Date: 20081009
Docket: CI 99-01-14589
(Winnipeg Centre)
Indexed as: Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.
Cited as: 2008 MBQB 265

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
	)	
TELECOMMUNICATION EMPLOYEES ASSOCIATION OF MANITOBA INC., COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 5 AND LOCAL 7, INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION 435, HARRY RESTALL, ON HIS OWN BEHALF AND ON BEHALF OF CERTAIN RETIRED EMPLOYEES OR THE WIDOWS/WIDOWERS THEREOF OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. AND MTS ADVANCED INC., AND LARRY TRACH, ON HIS OWN BEHALF AND ON BEHALF OF ALL UNIONIZED EMPLOYEES OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. and MTS ADVANCED INC.,	)	Brian J. Meronek, Q.C. and Kris M. Saxberg for the Plaintiffs
	)	E. William Olson, Q.C., Shane I. Perlmutter and Lynda K. Troup for the Defendants
	)	Judgment delivered: October 9, 2008
Plaintiffs,	)	
	)	
- and -	)	
	)	
MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. and MTS ADVANCED INC.,	)	
	)	
Defendants.	)	

BRYK, J.

[1] The plaintiffs bring a motion for:

(a) a declaration that Clifford Fox is an adverse witness;

(b) an order granting the plaintiffs leave to cross-examine Clifford Fox at trial; and

(c) direction with respect to the rights of the defendants to examine Clifford Fox at trial.

BACKGROUND

[2] A brief background will be helpful in understanding the somewhat complex nature of these proceedings which were commenced in 1999 by statement of claim.

[3] In 2002, Jon Singleton (Singleton) and Clifford Fox (Fox) were added as defendants by consent.

[4] In 2005, the defendants each moved for summary judgment. Prior to the motion being heard, the parties sought determination of several preliminary issues including whether Singleton and Fox were parties adverse in interest to the remaining defendants for the purposes of the summary judgment motion. In a decision delivered November 28, 2005 (2005 MBQB 259), Scurfield J. concluded at ¶13:

> [13] Finally, although Singleton and Fox have filed separate motions for summary judgment, all defendants rely on a common legal argument to support their motion. Taken as a whole, I am satisfied that at this stage of the proceeding, Singleton and Fox should not be considered as adverse parties within the meaning of Queen's Bench Rule 31.11(1).

[5] In 2006, Kennedy J. heard the motion for summary judgment and dismissed it. The defendants appealed the decision to the Manitoba Court of Appeal which dismissed the appeals of Manitoba Telecom Services Inc., MTS Communications Inc., MTS Mobility Inc., and MTS Advanced Inc. (collectively MTS) but allowed the separate appeals of Fox and Singleton on the basis that they were not necessary parties to the action since the only remedy sought against them was declaratory relief.

[6] A 10 week trial before McCawley J. was scheduled to commence in November 2007. The plaintiffs brought before her this application to have Singleton and Fox declared adverse witnesses and sought leave to cross-examine them as such. After hearing the motion, McCawley J. became aware of a potential conflict for the trial as a result of which she recused herself. As to the motion, however, she concluded it was one which should properly be dealt with by the trial judge during the course of the trial.

[7] Having arrived at a stage in the trial where Fox and later Singleton are scheduled to testify, the plaintiffs have brought forward this motion.

[8] Some evidence was adduced by plaintiffs in order to establish Fox's adversity which was then followed by the subsequent request to have him

declared adverse in interest and to permit the plaintiffs to cross-examine him at large.

[9] The plaintiffs also seek an order restricting the defendants to asking non-leading questions.

ISSUES

(a) Should Clifford Fox be declared an adverse witness?

(b) If so, should the plaintiffs be permitted to cross-examine Clifford Fox at large?

(c) In what manner are the defendants entitled to examine Clifford Fox?

(d) In any event, does the court have inherent jurisdiction to direct the manner in which plaintiffs examine their own witness, Clifford Fox?

APPLICABLE LEGISLATION

[10] The plaintiffs rely on s. 19 of ***The Manitoba Evidence Act***, C.C.S.M. c. E150 (the ***MEA***), which provides:

> **How far a party may discredit his own witness**
> **19** A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or if the witness, in the opinion of the court, proves adverse, the party may by leave of the court cross-examine him; but if the party desires to prove that the witness made, at some other time, a statement inconsistent with his present testimony, before the proof is given the circumstances of the proposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness and he shall be asked whether or not he did make the statement.

[11] As comparisons with the ***Canada Evidence Act***, R.S. 1985, c. C-5 (the ***CEA***), and the Ontario ***Evidence Act***, R.S.O. 1990, c. E.23 (the ***EA***), have been made by both parties in their submissions, it may be useful to replicate the appropriate sections from each.

