COUR SUPÉRIEURE

2010 QCCS 5607 (CanLII)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. 500-17-047317-089

DATE : November 17, 2010

IN THE PRESENCE OF : THE HONOURABLE JOËL A. SILCOFF, J.S.C.

BCE INC.

Plaintiff

v.

ONTARIO TEACHERS' PENSION PLAN BOARD
-and-
PROVIDENCE EQUITY PARTNERS VI INTERNATIONAL LP
-and-
MADISON DEARBORN CAPITAL PARTNERS V-A, L.P.
-and-
MADISON DEARBORN CAPITAL PARTNERS V-C, L.P.
-and-
MADISON DEARBORN CAPITAL PARTNERS V EXECUTIVE-A, L.P.
-and-
6796508 CANADA INC. (FORMERLY KNOW AS BCE ACQUISITION INC.)

Defendants

JUDGMENT

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I. INTRODUCTION

[1] By its *Re-Particularized and Amended Motion to Institute* (the **"Principal Action"**), Plaintiff, BCE Inc. (**"BCE"**) claims from Defendants, Ontario Teachers' Pension Plan Board (**"Teachers"**), Providence Equity Partners VI International LP (**"Providence"**), Madison Dearborn Capital Partners V-A, L.P., Madison Dearborn Capital Partners V-C, L.P., Madison Dearborn Capital Partners V Executive-A, L.P. (collectively, **"Madison"**) and BCE Acquisition Inc. (**"BCE Acquisition"**) $1,200,000,000 (the **"Break-Up Fee"**), being the amount of liquidated damages previously agreed upon by the parties in the event that a certain transaction involving the privatization of BCE failed to close by December 11, 2008.

[2] For the reasons expressed in its *Particularized Defence*, the Defendants contend that the Break-Up Fee is not due or payable and, accordingly, seek the dismissal of the Principal Action with costs.

[3] In the context of examinations on discovery being conducted after plea of representatives of each of the parties, counsel were unable to agree upon the nature, scope and duration of a witness exclusion protocol to be applied to these witnesses as well as to all other witnesses to be examined, in the future, on behalf of any one or more of the parties.

[4] Accordingly, Plaintiff presented its *Motion to Obtain an Order for the Exclusion of Witnesses* (the ***"Motion for the Exclusion of Witnesses"***), the conclusions of which are addressed in this judgment.

[5] Although the parties agree upon the appropriateness of some form of witness exclusion protocol, they have opposing views as to the :

(i) Number of designated representatives of each of them who are to be exempt from the application of the protocol;

(ii) Identity of those other witnesses to whom the protocol will apply; and

(iii) Duration of the protocol.

II. HISTORICAL AND PROCEDURAL CONTEXT

[6] Examinations on discovery of three representatives of BCE, Messrs. Vanaselja, Sabia and Beauregard were conducted between June 22, 2010 and July 7, 2010.

[7] On June 22, 2010, at the outset of Mr. Vanaselja's examination, the issue of witness exclusion and confidentiality during the discovery process and beyond was discussed by counsel. Although further discussions ensued, they were unable to agree

upon the appropriate parameters of a protocol to be respected by each them. It was agreed at the time, however, that pending a resolution of the issue, the parties, their counsel and the individuals present during the examinations of the three BCE representatives would not share the content of their testimony with any other persons expressly named by either party as potential witnesses or anticipated to be called as witnesses on discovery or at trial (the **"Interim Exclusion"**). Mr. Michel Lalande, BCE's sole designated representative at the time was exempt from the Interim Exclusion.

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[8] Seeing the failure of the parties to agree upon the appropriate parameters of a protocol, on August 18, 2010, in a message addressed to the Court in electronic form, BCE formally seized the Court of the *Motion for the Exclusion of Witnesses.* The *Motion* was heard on September 17, 2010.

[9] Prior to the hearing, counsel for Teachers' and Providence sought an adjournment of the examinations of their respective representatives, Messrs. Silvestri and Nelson, previously scheduled to begin on September 7, 2010 and September 13, 2010, until final judgment on the BCE's *Motion*.

[10] On September 7, 2010, for the reasons therein expressed, the Court issued the following *Interim Order*:

> **DISMISSES** the Defendants' Motion for an adjournment of the examinations of Messrs. Glen Silvestri and Jonathan Nelson, scheduled by the parties to begin respectively on Tuesday September 7, 2010 and Monday September 13, 2010;
>
> **ORDERS** that for the purposes of the aforementioned examinations, Messrs. Silvestri and Nelson shall have the right to take cognizance of the content of the transcripts of the examinations on discovery of Messrs. Siim Vanaselja, Michael Sabia, and Paul Beauregard that have already been conducted in this file;
>
> **ORDERS** that the Interim Exclusion will continue to apply to all other witnesses and third parties, including with respect to the transcripts of Messrs Silvestri's and Nelson's examinations, until the Court has rendered final judgment on Plaintiff's *Motion for the exclusion of witnesses*;
>
> […]

(the ***"Interim Order"***)

[11] Messrs. Silvestri and Nelson were examined, as scheduled, on September 7 and 13, 2010, in conformity with the provisions of the *Interim Order.*

[12] The *Motion for the Exclusion of Witnesses* was heard on the merits as scheduled on September 17, 2010. Considering the complexity and importance of the issues raised for determination, the matter was taken under advisement that day.

[13] Seeing that examinations on discovery of several witnesses were scheduled for the coming days and weeks and, considering the importance that these examinations take place without unnecessary delay, as well as for other reasons expressed at the time, the Court issued a *Safeguard Order* modifying certain provisions of the *Interim Order* pending final judgment on the *Motion for the Exclusion of Witnesses.*

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[14] The *Safeguard Order* provides, *inter alia :*

> [10] **ORDERS** that unless otherwise expressly modified by this *Safeguard Order,* all of the provisions of the Interim Exclusion and the *Interim Order* shall continue to apply *mutatis mutandis* during the discovery process to all witnesses examined in the present proceedings by either Plaintiff or Defendants;
>
> [11] **ORDERS** that the Interim Exclusion and the *Interim Order* shall not apply to the following **two designated representatives** of each of the parties;
>
> - **BCE Inc. :**
>
>   Mr. Michel Lalande
>
>   Ms. Martine Turcotte
>
> - **Ontario Teachers' Pension Plan Board :**
>
>   Mr. Glen Silvestri
>
>   Mr. James Leech
>
> - **Providence Equity Partners VI International L.P :**
>
>   Mr. Mark Masiello
>
>   Mr. Jonathan Nelson
>
> - **Madison Dearborn Capital Partners V-C, L.P. & Madison Dearborn Capital Partners V Executive – A, L.P.**
>
>   Mr. James Cole
>
>   Mr. James Perry Jr.

[15] On September 27, 2010, the Court heard representations on *Defendants' Motion de bene esse to Rectify or Vary a Safeguard Order.* Defendants sought by way of principal conclusions:

(i) to have excluded from the *Safeguard Order* certain of its representatives, Mr. Jeff Davis, Vice-President and Associate General Counsel of Teachers' and Mr. Mark Tresnowski, Managing Director and General

Counsel of Madison Dearborn Partners, LLC, which latter company acts as investment advisor to Madison; and

(ii) to correct a clerical error in the name of one of the previously designated representatives of Madison.

[16] Subsidiarily, Defendants sought to vary the *Safeguard Order* such that the designated representatives of Teachers' and Madison be modified to read as follows :

- **Teachers**

  Mr. James Leech

  Mr. Jeff Davis

- **Madison**

  Mr. James Perry Jr.

  Mr. Mark Tresnowski

[17] The Court dismissed the principal conclusions and granted Defendants' subsidiary conclusions. Accordingly, **for the purposes of the *Safeguard Order*,** the designated representatives of Teachers' and Madison were modified as requested. There was no change in the designated representatives of BCE or Providence.

[18] For the purposes of the *Safeguard* Order, seeing the apparently important functions performed by Mr. Davis on behalf of Teachers' and in order to permit him to adequately supervise the litigation and to assist in making important strategic decisions when appropriate, he was substituted as one of Teachers' designated representatives in replacement of the previously designated Mr. Silvestri.

[19] For the same reason, Mr. Tresnowski was substituted as one of Madison's representatives in replacement of the previously designated Mr. Cole.

[20] Although Teachers' initially agreed to limit to two its designated representatives exempt from the witness exclusion order, in a letter to the Court dated October 6, 2010, counsel asserts that such agreement was predicated upon the fact that Mr. Davis was never identified as a potential witness by BCE and that, for this reason, he would be exempt from any witness exclusion order. Accordingly, counsel contends, it was not necessary to designate him as one of the two Tearchers' representatives. However, counsel contends, BCE has *"suddenly and diametrically changed its position"* with respect to Mr. Davis. Thus, he contends, it is appropriate that the number of Teachers' designated representatives be increased to three in order that those persons directly involved can participate in the preparation and presentation of a full and complete defence to the Principal Action.

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[21] BCE disputes counsel's contentions. In a letter to the Court dated October 15, 2010, she contends that in the exchange of correspondence between opposing counsel it was clear from the outset that all individuals involved in the transactions which are fundamental to the present proceedings, including Mr. Davis, were covered by the Interim Exclusion and the *Interim Order*. She contends that Mr. Davis was intimately involved in the relevant transactions and was identified, at the outset, by Teachers' as a custodian of relevant documents and thus likely to be examined as a witness in these proceedings. As such, unless designated by Teachers' as one of its representative, being a potential witness, he should be subject to the requested witness exclusion order.

[22] In addition to the foregoing, there was another matter raised relating to which other witnesses, going forward, would be subject to the order and, accordingly, would not be permitted to take cognizance of the transcripts of examinations previously conducted. More specifically, there was disagreement as to whether the order should apply to all witnesses, including potential witnesses who have yet to be identified by either party (Plaintiff's position), or whether it should apply only to those persons specifically identified by each of them as being certain or likely witnesses in these proceedings (Defendants' position).

[23] Defendants claim they are able to and have indeed identified those persons who are or are likely to be called as witnesses.

[24] To date, Plaintiff only provided Defendants with **a non-exhaustive list** of those persons whom, it believed, are or are likely to be called as witnesses. It contended that, pending completion of the discovery process, it was unable to provide an exhaustive list.

[25] The Court previously suggested that, upon completion of the examinations recently conducted, Plaintiff should be in a position to provide the opposing parties with a definitive list of those witnesses or potential witnesses to whom the order would apply, under reserve of its right to modify same in the future should it become appropriate and subject to the Court's permission. It would appear that these examinations have either been completed or have been substantially completed.

[26] In the circumstances, a determination of the merits of the opposing parties' positions on this matter is no longer required. Each of the parties will be given until December 31, 2010 to identify their respective witnesses and potential witnesses. The witness exclusion order to be issued will then apply, as well, to those persons so identified at such time.

III. ISSUES IN DISPUTE

[27] The issues raised for determination are the following :

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(i) *Is it appropriate, in the circumstances of the present proceedings, to issue a witness exclusion order at the discovery stage that would apply to all witnesses to be examined, save for an exemption applicable to a number, to be determined, of designated representatives of each party?*

In the affirmative,

(ii) *How many representatives of each of the parties should be exempt from the application of the witness exclusion order?*

(iii) *Should "deal counsel" be exempt from the application of the witness exclusion order? and*

(iv) *Should the witness exclusion order apply, until the completion of trial on the merits in first instance, to all witnesses previously examined on discovery as well as to any other witnesses who may not have been examined but who are identified as potential witnesses?*

IV. POSITIONS OF THE PARTIES

(1) Plaintiff

[28] Exclusion of fact witnesses is the rule in Québec, not the exception. A request for exclusion of witnesses should be granted unless there are serious reasons for refusing it. Each of the parties, being legal persons, are entitled to have only one designated representative exempt from the application of any witness exclusion order.

