt to interfere with the fundamental precepts of the justice system, that is, that there is no property in a witness, not even an adversary witness, and the courts should leave it to the parties as to what witnesses to call and in what order to call them.[94] Further, the observation of Southin J.A. in the *Doman* case, "it has never been held that the...calling of the opposite party and his cross-examination are in any way a breach of the concept of procedural fairness",[95] would also appear to underpin the law as to the opposite party rule in the United States.

COMMENTARY ON *MONARCH, MURAO* AND *RUSSELL*

In *Monarch*, Lowry J. at trial wrote:

> 42. While all counsel appear to accept that the Rules of Court (Rule 40(17–20)) permit *Monarch* to proceed as it did,[96] 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.[97]

In response to the observation that the rule may give to the plaintiff "two extensive cross-examinations of each of the two personal defendants", the author

contends that the rule does nothing of the sort. The adverse parties could always be called at common law and can still be called as of right under s. 7(1) of the B.C. *Evidence Act*.[98] All that Rule 40(17)–(20) does is permit the adverse witness to be cross-examined. Further, the suggestion that the rule may be used by a plaintiff for two extensive cross-examinations needs to be explored. When an adverse witness later testifies in his own case, it is only if the adverse witness proceeds to cover the same ground already addressed in his opposite party evidence that it can be said there will follow a second cross-examination on the same matter. But it is still a cross-examination on matters addressed in evidence-in-chief when called by the defence. The adverse witness can't have it otherwise. He cannot say, "You have had your cross-examination of me and now I will testify differently and ignore what I've already testified to, and you can't challenge me by another cross-examination." Obviously that would be untenable.

Further, in most cases, when an adverse witness is called in his or her own case, it is unlikely he or she will testify differently about the matters already testified to in his or her opposite party evidence.[99] More likely he or she will address other matters not previously covered as to which there has yet to be a cross-examination. This cannot be labelled a second extensive cross-examination, not at least of the same subject matter.

As to what is said to be the obvious purpose of the rule, that is, "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", such obvious purpose cannot be found in the language of the rule, or in the common law leading up to the enactment of the original rule in 1961, or in s. 7(1) of the B.C. *Evidence Act*; nor is such alleged purpose to be found in any case authority on the rule. The plaintiff who carries the burden of proof in a civil case is entitled to try and prove his or her case any way he or she can, including by way of admissions obtained on examinations for discovery of the defendant, which can be pursued without any entitlement of the defendant to precede that discovery by neatly organized evidence-in-chief, or by admissions obtained from the party defendant at the trial. The court has no role in this and must not interfere and seek to tell the parties what witnesses to call or in what order to call them.[100]

Turning to the suggestion of Mr. Justice Lowry that the opposite party rule ought not to be invoked where an "assurance has been given that the parties will be called in their own defence", it is submitted that this is not an exception to the use of the rule in British Columbia, nor should it become one. The plaintiff's counsel, generally speaking, is not interested in such assurance even if it is put in the form of an undertaking. A defendant is not called in the plaintiff's case under the rule simply to provide some missing piece of evidence. Any necessary evidence that a defendant can offer can always be obtained using pre-trial discovery procedures. Rather, the defendant is called by plaintiff's counsel under the opposite party rule to be attacked on cross-examination, seeking to build on any admissions obtained during examination for discovery to destroy the defendant's case, with the hopeful expectation of bringing about a settlement or a successful trial award.

In this endeavour the defendant has no right to resist and say, "Before you cross-examine me, I want to give my evidence my way, in chief, first." As already noted, the defendant has no right to prevent or qualify his own examination for discovery by carefully prepared evidence-in-chief, no right to stop an 18A summary trial using such admissions obtained on examination for discovery because of a heartfelt desire to present his evidence in chief first, and no right to refuse to testify when called as a witness under s. 7(1) of the B.C. *Evidence Act*.

