SUPERIOR COURT OF JUSTICE

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COUR SUPÉRIEURE DE JUSTICE

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FROM:	**Lynn Charbonneau / For Master Beaudoin**
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COURT FILE NO.: 98-CV-06282
DATE: 2008/02/22

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
JOANNA GUALTIERI	Stephen Victor, Q.C. and Angela Holland for the Plaintiff
Plaintiff	
- and -	
ATTORNEY GENERAL OF CANADA, FRANK TOWNSON, IAN DAWSON, KEN PEARSON, JAMES JUDD, GORDON SMITH, GEOFF CLIFFE-PHILLIPS, DONALD CAMPBELL and LUCIE EDWARDS	Linda J. Wall and Alexander Gay, for the Defendants
Defendants	
	HEARD: October 9th, 2007

MASTER BEAUDOIN

REASONS FOR DECISION

[1] The Plaintiff ("Gualtieri") seeks an Order:

(a) Terminating her examination for discovery by the Defendants;
(b) Declaring that her Responses dated October 13, 2005, November 22, 2005 and January 27, 2006 to the Defendants' Requests to Admit dated September 28, 2005,

November 11, 2005, and January 16, 2005 are proper and sufficient;

(c) Barring the Defendants from delivering any further Requests to Admit pending the trial;

(d) Directing the Defendants to answer all outstanding undertakings and to answer questions taken under advisement and objected to; and

(e) Costs of their motion on a substantial indemnity basis.

Overview of the relief sought

[2] To date, the Plaintiff has attended 31 days of examinations, answered 10,579 questions, and given and answered 117 undertakings. She claims that the Defendants' examination for discovery of her has been onerous and abusive and that the stress of the Defendants' prolonged examination is severely affecting her health. There are letters from her treating physicians in support of this claim.

[3] Gualtieri argues that the Defendants are abusing the right to examine her by an excess of improper questions; that they are conducting their examinations in bad faith and in an unreasonable manner. In her view, she has complied with her discovery obligations to the best of her ability and has now reached, if not surpassed, her capacity to continue further and that any further examinations could have severe consequences on her health and would be unjust.

[4] The Defendants have delivered three Requests to Admit dated September 28, 2005 (19 requests), November 3, 2005 (52 requests) and January 16, 2006 (182 requests). Having consideration for the fact that she has attended 31 days of examination, answered 10,579 questions, and given and answered 117 undertakings, Gualtieri claims that any further response to Requests to Admit would have the effect of providing the Defendants with an extensive written discovery in addition to the already extensive oral discovery. She urges me to conclude that the Defendants' use of the Request to Admit to date amounts to an abuse of process of the Court.

The History of the Discoveries

- Gualtieri's examinations for discovery commenced on March 29, 2000, when she was examined by counsel for the former Defendant, Lloyd Axworthy.

- Her examination on behalf of the remaining Defendants began on April 13, 2004 and continued to April 15, 2004.

- In November of 2004, the Defendants were advised that Gualtieri was currently pregnant and, on the advice of her doctor, Dr. Barry Dollin, she could not proceed with any examination during the course of her high-risk pregnancy. As a result, her continued examination could not be scheduled until after the birth of her baby in the summer of 2005.

- Following a Case Conference held on January 13, 2005, Gualtieri's continued examination was scheduled for November 7 to 18, 2005 and November 21 to 25, 2005.

- On September 20, 2005, the Defendants were advised that Gualtieri could not proceed with the examinations scheduled for November 2005 based on the advice of her treating physician, Dr. Christiane Kuntz.

- On September 28, 2005 the Defendants served their first Request to Admit. The Plaintiff served her Response on October 13, 2005.

- On October 26, 2005, a Case Conference was held and, pursuant to my Order, Gualtieri's examination was adjourned until March 6 to 10, 2006, March 13 to 17, 2006 and April 18

to 21, 2006, and a further Case Conference was scheduled for April 21, 2006.

- On November 11, 2005, the Defendants served a second Request to Admit containing 52 facts. On November 22, 2005, the Plaintiff served her Response. There was some disagreement between counsel with regard to a number of the listed facts and discussion of a possible motion.

- On January 18, 2006, the Defendants served a Request to Admit, containing 160 facts, although the Plaintiff says that there were actually 182 facts listed. On January 27, 2006, Gualtieri served her response wherein she refused to admit the entire request to admit.

- On February 8, 2006, the parties attended a Case Conference before me and, I scheduled a motion to strike the Request to Admit and a motion to compel answers for April 25, 2006. That motion did not proceed.