[29] Counsel contends that a witness exclusion order may and should, in the context of the present proceedings, be issued not only during trial on the merits, as is customary, but as well at the discovery stage of proceedings. They argue[1] :

> 16. The rule on the exclusion of witnesses requires that witnesses testify outside of each others' presence with a view to ensuring the integrity of the process and preserving the credibility of witness testimony.
>
> 17. In order to preserve the ability of counsel to receive instructions from their client, an exception to this rule allows one representative per party to attend the examinations on discovery, even if he/she is a potential witness. The representative, as well as all counsel, must nevertheless respect the exclusion of witnesses rule and should not share the content of the testimony with other potential witnesses, including third parties (such as, in the present case, the parties' respective deal lawyers, financial advisors and KPMG).
>
> 18. These restrictions apply until the conclusion of trial.

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[1] *Plaintiff's Outline of Argument on its Request for Exclusion of Witnesses – August 25, 2010 Hearing.*

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(2) Defendants

[30] Counsel accepts the possibility of a witness exclusion order being issued at the discovery stage but contends that such orders are exceptional and entirely at the discretion of the Court. Nonetheless, counsel suggests that Defendants would not oppose an order which does not hamper their ability to present a full answer and defence and which does not restrict their ability to make use of evidence obtained on discovery in preparation for trial on the merits. Counsel writes[2] :

> 9. However, having duly considered the issue, Defendants submit that the **bare minimum** requirements of such a witness exclusion order would be that :
>
> 9.1 Those representatives who are necessary to allow the Defendants to properly conduct their defences, and in particular, in order to allow them to properly supervise the litigation on a day-to-day basis and to make important strategic decisions when appropriate be exempt from the witness exclusion order;
>
> 9.2 The witness exclusion order would cease to apply to any witness in respect of which the examination on discovery has been completed;
>
> 9.3 The witness exclusion order cease to apply generally after the completion of the discoveries such that the content of the examinations on discovery would be available for all purposes for trial preparation;

[31] Counsel further qualified Defendants' position regarding the *…bare minimum requirements of a witness exclusion order….*[3]:

> 4.1 Defendants be allowed to designate the number of representatives which is necessary to allow Defendants to properly conduct their defences, and in particular, in order to allow them to properly supervise the litigation and to make important strategic decisions when appropriate. In particular, based on Defendants current understanding of Plaintiff's intentions to examine witnesses, Defendant Ontario Teachers' Pension Plan Board (hereunder "**Teachers'**") should be permitted to designate two (2) representatives, Defendant Providence Equity Partners L.L.C (hereunder "**Providence**"), two (2), and Defendant Madison Dearborn Capital (hereunder "**MDP**"), three (3);
>
> 4.2 The exclusion order would not apply to the "deal" lawyers Mr. Jonathan Lampe, Mr. David Duffel, Mr. Ed Waitzer, and Mr. Jim Morphy;

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[2] *Defendants' Plan of Argument in Contestation of Plaintiff's Request for a Witness Exclusion Order.*

[3] *Defendants' Response to Plaintiff's Response to Defendants' Plan of Argument.*

4.3 The exclusion order would cease to apply to any witness in respect of which the examination on discovery is substantially complete;

4.4 The exclusion order cease to apply generally after the completion of the discoveries such that the content of the examinations on discovery would be available for all purposes for trial preparation;

4.5 The exclusion order would not apply to the testimony given during the examinations on discovery of witnesses adverse in interest;

[32] For the reasons previously mentioned, counsel modified its position regarding the appropriate number of designated representatives of Teachers' who should be exempt from the application of a witness exclusion order, increasing the number from two to three.

V. ANALYSIS

(i) ***Is it appropriate, in the circumstances of the present proceedings, to issue a witness exclusion order at the discovery stage that would apply to all witnesses to be examined, save for an exemption applicable to a number, to be determined, of designated representatives of each party?***

[33] The Court refers to and adopts by reference, the analysis of Rochette J.C.A. in his reasons for judgment in *Constructions Beaubois inc.* c. *Développement Les Méandres inc.*[4] regarding the Court's discretion in issuing a witness exclusion order.

> [7] Débutons en reproduisant l'article 294 *C.p.c.* :
>
> **294.** Sauf lorsqu'il est autrement prescrit, dans toute cause contestée, les témoins sont interrogés à l'audience, la partie adverse présente ou dûment appelée.
>
> Chaque partie peut demander que les témoins déposent hors la présence les uns des autres.
>
> [Mon soulignement]
>
> [8] Il est acquis au débat qu'une telle demande peut être formulée lors d'un interrogatoire préalable, que l'on soit en présence d'une personne physique ou d'une personne morale, mais qu'elle ne vise toutefois ni les parties ni leurs représentants qui ont le droit d'être présents[5]. Monsieur Boilard peut-il être qualifié de représentant de Méandres ?

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4 2009 QCCA 1271, J.E. 2009-1300 [" ***Constructions Beaubois"***].

5 *Immeubles Jutland ltée* c. *Charron*, [1980] R.P. 291 (C.A.). Voir aussi *Skyline Holdings inc.* c. *Master Kid inc.*, [1998] J.Q. n° 1020 (C.A.) (QL).

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> [9] Rappelons que le juge saisi d'une demande d'exclusion jouit d'une discrétion[6] dont l'exercice prendra nécessairement appui sur **le contexte factuel propre à chaque affaire**. Même si l'exclusion est la règle[7], le juge considérera le droit d'une partie d'être entendue pleinement, qui comprend le droit de son avocat de contre-interroger un témoin de la partie adverse en toute connaissance de cause[8]. Le juge prendra aussi en compte l'objectif recherché par l'ordonnance d'exclusion des témoins, soit « d'éviter qu'un témoin n'entende le témoignage des autres témoins et ait la possibilité d'adapter en conséquence, le cas échéant, son propre témoignage »[9]
>
> (Our emphasis)

[34] The exclusion of fact witnesses, where requested, is the general rule and not the exception in Québec. Although the Court retains certain discretion to refuse a request where warranted and although each case must be considered in light of the " *contexte factual proper à chaque affaire"*, such a request should only be refused for serious reasons. In discussing the decision of the Court of Appeal in *Hôtel-Dieu*, referred to as authority by Rochette J.C.A. in *Construction Beaubois,* Léo Ducharme in *L'administration de la prevue*[10] writes :

> 383. Selon un arrêt de la Cour d'appel [*Hôtel-Dieu de Québec c. Blois, [*1977] C.A. 563], le tribunal a discrétion pour accorder, refuser ou ordonner un huis clos mitigé. En première instance, le tribunal avait estimé qu'il n'avait aucune discrétion en la matière et s'était cru obligé, sur demande d'une des parties, d'ordonner l'exclusion de tous les témoins, y compris des témoins experts. La Cour d'appel a modifié ce jugement en restreignant l'ordonnance de huis clos aux témoins ordinaires. Il ressort de cet arrêt que la demande d'exclusion des témoins ordinaires doit être ordonnée, sauf s'il existe des motifs sérieux de la refuser, mais que la demande d'exclusion des témoins experts doit être refusée, sauf s'il y a des raisons spéciales de l'accueillir. […]
>
> (Our emphasis)

[35] There are no serious reasons for refusing to issue a witness exclusion order. What remains to be determined, however, is the scope and duration of the order.

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6 *Hôtel-Dieu de Québec* c. *Bois*, [1977] C.A. 563. Voir Jean-Claude Royer, *La preuve civile*, 4e éd., par Jean-Claude Royer et Sophie Lavallée,, Cowansville, Éditions Yvon Blais, 2008, no 531, p. 408.

7 *Léger* c. *Montpetit*, [1999] J.Q. no 1216 (C.A.) (QL).

8 *Immeubles Jutland ltée* c. *Charron*, *supra ,* note 5, 292.

9 Pierre Tessier et Monique Dupuis, « La preuve à l'instruction », dans la Collection de droit 2008-2009, vol. 2, École du Barreau, *Preuve et procédure*, Cowansville, Éditions Yvon Blais, 2008, p. 361. Voir *McLung* c. *R.*, (1993) 59 Q.A.C. 273.

10 Wilson & Lafleur ltée, Montréal, 2001, at pp. 142-143.

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(ii) ***How many representatives of each of the parties should be exempt from the application of the witness exclusion order?***

[36] Counsel for Plaintiff contends that, although there is a paucity of definitive authority on the subject, it is nonetheless "*well established*" that a legal person is limited to only one representative exempt from the application of such an order.

[37] Counsel for Defendants contends that, in the present circumstances, seeing the complexity of the issues raised for determination and given the internal decision making process followed by each of the Defendants respectively, their right to properly manage the conduct of the proceedings, to make strategic decisions and to provide a full answer and defence cannot be respected by limiting to one the designated representative for each of them.

[38] In support of their submissions, counsel filed affidavits of Glen Silvestri, Vice-President of Teachers', Mark Tresnowski, Managing Director and General Counsel of Madison Dearborn Partners, LLC, which entity is the investment advisor to Madison and Mark Masiello, Managing Director of Providence Equity Partners LLC, which entity is investment advisor to Providence. In both cases, the affiants refer to the fact that important strategic decisions concerning the conduct of these proceedings involve the participation of several senior officers of their respective corporations and that to limit to one those persons who would be exempt from the witness exclusion order would put them in an untenable position.

[39] Counsel argues[11]:

> 28. As a consequence of their involvement on behalf of each Defendant in the proposed privatization which has given rise to the present matter, at least one (1) representative per Defendant identified by Plaintiff as a witness on discovery has so far been responsible for supervising the litigation and making decisions and responding to requests from counsel on a day-to-day basis;
>
> 29. The organizational structure and decision process of each Defendant are such that major decisions, including important strategic decisions in the present litigation, are subject to the participation and approval of at least another senior executive involved in the proposed privatization, and also identified by Plaintiff as a witness on discovery;
>
> 30. Consequently, in order to both manage the present litigation on a day-to-day basis and to make important strategic decisions when appropriate, and given the representatives of Defendants currently identified as witnesses on discovery, **at least two (2) persons would currently have to be excepted from the proposed witness exclusion in order to have access to all of the relevant facts**;

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[11] Supra, note 2.

> 31. Given the foregoing factual situation prevailing within each Defendant, at present the designation of two (2) representatives per Defendant is required to allow Defendants to properly supervise and instruct their counsel and to be able to conduct their defence in the present litigation;
>
> 32. In light of the above, by refusing to exercise its discretion in allowing for the designation, at present, of two (2) representatives per Defendant, the Court would in fact be denying Defendants right to a full answer and defence. Indeed, the witness exclusion order, as sought by Plaintiff, not only jeopardizes Defendants' fundamental right to a full answer, but puts them in an impossible and unmanageable situation;

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[40] The relevant facts and the issues raised for determination in the Principal Action are highly complex. The prior negotiations culminating in the execution by the parties of the Definitive Agreement and the Final Amending Agreement (as defined in the Principal Action), which formalized the failed privatization of BCE were long and even more complex. The amounts involved in the contemplated transaction were unprecedented in Canadian corporate history. It is not unreasonable to suggest, as does counsel for Defendants, that the internal decision making process within each of the corporate entities party to the transactions understandably involved the participation and approval of several senior officers of each of them.

