Federal Court Cour fédérale

Date: 20230125

Docket: T-489-21

Citation: 2023 FC 121

Toronto, Ontario, January 25, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

REBEL NEWS NETWORK LTD
EZRA LEVANT AND SHEILA GUNN

Applicants

and

CANADA (THE HONOURABLE STEVEN GUILBEAULT AND THE HONOURABLE CATHERINE MCKENNA) AND THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] The Applicants have brought a Motion to Strike an affidavit (filed August 18, 2022), which was submitted by the Respondent, The Honourable Steven Guilbeault [Minister Guilbeault or Respondent], in the underlying Application. I will neither strike the affidavit, nor grant the alternate relief sought by the Applicants, for the reasons explained below.

I. Background

[2] On March 18, 2021, the Applicants commenced an Application for an Order from this Court declaring a violation of their section 2(b) right to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, as guaranteed under the *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The alleged infringement occurred when Minister Guilbeault blocked Mr. Levant on Twitter.

[3] Mr. Levant is the owner and founder of Rebel News Network Ltd [Rebel News]. He claims that Minister Guilbeault's Twitter account is a government feed and alleges that being blocked from this account limits his and Rebel News's ability—among other things—to access and communicate important information, participate in public debate, and express views on matters of public concern.

[4] On August 26, 2021, counsel for Minister Guilbeault filed an affidavit sworn by Ms. Greta Hoaken [the Hoaken Affidavit]. Ms. Hoaken was a summer law student at the law firm representing Minister Guilbeault in this matter. Her affidavit introduces three exhibits. Exhibit A contains screenshots of twelve publicly available tweets by Mr. Levant concerning Minister Guilbeault. Exhibit B contains screenshots of four publicly available tweets concerning Minister Guilbeault, which are either replies to tweets by Mr. Levant, or which tag Mr. Levant. Exhibit C contains screenshots of thirteen publicly available tweets by Mr. Levant not directly concerning Minister Guilbeault.

[5] Two other affidavits, put forward by the Attorney General of Canada, were included in Minister Guilbeault's Responding Motion materials (filed November 6, 2022); one from Ms. Tracy Headley and the other from Ms. Shelley Emmerson. Ms. Headley is a Director in the Communications and Federal Identity Policy Centre within the Treasury Board of Canada Secretariat, and her affidavit [the Headley Affidavit] contains information in respect of policies and lists related to official Government of Canada social media accounts and is relevant in this Motion.

[6] I note that while the Attorney General is one of the Respondents in the underlying Application, they were passive participants in this Motion hearing, providing occasional input where it was helpful to the Court to clarify matters. However, they did not make any written or oral submissions on the matters raised in this Motion. Thus, I only refer to the 'Respondent' below, namely Minister Guilbeault, rather than the 'Respondents' (which would include the Attorney General of Canada). Both Respondents will actively participate in the merits stage of this Application that is still to be perfected.

II. Issues Raised and Remedies Sought

[7] In their Notice of Motion filed with the Court on August 18, 2022, Mr. Levant and Rebel News request that this Court grant the following relief, in addition to ordering costs against Minister Guilbeault in the cause:

> A. strike all or portions of Ms. Hoaken's affidavit for lack of relevance, or alternatively pursuant to Rule 81(1) of the *Federal Courts Rules*, SOR/98-106;
>
> B. direct that an adverse inference be drawn against Minister Guilbeault pursuant to Rule 81(2) on any matter which Minister

> Guilbeault could provide better evidence, including whether his Twitter handle, @s_guilbeault, is:
>
> i. operated as an official Government of Canada account,
> ii. used to disseminate official messages,
> iii. recognized as a platform by which minister Guilbeault speaks as a minister, and
> iv. operated using public resources;
>
> C, order, in the alternative, that Ms. Hoaken be further cross-examined and provide responses to questions inappropriately objected to; or Minister Guilbeault to provide responses to the undertakings provided during Ms. Hoaken's cross-examination.

[8] The next section discusses these issues and sets out why the primary and alternate relief requested will not be granted.

III. Analysis

[9] The Federal Court of Appeal has emphasized that motions to strike all or parts of affidavits are an exceptional measure by this Court, and should only be used sparingly, particularly where the issue is one of relevancy. The Federal Court of Appeal held in *Canadian Tire Corp Ltd v PS Partsource Inc*, 2001 FCA 8 at para 18 [*Canadian Tire*]:

> I would emphasize that motions to strike all or parts of affidavits are not to become routine at any level of this Court. This is especially the case where the question is one of relevancy. Only in exceptional cases where prejudice is demonstrated and the evidence is obviously irrelevant will such motions be justified. In the case of motions to strike based on hearsay, the motion should only be brought where the hearsay goes to a controversial issue, where the hearsay can clearly be shown and where prejudice by leaving the matter for disposition at trial can be demonstrated.

[10] Thus, absent (i) demonstrated prejudice to a party and (ii) evidence of obvious irrelevance, this Court should not grant motions to strike all or parts of affidavits. The rationale is twofold. First, the Court, as the gatekeeper of its proceedings, must prevent unnecessary and undue delays to applications – which are intended to be summary proceedings – through preliminary or interlocutory motions. Second, this Court must discourage determinations that go to the weight of evidence, so that decisions to exclude evidence made with only a partial picture of the Applicants' case and the Respondent's defence do not undermine the ultimate weighing of evidence that should properly rest in the wheelhouse of the Application judge.

