Federal Court Cour fédérale

Date: 20230119

Docket: T-190-20

Citation: 2023 FC 94

Ottawa, Ontario, January 19, 2023

PRESENT: Associate Judge Mireille Tabib

BETWEEN:

PRIVACY COMMISSIONER OF CANADA

Applicant

and

FACEBOOK, INC.

Respondent

REASONS FOR ORDER AND ORDER

I. OVERVIEW

[1] The Respondent, Facebook Inc., brings this motion seeking to strike portions of the Application Record filed by the Applicant, the Privacy Commissioner of Canada (the "OPC"). The material in question consists of portions of the transcript of the re-attendance on cross-examination of Allison Hendrix, of documents marked as exhibits during that re-attendance, and of all references to the said portions of transcript and documents in the OPC's record.

[2] In the course of the hearing, Facebook made an oral motion to amend its notice of motion for the purpose of seeking to strike an additional document marked as an exhibit during the cross-examination. I took that motion under reserve to be addressed as part of the merits of the motion.

[3] The OPC brings its own motion to serve and file a memorandum of fact and law of up to 55 pages in length.

[4] For the reasons that follow, Facebook's motions are granted and the OPC's motion is dismissed.

II. THE MOTION TO STRIKE

A. *The law applicable to motions to strike*

[5] The parties are in general agreement as to the legal principles that apply to preliminary motions to strike in the context of applications, although they are at odds as to how these principles apply in the circumstances of this case.

[6] Most of the case law cited by the parties involves interlocutory motions to strike affidavits filed by a party as of right pursuant to Rules 306 or 307 of the *Federal Courts Rules*: *Hassouna v Canada (Citizenship & Immigration)* 2016 FC 1189; *Canadian Tire Corp. v PS Partsource Inc.*, 2011 FCA 8 at para 18; *Avon Products v Moroccanoil Israel Ltd* 2013 FC 1137; *Canada (Board of International Economy) v Canada (Attorney General)* 2017 FCA 43; *Gravel v*

Telus Communications Inc. 2011 FCA 14; *Lukacs v Canada (Transportation Agency)* 2019 FC 1256.

[7] The principle these cases establish is that interlocutory motions to strike should only be entertained in exceptional cases, where the impropriety is manifest and where leaving the matter for determination by the judge on the merits of the application would cause prejudice to a party or impair the orderly hearing of the application. The reasons that underlie this principle were succinctly set out as follows in *Minister of Public Safety and Emergency Preparedness v Najafi* 2019 FC 98:

> Generally, judicial reviews should not be punctuated by interlocutory matters. As the Court of Appeal put it in *Pharmacia Inc. v. Canada (Minister of National Health & Welfare)* (1994), [1995] 1 F.C. 588 (Fed. C.A.), "objection to the originating notice can be dealt with promptly in the context of consideration of the merits of the case" (p. 598). That is certainly true of an affidavit and a factum already on the record, without any objection having been recorded. The rule is that bifurcations are not encouraged. Judicial review applications are to be "heard and determined without delay and in a summary way" (subsection 18.4(1) of the Federal Courts Act RSC 1985, c. F-7). It is only when clearly warranted that discretion is to be exercised to decide interlocutory issues (*Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.)). As put quite colourfully by the Court in *Assn. of Universities & Colleges of Canada*, "(t)hose embarking upon an interlocutory foray to this Court to seek such a ruling will not often find a welcome mat when they arrive" (paragraph 11). One can surmise that the exercise of discretion is clearly warranted if the decision to make on an interlocutory motion is clear cut or obvious.

[8] The nature of the issues raised in this motion is exceptional. The motion is essentially one to rule on objections made in the course of a re-attendance for cross-examination. Many of the objections further relate to whether the questions asked properly fall within the scope of the

interlocutory order that allowed the re-attendance. The resolution of other objections also requires a retrospective review of the procedural history of the proceedings and consideration of rulings that were made in other interlocutory motions. Indeed, both parties have cited extensively from the reasons for orders, transcripts and motion records from previous motions. As such, this case is similar to *Eli Lilly Canada Inc. v Apotex Inc.* 2006 FC 953, in that the minutia involved in determining whether specific questions are "proper" in light of an order permitting re-attendance "would constitute a needless, time-consuming and disruptive distraction to the determination of the merits of the application" (*Eli Lilly*, para 2).