From the beginning of the introduction of the common law rule in British Columbia, and dating back all the way to *Clarke v. Saffrey* in England in 1824, there has been no restriction on the plaintiff calling the defendant under the opposite party rule. As noted, the original British Columbia rule of practice was enacted simply to permit the examination of the opposite party to proceed as a cross-examination. The codified rule should not now be converted by judicial edict into an instrument for the actual exclusion of the evidence of the adverse witness. Indeed, it would be well to remember that in Canada the original rule of incompetence of an interested party was first relaxed in 1851, not for the calling of interested evidence but to permit the opposite party to be called as an adverse witness where he or she could then be cross-examined.

In addition, this suggestion would seem to radically change the adversary process in a way that favours defendants. The plaintiff, who has the absolute right of determining what witnesses to call and in what order to call them so as to best present the plaintiff's case, would be prevented from calling the opposite party and cross-examining him or her as part of such best case presentation. On the other hand, the defendant would be allowed his or her best case presentation by having the defendant testify in chief in the defence case before being subject to a cross-examination, which of course would be the very reason for giving the undertaking.

As well, this suggestion also requires one to consider the impact on a number of other rules of practice. For example, since the defendant can wait until the end of the plaintiff's case before deciding (a) to make a no evidence motion or (b) not to call any evidence or (c) to call evidence, then one must ask, how would the undertaking operate? Would it take away options (a) and (b), or would the defendant still be entitled to make a no evidence motion, or with leave of the court withdraw his or her undertaking? There is no law on this, and the answers to these questions are not necessarily simple or obvious. Most likely the circumstances in each and every case would have a bearing on the matter.

These questions should serve to caution against a change that merely pulls on one strand of a closely woven fabric, as in the accepted rules of practice and procedure in our adversary system.

Returning to the *Monarch* case, it is submitted that the obvious purpose of calling the defendants Strother and Darc in the plaintiff's case was to get at their evidence by cross-examinations without having to wade through their evidence-in-chief. In some cases, use of the opposite party rule has had the additional benefit of bringing about a settlement either before the trial has begun (where a

subpoena or notice has been served), or during the early stage of the case with the opposite party adverse witness in the witness stand. In still other cases, utilizing the rule can result in significant admissions being obtained that were not obtained on examination for discovery which may result in a successful judgment against the defendant. In the *Monarch* case, it is the author's view that the admissions obtained in the cross-examination of the defendant Strother under the opposite party rule at trial were of assistance to the Court of Appeal in its decision to overturn the trial judgment and find Mr. Strother liable.

In *Murao*,[101] Mr. Justice Lowry, now on the Court of Appeal, repeated his criticisms in the *Monarch* case of the use of the rule and offered that the rule was "susceptible to abuse"[102] and that he saw

> 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.[103]

Taking these points in order, if the abuse the learned judge had in mind is using the rule for more than his statement of its "obvious purpose" (calling of an adverse witness to prove a fact or facts which cannot otherwise be satisfactorily proven), then in the author's opinion it is completely unsupported, as canvassed above.

As for the suggestion in *Murao* of preventing the calling of an adverse witness where there has been full discovery of the witness which can be read in and an undertaking given (presumably by defence counsel) that the adverse witness will be called in the defence case, would this then suggest that if a plaintiff is less diligent about discovery there would be a corresponding greater right to use the opposite party rule? Obviously this makes no sense. Casualness in exercising pretrial discovery is not a practice to be encouraged.

Finally, as for not exercising the rule where there is an undertaking by defence counsel to call the defendant in the defendant's case, this has already been answered in responding to the criticism in the *Monarch* case.