[11] Here, the Applicants have not met their burden to demonstrate that the Hoaken Affidavit would be prejudicial to them, nor have they brought convincing evidence that the Hoaken Affidavit is irrelevant. On the contrary, I find that it is relevant to the Application and should not be struck. Having established this, there is no need to grant the Applicants any of the remedies they seek in this Motion to Strike, which include striking all or parts of the Hoaken Affidavit, compelling Ms. Hoaken to be re-examined, and drawing a number of adverse inferences.

A. *The Hoaken Affidavit is relevant*

[12] The Applicants, relying on *R v Watson*, 1996 CanLII 4008, 30 OR (3d) 161 (ON CA), submit that relevance is the threshold question to be decided in evaluating whether evidence is to be put before the Court. They argue that the evidence in the Hoaken Affidavit is not relevant to the Application, because it does not make any facts in the underlying proceeding more or less probable. In other words, it does not assist the Court in determining the issues raised in the Application, namely the question of public access to communications from elected leaders.

[13] The Applicants contest the admissibility of the entire Hoaken Affidavit, including each of its three exhibits. They argue that Exhibits A, B and C are not relevant for the following reasons:

- Exhibit A – (tweets by Mr. Levant about the Minister): there is no evidence that Minister Guilbeault was aware of these tweets, thus they do not provide the Court with any information about why the Minister blocked Mr. Levant;

- Exhibit B – (tweets by Mr. Levant's followers that mention his tweets on the Minister): Mr. Levant has no control over other Twitter users.

- Exhibit C – (Mr. Levant's tweets that are not directly about the Minister): these tweets are not relevant because they do not have a justified connection to the Application or Minister Guilbeault.

[14] The Applicants add that not only is the evidence in the Hoaken Affidavit, including each of its exhibits, irrelevant, but their prejudicial effect outweighs their probative value; therefore, this Court should use its discretion to strike this evidence, even if it finds that the evidence is relevant. I will address the prejudicial effect and probative value in Section C below.

[15] The Respondent counters the Applicants' submissions on the Hoaken Affidavit, stating that it is well established that the discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances: either where an applicant can demonstrate material prejudice, or where not striking an affidavit or portions of an affidavit would impair the orderly hearing of the application on its merits. Here, Minister Guilbeault argues, neither circumstance is present.

[16] Minister Guilbeault asserts that the Affidavit is relevant and notes that it is rare for relevance to be relied upon as a reason for excluding evidence or striking out an entire affidavit. He contends that the tweets authored by Mr. Levant and his followers are directly relevant to the freedom of expression at issue, pointing to *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 56, 58 DLR (4th) 577, and argues that the purpose of an affidavit is to adduce facts relevant to a dispute without gloss or explanation, which later become part of legal submissions. Here, the Hoaken Affidavit is only tendered for the existence of publicly available tweets.

[17] I agree with the Respondent that given its contents and attachments, and in light of the surrounding circumstances, the Hoaken Affidavit does not warrant being struck. It does not meet the exceptional circumstances outlined in the case law, including *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 29, which reaffirms *Canadian Tire*.

[18] Ms. Hoaken conducted her searches and produced a sampling of tweets by Mr. Levant, of responses to his tweets, and of tweets which tagged him. At this early stage of litigation, and without the benefit of full or even partial arguments submitted in Minister Guilbeault's defence for these groupings of tweets, we cannot know the ultimate purpose to which they would be used in his defence to justify having blocked the Applicants.

[19] The trier of fact will be able to decipher relevant from irrelevant evidence with the benefit and context of all arguments being made. The Applicants cannot expect to have their

cake and eat it too, in alleging that Minister Guilbeault has violated their fundamental constitutional rights by suppressing Mr. Levant's freedom of speech and freedom of the press in ascertaining information, yet preventing him from putting in his version of the narrative, with the support of publicly available evidence from Twitter, the medium which forms the basis of the constitutional arguments.

[20] Had the Applicants wished to enter their own set of tweets to counter the evidence attached to the Hoaken Affidavit, they were free to put those tweets to Ms. Hoaken during her cross-examination. Alternatively, they could have sought to introduce their own affidavit, with leave of the Court, in order to submit their own sampling of Mr. Levant's and/or his followers' tweets.

[21] Conversely, the Respondent has the right to control his own response/defence. At this stage in the proceedings, the Hoaken Affidavit, which simply attaches to it the Twitter evidence, says nothing exceptional. Rather, it comprises a sum total of one page, explaining the three groupings of Twitter posts that Ms. Hoaken attached, without providing any opinion or other commentary on the nature or contents of the posts.

[22] The Applicants' request is premature at this point, where the steps in the Application are far from complete, including the filing of the Applicants' and Respondents' records, and their legal arguments which will place the evidence in its context by providing the "gloss or explanation" in the form of legal submissions: see *Peguis First Nation v Canada (Attorney*

General), 2021 FC 990 at paras 97–98 and *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18.

[23] One must recall the reason behind the expeditious steps in an application, as opposed to an action. As held by Justice Evans in *Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295 at para 5, "[a]pplications for judicial review are summary proceedings that should be determined without undue delay." This axiomatic principle applies today every bit as much as it did 20 years ago – and arguably more so with the necessity of the Courts to resolve matters expeditiously given the impact of the COVID-19 pandemic.

[24] As a corollary to the principle that applications are designed to be expeditious proceedings, this Court has consistently noted its discouragement of interlocutory motions in applications, for instance as pointed out by Associate Judge Horne in *China Mobile Communications Group Co Ltd v Canada (Attorney General)*, 2022 FC 125 at para 35, citing *Canadian Generic Pharmaceutical Association v Canada (Governor in Council)*, 2007 FC 154 at para 25.

[25] Here, if Minister Guilbeault is to have a fair opportunity to defend the positions he took and decisions he made in regard to his Twitter account, he should be able to mount a defence, including placing in the record public tweets posted by Mr. Levant, or exchanges with his followers, or other tweets tagging him. Should Mr. Levant wish to explain to the Application judge why those tweets are irrelevant or should otherwise be disregarded in light of the legal arguments being made, he will be free to do so. The judge deciding the merits, as one of their

primary tasks in deciding the matter, will place the appropriate weight on the Hoaken Affidavit and its exhibits in coming to a decision.

B. *The content of the Hoaken Affidavit is reliable*

[26] The Applicants submit that Ms. Hoaken is not a reliable witness because she does not have firsthand knowledge to contribute to evidence. Relying on *Split Lake Cree First Nation v Sinclair*, 2007 FC 1107 at para 19 [*Split Lake Cree*], the Applicants note that Rule 81(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] requires that affidavits be confined to facts within the personal knowledge of the deponent.

[27] The Applicants further argue that while Ms. Hoaken may have personal knowledge of finding the publicly available tweets through internet or Twitter searches, it is clear from the cross-examination that she was unable to answer anything about why these tweets are important to Minister Guilbeault. The Applicants submit Ms. Hoaken improperly refused or was unable to describe why she sampled these tweets, and she stated that her examination is not binding on Minister Guilbeault, essentially nullifying Mr. Levant's ability to rely on any answers gained through cross-examination.

[28] First, I wish to point out the distinction that this was not an examination for discovery, and Ms. Hoaken did not purport to be a witness for Minister Guilbeault. She may have been compelled to answer these questions had this been an examination for discovery. However, being a cross-examination based on her affidavit, the context was entirely different (see, for instance, *Merck Frosst Canada Inc v Canada (Minister of Health)*, [1997] FCJ No 1847, 80 CPR (3d) 550

[*Merck*]; see also *Mediatube Corp. v Bell Canada*, 2015 FC 391 at para 19 [*Mediatube*]). In *Merck* at para 4, Justice Hugessen of the Federal Court pointed to some of the distinctions in those two types of examinations:

> It is well to start with some elementary principles. Cross-examination is not examination for discovery and differs from examination for discovery in several important respects. In particular:
>
> a) the person examined is a witness not a party;
>
> b) answers given are evidence not admissions;
>
> c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
>
> d) production of documents can only be required on the same basis as for any other witness i.e., if the witness has the custody or control of the document;
>
> e) the rules of relevance are more limited.

[29] As was clearly pointed out by Justice Hugessen in this passage that has since been confirmed in various decisions of this Court (*Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at para 130 [*Ottawa Athletic Club*]; *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 102 at para 102; *CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 29), a witness in a cross-examination is neither a party, nor giving an admission. Also, the witness under cross-examination is not being examined on behalf of a party, unlike in Rule 237(1) that applies to corporate parties. Furthermore, given the nature of a cross-examination on an affidavit, the answers given by that witness may not be read in at trial, unlike discovery answers under Rule 288.

[30] Simply put, Ms. Hoaken was providing answers to questions in her own capacity, and neither purported to bind her employer (the law firm representing Minister Guilbeault), nor Minister Guilbeault himself. Although, when she wrote the affidavit she was a summer student working at that law firm, she provided evidence as a fact witness and was not acting as counsel. She acted as a fact researcher who conducted a search and was not purporting to speak for Minister Guilbeault or his counsel.

[31] Second, with respect to Rule 81(1), it states that:

81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	**81 (1)** Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

[32] To determine whether the facts deposed are within the affiant's personal knowledge, the Court can regard the affiant's office or qualification and whether it is probable that a person holding such office or qualifications would be aware of the particular facts (*Smith, Kline & French Laboratories Ltd v Novapharm Ltd*, [1984] FCJ No 223, 79 CPR (2d) 103).

[33] In this case, Ms. Hoaken was then a summer student, and given the limited nature of her affidavit, I find that she was in a position to know if the facts were true. As a summer student and within her knowledge at the firm, she was perfectly capable of finding and verifying public

tweets, the veracity of which is not disputed by the Applicants. Having said that, my inquiry at this early stage of the proceedings as the Case Management Judge deciding this motion only extends to determining whether the applicants have met the high burden of showing that the evidence is clearly unreliable. Having failed to meet that burden, the final determination of reliability will be made by the application judge.

C. *The prejudicial effect of the Hoaken Affidavit does not outweigh its probative value*

[34] The Applicants contend that Mr. Levant is acting as a journalist through Rebel News and is merely providing his political commentary or opinion. The Applicants argue that Ms. Hoaken's exhibits do not reveal any harassment, objectionable behaviour, or justification for Minister Guilbeault to have blocked Mr. Levant. The Applicants add that Ms. Hoaken admitted in cross-examination that her exhibits are a compilation of tweets without any particular system or structure. They submit that this results in an affidavit which, at best, is a random collection of tweets that should be struck because it is irrelevant, and at worst, is a biased selection of tweets intended to paint Mr. Levant in a negative light that should be struck because it would be prejudicial.

[35] The Applicants argue that the Hoaken Affidavit represents a slanted, out-of-context collection of tweets selected to draw ire and elicit prejudicial feelings about Mr. Levant based on his political beliefs, and to deny him access to justice. The Applicants assert that in determining admissibility, the Court is to consider the probative value of evidence against its prejudicial influence. They submit that the contents of the Hoaken Affidavit have little probative value

because the tweets in its exhibits are irrelevant to the underlying Application, and thus to admit them would result in undue prejudice to the Applicants.

[36] The Applicants further contend that the tweets presented are highly prejudicial to Mr. Levant's case because they stand to arouse the trier of fact's bias or emotions of hostility or sympathy, or to create a side issue that will unduly distract the trier of fact from the main constitutional grounds at issue in these proceedings (see, for instance *R v Seaboyer*, [1991] 2 SCR 57 at para 45, 83 DLR (4th) 193 (SCC) [*Seaboyer*]).

[37] Minister Guilbeault points out that the Applicants neither dispute the authenticity of the tweets, nor have they demonstrated any prejudice resulting from them. He adds that prejudice must not be confused with the risk of an adverse result, and that just because evidence might impact a party adversely does not mean that it operates unfairly, relying on *R v Campbell*, 2018 ONCA 205 at para 19 and the earlier decision in *R v Handy*, 2002 SCC 56 at para 139 [*Handy*].

[38] Minister Guilbeault further asserts that the Hoaken Affidavit is relevant, because it provides relevant context to the analysis of questions in the underlying proceeding, namely, whether Canada or Minister Guilbeault have a duty to provide a platform for the Applicants' speech, and whether Minister Guilbeault and his followers should be required by the *Charter* to engage with Mr. Levant and his followers.

[39] After a holistic review of the Hoaken Affidavit and all exhibits attached, I am not persuaded that prejudice is made out at this stage of the proceedings. On the contrary, I agree

that the contents of the Hoaken Affidavit are relevant to the Application and should be considered in the context of the arguments being made by Minister Guilbeault at the merits stage of the Application. At this early juncture, however, the evidence presented by the Applicants does not reach the threshold of so tainting the proceeding that it warrants the Hoaken Affidavit being struck from the record in its entirety.

[40] While I agree with the Applicants that the risk exists that the tweets in the Hoaken Affidavit could be viewed negatively, the case law is clear that the risk of leading to an adverse result must not be confused or conflated with the unfairness of their admission (*Seaboyer*, *Handy*, as above). If in light of the full record – which again, has yet to be submitted by either side – the legal arguments demonstrate to the Application judge that the evidence contained in the Hoaken Affidavit should be disregarded or given diminished weight, the Application judge will deal with this evidence appropriately.

D. *Ms. Hoaken properly objected to questions during cross-examination*

[41] The Applicants request that if the Court decides to admit the Hoaken Affidavit, the Applicants should be given the opportunity to re-examine Ms. Hoaken, on the basis that her employing law firm improperly objected to questions and refused advisements during cross-examination, relying on solicitor-client privilege.

[42] The Applicants submit that the Hoaken Affidavit violates Rule 82 of the *Rules*, which prevents a solicitor's affidavit from being submitted without leave of the Court. The Applicants recognize that Ms. Hoaken is not yet a lawyer, but as an employee (at the time) of Minister

Guilbeault's counsel, the Applicants argue she was close to being captured under this role. They add that if permitted, her evidence should not receive preferential weight because of her professional status, relying on *Pluri Vox Media Corp v Canada*, 2012 FCA 18 at paras 6–8 [*Pluri Vox*].

[43] The Applicants further argue that because Ms. Hoaken swore an affidavit on Minister Guilbeault's behalf, this was an overt waiver of litigation or solicitor-client privilege. Adding that the ability to cross-examine Ms. Hoaken on how the evidence was gathered is important for assessing the probative value and prejudicial effect, relying on *R v Darrach*, 2000 SCC 46 [*Darrach*]. The Applicants argue that Ms. Hoaken cannot tender evidence without providing the method by which it was gathered, but do not provide an authority for their proposition.

[44] The Respondent rejects the Applicants' characterization of Rule 82, asserting that it exists to prevent a solicitor from both deposing an affidavit and arguing in court on the basis of that same affidavit. The Respondent argues that Rule 82 is irrelevant in this case since Ms. Hoaken is not making submissions to the Court on this Motion or the Application. Rather, she has simply attached certain publicly available texts that she found on Twitter.

[45] The Respondent maintains that questions and undertakings were properly refused on the bases raised by counsel in the objections during Ms. Hoaken's March 8, 2022 cross-examination, or subsequently when refusing to answer the questions taken under advisement. In advance of the hearing of this motion, Respondent's counsel provided a list of questions it understood to be at issue in this motion, along with undertakings that were refused and their basis of refusal.

[46] The Respondent notes that many of the Applicants' questions were in respect of how the selection of tweets that were contained in the Affidavit were decided upon, or in respect of the instructions provided to the affiant, Ms. Hoaken, which constitute litigation privileged information (*Blank v Canada (Minister of Justice)*, 2004 FCA 287 at para 17; affirmed in 2006 SCC 39).

[47] With respect to solicitor-client privilege, the Respondent submits that the relationship of solicitor and client prevents a lawyer, or those employed by the lawyer in the course of their professional activities, from disclosing any information made known to them by the client. Communications made or sought to enable the client to obtain legal advice are protected by legal advice privilege. The claim of solicitor-client privilege can only be waived by the person whose privilege it is.

[48] In considering whether Ms. Hoaken properly objected to questions during cross-examination, I begin with Rule 82 which states:

82 Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.	**82** Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

[49] Before analysing the Rule 82 argument, a review of the relevant principles underlying that rule, and case law comment on it, is apposite.

[50] Generally, members or employees of a counsel's law firm acting in a matter should not give non-opinion evidence on issues in that same matter that attracts controversy. The leading decision on the subject is *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133 [*Cross-Canada*]. At paragraph 5 of *Cross-Canada*, the Federal Court of Appeal adopted a list of factors that should be considered:

> [5] […] The Divisional Court [in *Essa (Township) v Gueris; Membery v Hill*, 1993 CanLII 8756, 52 CPR (3d) 372 (ON SCDC)] articulated the following factors as being worthy of consideration in a situation where a complaint is made about affidavits being filed by members or employees of the law firm conducting the litigation:
>
> a) the state of proceedings;
> b) the likelihood that the witness will be called;
> c) the good faith (or otherwise) of the party making the application;
> d) the significance of the evidence to be led;
> e) the impact of removing counsel on the party's right to be represented by counsel of choice;
> f) whether trial is by judge or jury;
> g) the likelihood of a real conflict arising or that the evidence will be "tainted";
> h) who will call the witness if, for example there is a probability counsel will be in a position to cross-examine a favourable witness;
> i) the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

[51] Justice McHaffie of this Court has considered Rule 82 on the admissibility of affidavits when written by counsel or employees of law firms, in three recent decisions.

[52] First, in *Toys "R" Us (Canada) Ltd v Herbs "R" Us Wellness Society*, 2020 FC 682 [*Toys "R" Us*], he considered an affidavit written by an associate lawyer regarding his visit to a

store as an articling student. Justice McHaffie, at para 10 of *Toys "R" Us*, cited *Cross-Canada* at paras 4–5:

> There can be no hard and fast rule, but it does seem to us that it is not good practice for a law firm to cause its employees to act as investigators for the purpose of having them later give opinion evidence on the most crucial issues in the case. This is especially true where, as in this case, there is no evidence from any non-employee of the firm on these crucial issues. Opinion evidence is meant to be objective. The goal of objectivity is not furthered by having employees of the law firms give crucial opinion evidence. Such employees may be motivated by loyalty to their employer or fear of reprisal or lack of advancement in giving such opinions.
>
> Counsel for the Appellants argues that this potential lack of objectivity should go only to the weight which should be given to such evidence. In our view, that is not always a complete answer to the problem. In most cases such investigation and opinions can be conducted by objective non-employees. The lawyer who relies on members or employees of the firm to provide such evidence runs a risk that lesser weight may be given to such evidence. A client should not be subjected to this risk unless it is clearly necessary. This is not to say that it never can be done. There will always be exceptions and all of the circumstances in a case must be taken into account.
>
> [Emphasis added.]

[53] In the current case, Ms. Hoaken did not offer her opinion on any matters, either in her Affidavit or in cross-examination. However, *Toys "R" Us* at para 11 stated that "concerns arise even where factual non-opinion evidence is being given on matters of substance, particularly those going to the heart of the issues and beyond the 'non-controversial'" (citing *AB Hassle v Apotex Inc*, 2008 FC 184 at paras 45–46, aff'd 2008 FCA 416; *Cross-Canada* at para 7).

[54] I turn back to *Toys "R" Us*, which applied its own analysis to determine if there was inappropriate or controversial evidence contained in the affidavit evidence:

> [12] In the present case, I consider the nature and significance of the evidence, and the absence of any indication why the evidence had to be led by a lawyer from Gowling WLG, to be of particular importance. Based on these principles and considering the relevant factors, I conclude that the evidence speaking to the lawyer's (a) subjective descriptions of the exterior signage; (b) investigative actions in entering the retail store and gaining access to the back section of the store; and (c) assessment of the store's interior and its "atmosphere," is improper evidence to come from a lawyer at the firm representing the party in the proceeding. I will disregard these aspects of the affidavit.
>
> [13] Toys "R" Us submits that some aspects of the affidavit remain as objective non-controversial facts. In particular, it argues that the evidence that the lawyer went to the Herbs "R" Us store on the given dates and took the exhibited photographs of the exterior is not controversial. It points to Herbs "R" Us' social media accounts, which themselves display the store signage, a fact proved in Mr. Juhasz's affidavit. As a general rule, the Court should not be called upon to undertake a line-by-line severance of "surviving" evidence from a solicitor's affidavit that plainly goes beyond what is appropriate for such an affidavit. Nor does the fact that evidence is corroborated necessarily make it proper or "non-controversial." Nonetheless, in these circumstances I agree that in light of the evidence as a whole, the statements in the lawyer's affidavit regarding the dates he went to the Herbs "R" Us store, and the exterior photographs that he took at that time, are not controversial, and are admissible. In any case, Mr. Juhasz's evidence independently proves the nature and use of the signage.

[55] Similarly here, the Parties do not dispute the veracity of the tweets furnished by Ms. Hoaken. That is why I conclude that the subject matter of the affidavit is non-controversial. Unlike the inappropriate portions of the affidavit described above in *Toys "R" Us*, Ms. Hoaken – at least based on the evidence before the Court – engaged in no subjective assessment or inappropriate investigative work.

[56] While the Applicants vehemently oppose the contents of the Hoaken Affidavit and its tweets, finding public posts disagreeable or unbalanced is distinct from the postings being

controversial, which would have occurred had the legitimacy or veracity of the tweets been questioned. If the Applicants had wished to file their own set of tweets to counterbalance the 20-odd tweets filed by Ms. Hoaken, they were free to put those tweets to Ms Hoaken during her cross-examination, and/or seek leave to file further evidence. Ms. Hoaken's verification of screenshots of tweets are analogous to photographs in the public domain, and are therefore non-controversial. They should not be struck by this Court.

[57] In the second of his three recent cases touching on the admissibility of affidavit evidence deposed by employees of law firms, Justice McHaffie accepted an affidavit by an articling student describing the Instagram page of a company and video evidence of her accessing the Instagram page (*Subway IP LLC v Budway, Cannabis & Wellness Store*, 2021 FC 583 at paras 14–16 [*Subway*]). There, Justice McHaffie accepted the affidavit and exhibit evidence, despite the lack of a reason why the evidence in question could not have been provided by another witness not associated with counsel's law firm (*Subway* at para 15). Relying on the *Cross-Canada* factors, Justice McHaffie was ultimately persuaded by "the nature of the evidence, the fact that it appears to ultimately emanate from the respondents, and the fact that it is presented in objective terms that clearly explain the source of the video exhibit" (*Subway* at para 16).

