Federal Court  Cour fédérale

**Date: 20160105**

**Docket: T-2587-14**

**Citation: 2016 FC 9**

**Ottawa, Ontario, January 5, 2016**

**PRESENT: The Honourable Mr. Justice LeBlanc**

**BETWEEN:**

**KELLY O'GRADY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## ORDER AND REASONS

*Introduction*

[1] The Applicant is bringing a motion in writing pursuant to Rules 96(2), 81(2), 369 and 371 of the *Federal Court Rules*, SOR/98-106 (the Rules). In particular, the Applicant moves to have an adverse inference drawn from the affidavit evidence of Ms. Jane Badets, the Respondent's affiant (the Affiant) in the underlying review proceeding, which was sworn on July 10, 2015 and September 18, 2015.

[2] In the alternative, the Applicant seeks an order "authorizing" the Affiant to testify in Court pursuant to Rule 371 which, in the circumstances of his case, amounts to a request for an order requiring the Affiant to testify in Court in relation to her motion. Accessorily, the Applicant is asking the Court to order that all subsequent steps in the underlying review proceeding follow the timelines set out in the Rules.

[3] The Respondent opposes the Applicant's motion and objects to the filing of the Applicant's affidavit sworn in reply to the Respondent's motion record. It contends in this regard that evidence is not permissible on reply.

[4] The Respondent is correct on this point. Rule 369(3) allows a moving party to reply to a respondent's motion materials. However, Rule 369(3) is clear that the moving party is permitted to file only written representations in reply. Any derogation to this Rule would need to be sought – and authorized by – the Court, which was not done in this case. The Applicant's reply affidavit will therefore be disregarded.

*Background*

[5] The relevant facts to the Applicant's motion are these. The Applicant's underlying review proceeding is a challenge to a decision of the Privacy Commissioner of Canada dismissing a complaint filed by the Applicant under the *Privacy Act*, R.S.C. 1985, c. P-21 (the Act), regarding the alleged use of the Applicant's personal information in a Perinatal Outcomes Study (the Study) performed by Statistics Canada through its Data Research Centre at McGill University (the Data Center), which required the record linkage of a sample of birth records

between May 14, 1994 and May 13, 1996 and May 16, 2004 and May 15, 2006 to Census data collected in 1996 and 2006. The Applicant gave birth in Ontario during the 1994-1996 period and claims that, contrary to the provisions of the Act, information from her birth records was intentionally used without her consent, through records linkage, for a purpose not previously identified.

[6] At all relevant times, the Affiant was Director General, Census Subject Matter, Social and Demographic Statistics Branch at Statistics Canada and was responsible in that capacity, of all Statistics Canada Research Data Centers. She states that the Applicant's records did not form part of the Census-linked birth records for the Study as no Ontario births for the 1994-1996 period were included in the data linkage for the Study because of data quality concerns. The Affiant's affidavit further states that Statistics Canada has taken steps to minimize intrusions on individual privacy interests that may result from record linkage. In this case, this meant, *inter alia*, that record linkages were performed by Statistics Canada employees, the names of individuals were only used for linkage purposes and names were removed from the linked files before access to the linked files was given to physicians and researchers conducting the Study at the Data Center.

[7] On July 31, 2015, the Applicant sent the Respondent a list of written cross-examination questions for the Affiant which she significantly reduced on August 7, 2015. On both occasions, the Respondent refused to accept service on the grounds that it had not been properly served. The Applicant sought direction from this Court on how to proceed in these circumstances. On September 10, 2015, the Court directed (the Direction) that the written cross-examination

questions communicated to the Respondent on August 7, 2015 (the Written Examination Questions), be deemed to have been served on the Respondent and that the written examination be completed within ten days of the date of the Direction.

[8] On September 18, 2015, the Respondent served the Applicant a further affidavit from the Affiant in response to the Applicant's Written Examination Questions. The Respondent acknowledges that it failed to answer two of the 26 questions claiming that these two questions were unclear and improper in form.

[9] The Applicant challenges the content of the Affiant's second affidavit on the basis that the Affiant allegedly failed to identify the sources of her evidence, refused to address inconsistencies in her response to the Written Examination Questions and significantly relied on third-party evidence. She alleges that the Respondent refused to supply the proper names of the two datasets used to form the basis of the Study and the names of three forward linked files generated by the Study. The Applicant further contends that the Affiant failed to disclose the sources of her evidence "proving" that the Applicant's information was not used in the Study.

