

**SUPERIOR COURT
(Class Action Division)**

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° : 500-06-000076-980
500-06-000070-983

DATE : November 28, 2011

PRESIDING: THE HONORABLE BRIAN RIORDAN, J.S.C.

N° 500-06-000076-980

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ

and

JEAN-YVES BLAIS

Plaintiffs

v.

JTI-MACDONALD CORP. ("JTI")

and

IMPERIAL TOBACCO CANADA LTÉE ("ITL")

and

ROTHMANS, BENSON & HEDGES INC. ("RBH")

Defendants / Plaintiffs in Warranty (collectively: the "**Companies**")

v.

PROCUREUR GÉNÉRAL DU CANADA (the "AGC")

Defendant in Warranty

JUDGMENT ON ITL's MOTION TO QUASH A SUBPOENA

AND

N° 500-06-000070-983

CÉCILIA LÉTOURNEAU

Plaintiff

v.

JTI-MACDONALD CORP.

and

IMPERIAL TOBACCO CANADA LTÉE

and

ROTHMANS, BENSON & HEDGES INC.

Defendants / Plaintiffs in Warranty

v.

PROCUREUR GÉNÉRAL DU CANADA

Defendant in Warranty

JUDGMENT ON ITL'S MOTION TO QUASH A SUBPOENA

[1] ITL objects to Plaintiffs' calling Mr. Ian Muir as a witness at the trial of these cases, rescheduled to commence on March 5, 2012. The trial was originally fixed to start on October 17, 2011 but was postponed at the Companies' request.

[2] ITL attacks the subpoena served on Mr. Muir and requiring him to appear on October 18, 2011¹ on two grounds: it "amounts to nothing but a fishing expedition on the part of Plaintiffs" and it "violates the principles of proportionality".

[3] Mr. Muir served as president of ITL from April 2009 until October 2011. Prior to that, the Court is informed that he worked for some twenty-five years at British American Tobacco ("**BAT**"), ITL's mother company for at least part of the class action period. Effective October 1, 2011, he was replaced as president of ITL by Marie Polet, who apparently also worked for BAT for a number of years. Plaintiffs were unaware of the change at the top of ITL when they served the subpoena and have consistently named Mr. Muir as a witness in their previous witness lists.

¹ Presumably, Plaintiffs have taken or will take the steps required to change the date of his appearance to March 2012.

[4] Concerning the allegation of a fishing expedition, ITL argues that the fifty-five documents on which Plaintiffs indicate they intend to question Mr. Muir at trial (the "**Documents**") were neither drafted by nor addressed to him. As such, he is not the appropriate witness to testify about them. In light of that, they reason, there are only two possible reasons for calling him as a witness: to grandstand in front of the media or to "go on a fishing expedition".

[5] Plaintiffs see otherwise. They point out that Mr. Muir will be a useful and proper witness on at least two points of relevance to these proceedings: the position that ITL took on various questions over time, including after the class action period ending in 1998, and the role and knowledge of BAT with respect to the production and sale of cigarettes by ITL and the latter's knowledge of certain facts.

[6] Both of the authorities ITL cites² deal exclusively with examinations on discovery, as opposed to a trial on the merits. Offering no authority in support, they argue that the same rules should apply in both cases.

[7] The Court respectfully but firmly disagrees.

[8] The test for calling a witness at trial is much more lenient than the rather rigid one our Code of Civil Procedure imposes on pre-trial discoveries. Since ITL offers no caselaw dealing with the criteria for trial witnesses, the Court must assume that there is nothing in the jurisprudence to support the exclusion of Mr. Muir as an eventual witness.

[9] Moreover, Plaintiffs have satisfied us that their objective is neither grandstanding nor fly-casting. Although it is unlikely that the case will turn on Mr. Muir's testimony, we are satisfied that it will be relevant and admissible. We thus reject ITL's first argument.

[10] On the question of proportionality, ITL notes that it offered in late July to have Ms. Polet testify in Mr. Muir's place. It takes the position that this would make more sense, given that she is the current president and is in a better position than Mr. Muir to testify on points relating to ITL. As for points relating to BAT, it argues that, in light of her years there, she is in as good a position as Mr. Muir to testify on those.

[11] The fact that Mr. Muir's is a former employee is also important in its argument. It cites Royer who writes, concerning an examination on discovery, that an employee who has ceased to work for a company may only be examined if he is the most qualified person to respond to the questions³.

[12] Regarding ITL's offer, Plaintiffs refuse it on the ground that Ms. Polet has not been there long enough and may not have sufficient knowledge of the operations and positions of ITL for her testimony to be useful. That is Plaintiffs' right and they will have to live with their choice, unless they choose to call Ms. Polet, as well.

² Jean-Claude ROYER, *La preuve civile*, 4th edition, Éditions Yvon Blais; *Mitchell v. Future Electronics inc.*, B.E. 2005BE-896 (Q.S.C.).

³ *Ibidem*, p. 470.

[13] On the other point, Mr. Muir's status as an ex-employee has no relevance to his being called at trial. The test at that stage is whether he is a qualified witness to testify on relevant facts, not whether he is the most qualified person on them.


[14] The Court understands that Mr. Muir has returned to live in his native England after his early retirement from ITL last month. Consequently, there would be a certain expense, and perhaps inconvenience, for him to come to Canada to testify. In the context of two files that could conceivably result in judgments totalling in the tens of billions of dollars, the principles of proportionality, far from working against his being called, render any concern in that regard immaterial.

[15] After hearing the parties, the Court can see no reason to impede Plaintiffs from calling Mr. Muir as a witness at trial. We must dismiss ITL's motion.

BASED ON THESE REASONS, THE COURT:

[16] **DISMISSES** ITL's Motion to Quash a Subpoena concerning Mr. Ian Muir;

[17] **COSTS TO FOLLOW SUIT.**



BRIAN RIORDAN, J.S.C.

Hearing Date: November 24, 2011