[58] Turning back to the present case, Ms. Hoaken's evidence is of uncontroverted screenshots of tweets which emanated from Mr. Levant or those who commented in response to his tweets. In the Hoaken Affidavit, Ms. Hoaken objectively states the source of the public

tweets that she viewed. Nothing is hidden, and no one denies that these tweets existed and can be accessed by anyone having internet access.

[59] *UBS Group AG v Yones*, 2022 FC 132 [*Yones*] was the third of Justice McHaffie's recent cases that included affidavits from lawyers and students employed by law firms, each of which applied the *Cross-Canada* factors. In *Yones*, the Court decided not to strike an objectively stated and non-opinionated summary of a website and telephone conversation by an associate lawyer and a legal assistant (*Yones* at para 21). This decision emphasised the importance of the objective and non-controversial nature of the content of an affidavit in allowing the affidavit from within a law firm to be accepted.

[60] The Applicants, for their part, rely on *Pluri Vox* for the principle that Ms. Hoaken should not receive special treatment due to her role entering the profession. In *Pluri Vox*, the Court of Appeal considered Rule 4.02 of the Law Society of Upper Canada's Rules of Professional Conduct – analogous to Rule 82 – which provides generally that "a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal," subject to the discretion of that tribunal. The Federal Court of Appeal held at paras 6–8 of *Pluri Vox*:

> [6] The rationale for this rule is set out in the accompanying commentary:
>
> > A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear

> as a witness should not expect to receive special treatment because of professional status.
>
> [7] Problems can arise when a lawyer acts on a motion both as a witness on controversial matters of fact and as an advocate. An unacceptable conflict can ensue:
>
> - On the one hand, clients expect that their lawyer will be capable of being believed and trusted by the court. After all, the lawyer is an officer of the court.
>
> - But, on the other hand, when the lawyer enters the fray by testifying on factual matters, the lawyer runs the risk of his or her testimony being disbelieved, with the effect of undercutting the lawyer's believability and trustworthiness as an advocate for the client's cause. Further, the lawyer seems less of an officer of the court and more as a partisan with a stake in the outcome of the case. Finally, the lawyer may be in conflict or may appear to be in conflict by trying to defend his or her own credibility as a witness, rather than single-mindedly advancing the client's cause.
>
> Further, a lawyer has certain obligations of fairness and responsibility as an advocate (see, *e.g.*, Rule 4.01 of the Law Society's Rules of Professional Conduct). Many of these have the potential to be broken if the lawyer becomes a participant in the fray.
>
> [8] When the Court interprets and applies Rule 82, concerns such as these should be front of mind. The more that these concerns are present, the more the Court should exercise its discretion against allowing a lawyer's affidavit. The Court should also consider whether the evidence can be supplied by a person other than the lawyer.

[61] *Pluri Vox,* like the trilogy of decisions from Justice McHaffie referred to above, is another example of a case where uncontroversial facts from a lawyer were permitted into the record. At all material times, Ms. Hoaken was not a solicitor representing Minister Guilbeault. Rather, she was a summer student asked to provide findings from an internet search of publicly available tweets.

[62] The Applicants further rely on *Darrach* to argue that the Court cannot properly assess the probative value and prejudicial effect of the Hoaken Affidavit, because the Applicants were improperly hindered in their ability to cross-examine Ms. Hoaken.

[63] I disagree. In this context, *Darrach* stands for the principle that cross-examination is of essential importance in determining whether a witness is credible, and that without cross-examination, a court cannot attribute much, if any, weight to their evidence "because it is impossible to assess its probative value and prejudicial effect" (*Darrach* at para 63).

[64] With respect to the Applicants' challenge of the responses provided by Ms. Hoaken and her counsel to the undertakings made during her cross-examination, and to the questions taken under advisement, I find that the undertakings were fulfilled, including through the information provided in the Headley Affidavit on the functioning of Government of Canada social media. It is unclear what more the Applicants wanted or why they argue the responses were inadequate.

[65] Furthermore, the advisements were either fulfilled or properly objected to based on the rationale provided by Minister Guilbeault's counsel in their written response to the Applicants.

[66] Turning back to Ms. Hoaken's refusal to answer questions during her cross-examination, the Applicants did not challenge the refusals in any meaningful way during the cross-examination of Ms. Hoaken and their Motion Record did not contain any listing of inappropriately refused questions.

[67] I asked counsel for the Applicants on more than one occasion during the motion hearing exactly which refusals they were challenging. The Applicants responded that they were unable to single out specific questions or responses. Rather, the Applicants argued that the entirety of Ms. Hoaken's cross-examination was impeded by constant objections by Minister Guilbeault's counsel to questions on the basis of relevancy, proportionality and privilege. The Applicants submit that as a result, they were unable to obtain responses to basic questions that should have been answered by Ms. Hoaken.

[68] Again, I am unsatisfied with this response. I find that Ms. Hoaken provided complete answers in a straightforward and honest manner for the questions that counsel did not object to. Where she could not remember or did not have knowledge or did not take detailed notes of the methodology she used in her internet search, she stated so plainly and without prevarication.

[69] As pointed out above, the objections raised during the cross-examination of Ms. Hoaken, as well as those ultimately provided in Minister Guilbeault's written responses to the cross-examination on the basis of proportionality and relevancy, were all reasonably taken for the reasons expressed both in the cross-examination and subsequently in writing.

