SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia (Attorney General) v. Barton, 2014 NSSC 145

Date: 20140404
Docket: Hfx No. 396602
Registry: Halifax

Between:

Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia

Applicant

v.

Gerald Gaston Barton

Respondent

Judge:	The Honourable Justice James L. Chipman
Heard:	April 4, 2014 in Halifax, Nova Scotia
Written Decision:	April 25, 2014
Counsel:	Darlene Willcott and Sheldon Choo, for applicant Dale Dunlop and Ian Gray, for the respondent Jessica Harris and Angela Green for the Attorney General of Canada (*watching brief*)

By the Court:

[1] By Notice of Motion filed April 1, 2014, The Attorney General of Nova Scotia, a defendant in this proceeding, moved to abridge the amount of time required for notice to quash the subpoena of Lena Diab, Attorney General of Nova Scotia, compelling her to give evidence at trial beginning on April 7, 2014.

[2] On the same date, April 1, 2014, counsel for the plaintiff, the party issuing the subpoena, consented to the abridgement of time requested by the Attorney General of Nova Scotia. This was confirmed at the pre-trial conference held on April 2nd and by way of correspondence dated and filed on April 2nd by the plaintiff in respect of this Motion.

[3] During the pre-trial conference, plaintiff's counsel raised, for the first time, his wish to call another witness, the plaintiff's spouse, Phyllis Maynard. I advised the parties that I would hear argument on this issue during the within Motion, heard this morning, April 4, 2014, in regular chambers and I was pleased to learn that the parties have now agreed Ms. Maynard may testify at the trial of this matter next week.

[4] By way of background to the within Motion, it is important to review the relevant chronology in this litigation:

- On June 11, 2012, the plaintiff commenced an action against the defendant, the Attorney General of Nova Scotia claiming malicious prosecution. He also brought an action against the RCMP for negligent investigation.

- On June 15, 2012, the plaintiff filed an Amended Statement of Claim naming the Attorney General of Canada as defendant in the place of the RCMP.

- The Attorney General of Canada served the plaintiff with a Demand for Particulars in June 2012. The Answer to Demand for Particulars was filed on July 5, 2012.

- The Attorney General of Canada served the plaintiff with a Demand for Particulars and The Answer to Demand for Particulars was filed on July 17, 2012.

- On August 3, 2012, the Attorney General of Canada brought a Motion for Summary Judgment on the pleadings seeking to dismiss the plaintiff's claim.

- On September 12, 2012, the Attorney General of Nova Scotia also brought a Motion for Summary Judgment on the pleadings seeking to dismiss the plaintiff's claim.

- The Motion of both parties was heard on November 1, 2012. The Court dismissed the Motion and granted the plaintiff 30 days to further amend his pleading.

- On January 4, 2013, the plaintiff filed a Second Amended Originating Notice and Statement of Claim.

- A second Motion for Summary Judgment was initiated by the Attorneys General in March 2013. The Motion was heard on April 4, 2013. The Motion was partially successful as the Court dismissed the plaintiff's claim against the Attorney General of Nova Scotia for negligent performance of prosecutorial duties noting the claim was not actionable. The Court, however, permitted the plaintiff to proceed with his claim against the Provincial Crown for malicious prosecution. The Court also dismissed the plaintiff's claim against the Federal Crown for malicious prosecution but permitted the plaintiff to proceed with his claim against the Federal Crown for negligent investigation by the RCMP.

- In April 2013 court documents in relation to this matter were located in an off-storage facility in Dartmouth. These documents included the preliminary inquiry transcript, the Information, and the Certificate of Conviction. These documents were sent to counsel on May 7, 2013 and subsequently attached to the Affidavit of Documents filed on behalf of the Attorney General of Nova Scotia.

- On May 21, 2013 the Defence was filed by the Attorney General of Canada.

- On May 27, 2013 the Defence was filed by the Attorney General of Nova Scotia.

- On August 6, 2013, the plaintiff filed a Third Amended Statement of Claim.

- On September 4, 2013, the Attorney General of Nova Scotia filed an Amended Defence.
- On September 5, 2013, the Attorney General of Canada filed an Amended Defence.

- On September 26, 2013, the Attorney General of Canada filed a Request for Date Assignment Conference Memorandum.

- On October 3, 2013, the plaintiff filed his Memorandum for DAC Judge naming two witnesses, the plaintiff and Carol Oliver.