[9] Finally, unlike most interlocutory motions to strike evidence, this motion was brought at a time where the OPC's Memorandum of Fact and Law has been communicated to the Court. This allows the Court to readily ascertain the purpose for which the OPC intends to use some of the impugned evidence, removing the conjecture that stands in the way of an early determination of admissibility in most cases.

[10] I am therefore satisfied that the case management judge is as well placed as the hearing judge to make the required determinations. In addition, and as further discussed below, the inadmissibility of the impugned evidence is manifest. This is one of those exceptional cases where the ruling should be made at the interlocutory stage.

B. *Procedural history*

[11] This application was commenced by the OPC pursuant to paragraph 15(a) of the *Personal Information Protection and Electronic Documents Act*, SC 2000 ("PIPEDA"),

following the OPC's investigation into a complaint against Facebook. That complaint centred on media reports that a British consulting firm, Cambridge Analytica, had accessed the personal information of certain Facebook users without their consent through a third party App called "This is Your Digital Life". The application seeks a declaration that Facebook contravened provisions of PIPEDA and seeks remedies intending to ensure ongoing compliance by Facebook.

[12] The OPC's evidence on the application consists only of a voluminous affidavit by Michael Maguire. That affidavit sets out the details of the OPC's investigation and of Facebook's submissions, and introduces the reports and proceedings of other data protection authorities regarding the Cambridge Analytica scandal. Following a partially successful motion by Facebook to strike portions of the Maguire affidavit, the Court gave the OPC an opportunity to file additional evidence before Facebook was to file its own responding evidence. The OPC declined to do so, and Facebook served its evidence, consisting only of the affidavit of Allison Hendrix, its Public Policy Director.

[13] Ms. Hendrix was cross-examined on her affidavit in February 2022. During the course of her cross-examination, the OPC tried to question her about six documents that were not included in either Mr. Maguire's or in Ms. Hendrix's affidavits. Five of those documents the so-called "Six4Three Documents" were produced by Facebook in the course of a litigation between itself and an App developer, Six4Three LLC, in the state of California. They consist of communications allegedly exchanged between Facebook executives, an undated and unsigned internal memo, and what appears to be an unsigned standard form of agreement. The documents were subject to a protective order issued by the California Court, but were leaked to the media in breach of that order. They eventually became readily available to the public on the Internet,

including on a government website in the United Kingdom. The sixth document is a 2021 report from an independent third-party assessor appointed by the United States Federal Trade Commission as part of a regulatory proceeding undertaken by that agency against Facebook ("the Assessor's Report").

[14] Facebook objected to all questions relating to the Six4Three Documents on the principal ground that they had been disclosed in violation of a court order. It also objected to all questions concerning the Assessor's Report on the ground that Ms. Hendrix had never seen it before.

[15] In May 2022, the OPC brought a motion seeking leave to file an affidavit of one of its representatives for the purpose of introducing into evidence the Six4Three Documents and the Assessor's Report, pursuant to Rule 312 of the *Federal Courts Rules*. That motion sought, as an alternative relief should the Court not grant leave to file that affidavit, an order requiring Facebook to answer all of the questions refused during the cross-examination of Ms. Hendrix.

[16] By order dated June 1, 2022, I dismissed the OPC's request to file the Six4Three Documents and the Assessor's Report as a new evidence on the application. Not only did I find that the documents had been available to the OPC prior to the filing of Facebook's evidence, but I concluded that allowing them to be introduced through the affidavit of one of the OPC's representative would be prejudicial to Facebook. It was obvious at the time that Facebook's objection to the admissibility of the Six4Three Documents went beyond the fact that they had been illegally leaked. Facebook also asserted that they constituted hearsay and had not been properly authenticated. I concluded that introducing the documents in evidence through an independent affidavit would effectively exempt the OPC from having to address the admissibility

issues raised by Facebook head-on in the course of cross-examination and would leave the ultimate determination of admissibility to the application judge. It would also leave Facebook with no opportunity to comment on the documents through Ms. Hendrix's testimony (assuming, of course, that she has sufficient familiarity with the Six4Three Documents to authenticate and speak to them). I thus found the OPC's proposed approach to be prejudicial to Facebook.

