Federal Court of Appeal  Cour d'appel fédérale

Date: 20170307

Docket: A-253-16

Citation: 2017 FCA 43

CORAM: **SCOTT J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

BOARD OF INTERNAL ECONOMY AND SPEAKER OF THE HOUSE OF COMMONS

Appellants

and

ATTORNEY GENERAL OF CANADA AND BOULERICE ET AL.

Respondents

Heard at Montréal, Quebec, on January 9, 2017.

Judgment delivered at Ottawa, Ontario, on March 7, 2017.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: SCOTT J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from a decision of the Federal Court wherein Justice Locke (the Judge) upheld an interlocutory order issued by Prothonotary Morneau (the Prothonotary) dismissing the Board of Internal Economy (the Board) and the Speaker of the House of Commons' (collectively referred to as the appellants) motion to strike the affidavit of Maxime St-Hilaire (the St-Hilaire

affidavit), a law professor at the University of Sherbrooke (the Motion to Strike). This affidavit was filed by the respondents, who are a number of current and former Members of Parliament (MPs) of the New Democratic Party of Canada (the NDP, collectively referred to as the respondent MPs) in response to a motion brought by the appellants challenging the jurisdiction of the Federal Court and requesting the striking of four applications for judicial review filed by the respondent MPs (the Jurisdiction Motion). These applications concern several decisions made by the Board, finding that the use of funds, goods, or resources made available to certain members of the NDP for mass mailings and the setting up of satellite offices was not proper having regard to the intent and purposes of the by-laws established by the Board.

[2] For the reasons that follow, I am of the view that the appeal should be granted, and that the affidavit should be struck.

I. Background

[3] The facts underlying the current appeal arise out of four applications brought by the respondent MPs between July 3, 2014 and February 17, 2015, challenging decisions made by the Board. In those decisions, the Board: 1) found that a number of the respondent MPs' large-volume mailings were in contravention of the Board's by-laws and policies on the ground that they were prepared by and for the benefit of a political party; 2) directed a number of the respondent MPs to reimburse the printing and mailing costs used in contravention of the Board's by-laws and policies; 3) found that a number of the respondent MPs inappropriately used parliamentary resources for certain employment, telecommunication and travel expenses, and more specifically, for a number of employees who were found not to be working out of a

parliamentary or constituency office; and 4) directed the House of Commons Administration to send a statement of account to a number of the respondent MPs indicating the amount that must be reimbursed for the inappropriate use of parliamentary resources. These four applications were joined and scheduled to be heard together pursuant to orders of the Federal Court.

[4] The appellants responded with a motion whereby they sought to strike the applications on the grounds that the Federal Court does not have jurisdiction to hear and determine matters within the exclusive purview of the House of Commons, which are free from interference by operation of the doctrine of parliamentary privilege. More particularly, the appellants argued want of jurisdiction on the basis that: 1) the Court would infringe the constitutional independence of the House of Commons, as well as the privileges and immunities held by the House of Commons, thereby violating the Constitution; 2) the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 is not a law within the meaning of section 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; and 3) the Board is not a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act*, R.S.C. 1985, c. F-7. That motion was ordered to proceed on its merits prior to any debate under Rules 317 and 318 of the *Federal Courts Rules*, S.O.R./98-106.

[5] On December 17, 2015, the respondent MPs served the St-Hilaire affidavit in response to the Jurisdiction Motion. In his affidavit, Professor St-Hilaire describes himself as a comparative constitutional expert, and in particular, as having a specific expertise on the "best practices" and "international standards" in the area of constitutional law. The purpose of this affidavit was said

to present evidence of a "worldwide trend to construe parliamentary privilege narrowly", and is characterized as admissible by the respondent MPs as proof of foreign law.

[6] In the affidavit, he opines that there is an international global standard of constitutional law pursuant to which the administration of expenses does not fall within the common law concept of parliamentary privilege (para. 4); that the U.K. Courts have held that the management of MPs' expenses does not fall within the purview of the doctrine of parliamentary privilege (paras. 5-6); that neither the *Parliamentary Privileges Act 1987* (Cth.) of Australia, the *Parliamentary Privilege Act 2014* of New Zealand, nor the *Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 2004*, No. 4 of 2004 of South Africa specifically deal with the management of parliamentarians' expenses (paras. 8-10); that the reimbursement of parliamentary expenses cannot be construed as a matter that is purely internal to the affairs of the House of Commons (para. 11); and that there is a trend within the Commonwealth and in Europe to treat parliamentary privilege restrictively, based on a criterion of "necessity" (paras. 14 and following). Based on this general review of international law, he concludes that parliamentary expenses are currently considered as being outside the scope of protection of parliamentary privilege, thus being subject to the rule of law and to the scrutiny of judicial review.