The ***Canada Evidence Act***

> **Adverse witnesses**
> **9.(1)** A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.
>
> **Previous statements by a witness not proved adverse**
> **9.(2)** Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audiotape or videotape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

The Ontario ***Evidence Act***

> ***How far a party may discredit his or her own witness***
> **23.** A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character, but the party may contradict the witness by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his or her present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and the witness shall be asked whether or not he or she did make such statement.

[12] On the issue of the court's inherent jurisdiction, I note the following provisions in ***The Court of Queen's Bench Act***, C.C.S.M. c. C280 (the ***Act***), and the *Queen's Bench Rules*, Manitoba Regulation 553/88 (the *Rules*):

The Court of Queen's Bench Act

> **Evidence, practice and procedure**
> **33(2)** The taking of evidence and the practice and procedure in the court shall be regulated and governed by the rules of evidence and the modes of practice and procedure as they existed in England on July 15th, 1870, except as they may have been changed or altered by
> (a) an Act of the Legislature or of the Parliament of Canada;
> (b) an Act of the Parliament of the United Kingdom affecting the province and enacted before the coming into force of the Statute of Westminster, 1931; or
> (c) a rule or order of the court.
>
> **Rules of law and equity**
> **33(3)** The court shall administer concurrently all rules of equity and the common law.
>
> **Rules of equity to prevail**
> **33(4)** Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.

Court of *Queen's Bench Rules*

> **Leading questions on direct examination**
> **53.01(2)** Where a witness appears unwilling or unable to give responsive answers, the trial judge may permit the party calling the witness to examine the witness by means of leading questions.
>
> ...
>
> CALLING ADVERSE PARTY AS WITNESS
>
> **Securing attendance**
> **53.07(1)** A party may secure the attendance of a person who is,
> (a) an adverse party;
> (b) an officer, director or sole proprietor of an adverse party; or
> (c) a partner in a partnership that is an adverse party;
> as a witness at a trial ...

> **Cross-examination by party calling a witness**
> **53.07(4)** A party calling a witness pursuant to subrules (1) or (2) may cross-examine him or her, unless, in the case of a party referred to in subrule (2), the court otherwise orders.
>
> **Cross-examination by other parties**
> **53.07(5)** After the witness has been examined, he or she may be cross-examined by his or her own counsel, or by counsel for his or her corporation or partnership, but the cross-examination shall be confined to the explanation of matters brought out in examination; cross-examination of the witness by other parties opposed to him or her, or to his or her corporation or partnership, may be general or limited as the court may direct; the right of re-examination on a new matter brought out on cross-examination shall be confined to parties adversely affected by the new matter.

ANALYSIS

Definition of Adverse

[13] Plaintiffs argue that Fox is an adverse witness within the definition provided by the decision of the Ontario Court of Appeal in ***Wawanesa Mutual Insurance Co. v. Hanes***, [1961] O.R. 495. If this court makes that finding, they say s. 19 of the ***MEA*** clearly permits cross-examination with leave of the court.

[14] Plaintiffs contend that ***Wawanesa*** and other cases stand for the proposition that "adverse" and "hostile" have been given separate and distinct meanings with "adverse" meaning "unfavourable" or "assuming an opposite position". As well, there is a lower threshold in establishing a witness as "adverse".

[15] Defendants argue that plaintiffs have misunderstood and misinterpreted the decision in ***Wawanesa*** and other cases that followed. All of those cases

involve a prior inconsistent statement which is different than the present fact situation. Defendants say a review of the historical evolution of this principle will show that s. 19 of the ***MEA*** as well as other comparable sections in legislation from other provinces including s. 23 of the ***EA*** together with s. 9 of the ***CEA*** can be traced back to their common law origins where "hostile" and "adverse" were used interchangeably.

[16] Defendants rely on *Sullivan and Driedger on the Construction of Statutes*, Fourth Edition, (Butterworths, 2002) by Ruth Sullivan, in support of the principle that common law terms and concepts are presumed to retain their common law meaning and that it is unnecessary that legislation exactly reproduce the common law terminology. Courts must consider whether words were meant to modify the common law concepts (my emphasis added). Because legislation is meant to operate within the existing framework of established concepts and principles, it must be interpreted with those concepts and principles in mind, but, insofar as legislation is designed to effect special changes, the weight of past understandings must not be allowed to defeat that purpose (my emphasis added).

[17] Both sides agree the seminal case distinguishing "adverse" from "hostile" is ***Wawanesa***. Although it centres around the issue of a prior inconsistent statement, it provides a thorough review of the progression of the principle relating to cross-examination of one's own witness from its common law origin to the present day.

[18] In ***Wawanesa***, the relevant statute was s. 24 (now s. 23) of the ***EA***. For purposes of this review, I have identified the following eight specific components to that section:

1. a party calling a witness is not allowed to impeach his credit by general evidence of bad character but

2. may contradict him or her by other evidence or

3. if in the opinion of a judge, the witness proves adverse,

4. such party with leave of the court;

5. may prove that witness made at some other time a statement inconsistent with his or her present testimony;

6. but before so proving

7. the party must tell the witness when the statement was made and

8. ask the witness if he or she actually made the statement.

[19] Section 9(1) of the ***CEA*** is almost identical except the words "in case the witness shall, in the opinion of the judge, prove adverse" are inserted before the words "may contradict the witness by other evidence".

[20] In reviewing the history of s. 24 of the ***EA***, the court in ***Wawanesa*** noted it had its origin in the ***Common Law Procedure Act***, 1854 (Lord Denman's Act) 17 & 18 Vict., c. 125, s. 22. The relevant section was later reproduced in substantially the same form in ***An Act for amending the Law of Evidence and Practice on Criminal Trials***, 1865, 28 Vict., c. 18, s. 3. The only substantial difference between that section in the two English ***Acts*** and in s. 24

is where, in the English ***Acts***, the words “in case the witness shall, in the opinion of the judge, prove adverse”, appear before the words “contradict him by other evidence”.

[21] In ***Greenough v. Eccles*** (1859), 5 C.B. (N.S.) 786; 141 E.R. 315, Cockburn C.J. concluded there was a blunder in the drafting of the ***Common Law Procedure Act***. He noted the first two components of the section (i.e. identical to components **1** and **2**) were intended to be declaratory of the existing law and that the third component (i.e. which consists of the criteria in components **3** to **8**) was intended to give a party an opportunity, with leave of the court, if a witness proved adverse or hostile, by showing he had previously made a statement inconsistent with his testimony to be cross-examined. The reference to “adverse” should not have been attached to the first and second components which were declaratory. It created additional restrictions to the right to contradict by other evidence.

[22] In the common law, according to *Best on Evidence*, 12th ed., p. 566, a party was not allowed to give general evidence of his/her own witness being unworthy of belief in order to discredit that witness. That principle evolved on the premise that permitting a party to discredit his/her own witness with general evidence of their unworthiness of belief would give that party effective control over the witness. However, the party could discredit his/her own witness collaterally by adducing evidence to show that witness’s evidence was untrue. Otherwise, it would be unjust and absurd if a party was bound by the

unfavourable statement of witnesses with whom he/she had no privity and who are frequently called from pure necessity. Those common law principles are reflected in components **1** and **2**.

[23] At that time in history, however, the issue of whether a party could show his/her own witnesses made statements out of court inconsistent with the evidence they had given, was unsettled, and led to the enactment of statutes previously referred to in ¶20.

[24] The procedure outlined in the statutes is broken down into the following three components previously referred to in ¶21:

1. the judge forms the opinion whether the witness is adverse;
2. if the witness is adverse, the witness must have mentioned to him/her the circumstances of their previous statement and be asked whether they made that statement; and
3. the judge has the discretion to permit the evidence providing the witness made the statement.

[25] The general purpose of the statutes was to clarify the uncertainties in the common law and to give the judge the discretion to guard against the possible dangers inherent in admitting prior inconsistent statements.

[26] The issue of whether the words “adverse” and “hostile” are identical in meaning and therefore interchangeable first arose in ***Greenough*** where “adverse” was held to mean “hostile”. In the common law, parties could only cross-examine a “hostile” witness. Williams J. reasoned that since the enacted

legislation required the judge to form an opinion that the witness was "adverse" before the right to contradict or prove he had made inconsistent statements was only reasonable if the word "adverse" meant "hostile", i.e. consistent with the common law, but wholly unreasonable and unnecessary if it meant "unfavourable".

[27] The trial judge in ***Wawanesa*** equated the word "adverse" with "hostile" and because he had not found the witness to be "hostile", he refused to exercise his discretion to admit an inconsistent statement. In reviewing that decision, the Ontario Court of Appeal determined that had he considered the definition of "adverse" in a broader sense, he might have admitted the inconsistent statement. The following excerpt explains why that court adopted a broader definition for the word "adverse". It critically refers to William J.'s decision in ***Greenough*** at p. 505:

> I find it difficult to appreciate this reasoning. If it had been intended that a witness must be shown to be hostile in mind before the statement could be admitted, the statute could have said so. The word "adverse" is a more comprehensive expression than "hostile". It includes the concept of hostility of mind, but also includes what may be merely opposed in interest or unfavourable in the sense of opposite in position. As defined in the Shorter Oxford English Dictionary, the word is given the following meanings: 1. Acting in opposition to, actively hostile. 2. Opposing anyone's interests; hence unfavourable, injurious, calamitous. 3. Opposite in position. At common law, in some cases, it was attempted to draw a distinction between the use of a prior inconsistent statement for the purpose solely of impeaching the credit of a witness and cases in which it was introduced for other purposes, although it might consequentially impeach the credit of a witness. By the section the prior inconsistent statement even though its only effect is to impeach the credibility of the witness, may be put to the witness. I also think that the argument which was rejected in the *Greenough* case is persuasive. It is summarized by Williams, J. at p. 803, and in part is as follows:

> The fetter thus imposed, it is further said, would be harmless in its operation, if "adverse" be construed "unfavourable," but most oppressive if it means "hostile"; because the party producing the witness would be fixed with his evidence, when it proved pernicious, in case the judge did not think the judge "hostile," which might often happen; whereas, he could not in such a case fail to think him "unfavourable".
>
> That is precisely the situation in the case at bar. The prior inconsistent statements were submitted for the purpose of impeaching the credit of the witnesses. The learned Judge refused to declare the witnesses hostile. Consequently, by reason of his ruling that "adverse" meant "hostile", the learned Judge did not consider whether the witness, although not hostile, was adverse in the broader sense and therefore did not exercise any discretion after the admission of the alleged statement.

[28] Further, at pp. 503, 504, the determination of the definition of "adverse" was made:

> ... The issue is whether "adverse" means "unfavourable" in the sense of opposite in position or intends the more restricted meaning of "hostile". The authorities are conflicting upon that point. None of the authorities pertaining to the question as cited to us, and none of those others which I have since examined are binding upon this Court. The weight of English and Canadian authority tends to support a construction which would render "adverse" as the equivalent of "hostile" in the sense of showing a hostile mind.

[29] I have not been made aware of any jurisprudence binding upon this court which would indicate which definition has found favour in Manitoba.

[30] ***Wawanesa*** concluded that s. 24 of the ***EA*** covered the entire field of inconsistent statements including those of "hostile" or merely "adverse" witnesses. It set out the following test to be followed when a party applies to introduce a prior inconsistent statement:

1. the judge should consider the testimony and statement and be satisfied the witness made the statement;

2. the judge should consider the relevant importance of the statement to decide whether it is substantially inconsistent;

3. the judge should consider all of the surrounding circumstances that may assist him/her in deciding if the witness is "adverse"; and

4. if the judge is satisfied the witness is "adverse", he/she may consider whether, under all the circumstances and bearing in mind the possible dangers in admitting the statement, if the ends of justice would be best attained by admitting it. Beyond that, if a judge found the witness to be "hostile", he/she might also permit the witness to be cross-examined.

[31] This court was asked to consider other cases which involved the interpretation of s. 9 of the ***CEA*** because of its similarity to s. 19 of the ***MEA***.

[32] ***R. v. Uppal***, 2003 BCSC 1922, is a decision of the British Columbia Supreme Court. A witness named Chohan was one of five individuals accused of murder. However, in exchange for immunity from prosecution, he agreed to testify as a Crown witness. As well as giving the police two statements, he took them to the crime scene for a re-enactment. The Crown applied under s. 9(1) of the ***CEA*** for a ruling that Chohan was an "adverse" witness.

[33] From my reading of the ***Uppal*** decision, I found the following sentence at ¶4 to have caused the confusion which seems to have arisen:

> ... Such a finding would permit them to cross-examine Chohan at large. ...

[34] One can only assume the words “on the prior inconsistent statements” were inadvertently omitted at the end of the aforementioned sentence. I make that assumption on the basis that if the Crown ultimately was successful in cross-examining Chohan at large on his prior inconsistent statements, it intended to later apply to have those prior inconsistent statements admitted not only for purposes of credibility but also as proof of their content. Moreover, there is nothing in s. 9(1) of the ***CEA*** that remotely suggests a right to cross-examine a witness at large once that witness is found to be “adverse”. The section only permits that witness to be cross-examined on his/her prior inconsistent statement.

[35] In ***Uppal***, “adverse” was accepted by the court as meaning unfavourable. The court also adopted the tests to be used to determine whether a witness is “adverse” which were outlined in ***Wawanesa***. As with ***Wawanesa***, the context was a determination of whether prior inconsistent statements could be used to undermine the credibility of a witness.

[36] Interestingly, the court in ***Uppal*** found that establishing the first and second criteria as set out in ¶30 might be enough to support a finding of adversity (emphasis added). In other words, if the judge considered the testimony and statement and was satisfied the witness made it and also considered the statement to be relatively important in deciding whether it was substantially inconsistent, a court might make a finding of adversity on that basis alone.

[37] The court found Chohan to be an "adverse" witness and permitted the Crown to cross-examine him on his prior inconsistent statement. It did not permit the Crown to cross-examine Chohan at large, contrary to what plaintiff argued in its submission.

[38] Plaintiffs argue that s. 9 ***CEA*** can be interpreted so as to permit cross-examination at large of a witness declared "adverse". The plaintiffs place reliance on a text entitled *The Portable Guide to Witnesses* by Peter J. Sankoff (Sankoff), Faculty of Law, University of Auckland, New Zealand, (Thomson, Carswell), where, at p. 65, he makes the following observation in reference to s. 9 of the ***CEA***:

> The provision can be extremely useful. To begin with, where the witness is declared adverse, the party who called them may impeach their testimony through use of a prior inconsistent statement. In addition, it would appear that the designation permits cross-examination at large, ...

[39] Sankoff supports his conclusion by reference to the Ontario Court of Appeal decision in ***R. v. Soobrian*** (1994), 76 OAC 7; 21 O.R. (3d) 603; 96 C.C.C. (3d) 208. That is not my understanding of what ***Soobrian*** says.

[40] The complainant alleged that Soobrian and a co-accused, Beaudry, sexually assaulted her after she had consensual sex with her boyfriend "M". Both Soobrian and Beaudry provided statements and testified to the fact that Beaudry had consensual sexual activity with the complainant while Soobrian had no sexual contact with her at all. "W", an off-duty police officer who was also present during the alleged sexual assault, originally said he didn't see any sexual

activity at all but later, and prior to the preliminary hearing, he told the police he saw consensual sexual activity between the complainant, Beaudry and her boyfriend "M". That was "W's" testimony at the preliminary hearing as well. At the trial, the Crown called "W" as its witness and his testimony was consistent with his evidence at the preliminary hearing. The Crown indicated its intention to impeach "W" by his initial statement and through general cross-examination, show he lied in collaboration with his friends Soobrian and Beaudry. Without court approval, the Crown asked "W" about his prior statements. However, "W" maintained his testimony and explained the reason for the discrepancy between his first and subsequent statements. The Crown then applied to have "W" declared "adverse" pursuant to s. 9(1) of the ***CEA***. The court refused but permitted the Crown to cross-examine Soobrian on his statement under s. 9(2). After that cross-examination, the Crown asked to have "W" declared "adverse". The court refused to make that finding but allowed the Crown yet further cross-examination on "W's" statement. It is important to note that in refusing to find "W" to be an "adverse" witness, the court concluded the Crown had hoped to cross-examine "W" at large not to undermine his credibility but to attack the credibility of all defence witnesses.

[41] The Ontario Court of Appeal agreed the trial judge was correct in holding s. 9(1) was not available to permit cross-examination of witnesses as "W" was not shown to be "adverse". They further observed that had the Crown sought a ruling whether it was permissible to cross-examine "W" pursuant to s. 9(2) at the

commencement of his evidence, the trial judge should also have denied that as the Crown's admitted purpose of cross-examining "W" was to provide a foundation to discredit the defence witnesses and thus support the testimony of the complainant. Without an evidentiary foundation of collusion, the cross-examination should not have been permitted. Without that limit, "W's" evidence was irrelevant or of minimal probative value and of high prejudicial value.

[42] The court's decision in ***Soobrian*** was very fact-specific and in my view, does not stand for the principles that an "adverse" witness can be cross-examined at large, at least in relation to s. 9 of the ***CEA***.

[43] The issue of whether a witness can be cross-examined at large on a finding of being "adverse" was also commented upon by the Ontario Superior Court in ***R. v. Vivar***, [2004] O.T.C. 5, [2004] O.J. No. 9, 60 W.C.B. (2d) 53. I concur with the following comments of Dambrot J. at ¶10, ¶11 and ¶12:

> [10] In this case, having regard to the cases I have referred to, I am satisfied that Mr. Reyes has proved to be a witness who is adverse to the Crown. I have no doubt that he made the prior statement alleged by the Crown, that it is inconsistent with his testimony at trial to some degree, and that Mr. Reyes is a witness who is unfavourable to the Crown in the sense of assuming by his testimony a position opposite to that of the Crown. While there is much in the prior statement that is consistent with his position today, the inconsistencies exemplify what is apparent about Mr. Reyes: he is determined to the extent possible to avoid saying anything in his evidence that might strengthen the Crown's case against Mr. Vivar. He has been untruthful about some things, and forgetful about others, in furtherance of this endeavour. Whether this effort comes from fear, or friendship, I cannot say with certainty. But it is sufficient to make him an adverse witness.
>
> [11] The question then arises what rights this finding gives to the Crown. While a Crown claims an entitlement to cross-examine Mr. Reyes at large, and many of the cases, without any real analysis, seem to support this position, I do not think it is correct. Certainly the words of s. 9(1) do not hint at such a right. Section 9(1) says no more than that

> upon a finding of adversity, the trial judge has a discretion to permit the party that called the witness to prove the prior inconsistent statement. It may well be that permission to prove the statement of necessity includes the right to confront the witness with it, and cross-examine the witness about the inconsistency. Indeed one would think that confronting the witness with a statement should be a prerequisite to proving it. But there is no suggestion of a right to cross-examine at large.
>
> [12] The confusion may arise as a result of the differences in view about the meaning of the word adverse in s. 9(1). If it meant hostile in the traditional sense, as many courts have thought, then cross-examination upon a finding of hostility, which was permitted at common law, would logically be available after a finding of adversity under s. 9(1). But since in Ontario at least it does not have that meaning, then unless s. 9(1) supplants the common law, it would be illogical to think that a finding of adversity would bring the same rights to a party as would a finding of hostility. There is support in the leading cases for my approach.

Does s. 19 of the *MEA* permit the cross-examination at large of an adverse witness?

[44] All of the cases upon which plaintiffs have relied relate to whether a witness can be cross-examined on a prior inconsistent statement. None of them resemble the facts here where the plaintiffs are seeking leave to cross-examine Fox at large as their own witness because he takes a position different from theirs. Defendants argue that is a much broader interpretation of s. 19 than is warranted. The interpretation should be restricted so as to only provide an opportunity for an "adverse" witness to be cross-examined on a prior inconsistent statement, i.e. the same restrictions which have been placed on s. 23 of the ***EA*** and s. 9 of the ***CEA***.

[45] I agree with defendants' submission that the legislative enactments found in s. 19 of the ***MEA*** as well as s. 23 of the ***EA*** and s. 9 of the ***CEA*** have evolved

from the common law. I also concur that a more restrictive application has been applied to the latter two statutory provisions.

[46] However, s. 19 of the ***MEA*** includes a significant provision - "the party may by leave of the court cross-examine him" - not found in either s. 23 of the ***EA*** or s. 9 of the ***CEA***.

[47] Defendants argue s. 19 is an update of the 1933 ***MEA*** whose s. 16 was virtually identical to the current s. 19. Defendants say that as with s. 23 of the ***EA*** and s. 9 of the ***CEA***, s. 16 evolved from the common law and should also be afforded the same restrictive application notwithstanding the inclusion of the reference to cross-examination. A comparison of the earlier s. 16 and the current s. 19 of the ***MEA*** reveals both to be identical except that the word "him" in the phrase "cross-examine him" is followed by a semi-colon whereas in the earlier ***Act*** it was followed by a comma. Plaintiffs argue the semi-colon is disjunctive and that what follows is a separate thought and is not intended to be a restriction on the nature or scope of the cross-examination. It relates only to prior inconsistent statements and the specific procedure for introducing them. Moreover, if cross-examination was to be limited to cross-examination of the prior inconsistent statement, express language to that effect would have been used.

[48] I am mindful of the observations of Messrs. Sullivan and Driedger referred to in ¶16 that courts must consider whether words were meant to modify the common law concepts and that insofar as legislation is designed to effect special

changes, the weight of past understandings must not be allowed to defeat that purpose.

[49] The first rule in the interpretation of statutes is that the words be given their everyday meaning. The words "the party may by leave of the court cross-examine him" are clear and unequivocal. I have not been provided with any authority relating to s. 19 which precludes a broader interpretation of that section. Accordingly, I conclude that s. 19 of the ***MEA*** permits *inter alia*, with leave of the court, cross-examination at large of a witness who has been proved "adverse" in interest.

[50] Whether "adversity" should be given a broader or narrower interpretation, the best that can be said is that authorities are conflicting on that issue. I tend to favour and accept the interpretation provided for in ***Wawanesa*** which includes meaning "opposite in position".

Is Fox an adverse witness?

[51] A number of questions were put to Fox at the commencement of his examination by plaintiffs for the express purpose of establishing him as an "adverse" witness. That Fox's position in this litigation is opposite to that of plaintiffs' is indisputable. That is clearly established by his statement of defence and his responses to questions put to him in both examinations for discovery and cross-examination on his affidavit. More than that, however, in his preliminary examination at trial, he made it clear he was standing by his opinion that the two Plans provided benefits which were equivalent in value as of January 1, 1997,

the implementation date. When he was cross-examined on February 21, 2006 on his affidavit sworn February 1, 2006, he agreed that control under the new Plan was not the same as it was under the Civil Service Superannuation Plan, that in the new Plan the employer could unilaterally use surplus without employee approval which they couldn't under the Civil Service Superannuation Plan and that as a result, there wasn't equivalency between the two plans (Questions 493 to 495). His sworn evidence at trial clearly conflicts with his sworn evidence on cross-examination on his affidavit.

[52] On being questioned about the discrepancy in his billings, and specifically with respect to a reversal made in relation to the time entered on one of his bills, he indicated he didn't know why it took place. At the aforementioned cross-examination, he gave a different answer stating the reversal is probably what happened due to an agreement which he had previously entered into with the Provincial Auditor's office. These answers are also inconsistent with one another.

[53] There are other instances where Fox's trial testimony was different to responses given under oath at both his examination for discovery and cross-examination with the result that I have no difficulty in finding him to be an "adverse" witness.

Does the court have inherent jurisdiction to permit cross-examination of a party's own witness?

[54] The plaintiffs argued the court has inherent jurisdiction to ensure a trial is conducted fairly and that the *Rules* enable a court to take whatever steps are necessary to ensure fairness.

[55] In ***Uppal***, the following comment at ¶8 supports this proposition:

> [8] However, given the potential prejudice to the accused in this case, I concluded that I had a residual discretion in the interests of trial fairness, and in view of a trial judge's duty to ensure fairness in a trial, to permit defence counsel to cross-examine the witness on matters relevant to adversity. This cross-examination was undertaken.

[56] In any trial, it is important that all evidence presented to the court be subjected to close scrutiny and that is best achieved by cross-examination. Ordinarily, each side calls witnesses to provide evidence which tends to support their position and the other side has an opportunity to test that evidence under cross-examination. That procedure ensures trial fairness.

[57] Here, the circumstances are quite unique in that two individuals, namely, Fox and Singleton, played key roles in the events which ultimately led to this litigation. They did not resist being added as defendants. They were extensively examined for discovery and cross-examined on affidavits. Their evidence in some instances is central to the issues which the court has been asked to determine. However, due to the nature of relief being sought by plaintiffs, Fox and Singleton were discharged as parties to the action. One of the consequences of that decision was to extinguish certain of plaintiffs' rights, including the right to read in portions of the examinations for discovery of Fox and Singleton which were favourable to their case and more importantly, to deny plaintiffs the opportunity to cross-examine them at the trial. The defendants refused, as was their right, to undertake to call Fox or Singleton as witnesses. As a result, it fell on the shoulders of plaintiffs to call them as witnesses for that was the only way the court would have the opportunity to hear their evidence.

That put plaintiffs at an extreme disadvantage for obvious reasons. That unique set of circumstances compelled the plaintiffs to seek the opportunity to cross-examine them.

[58] Despite the Court of Appeal having released Fox and Singleton as parties, the need to have their evidence before the court and under scrutiny is evident in the following comments of Scott C.J.M. in the summary judgment appeal (***Telecommunication Employees Inc. et al. v. Manitoba Telecom Services Inc. et al.***, 2007 MBCA 85) at ¶27 to ¶34:

> **27** The motions court judge firmly dismissed the applications of MTS, Fox and Singleton for summary judgment. He rejected MTS's argument that sec. 15 of the *Act* provided an ironclad defence to MTS and that Fox's decision in the circumstances was not challengeable by the employees. He concluded that a trial was required to ascertain whether Singleton was entitled to the protection of sec. 20 of *The Provincial Auditor's Act*. While conscious of the desirability that any findings he made should not be determinative of the issues to be considered at trial, he dealt in considerable detail with the position of the parties and the factual background. With respect to the allegations against Fox and Singleton, he noted (at paras. 28-29):
>
> - ... they relate to allegations of interference by Singleton influencing the determinations made by Fox, wrongfully interfering and changing Fox's report, usurping his role, collaborating with employees of the defendants [MTS] and otherwise changing, substituting or replacing the review and report made by Fox and knowingly exceeding his jurisdiction.
> - With respect to Fox it is also alleged he acted in excess of his jurisdiction allowing Singleton to interfere with the exercise of his independent role. The Plaintiffs allege the determination that Fox made in his letter of March 5, 1997 is invalid and of no force and effect and because it was influenced and changed by Singleton and it is the February 18, 1997 report that ought to stand.
>
> **28** He then concluded (at para. 35):
>
> - In this case Fox admitted in evidence, he was not an expert in pension plan comparison, and he admitted he

> needed help. This case raises the question of whether he might turn to some other person to make the fundamental recommendations on equivalency. In doing so, if he relied on Singleton, and his colleagues, without giving the employees an opportunity to present their opinion, the opinion rendered by Fox could be viewed as not his opinion, possibly unfair and potentially in error. Procedural Fairness would apply because of the impact that error may have on the financial welfare of the employees. To seek advice from others not knowing if the advice is sound or not does a disservice to the employees. Furthermore, denial of equal access to information provided to the Actuary by MTS, so it might be corrected or argued, is clearly contrary to procedural fairness.