[17] As for the Assessor's Report, to which Facebook had also raised objection on the basis that it constituted hearsay and inadmissible expert opinion, I concluded, for essentially the same reasons, that allowing it to be filed through an affidavit of a representative of the OPC would be prejudicial to Facebook.

[18] Having denied the principal relief sought in the OPC's motion, I proceeded to hear the objections raised in the course of the cross-examination. The rulings made are included in two orders, one dated June 13, 2022, and the other, dated July 25, 2022. I dismissed Facebook's blanket objection founded on the fact that the Six4Three Documents had been illegally leaked in breach of a US protective order. With respect to questions pertaining to the Six4Three Documents, I ruled, as part of the June 13, 2022, order, that Ms. Hendrix was not required to seek information from others at Facebook in order to answer questions to which she did not have personal knowledge. I also ruled that "asking Ms. Hendrix to explain, speak about, or comment on statements made by another person may not be appropriate, but that it is appropriate to ask whether she is aware of statements made by others, or to seek to establish her knowledge of the existence or authenticity of documents authored by others." With respect to the Assessor's Report, it was clear from the transcript that even though Ms. Hendrix had apparently directly participated in the work of the Assessor that had led to the written report, she had never seen or

read the report itself. It was therefore not appropriate to ask her questions as to what was written in the Report. However, I ruled that those questions that went to ascertaining the extent to which Ms. Hendrix had personal knowledge of the work conducted by the Assessor were proper and should have been answered.

[19] The July 25, 2022, order also provides that:

> Ms. Hendrix shall attend for further cross-examination of up to two hours, on a date to be scheduled by the parties, to answer the questions ordered in paragraph 1 above and the questions she has agreed to answer (Refusals #15-20, 30-35, 37, 39, 44 and 47-50, and Advisement #19), including any follow-up questions properly arising from her answers to those questions.

[20] In the course of that re-attendance, Facebook objected to numerous questions on the ground that they fell outside the scope of the permitted re-attendance. As contemplated in Rule 95, Facebook's objections were stated on the record and Ms. Hendrix was permitted to answer the questions under reserve objection, meaning that the propriety of the questions is to be determined before the answer can be used on the merits of the application. Facebook also objected when the OPC sought to mark as exhibits documents that had not been properly identified or authenticated by Ms. Hendrix.

[21] The OPC subsequently delivered its proposed Memorandum of Fact and Law, which confirms its intention to use and rely upon the impugned portions of the transcript and exhibits. The Memorandum of Fact and Law has yet to be formally filed, pending the determination of this motion and of the motion by the OPC seeking leave to exceed the 30-page limit imposed by Rule 70.

C. *The objections*

[22] The objections fall in two broad categories: objections to questions falling outside the scope of the permitted re-attendance and objections to documents that were not properly authenticated. Some documents are objected to on the basis of both types of objections.

(1) Proper scope of re-attendance.

[23] The OPC readily concedes that the proper scope of the re-attendance is governed by the terms of the Order dated July 25, 2022. Indeed, a party who brings a motion to rule on objections, even if successful, does not have an automatic right to have the witness re-attend in order to answer the questions ruled appropriate. The Court has discretion to order that the answers be provided in writing, or orally by way of re-attendance. In this case, the Order provides that Ms. Hendrix was to re-attend to answer the specific questions that the Court had ruled appropriate and those that she had voluntarily agreed to answer, "including any follow-up questions properly arising from her answers to those questions." The OPC takes the position that proper follow-up questions include questions relating to Ms. Hendrix's credibility, not only as it relates to the answers given to the previously refused questions, but generally.

[24] This rather expansive view of the scope of the order might explain the unusual way in which the OPC's counsel chose to go about the re-attendance. The OPC did not start by posing the previously refused question, exactly as initially phrased or with such modifications as the circumstances or the terms of the order require, and then asking follow-up questions arising from the witness's actual answer. Instead, counsel for the OPC began by asking a series of entirely

different questions, including questions clarifying an answer to undertaking previously given, questions relating to Ms. Hendrix's previous depositions in two US proceedings and her preparation for those depositions, Facebook's filings with the US Securities and Exchange Commission, and about paragraphs of the affidavit she swore for this application but that had not been the subject of objections in her previous cross-examination. Only after asking those questions, which were answered under reserve objection, did counsel for the OPC turn to questions relating directly to the Six4Three Documents. Later on, in the course of asking the witness about her participation in the work of the Assessor, the OPC asked a series of questions on the subject of why Ms. Hendrix had never requested or obtained a copy of the Assessor's Report. As mentioned earlier, it had already been established in the course of the initial cross-examination that Ms. Hendrix had never previously seen the Assessor's Report.

[25] Facebook strenuously objected to the OPC's approach, noting that the questions did not and could not arise from Ms. Hendrix's answers to the questions originally refused, especially since most were put to her before she had even been asked one of these original questions. The OPC argues that it was not bound to ask follow-up questions in a specific temporal order. It adds, in any event, that it was entirely appropriate for it to ask questions to establish a foundation for awareness and knowledge before asking directly about the witness' actual knowledge, and that it was equally appropriate to ask questions probing the witness' credibility, "on issues she was required to address at the follow-up examination." The OPC submits that the procedure advocated by Facebook would mark the triumph of form versus substance and unduly constrain counsel's ability in seeking the truth.

[26] The OPC's approach is misguided and, if sanctioned, would pervert the clear purpose and intent of the order for re-attendance in this case.

[27] At the time the motion to rule on objections was made, the OPC had concluded its cross-examination of Ms. Hendrix. This was not a case where, finding itself stymied in conducting an effective examination, a party adjourns the examination in order to seek directions or rulings, as contemplated in Rule 96(2). Unless it is facing obstructive behaviour that justifies adjourning the examination to seek directions, a party conducting an examination must conclude its examination before seeking a ruling on objections. Even when facing objections, the examining party must put on the record all of the questions it can reasonably foresee being relevant and proper. That includes foundation questions, the actual question one would wish to ask assuming foundation was established, and any relevant follow-up question from the answer one can reasonably expect to receive. This allows the Court, when determining motions arising from objections, to comprehensively resolve all issues arising from the examination. It also allows examinations to be completed in writing following the determination of objections without the need for re-attendance. Re-attendance is reserved for those cases where it is anticipated that complex or nuanced answers might be given, or new information provided, that could not have been anticipated and for which follow-up questions would be appropriate.

[28] In the present case, faced with Facebook's objections in respect of the Six4Three Documents and in respect of the Assessor's Report, the OPC proceeded to put on the record all of the questions it had intended to ask. The OPC seemed well aware that Ms. Hendrix was not the author of the Six4Three Documents and might be unable to authenticate them. Indeed, counsel for the OPC felt it necessary to specifically ask Ms. Hendrix to make inquiries of the

authors and recipients of the documents, to determine whether the documents were authentic. It was open for the OPC at the time to also ask and put on record any question it wished to ask Ms. Hendrix as to whether she had come across the Six4Three Documents in preparation for her deposition in other US litigation. When Ms. Hendrix testified, in the course of the initial cross-examination, that she had not seen the Assessor's Report, the OPC had the opportunity to ask her why she had not found it useful to obtain a copy and review it in preparation for her testimony. Finally, the OPC could have asked Ms. Hendrix to bring Facebook's public SEC filings to the original cross-examination so that she could be questioned on them.

[29] The OPC chose not to do so. The fact that the Court subsequently held that Ms. Hendrix did not have the obligation to seek information from others at Facebook in order to answer the OPC's questions and that the OPC could not introduce the disputed documents through its own affidavit does not entitle the OPC to a do-over or a second kick at the can. Yet it seems that the OPC attempted to use the permitted re-attendance to do just that.

[30] The questions seeking to introduce the SEC filings bear no apparent relation to any of the questions previously refused. The other impugned questions are clearly designed to shore up the OPC's case for authenticating documents of which Ms. Hendrix either had no recollection or no prior knowledge. Some questions obviously bear a relation to the Six4Three Documents and to the Assessor's Report. However, they are manifestly not questions that arise from any answer provided by Ms. Hendrix in the course of answering the specific questions for which re-attendance was permitted. Indeed, the OPC did not really attempt at the hearing to demonstrate how any particular question might be said to constitute a proper follow-up to any of the answers it eventually obtained to the original questions.

[31] The OPC tried to bootstrap its case by referring to case law to the effect that questions relating to the credibility and reliability of the deponent's evidence are allowed on cross-examination and to a ruling I made on the refusals motion, to the effect that credibility was "a sufficient reason" to ask some of the questions objected to. Whether questions going to the witness's credibility are generally permissible on a cross-examination is not the issue here. The issue is whether, in the circumstances of this case, such questions properly arose from the answers given by the witness to the questions originally refused. If they did not, then they fall outside the scope of the re-attendance as permitted.

[32] The OPC also points to representations it made in the course of the hearing on the refusals motion specifically asking assurances that follow-up questions from the answers could include challenging the witness' credibility and why she had not read the Assessor's Report. Counsel may have asked for those assurances, but clearly, I declined to give them. The transcript of the hearing further reveals that I cautioned counsel at least twice that re-attendance did not constitute a do-over or a second kick at the can, that I declined to provide an advance ruling as to what questions would be permissible, and that the only measure of what would be permissible on re-attendance was whether a question constitutes an appropriate follow-up in view of the answers to the specific questions on which I had ruled.

[33] There is nothing vague or open to interpretation in the terms of the order for re-attendance. While it does not dictate the order in which questions are to be asked, it is explicit that any additional question must be a follow-up question, "properly arising from her answers to those questions." This implicitly requires that the witness be called upon to answer the original questions before being called upon to answer a follow-up question. Allowing the examining

party to front-load so-called “follow-up” questions in the name of maintaining the element of surprise in search for the truth, and then retroactively try to justify the questions by tying them to the answers subsequently received is an invitation to abuse. It leaves the party being examined unable to formulate meaningful objections and leads to convoluted debates before the Court. I reiterate that, at the time the order for re-attendance was made, the OPC’s cross-examination on affidavit was meant to be completed. Re-attendance, in the circumstances, is understandably an exceptional measure and the permission should be narrowly construed. Exceeding the scope of a permitted re-attendance constitutes an abuse of process. The questions and answers obtained as a result of abusive conduct cannot be allowed to stand, no matter how relevant or useful they may be.

[34] Questions number 13 to 107 and 230 to 259 manifestly do not arise from Ms. Hendrix’s answers to any of the questions previously refused. These questions are improper, as they were not authorized under the re-attendance order. The OPC had no right to ask those questions and both the questions and answers given under reserve of objection shall be struck.

(2) Documents marked as exhibits

[35] The documents to which those objections pertain are the following:

- Exhibit 7 is a document produced in answer to a previous undertaking
- Exhibits 8 and 9 are said to be being Facebook filings with the SEC
- Exhibit 10 is said to be a Facebook post of Mark Zuckerberg dated December 5, 2018
- Exhibits 11 to 12, and 14 to 15 are four of the five Six4Three Documents

- Exhibit 17 is an excerpt from the Six4Three litigation deposition transcript of Ms. Hendrix

- Exhibit 18 is the Assessor's Report

[36] Exhibits 7 to 9 were introduced as part of those questions I have found improper. They are accordingly effectively struck as a result of that conclusion. Had the questions been proper, I would not have struck Exhibit 7, as Ms. Hendrix recognized it as a document that she had obtained from Facebook in specific answer to an undertaking she had agreed to fulfil. The document being properly authenticated, any question as to its relevance or admissibility for the truth of its content would have been deferred to the judge on the merits.

[37] I would, however, have had no hesitation in striking Exhibits 8 and 9. Counsel for the OPC baldly asserts that the documents are true copies of Facebook's annual filing with the SEC for the year ended December 31, 2021, and its quarterly filing for the quarter ended March 31, 2022. However, Counsel's opinions and assurances are not admissible evidence and cannot serve to authenticate the documents. Ms. Hendrix stated unequivocally, when shown the documents, that she had never seen them before, that she is not familiar with the process for filing those reports, and did not know who prepared them. While she testified that she had no reason to think that reports filed by Facebook might be inaccurate, she was unable to positively identify the documents as being reports filed by Facebook.

