Federal Court

Cour fédérale

Date: 20210226

Docket: T-2049-19

Citation: 2021 FC 185

BETWEEN:

KEVIN O'LEARY AND LINDA O'LEARY

Plaintiffs/Defendants by Counterclaim

and

ROSA RAGONE, ANTONIO RAGONE AND PAULA BRITO

Defendants/Plaintiffs by Counterclaim

and

MURRAY WOHLMUTH

Defendant

and

RICHARD RUH and IRV EDWARDS

Third Parties

AND BETWEEN:

Docket: T-354-20

RICHARD RUH and IRV EDWARDS

Plaintiffs/Defendants by Counterclaim

and

ROSA RAGONE, ANTONIO RAGONE, PAULA BRITO, DAVID OWEN, Litigation Administrator of the Estate of SUSANNE BRITO, DAVID OWEN, personally, LIAM OWEN, a minor under the age of 18 years by his Litigation Guardian, DAVID OWEN, RUBY OWEN, a minor under the age of 18 years by his Litigation Guardian, DAVID OWEN, DAVID CASH, a minor under the age of 18 years by his Litigation Guardian, DAVID OWEN, SANDRA OCSKASY, ALLISON POLTASH, ALEXANDER POLTASH, and PAULINE NEW

Defendants/Plaintiffs by Counterclaim

and

MURRAY WOHLMUTH

Defendant

REASONS FOR ORDER

TABIB P.

[1] The Defendants/Plaintiffs by Counterclaim in these actions have brought motions pursuant to Rules 233(1) of the *Federal Courts Rules*, to compel the Ontario Provincial Police ("OPP") and the Public Prosecution Service of Canada ("PPSC") to produce copies of police records, Crown briefs and other documents relating to a fatal boating accident on Lake Joseph on August 24, 2019. In the alternative, the motions seek an order compelling the OPP to produce an officer to be examined on discovery, pursuant to Rule 238. The Plaintiffs/Defendants by Counterclaim and the Defendant Murray Wohlmuth take no position on the motions. The OPP and PPSC contest the motions.

[2] For ease of reading, the moving parties will be referred to in these reasons as "the Defendants" and the requested documents will be referred to as "the Crown brief". Both motions were heard together on the same motion records and these reasons apply to both.

[3] For the reasons that follow, the motions will be dismissed.

I. Background

[4] As alleged in the pleadings, the Defendants are the family members and loved ones of Susanne Brito and Gary Poltash, who died as a result of a collision between the pontoon boat on which they were passengers and a speedboat. The pontoon was owned by Irv Edwards but operated that night by Richard Ruh while the speedboat, owned by Kevin O'Leary, was driven by Linda O'Leary. Following the OPP's investigation of the incident, the PPSC laid charges against the operators of both vessels. Ms. O'Leary was charged with operating a vessel in a careless manner, without care and attention or without reasonable consideration for other persons, contrary to s 1007 of the *Small Vessels Regulations* SOR/2010-91 of the *Canada Shipping Act* 2001 SC 2001, c 26; Dr. Ruh was charged with failing to exhibit a stern light on a power vessel underway, contrary to Rule 23(a)(iv) of Schedule 1 of the *Collision Regulations* CRC c 1416 of the *Canada Shipping Act*. While neither of the charges carries a prison sentence, they are considered criminal in nature. Accordingly, the prosecution was required to and did disclose all of the investigative and prosecution documents to the criminal defence counsel of Ms. O'Leary and Dr. Ruh. That Crown brief was identical for both accused.

[5] In parallel, a series of wrongful death actions were commenced by the Defendants before the Ontario Superior Court against Kevin O'Leary, Linda O'Leary, Irv Edwards and Richard Ruh.