- The DAC proceeded on November 15, 2013 and it was established that the trial would proceed April 7th, 8th, 9th, and 10th, and that the parties would file their Witness Lists by January 9, 2014, the Finish Date.

- The Attorney General of Canada filed their Witness List on December 5, 2013 and identified Inspector Earl Hamilton and Constable Brent Kelly as their witnesses.

- The Attorney General of Nova Scotia filed their Witness List on January 2, 2014 and identified Crown counsel at the time of the matters in issue, the Honourable Justice Charles Haliburton (retired) as their witness.

- The plaintiff filed his Witness List on January 9, 2014 listing himself and Carol Oliver as witnesses.

- The plaintiff then had cause to issue a Subpoena on March 28, 2014 compelling the Attorney General of Nova Scotia, Lena Diab, to attend in court on April 7th to give evidence.

- The Subpoena was served on the Attorney General of Nova Scotia on March 31, 2014.

[5] Accompanying the Attorney General of Nova Scotia's Notice of Motion was their brief and an Affidavit of Tara Walsh, Director of Communications for the Nova Scotia Department of Justice. This was the only evidence brought forward by the parties. Ms. Walsh was not cross examined.

[6] In their brief, the Applicant, the Attorney of Nova Scotia, states at pp. 2 and 3:

> Rule 4.18 requires parties to file a list of witnesses the parties intend to call at trial except for those who will be called solely to impeach the credibility of another expected witness. Pursuant to Rule 4.18(2) a party can only call at trial a witness that is named on that parties [*sic*] list, unless called to impeach the credibility of another witness or if the trial judge permits the party to call witness in order to avoid an injustice. Furthermore Rule 4.18(3) states:
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> > 4.18(3) A party who determines to seek permission to call a witness not on the party's witness list must immediately notify all other parties and the trial judge of the determination and the grounds for asserting that the witness must be called in order to avoid an injustice.

> The Plaintiffs have not met the requirements of Rule 4.18(3) or provided any grounds as to why Minister Diab must be called in order [*sic*] avoid an injustice. The AGNS anticipates that the Plaintiffs may argue that they were not aware of the need to call Minister Diab until she made her statement to the media. The AGNS submits that Minister Diab is not compellable as a witness, and if she was she has no relevant evidence to tender at trial. She has no evidence to tender that requires her testimony to prevent an injustice.

[7] In his brief, the respondent replies:

> The Attorney General is correct in her anticipation that the reason we sought to subpoena Minister Diab at this very late stage of proceedings is that before her comments to reporters on March 27 we had no idea she might have useful evidence to present to the court. With that said, her comments, as reflected in the transcript attached to Ms. Walsh's affidavit, are instructive.
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> 'As a lawyer,' she said, 'I can tell you that these cases are very complex and there's a lot of facts, and a lot of the facts will come out in court.' This is, in our submission, an interesting thing for the Attorney General to have said.

[8] The Attorney General of Nova Scotia cites relevance - or lack thereof - along with Members Privilege as their main argument for why the Court should quash the subpoena.

[9] The plaintiff says that he has established a "link of relevance." As for Members Privilege, he says that it does not apply in such a way as to justify quashing the subpoena. Indeed, they argue one solution would be for the plaintiff to leave his case open, with the expectation of calling the Minister later, after the House adjourns.

[10] To these positions, I would insert another aspect for consideration in assessing this matter, that being the procedural backdrop. Associate Chief Justice Smith set out the relevant regime in the recent decision of *Garner v. Bank of Nova Scotia* [2014] NSJ No.59, at paras. 23 and 24:

> **23** Our present *Civil Procedure Rules* contain a different regime. Trial dates are now provided much earlier in the process, before the parties are ready for trial. At the

> Date Assignment Conference, the court fixes a Finish Date which is the date by which ***all*** pretrial procedures are to be completed (see Rule 4.16(6)(c). A party who intends to make a pretrial motion that may materially affect a forecast of trial readiness, must, before the Date Assignment Conference, fully inform themselves regarding how much time it will take for the motion to be presented and must, at the Date Assignment Conference, advise the judge of the nature of the intended motion, the intended evidence in support of the motion, the plan for proceeding with the motion and a proposed deadline by which all documents will be filed (see Rule 4.16(4)). Counsel then have an obligation to insure that the case is trial-ready by the time the Finish Date arrives.
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> **24** There will be occasions when an unexpected issue arises which may require a motion after the Finish Date and prior to the trial. Examples include a motion for an adjournment due to unexpected circumstances or a motion to amend a witness list. In my view, these motions should be the exception rather than the rule. Our present system is designed so that ***all*** pretrial procedures are completed by the Finish Date. When that date arrives, counsel should be ready for and prepared to proceed to trial without further pretrial motions.