[38] The OPC nevertheless insisted that the documents be marked as Exhibits 8 and 9 "for identification purposes". Marking a document "for identification purposes" does not have the effect of introducing that document into evidence. Before a document can be received in

evidence, for any purpose, a witness must be able to attest to the fact that they are what they purport to be, or are either the original of a document or a true copy of an original document. The only exceptions to that rule are documents of which the Court can take judicial notice, those that can be introduced through specific legislative provisions or those that the parties agree can be admitted without authentication (J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018), §18.6 *; Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268, at para. 20). Marking a document "for identification" is a convenient method for identifying a document used in the course of examining a witness when that document has yet to be properly introduced into evidence. It allows a party to test a witness' knowledge of the document or its content, even though that witness is unable to properly authenticate the document himself or herself. What the witness might say about his or her knowledge of the document or of its content will form part of the evidence on the proceeding, but the document itself cannot and will not form part of the evidence until such time as it has been formally authenticated by an appropriate witness (*Law of Evidence in Canada*, above, §2.121). If no competent witness can be found to authenticate the document, then it has not been introduced into evidence and cannot remain on the record.

[39] In this case, both parties have already filed all of the affidavits that they are entitled to file, and all cross-examinations are completed. There is no available evidence to authenticate these documents and they simply cannot be admitted into evidence.

[40] Exhibit 10 was shown to Ms. Hendrix as being "what appears to be a Facebook post by Mark Zuckerberg of December 5, 2018." Ms. Hendrix was asked whether she was "Facebook friends" with Mr. Zuckerberg, but was never asked to identify or authenticate the document, and

she did not otherwise recognize or profess knowledge of it. Again, the document was marked "for identification", but was never authenticated by a competent witness. The document is not a proper exhibit on this application.

[41] The OPC did ask Ms. Hendrix to identify or authenticate Exhibits 11, 12, 14 and 15, four of the Six4Three Documents. The first three of these documents appear to be email threads exchanged in 2012 between various people. Ms. Hendrix recognized their names as corresponding to persons who are part of the Facebook organization. The fourth document appears to be an outline of suggested changes to the Facebook platform, which is otherwise undated and unsigned. It bears noting that Ms. Hendrix is only listed as having been copied on some, but not all of the emails forming part of the first chain (Exhibit 11). Her name does not appear on any of the emails or documents forming part of Exhibits 12, 14 and 15.

[42] Ms. Hendrix could not confirm that any of the documents reflected emails actually sent and received by the recipients and senders indicated, at about the time that appears on their face. She recalled having seen the documents in the context of litigation and thought she might have answered questions in relation to them, but her testimony was clearly to the effect that she had no independent recollection or knowledge of the documents.

[43] The OPC's counsel tried another tack to establish that these documents were authentic Facebook documents. It referred to an affidavit of Ms. Alice Yu, a legal assistant to Facebook's outside counsel, which was filed by Facebook in the context of the refusals motion. In that affidavit, Ms. Yu identified exhibits 11, 12, 14 and 15 as being among the document disclosed by Six4Three in violation of the California protective order and that were made publicly available

on the Internet. Ms. Hendrix did not recognize the affidavit of Ms. Yu and stated that she does not know who that person is. Ms. Yu's affidavit was marked as Exhibit 13, under reserve of Facebook's objection.

[44] Ms. Hendrix was also asked whether the documents were the same documents as were discussed in the Zuckerberg Facebook post (Exhibit 10, which I have now held should be struck). Ms. Hendrix could not say. When pressed as to whether Exhibits 11, 12, 13 and 14 were likely the same documents that she had seen and reviewed as part of other litigation involving Facebook, Ms. Hendrix testified that it was "very likely" that they were the same but that she "could not be absolutely certain."

[45] Ms. Hendrix was not an appropriate witness to identify and authenticate those documents. As pointed out by Facebook, authentication is especially important for electronic documents, given the increased prospect of manipulation or corruption.

[46] The OPC argues that the documents are sufficiently authenticated as genuine Facebook document through the affidavit of Ms. Yu. The OPC further finds confirmation of the identity of the documents from Facebook's position on the refusals motion, in which it took the official position that the documents were illegally leaked Facebook documents.

[47] The problem with the OPC's argument is that it relies, for authentication, on evidence and written representations filed for the sole purpose of an interlocutory motion. The evidentiary record to be used on the merits of an application is constituted of the affidavits and documents exchanged in accordance with Rules 306 and 307 of the *Federal Courts Rules*, of documents

contained in the Certified Tribunal Record, where applicable, and of such evidence as is properly introduced in the course of cross-examinations. No other evidence may be filed unless it is filed pursuant to an Order made on a motion pursuant to Rule 312. The parties may not, without leave, draw from the evidentiary record constituted for the purpose of interlocutory motions to complement that record or to fill evidentiary gap. That is, however, exactly what the OPC is attempting to do.

[48] Even if Ms. Yu's affidavit could be relied upon to "authenticate" the Six4Three Documents, their admissibility would still be questionable. Construed generously, the evidence before me establishes only that Exhibits 11, 12, 14 and 15 are true copies of documents that were disclosed by Facebook as part of its documentary disclosure obligations in the context of a US litigation. This, however, is not quite the same as authenticating a document. Documents disclosed as part of the documentary discovery process are not automatically admissible as evidence in that or any other proceeding. There is no rule pursuant to which a party is deemed to have admitted the authenticity of documents that it discloses as part of its affidavit of documents, much less the truth of its contents.

[49] The matter would have been different if the sole purpose for which the OPC sought to introduce those documents is to establish that they had been in Facebook's possession. Admissibility might even be arguable for the purpose of showing that certain emails were sent and received between certain persons at or around certain dates. Had that been the objective pursued by the OPC in tendering the documents into evidence, I might have left the matter to the appreciation of the judge on the merits.

[50] It is, however, abundantly clear from the OPC's memorandum of fact and law that the purpose for which it seeks to introduce the Six4Three Documents is to stand as proof of their content. More specifically, the OPC wishes to hold up the contents of the exchanges as evidence that the statements made in the emails and in the unsigned memo accurately reflect the views and intentions of their authors and, by extension, of Facebook itself. For that purpose, the impugned documents are manifestly inadmissible hearsay.

[51] Asked specifically about the content of the email threads, which appeared to be discussions about the business model of the Facebook platform, Ms. Hendrix testified that she did not believe she was part of those discussions, and was not "the right person" to speak about Facebook's business model.

[52] As mentioned earlier, the OPC attempted to file into evidence the very same Six4Three Documents, authenticated solely by the fact that they had been disclosed by Facebook in US litigation, as part of its previous motion pursuant to Rule 312. In the June 1, 2022, Order dismissing that motion, I made the following observations:

> It bears noting that Facebook's objections are not simply based on the illegal disclosure of the Six4Three Documents or a lack of relevance, but also, on hearsay and lack of foundation as to authenticity. It is clear that the OPC intends these documents to stand as authentic Facebook documents and for the truth of their content: the OPC argues that the communications represent the thoughts of their supposed authors, that "Letter Exhibit D" shows that the 3.0 platform was designed with certain attributes, and that a standard contract bearing certain terms was used by Facebook.
>
> Introducing the documents in evidence through an independent affidavit effectively exempts the OPC from having to address the admissibility issues raised by Facebook head-on in the course of cross-examination and would leave the ultimate determination of admissibility to the Application Judge. Assuming that Ms. Hendrix

> has, as it is supposed by the OPC, sufficient familiarity with the Six4Three Documents to authenticate and speak to them, so as to overcome Facebook's objections to admissibility, it is reasonable to think that she would also be able to provide context or further information on the documents. The OPC's approach, of forgoing cross-examination and filing the documents directly, would foreclose that possibility. It would leave Facebook with no opportunity to comment on the documents through Ms. Hendrix's testimony unless it brings its own motion for leave to file additional evidence."
>
> (Emphasis added)

[53] The OPC having been allowed to pursue its cross-examination of Ms. Hendrix as to the Six4Three Documents, it has become clear that she does not have sufficient familiarity to authenticate or to speak to them, to provide context or further information on the documents. One must also not lose sight of the fact that the documents at issue are not official corporate Facebook literature or public statements. They appear to be internal messages between individual members of the Facebook organization. The OPC's attempt to introduce the documents through the testimony of Ms. Hendrix is nothing more than an attempt to do indirectly what it was precluded from doing directly through its Rule 312 motion: introducing into evidence documents to stand for truth of their contents based on nothing more than evidence that they once formed part of Facebook's documentary disclosure in another litigation. That flies in the face of the rule against hearsay, and cannot be saved under any exception based on necessity, reliability or fairness.