[6] The present actions were instituted by the O'Learys, Ruh and Edwards pursuant to the *Marine Liability Act* SC 2001, c 6. Each action seeks the constitution of a limitation fund, the suspension of all other civil claims arising out of the collision, and a declaration that the Plaintiffs are entitled to limit their liability in accordance with Part 3 of the *Marine Liability Act*. By order dated July 3, 2020, this Court approved the constitution of the limitation funds and enjoined all claimants from proceeding in other jurisdictions pending the determination of the Plaintiffs' right to limit their liability. All potential claimants have now been identified, and pleadings in these limitation actions closed in late October 2020.

[7] The Defendants' first order of business following the close of pleadings has been to bring these motions for production of the Crown brief. The OPP and PPSC oppose the disclosure at this time. However, they have undertaken to communicate the Crown brief to the Defendants upon the conclusion of the last the criminal regulatory trial (subject to review and specific redactions to protect personal information of third parties or for public interest reasons). Dr. Ruh's prosecution is now at an end. Ms. O'Leary's trial is scheduled to begin on June 14, 2021 and to conclude on July 23, 2021.

II. The Issues

[8] The ultimate issue in relation to the Crown brief is not whether the OPP and PPSC ought to disclose it to the Defendants – they have already agreed to do so as early as July 23, 2021, subject to review and specific redactions (the nature of the redactions that might be made is yet to be identified and was not spoken to on these motions.) The ultimate issue with respect to the Crown brief therefore is whether the Court should order its disclosure now, without waiting for the conclusion of the upcoming criminal trial.

[9] Resolving that issue requires consideration of the following questions:

- Have the Defendants satisfied the requirements for production from non-parties under Rule 233(1)?
- If so, should the Court exercise its discretion to order production prior to the conclusion of the last criminal trial?

[10] In addition, if disclosure is not ordered, the alternative relief sought in the motions will require the Court to determine:

- Whether the Court can compel the OPP to produce an officer for discovery pursuant to Rule 238.
- If so, do the Defendants meet the requirements of Rule 238, and should the Court exercise its discretion in their favour.

III. The Motion for Production, Rule 233(1)

A. *The Requirements of Rule 233(1)*

[11] Rule 233(1) permits the Court to order a person who is not a party to an action to produce any document within its possession, if the document is relevant and compellable at trial:

Production from non-party with leave	**Production d’un document en la possession d’un tiers**
233 (1) On motion, the Court may order the production of any document that is in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial.	**233 (1)** La Cour peut, sur requête, ordonner qu’un document en la possession d’une personne qui n’est pas une partie à l’action soit produit s’il est pertinent et si sa production pourrait être exigée lors de l’instruction.

[12] There is little doubt that the content of the Crown brief is generally relevant to the issues in this case. The information was collected and disclosed on the basis, *inter alia*, that it would be relevant to establishing or disproving that Ms. O’Leary was negligent in the operation of the vessel and that Dr. Ruh failed to display the required navigation lights, issues that go squarely to their conduct and liability for the collision, both of which are disputed. There is also no doubt that the documents sought are within the possession of the OPP and of the PPSC. No one suggests that the production of the Crown brief could not be compelled at trial.

[13] The Court is therefore satisfied that the Defendants meet the formal requirements of Rule 233.

[14] The inquiry, however, does not end there. The Federal Court of Appeal has recognized that Rule 233 is a discretionary remedy. Merely establishing that relevant and compellable documents are in the possession of a third party does not entitle a litigant to a production order. Requiring a stranger to litigation to produce documents to a party remains an exceptional remedy and the Court must still exercise its discretion to determine whether it should be granted in the circumstances (*Hospira Healthcare Corp. v Kennedy Institute of Rheumatology*, 2019 FCA 188).