Curiously in *Murao*, the issue before the trial court was not some perceived misuse of the rule. Rather, it was the nature of the examination to be conducted by counsel for the adverse party after a cross-examination by counsel for the opposite party. On this point Mr. Justice Lowry adopted (in the author's view) a literalist position, and since the rule provides that after the cross-examination of the adverse witness by counsel for the opposite party that "cross-examination of the witness by counsel for the adverse party shall be confined to explanation of matters brought out in the examination in chief",[104] Justice Lowry held cross-examination means cross-examination and counsel for the adverse witness could ask leading questions.[105]

While Rule 40(20) does indeed use the word "cross-examination" in referring to the examination of the witness by his own counsel, should this mean the court cannot exercise its discretion to require such examination to be done by non-leading questions? The judgment of Macdonald J. in *Power Consolidated*[106] supports the opposite view, namely, that such judicial discretion as to the mode

of examination is not absented by the language of the rule. Likewise the whole history and policy of the common law has generally favoured limiting the right of cross-examination to situations where the witness and the party of examining counsel are truly adverse. This is indeed the law in all of the jurisdictions in the United States (see *supra*) and in many of the provinces of Canada.

Finally, in *Russell v. Russell*,[107] the *obiter* comments of the Davies J. (see *supra*), which mirror those in both *Monarch* and *Murao*, are answered by the same reasoned argument, as above. In addition, however, Davies J. suggested[108] that the use of the opposite party rule may interfere with the rules as to burdens of proof and fairness to witnesses, the latter referring to *Browne v. Dunn*.[109] These criticisms, it is respectfully submitted, are equally unwarranted and erroneous.

According to Davies J. in *Russell*, counsel sought a ruling from the court at the conclusion of her cross-examination of the defendant *Russell* under the opposite party rule that if the defendant's own counsel did not immediately cross-examine (presumably by non-leading questions) the defendant on the same issues addressed in the opposite party cross-examination and chose instead to wait until calling evidence-in-chief in the defence case, an adverse inference should be drawn against Mr. Russell's credibility.[110]

With the greatest of respect to Mr. Justice Davies, the simple response could have been that the court will not tell counsel how to conduct their cases, that adverse inferences are only inferences that *may* be drawn, not must, and that the only time at which they may be drawn is at the end of the case, when the court is considering and taking into account all of the factors relevant to assessing the credibility of a witness's evidence and the weight to be given to it.

As for the so-called rule in *Browne v. Dunn*, it is only a rule of guidance and not an absolute rule that in fairness to witnesses counsel should put all material matters to an adverse witness in cross-examination which he or she intends to elicit from his other witnesses.[111] However, as already noted, the rule is not an absolute one in the sense that it does not prevent the calling of a witness's evidence, and if plaintiff's counsel fails to put material matters to the adverse defendant in cross-examination under the rule and then leads such matters from the plaintiff, it is an easy matter for the adverse witness, who is still before the court, to address such material matters in his own case. With respect, I fail to see how either the concept of drawing an adverse inference or the rule of fairness in *Browne v. Dunn* are in any way affected by calling the adverse witness in the opposite party's case which, apart from the codified rule that permits it to be done by a cross-examination, has been around ever since *Clarke v. Saffrey* was decided in 1824.

CONCLUSION

As an integral part of the common law in the conduct of civil trials, it has always been permissible, if not even encouraged, for the opposite party to be called as a witness by his or her adversary—"even encouraged" because use of the opposite party rule can be a powerful encouragement to settlement, something the civil law desires sufficiently to protect with a settlement privilege.

With respect to the suggestion by Davies J. in *Russell v. Russell* that there is a notional procedural unfairness to defendants in the use of the rule because in practice it is a rule used by plaintiffs in calling defendant witnesses, it is reasonable to respond that it is the plaintiff who has to start the case, it is the plaintiff who shoulders the burden of proof of the case, and it is the defendant who is entitled to sit back and poke holes in the plaintiff's case. Thus, if the plaintiff can prove his case out of the mouth of the defendant, why should the courts be concerned to prevent this? It is not their role to do so, and prior to the trio of cases of *Monarch, Murao* and *Russell*, no case could be found in B.C. which suggests there is any procedural unfairness in the plaintiff's use of the opposite party rule, either as found in Rule 40(17)–(20) and its predecessor Rule 25A, or in the common law or under s. 7(1) of the B.C. *Evidence Act*. Moreover, as Southin J.A. said in the *Doman* case, repeated here one more time, "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".[112]