[10] The Applicant claims that in so doing, the Affiant failed to comply with an Order of the Court made under Rules 96 or 97. As a result, she contends that it is open to the Court to find the Affiant in contempt pursuant to Rule 98 or to order the Affiant to answer a question "that was improperly objected to" as contemplated by Rule 97(b).

[11] However, the Applicant is of the view that neither of these remedies "will fill the missing gaps or clear up any glaring inconsistencies" in the Affiant's evidence. Accordingly, she submits that the most appropriate remedy in these circumstances is to draw, through Rule 81(2), an adverse inference from the Affiant's "patent refusal to provide critical details regarding the Study, […] failure to address blatant inconsistencies in her response to the written cross-examination; […] failure to name all but one of her sources; and […] substantial reliance on third-party information" . In the alternative, as indicated previously, the Applicant seeks an order under Rule 371 requiring the Affiant to testify in Court.

*Issues*

[12] The Applicant's motion raises, in my view, the following three questions:

a. Whether the Respondent failed to comply with the Court's Direction, namely whether it answered the Written Examination Questions within the timeframe set out therein;

b. Whether the Court should draw an adverse inference from the Affiant's evidence of July 10, 2015 and September 18, 2015; and

c. Whether it is open to the Court, as an alternate remedy, to require the Affiant to testify in Court.

[13] For the reasons that follow, I find that all three questions shall be answered in the negative.

*The Respondent Complied with the Court's Direction*

[14] There was no failure on the part of the Respondent to abide by the Court's Direction which was meant to resolve the issue related to the service of the Written Examination Questions, which was preventing the underlying proceeding to move forward, and to ensure that this matter could proceed further in an orderly manner. It was not an Order made pursuant to Rules 96 or 97. The Direction was clearly not aimed at sanctioning a case of improper conduct, misconduct or failure to attend as contemplated by Rules 96 or 97.

[15] In this regard, the Applicant's reliance on Rule 96(2) is misplaced. This Rule provides that a person conducting an oral examination "may adjourn the examination and bring a motion for directions if the person believes answers to questions being provided are evasive or if the person being examined fails to produce a document or other material requested under Rule 94". However, Rule 96(2) does not apply in the context of a written examination under the Rules. Rule 100 is clear to that effect: only Rules 94, 95, 97 and 98 are applicable to written examinations, with the necessary modifications.

[16] Here, I cannot find that the Respondent did not comply with the Direction since it answered the Written Examination Questions by way of an affidavit as required by Rule 99(3) and within the time frame set out in the Direction. Furthermore, as I have just indicated, this is not a case where Rules 97 and 98 are engaged. Rule 94, which deals with the production of documents arising on examination, is clearly not engaged either. Finally, to the extent that Rule 95 is engaged with respect to the Respondent's objections at answering two of the 26 Written

Examination Questions on the ground that one was unclear and the other not in proper form, I find that these objections are well-founded and are, as a result, sustained.

*The Rule 81(2) Argument*

[17] The Applicant contends that the Court should draw an adverse inference pursuant to Rule 81, which reads as follows:

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| 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. |
| (2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts. | (2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables. |

[18] Adverse inferences drawn pursuant to Rule 81(2) are restricted to limited circumstances. In particular, Rule 81(2) does not allow the Court to draw any adverse inferences due to inconsistencies in an affiant's responses or reliance on so called "third-party evidence." The purpose of affidavits is to assist the Court in determining disputes by adducing facts "relevant to

the dispute without gloss or explanation" (*Canada (Attorney General) v Quadrini*, 2010 FCA 47, at para 18; *Dwyvenbode v Canada (Attorney General)*, 2009 FCA 120, at para 2). While affidavits are generally confined to personal knowledge, courts have taken the view that an affiant may in some circumstances rely on hearsay evidence and evidence made on belief.

[19] The Supreme Court of Canada developed a principled approach to the admissibility of hearsay evidence, which has been adopted by the Federal Court of Appeal in *Éthier v Canada*, [1993] 2 FC 659, 63 FTR 29 and by the Federal Court in *Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823, 414 FTR 291 [*Twentieth Century Fox*] regarding the admissibility of hearsay evidence given by way of affidavit. In *Twentieth Century Fox*, Justice Phelan held that an affiant is in a position to know that the facts are true where evidence is "corporate" in nature in that the affiant acts in a supervisory capacity and is responsible for his subordinates (at para 22). In my view, the Affiant, who at the time the Study was conducted was Director General, Census Subject Matter, Social and Demographic Statistics Branch at Statistics Canada and was responsible, in that capacity, of all Statistics Canada Research Data Centres, is in a position to know that the facts sworn in her affidavit are true.

[20] For similar reasons, I am of the opinion that while the Affiant swore her affidavit on belief and information, she was not obliged to "provide evidence of persons having personal knowledge of material facts." This Court has taken the position that no adverse inference will be drawn where it is probable that an affiant's qualifications or office places an affiant in a position where he or she would, of his or her own knowledge, be aware of the particular facts (*Smith*,

*Kline & French Laboraties Ltd v Novapharm Ltd* (1984) 79 CPR (2d) 103, at para 9, 25 ACWS (2d) 470). Thus, the Affiant need not provide evidence of persons having personal knowledge of material facts but be in a position to "be aware" of the particular facts. In my view, in her position as Director General, Census Subject Matter, Social and Demographic Statistics Branch and being responsible for all Statistics Canada Research Data Centres, including the Data Centre where the data at issue was accessed, the Affiant was probably aware of the particular facts and therefore in a position to swear the affidavit without providing evidence of persons having personal knowledge of material facts.

[21] Moreover, I find that the Affiant did provide evidence of persons having personal knowledge of the material facts as she swore in the September 18, 2015 affidavit. The Affiant consulted Mr. Richard Trudeau who apparently handled the Applicant's request to have her personal information removed from the Study and who was copied on several emails regarding Health Canada's decision to exclude Ontario from the Study. Further, the exhibits sworn by both the Applicant and Respondent, which were included in the record before me, support the facts sworn in the Affiant's September 18, 2015 affidavit.

[22] In addition, from my analysis of the record before me, it is not readily apparent that the Affiant's evidence is plagued with blatant inconsistencies and lacks critical details regarding the Study, as argued by the Applicant. In any case, I am of the view that this is a matter to be assessed by the judge hearing the case on the merits. Failure to provide the best evidence goes to the weight to be accorded the affidavit (*Lumonics Research Ltd v Gould*, [1983] 2 FC 360, 46 NR 483), something which is in the purview of the application judge, not the motion judge.

[23] Finally, regarding the Applicant's claims of bias, I agree with the Respondent that it is improper for the Applicant to seek to argue these claims on this motion when it will be treated on the merits once the application is heard.

[24] I see no reason, therefore, to draw any adverse inferences from either the Affiant's July 10, 2015 affidavit or September 18, 2015 affidavit.

*The Rule 371 Alternate Argument*

[25] Rule 371 empowers the Court, in special circumstances, to authorize a witness to testify in Court in relation to an issue of fact raised on a motion. The Applicant bears the onus of demonstrating that "special reasons" exist for the Court to order the Affiant to testify in Court in relation to the facts raised on the motion (*Glaxo Can Inc v Canada (Minister of National Health and Welfare)* [1987] 11 FTR 132, at para 7). Apart from the fact that the present motion is a motion in writing under Rule 369, which is to be decided without an oral hearing, it is clear from the Applicant's submissions that the Applicant does not raise any special reasons to this effect. Here, I agree with the Respondent that the Applicant's request under Rule 371 is an attempt to do indirectly what she cannot do directly, that is seeking another opportunity to cross-examine the Affiant when she already had the opportunity to do so.

[26] For these reasons, the Applicant's alternate request under Rule 371 is denied.

[27] The Applicant's motion is therefore dismissed. Costs are to follow the event.

**ORDER**

**THIS COURT ORDERS that:**

1. The motion is dismissed;

2. All subsequent steps in the underlying review proceeding shall follow the timelines set out in the *Federal Courts Rules*; and

3. Costs to follow the event.

"René LeBlanc"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2587-14 |
| **STYLE OF CAUSE:** | KELLY O'GRADY v ATTORNEY GENERAL OF CANADA |

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

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| **ORDER AND REASONS:** | LEBLANC J. |
| **DATED:** | JANUARY 5, 2016 |

**SOLICITORS OF RECORD:**

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| Kelly O'Grady<br>Pembroke, Ontario | FOR THE APPLICANT<br>Self-Represented |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |