SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v The Attorney General of Canada*, 2016 YKSC 47

Date: 20160906
S.C. No. 06-A0092
Registry: Whitehorse

BETWEEN:

ROSS RIVER DENA COUNCIL

PLAINTIFF

AND

THE ATTORNEY GENERAL OF CANADA on behalf of and as the representative for Her Majesty the Queen in right of Canada

DEFENDANT

Before Mr. Justice L.F. Gower

Appearances:
Stephen L. Walsh — Counsel for the plaintiff
Suzanne M. Duncan — Counsel for the defendant

RULING
(Application to set aside notice under subrule 42(17))

[1] This is an application by the defendant, Attorney General of Canada ("Canada"), for an order that the notice of intention which the plaintiff, Ross River Dena Council ("RRDC"), served upon Shari Borgford (or Canada), for the purpose of calling her as a witness, be set aside. The notice was served pursuant to sub-rules 42(16) and (17) of the *Rules of Court*, which provide as follows:

> 42(16) Subrules (17) to (20) apply where a party wishes to call as a witness at the trial
>
> (a) an adverse party, or

> (b) a person who, at the time the notice referred to in subrule (17) is delivered, is a director, officer, partner, employee or agent of an adverse party.
>
> (17) If a party wishes to call as a witness a person referred to in subrule (16), the party may deliver to the adverse party a notice in Form 41 together with proper witness fees at least 7 days before the day on which the attendance of the intended witness is required.

[2] Canada's application is pursuant to sub-rule 42(19)(b), which states:

> (19) The court may set aside a notice delivered under subrule (17) on the grounds that
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> …
>
> (b) the evidence of the person is unnecessary,
>
> …

[3] I understand that Ms. Borgford acted as the Regional Director General of the Yukon Regional Office of Indian and Northern Affairs Canada ("INAC"), when the Region was without a permanent Regional Director General. This was from December 6, 2010 to August 2, 2011. I also understand this to be the agency of the federal government in Whitehorse responsible for the negotiation and implementation of land claim agreements with Yukon First nations.

[4] Ms. Borgford swore an affidavit in this proceeding (the "06 Action") on February 28, 2011, in which she provided answers to 51 interrogatories, many of which had several sub-questions. Ms. Borgford also swore an affidavit in the proceeding related to this one, S.C. No. 05-A0043 (the "05 Action") on September 27, 2013, in which she purports to clarify and change an answer she gave in her earlier affidavit to questions 39 (i), (ii) and(iii). Her evidence in this regard relates to whether, when and

how the parties to the Umbrella Final Agreement ("UFA") ratified that Agreement as required by s. 2.2.8 of the UFA.

[5] This ratification issue is potentially of central importance to RRDC in the trial in the '06 Action, as it relates to the issue of whether Canada negotiated in good faith in the modern era (roughly the late 1970s to the early 2000s) with RRDC towards obtaining a land claim agreement.

[6] I further understand that RRDC's counsel has cross-examined Ms. Borgford on these two affidavits and intends to introduce transcripts of that cross-examination as evidence at the trial of the '06 Action.

[7] RRDC's counsel informs me that he does not expect his cross-examination of Ms. Borgford at the trial will take more than approximately half-a-day. He also says that he expects Ms. Borgford may be the only witness called by RRDC, as the other evidence in the trial will be tendered by way of documents, admissions and other written material.

[8] Canada's counsel submits that Ms. Borgford's evidence is unnecessary because she has already been cross-examined on her affidavits and because virtually all of her evidence is based upon information and belief, as she was not responsible for the Yukon Regional Office of INAC during the relevant time period when the negotiations were ongoing between RRDC and Canada. Further, outside of the time she acted as Regional Director, Ms. Borgford's principal responsibilities as an employee of the federal government were in areas of finance and not land claims negotiations.

[9] For the above reasons, Canada's counsel has indicated that she does not expect to call Ms. Borgford as a witness at the trial of the '06 Action. Further, Canada's counsel refuses to make Ms. Borgford available for cross-examination at the trial.

[10] Canada's counsel referred to a number of cases in support of its application. In *Russell v Russell*, 2002 BCSC 1233, Davies J. observed that the rules in British Columbia equivalent to the Yukon sub-rules 42 (16) and (17) can put a defendant at a disadvantage because, if the plaintiff is permitted to call the adverse party or witness as part of their case, and that party or witness testifies as part of the defence case, then the plaintiff has two opportunities to cross-examine (para. 31). However, Davies J. further commented that if the defendant undertakes to call him or herself, or the proposed adverse witness, then there is little need to employ the sub-rules (para. 32). Obviously, this case is distinguishable from the one at bar, since the defendant has made no such undertaking to call Ms. Borgford at the trial.

