Federal Court

Cour fédérale

Date: 20201110

Docket: T-775-13

Citation: 2020 FC 1046

Ottawa, Ontario, November 10, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

HENDRIK TEPPER

Applicant

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

[1] The Plaintiff, Hendrik Tepper, brought a motion in writing, pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [FC Rules] seeking an order declaring certain individuals that he intends to call as witnesses at trial in this action as adverse.

[2] More specifically, the Plaintiff submits that in the absence of a Rule within the FC Rules concerning the declaration of a witness as adverse, pursuant to s 40 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA], the laws of evidence in force in the province of Ontario, where this

action was taken and is being pursued, have application to this action. Accordingly, Rule 53.07 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 [Ontario Rules] applies and permits the cross-examination of an adverse party or the officer, director, employee or sole proprietor of an adverse party, to the extent Ontario Rule 53.07 does not conflict with s 9 of the CEA. That is, in this action, the Plaintiff can subpoena individuals who fall within the term "officer, director, employee or sole proprietor of an adverse party" and treat such witness as adverse and cross-examine them (*Farmer Construction Ltd v R*, [1983] CTC 198 (FC); aff'd [1983] FCJ. No. 417 (FCA), see para 4; *Wewaykum Indian Band v. R*, [1995] FCJ No. 1202 (FCTD) at para 576, aff'd except as to costs [1999] F.C.J. No. 1529 (FCA), aff'd 2002 SCC 79; *Fairford First Nation v Canada (Attorney General)*, [1997] FCJ No 270 (FCTD) [*Fairford*], at paras 2-3; *South Yukon Forest Corp v R*, 2010 FC 495 at paras 40-41, rev'd on other grounds 2012 FCA 165).

[3] The Plaintiff submits that in this matter the witnesses that he seeks to have declared as adverse fall into four categories and that Ontario Rule 53.07 applies to each of those categories which are as follows:

(a) Current employees (public servants) of the Government of Canada:

- Constable Audrey Bernier-Sastre, who served as an Interpol Officer for the Royal Canadian Mounted Police between 2008 and 2009 and who to be is currently employed as a National Security Intelligence Analyst for the RCMP;

(b) Current and former Ministers of the Government of Canada;

- The Honourable Diane Ablonczy, who served as Minister of State for Foreign Affairs (Americas and Consular), from January 2011 to July 2013;

- The Honourable John Baird, who served as Minister of Foreign Affairs, from May 2011 to February 2015;

- The Honourable Dominic Leblanc, who served as Vice-chair of the Committee on Foreign Affairs and International Development, from May 2011 to September 2012, and is currently serving as President of the Queen's Privy Council for Canada.

(c) Former employees (public servants) of the Government of Canada:

- Patricia Fortier, who served as Director General, Consular Affairs Bureau (CND) at the Department of Foreign Affairs and International Trade ("DFAIT"), from March 2011 to August 2011;

- Nicholas Newhouse, who served as Second Secretary/Consul with DFAIT, and who was posted to Beirut, Lebanon, from September 2, 2008, until September 11, 2011;

(d) Former exempt staff in the Ministers' office, also known as political staff or ministerial staff:

- Catherine Godbout, who served as a Senior Advisor, Consular Affairs and Treasury Board, to Minister Ablonczy, from January to May 2011.

- Ashley McArthur, who served as Parliamentary Affairs and Issues Management Advisor to Minister Baird, from August 2009 to May 2011, and then as a Senior Policy Advisor, Consular Affairs, to Minister Ablonczy, from May 2011 to July 2013.

[4] The Defendant does not take issue with the general applicability of Ontario Rule 53.07 to this action. However, the Defendant submits that the Court should dismiss the Plaintiff's motion with respect to four of the witnesses – Former Minister Diane Ablonczy, Former Minister John Baird, Constable Audrey Bernier-Sastre, and Nicolas Newhouse – because the Attorney General of Canada declared on July 31, 2020 that it intends to call all of those individuals as witnesses at trial. Accordingly, pursuant to Ontario Rule 53.07(4)(b), those individuals cannot be called as adverse witnesses by the Plaintiff.