- The Plaintiff attended continued examinations on March 6, 2006. At the conclusion of the examination on March 6, 2006, the Plaintiff collapsed on the floor, in a room down the hall from where the examination had taken place. As a result of this collapse, counsel agreed to an examination schedule, which would provide the Plaintiff with sufficient breaks between examination sessions to recuperate.

- The Plaintiff attended further examinations for discovery on March 7, 8, 10, 13, and 14, 2006. Examinations previously scheduled for March 16 and 17, 2006 were adjourned, on the basis that Gualtieri was ill and could not proceed. This was

confirmed in a medical note from Dr. Kuntz, dated March 15, 2006. Dr. Kuntz also noted that, because of the stress of the situation she was presently in, she had a recurrent viral illness indicating a weakened immune system.

- On April 21, 2006, the parties attended another Case Conference and further continued examinations of the Plaintiff were scheduled for May 1-3, July 4-7 and July 10-14, 2006.

- The Plaintiff attended continued examinations on May 1, 2 and 3, and July 4, 5, 7, 10 and 11, 13 and 14, 2006. During the course of the examinations in July 2006 the Plaintiff again became ill. On July 10, 2006, she attended before Dr. Kuntz who advised that the examinations should be postponed on medical grounds. Nevertheless, the Plaintiff chose to continue with her examination on July 11, 13 and 14, 2006.

- The parties attended another Case Conference on July 14, 2006 and I ordered continued examinations of the Plaintiff to take place for September 11 to 15, September 25 to 29 and the week of October 2 to October 6, 2006.

- The Plaintiff attended continued examinations on September 11, 12 and 14, 2006. On September 25, 2006, Ms. Gualtieri was unable to attend the examinations for a full day. The Plaintiff attended continued examinations on September 28, and 29 and October 2 and 3, 2006. On October 4, 2006, the Defendants wrote to the Plaintiff and requested various undertakings.

- On October 4, 2006, in the course of preparing for her continued examinations and attempting to answer

undertakings, the Plaintiff says she suffered a complete mental and physical collapse. Ms. Holland attended on October 5, 2006, and cancelled the scheduled examinations for discovery for that day and the next.

- On October 11, 2006, Plaintiff's counsel wrote to the Defendants and forwarded a medical note of Dr. Barry Dollin, the Plaintiff's treating psychiatrist, dated October 4, 2006. Dr. Dollin advised that, due to the Plaintiff's medical history and current clinical state, she should take a one-week medical leave to recover, following which she would be evaluated.

- Another report from Dr. Barry Dollin, dated October 24, 2006 was delivered to the Defendants wherein he stated, that the Plaintiff should not return to her discovery process for another six weeks and that the ongoing legal proceedings are bound to be difficult and possibly harmful to her.

- At an October 31, 2006 Case Conference, Mr. Victor claimed that the Plaintiff's continued examination was onerous and abusive and that the Plaintiff intended to bring a motion to stop the examinations. As a result, this motion was originally scheduled for March 1, 2007. I also ordered that all other motions arising from discoveries would be scheduled for the same date and a timetable was set for the delivery of answers to undertakings, and the delivery of motion materials.

- On March 1, 2007, Gualtieri brought a preliminary motion that I recuse myself from the motion which motion I dismissed. This motion could not be rescheduled until October 9th, 2007. There was insufficient time to deal with the Defendants' cross-

motion and the motion was adjourned. On October 17, 2007, The Defendants apparently decided not to pursue their motion and wrote to the court. That correspondence was not brought to my attention until recently.

The pleadings

[5] Any consideration of the extent of the discoveries must commence with a review of the pleadings. The Plaintiff amended her pleadings on March 19th, 2004. The Fresh Statement of Claim is 27 pages and 77 paragraphs long. She has sued the Attorney General of Canada and 8 other individual Defendants. The Plaintiff was an employee of the Department of Foreign Affairs and International Trade (DFAIT). The individual Defendants were either Deputy Ministers or supervisors of the Plaintiff at various times. The allegations in her claim cover a period between 1992 and 1998. At paragraphs 23 through to 27 there are allegations of departmental overspending, waste and financial mismanagement. These are more specifically identified in 9 sub-paragraphs of paragraph 25. The most substantial part of her claim addresses her complaints of harassment, abuse and retaliation by the Defendants.

[6] The Statement of Defence is itself some 26 pages and 68 paragraphs in length. The allegations of waste, misspending and of harassment are denied and the Defendants describe Gualtieri's characterization of herself as a whistle-blower as an *ex post facto* fabrication to cover up her own deficiencies and difficulties in the workplace. They have responded in detail to her claims of government waste and overspending.

The Conduct of the Examinations

[7] In support of this motion, Gualtieri has filed three volumes containing 105 excerpts from her discoveries wherein she describes the Defendants' questions as repetitive, argumentative, picayune or irrelevant, improper, unreasonable and overly broad.

[8] I have reviewed the voluminous materials provided by the Plaintiff and while the Defendants' claim that these excerpts are an exercise in selective editing, I am satisfied that

the most of the criticisms are well founded. Many of the questions are repetitive and argumentative. There are frequent interventions by Plaintiff's counsel as he attempts to bring some focus to the questions being asked.

[9] The greatest difficulty in these discoveries arises from the Defendants' focus on the allegations of waste at various foreign missions as set out in the Statement of Claim. Gualtieri submits that the Defendants are using the discoveries to conduct an unnecessary project review of each mission. The Defendants say that they are required to cover all missions or projects that will be referred to by Gualtieri at trial and that her counsel understood the consequences of putting such a large number of missions and projects in issue.

[10] While the Defendants have acknowledged that an allegation of waste is not a conclusion on harassment, they no doubt seek to undermine Gualtieri's claims of harassment by discrediting her allegations of waste. Although there is a link between the allegations of harassment and waste, these claims are not interdependent. A claim for harassment could succeed even if it is demonstrated that the allegations of waste were ultimately without merit. At trial, the Plaintiff will have to establish that she had good reason to believe that this waste was taking place and that she was punished for pursuing her legitimate concerns. In responding to issues raised by the Plaintiff, the Defendants will have to establish that they took reasonable steps to investigate and satisfy themselves that there was no wrongdoing and that they adequately responded to Gualtieri's concerns.

[11] The Defendants are entitled to know what evidence the Plaintiff will rely on in support of her allegations of waste as well as the particulars of the harassment she claims to have suffered. They are also entitled to seek admissions in support of their defence. Nevertheless, there are limits; this does not entitle the Defendants to ask Gualtieri questions with regard to all of the evidence they may have to rebut her claims. They may wish to demonstrate that Gualtieri lacked knowledge of the policies and procedures that applied to the foreign missions in issue and may ask her some questions to test that point. Nevertheless, I conclude that the Defendants have gone too far in this line of questioning.

[12] Although the Request to Admit, dated January 16, 2006 involves another issue for this motion, it demonstrates the Defendants' overreaching approach to discoveries on this particular issue. Here are but a few examples:

The Plaintiff is requested to admit:

> **General OR (Official Residence) requirements**
>
> 17) that the family area must have a suitable number of bathrooms to service the number of bedrooms in the OR.
>
> 18) that the master bedroom must have ample storage, suitable for storage of long evening gowns and other formal attire used at official functions.
>
> 20) that the general work/area of an OR requires secure storage for such things as bottled beverages.
>
> 23) that separate male and female washrooms are required in close proximity to the common room.
>
> ....
>
> **Tel Aviv**
>
> 31) that the employee assigned by the Bureau to manage the OR in Tel Aviv was Micheline Berthot. (*I note that the Plaintiff was already extensively examined about Ms. Berthot*)
>
> 32) that the Government of Canada retained legal counsel in Israel to act as agent for the Attorney General of Canada in a dispute involving the OR that was located in Tel Aviv.
>
> 33) that under the *Department of Justice Act*, only the Attorney General of Canada has the authority to retain legal counsel for the Government of Canada.
>
> 34) that the Plaintiff has knowledge in respect of how foreign legal agents are retained to represent the Government of Canada.
>
> 35) that the Plaintiff has no knowledge in respect of how foreign legal agents are retained to represent Government of Canada.

> *There are 31 facts relating to the Tel Aviv mission even though I could find no reference to that mission in the Statement of Claim.*

[13] The document goes on to reference other missions. Most of the facts listed are of doubtful relevance and even if they were relevant, it is far from clear what benefit is obtained in making this request. It is likely that the Defendants will still be required to give evidence as to some of these facts in support of their defence that there was no government waste as alleged. They will no doubt cross-examine Gualtieri on her allegations at trial. It is unclear how they intend to integrate any response she could possibly make as part of their case. In any event, the document reveals the Defendants' exhausting approach to the discovery process.

[14] The Defendants do not seriously challenge the Plaintiff's claims that the continued discoveries have negatively impacted her health. In his last report, Dr. Barry Dollin notes: "*It is easy to imagine how the current legal process itself could be perpetuating the psychiatric injury cause by the original harassment and how it could be continuing to cause repetitive harm.*" He concludes that: "*Ongoing legal proceedings are bound to be difficult and possibly harmful to her*".