[41] Similarly, it is not unreasonable to expect that in making strategic decisions with respect to the present litigation, the participation of more than one senior officer of each of the Defendants is both necessary and appropriate. The Court is concerned that, by limiting to one the number of designated representatives of each Defendant, it would place them in an untenable situation which could jeopardize their fundamental right to a full answer and defence. The Court has similar concerns regarding Plaintiff's ability to make strategic decisions and properly manage the conduct of the present proceedings with only one designated representative exempt from the order, although counsel does not seem to share this concern.

[42] What is at stake here are opposing conceptual priorities. On the one hand, by limiting to one the representatives of each of the respective parties exempt from the application of the order, the Court could possibly favour and protect the integrity and credibility of the testimony given by the witnesses already examined or to be examined on discovery, including those other witnesses who might have otherwise been designated as additional representatives of each of the parties. The problem is, however, that by so ordering the Court would be denying Defendants their right to a full answer and defence prepared with the assistance of those informed senior officers familiar with the evidence. The Court must choose its priorities.

[43] In the particular circumstances of these proceedings and, considering the uncontradicted evidence regarding the complex nature of the decision making process of, at the very least, each of the Defendants, the right to a full answer and defence prepared by informed representatives must trump the desire to protect the integrity and

credibility of the testimony that might be given by the additional exempt representatives sought to be named by each of them. Although by so ordering, there is a risk that their testimony may be contaminated, this matter can be dealt with at trial when questions of credibility may very well be raised.

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[44] During the September 17, 2010 hearing on the *Motion for the Exclusion of Witnesses,* counsel for Defendants argued that in light of the identity their respective representatives who were, at the time identified by Plaintiff as witnesses on discovery, they were satisfied that the following number of representatives of each of them be exempt from the order: Teachers'- two; Providence – two; and Madison - three.

[45] However, circumstances have since changed. For the reasons previously discussed, Teachers' now asks that it be permitted to designate three representatives in order to include Mr. Davis. The Court considers Teachers' request reasonable in the circumstances previously noted.

[46] Accordingly, and in the interest of fairness and although not requested by Plaintiff, the Court will exercise its discretion by allowing each of the parties, including Plaintiff, to designate a maximum of three representatives who will be exempt from the witness exclusion order to be issued.

(iii) ***Should "deal counsel" be exempt from the application of the witness exclusion order?***

[47] Defendants asks that internal or external legal counsel who negotiated and assisted in the drafting of the Definitive Agreement and the Final Amending Agreement (collectively **"Deal counsel"**) be exempt from the application of the witness exclusion order. Plaintiff opposes Defendants' request.

[48] It is not disputed that Deal counsel from both sides are considered important witnesses and that they are expected to be examined either on discovery or at trial regarding their communications with opposing parties or their representatives, as well as in regard to non-privileged communications with third parties. Opposing counsel have made this known to each other in various exchanges of correspondence and during representations to the Court at various hearings.

[49] It is similarly not disputed that Deal counsel do not act as counsel *ad litem* in the present proceedings. The fact that some counsel, who previously acted as Deal counsel, may advise counsel *ad litem* in the conduct of these proceedings is not sufficient justification to warrant their exemption from the witness exclusion order sought. They may do so without necessarily having access to the evidence given by the other witnesses called to testify in these proceedings.

[50] Given the apparent importance attached to their evidence and, in order to favour and protect the integrity and credibility thereof, it is preferable that they not be excepted

from the witness exclusion order. The Court can see no reason why they should be treated differently from any other witnesses.

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(iv) Should the witness exclusion order apply, until the completion of trial on the merits in first instance, to all witnesses previously examined on discovery as well as to any other witnesses who may not have been examined but who are identified as potential witnesses?