[7] On March 10, 2016, the appellants brought the Motion to Strike that is at the heart of the current appeal. In support of their motion, the appellants argued that the contents of the St-Hilaire affidavit amount to legal arguments to support the respondent MPs' position rather than conveying facts within the knowledge of the deponent. They also submitted that there is no

factual dispute with respect to the application of international law in this case which would require proof through the evidence of an expert on the matter.

[8] In an unreported decision dated May 18, 2016, the Prothonotary dismissed the appellants' Motion to Strike the affidavit. After having referred to decisions of this Court and of the Federal Court showing that the striking of an affidavit at an interlocutory stage is an exceptional discretionary remedy which should be exercised sparingly, he found that none of the special circumstances laid out in the case law to justify the striking of an affidavit at such an early stage of a proceeding were present in the matter before him.

[9] The Prothonotary, relying mostly on *Armstrong v. Canada (Attorney General)*, 2005 FC 1013, 141 A.C.W.S. (3d) 5 [*Armstrong*], first determined that the contents of the affidavit could be reproduced in the respondent MPs' Memorandum of Fact and Law. This led him to conclude that there could be no serious prejudice in allowing the affidavit to go forward. He also found that having to produce reply evidence and conduct further cross-examinations is normal course in a judicial review proceeding. The Prothonotary further found that the judge ultimately seized of the Jurisdiction Motion will be able to distinguish between the factual allegations in the affidavit and the legal arguments formulated therein, and that it cannot be said that the judge will be swayed by the fact that the affiant is a professor of law. Finally, the Prothonotary found that the Motion to Strike was not brought within a reasonable period as required by Rule 58(2) of the *Federal Courts Rules*, and disrupted the schedule laid out in a preceding order.

[10] In a decision reported as 2016 FC 745, and rendered on July 4, 2016, the Judge upheld the Prothonotary's discretionary decision to not strike the affidavit. The appellants submitted before the Judge that the Prothonotary had erred in not considering more recent authority of this Court on the issue of grounds to strike an affidavit. The Judge dismissed this argument on the basis that the cases referred to (*Gravel v. Telus Communications* Inc., 2011 FCA 14 [*Gravel*]; *Duyvenbode v. Canada (Attorney General),* 2009 FCA 120, [2009] F.C.J. No. 504; *Canada (Attorney General) v. Quadrini*, 2010 FCA 47, 399 N.R. 33 [*Quadrini*]) were in fact consistent with the principles laid out in *Armstrong*, which was properly relied upon and applied by the Prothonotary. The Judge further dismissed the appellants' submissions that the affidavit offended Rule 81, which confines affidavits to facts within the deponent's personal knowledge, as being inapplicable to experts.

[11] On the issue of the appellants' concerns in creating a precedent that will encourage parties to buttress their legal arguments with expert opinions prior to the filing of their memoranda of fact and law, and that this possibility runs counter to the principle of proportionality found under Rule 3 of the *Federal Courts Rules*, the Judge noted that the Prothonotary took the potential of additional steps into consideration in making his determination. He thus could not find that the Prothonotary erred as a matter of principle in refusing to consider the overlay of competing expert legal opinion at such an early stage of a proceeding.

[12] Finally, the Judge refused to acknowledge a distinction between lay and expert affiants, finding that the judge hearing the Jurisdiction Motion will be able to ignore any evidence it

concludes to be inadmissible. The Judge did not find any clear error in the Prothonotary's determination that no material prejudice will be suffered in refusing to strike the affidavit, and that no exceptional circumstances were present to warrant the striking of the affidavit. Having so concluded, he found it unnecessary to consider the Prothonotary's finding that the Motion to Strike was not brought by the appellants in a timely manner.

II. Issue and standard of review

[13] The question for this Court is relatively narrow: did the Judge err in refusing to interfere with the Prothonotary's order, therefore declining to strike the St-Hilaire affidavit?

[14] This Court recently revisited the standard of review applicable to discretionary decisions made by prothonotaries, along with those made by the Federal Court on appeal of a prothonotary's decision, in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] F.C.J. No. 943. There it was held that the standard of review laid out in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, 149 N.R. 273 should be abandoned and replaced by the standard enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The parties are in agreement that this is the standard to be applied, and this Court will therefore only interfere with the Federal Court's review of a prothonotary's decision where there is either an error of law, or an overriding and palpable error as regards questions of fact or of mixed fact and law.

III. Analysis

[15] It is well established that an affidavit shall be confined to facts within the deponent's personal knowledge. This principle is codified in Rule 81(1) of the *Federal Courts Rules*, which states as follows:

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.

[16] This Court has enforced that rule on many occasions, and has repeated that statements made in an affidavit must be confined to facts within the personal knowledge of the deponent. The following quote from *Quadrini* (at para. 18), illustrates the position taken by the Court:

> […] As a general rule, the affidavit must contain relevant information which would be of assistance to the Court in determining the application. As stated by our Court in *Dwyvenbode v. Canada (Attorney General)*, 2009 FCA 120, the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions, or where the Court is convinced that admissibility would be better resolved at an early stage so as to allow the hearing to proceed in a timely and orderly fashion (*McConnell v. Canadian Human Rights Commission*, 2004 FC 817, affirmed 2005 FCA 389). [emphasis in the original]

[17] Courts have recognized, however, that certain exceptional issues require the application of special knowledge lying outside the expertise and experience of the usual trier of fact. As a result, expert opinion evidence became admissible as an exception to the rule against opinion evidence, but only in those cases where it was necessary to provide the trier of fact with the

technical or scientific basis upon which to properly assess the evidence presented (see *R. v. Abbey*, [1982] 2 S.C.R. 24 at p. 42, 138 D.L.R. (3d) 202; *R v. D.D.*, 2000 SCC 43 at para. 50, [2000] 2 S.C.R. 275.) In those circumstances, the admissibility of expert opinion evidence will depend on it meeting a certain number of requirements, namely relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert (see *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419 [*Mohan*]; J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham, Ontario: LexisNexis, 2014) at paras. 12.35 and following).

[18] In *Mohan*, however, the Supreme Court cautioned against the risk that experts be permitted to usurp the functions of the trier of facts. Quoting from Lord Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699 (at p. 718), the Court warned that:

> [a]n expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.
>
> (*Mohan* at p. 24)

This is precisely why questions of domestic law (as opposed to foreign law) are not matters upon which a court will receive opinion evidence. Such matters clearly fall within the purview of the court's expertise and opinion evidence on these issues would usurp the court's role as expert in matters of law (see *Association of Chartered Certified Accountants et al. v. Canadian Institute of Chartered Accountants et al.*, 2016 FC 1076 at paras. 29 and following; *Eurocopter v. Bell Helicopter Textron Canada Limitée*, 2010 FC 1328 at para. 10, [2010] F.C.J. No. 1650; *Quebec (Attorney General) v. Canada*, 2008 FC 713 at para. 161, 359 F.T.R. 1, affirmed 2009 FCA 361,

400 N.R. 323, affirmed 2011 SCC 11, [2011] 1 S.C.R. 368; *Es-Sayyid v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2012 FCA 59 at para. 41, 432 N.R. 261; *Brandon (City) v. Canada*, 2010 FCA 244 at para. 27, 411 N.R. 189; *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 223 at paras. 10-11, 406 N.R. 308; *The Law of Evidence in Canada* at paras 12.155 and 12.156).

[19] In the case at bar, the nature of the St-Hilaire affidavit is not readily apparent at first sight. The Judge appears to have treated it as an expert affidavit, despite the fact that it is not accompanied by a Form 52.2 Certificate Concerning Code of Conduct for Expert Witnesses and Professor St-Hilaire's curriculum vitae. The panel pointed to these procedural omissions during oral argument, and as a result, counsel for the appellants filed a motion post-hearing seeking leave of the Court to file the missing Certificate and curriculum vitae. Although it will be unnecessary to rule on that motion in light of my findings that the Judge erred in upholding the Prothonotary's decision and in not striking the affidavit, I nevertheless take the latest motion of the respondent MPs as further confirmation that the St-Hilaire affidavit is to be considered as an expert affidavit.

