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President of Queen's Privy Council for Canada to be an "adverse witness" in potato farmer's case

By Stephen Thiele

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The examination of witnesses at a trial is governed by certain basic rules. For a witness who is being questioned by the side for which that person is a witness, a lawyer is generally prohibited from asking leading questions. Leading questions are those that elicit a "yes" or "no" answer because in essence the question itself contains the answer. In contrast, leading questions are permissible when cross-examining a witness who is being questioned by the other side. This is permitted because the purpose of cross-examination is to test the credibility of the witness.

Since a party who produces a witness cannot impeach the credibility of the witness, in circumstances where that the witness has loyalties to the other side, it is important that the party calling such a witness be able to treat them as an adverse witness and to "cross-examine" them.

In *Tepper v. Canada (Attorney General)*, 2020 FC 1046, the court was required to determine whether the plaintiff ought to be entitled to treat certain witnesses he intended to summons to

give testimony as "adverse witnesses", including the Honourable Dominic Leblanc, the President of the Queen's Privy Council for Canada.

The plaintiff was a New Brunswick potato farmer who was suing the federal government for over \$16 million for its alleged failure to secure his freedom from a Lebanese jail in 2011. The plaintiff had been arrested and jailed on an international warrant that accused him of having exported rotten potatoes to Algeria four years earlier and that he had forged export documents. The plaintiff spent nearly a year in jail before his release under a Lebanese presidential decree. He has contended that he lost a year of his life, that the federal government did not do enough to protect him and repatriate him, and that the RCMP had allegedly provided to Algerian authorities certain private information in contravention of the *Privacy Act*.

At the time of the plaintiff's arrest and detention in Lebanon, Leblanc, was an opposition Member of Parliament and was the opposition's Foreign Affairs critic. On many occasions, he spoke

about the plaintiff's plight in Lebanon and criticized the government of the day for not doing enough to secure the plaintiff's release from jail and to bring him back home to Canada. Accordingly, the government contended that Leblanc's interests were aligned with those of the plaintiff and that if the plaintiff wanted to call Leblanc as a witness, he was not an adverse witness for the purposes of rule 53.07 of the Rules of Civil Procedure, which governed the right of the plaintiff's right to obtain an order declaring Leblanc to be an adverse witness.

Under the rule, a party is permitted to cross-examine an adverse witness or the officer, director, employee or sole proprietor of an adverse party. The rule applies to Ministers, who are viewed as analogous to officers of a corporation. Accordingly, the plaintiff argued that Leblanc, notwithstanding his position as an opposition member at the time of the plaintiff's detention, was now an adverse witness because as a member of the Privy Council he had obligations to the Crown or the defendant. Leblanc swore an oath to the Crown and was bound by secrecy regarding "all matters committed and revealed" in the Privy Council for Canada.

The court concluded that Leblanc should be declared an adverse witness because his current position was that of a representative of Canada, which was the defendant in the action. Even though the court acknowledged that Leblanc was not a member of the governing party at the time of the plaintiff's detention, he was now closely connected to the government. That close connection was established by his oath as a Member of the Privy Council, which states:

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.

In rendering its decision, the court relied on Fairford First Nation v. Canada (Attorney General), 1997 CanLII 4901 (FC) for the proposition that r. 53.07 could be applied to a situation where a Minister's role and interest had shifted from being an opposition member at the time the events at issue took place to currently being a Minister with the government that was defending the plaintiff's action.

The court also relied on Granitile Inc. v. Canada, [1998] OJ No. 5028 (Gen. Div.) (not available on CanLII) wherein it was determined that r. 53.07 should be liberally construed to secure the just determination of a proceeding on its merits and that the purpose of the rule was to allow a party to call a witness who essentially was an opponent without be confined to ask non-leading questions. In Granitile, the court stated: "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 lesson for politicians is that while one day they might make arguments adverse in interest to government on an issue that becomes litigious, they may regardless become an adverse witnesses in a court case against government many years later if at the time the issue goes to



court the politician has become a high-ranking member of the government. This potentially places in Leblanc in a difficult position when he testifies because while he may now has a loyalty to the Crown, the plaintiff will be able to challenge it through the right of cross-examination.

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If you have a litigation matter and are in need of legal advice, please do not hesitate to contact the Chair of our dispute resolution group, **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

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