Date: 20081104
Docket: CI 99-01-14589
(Winnipeg Centre)
Indexed as: Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.
Cited as: 2008 MBQB 290

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
	)	
TELECOMMUNICATION EMPLOYEES ASSOCIATION OF MANITOBA INC., COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 5 AND LOCAL 7, INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION 435, HARRY RESTALL, ON HIS OWN BEHALF AND ON BEHALF OF CERTAIN RETIRED EMPLOYEES OR THE WIDOWS/WIDOWERS THEREOF OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. AND MTS ADVANCED INC., AND LARRY TRACH, ON HIS OWN BEHALF AND ON BEHALF OF ALL UNIONIZED EMPLOYEES OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. and MTS ADVANCED INC.,	)	Brian J. Meronek, Q.C. and Kris M. Saxberg for the Plaintiffs
	)	E. William Olson, Q.C., Shane I. Perlmutter and Lynda K. Troup for the Defendants
	)	Judgment delivered: November 04, 2008
Plaintiffs,	)	
	)	
- and -	)	
	)	
MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. and MTS ADVANCED INC.,	)	
	)	
Defendants.	)	

BRYK, J.

[1] The plaintiffs bring a motion for:

(a) a declaration that John Singleton is an adverse witness;

(b) an order granting the plaintiffs leave to cross-examine John Singleton at trial; and

(c) a direction with respect to the rights of the defendants to examine John Singleton at trial.

BACKGROUND

[2] In a judgment delivered October 9, 2008, the same issues were considered with respect to Clifford Fox (Fox). At that time, I made an extensive review of the background and applicable legislation and performed an analysis, all of which are equally applicable to this motion. Accordingly, I will restrict these reasons to the issue of whether or not there was sufficient evidence upon which to find John Singleton (Singleton) to be an adverse witness.

[3] During a somewhat lengthy initial examination of Singleton by plaintiffs' counsel, a number of questions were put to him for the express purpose of establishing him as an "adverse" witness. As with Fox, it is indisputable that his position in this litigation is opposite to that of the plaintiff. That is clearly established by his statement of defence and his responses to questions put to him both at examinations for discovery and in cross-examination on his affidavit.

[4] There were questions on a number of collateral issues where Singleton contradicted his previously sworn evidence at examinations for discovery or cross-examinations on his affidavits. By way of example, at trial he insisted that he had no assistance from counsel for MTS in the preparation of an affidavit and that it was prepared by his own law firm of Aikins MacAulay. In cross-examination on an affidavit sworn January 30, 2006, he admitted that affidavit had been prepared by MTS lawyers (page 7, question 4).

[5] In response to questions relating to Fox's hourly rate, he made reference to having a recollection of a one page letter that may have increased that hourly rate from that which had been set out in a September 30/04 Retainer Agreement. That evidence was contradicted by an answer given at his cross-examination on an affidavit where he candidly agreed that Fox was being paid the same rate as was set out in the aforementioned Retainer Agreement (page 62, question 262).

[6] In more instances than I would have thought reasonable, Singleton relied upon an inability to recall conversations or events. Understandably, the events about which Singleton was being questioned occurred approximately 12 years ago and his memory would necessarily have faded to some extent with the passage of time. However, my impression was that some of his inability to recall was self-serving and indicative of a reluctance to provide answers which might be helpful to the plaintiffs' cause.

[7] My greatest concern, however, is reserved for Singleton's recollection of his interaction with William Fraser (Fraser) with respect to a draft letter of opinion which Fox had prepared. Singleton faxed that draft opinion to Fraser on February 7, 1997. On being asked why that document was not included in his affidavit of documents, his response through his legal counsel was that it was omitted due to an oversight and that it was located by a senior staff member who had gone through the files again. In response to a question at examination for discovery, he recalled directing a staff member to search for it but that staff member was unable to locate it. He agreed that his answer at the examination for discovery was the correct one. On the same issue, at trial he recalled sending that document to Fraser while in his cross-examination on affidavit, he said he did not recall sending it to Fraser (page 65, question 728).

[8] Further, at trial he recalled a conversation with Fraser regarding the "secondary objective" in Fox's February 3/97 draft letter of opinion. At his examination for discovery, he stated he had no specific recollection of any conversation with Fraser.

[9] A similar discrepancy related to a question of whether or not he had any recollection of discussing issues respecting funding between MTS and the employees/retirees with Fraser.

[10] As a result of these and other discrepancies in Singleton's trial testimony compared to responses given under oath at both his examinations for discovery

and cross-examinations, I have no difficulty in finding him to be an adverse witness.

[11] As with Fox, I exercise my discretion to permit cross-examination of Fox by plaintiffs' counsel notwithstanding the fact that he appears before the court as their witness. I do so in order to have his evidence presented in a manner consistent with the principles of fairness and justice which can only occur if that evidence is subject to the scrutiny of cross-examination by the party adverse in interest.

[12] For the same reasons which applied to Fox, I am permitting defendants' counsel to cross-examine Singleton as well.

_____ J.