[20] Counsel for the respondent MPs submit that the St-Hilaire affidavit, while containing legal argument, is not, when considered as a whole, a legal opinion. They prefer to characterize it as evidence "aimed at providing coherent factual information on historical context, positive foreign law as well as Comparative Constitutional Law Tools" (Memorandum of Fact and Law of the respondent MPs at para. 55). They also dispute the appellants' argument that it usurps the Court's role and goes to the very issue which the Court will have to determine in the Jurisdiction

Motion (namely the application and scope of parliamentary privilege), arguing instead that the affidavit only provides evidence "of a worldwide best practice in constitutional law that constrains the concept of parliamentary privilege" in order to help the Court define the scope of that privilege (Memorandum of Fact and Law of the respondent MPs at paras. 52-53). I respectfully beg to differ.

[21] First of all, a careful reading of the affidavit reveals that it is not limited to facts but is riddled with opinions. For example, Professor St-Hilaire states at paragraph 4 of his affidavit that there is, in his view, an international global standard of constitutional law pursuant to which the administration of parliamentary expenses does not fall within the common law concept of parliamentary privilege. Such a statement not only rests on his own assessment of the practice in other countries and of the authorities upon which he relies, but is also meant to be prescriptive of the direction towards which Canadian law should be moving. The same is true of paragraph 11, where Professor St-Hilaire asserts that it would be difficult to describe the reimbursement of parliamentary expenses as an issue that is purely internal to the affairs of the House of Commons, thereby allowing it to avoid the scrutiny of judicial review. Paragraph 14 similarly offers the opinion that, subject to a few exceptions, the tendency within the Commonwealth is now to restrict the application of parliamentary privilege on the basis of a criterion of "necessity".

[22] Finally, paragraphs 23 and 24 are clearly in the nature of legal opinion. On the basis of his review of the authorities in England, Australia, New Zealand and South Africa, of a report from the Venice Commission of the Council of Europe, and of a discussion paper from a

sub-committee of the Canadian Senate, Professor St-Hilaire opines that the notion of parliamentary privilege is headed towards a more restrictive interpretation which sees parliamentary expenses being excluded from the application of the doctrine of parliamentary privilege. Professor St-Hilaire even goes so far as stating that subjecting parliamentary expenses to the rule of law and judicial review not only represents a worldwide "standard", but that such a practice is to be commended because it is based on reason:

> 24. [unofficial translation] It is apparent from paragraphs 11 to 23 that the exclusion, in foreign law, of the management of parliamentarians' expenses from the scope of parliamentary privilege, which results in these expenses being subject to the rule of law and to judicial review for their legality and constitutionality, principles which of course do not exclude a degree, even a relatively high one, of "deference" to the decision-maker, represents a "standard". Indeed, it is not only a common practice, but a good one, even better than any other alternative, because it is founded in reason.
>
> Affidavit of Maxime St-Hilaire, Appeal Book at p. 102

[23] It cannot credibly be contended that the St-Hilaire affidavit is in the nature of a factual brief providing neutral information with respect to the historical development of the parliamentary privilege, and on comparative and foreign law. It reads like a legal opinion: it draws from Canadian and foreign sources to offer a conclusion which happens to support the respondent MPs' argument. Indeed, the gist of its content could very well have been integrated in the Memorandum of Fact and Law submitted by the respondent MPs. Alternatively, the affidavit could have been reformatted into an article for publication in a legal journal, and referred to by the respondent MPs as an authority supporting their position. But it clearly does not provide evidence that is necessary to enable a judge, as a trier of fact, to appreciate the matters in issue due to their technical nature, as required by *Mohan*.

[24] This is clearly not a case where the foreign law and authorities referred to by Professor St-Hilaire constitute factual issues which require proof; they are relied upon solely for the purpose of assisting the Court in its analysis of an issue of domestic law. Courts routinely rely on foreign case law and doctrine without the need for such authorities to have been introduced by way of an affidavit (see, for example, *Kazemi (Estate) v. Islamic Republic of Iran*, 2014 SCC 62 at paras. 34-39, [2014] 3 S.C.R. 176, on the notion of state immunity; *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at paras. 591-609, 28 Imm. L.R. (4th) 1, on the interpretation to be given to s. 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter); *World Bank Group v.* Wallace, 2016 SCC 15 at paras. 47, 61, 70-71 and 79-83, [2016] 1 S.C.R. 207, to interpret the scope of the International Bank for Reconstruction and Development, along with the International Development Association's archival immunity; *Jones v. Tsige*, 2012 ONCA 32 at paras. 55-65, 346 D.L.R. (4th) 34, to support a finding that a right of action for intrusion upon seclusion should be recognized in Ontario). As a matter of fact, the Supreme Court's seminal decision on parliamentary privilege, *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at paragraphs 21 to 74, [2005] 1 S.C.R. 667, referred extensively to foreign authorities in its analysis of the doctrine without the need for any affidavit evidence in that respect.

[25] The case law referred to by the respondent MPs does not support the admissibility of the St-Hilaire affidavit. In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 [*Canada (Information Commissioner)*], for example, the expert evidence considered was not of a legal nature but rather related to

government machinery. There the Supreme Court found that such evidence could be relied upon not to interpret the *Access to Information Act*, R.S.C., 1985, c. A-1, but to "situate [its] interpretation […] within its proper context" (*Canada (Information Commissioner)* at para. 33). The St-Hilaire affidavit is clearly of a different nature: its essential character is not to offer historical perspective into the concept of parliamentary privilege, but to suggest a restrictive interpretation of section 18 of the *Constitution Act, 1867* and of section 4 of the *Parliament of Canada Act*, on the basis of a legal analysis of foreign constitutional provisions and authorities.

[26] In *Daniels v. Canada*, 2013 FC 6, 357 D.L.R. (4th) 47, an aboriginal law matter, the Federal Court similarly accepted expert evidence to provide context essential to a proper understanding of the applicable law. It is also worth noting that most experts in that case were historians and anthropologists and were not providing legal expertise.

[27] The last case relied upon by the respondent MPs in this respect is *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, 73 D.L.R. (4th) 686 where the Supreme Court acknowledged the distinction between adjudicative facts and legislative facts. While the former relate to the immediate parties to a litigation, the latter are of a more general nature and aim to establish the purpose and background of legislation, including its social, economic and cultural context. Legislative facts are often crucial for a proper consideration of Charter issues, especially when the deleterious effects of a legislative provision are at stake. In the case at bar, the impugned affidavit is not filed in that spirit: the facts supplied by Professor St-Hilaire are not of an economic, social or cultural nature. The state of the law in a foreign jurisdiction does not amount to a legislative fact. Moreover, the St-Hilaire affidavit is not meant to explain the

purpose and background of parliamentary privilege so much as to advocate for a more restrictive interpretation of that privilege in light of recent developments in foreign law and practice.

[28] For all of the above reasons, I am therefore convinced that the affidavit is inadmissible pursuant to Rule 81(1) and does not properly fall within the exception afforded to experts. The issue for this Court, however, is not whether the St-Hilaire affidavit was properly accepted for filing but whether the Judge erred in refusing to interfere with the Prothonotary's order to defer the question of admissibility to the judge who will hear the matter on the merits.

[29] It is well-established, as noted by both the Prothonotary and the Judge, that the discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances. In *Armstrong*, for example, upon which the Prothonotary relied extensively, the Court stated that the discretion to strike an affidavit should be exercised only "where it is in the interest of justice to do so, for example or in cases where a party would be materially prejudiced where not striking an affidavit or portions of an affidavit would impair the orderly hearing of the application" (at para. 40). This approach was reiterated by this Court in *Gravel* (at para. 5) in the following terms:

> […] In the first decision, the judge hearing the case acknowledged that it has been established in the case law of this Court that on judicial review, motions to strike all or part of an affidavit should only be brought in exceptional circumstances, especially when the element to be struck out is related to the relevancy of the evidence: see *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8. The reason is quite simple: applications for judicial review must quickly proceed on the merits, and the procedural impacts of the nature of a motion to strike are to delay unduly and, more often than not, needlessly, a decision on the merits.