[11] In *Murao v Blackcomb Skiing Enterprises Limited Partnership*, 2005 BCCA 43, the British Columbia Court of Appeal also commented on the "perceived tactical advantage" to a plaintiff in calling an adverse witness as part of its case (para. 22). However, the Court also went on to comment that there is "little place for calling an adverse witness when, as here, there has been full discovery of the witness which can be read in and an undertaking has been given that the witness will be called" (my emphasis). Again, the case is distinguishable from the one at bar, in which no such undertaking has been given.

[12] In *Dawson v Tolko Industries Ltd.*, 2010 BCSC 1384, Butler J. referred to both *Russell* and *Murao*, but nevertheless observed at para.16:

> … The use of an adverse party witness may, in certain circumstances, be an effective way to prove a party's case. Counsel should not be deprived of that option when the language in the adverse party witness rule does not contain that limitation.

Butler J. then went on, at para. 19, to emphasize the need for restraint by courts in preventing a party from calling an adverse witness:

> 19 Further, as I noted in *Canadian Bedding*, the discretion granted to the court must be exercised with restraint. In *De Sousa v. Kuntz* (1988), 24 B.C.L.R. (2d) 206 (C.A.), Wallace J.A. cautioned that it was only in a clear case that a judge should exercise his discretion to set aside a subpoena on the ground of necessity. He emphasized, at 214, the need for a judge to be acutely aware that if he sets aside a subpoena:
>
> > ... he is substituting his view for that of counsel as to the need to subpoena a certain witness and that he will seldom have as complete an appreciation as counsel does of the benefits -- both tactical and substantive -- that a litigant may derive from calling a certain witness.
>
> That caution applies with equal force in relation to the adverse party witness rules. If plaintiff's counsel decides to utilize the adverse party witness rule in order to satisfy the onus of proof borne by the plaintiff, the court should be reluctant to interfere. (my emphasis)

[13] In *Alnoo v Colgate-Palmolive Canada Inc*., 2012 BCSC 1342, Wedge J. agreed with the comments of Butler J. in *Dawson*, quoted immediately above (at para. 31), and continued as follows:

> 29 The recent decision of Mr. Justice Butler in *Dawson v. Tolko Industries Ltd.*, 2010 BCSC 1384, examines the meaning and effect of these provisions in detail. He observed at para. 18 that the Court is granted only limited jurisdiction to set aside an adverse witness notice. It is only where the evidence of the person is "unnecessary" that the Court can set aside the notice.

> 30 Further, as the Court noted at para. 19, it is only in a clear case that a judge should exercise his or her discretion to set aside a subpoena on the ground that the evidence is unnecessary. That is because the Court should be very cautious about second guessing the litigants concerning the benefits they may derive from calling a particular witness. (my emphasis)

[14] In *Lam v Chiu*, 2012 BCSC 441, Gray J. also referred with approval to Butler J. in *Dawson*. She further emphasized the limited discretion of courts to prevent a plaintiff from employing the adverse witness rule, and even went so far as to say that courts should not do so unless it would be "abusive or clearly unjust" otherwise:

> 24 In my view, I have a discretion to restrict evidence being tendered at trial, but it is a very limited discretion, directed towards ensuring that there is a fair trial procedure. Where the Rules provide for a specific procedure, in my view, I could only interfere where allowing the procedure would be abusive or clearly unjust.… (my emphasis)

[15] In the case at bar, Canada will not be calling Ms. Borgford as a witness. Therefore, she will not be available to RRDC's counsel for cross-examination at the trial unless I allow RRDC to call her as a witness as part of the plaintiff's case pursuant to the adverse witness rule. RRDC's counsel assures me that his cross-examination of Ms. Borgford will not be overly long and is not expected to take more than half a day. Further, this is not a situation where the plaintiff will have an unfair advantage over the defendant by having two opportunities to cross-examine the same witness. I am not exactly sure what the nature of the cross-examination will be, other than it will almost certainly touch upon the area of the disputed ratification. However, as Butler J. observed in *Dawson*, courts seldom have as complete an appreciation as counsel does of the benefits, both tactical and substantial, that a litigant may derive from calling a certain witness. Therefore, I am to be very cautious before second-guessing what

benefit RRDC may derive from calling Ms. Borgford. For these reasons, I am dismissing Canada's application.

[16] RRDC will have its costs in the cause for this application.

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GOWER J.