

2. NON-PARTY WITNESS HAS REFUSED TO GIVE RESPONSIVE STATEMENT OR HAS GIVEN CONFLICTING STATEMENTS [§5.6]

In applying to examine any witness under SCCR, Rule 7-5(1), the applicant must depose that the proposed witness has refused or neglected the applicant's request to give a responsive statement, either orally or in writing, or has given conflicting statements (SCCR, Rule 7-5(3)(c)). The leading case, *Johnston v. Royal Jubilee Hospital*, 1980 CanLII 469 (BC CA), held that where a witness offers to provide written answers to written questions, the prerequisites for an examination have not been met, because the witness cannot be said to have failed to give a responsive statement. This principle was reiterated in *Sindaco v. Gilbey*, [1991] B.C.J. No. 3426 (QL) (S.C.) (Master), and more recently in *Araya v. Newsun Resources Ltd.*, 2020 BCSC 511.

An action arose out of a motor vehicle collision at a four-way stop in *Dhingra v. Hayer*, 2022 BCSC 2042 (Master), with both parties claiming the other failed to stop. The plaintiff's investigator made numerous attempts to contact the defendant's two adult children, who were witnesses to the collision, to no avail. When the plaintiff served an application pursuant to Rule 7-5 for pre-trial examinations of the witnesses, the defendant provided written statements of the witnesses obtained by the defendant's investigator. The court held this was unsatisfactory and made the orders sought as the witnesses were unresponsive to the plaintiff's investigator, who had no opportunity to ask them any questions whatsoever.

Mohajer v. Mohagheghi, 2022 BCSC 1932 (Master) was an action relating to beneficial ownership of shares of the holding company of a pizza business. The plaintiff sought an order for the examination of J, who had allegedly provided accounting advice to the parties concerning the accounting of sums taken from the business as shareholder loans. J did not provide a response to the plaintiff's request for a written statement, and the court ordered J be examined under Rule 7-5.

Similarly, in *D'Anzica v. 0798898 B.C. Ltd.*, 2010 BCSC 1644 the plaintiff sued to enforce an agreement to settle a commercial property dispute and applied under Rule 7-5 to examine a lawyer who was alleged to have represented one of the parties at the settlement meeting. The claimants asked the lawyer, M, to provide a responsive statement as to whom he had represented in the meeting—the personal defendant or the numbered company. The reason for the application under Rule 7-5 was that the plaintiffs wanted to examine M as to whom

he represented at the settlement meeting. The court dismissed the application, stating at para. 7:

The claimant's present application is understandable from their point of view: they do not like [M's] answer and they would like to test the quality of [M's] assertion that he never acted for Mr. Haddrell. However, because the claimant cannot show that [M] has failed to give a responsive statement, or that he has given conflicting statements, they cannot rely on Rule 7-5 for an order that [M] submit to pre-trial examination.

However, where the court was of the view that a party was using the offer of a statement to frustrate proper discovery under former Rule 28 (SCCR, Rule 7-5), an examination under Rule 28 would be ordered. In *Lew v. Fenkarek*, 1994 CanLII 2938 (BC SC) (Master), Master Powers stated at para. 18:

Where a party comes forward after a witness has been unresponsive and offers to act as a conduit to provide the witness a statement, or perhaps more accurately to act as a filter to provide the witness's statement, the party in essence is acting as if they had control of or had some property interest in that witness.

This statement was adopted by the court in *Cowburn v. Northern Health Authority*, 2004 BCSC 1381 (Master), where witnesses apparently in the employ of the defendant, and instructed by a supervisor not to discuss the alleged incident with the plaintiff or the plaintiff's counsel, then came to court and offered through defence counsel to provide witness statements. Master Baker stated at para. 13:

That, with respect, is the inevitable conclusion that I come to here, that notwithstanding that Carr, Hickerty and Kiem are not parties to the proceeding, and notwithstanding that they are clearly witnesses as contemplated by [decided authority], it's inescapable to me that there is an attempt to exert property in the witnesses.

In *Gavin Homes Ltd. v. Coma Construction Ltd.*, 1979 CanLII 771 (BC CA), the proposed witness gave a statement. In an interview with counsel for the applicant, accompanied by opposing counsel, the proposed witness gave a conflicting statement. The court held that former Rule 28(3)(c) (SCCR, Rule 7-5(3)(c)) applied and the witness was ordered to be examined under oath.