Southin J.A.'s observation has to be enlarged upon, because of course it is not the opposite party rule, *per se*, that permits the calling of the opposite party. It is the common law of procedure and evidence, and s. 7(1) of the B.C. *Evidence Act*, which, as Ruttan J. reminded us in *Napier v. Napier*,[113] has always permitted a party to call the opposite party. All that the codified rule does, at least in its original 1961 form, is permit the calling of that opposite party to proceed as a cross-examination, an approach that is fully consistent with the long history of civil and criminal trial procedure.

Thus, the criticisms in *Monarch, Murao*, and *Russell* are in the author's view not valid and should not be followed or (it is submitted) repeated. The opposite party rule is in practice a procedure of long standing and is consistent with the policy of the common law as enacted in s. 7(1) of the B.C. *Evidence Act*, that is, the parties to civil suits are competent and compellable in the same way they would be if not parties to the proceedings.[114]

There is no limited purpose for the application of the opposite party rule. It does not interfere with any of the processes for determining the merits of the issues in civil cases, it is a rule of practice of wide application in the common law and it has never, hitherto, been considered a rule that was unfair or susceptible to abuse.

It seems apt to close this discussion by referring to a passage in the 1930 judgment of Riddell J.A. in *Harwood & Cooper v. Wilkenson*,[115] referred to by the Honourable J.O. Wilson in *A Book for Judges*:[116]

> Counsel, not the Judge, is to determine what witnesses he is to call in support of his case; and, while the Judge has the right to comment upon and base his judgment *pro tanto* on the non-production of any witness or witnesses, he has no right to criticize the discretion observed by counsel in so deciding—there may be a score of things that the counsel knows which the Judge cannot know that determine his decision, and he, not the Judge, is *dominus litis*.[117]

This passage applies with equal force to the decision of plaintiff's counsel to call the defendant as a witness in the plaintiff's case. The trial judge "has no right

to criticize the discretion observed by (plaintiff's) counsel in so deciding". Nor, it is submitted, should the court even become involved in counsel's decision by suggesting that the right to the call the defendant not be exercised in exchange for an undertaking by the defendant's counsel to call the defendant in the defence case. As already noted, the desire to call the defendant in the plaintiff's case is generally not simply a matter of filling in a missing piece of evidence and therefore the plaintiff is not interested in such undertaking. The plaintiff's decision involves wanting to cross-examine the defendant in order to destroy the defendant's case. Thus the court cannot become involved in counsel's decision, and any attempt to do so risks giving the appearance of favouring the defence. Counsel can only be *dominus litis* in the decision to call the opposite party in the plaintiff's case if the court stays out of the matter altogether.