[11] In the case before me, there can be no doubt that Ms. Diab's March 27, 2014 statements to the media occurred late in the litigation, coming as they did just 11 days before the scheduled start of this trial on April 7th. As such, they obviously occurred well after the Finish Date, the date witness lists were due, and following the Trial Readiness Conference. For this reason, they may be fairly regarded as an unexpected circumstance. However, this feature alone does not necessarily equate with allowing the subpoena of Ms. Diab to stand.

[12] Rather, I must carefully examine the question of relevance. *Bowater Mercy Co. v. Nova Scotia (Minister of Finance),* [1991] 106 N.S.R. (2d) 416 sets out the test relating to the validity of a subpoena at paragraph 10:

> I accept that view of the applicable law as espoused by the court in Canada Metal. Thus if the issuer establishes a link of relevance between the proposed witness and the issue in the proceedings he is entitled *prima facie* to have a subpoena issued. The burden then shifts to the attacker to show good reason, such as oppressiveness or abuse of power, why the subpoena should be quashed.

[13] So, can it be said there is a link of relevance? To answer this question, I will examine the transcript of Ms. Diab's comments to the media, as set out in Exhibit 'A' of Ms. Walsh's Affidavit:

> As the Attorney General, this matter, at the moment, is before the court, and therefore I cannot comment on what's happening there. As a lawyer, I can tell you that these cases are very complex and there's a lot of facts, and a lot of the facts will come out in the court, and these are not facts that are suitable for me to be ... to discuss with the media.

[14] In my view, Ms. Diab's comments are very general in nature. In her first sentence, she affirms she is the Attorney General and notes the matter is before the court, adding, "... therefore I cannot comment on what's happening there." There is clearly nothing in this first sentence, and this is conceded by Mr. Dunlop, that

can establish a "link of relevance." As for her second and final sentence, this is what she says:

> As a lawyer, I can tell you that these cases are very complex and there's a lot of facts, and a lot of facts will come out in the court, and these are not facts that are suitable for me to be ... discuss with the media.

[15] While the plaintiff may characterize this as "an interesting thing for the Attorney General to have said", I fail to understand how this statement can be held to equate with a link to relevance. Indeed, Ms. Diab prefaces her comments with the declaration, "As a lawyer." She goes on to speak in the general when she refers to "these cases." I therefore find that the remainder of her comments are very general in nature and I will add, in my view, very prudent and careful. In my opinion, the Attorney General of Nova Scotia has not provided anything of specificity such that her presence as a witness at this trial would be required. There is nothing she has said that leaves me to conclude, as was the situation in *Bowate*r, *supra*, that there is a link to relevance.

[16] In the result, I find the plaintiff has not met the requirement of *C.P.R. 4.18(3)*.

[17] That is to say, he has not provided any grounds as to why Minister Diab must be called in order to avoid an injustice.

[18] I would add that, in coming to this conclusion, I am mindful of Ms. Walsh's uncontested Affidavit evidence and draw particular attention to paras. 5 and 6:

> 5. On March 27, 2014 Honourable Lena Diab was provided with a Briefing Note prepared by Darlene Willcott, a solicitor at the Nova Scotia Department of Justice, Legal Services Division that was dated March 27, 2014. On the top of the Briefing note it states "Solicitor-Client Privileged Advice to Minister - CONFIDENTIAL."
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> 6. This briefing note was the first time that Minister Diab had been briefed on this matter.

[19] Given this, to the extent Ms. Diab has any relevant information to this case, I find that it is as a consequence of being briefed by the lawyers from her Department and, therefore, in the context of solicitor-client privilege.

[20] Having regard to my decision on the lack of relevance of Ms. Diab's statements, along with the solicitor-client privilege, I do not find it necessary to consider the Members Privilege argument.

[21] I will determine costs on the Application as part of my overall costs disposition following next week's trial.

J.