B. *The Factors to Be Considered in Exercising the Court's Discretion*

[15] There is no set list of factors that the Court must, or can, consider in the exercise of its discretion. However, the following factors have been mentioned as potentially relevant, and in some cases applied, in the context of motions invoking Rule 233 (*Hospira Healthcare Corp. v Kennedy Institute of Rheumatology*, 2018 FC 992 (upheld at 2019 FCA 188); *Rovi Guides Inc. v Videotron GP* 2019 FC 1220, (upheld at 2019 FCA 321); *Eli Lilly v Sandoz Canada Inc.* 2009 FC 345; *Voltage Pictures LLC v John Doe* 2017 FCA 97 (rev'd on other grounds 2018 SCC 38); *Tippett v Canada* 2020 FC 714):

- whether the information can be obtained from another party or source;
- the necessity of the order;
- whether an order is premature;
- the necessity and probative value of the documents in light of documents already disclosed;
- the privacy interests of, or prejudice to, other non-parties;
- confidentiality concerns;
- public interest in disclosure;

- delay, cost or disruption in the proceedings;
- the non-party's involvement in the matter under dispute;
- the specificity of the request for production;
- any costs to the producing party;

[16] The Defendants have also referred to the Court of Appeal of Ontario's decision in *Ontario (AG) v Ballard Estate* [1995] OJ No 3136, which sets out, at para 15, a list of factors that must be considered in deciding a motion for production from a non-party pursuant to Rule 30.10 of the *Rules of Civil Procedure* RRO 1990, Reg. 194. These factors are:

> • the importance of the documents in the litigation;
>
> • whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;
>
> • whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
>
> • the position of the non-parties with respect to production;
>
> • the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;
>
> • the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

[17] The Court agrees with the PPSC's submissions to the effect that *Ballard* is not binding on this Court and that reference to its factors is unnecessary given the Court's own distinct rules and rich jurisprudence. Still, the Court sees no reason why the factors set out in *Ballard* could not, in

an appropriate case, also be considered on a Rule 233 motion. Indeed, most are already recognized in the Federal Court's jurisprudence, while others, such as fairness between the parties, are echoed in the factors expressly mentioned in Rule 238, which governs discovery of third parties. As the Federal Court of Appeal observed in *Hospira*, above, the fact that certain factors are expressly set out in Rule 238 but not in Rule 233 does not foreclose their consideration on a motion for production.

[18] Finally, both the Defendants and the responding parties OPP and PPSC are *ad idem* that in cases involving the Crown brief in criminal prosecutions, the protection of the integrity of the ongoing prosecution is "a serious policy and public interest consideration" that must be taken into account. To that end, the Ontario Superior Court, in *DP v Wagg* [2002] OJ No 3808, (aff'd at [2004] OJ No 2053), outlined the relevant principles and set out a screening process by which these principles could most adequately be considered and applied. Again, while not binding on this Court, the Court sees no reason why the underlying policy and public interest considerations discussed in *Wagg* should not be considered by the Federal Court where the documents sought under a Rule 233 motion form part of the Crown brief for a criminal prosecution. The Court will discuss and consider the *Wagg* principles in further detail as part of its analysis.

C. *Analysis - Discretion under Rule 233(1)*

(1) Availability from other sources, necessity and prematurity

[19] As of the date of hearing, the limitation actions were just past the pleading stage. The parties have exchanged affidavits of documents, but discoveries have yet to be scheduled. No

trial date has been set and even assuming the most alacrity in proceeding, the matters will not be ready for trial for at least another year. As per the PPSC's undertaking, its general objection to disclosure of the Crown brief will be lifted as soon as the end of July 2021, that is, in some six months from the date of hearing the motion. By then, a very large part, if not all, of the information contained in the Crown brief will in any event have been laid on the public record through its use in Ms. O'Leary's trial.

[20] Applying these facts to the factors outlined earlier in these reasons, it becomes plain that:

- Much of the information can, within six months, be obtained from another source, mainly the public record of the upcoming criminal trial.
- An order is not necessary, as the PPSC is disposed to producing the Crown brief following Ms. O'Leary's trial.
- The motion is premature.

[21] These conclusions, on their own, militate strongly against the issuance of the requested production order.

(2) Fairness

[22] The Defendants strenuously argue that a disclosure order should be issued at this time, without awaiting the conclusion of the O'Leary prosecution, as doing otherwise would be unfair. Indeed, the notion of unfairness to the Defendants is a leitmotif of their argument.

[23] Essentially, they argue that Ms. O'Leary and Dr. Ruh have been provided with disclosure, "allowing them to conduct a fulsome investigation into the incident" while the Defendants have been denied the same right. They also argue that awaiting the conclusion of the prosecution before having access to the Crown brief restricts their ability to find witnesses, to avoid fading memories and loss of evidence due to destruction, and to accumulate evidence while it is fresh. Finally, they submit that having to wait prevents them from proceeding with the litigation as expeditiously as possible so that they can achieve some level of finality and move on with their lives.

[24] The Defendants' first argument incorrectly characterizes Dr. Ruh and Ms. O'Leary's rights of access and ability to use the Crown brief. The Defendants state that Linda O'Leary and Richard Ruh "have received" disclosure of the Crown brief. That, however, is not entirely accurate.

[25] The evidence on which that statement is based shows that disclosure was not made to Dr. Ruh and Ms. O'Leary themselves, but to their criminal defence counsel. In exchange for disclosure, these lawyers have signed undertakings pursuant to which they undertook to keep the documents and any copy in their own office, to not disseminate them outside their office, and to use them solely for the purpose of the defence of the criminal proceedings. As such, it is incorrect to characterize Ms. O'Leary and Dr. Ruh as having received the disclosure or to suggest that they are in a position to use it for the purpose of these actions. While their criminal counsel can undoubtedly share the information contained in the Crown brief with them for the purpose of preparing the criminal defence, it is to be noted that the criminal and civil solicitors

for Dr. Ruh and Ms. O'Leary are not the same. Accordingly, the information from the Crown brief cannot be shared with their counsel in these civil actions, whether it be for getting advice on the merits of the actions or for furthering their civil case.

[26] All parties in these limitation actions are therefore, with respect to the Crown brief, on the same footing. The Defendants' argument that they are unfairly being deprived of the same access to information which the Plaintiffs enjoy is unfounded in fact.

[27] The Defendants contend that lack of access to the Crown brief impedes their ability to find and conserve evidence from witnesses. However, the Defendants concede that they are at liberty to conduct their own investigation into the occurrence, to look for and contact potential witnesses, and to seek statements from them. There has been no evidence or cogent argument made to the effect that the ability to identify and locate witnesses to the events leading up to the fatal collision and the collision itself is peculiarly within the means or ability of police forces. Of course, the Defendants' ability to elicit the cooperation of witnesses may not be as considerable as that of the police. Still, the Court does not see how having possession of the Crown brief would enhance the Defendants' ability in this regard.

[28] The Defendants' argument that delay may result in failing memories or the destruction of evidence is unsubstantiated. As mentioned, the Defendants are free to conduct their own investigation to secure any evidence or testimony the police may have missed. To the extent the Defendants place reliance on the investigative work done by the police, the evidence it has uncovered and the witnesses' recollections it has gathered are already preserved in the Crown

brief. Obtaining the Crown brief would enable the Defendants to pick up the investigation where the police left off, to try to elicit further or better information by contacting witnesses already identified and interviewed by the police or by following further leads. However, the possibility that crucial evidence was missed by the police and would be lost in the next six months if the Defendants cannot immediately begin their follow-up efforts is speculative, at best.

[29] Given the Defendants' position that it would be prejudicial for them to proceed to discovery prior to receiving the Crown brief, the delayed disclosure does mean that discoveries would not take place earlier than August 2021. One should not, however, presume that every day by which the disclosure of the Crown brief is delayed on account of the criminal prosecution directly translates into an equal delay in the conclusion of the present actions, or that immediate disclosure would automatically shave six months off their determination.

[30] Even if the Crown brief were disclosed today, the O'Learys have taken the position that they ought not to be compelled to submit to examinations for discovery until the conclusion of Ms. O'Leary's regulatory charges trial. While that issue has yet to be put before the Court for determination, the O'Learys' position is not without merit, and the simple fact that it would need to be judicially determined would in any event delay the conduct of discoveries and the progress of the action.