ENDNOTES

1. [2002] B.C.J. No. 1982.
2. Robert Holmes, assisted by Leslie Muir, was lead counsel for Monarch. The writer, assisted by Wendy Baker, acted for certain third parties, and as well assisted Holmes and Muir in presenting the plaintiff's case. Mr. Holmes called and cross-examined the defendant, Robert Strother, under the opposite party rule, and the writer called and cross-examined Mr. Darc under the opposite party rule.
3. *3464920 Canada Inc. v. Strother*, 2005 B.C.C.A. 35.
4. 2005 B.C.C.A. 43.
5. *Ibid.* at para. 22.
6. 2002 B.C.S.C. 1233.
7. *Ibid.*
8. (2005) 63 Advocate 39.
9. *Court Rules Act*, Supreme Court Rules (includes amendments up to B.C. Reg. 136/2005, July 1, 2005).
10. *Ibid.* at 126–126.1.
11. Alan W. Mewett, Q.C., *Witnesses* (Toronto: Carswell, 1991).
12. [1824] C.P. 126, 171 E.R. 966.
13. 6 & 7 Vict., c. 85.
14. 14 & 15 Vict., c. 99, s. 2.
15. See Mewett, *supra* note 10 at 3–11.
16. *An Act to Improve the Law of Evidence*, 14 & 15 Vict., c. 66.
17. Mewett, *supra* note 11 at 3–12.
18. *Evidence Act*, S.O. 1873 (36 Vict.), c. 10, ss. 1, 3.
19. R.S.O. 1990, c. E. 23.
20. *Ibid.*
21. R.S.B.C. 1996, c. 124.
22. *Ibid.*, s. 7(1).
23. (1985), 42 C.R. (3d) at 38–39 (Ont. C.A.).
24. (1994), 26 C.P.C. (3d) 1 at 9 (Man. C.A.).
25. (1989), 70 O.R. (2d) 506 (C.A.) (function of subpoenas described).
26. *Supra* note 12.
27. *Ibid.* at 966.
28. *Ibid.*
29. 7th ed. at 1178.
30. 15th ed. at 156.
31. *Common Law Procedure Act*, 1854 (17 & 18 Vict.), c. 125 (also known as Lord Denman's Act of 1854); see s. 16 of the B.C. *Evidence Act*, R.S.B.C. 1979, c. 116, and s. 9(1) of the *Canada Evidence Act*, R.S.C. 1995, c. C-5.
32. (1887), 42 Ch.D. 372.
33. *Ibid.* at 373.
34. John H. Wigmore, *Wigmore on Evidence*, revised by James H. Chadbourne (Boston: Little, Brown, 1972), vol. 5. p. 32.
35. (Toronto and Vancouver: Butterworths, 1992) at 821.
36. *Supreme Court Rules* 1961, Rule 25A(1), (2) and (3).
37. *Rules of Civil Procedure*, Ont. Reg. 194, R. 53.07.
38. *Court of Queen's Bench Rules*, Man. Reg. 553/88, R. 53.07.
39. *Supra* note 36 at 83.
40. (1964), 45 D.L.R. (2d) 632 (B.C.S.C.).

41. [1891] P. 129.
42. *Supra* note 40 at 634.
43. *Supra* note 35.
44. *Supra* note 36 at Rule 25A(2).
45. [1979] B.C.J. No. 450.
46. *Ibid.* at para. 11.
47. [1985] B.C.J. No. 2799 (S.C.) (Q.L.) and (1978), 8 B.C.L.R. 325 (S.C.), respectively.
48. *Ibid.* at 1.
49. [1990] B.C.J. No. 2963 (S.C.) (Q.L.).
50. *Ibid.* at paras. 13, 14.
51. [1994] B.C.J. No. 2007 (S.C.) (Q.L.).
52. *Ibid.* at para. 4.
53. *Ibid.* at para. 9.
54. [1989] B.C.J. No. 2122 (C.A.) (Q.L.).
55. [1987] B.C.J. No. 1837 (S.C.) (Q.L.).
56. *Supra* note 54 at 7.
57. [1996] B.C.J. No. 3040 (C.A.) (Q.L.).
58. *Supra* note 9 (Rule 40(21)).
59. *Supra* note 57 at paras 9, 12, 13.
60. [1996] B.C.J. No. 2631 (C.A.) (Q.L.).
61. *Ibid.* at para. 47.
62. Alberta, *Rules of Court*, R. 292 (Alta. Reg. 390/68).
63. *Rules of the Supreme Court of the Northwest Territories*, R. 363(1) (N.W.T. Reg. R-010-96).
64. *Judicature Act*, R.S.Y. 2002, c. 128, s. 38.
65. Saskatchewan, *The Queen's Bench Rules*.
66. *Supra* note 35.
67. *Supra* at 6–7.
68. *Ibid.*
69. *Ibid.*
70. Ontario, *Rules of Civil Procedure*, R. 53.07(4).
71. Manitoba, *Queen's Bench Rules*, R. 53.07(3).
72. Prince Edward Island, *Rules of Civil Procedure*, R. 53.07(4).
73. New Brunswick, *Rules of Court*, R. 55.05(2).
74. *Caron v. Chodan Estate*, [1989] O.J. No. 2607 (H.C.J.) (Q.L.).
75. (1987), 10 R.F.L. (3d) 247 (Ont. H.C.).
76. *Supra* note 70; see also *Ariaco International Leasing Inc. v. Bowing Canada Inc.*, [2000] O.J. No. 2420.
77. Nova Scotia, *Civil Procedure Rules*, R. 31.03.
78. Newfoundland, *Rules of the Supreme Court*, 1986, c. 42, Sched. D, R. 46.02(3).
79. *Code of Civil Procedure*.
80. *Ibid.* at para. 306.
81. *Federal Court Rules*, 1998.
82. *Ibid.* at s. 91(3)(a).
83. David A. Skolansky, *Evidence: Cases, Commentary and Problems*, "Chapter I: Introduction to Evidence Law," UCLA: www1.law.ucla.edu/~Sklansky/evidence.
84. United States, *Federal Rules of Civil Procedure*, R. 611(c).
85. Arkansas, *Rules of Evidence*, R. 611.
86. California, *Evidence Code*, s. 776(a)(b).
87. *General Laws of Massachusetts*, tit. II, c. 233, s. 22.
88. Pennsylvania, *Rules of Evidence*, R. 611(c).
89. Texas, *Rules of Evidence*, R. 611.
90. Washington, *Rules of Evidence*, R. 611.
91. *Supra* note 12.
92. *Supra* note 34.
93. *Ibid.* at para. 774.
94. *Supra* note 35.
95. *Supra* note 61.
96. At the trial, counsel for the defendants raised no objection to the plaintiff's counsel calling the defendants Strother and Darc under the opposite party rule. Rather, it was raised as an issue of contention by the trial judge himself in challenging the use of the rule by plaintiff's counsel.
97. *Supra* note 1, at paras. 42 and 43.
98. *Supra* note 21.
99. In *Monarch*, the unusual occurred. The defendants obtained a ruling at trial that they could cover the same ground in their evidence-in-chief that was covered in their cross-examinations under the opposite party rule. Then, the defendant Strother, after listening to the plaintiff's other witnesses and after referring to new or not disclosed documents in the defendants' case, testified quite differently from his evidence as an opposite witness. The plaintiff was allowed a further examination for discovery during a break in the trial, and a further cross-examination of Strother in the defendants' case.

100. *Supra* note 35; see also *R. v. Smuk*, [1971] 3 C.C.C. (2d) 457 (B.C.C.A.).
101. *Supra* note 4.
102. *Ibid.* at para. 22.
103. *Ibid.*
104. *Supra* note 9, at R. 40(20).
105. *Supra* note 4, at para. 23.
106. *Supra* note 49.
107. *Supra* note 6.
108. *Ibid.* at paras. 30–31.
109. (1893), 6 R. 67.
110. *Supra* note 7.
111. The rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), normally applies to defendants. In the cross-examination of the plaintiff's witnesses the proper practice requires the cross-examiner to put all material matters to the witnesses that will later be elicited from the defendant's witnesses. It has no real application where the defendant is called by the plaintiff under the opposite party rule. After the plaintiff's cross-examination under the rule, the defendant is still before the court and can testify as to material matters in his own case.
112. *Supra* note 61.
113. *Supra* note 42.
114. *Supra* note 21.
115. [1930] 2 D.L.R. 199 at 203.
116. (Ottawa: Canadian Judicial Council: Supply and Services Canada, 1980).
117. *Ibid.* at 50.