And (at para. 40):

- A duty was owed, in my view, to the employees and employer. A duty to the employees and MTS to be correct was imposed upon Fox. The Government expected independence from the actuary, not incompetence, inexperience or outside influence. The Government's expectation in legislating as it did was entitled to correctness and it is this factor which is called into question in the handling of the surplus, the deficit and the governance of the plan.

29 With respect to the use of surplus by MTS to take a "contribution holiday," he noted (at para. 50):

- ... These issues based on the record of examination and cross examination are not easily understood and contain what was referred to as a polycentric input of factors and whether the process benefits the plaintiffs is seriously questioned.

30 Concerning the extensive documentary and other evidence before him, he wrote that (at paras. 58-60):

- ... it leaves [no] doubt that references to Mr. Fox receiving recommendations or amendments to his report reflect a greater role played by Singleton in finalizing the report than it should. The amendments are not trivial and included wholesale changes to the report.
- The changes made by Singleton to the final report raise an issue of his credibility as to how much input he actually had or alternatively how important he regarded his responsibility to assist Fox.

- Other areas which have been argued create at least an issue of credibility and concern about who was the actual author of the report and Fox's independence. If as alleged Singleton provided the basis for a portion of the report prepared by Fox which included Singleton's ideas and suggestions, the final report including Singleton's material may not have been able to be adequately critiqued by Fox, who was not as informed or familiar with the subject matter. He may not have necessarily been able to tell whether or not Singleton's contribution was correct.

31 He was of the opinion that such conduct could constitute a breach of natural justice.

32 His opinion was that the *Act* did not preclude an appeal from Fox's determination, and that if Fox's final opinion was incorrect, the question whether there was an avenue available to correct it was a matter for a court at trial to decide.

33 He further opined that declaratory relief could be available in the circumstances. As to the standard of review, to the extent that it was relevant (at para. 112):

- The financial impact of non equivalence on the "employees" is substantial over the course of their receiving pension benefits. Reliance on retirement income for a standard of living has a high degree of importance to each member to insure the right amount is calculated. This achievement requires correctness.

And (at para. 117): "[F]airness and correctness are essential components to the review of the actions taken by Fox."

34 In the result, he found that questions about Singleton's good faith and the protection of sec. 20 were genuine issues for trial. A trial judge's assessment of his conduct was necessary to determine the question of bad faith and the effect it may have had on Fox's opinion. Also in issue is whether "this approach taken by Singleton to deliberately keep the information from the employees is a matter of Bad Faith'" (at para. 128). As the motions court judge summarized: "On the basis of Restall's [one of the employees] evidence it leads one to conclude that Singleton controlled the process and the issues which made up equivalency" (at para. 148).

[59] He then went on to say at ¶117:

117 In the end, I am left with the view that it is neither appropriate nor convenient that the issues respecting the determination of equivalency be resolved on the basis of affidavit and documentary

> evidence. As we have seen, the case is one of first impression and the facts are extremely complex. I have little doubt that there will be much "hard swearing" with respect to the roles played by Fox and Singleton and its impact on the determination of equivalency.

[60] In order to have the evidence of Fox (and Singleton) presented in a manner consistent with the principles of fairness and justice, it had to be made subject to the scrutiny of cross-examination by the party "adverse" in interest. On that basis, I have exercised my discretion to permit the cross-examination of Fox by plaintiffs notwithstanding the fact that he appears before the court as their witness.

NATURE OF EXAMINATION TO BE PERMITTED BY DEFENDANTS

[61] Plaintiffs urged the court to restrict the manner in which defendants are permitted to examine Fox. As a result of my ruling, plaintiffs who have called Fox have been permitted to cross-examine him. I am unable to find any justification to deny defendants the same rights. In my view, after cross-examination by plaintiffs, restricting defendants to direct examination would render that exercise meaningless. Moreover, until Fox testifies under cross-examination, there is no certainty what his evidence will be. As a result, I have concluded that procedural fairness requires that I give defendants the same right of cross-examination as was given plaintiffs. At the time of my deliberation and review of all of the evidence, I will consider the weight to be given to Fox's evidence without attaching that evidence to either party's case.

COSTS

[62] The parties may include submissions regarding costs of this motion with their final submissions at the conclusion of the trial.

_____ J.