[31] Finally, the Court does understand and appreciate the Defendants' desire to proceed with and conclude this litigation as quickly as possible so that they can gain closure and move on with their lives. However sympathetic the Court may be to that human need, it does not constitute a

procedural or substantive unfairness or prejudice in the litigation, and no evidence of real or apprehended psychological harm has been presented.

[32] The Court is not satisfied that fairness requires the immediate disclosure of the Crown brief.

(3) The Wagg factors – Public interest

[33] The OPP and PPSC submit that disclosure of the Crown brief prior to the conclusion of the last criminal regulatory trial, in July 2021, would be injurious to the public interest, as it would jeopardize the integrity of the prosecution and the fair trial rights of the accused. The reasons for that apprehension are set out in a cogent and complete fashion in the affidavit of Stephen A. White and its attachments, filed as part of the PPSC's responding record. The evidence establishes that there was and continues to be considerable public interest in the incident, that active efforts on the part of the media were made to find out and report on any aspect of the investigation and charges, that journalists appear to have succeeded in gaining access to information that should have been held confidentially, and that details gathered by journalists are widely disseminated. The evidence makes a cogent and persuasive case that dissemination of information contained in the Crown brief could feed media reports, rumours or gossip, come to the attention of witnesses and, especially given the intense public scrutiny, might influence their evidence at the criminal trial.

[34] As mentioned above, the possibility that premature disclosure of the Crown brief may jeopardize the integrity of criminal prosecutions has been jurisprudentially recognized as a

serious policy and public interest consideration (*Wagg*, above, *Dixon v Gibbs* [2003] O.J. No 75 (SCJ), paras 27 to 29). That likelihood is, in this case, well supported by the evidence and constitutes another strong factor militating against ordering disclosure at this time.

[35] The Defendants rely on exceptional cases where the courts have favoured full disclosure in civil cases over the Crown's desire to protect the confidentiality of the Crown brief, in an effort to show that this Court ought similarly to exercise its discretion in their favour. The cases on which the Defendants rely have nothing in common with the circumstances of the present case and do not diminish the weight which the Court ascribes to this factor.

[36] In *N.G. v Upper Canada College* [2004] O.J. No 950, aff'd [2004] O.J. No 1202, the Court ordered production of the plaintiff/victim's police statement, for use in his civil action against the defendant/accused, in circumstances where the criminal trial was to begin and end a few weeks prior to the start of the civil trial. More importantly, in that case, the plaintiff/victim had already testified publicly at the preliminary inquiry "thus eliminating the likelihood that disclosure of the video and transcript at this stage could be the cause of any tainting of victim's evidence".

[37] In *Aylmer Meat Packers Inc. v HMQ (Ontario) and AG Canada* 2010 ONSC 649, the plaintiff was seeking damages against provincial and federal authorities, arising from their conduct in the execution of search warrants, the detention of meat products and the suspension of its license to operate a meat slaughtering facility. The plaintiff was seeking to use, in the course of the civil action, the same evidence that had been disclosed to it by the Crown in the context of

criminal and regulatory charges stemming from the incidents. That case proceeded from the premise that the plaintiff/accused itself, and not only his criminal counsel, had already been provided with the documents sought. The issue before the Court was therefore quite different, in that the Crown had to explain why it would impair the public interest to allow the plaintiff to use documents and information it already possessed, in the context of a civil trial between itself and the Crown. The Court in *Aylmer* found that the Crown's evidence spoke mostly in generalities, had made no effort to provide a cogent explanation.

[38] The Defendants argue that the Crown's public interest concerns could be addressed by imposing strict confidentiality provisions. However, given the intense media interest, the Court is not satisfied that even strict confidentiality provisions would provide adequate safeguards against leakage in the circumstances of this case.

[39] Finally, the Court is not inclined to minimize the importance of the public interest concerns on account of the regulatory nature of the accusations or the fact that no custodial sentences can result from them. The administration of criminal regulatory justice should not take a back seat to the pursuit of civil compensation for the victims, especially where the criminal proceedings have been proceeding expeditiously and where allowing them to follow their course will not detract from the fair and expeditious determination of the civil recourse.

