

CANADA / JUDGMENT

Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP

2020 BCSC 1344

COURT

Supreme Court of British Columbia

DECIDED

15 September 2020

Source: bccourts.ca - Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1344 Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP,

2020 BCSC 1344

Date: 20200915

Docket: S186535

Registry: Vancouver

Between:

Blizzard Uranium Corp., Eros Resources Corp. and Blizzard Finance Corp.

Plaintiffs

And

Nathanson, Schachter & Thompson LLP and Murray Clemens

Defendants

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiffs:

H. Poulus, Q.C.

J. Buysen

Counsel for the Defendants:

C. Dennis, Q.C.

E. Aitken

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 15, 2020

Table of Contents

Background Facts and Nature of the Action.. 3

The Examinations for Discovery.. 7

The Positions of the Parties and the Applicable Rules. 7

Ocean Rodeo. 9

Analysis.. 16

Congruent Relief.. 18

Costs Thrown Away in Preparation for the Discovery.. 20

Summary.. 20

- [1] These cross-applications raise the following issue: In a case where the cause of action has been assigned, does the defendant have a right to examine both the assignor and the assignee?
- [2] The defendants say that Rule 7-2(7) of the Supreme Court Civil Rules creates an additional, or cumulative, right to examine the assignor and the assignee. In response, the plaintiffs argue that the subrule simply clarifies that the defendant may choose to examine the assignor instead of the assignee.
- [3] The issue requires a review of Rule 7-2 relating to examinations for discovery.
- [4] The main issue on this hearing relates to the defendants' proposed examination under Rule 7-2(7) of Mr. Ron Netolitzki as a representative of the assignor, Blizzard Uranium Corp. ("Blizzard Uranium"). However, this application will clarify the nature of that discovery and whether it affects the defendants' right to (also) examine Mr. Anthony Beruschi as a representative of the assignee, Blizzard Finance Corp. ("Blizzard Finance").

[5] For the reasons set out below, I find that on these facts, the defendants are entitled, as of right, to conduct two examinations for discovery. In coming to that conclusion, I am relying on the reasoning of Bracken J. in *Ocean Rodeo Sports v. Oyen*, 2017 BCSC 876 [Ocean Rodeo].

[6] Counsel also sought related, ancillary relief in their cross-applications. I deal with those arguments after the main issue.

Background Facts and Nature of the Action

[7] The background to this action is relevant for the consideration of the positions of the parties.

[8] There are three plaintiffs:

- a) Blizzard Uranium was the registered owner of certain mineral claims and the assignor of the cause of action against the defendants. It is a wholly-owned subsidiary of Eros Resources Corp. Mr. Netolitzky is a current director of Blizzard Uranium.
- b) Eros Resources Corp ("Eros") owned 100% of the shares in Blizzard Uranium.
- c) Blizzard Finance was formed as a result of a divisive plan of arrangement which divided Eros into two companies: Eros and Blizzard Finance. Blizzard Uranium and Eros assigned this cause of action, and other assets, to Blizzard Finance. Blizzard Finance is an unlisted reporting issuer in British Columbia and Alberta. The defendants say that Mr. Anthony Beruschi is the controlling shareholder of Blizzard Finance.

[9] The defendants are a law firm and the partner who acted for Blizzard Uranium and Eros.

[10] The plaintiffs' claim against the defendants is framed in solicitor's negligence, breach of contract, and breach of fiduciary duty.

[11] The plaintiffs' position is that the interests of the three plaintiff entities are completely aligned. They are represented by one counsel.

[12] Counsel for the plaintiffs describes the claim against the defendants as follows:

- a) Blizzard Uranium and Eros retained the defendants to represent them in an action against the province of British Columbia. The province sought to expropriate 17 mineral claims owned by Blizzard Uranium and Eros.
- b) In October 2008, in furtherance of their retainer, the defendants filed a statement of claim against the province with respect to the expropriation of the 17 mineral claims.
- c) In the course of preparing the pleadings the defendants became aware that there was another group of mineral claims (the "B Claims") registered in the name of Blizzard Uranium.
- d) In March 2010, the defendants, without instructions, amended the statement of claim to include the B Claims.

- e) The plaintiffs allege that the defendants knew, or ought to have known, that neither Blizzard Uranium nor Eros beneficially owned the B Claims. The B Claims were beneficially owned by Mr. Beruschi. The plaintiffs say that the defendants' inclusion of the B Claims in the amended statement of claim was negligent and breach their contractual or fiduciary duties.
- f) In October 2011, Blizzard Uranium and Eros reached a settlement with the province on the expropriation claims (the "Province Settlement"). The terms of the Province Settlement included the requirement that they surrender all mineral claims included in the action, including the B Claims. In exchange for the surrender, the province would pay \$30 million plus the costs of that action.
- g) Blizzard Uranium and Eros were not able to complete the Province Settlement because they were not the beneficial owners of the B Claims.
- h) The plaintiffs allege that the defendants learned about the error soon after the Province Settlement, and the defendants embarked on a course of action that was calculated to, and did, obscure the fact that they had made the error.
- i) On the advice of the defendants, Blizzard Uranium and Eros embarked on a series of litigation strategies against Mr. Beruschi and certain companies he controlled in an attempt to obtain the B Claims and complete the Province Settlement.
- j) In March 2014, Blizzard Uranium, Eros, and Mr. Beruschi entered into a letter agreement (the "Beruschi Agreement") that allowed the Province Settlement to complete. The Beruschi Settlement required payment of funds from Blizzard Uranium and Eros to Mr. Beruschi on account of the B Claims, with additional compensation to be determined.
- k) Further, the Beruschi Agreement provided that Eros would be divided into two companies: Eros and Blizzard Finance. The parties further agreed that Blizzard Uranium and Eros would assign to Blizzard Finance all claims against the defendants that are now included in this action.

[13] In the amended response to civil Claim, among other positions, the defendants plead that:

- a) the assignment of the professional negligence claim against the defendants is void and unenforceable at law as a champertous arrangement or an abuse of process;
- b) the defendants were not negligent and they did not owe the plaintiffs any contractual or fiduciary duty. In the alternative, they say they did not breach such duty;
- c) to the extent that Mr. Beruschi was the beneficial owner of the B Claims, the defendants say:
 - i. there was value in the B claims;
 - ii. the province settled all the claims, including the B Claims;
 - iii. thus, to the extent that the plaintiffs in this action had to pay funds to Mr. Beruschi in the Beruschi Settlement, the plaintiffs in this action suffered no loss.

- [14] The defendants further argue that, if any loss was suffered by the plaintiffs, that loss was occasioned by the negligence of Mr. Beruschi.
- [15] The defendants note that Blizzard Finance is not affiliated with the other plaintiffs nor does it share any directors or officers.
- [16] These positions, taken by the defendants, are relevant to this application. The defendants submit that there is no commonality of interest between the plaintiffs on certain aspects of the claim.

The Examinations for Discovery

- [17] Against that backdrop, the defendants now wish to examine for discovery:
- a) Mr. Netolitzki as a representative of the assignor Blizzard Uranium under Rule 7-2(7);
 - b) Mr. Beruschi as a representative of the plaintiff Blizzard Finance. They note that Mr. Beruschi is a controlling shareholder of Blizzard Finance and acted as agent for the company in the negotiations and the ultimate implementation of the Beruschi Agreement.
- [18] The plaintiffs acknowledge that both individuals would have personal knowledge about matters in issue. However, they say that Mr. Beruschi has never had a role within Blizzard Finance (apart from shareholder).
- [19] Having said that, this hearing is limited to the question of whether the defendants have a right to examine Mr. Netolitzki pursuant to Rule 7-2(7) as opposed to examining him under Rule 7-2(5).

The Positions of the Parties and the Applicable Rules

- [20] In overview, the plaintiffs' argument starts from the following positions:
- a) There is no common law right to examine for discovery.
 - b) Every right must be found within the Rules.
 - c) Rule 7-2(1) provides:

Examination of parties

- (1) Subject to subrule (2), each party of record to an action must
 - (a) make himself or herself available, or
 - (b) if any of subrules (5) to (10) apply, make a person referred to in that subrule available,
- for examinations for discovery by the parties of record to the action who are adverse in interest to the party subject to examination.

d) The drafting of subrule (1) is disjunctive. Hence, (with few exceptions noted in the Rule) the Rule provides that a non-individual (i.e. a body corporate) plaintiff, or group of plaintiffs, need only put forward one representative.

e) Rule 7-2(1) refers to subrules (5) through (10). Subrule (5) provides:

Examination of party that is not an individual

(5) Unless the court otherwise orders, if a party to be examined for discovery is not an individual,

(a) the examining party may examine one representative of the party to be examined,

(b) the party to be examined must nominate as its representative an individual, who is knowledgeable concerning the matters in question in the action, to be examined on behalf of that party, and

(c) the examining party may examine

(i) the representative nominated under paragraph (b), or

(ii) any other person the examining party considers appropriate and who is or has been a director, officer, employee, agent or external auditor of the party to be examined.

f) The plaintiffs argue that subrule (5) merely identifies certain classes of persons whom an adverse party can compel to be examined as a "representative" of a "party of record". In response, the defendants submit that subrule (5) is designed to provide the mechanics of choosing the representative to be examined from a corporate or other "non-individual" party.

[21] The plaintiffs acknowledge that, in circumstances where the opposing party cannot obtain sufficient information from one representative, then that opposing party has a right to examine a second representative. However, that test creates a "higher bar" for the opposing party. That position is not in issue in this application.

[22] This application circles around subrule (7) which provides:

Examination of assignor

(7) If an action is brought by an assignee, the assignor may be examined for discovery.

[23] In line with their positions set out above, the plaintiffs submit that this subrule makes provision to include the assignor of a cause of action (or other relevant thing) in the "pool" of potential candidates to be discovered. It does not, they argue, create an independent, or cumulative, right to an additional discovery.

[24] As set out above, the plaintiffs' submissions argued this application based on first principles and analogous case law.

- [25] In response, the defendants say that the decision in *Ocean Rodeo* is binding, well-considered, correct, and applicable to these facts. In *Ocean Rodeo*, Bracken J. ruled that the defendant law firm could discover each of the (individual) assignors of a patent as well as the assignee.
- [26] The defendants submit that in order to be successful on this application, the plaintiffs must first convince me that *Ocean Rodeo* is either distinguishable or should not be followed.
- [27] I agree with the defendants' construction of the issues and, for that reason, I have ordered these reasons to deal first with the *Ocean Rodeo* decision.

Ocean Rodeo

- [28] The decision in *Ocean Rodeo* dealt with a situation where four individuals filed a provisional application for a patent with the United States patent office in 2001. The four inventors then assigned their rights to the corporate plaintiff in 2002. The assignee retained the defendant law firm to perfect the provisional filing for the patent. The plaintiff (assignee corporation) alleged that the law firm missed the deadline for filing. The plaintiff sued the law firm.
- [29] On those facts, the defendant law firm sought to examine three of the individual inventors under Rule 7-2(7) as the assignors of the rights. In his reasons, Bracken J. expressed the issue as whether the subrule should be "given a more broad interpretation as sought by the defendants, or a more narrow interpretation as the plaintiff submits" (at para. 19).
- [30] The parties in *Ocean Rodeo* advised the court that it was a case of first instance in respect of the interpretation of Rule 7-2(7). Justice Bracken assessed the issues as follows:
- [22] The law, and the jurisprudence surrounding the rules, seeks to make more efficient the use of time and money involved in litigation through court rules such as Rule 1-3 (2), the proportionality rule, as well as other rules. The law also seeks to encourage cooperation of the parties in getting at the root of the action, to provide more efficient and cost efficient trials, and to promote early settlement.
- [23] Thus, I accept there must be some limit to the right to examination of an assignor and not simply an open invitation to conduct an unlimited examination. That limit requires at least these two threshold factors. First, the party proposing to conduct the examination must establish that the person to be examined has assigned a right or an interest in property that is relevant to the action or a right of an action itself to be entitled to an examination.
- [24] Secondly, the assignor must show some material evidence relating to an issue in the action that might be obtained from the person it seeks or they seek to examine. It is not an open-ended right to examine any assignor about anything, but a limited right to be used when the threshold requirements of relevancy and materiality are met.

- [25] In this case, in my view, the defendants have shown relevance as to the nature of the invention and relevance of any contribution that the three persons it seeks to examine have made directly or indirectly to the instructions that were given to the defendants' solicitors.
- [26] Thus, I find that there is a right for the defendants to examine the three individuals, but limited to the questions as to the nature of the invention itself and any contribution directly or indirectly that the three individuals may have made to the instructions that were given to the solicitor.
- [31] Both parties agree that this aspect of Bracken J.'s decision has not been considered by subsequent decisions. Hence, it stands as the only decision considering subrule (7).
- [32] The defendants note that part of Justice Bracken's consideration involved the expected benefit that would derive from the multiple discoveries: the defendant would gain a better understanding of the plaintiff's case, thus promoting a more efficient trial and the prospect of early settlement. That benefit is to be balanced against the concepts of proportionality and the efficient use of time and money involved in litigation.
- [33] The plaintiffs acknowledge that the case stands for a proposition that does not assist them. They argue that it is distinguishable or that it was not a considered decision and not binding on me.
- [34] First, the plaintiffs submit that Ocean Rodeo is distinguishable. They argue that the assignors were individuals, whereas the assignor in this case is a corporation.
- [35] I noted above that the plaintiffs proffer a narrow interpretation of the Rules in respect of examinations for discovery. In respect of Rule 7-2(7), the plaintiffs' construction leads to their argument that the use of the term "assignor" only applies to individuals. They argue that it does not give rise to the right to examine a representative of a corporate assignor. The plaintiffs argue that Mr. Netolitzky is not an assignor and, as a result, he does not fall within Subrule (7).
- [36] In support of that position the plaintiffs rely on the decision of Tysoe J. (as he then was) in *Szeto Enterprises Ltd. v. Kitsilano Plumbing et al*, 2004 BCSC 1710 [Szeto]. That case involved Rule 27, the predecessor of Rule 7-2. In a subrogated action, the defendant sought to examine the former claims manager of the insurance company for whose immediate benefit the action was brought. Justice Tysoe noted that a "right to examine an individual for discovery must be found in the Rules" (at para. 10). He declined to allow the discovery on the basis that the proposed representative was not a current or former employee of any party to the action. The insurer, although subrogated, brought the action in the name of the insured.
- [37] The plaintiffs note that Szeto was followed in *Semkiw v. Wilkosz*, 2009 BCSC 1068. In that case, Sewell J., relying on Szeto, concluded that there was no right to examine a representative of the Workers Compensation Board ("WCB") where it had a subrogated interest in a personal injury claim.

- [38] In response to the plaintiffs' argument regarding the narrow meaning of the term "assignor", the defendants submit:
- a) Szeto was decided on the basis that the insurance company was not a party to the action. Further, Justice Tysoe specifically found that the term "person" in Rule 27(8) included bodies corporate:
- [9] I agree with Master Scarth that, under the B.C. Rules, the word "person" has the meaning given to it in the Interpretation Act, R.S.B.C. 1996, c. 238, with the result that it includes corporations.
- b) Semkiw was also decided on the basis that WCB was not a party to the action. It does not assist the plaintiffs.
 - c) The Szeto decision was considered by Fitzpatrick J. in *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2008 BCSC 1883 [Abakhan]. In that case, the defendant (a bankrupt corporation) sought to examine representatives of certain corporate creditors pursuant to Rule 27(8). The defendant argued that the creditors were the "persons" for whose immediate benefit the action was brought. Justice Fitzpatrick, in considering the Szeto decision, wrote:
- [21] The trustee [plaintiff] submits that the case stands for the proposition that one cannot examine a current director, officer or employee of a corporation. However, I do not agree. A corporation cannot be examined except through a representative. If the word "person" includes corporations, as was accepted in Szeto, then in order to examine a corporation for discovery, one must be entitled to examine a representative of the corporation, that is, the person designated by the corporation to answer questions on its behalf.
- d) On that basis, Fitzpatrick J. allowed the defendant to examine representatives of three of the creditors (non-parties).
 - e) In summary, the defendants submit:
 - i. Szeto does not stand for the proposition proffered by the plaintiffs;
 - ii. Similarly, Semkiw does not assist the plaintiffs; and
 - iii. Szeto was considered and distinguished in Abakhan, which supports the defendants' position in this case.
- [39] On that basis, the defendants say that the plaintiffs' submissions on the meaning of the term "assignor" are not correct in law.
- [40] Anticipating the defendants' position on the Abakhan decision, the plaintiffs argue that it was not open to Fitzpatrick J. to reject the reasoning from Szeto unless it fell within the parameters of *Hansard Spruce Mills Limited (Re)*, [1954] 4 D.L.R. 590 (B.C.S.C.) [Hansard Spruce Mills]. In that regard, the plaintiffs submit that Abakhan was wrongly decided.

- [41] I do not need to determine whether Szeto or Abakhan, or both, are correct. The difference between the two cases arises in respect of a defendant examining a representative of a corporate non-party. Szeto did not allow the examination of a former employee of the non-party. Abakhan allowed the examination of a representative of a non-party. In this case, the defendants seek to examine current directors or agents of named plaintiffs.
- [42] Further, neither Szeto nor Abakhan assists the plaintiffs. Neither case stands for the proposition that the term "assignor" in Rule 7-2(7) refers only to an individual. As noted above, both cases interpret the term "person" within Rule 7-2 as including a body corporate. The defendants submit, and I accept, that the plaintiff's proposed construction of the term "assignor" (being limited to individuals) would be nonsensical. I can see no rationale for restricting the right to examine an assignor to circumstances where the assignor was an individual, as opposed to a body corporate.
- [43] Further, the plaintiffs' submissions would require me to find that two prior decisions of this Court (Abakhan and Ocean Rodeo) were not fully, or incorrectly, decided.
- [44] That leads to the plaintiffs' second argument on Ocean Rodeo: it was issued orally and, thus, it is worthy of analysis. The plaintiffs submit that it is an appropriate case to follow the guidance of Wilson J. (as he then was) in Hansard Spruce Mills at 592 where, in the oft-cited excerpt, he wrote:

Therefore, to epitomize what I have already written in the Cairney case, I say this: I will only go against a judgment of another Judge of this Court if:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
- (c) the judgment was unconsidered, a nisi prius judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

[45] The plaintiffs submit that in Ocean Rodeo, the court:

- a) was not directed to relevant authorities and argument relating to existing statutes; and
- b) gave the reasons orally and did not fully consider them.

- [46] With respect to the first point, counsel for the plaintiffs submits Bracken J. was not taken to the arguments that he makes in this application. He says that his submissions on those points constitute, or describe, the proper interpretation of Rule 7-2(1), (5), and (7). Hence, he argues that I am not bound to follow Ocean Rodeo, because Bracken J. did not have the benefit of those arguments on the proper statutory authority.
- [47] With respect to the second point, counsel for the plaintiffs directed me to a number of paragraphs of Ocean Rodeo wherein, counsel submits, Bracken J. considered factors that were not relevant to the proper analysis. Those factors include the discussion of the Federal Court rules, which are distinguishable.
- [48] In response, the defendants argue that there is no reason to accept the plaintiffs' submissions on those points. They note that:
- a) Ocean Rodeo was a case of first instance interpreting Rule 7-2(7);
 - b) the plaintiffs cannot point to a case or statute that was not considered by Bracken J.;
 - c) instead, the plaintiffs argue that their own arguments were not made in Ocean Rodeo. The defendants submit that and "unmade argument" is not an element of the Hansard Spruce Mills test.
- [49] The defendants further submit that it is entirely possible, if not probable, that counsel for the plaintiff in Ocean Rodeo considered but rejected the arguments being made by counsel in this case on the basis that the arguments were untenable.
- [50] On that basis, the defendants submit, the plaintiffs cannot fit their arguments within the parameters of Hansard Spruce Mills.
- [51] Further, the defendants submit that the decision in Ocean Rodeo is correct. They argue that the subrule clearly contemplates that assignors may be either individuals or corporate entities. That interpretation is in accordance with the other subrules where "person" has been interpreted as including a corporation. The defendants submit that, in the case of a corporate assignor, the parties are required to refer to Rule 7-2(5) for the mechanics of deciding who will be the representative to be examined. Further, it makes sense to allow two examinations in circumstances where the assignor may have different realms of knowledge, and perhaps different positions, than the assignee.

Analysis

- [52] I agree with the submissions of the defendants with respect to the Ocean Rodeo decision and the proper interpretation of Rule 7-2(7).

- [53] I find that the decision in Ocean Rodeo is not distinguishable on the basis that the assignors in that case were individuals. It would make no sense to interpret the term "assignor" in a manner that did not contemplate corporations. I further accept the defendants' submission that the structure of Rule 7-2 requires the parties to refer to Rule 7-2(5) to determine the appropriate representative of a corporate "assignor" to be examined for discovery.
- [54] I do not accept the plaintiffs' submission that the Ocean Rodeo decision was poorly considered or falls within the Hansard Spruce Mills exceptions. Those exceptions do not include the possibility that counsel in the later case will formulate an argument that was not made in the earlier hearing. With respect to the Ocean Rodeo decision, the plaintiffs:
- a) cannot point to a subsequent decision that affects the validity of the decision;
 - b) cannot demonstrate that some binding authority or relevant statute was not considered;
 - c) cannot establish that the decision was unconsidered.
- [55] I further note that the reasoning in Ocean Rodeo accords with the reasoning and result in Abakhan with respect to discoveries of multiple entities.
- [56] On that basis, I find that the Ocean Rodeo is binding authority for the proposition that, in the appropriate case, a defendant will have the right to examine both the assignor and assignee of a cause of action (or other element of a claim).
- [57] As set out in Ocean Rodeo (at paras. 23-24), in order to establish that it is an "appropriate case", the examiner must demonstrate (at least) that:
- a) the person to be examined has assigned a right or an interest in property that is relevant to the action, or a right of an action itself; and
 - b) some material evidence relating to an issue in the action that might be obtained from the person it seeks to examine.
- [58] Although this application only relates to the defendants' right to examine Mr. Netolitzky under Rule 7-2(7), I note that the defendants' submissions set out their position that they would be unable to obtain all of the information they required through the examination of only one representative of the plaintiffs.
- [59] As noted above, the defendants' response to civil claim asserts that the B Claims, beneficially owned by Mr. Beruschi, had value. They allege the value of the B Claims was recognized in the Province Settlement. Hence, their position is that the plaintiffs suffered no loss by the inclusion of the B Claims in the original amended statement of claim and the subsequent Province Settlement. The defendants further assert that, if a loss was suffered, Mr. Beruschi's negligent actions were the cause of any loss to the plaintiffs.

- [60] I accept the defendants' submission that they require an opportunity to examine on the position of both the assignor and the assignee in order to obtain a full understanding of the position of each of the plaintiffs. I accept that, if they are limited to a discovery of Mr. Netolitzky, Mr. Netolitzky would not be able to inform himself of the positions of Mr. Beruschi in his capacity with Blizzard Finance, and vice versa.
- [61] On that basis, I accept the defendants' submission that Mr. Netolitzky will have information about the nature of the relationship between the plaintiffs, inter se, and with the defendants before the assignment. The proposed representative of Blizzard Finance, Mr. Beruschi, will have information about other aspects of the claim that cannot be obtained from Mr. Netolitzky.
- [62] I further accept the defendants' submission that, given the defences raised, there is a prospect of a lack of commonality between the positions of the corporate plaintiffs.
- [63] Hence, the two threshold factors set out in *Ocean Rodeo* are met in this case.
- [64] As noted in *Ocean Rodeo*, it is not an open-ended right to examine, but a limited right to examine subject to relevancy and materiality.
- [65] I noted, at the outset, that the plaintiffs made submissions regarding the proper interpretation of Rule 7-2(7), should I find that *Ocean Rodeo* is not binding authority. Having reached my conclusion on the reasoning in *Ocean Rodeo*, I do not need to address the plaintiffs' main submissions on Rule 7-2(7).
- [66] I also noted, at the outset, that counsel sought related, ancillary relief in their cross-applications. I deal with those arguments below.

Congruent Relief

- [67] The plaintiffs submit that, in the event that I find that the defendants are entitled to more than one examination for discovery, then, in turn, the plaintiffs should be entitled to more than one discovery of representatives of the defendants.
- [68] In support of this proposition, the plaintiffs cite the decision in *Blue Line Hockey et al. v. Orca Bay Hockey et al.*, 2007 BCSC 443. Justice Wedge in the face of multiple plaintiffs seeking to examine multiple defendants, noted:
- [38] I do not interpret Rule 27(3) as granting the seven named Orca Bay defendants separate entitlement to each examine a representative of the plaintiffs as a whole, much less each of the seven named plaintiffs. The rights of parties on discovery must, as a matter of common sense and fairness, be congruent rights. As such, it surely cannot be that the plaintiffs in the circumstances of this action have the right to examine for discovery every one of the named corporate defendants regardless of whether there exists commonality of interest among those defendants.

- [69] The plaintiffs further note that this reasoning was cited favourably by Garson J.A., in the chambers decision of *Soprema Inc. v. Wolrige Mahon LLP*, 2014 BCCA 366 which states:
- [22] In *Blue Line Hockey* at para. 38, Madam Justice Wedge emphasized the congruency of rights of parties on discovery and rejected any distinction between a right to examine multiple co-plaintiffs and its reverse. Rather, the rights themselves must be symmetrical and limited to a single examination when the adverse parties have a commonality of interest.
- [70] On the basis of the "congruent" language used in *Blue Line Hockey*, the plaintiffs' counsel submits that, if the defendants have the right to two discoveries, then the plaintiffs should have "congruent" rights to examine more than one of the defendants.
- [71] In response, the defendants interpret the meaning of Wedge J.'s para. 38 somewhat differently. The defendants submit that the plaintiffs cannot point to a distinction in the positions of Mr. Clemens and his law firm. The defendants say that *Blue Line Hockey* stands for the proposition that, "congruent rights" of discovery mean: both sides are entitled to rely on the reasoning that if the opposing parties do not have a commonality of interest, then there is a right to an additional discovery.
- [72] On that basis, the defendants submit that the concept of "congruent" rights does not mean an automatic right for the same number of discoveries as the opponent.
- [73] In my opinion, the defendants' characterization of Justice Wedge's statement in *Blue Line Hockey* is correct. Paragraph 38 (above) specifically states that it "cannot be" that the plaintiff has further rights of discovery "regardless of whether there exists commonality of interest among those defendants."
- [74] I have not been directed to any pleading or evidence that would suggest that the interests of Mr. Clemens would, or could, potentially differ from the interests of his firm. Hence, there being a commonality of interest, I find no basis to allow a further discovery by the plaintiffs beyond any discovery of Mr. Clemens. Of course, if the discovery of Mr. Clemens is not satisfactory, the plaintiffs retain the right to apply for a second discovery.

Costs Thrown Away in Preparation for the Discovery

- [75] The defendants' application seeks the costs thrown away in preparation for the (cancelled) discovery of Mr. Netolitzky. Counsel for the defendants advises that the plaintiffs cancelled the planned discovery the day before it was scheduled to proceed. The defendants made their position (regarding the Rule 7-2(7) examination) known to the plaintiffs on March 26, 2020. They requested the plaintiffs' position. The plaintiffs acknowledge that it took some time to obtain instructions, thus leading to the discovery being cancelled on April 21, 2020, the day before it was scheduled to proceed.

[76] Although the discovery was late-cancelled, and although I have accepted the defendants' position in this application, I am not willing to award costs at this time. I think it is more appropriate to award costs thrown away in the cause.

Summary

[77] The plaintiffs' application for an order that the defendants are not entitled, as of right, to examine multiple representatives of the plaintiffs is dismissed.

[78] It follows that the defendants' application for an order that Mr. Netolitzky attend to be examined for discovery under Rule 7-2(7) is granted.

[79] The plaintiffs' application for congruent, multiple, examinations for discovery is dismissed.

[80] The defendants are entitled to costs in the cause for the costs thrown away of the previously scheduled discovery of Mr. Netolitzky.

"A. Ross J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/13/2020BCSC1344.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/blizzard-uranium-corp-v-nathanson-schachter-and-thompson-lp-2020>

Prepared on 26 October 2026 · Esheria