[70] If the proper scope of cross-examination is exceeded, the affiant is entitled to refuse to answer those questions (*Global Television v Canadian Energy and Paperworkers Union*, 2002 FCA 376 at para 8). As this Court has noted, where a tactic of taking questions under advisement without explanation hinders the examination, there may always be consequences in costs (*Glaxo Group Ltd v Novopharm Ltd*, 1999 CanLII 8854 at para 31, per Justice Evans, as he then was;

see further commentary on the topic of "under advisement", although relating to the context of discovery, at *Mediatube* at paras 7–10, 20).

[71] Here, Minister Guilbeault's counsel helpfully assembled a list of questions that they attached as Appendix A to the Respondent's Motion Record, understood by Minister Guilbeault to be at issue in this Motion. The only question taken under advisement that the Respondent appears to have refused to answer on the basis of litigation privilege in their written responses, based on my review of the transcript and the various responses given subsequent to the March 8, 2022 examination of Ms. Hoaken, was the following:

Question	**Respondent's Basis for Refusal**
To review records and assess whether there were any other Tweets that Greta Hoaken took screenshots of during her search which were not produced, including reviewing any backup systems for any Tweets that were screenshotted and then deleted and otherwise destroyed or lost; if any can be located, to provide the same	The question is irrelevant and the information is litigation privileged.

[72] Here, I agree that the question is irrelevant, and the fact that she did the research and gave the answers that she did (that she was unable to recall and/or find the search parameter information requested) was a sufficient and complete answer to the questions asked. The law firm could not be compelled, as a result of her cross-examination, to undertake this kind of review on her behalf. As described above, while that may have been the outcome required in the context of an examination for discovery, this matter arose out of a cross-examination.

[73] Finally, the parameters that the law firm set for their then-employee, Ms. Hoaken, to conduct her search, was properly the subject of the claimed privilege. This was part and parcel of

the legal strategy for the litigation that they were conducting, and the fact that a summer student carried out research of non-controversial public tweets, and could properly be the subject of cross-examination, does not mean that privilege falls away entirely. Ultimately, as noted above, just as the Applicants have the right to bring this application on account of alleged unfairness in the use of Twitter, the Respondent has the right to defend himself and choose which tweets to present, according to its litigation strategy.

[74] Consequently, I am not prepared to strike the Hoaken Affidavit or the evidence that it attached on the basis of Ms. Hoaken's employment as a summer student at the law firm. While someone outside the firm may well have been a better choice in that it would have reduced disagreement between the Parties, she nonetheless provided limited evidence in her affidavit that in my view was non-controversial for all the reasons explained above. Questions were properly objected to and Ms. Hoaken should not be compelled to be re-examined.

[75] The Parties, when asked, were not aware of any authority for ordering re-examination on cross-examination of an affidavit. It is not surprising given the objectives of a summary application, as contained in sections 18.1 and 18.3 of *the Federal Courts Act*, RSC 1985 c F-7, that ordering the re-examination of an affiant would be an exceptional occurrence. I see no justification for it here.

[76] I will note for the record that while the Applicants requested this Court, in the alternative, to compel Minister Guilbeault to answer questions that Ms. Hoaken could not, they have merely

raised this in their Motion Record, without providing supporting argument. This request was also not sufficiently pursued in the Motion hearing.

[77] Ultimately, Ms. Hoaken is a fact witness. She is not an expert. Rather, she gathered a series of tweets from the internet. At no time did the Respondent put her forward as an advisor to Minister Guilbeault, or someone to speak to the rationale underlying his policy choices, decisions or choices in the use of social media.

E. *Adverse inferences pursuant to Rule 81(2) of the* Federal Courts Rules *should not be drawn at this stage of the proceeding*

[78] The Applicants submit that the Court is empowered to exercise discretion to draw an adverse inference under Rule 81(2) when no firsthand evidence is presented, and no adequate explanation is provided for why the best evidence is not available, relying on *Ottawa Athletic Club* at para 119 and *Gray v Canada (Attorney General)*, 2019 FC 30 at para 140 [*Gray*]. The Applicants also contend that the Court should draw an adverse inference because Minister Guilbeault very likely can provide a better affiant, making it seem that he has chosen not to submit better evidence (*Split Lake Cree* at paras 26–27).

[79] As pointed out above at paragraph [7] of these Reasons setting out the relief sought, the Applicants request that this Court should draw one or more of the following adverse inferences:

- Minister Guilbeault intends for the Twitter account with the handle @s_guilbeault to be operated as an official Government of Canada Twitter account;

- Minister Guilbeault uses the Twitter account with the handle @s_guilbeault to disseminate official messages;

- Minister Guilbeault aims to have the Twitter account with the handle @s_guilbeault recognized as the platform by which he speaks as a Minister;

- Minister Guilbeault operates the Twitter account with the handle @s_guilbeault using public resources; and

- Any other inference that the Court determines that Minister Guilbeault could provide better evidence.

[80] The Respondent argues that the adverse inferences the Applicants ask this Court to draw are ultimate issues on the Application, rather than relief that can be granted in this interlocutory context. The Respondent further submits that adverse inferences are a discretionary matter closely tied to the adjudication of facts and should not be made on a preliminary motion, adding that the Applicants' use of the *Gray* case is actually an example of why the requested adverse inferences should not be drawn on this Motion, since the Court found in that case that there is no error in declining to draw an adverse inference from the respondent's failure to provide an affidavit based only on personal knowledge.