[5] The Defendant also submits that the Court should dismiss the Plaintiff's motion with respect to Minister Dominic LeBlanc because the documentary record indicates that the Minister will provide evidence that is aligned with, not adverse to, the Plaintiff's interests.

[6] The Defendant does not oppose the Plaintiff's request to have the remaining three witnesses – Patricia Fortier, Catherine Godbout, and Ashley McArthur – subpoenaed and declared adverse witnesses. The Defendant acknowledges that their evidence will likely be adverse in interest to the Plaintiff's.

[7] Prior to my consideration of this motion, the parties advised the Court, by letter dated October 30, 2020 that they had reached agreement with respect to witnesses that both parties identified as necessary to their respective cases. Specifically, The Honourable Diane Ablonczy, The Honourable John Baird, Audrey Bernier-Sastre and Nicolas Newhouse. The Defendant has undertaken to call these four common witnesses at trial with the result that the Plaintiff will have the opportunity to cross-examine them in the ordinary course. The parties have also agreed that – for that purpose – the Plaintiff's case-in-chief will not close until the four common witnesses have been cross-examined by the Plaintiff. The parties recognize that this manner of proceeding represents a deviation from FC Rule 274, where in the ordinary course the Plaintiff would conclude his case prior to the Defendant adducing evidence, and therefore they jointly request a direction from the Court confirming the above manner of proceeding. The parties also advised that the adverse witness motion, as it pertains to the four common witnesses, is rendered moot by their agreement.

[8] In the result, I need not consider the motion with respect to the four common witnesses and I will, contemporaneously with this Order, issue a direction pursuant to FC Rule 274 permitting the requested variation in the order of presentation at trial.

[9] Additionally, as the Defendant does not oppose Patricia Fortier, Catherine Godbout, and Ashley McArthur being declared adverse witnesses, as requested by the Plaintiff, and I am satisfied that former employees can be captured by Rule 57.03(1) of the Ontario Rules (*Facchini v The Attorney General of Canada*, 2019 ONSC 6559 at para 16; *Graci v New Steel Roofers Inc*, 2010 ONSC 2677, at para 11; *Robinson v Laushway*, [1991] 27 ACWS (3d) 317 (ON Gen Div), at para 48), I will grant the requested order with respect to those witnesses.

[10] This leaves only Minister LeBlanc.

[11] The Plaintiff submits that case law of the Ontario Superior Court of Justice has interpreted Ontario Rule 53.07 as also applying to Ministers (including witnesses who were Ministers at the time of events giving rise to an action, that is, former Ministers), considering the role of Minister to be analogous to that of an officer of a corporation. In that regard, the Plaintiff refers to *Granitile Inc v Canada*, [1998] OJ No. 5028 (Gen Div), at para 23 [*Granitile*] and submits that in *Granitile* the court in that case had good reason to conclude that former Ministers remain closely connected and “controlled by loyalty or obligation” to the Crown. In this case, connection and loyalty is illustrated by the oaths they take as part of their appointment to cabinet.

[12] Specifically, the Plaintiff submits that pursuant to the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 11, appointment to the Prime Minister of Canada's cabinet requires that an individual be appointed as a Member of the Privy Council. All prospective Ministers must, among other things, swear the Oath of the Members of Privy Council. That oath contains several elements that speak to ongoing obligations for members of the Privy Council, notably the requirement to be a faithful servant, as well as the requirement to maintain secrecy surrounding matters raised in Privy Council. Further, an appointment to the Privy Council does not terminate once the individual is no longer a Minister, as the individual is only removed from the Privy Council by order of the Governor General. Individuals may continue to be represented by the title "honourable" and the post-nominal letters, "PC".