(4) Other factors

[40] The remaining factors identified in the jurisprudence, such as the privacy interests or prejudice to other non-parties, confidentiality concerns, delay, costs or disruption in the

proceeding from granting the order, the non-party's involvement in the dispute, the specificity of the request for production, and the costs to the producing party, have little or no meaningful application in the circumstances of this case. None would outweigh the previously identified concerns over the prematurity of the request, the anticipated availability of the information without the need for an order, and the public interest in preserving the integrity of the criminal trial.

D. *Conclusion, Rule 233(1)*

[41] The Court is not satisfied that it is in the interest of justice that an order requiring the OPP or PPSC to produce the Crown brief to the Defendants be made at this time.

IV. Motion to Examine an OPP Officer, Rule 238

A. *Can the OPP be compelled to produce an officer for discovery?*

[42] The Defendants have not identified a particular member of the OPP whom they believe has personal knowledge of relevant information and whom they wish to examine. Rather, they are seeking an order requiring the OPP to designate an officer to act as its representative in order to be examined on discovery. As such, the motion raises the issue of whether the OPP, as an agency of the provincial Crown, can be compelled to be examined as a third party in this proceeding or to produce an officer for that purpose.

[43] That issue has been authoritatively resolved by the Supreme Court of Canada in *Canada v Thouin* [2017] 2 SCR 184, in which parties to a civil proceeding wished to examine a

representative of the federal Crown as a third party. The Supreme Court in that case reiterated that by reason of Crown immunity, the Crown was historically exempt, at common law, from the obligation to submit to discovery, even in proceedings in which it is a party (para17-18). That immunity can only be removed by a clear and unequivocal expression of legislative intent (para 19). As it was an agency of the federal Crown that was sought to be examined, the Supreme Court had to interpret s 27 of the federal *Crown Liability and Proceedings Act, RSC 1985, c C-50*, which provides that the Crown is subject "to the rules of practice and procedures of the court" where proceedings are taken. The Supreme Court concluded that the provision lacked the clarity of language and explicit intention necessary to bind the Crown in all proceedings to which it may be called, and ruled that the effect of the section was limited to lifting the Crown's immunity in proceedings to which it is a party. The Supreme Court concluded that the federal Crown was immune from discovery as a third party.

[44] The issue, as it applies to the Ontario provincial Crown, is even clearer. Subsection 19(2) of the Ontario *Crown Liability and Proceedings Act, 2019* SO 2019, c 7, expressly provides:

> Nothing in this Act subjects the Crown or an officer or employee of the Crown to the discovery and inspection of documents or to examination for discovery in a proceeding to which the Crown is not a party.

[45] Not only does the Ontario *CLPA* not clearly and explicitly lift the Ontario Crown's immunity from discovery in a proceeding to which it is not a party, but it expressly entrenches its common-law immunity in that regard. The Court is satisfied that the OPP cannot be compelled to designate an officer to be examined for discovery in this matter pursuant to Rule 238. That conclusion is determinative of that part of the motion. As a result, the Court does not need to

determine whether the requirements of Rule 238 are met or whether the Court should exercise its discretion in favour of the Defendants in this matter.

"Mireille Tabib"
Prothonotary

Ottawa, Ontario
February 26, 2021

<u>**FEDERAL COURT**</u>

<u>**SOLICITORS OF RECORD**</u>

DOCKET:	T-2049-19 and T-354-20
STYLE OF CAUSE:	KEVIN O'LEARY ET AL v. ROSA RAGONE ET AL /RICHARD RUH ET AL v. ROSA RAGONE ET AL
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 29, 2021
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Nick Todorovic	FOR THE DEFENDANTS/PLAINTIFFS BY COUNTERCLAIM
Teza Lwin	FOR THE NON-PARTY RESPONDENT – ATTORNEY GENERAL OF CANADA REPRESENTING THE PUBLIC PROSECUTION SERVICE OF CANADA
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