[15] The Defendants maintain that Gualtieri's medical condition is not a good reason for denying them the right of discovery. In instances where a Plaintiff is ill, the court must sanction behaviour that allows for the Plaintiff to be accommodated and yet preserves their rights. The Defendants duly note that they have made every effort to accommodate the Plaintiff Gualtieri's medical condition and have agreed to proceed no more than two days at a time, although at an inconvenience. They submit that this arrangement has worked well and there is no evidence to suggest that it cannot work.

The Law

[16] Rule 34.14 (1) allows for the adjournment of an examination for the purpose of seeking an order to terminate an examination where:

(a) The right to examine is being abused by an excess of improper questions, or

(b) Where the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined.

[17] The right to discovery is not absolute and the court has restrained ongoing discovery that is found to be onerous or abusive. It need not be shown that discovery is intentionally abusive. It may be sufficient for the court to find that the proposed discovery will be out of all proportion to the matters in issue. Discovery rights are subject to court supervision and are not absolute rights. [1]

[18] In one instance,[2] Justice Benotto found the discovery process had reached the point of harassment after 16 days. As she said:

> "While wide latitude is generally acceptable, there are limits. It is not 'an open door to harass a party' by exploring every line of questioning: *Kay v. Posluns* (1989), 71 O.R. (2d) 238 per Justice Steele at p. 246. There is a point where the discovery process can be used to create havoc for a litigant by increasing expense and threatening delay. That point has been reached here."

[19] As noted by our Court of Appeal:

> "The discovery process must be kept within reasonable bounds. Lengthy, some might say interminable discoveries are far from rare in the present litigation environment. We were told that discovery of these defendants has already occupied some 18 days and is not yet complete. ...The effective and efficient resolution of civil lawsuits is not served if the discovery process takes on dimensions more akin to a public inquiry than a specific lawsuit."[3]

[20] The Defendants argue that Plaintiff's counsel had the right to refuse to answer questions they considered irrelevant and allow them to be made the object of a motion under Rule 34.12. They claim that there are only 6 objections on the record and that no motions

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[1] *Senechal v. Muskoka (Municipality)* [2005] O.J. No 1406 (S.C.J.) at paras 6 and 8.
[2] *671122 Ontario Ltd. v. Canadian Tire Corp.* [1996] O.J. No. 2539 (Ont Gen. Div.)

were ever filed. They note that two thirds of the examples offered by the Plaintiff predate 2004. They argue that any disagreement as to the relevancy of questions asked does not entitle Gualtieri to the extraordinary remedy under Rule 34.14.

[21] While there may have been few objections, I note that since April 2004, Mr. Victor has given the Defendants a number of warnings that he viewed their conduct of the examinations as "*crossing the line*" and an abuse of their discovery rights

[22] The Defendants say that the threshold to apply any remedy under Rule 34.14 is high: that Rule 34.14 is limited to circumstances where the conduct of one counsel or another is such that a proper examination cannot be held. The "improper" behaviour must be more than a legitimate disagreement between counsel as to the propriety of particular questions; rather, it requires misconduct such as to render the examination futile without the intervention of the Court.[4]

[23] They cite Rule 34.14(2), which allows for the award of costs personally against counsel that is responsible for the misconduct and suggest that this sheds light on the type of "improper" conduct that is required in order to invoke Rule 34.14(1). They dispute that there is any evidence on the record to suggest that there has been improper conduct of the type contemplated by Rule 34.14(1).

Decision

[24] Rule 34.14 recognizes the court's discretion to supervise the discovery process. Terminating the discoveries is only one of the orders that the court could impose in its arriving at a decision that it considers just in the circumstances of the case. I agree that the termination of discoveries or the imposition on an award of costs should be reserved for the case of serious misconduct. In this instance, the Defendants' laboured examinations may have been exhausting but I am not satisfied that they have been intentionally abusive.

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[3] *Ontario (Attorney General) v. Ballard Estate*, [1995] 44 C.P.C. (3d) 91 (Ont. C.A.)
[4] *Kingsberg Developments Limited v. MacLean et al.*, [1985] O.C.P. 162

[25] In their zeal to defend their clients from Gualtieri's claims I conclude that they have taken their discovery beyond reasonable limits. I am satisfied that they have attached a disproportionate amount of time in conducting a project review of the foreign missions referred to in the claim. The discovery has taken on the dimensions of a public inquiry. As noted by Gualtieri's counsel, more than seventy-five percent of the pleading involves the allegations of harassment and retaliatory conduct. Thirty-one days of discovery should have been more than sufficient to discover the Plaintiff and the Plaintiff was justified in seeking the intervention of the court. The impact on her health has not been seriously disputed and cannot be ignored.

[26] In my view, the appropriate remedy in this instance is to limit the Defendants to 8 more hours of discovery. The Defendants advised the Court at the last Case Conference that about three-quarters of the discovery had been completed. The areas that remain to be covered include: (a) re-classification from AS-04 to AS-05; (b) performance reviews; (c) dealings with individuals Defendants Judd, Smith; (d) certain documents and events in the period May 1996 to December 1997 left over from the last discovery; (e) specific paragraphs in the claim; and, (f) questions arising out of answers to undertakings. With clearer and more precise questions, they should be able to accomplish this task in the time allocated and still accommodate the Plaintiff's health concerns.

The Requests to Admit

[27] An examination for discovery may take the form of an oral examination or at the option of the examining party, a written examination, but the examining party is not entitled to subject a person to both forms except with leave of the court. [5]

[28] In *Milani v. Milani* [2005] O.J. No. 693 (Ont. Sup. Ct.)[6] the applicant requested that the court strike the respondent's Requests to Admit and prohibit the respondent from serving any more Requests to Admit. In that case, the respondent had served 5 Requests to Admit of

[5] Rule 31.02(1)

[6] Although the court was dealing with Rule 22 of the *Family Law Rules*, the provisions of that Rule are similar to those of Rule 51

which the applicant had responded to 4, but upon receiving the last Request to Admit the applicant sought the assistance of the court. The Court held that the last Request to Admit was to be struck and ordered that the respondent was not to deliver any further Requests to Admit pending trial.

[29] The Court stated:

> ...The court must not allow a process that was intended to expedite the gathering of facts and to keep costs down to become a weapon in the hands of a litigant. Nor can the court allow irrelevant and personally hurtful questions to be asked in this format anymore than the court would allow such in trial. To permit this would be to give licence to the respondent to subvert the useful tool of the Request to Admit and use it to harass the applicant."

[30] The Defendants rely on case law[7] that says Rule 51 contains a complete code. That it creates a mandatory procedure by which a respondent must abide once served with a Request to Admit. They also argue that there is nothing in Rule 51 that would prevent a party from relying on both a discovery process and a Request to Admit. The choice by which counsel decides to elicit facts is a strategic decision that is left to the good judgment of counsel. Moreover, the Defendants argue that a Master must not make rulings on the propriety of a Request to Admit, rather the issue should be left to the discretion of the trial judge.

[31] More recently[8], Master Egan chose to follow the *Milani* decisions and ruled that Requests to Admit can and should be dealt with by way of interlocutory motions in appropriate cases. She specifically concluded at para. 26: "*When an abuse of process is alleged, it must be dealt with on an interlocutory motion or the abuse, if it exists, is allowed to continue.*" She struck the Request to Admit in that case as an abuse of process.

[32] In this instance, there have been 31 days of discovery. I have already commented on the latest Request to Admit. I fail to see how this latest Request will expedite the gathering of relevant facts or save costs. The volume of these Requests, the nature of the facts listed along

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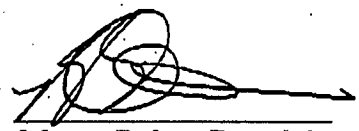
[7] *RSC Management Ltd. v. Cadillac Fairview Corp. Ltd.* 51 O.R. (2d) 107
[8] *Slate Falls Nation v. Canada (Attorney General)* [2005] O.J. No. 5228 (S.C.J.)

with the 31 days of discovery with over 10,500 questions asked and answered leads me to conclude that this is an attempt to obtain written discovery in addition to oral discovery and is an abuse of the discovery procedure. Although the Plaintiff asked for a declaration that her response to the Request to Admit dated January 16, 2005 is proper and sufficient, that response was essentially a refusal. I agree that this latest Request to Admit is an abuse of process and the appropriate remedy is to strike it. I doubt that I have the jurisdiction to bar the Defendants from delivering any further Requests to Admit, but I trust that my conclusions on this Motion will discourage any further attempts.

[33] The parties may make written submissions as to costs within 20 days of the release of this decision.



Master Robert Beaudoin

Released: February 22, 2008

COURT FILE NO.: 98-CV-06282
DATE: 200/02/22

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOANNA GUALTIERI

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA, FRANK TOWNSON, IAN DAWSON, KEN PEARSON, JAMES JUDD, GORDON SMITH, GEOFF CLIFFE-PHILLIPS, DONALD W. CAMPBELL, and LUCIE EDWARDS

Defendants

REASONS FOR DECISION

MASTER BEAUDOIN

Released: February 22, 2008