Credibility Assessments

Dan Parlow
Kornfeld LLP, Vancouver

Nils Preshaw
Kornfeld LLP, Vancouver

8-9 May 2025

Challenging witnesses' credibility in Canadian civil cases

By Dan Parlow and Nils Preshaw, Kornfeld LLP

In recent years, we have frequently been approached to comment on techniques used to manage witnesses in a variety of situations where credibility has been a central issue. Between us, we have over 50 years' combined experience in dealing in commercial, civil, estates and criminal cases in which we have honed skills directed at uncovering alleged frauds, conspiracies and other business practices involving massive fabrication of evidence.

In the recent past, our collective efforts have been focused on two cases involving valuable redevelopment properties. The first, *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739, appeal dismissed 2020 BCCA 130, leave to appeal to SCC refused 2021-01-21, SCC 39246, turned on allegations by the vendor that an otherwise valid $28.8m contract ought not to be enforceable due to the purchaser's illegal purposes in its creation and circulation, and allegations of conspiracy between the purchaser and the dual-agency realtor. The second case, *Mand v. Cheema*, B.C.S.C.,Vancouver Registry No. S205263 (judgment pending), turned on beneficial ownership of a parcel in an industrial park. In both cases, we made serious allegations of fabrication of evidence and spoliation of documents. The trials in these cases lasted some 77 and 107 days, respectively.

This article is based primarily on lessons learned from our experiences in *Youyi* and earlier cases. Once *Mand v. Cheema* is finally concluded and subject to client approval, we hope to be in a position to offer additional comments based on lessons learned therein.

The court's conclusions in Youyi

In *Youyi,* the purchaser's representative, Mr. Liu, was found to have concocted fabricated stories to cover up his deceit of business partners and of prospective assignees and lenders which ultimately led the court to decline enforcement of an otherwise legal contract. One of the fabricated stories was expressly incorporated into the pleadings of both the purchaser and the realtor with whom we alleged he was colluding. Ultimately, the purchaser was held to have used a number of techniques to mislead others into believing, *inter alia,* that the contract price was $10m higher than

the true price; that a $10m deposit had been paid when it had not; and that during the redevelopment period the property was to be leased back to the vendor on terms more favourable than the true terms.

In addition, realtor Hien, who acted for both purchaser and vendor, was found to have withheld material zoning information from the vendor, and to have engaged in deception of others with whom he was to share his intended sizeable commission on closing.

Based on the illegal purpose doctrine known as *ex turpi causa,* the court declined to enforce the purchase contract, despite a sizeable deposit having been paid to the vendor, all subjects having been removed, and despite over one year having elapsed from contract execution to closing. Nor, given the illegal purposes, was the purchaser able to recover his large deposit despite the ruling that the contract was unenforceable: 2021 BCSC 2144. On the alternative defense of conspiracy, despite various factual elements having been established, the court found on the evidence that the dots from one to the other were not sufficiently connected.

Initial evidentiary challenges

As the evidence of these improprieties was almost entirely outside the vendor's knowledge, it was necessary first to develop theories as to what may have occurred; to test those theories by gaining access to documents and witnesses who were largely within Mr. Liu's and Mr. Hien's spheres of influence; and finally, to refine and ultimately prove those theories in court on a balance of probabilities.

Developing and refining theories

It was alleged against the purchaser's representative, Mr. Liu, that he had used various documents and information in such as manner as to cause parties within his own sphere to believe that the purchase price and deposit were higher than they were; and that the rent payable during a lengthy lease-back period pending redevelopment was higher than it was. We theorized that he had conveyed such information to his own business partners to convince them to invest at a higher price; to his appraiser to coax a higher appraisal value; to his own realtor to convince potential assignees to offer more on an assignment; and to his own mortgage brokers to convince lenders to advance more funds on closing and on more favourable terms than they otherwise would have

offered. We theorized that he had also implicated his own lawyers. We theorized that all of these professionals had been duped by his misinformation.

Once there was a rational basis upon which to support a plausible theory of what had transpired, we could move to collect evidence supporting the theory. The road from theory to proof had many bumps and forks. As evidence was obtained, we would frequently test it against our theories, repeatedly refining them.

As with a jigsaw puzzle, it was essential to constantly re-examine the direction in which we were heading and change course as mandated. Over the years, we have learned that if we leave our minds wide open to being wrong, we inevitably end up with more favourable results.

Pleading amendments, document production motions and interviews to gain compliance with court orders

Since the plaintiff's hired professionals were understandably reluctant to grant us interviews, we worked to develop alternative means of gaining information from them. Central to the task was to apply to the court for a lengthy series of third-party production orders, after which we could confer with each professional to establish whether full compliance had been made. To secure the court orders needed, we devised vast pleading amendments which set out extensive allegations tracking our theories as developed to date. This was an exercise in finesse: the more specific the allegations and the more plausible they were on the evidence collected to date, the more likely we would be to convince the court that the orders requested met the test for relevance, were not unduly prying into non-parties' personal affairs, and would not be considered as mere fishing expeditions.

We proceeded in two stages, starting with an extensive, detailed pleading amendment. Once our amended pleadings were in place, we then proceeded to make detailed document demands from both opposing parties and relevant non-parties.

Reputation of professional persons

Even with the court orders, it required considerable finesse to extract useful information from the plaintiff's professional advisors. It is human nature that a professional person – whether a realtor, mortgage broker, banker, appraiser, accountant, lawyer or otherwise - will feel a natural trepidation

at the prospect of having their personal reputation swept up in allegations of impropriety against a client. For this reason, we are careful to restrict our theories of impropriety so that our allegations do not extend beyond those which are absolutely necessary.

In *Youyi,* except for the dual-agent realtor we were able to communicate clearly to potential professional witnesses that it was neither our intention nor our inclination to make allegations of impropriety on their part. Our theory was therefore focused on the purchaser's representative having had a practice of manipulating professional persons within his ambit into unwittingly assisting him in perpetrating deceptions on his real intended targets. In this way, we were able ultimately to engage the cooperation of his realtors, mortgage brokers, appraisers and architects.

A key method of securing the desired document production orders, while engaging the relevant professionals, was to specify in the amended pleadings both the names of the professional persons and the manner in which we alleged they had been duped by the plaintiff. In this way, they became more comfortable with the notion that our motivation was not to impugn their own credibility or professional status. As they could see that they were not alleged to have been complicit in any plot, they became slowly more cooperative.

As each professional witness was ordered to produce documents, there was a natural window of opportunity for us to engage with that witness both for the purpose of ensuing their production was compliant with the court's orders, and at the same time, to learn as much as possible about the "back story". In some cases, it seemed that the professionals felt this was an opportunity to tell their stories, and to gain the sympathetic ear of their client's opposing counsel.

Documents used for illegal purposes but otherwise legal on their face

As we obtained document production from this assortment of professional people, we refined our theories as to how Mr. Liu had planned to use contract documents that otherwise, on their face, did not bear a taint of illegality. For example, a contract of purchase and sale, a lease-back of the subject property back to the vendor, and a $40,000,000 contract assignment, all appeared on their face to be innocuous commercial documents. As opposed to other *ex turpi causa* cases involving gambling, illegal grow-ops, criminal interest or other patently illegal activity, in this case it was all about the "back stories" which were necessary to establish the plaintiff's illegal purposes.

In this way we were able to establish that an alternative version of the contract had been manufactured to deceive business partners into investing a higher amount; that a lease-back option in the contract of purchase and sale had been placed on its own schedule to the contract to facilitate its later substitution by the purchaser with a false page given to lenders; that an assignment agreement had been procured by use of an appraisal which had itself been manipulated by use of an inflated price; and that the conditions of two lenders' financing agreement were predicated on falsified lease-back information.

Extracting admissions on discovery

On examinations for discovery, we focused on obtaining explanations for events which were inconsistent with the documents on their face; and on obtaining evidence for which Mr. Liu appeared unable to readily determine our objectives in asking the questions. Similarly, evidence was elicited from the realtor, Mr. Hien, which we suspected would ultimately prove incompatible with that of other, disinterested witnesses and with their contemporaneous records.

In many respects, we decided that it would be more favourable to save their concocted explanations for trial, rather than challenging them on their evidence at the discovery. In this way, rather than giving the opposing parties a roadmap from which to determine how to tailor their evidence at trial, we focused on getting each witness to provide us with precise and explicit explanations that we were confident would not stand up at trial. The key objective was to leave no nuance or ambiguity on the record.

The sheer volume of evidence obtained from a wide variety of sources, including interviews of Mr. Liu's own professional witnesses, allowed us to canvass different sequences of events in a manner where the opposing parties were uncertain as to what we were seeking to achieve. In this way, it was difficult for them to devise explanations which might allow them to at trial to escape successful challenge.

Handling of witnesses on cross-examination at trial

At trial, the false explanations of the purchaser's representative having been crystallized on discovery, it proved effective in questioning him, to juxtapose his earlier evidence against the anticipated oral and documentary evidence of his own professionals. He was placed in the

unenviable position of having to disagree with anticipated evidence of his own professional persons in order to support his own story.

Given that the non-party production orders had facilitated our ability to interact with the target witnesses, in many cases it appeared that Mr. Liu was taken by surprise by their anticipated evidence. Our goal was to leave the court with a clear choice between a story told by the plaintiff's key witness and contrary stories told by his own professional persons who had no reason to concoct evidence contrary to their own client's interests.

Armed with the documents and explanations (and in some cases sworn statements) of the professionals retained by the purchaser, and expecting that these individuals would not want to risk giving false evidence to protect their client, it became a relatively straightforward task to elicit their clear, contrary explanations either on cross-examination, or where called by the plaintiffs, by examining them in chief as part of the defendants' case. In either case, we were able to consistently put to Mr. Liu at trial our theory that he had used deceptive tactics to manipulate his own professionals into unknowingly aiding him to achieve illegal purposes. Ultimately, his evidence, as so juxtaposed, was repeatedly rejected by the court.

Notice to cross-examine adverse party as early witness

In the case of realtor Hien, we again sought to put his concocted versions of events to him before he could have the opportunity to explain away the underlying documents. Since he was not a plaintiff but a defendant by counterclaim, we elected to serve notice to cross-examine him as an adverse party witness, at the outset of our case and before calling our client, the main defendant's witness.

By again juxtaposing Mr. Hien's evidence against historical documents and the evidence of more reliable witnesses, we were able to demonstrate not only the falsity of his stories, but also that he had perjured himself on discovery and in his earlier trial evidence (which he ultimately admitted); and further, that shortly before trial he had caused to be deleted from his electronic real estate file documents that were materially adverse to his evidence.

Adverse inferences

We have found that when concocted stories are involved, there are frequently material witnesses not called and material documents not produced. In our experience, it is far too infrequent for counsel in such circumstances to ask the Court to draw adverse inferences.

Adverse inferences are not intended as generalized commentary on a party's conduct of trial; they must pertain to specific facts sought to be established. The party asking for the inference to be drawn must be in a position to clearly articulate precisely what the court is being asked to conclude in consequence of the missing evidence.

Because adverse inferences are, at law, a part of the court's fact-finding process akin to any other factual inference sought, whether the court will ultimately draw such an inference in a given circumstance is highly unpredictable. Some judges are more inclined to draw them than others, and at law their choice is highly discretionary.

Seeking an adverse inference in appropriate circumstances can be an excellent way to highlight an unexplained dearth of evidence on a material issue, even if ultimately the court decides not to accede to counsel's request. In some cases, the trial judge may decide that an adverse inference is unwarranted because the party requesting it may have been equally able to call the witness as part of their own case. In others, the very existence of other sufficient evidence to establish the factual conclusion urged may lead the judge to conclude that the adverse inference is unnecessary.

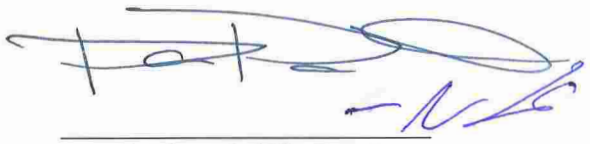
Although an adverse inference is usually sought in consequence of a material witness not called, it can be an equally powerful tool in the case of allegedly suppressed documents. It must be established, on a balance of probabilities, that the party against whom the inference is sought had the impugned documents available either shortly before or at the trial and made a conscious or reckless decision not to bring them forward. The argument is powerful not only in plugging evidentiary gaps necessary to the court's fact-finding on a material issue, but also in impugning the opponent's credibility. It is one thing to fail to call a witness which nobody is technically obliged to call; it is yet another to suppress material documents contrary to one's positive obligation to one's adversary and to the court.

In *Youyi,* the court ultimately drew adverse inferences from the purchaser's failure to call a business partner alleged to have been duped based on a fabricated purchase price and deposit; from the failure to call an architect alleged to have conducted due diligence shortly following the alleged "prior contract"; and from the failure to call an employee alleged to have introduced the parties to each other; that their evidence would not have supported the purchaser's claim that the alleged "prior contract" had in fact existed. With respect to certain other inferences sought from the purchaser's failure to lead evidence, the court found that the evidence before the court was sufficient as to render an adverse inference unnecessary.

With respect to the realtor, the court drew an adverse inference from his failure to produce an alleged commission-sharing agreement, and from his failure to call a friend alleged to have participated in that arrangement. Based on all the evidence, the court found that the only plausible explanation for certain documentary entries made by the realtor was to allow him to funnel half of the sizeable commission away from his other business partners with whom he would otherwise have had to share it.

Conclusion

The foregoing are some of the techniques used to develop and refine theories of fabricated stories concocted by our opposing parties and incorporated into their pleadings, and of fictitious evidence offered by them to support those stories. They are some of the many ways we have found useful in impugning the credibility of witnesses in commercial disputes.



Dan Parlow & Nils Preshaw
April 2025