[30] In the case at bar, however, I find that the admissibility issue is better resolved at an early stage for two reasons. First, the St-Hilaire affidavit is so clearly out of bounds and replete with

legal opinion that it ought to be stopped in its tracks. There is simply no point in leaving it on the record, as it is so clearly inadmissible that there is no need to have a full record before coming to a final assessment of its merits. If Rule 81(1) is to have any meaning, it must be enforced in cases such as this one where an affidavit is tendered to provide an expert legal opinion on the very substantive issue that the Court will have to consider. This is a situation far removed from the scenario considered in *Armstrong*, where the affidavit was not that of an expert but of a lay affiant, who happened to also be the applicant, and who had strayed into argument.

[31] Second, it is in the interests of justice to intervene at this early stage, as the appellants would be materially prejudiced and the orderly hearing of the application would be impaired if the St-Hilaire affidavit was not struck immediately. The concern is not so much that the judge hearing the merits of the Jurisdiction Motion will be improperly swayed by the contents of the affidavit, as the appellant would have it. Judges are seasoned in the task of ignoring testimony and opinion that they have excluded in the course of a proceeding, and at weighing evidence which, even if found to be admissible, is of little relevance, reliability or credibility.

[32] If the Court was to allow the affidavit to stand at this juncture, however, the appellants may be constrained, if only for tactical reasons, to not only cross-examine the affiant (which they have apparently already done), but also to retain one or more legal experts of their own and to file a responding affidavit. This course of action would have the unfortunate result of distracting the Court from its core task and embarking on a parallel track of determining which expert is more credible and reliable. This would bring the Court into a redundant debate that, at best, would unduly lengthen what should be an expeditious proceeding and, at worst, lead the Court to

abdicate its responsibility regarding matters of law. Such an outcome should not be countenanced.

[33] As a result, I find not only that the affidavit is inadmissible, but that the Judge erred in not setting aside the order of the Prothonotary and in not striking the St-Hilaire affidavit.

[34] Since he determined that the Prothonotary had not erred in his decision to not strike the affidavit, the Judge refrained from considering whether the Prothonotary erred in alternatively finding that the Motion to Strike ought to be dismissed for delay. This Court is therefore left to assess the subsidiary conclusion of the Prothonotary of its own volition. Having carefully considered the matter, I find that the delay in bringing the Motion to Strike is not fatal for the appellants. I come to that conclusion for two reasons.

[35] I acknowledge that the test for dismissing a motion for delay is framed broadly; the use of such terms as “as soon as practicable” in Rule 58(2), coupled with the phrases “the Court may, by order” and “within a sufficient time after the moving party became aware of the irregularity” in Rule 59, implies that this decision is discretionary and turns largely on the facts of any given case. That being said, the Prothonotary seems to have assumed that the jurisprudence establishes a cut-off period of two months to bring a motion for delay, which is not the case. The decision of the Federal Court in *Scottish & York Insurance Co. v. York*, 180 F.T.R. 115, 94 A.C.W.S. (3d) 449, which was argued by the respondent MPs before the Prothonotary and upon which he implicitly relied (see Prothonotary’s Reasons at para. 27), does not stand for the principle that the “as soon as practicable” requirement found in Rule 58(2) inflexibly entails that a motion be

brought within a two month period following the date on which the moving party was made aware of an irregularity. To the extent that the Prothonotary relied on that mistaken interpretation of Rule 58(2), he committed an error of law.

[36] Furthermore, I cannot bring myself to the conclusion that a court should not strike an affidavit that is clearly inadmissible merely because a motion to that effect may not have been brought as quickly as it should have been. After all, the *Federal Courts Rules* must be interpreted and applied "so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits" (Rule 3). This is particularly the case where the respondent MPs have not shown any harm as a result of the appellants' delay of at most a few weeks in bringing their Motion to Strike. The prejudice that the appellants would suffer if their motion were dismissed for delay clearly outweighs any inconvenience that may result from the slippage in the scheduling of the Jurisdiction Motion.

IV. Conclusion

[37] I would therefore grant the appeal, set aside the order of Justice Locke, and strike the affidavit of Maxime St-Hilaire. Costs are awarded to the appellants.

"Yves de Montigny"
J.A.

"I agree
A.F. Scott J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	SCOTT J.A. BOIVIN J.A.
DATED:	MARCH 7, 2017

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