[13] The Defendant does not take issue with the question of whether a former or current Minster may fall within the scope of Ontario Rule 57.03. However, the Defendant points to the affidavit of Ansle John [John Affidavit], legal assistant with the Civil Litigation Section of the Department of Justice, sworn on October 29, 2020, and filed in support of the Defendant's response to this motion. This affidavit attaches as exhibits a transcript of Minister LeBlanc's comments made on June 14, 2011 in the House of Commons (Exhibit "B"); an email providing the transcript of Minister LeBlanc's comments at the Question Period on June 20, 2011 (Exhibit "C"); an email providing the transcript of Minister LeBlanc's comments at a news conference on June 21, 2011 (Exhibit "D"); and, the partial transcript of an interview of Minister LeBlanc by CBC on December 15, 2011 (Exhibit "E").

[14] The Defendant also notes that Minister LeBlanc is currently a sitting Member of Parliament and Minister in the Liberal Government of Canada. However, during the period when the Plaintiff was detained in Beirut (March 2011 to March 2012), now Minister LeBlanc was then a Member of Parliament for New Brunswick in the then Liberal opposition party, he sat in the Liberal Caucus as the Foreign Affairs Critic. As such, he made public statements on several occasions indicating that he did not believe that Canadian officials were doing enough to secure the Plaintiff's release from detention, as demonstrated by the above Exhibits. The Defendant submits that it is clear from both the tenor and substance of then Member LeBlanc's comments that, for the purposes of this trial, his interests are aligned more closely with the Plaintiff's, not the Defendant's, and thus he is not an adverse witness who properly fits under Ontario Rule 53.07.

[15] Further, during the relevant period Member LeBlanc was a member of the Liberal opposition party whose objectives were not aligned with those of the Government of Canada, then governed by the Conservative party. In that respect, the Plaintiff's reliance on the *Constitutional Act 1867*, the Oath of the Members of the Privy Council, and related jurisprudence is misplaced because, at the material time, Member LeBlanc had no allegiance to the Conservative Government of Canada since he did not form part of it; nor was he a member of former Prime Minister Harper's Cabinet. And while the Plaintiff points out that Minister LeBlanc is presently the President of the Queen's Privy Council for Canada, Minister LeBlanc is not being called to testify in his capacity as a sitting Minister of the current Government.

[16] Accordingly, the Defendant submits that the Court should deny the Plaintiff's request to have Minister LeBlanc declared an adverse witness.

[17] In reply, the Plaintiff rejects the Defendant's view that Minister LeBlanc's interests are more closely aligned with those of the Plaintiff and submits that the Court should not take such a narrow view of Minister LeBlanc's obligations to the Crown. Expressing concern for the manner in which a governing party is handling a situation where a Canadian citizen is being detained abroad should not be so easily equated with opposition to the Crown itself.

[18] The Plaintiff also again refers to the Oath of the Members of Privy Council and submits that as the current President of the Queen's Privy Council for Canada, Minister LeBlanc is obliged to act as a "true and faithful servant to Her Majesty Queen Elizabeth the Second", however, the Plaintiff's action is against the Crown. Accordingly, it is not evident that Minister LeBlanc's interests are aligned more closely with the Plaintiff's, as the Defendant submits. Further, Minister LeBlanc is also bound to secrecy regarding "all matters committed and revealed" in Her Majesty's Privy Council for Canada (*Babcock v Canada (Attorney General)*, 2002 SCC 57, at para 19; CEA at s 39). While the events in question arose prior to Minister LeBlanc's appointment to Her Majesty's Privy Council for Canada, it is reasonable to assume that Minister LeBlanc, in view of his secrecy obligations, will be cautious in the manner he provides his testimony.

[19] The Plaintiff submits that given Minister LeBlanc's ongoing obligations to the Crown, both in regard to loyalty and secrecy, and having considered the rationales in *Granitile* and *Fairford*, Minister LeBlanc is captured by Ontario Rule 53.07.

Analysis

[20] Ontario Rule 53.07 states as follows:

> **CALLING ADVERSE PARTY AS WITNESS**
>
> ***Persons to Whom Rule Applies***
>
> **53.07** (1) Subrules (2) to (7) apply in respect of the following persons:
>
> 1. An adverse party.
>
> 2. An officer, director, employee or sole proprietor of an adverse party.
>
> 3. A partner of a partnership that is an adverse party.
>
> ***Securing Attendance***
>
> (2) A party may secure the attendance of a person referred to in subrule (1) as a witness at a trial,
>
>> (a) by serving the person with a summons to witness, or by serving on the adverse party or the lawyer for the adverse party, at least 10 days before the commencement of the trial, a notice of intention to call the person as a witness; and
>>
>> (b) by paying or tendering attendance money calculated in accordance with Tariff A at the same time. O. Reg. 536/96, s. 4; O. Reg. 575/07, s. 1.
>
> (3) If a person referred to in subrule (1) is in attendance at the trial, it is unnecessary to serve the person with a summons or to pay attendance money to call the person as a witness. O. Reg. 536/96, s. 4.
>
> ***When Adverse Party may be Called***

> (4) A party may call a person referred to in subrule (1) as a witness unless,
>
> > (a) the person has already testified; or
> >
> > (b) the adverse party or the adverse party's lawyer undertakes to call the person as a witness. O. Reg. 536/96, s. 4; O. Reg. 575/07, s. 4.
>
> ***Cross-examination***
>
> (5) A person referred to in subrule (1) may be cross-examined by the party who called him or her as a witness and by any other party who is adverse in interest to that person.
>
> ***Re-examination***
>
> (6) After a cross-examination under subrule (5), the person may be re-examined by any party who is not entitled to cross-examine under that subrule.
>
> ……

[21] This, and similar rules of civil procedure in other provinces have been enacted for the purpose of ensuring that if evidence of an adverse party is required it may be secured (*Fairford* at para 6). In securing the evidence of an adverse party, "the Rule therefore facilitates a party's ability to get at the truth by enabling that party to cross-examine representatives of his opponent without having to establish the hostility of that witness under the common law test" (*Granitile* at para 23). An adverse witness in this context is "one who is opposed in interest or unfavourable in the sense of opposite in position to the party calling that witness" (*R v. Figliola*, 2011 ONCA 457 at 50 citing *Hanes v. Wawanesa Mutual Insurance Co*., [1961] O.J. No. 562 (ONCA)). Once a witness is declared as adverse, he or she may be cross-examined by the party who called him or her as a witness (Ontario Rules 53.07(5)). After cross-examination, the adverse witness may be re-examined by a party to the proceeding who he or she is not adverse in interest (Ontario Rules 53.07(6)).

[22] In this matter, having reviewed the Exhibits to the John Affidavit, I agree that at the time the comments contained therein were made, Mr. LeBlanc as a Member of the House of Commons of the then Liberal opposition party, was clearly not aligned with the manner in which the then Conservative ruled Government was responding to the Plaintiff's detention in Lebanon. That is, at that time, Member LeBlanc's position was more closely aligned with the Plaintiff's than with the then Government of Canada. His interest was adverse to the then Government.

[23] However, subsequent to the Plaintiff's detention in Lebanon, the government changed and now, at the time of trial, the Liberal party governs Canada. Minister LeBlanc is a Minster of that Government and is President of the Queen's Privy Council for Canada. Thus, he is now a member of the Government that is defending against the Plaintiff's claim against the Crown. I note in passing that pursuant to section 23 of the *Crown Liability and Proceedings Act*, RSC, 1985. C C-50, proceedings against the Crown are to be taken in the name of the Attorney General unless authorized by statute to be in the name of the relevant agency to which the proceedings are against.

[24] In *Fairford,* this Court considered a motion by the plaintiffs therein seeking an order enabling them to cross-examine their own witness as an adverse party under Manitoba Court of Queen's Bench Rule 53.07, which is similar to Rule 53.07 of the Ontario Rules. The Court found that the Rule applied and then considered whether the witness was an officer of the defendant as that term was used in Rule 53.07. The witness had been an employee of the Department of Indian Affairs. In the early 1960's, he was Superintendent of the Fisher Nation River Agency but by 1980 he had been promoted to Regional Director General, Alberta. The defendant in the

action, the Attorney General for Canada, argued that the relevant time at which to consider whether the witness was an officer of the defendant was when he worked in Manitoba in the 1960's and at that time he was an employee and not an "officer" of the defendant. This Court stated:

> 6 However, Rule 53.07 contains no condition that in order to be considered an officer for the purposes of the Rule, an individual must have been an officer at the time relevant to the litigation. The purpose of the rule is to ensure that if the evidence of an adverse party is required it may be secured. The rule recognizes that an adverse party, by definition, is adverse in interest to the party seeking his or her evidence and therefore the appropriate way in which to examine that adverse party is by way of cross-examination. Where the adverse party is not a natural person, i.e, a corporation or government, an officer or director is the person whose attendance may be secured and who may be cross-examined. **Clearly a present officer or director will have an interest that is, if not identical, similar to the interest of the adverse party**. That is why cross-examination is allowed in the case of such a witness. **The fact that the evidence given by an officer may relate to a time when he or she was not an officer is not a relevant consideration. If the person at any time has achieved the position of officer with the adverse party, the rule may be invoked.**
>
> (emphasis added)

[25] In *Fairford* the subject witness had left the Department of Indian Affairs in 1983 and had not been employed since then with the federal government. This Court found that by the passage of time and the witness's subsequent role as a consultant to Indian Bands there was a substantial distance between him and the Government of Canada. His current interest was not similar or identical to the government and therefore "his personal position today, in relation to the government, is very different from what it was when he was Regional Director General of the Department of Indian Affairs for Alberta". These considerations persuaded the Court that the

matter before it would not be an appropriate case in which plaintiff's counsel should be able to treat the witness as an officer of an adverse party and cross-examine him.

[26] In my view, *Fairford* demonstrates that Ontario Rule 57.03 may be applied in a situation such as this, where Minister LeBlanc's role – and interest – has shifted. While he was a member of the opposition at the time the Plaintiff was detained, he is now a Minster with the Government that is currently defending the action.

[27] This is also supported by *Granitile* where the Ontario Court of Justice considered Ontario Rule 53.07 in the context of The Honourable Elmer MacKay who was the relevant Minister for part of the time period relevant to that action:

> 23 Counsel for the plaintiffs also subpoenaed and sought to cross-examine The Honourable Elmer MacKay who was the Minister of D.R.I.E. for part of the period relevant to this action. It was Mr. MacKay's decision not to provide a Cape Breton Loan which led to the termination of the government's financial commitment to the project in 1991. The right to cross-examine under Rule 53.07 applies to (1) an adverse party, (2) an officer, director, employee or sole proprietor of an adverse party, and (3) a partner of a partnership that is an adverse party. As a Member of Parliament and a Cabinet Minister, Mr. MacKay is not a mere employee of the defendant, Her Majesty the Queen in Right of Canada. Neither is he an officer or director of the Crown, although the function he performed within government is analogous to that of an officer or director of a corporation. In one sense he could be said to be the actual adverse party since he was the representative of Her Majesty in this Ministry. However, none of these characterizations fits exactly. I was not directed to and am not aware of any case directly on point. However, in my opinion, the general principles set out in Rules 1.04(1) and (2) are applicable. Thus, Rule 53.07 should be liberally construed to secure the just determination of this proceeding on its merits: Rule 1.04(1). Further, where a matter is not provided for in the rules, the practice shall be determined by analogy to them: Rule 1.04(2). The purpose of Rule 53.07 is to enable a party to call as a witness a person who is essentially his

> opponent in the litigation without being hampered by the requirement that he can only ask non-leading questions. **Where the witness is the adverse party, or is so closely connected to the adverse party as to be aligned in interest, or is subject to being controlled by loyalty or obligation to the adverse party, the right to cross-examine that witness is crucial.** The Rule therefore facilitates a party's ability to get at the truth by enabling that party to cross-examine representatives of his opponent without having to establish the hostility of that witness under the common law test. The breadth of the Rule suggests that its drafters intended it to apply equally to corporations and to natural persons. Although the Crown does not fall squarely within either category, I consider it unfair for parties litigating against the Crown to be in a worse position under Rule 53.07 than parties litigating against any other suable entity. The Crown is clearly subject to the Rule in respect of its employees. It would, in my view, be unjust to interpret the Rule so as to provide the plaintiffs with the right to cross-examine low level civil servants but to deny that right in respect of the most senior representative of the Crown, the Minister himself. Since the Rule does not deal specifically with Ministers of the Crown, I would interpret it by analogy as being the equivalent of either the adverse person or an officer or director of the adverse person. Therefore, I ruled that the plaintiffs were entitled under Rule 53.07 to cross-examine the Minister.
>
> (emphasis added)

[28] In the circumstances of this matter, while Minister LeBlanc was not a member of the governing party and did not make decisions related to the Plaintiff when the events leading to this litigation occurred, Minister LeBlanc is now a representative of Canada, the Defendant in this action. He is now closely connected to the Government of Canada.

[29] I agree with the Plaintiff that this close connection is demonstrated by the oath of Members of the Privy Council:

> ***Oath of the Members of Privy Council***
>
> I, [insert name], do solemnly and sincerely swear (declare) that I shall be a true and faithful servant to Her Majesty Queen Elizabeth

> the Second, as a member of Her Majesty's Privy Council for Canada. I will in all things to be treated, debated and resolved in Privy Council, faithfully, honestly and truly declare my mind and my opinion. I shall keep secret all matters committed and revealed to me in this capacity, or that shall be secretly treated of in Council. Generally, in all things I shall do as a faithful and true servant ought to do for Her Majesty.
>
> So help me God.

[30] I do not agree, however, that the requirement to maintain secrecy surrounding matters raised in Privy Council, as supported by s 39 of the CEA, informs whether the Minister can be considered as adverse. This is not a question of his interest or loyalties, but a requirement of oath and office. As s 39 states:

> 39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

[31] The fact that this obligation may cause the Minister to "be cautious in the manner he provides his testimony" does not, to my mind, mean that he is adverse in interest to the Plaintiff.

[32] In conclusion, I am satisfied that as Minister LeBlanc is a current Minster of the Government of Canada, and President of the Queen's Privy Council for Canada, his interests as a representative of Canada, the Defendant in the action, are therefore adverse to those of the Plaintiff.

ORDER IN T-775-13

THIS COURT ORDERS that

1. Pursuant to section 40 of the *Canada Evidence Act* and Rule 53.07 of the Ontario *Rules of Civil Procedure* the following individuals, whom the Plaintiff intends to subpoena and call as witnesses at the trial of this action, are declared to be adverse and may be cross-examined by counsel for the Plaintiff in accordance with that Rule:
    i. The Honourable Dominic LeBlanc;
    ii. Patricia Fortier;
    iii. Catherine Godbout; and
    iv. Ashley McArthur.
2. The Plaintiff shall have its costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-775-13
STYLE OF CAUSE:	HENDRIK TEPPER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*
ORDER AND REASONS:	STRICKLAND J.
DATED:	NOVEMBER 10, 2020

WRITTEN REPRESENTATIONS BY:

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