[51] Plaintiff asks that the witness exclusion order remain in force until completion of trial on the merits. It argues that if the exclusion is lifted prior to trial, the entire purpose of the order would be defeated. Among the authorities cited by counsel as precedent and authority for its submissions, are the reasons of Carrière J. in an interlocutory judgment rendered in *Widdrington* v. *Wightman al.*[12] wherein he writes :

> …the Court has taken the following steps **since the trial began** in September 1998 :
>
> **[…]**
>
> **ORDERED** the witnesses who have testified to date not to divulge or discuss their testimony with third parties or their representatives not only during the time frame in which they are testifying but also subsequently:
>
> **[…]**
>
> (Our Emphasis)

[52] With respect, as appears from extract cited above, the order in question was a customary witness exclusion order issued at trial and not during the discovery process long before trial and the preparation thereof.

[53] Counsel for Defendants argues that the order requested by Plaintiff would hamper the right of all parties to adequately prepare for trial and would fly in the face of the underlying purpose of the discovery process undertaken in these proceedings. The Court shares counsel's concerns.

[54] At this stage of the proceedings, it is not known whether all or any part of the transcripts of the examinations on discovery will be produced in evidence for use at trial. To the extent that any of the parties choose to do so, unless filed under seal pursuant to an order of this Court, these transcripts would form part of the Court record accessible to the public in general and to any interested witness in particular. In such eventuality,

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[12] J.E. 2000-2154 (S.C.),p. 2.

the Court is concerned as to the enforceability of an exclusion order remaining in force until completion of trial on the merits as requested by Plaintiff.

[55] Seeing of the uncertainty regarding the production of the transcripts of the examinations in question and for the other reasons expressed above, the Court considers it appropriate that the witness exclusion order to be issued remain in force only until the date of filing by the parties of their Joint Declaration of Readiness. The Court will reserve the rights of each of them to make such further representations, if appropriate at the time, regarding a possible extension of the order for such duration and under such conditions as may in the circumstances be appropriate.

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FOR THESE REASONS, THE COURT:

[56] **GRANTS,** in part, Plaintiff's *Motion for the Exclusion of Witnesses;*

[57] **ISSUES** the witness exclusion order hereinafter described, to remain in full force and effect until the date of filing by the parties of their *Joint Declaration of Readiness* (the **"Witness Exclusion Order"**)*;*

[58] **DECLARES** that, effective the date hereof, to the extent applicable and where circumstances so require, the Witness Exclusion Order replaces and supersedes the Interim Exclusion, the *Interim Order* and the *Safeguard Order,* (as such terms are herein defined);

[59] **ORDERS** that all witnesses, including "Deal counsel" (as herein defined), who have been examined on discovery, as well as those who have yet to be examined but are otherwise identified in a definitive list of witnesses or potential witnesses communicated and exchanged between counsel for each of the parties respectively by no later than December 31, 2010, not disclose or discuss their testimony with any other witnesses or their representatives prior to the date of filing by the parties of their *Joint Declaration of Readiness;*

[60] **ORDERS** that the transcripts as well as the content of the testimony given by the witnesses examined on discovery on behalf of either Plaintiff or Defendants be kept confidential and not disclosed to any other witnesses identified in the definitive list of witnesses or potential witnesses communicated and exchanged between counsel for each of them;

[61] **ORDERS** that, within a delay of 10 days from the date hereof, each party designate a maximum of three representatives who, subject to the following condition, will be exempt from the application of the Witness Exclusion Order;

[62] **ORDERS** that the designated representatives of each of the parties respectively, all counsel *ad litem,* as well as all advisory or "auxiliary" counsel, if any, in attendance during the examinations, refrain from discussing or communicating the content of the testimony given by the witnesses so examined with or to other persons not yet

examined but designated by the parties as witnesses or potential witnesses pursuant to the requirements of this Order;

[63] **RESERVES** to each of the parties the right to make such representations, if any and if appropriate, at any time prior to the filing of the *Joint Declaration of Readiness*, regarding a possible extension or variance of the Witness Exclusion Order for such duration and under such conditions as may at such time and in the circumstances be deemed appropriate;

[64] **THE WHOLE** with costs to follow.

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JOËL A. SILCOFF, J.S.C.

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Attorneys for BCE Inc.

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Date of hearing : September 17, 2010