[81] Rule 81(2) of the *Rules* states that:

Affidavits on belief	**Poids de l'affidavit**
(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to	**(2)** Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir

provide evidence of persons having personal knowledge of material facts.	le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

[82] Rule 81(2) thus allows an adverse inference to be drawn from the failure of a party to provide evidence from persons having personal knowledge. This suggests that an affidavit on information and belief should provide an explanation why the best evidence is not available, unless this is otherwise apparent. The Rule is consistent with the approach that the failure to provide the best evidence goes to the weight or probative value to be accorded to the affidavit (*Lumonics Research Ltd v Gould*, 1983 CanLII 5000 (FCA), [1983] 2 FC 360 at page 369; *Ottawa Athletic Club* at para 119), and does not constitute a barrier to admissibility (*Split Lake Cree* at para 26).

[83] In *Gray*, Justice Kane notes that the permissive language of Rule 81(2) does not require that an adverse inference be drawn where best evidence is not raised and explanation is not provided (para 140). Justice Kane notes that the case law has evolved to treat "adverse inferences as a matter of discretion, partly because the matter is bound up inextricably with the adjudication of the facts" (*Gray*, at para 141; citing *Apotex Inc v Canada (Health)*, 2018 FCA 147 at para 68; *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221 at para 73). Justice Kane continues to quote the Federal Court of Appeal in *O'Grady v Canada (Attorney General)*, 2016 FCA 221 at para 11:

> Whether or not evidence is within an affiant's personal knowledge under Rule 81(1) bears on the admissibility of the affidavit. However, whether an adverse inference should be drawn from otherwise admissible evidence is a matter better left for the application judge, who has the benefit of the complete record and the arguments of counsel. To this extent, we would clarify the

> reasons given by the Judge. The question of what inference, adverse or otherwise, is to be drawn remains open to the application judge hearing this matter on the merits.

[84] In the current case, my discretion is guided by the Federal Court's caution on advance rulings on evidentiary issues. I note further that the Federal Court of Appeal in *Bernard v Canada Revenue Agency*, 2015 FCA 263 paras 10–11; (leave to appeal refused, SCC Doc 36834) held:

> [10] Whether the Court should provide an advance ruling on an evidentiary issue or, for that matter, any other issue in an application for judicial review is a matter of discretion to be exercised on the basis of recognized factors: *Association of Universities and Colleges of Canada v. Access Copyright*, 2012 FCA 22, 428 N.R. 297 at paragraph 11; *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at paragraph 6.
>
> [11] One factor is whether the advance ruling would allow the hearing to proceed in a more timely and orderly fashion: *Collins*, above at paragraph 6, *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, aff'd 2005 FCA 389. Another factor is whether the result of the motion is relatively clear cut or obvious: *Collins* at paragraph 6; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8, 267 N.R. 135. If reasonable minds might differ on the issue, the ruling should be left to the panel hearing the appeal: *McKesson Canada Corporation v. Canada*, 2014 FCA 290, 267 N.R. 135 at paragraph 9; *Gitxaala Nation v. Canada*, 2015 FCA 27 at paragraph 7.

[85] More recently, the Federal Court of Appeal has applied this rationale to decline motions to strike affidavits where the admissibility and centrality of the disputed evidence to the ultimate issues would be better determined at the hearing on the merits, once these issues have crystallized (*International Air Transport Association v Canada (Transportation Agency)*, 2020 FCA 172).

[86] The Applicants have pointed out that they cannot cross-examine Ms. Hoaken on all the questions that they would like based on the affidavit that she provided. They further point out that the Respondent has shielded himself from questioning the source of the controversy because no affiant has purported to speak for Minister Guilbeault, including Ms. Hoaken. Again, and not to sound like a broken record, I repeat that it is premature to make these arguments. Inferences may be properly drawn once the full record and scope of the arguments have been presented. Hence, the Applicants can ask the application judge to draw whatever inferences they suggest are apposite. Going back to a decision that they themselves cited, this was precisely the outcome in *Gray*.

IV. Costs

[87] Counsel for both Parties conferred during the hearing of this Motion and agreed in principle that costs should be in the cause. Counsel took their agreement under advisement, undertaking to update the Court after conferring with their respective clients. Mr. Williamson then confirmed the agreement with the Court by letter dated December 20, 2022, which the Court endorses.

V. Conclusion

[88] This does not come close to being one of those exceptional cases described by the Court of Appeal that warrants an advance ruling, namely because prejudice has not been demonstrated and the evidence is not obviously irrelevant. Neither the Hoaken Affidavit, as a whole, nor any part of it will be struck in this case. There is also no justification to allow for the highly unusual situation in which Ms. Hoaken would be recalled for further cross-examination. The Applicants

had a full and fair opportunity to examine her, and availed themselves of that opportunity. The fact that they chose not to furnish their own evidence, or seek leave to do so, should and will not impact Ms. Hoaken. The Court also declines to provide any other relief sought through this Motion, as explained above.

ORDER in T-489-21

THIS COURT ORDERS that:

1. The Motion is dismissed.

2. Any award of costs in respect to this Motion will be awarded as costs in the cause.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-489-21
STYLE OF CAUSE:	REBEL NEWS NETWORK LTD ET AL v CANADA (THE HONOURABLE STEVEN GUILBEAULT)
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 15, 2022
JUDGMENT AND REASONS:	DINER J.
DATED:	JANUARY 25, 2023

APPEARANCES:

Chad Williamson Scott Nicol	FOR THE APPLICANTS
Michael Fenrick Kartiga Thavaraj	FOR THE RESPONDENT THE HONOURABLE STEVEN GUILBEAULT
Sean Gaudet Emily Atkinson	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Williamson Law Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANTS
Paliare Roland Rosenberg Rothstein LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT THE HONOURABLE STEVEN GUILBEAULT
Attorney General Of Canada Toronto, Ontario	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA