

CANADA / JUDGMENT

Nordwall v. Moore

2025 BCSC 500

COURT

Supreme Court of British Columbia

DECIDED

3 March 2025

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2025 BCSC 500 Nordwall v. Moore

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nordwall v. Moore,

2025 BCSC 500

Date: 20250303

Docket: S227134

Registry: Vancouver

Between:

Andrew Nordwall

Plaintiff

And

Grace Moore, in her capacity as named trustee of the Helen Stewart Alter Ego Trust, named
Executor and Trustee of the Will of Helen Stewart, deceased, and in her personal capacity

Defendants

Before: The Honourable Mr Justice Crerar

Oral Ruling re the Defendants' Opening Statement

Counsel for the Plaintiff:

G. Behan

A.L. Colpitts

B. Rahn, Articled Student

Counsel for the Defendants:

H. Shapray, K.C.

G. Lo

Place and Dates of Trial:

Vancouver

January 13-17, 20-21, 23-24, 27-31,

March 3, 2025

Place and Date of Judgment:

Vancouver

March 3, 2025

- [1] THE COURT: The plaintiff objects to the defendants' opening statement. To provide a context, we heard several weeks of trials, comprising the plaintiff's opening statement and witnesses, a few months ago. This is phase two of the trial, which will take up this week. It is the logical point for the defendants' opening statement, although there was an hour orphaned at the end of the first phase of this trial where, in theory, the defence could have provided an opening. We almost certainly will come back for a third phase of this trial, in June, for the remaining defence witnesses as well as the closing arguments.[1]
- [2] The opening statement of the defendants is in written form, with, presumably, the oral form going over the bulk of that written opening statement. It is the longest opening statement I have ever seen, as a lawyer and judge, by a considerable length. It is 60 pages -- 198 paragraphs -- long.
- [3] The contents of the opening statement, however, are the primary focus of the objection. Considerable portions set out argument of a nature that one would expect in a closing argument. It also contains considerable comments on the credibility of the plaintiff's witnesses, who were heard in the first phase of the trial. As an example, we reached paragraph 4, when the objection was made:

We now know that [the plaintiff] was prepared to fabricate, intimidate as well as persist in the false character assassination of both [the defendant] and his mother in order to obtain money that he had to know he had no legitimate legal claim to.

- [4] The opening statement also includes considerable quotations from the testimony that has already been provided. It also quotes, at length, emails: for the most part, sent to and from the deceased, Helen Stewart.

- [5] Both sides cited the leading authority on opening statements: *Brophy v. Hutchinson*, 2003 BCCA 21. Brophy arose in the context of a jury trial. I agree with Mr. Behan that the law, however, is identical to both judge-alone as well as jury trials, just as rules of evidence are equally applicable to both.
- [6] As with certain rules of evidence, however, the concerns about prejudice are considerably lessened with a trial such as the present, which is presided over by a judge without a jury. Accordingly, as a matter of case management and as a matter of dealing with this particular objection, I will be considerably guided by my case management powers.
- [7] Brophy states:
- [24] The opening's purpose is to outline the case the party bearing the onus of proof (usually the plaintiff) intends to present. Counsel's goal in opening is, or should be, to assist the jury in understanding what his or her witnesses will say, and to present a sort of "overview" of the case so that the jury will be able to relate various parts of the evidence to be presented to the whole picture counsel will attempt to present.
- [41] In an opening statement, counsel may not give his own personal opinion of the case. Before any evidence is given he may not mention facts which require proof, which cannot be proven by evidence from his own witnesses, or which he expects to elicit only on cross-examination. He may not mention matters that are irrelevant to the case. He must not make prejudicial remarks tending to arouse hostility, or statements that appeal to the jurors' emotions, rather than their reason. It is improper to comment directly on the credibility of witnesses. The opening is not argument, so the use of rhetoric, sarcasm, derision and the like is impermissible: see Halsbury, *supra*, at para.103; Williston and Rolls, *The Conduct of An Action* (Vancouver: Butterworths, 1982); Olah, *The Art and Science of Advocacy* (Toronto: Carswell, 1990) at 8-8; Lubet, Block and Tape, *Modern Trial Advocacy: Canada*, 2nd ed. (Notre Dame: National Institute for Trial Advocacy, 2000).

[emphasis added]

- [8] What I draw from para. 24, and emphasize, is that the opening's purpose is to outline the case that the party intends to present. Counsel's goal in opening is, or should be, to assist the jury or the judge in understanding what his or her witnesses will say and to present a sort of overview of the case, so that the jury will be able to relate the various parts of the evidence to be presented to the whole picture that counsel will attempt to present.
- [9] Paragraph 24 also sets out the purpose of the opening statement: to provide an outline or an overview. This is certainly the dominant theme of leading texts on trial advocacy and trial procedure: the *British Columbia Civil Trial Handbook*, 7th ed (Vancouver: The Continuing Legal Education Society of British Columbia, 2005); J Kenneth McEwan, *Sopinka on the Trial of an Action*, 4th ed (Toronto: LexisNexis, 2020), as well as two trial advocacy texts that are typically used in law school courses on the subject: Steven Lubet, Sheila Block & Cynthia Tape, eds, *Modern Trial Advocacy: Canada*, 2nd ed (Notre Dame: National Institute for Trial

Advocacy, 2000), and Thomas A Mauet, Donald G Casswell & Gordon P Macdonald, *Fundamentals of Trial Techniques*, 1st Canadian ed (Boston: Little, Brown, 1984). The passages on opening statements in these texts also convey the purpose and essence of an opening statement: providing an outline and overview, rather than a full-blown argument.

- [10] That is made express in *Brophy* at para. 41: it is improper to comment directly on the credibility of witnesses. The opening is not argument, so the use of rhetoric, sarcasm, derision, and the like is impermissible. Chief Justice Finch cites various authorities, including some of the authorities that I have just cited.
- [11] So, as a preliminary concern, the present opening statement goes far beyond an outline or an overview. It plunges into evidence. *Prima facie*, by its length and detail, it resembles a closing argument.
- [12] That said, the authorities readily recognize that the thin line between an opening statement and argument is easy to define, but not easy to apply in practice. As stated in *Fundamentals of Trial Techniques* at page 31:

Stating the rule against arguments is quite easy. Determining where the line is, or where you have crossed it, is not easy, since judges differ widely in their interpretation of what constitutes impermissible argument. Some give considerable leeway, while others give the prohibition a strict interpretation.

- [13] Paragraph 4 of the present opening statement, quoted above, gives an example of an argument reserved for closing. Such content is improper in opening statements. As stated in *Modern Trial Advocacy: Canada* at page 338.

As we noted above, the rule against argument is inherent in the very concept of the opening statement. Our system of law, based as it is on the production of testimony and exhibits, has no place for argument that precedes the introduction of evidence. Indeed, jurors are cautioned against discussing the case even among themselves before all of the evidence has been presented. Jurors are not supposed to begin making up their minds until they have heard all of the evidence. Since the limited function of the opening statement is to create a context for understanding, argument is improper.

- [14] Both sides also referred to *Aberdeen v. Township of Langley*, 2006 BCSC 2062, a decision of Mr. Justice Groves, which in turn quotes *Morrison v. Greig*, [2006] O.J. No. 4154 at para. 10. *Morrison* emphasizes the points drawn out in *Brophy*: that the opening statement is intended to be an outline. It is not intended to be an argument designed to "put a spin" on the position of the party.
- [15] In Mr. Shapray's favour, *Aberdeen* does acknowledge that the purpose of an opening statement is to provide the whole story that sets out the perspective of the party producing the opening statement: para. 25.
- [16] Mr. Shapray also relies upon para. 19 of *Brophy*:

[19] The practice as to opening addresses in England is summarized in Halsbury's Laws of England, 3rd ed., Vol.3, at para.107:

When counsel for the new party who does not begin announces his intention to call witnesses, then on the close of his opponent's case he opens his own case, and comments on the evidence that has been given, and states the effect of the evidence which he proposes to adduce.

[17] I emphasize that this passage contemplates defence commenting on the evidence already presented specifically with respect to the anticipated effect of the evidence which he proposes to adduce on that past evidence.

[18] I take it from this that there is some leeway to comment on the evidence that was provided in the plaintiff's case, including on evidence that was provided by Mr. Nordwall, as well as Dr. Shulman, whose expert evidence is also the subject of some commentary within the opening statement.

[19] The last point I would make with respect to the defence's argument for an expanded and argumentative opening statement is the nature of the document agreement before the Court. The deceased, Ms. Stewart, was a particularly prolific writer of emails. Indeed, as the trial judge reading those her emails, I practically hear her voice giving evidence on the stand. Of course, it is not unusual in an estates case to have some sort of documentary evidence of the deceased person's state of mind, intentions, and interactions with the parties. But I suspect that this case allows the testator to play a trial role, and, in effect, provide evidence from the grave, in the most expansive manner ever seen in this jurisdiction. That is my hypothesis, and not based upon a statistical study of our jurisprudence. Suffice to say, in the ten binders of documents before the Court, there are hundreds of pages of emails composed and received by Ms. Stewart.

[20] Mr. Shapray argues that it is appropriate and helpful to the Court to quote from these emails at length in the opening: first, to assist the Court and, second, in a manner analogous to setting out what he would anticipate a given witness would say: as set out above, a traditional purpose for an opening statement.

[21] With the positions and the authority before the Court, I am going to decide this matter largely as a matter of trial management, informed by those authorities which, again, recognize that some of these edicts are not crisply applied in practice, and that the trial judge enjoys considerable leeway.

[22] In its trial brief, defence stated that it would take an hour and a half for its opening statement. There is no way that these 60 pages could be read out in substance in an hour and a half. I will direct that Mr. Shapray be held to his trial estimate of an hour and a half. That will largely effect the paring down of the contents of the opening statement.

[23] I will further direct that the lengthy passages from the testimony that has already been provided not be read out in full. Mr. Shapray will be permitted to reference one or two lines. I am not going to set out a hard-and-fast rule. But counsel is not permitted to start with the

first question and read them all out into the record. There is absolutely no utility in that. It would certainly go beyond the authorities' allowance for a defence opening argument to comment on evidence that has been adduced so far. Mr. Shapray may highlight one or two sentences from each excerpt, but shall not read from them at length.

- [24] A similar direction applies to the quotations from the record, specifically Ms. Stewart's emails. With respect to emails that have already been discussed and canvassed in direct examination and cross-examination, those shall be limited to one line for emphasis or, more ideally, a précis of their contents, so that Mr. Shapray is indeed doing no more than commenting on the evidence that has already come.
- [25] I will give a little bit more leeway to Mr. Shapray with respect to emails that have not yet been canvassed in trial so far. He may read more of those emails in his opening statement. Those do provide, consistent with Aberdeen, a sense of the defence's perspective on the litigation issues, as well as an overview of the evidence that is anticipated to be adduced.
- [26] The corollary of this is that I am going to hold Mr. Shapray to the rationale he has presented to the Court for quoting from these emails in his opening statement: that is, it will save the need of putting those emails to the defendant, Ms. Moore, as part of her direct examination. These emails are already in the record, without need for authentication or elaboration through a live witness. Accordingly, if he decides to shoot his bolt with a given email in opening statement, it will be only very briefly put to the witness in their direct examination if at all. I am sure that Mr. Behan will be on his toes to object to any abuse in that regard. That is my ruling.

"Crerar J"

- [1] These oral reasons have been edited for style and syntax, but their substance has not changed.

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