[54] In the course of the re-attendance on cross-examination, the OPC referred Ms. Hendrix to portions of her US deposition, to refresh her memory as to her familiarity with and knowledge of one of the Six4Three Documents. Ms. Hendrix acknowledged and recognized the document, and

it was filed as Exhibit 16, without objection. Counsel for the OPC then proceeded to mark as Exhibit 17 not only the specific few paragraphs that were read out to Ms. Hendrix, but a 100-page excerpt of that previous deposition. Ms. Hendrix was not asked to read or recognize any part of that longer excerpt other than that the portions that were specifically read out and shown to her on-screen. “Exhibit 17” has not been properly authenticated nor has foundation for its relevance and propriety in the context of re-attendance been established.

[55] Exhibit 18 is the full Assessor’s Report, which Ms. Hendrix had previously testified to never having seen or read before. It is abundantly clear that she is not the author of that document. There is no evidence on the merits of the application from which the Report can be independently authenticated, and no witness who could speak to the truth of it content. The document is manifestly inadmissible; it will be struck, along with all reference to it in the OPC’s memorandum of fact and law.

D. *Facebook’s motion to amend the notice of motion*

[56] As mentioned above in the context of the discussion concerning the admissibility of the Six4Three Documents, the affidavit of Ms. Yu, previously filed for the purpose of the refusals motion, was filed as Exhibit 13 of Ms. Hendrix’s cross-examination under reserve of objection. However, Facebook’s notice of motion did not ask that it be struck, an omission that I noted and questioned in the course of the hearing. Facebook thus made an oral motion to amend its notice of motion to include that additional relief.

[57] It is not clear why Facebook did not include conclusions addressing that affidavit in its initial notice of motion, but the OPC could not provide a reason why it would be prejudiced in having to address the admissibility of that affidavit in the course of the hearing. I am satisfied that it is in the interest of justice that the motion be granted. Although there is no reason to doubt the authenticity of the affidavit, Ms. Hendrix had no independent knowledge of that affidavit and it could not properly be introduced through her testimony. As mentioned above, the affidavit of Ms. Yu does not form part of the record on the merits of the application, and the OPC could not properly rely upon it for the purposes of the merits without leave. Given my conclusions as to the inadmissibility of Exhibits 11, 12, 14 and 15, the continued presence of Ms. Yu's obviously inadmissible affidavit serves no purpose and may lead to confusion. It ought to be struck.

III. The OPC's motion for leave to file a memorandum of fact and law exceeding 30 pages.

[58] Rule 70 of the *Federal Courts Rules* provides that memoranda of fact and law may not exceed 30 pages unless leave of the Court has previously been obtained. As noted by Facebook, the Court grants such extensions only "sparingly". The applicant must establish "exceptional" circumstances through "specific demonstrations of need". (*Canada v General Electric Capital Canada Inc*, 2010 FCA 92, at para 5(a); *Forest Ethics Advocacy Association v Canada (Attorney General)*, 2014 FCA 182, at para 24).

[59] I am not satisfied that the OPC has met that onus. While the record is indeed voluminous, the essential facts underlying the dispute are not genuinely disputed. Having reviewed the proposed memorandum, I find that those facts that are necessary to provide context could have been summarized much more succinctly. The memorandum as proposed also contains a

significant volume of rhetorical remarks, argumentative statements and repetitions that are neither necessary to the determination of the issues, nor particularly useful. Substantial portions of the submissions are, further, devoted to presenting and discussing evidence that I have now determined ought to be struck, and will need to be removed and redrafted.

[60] While the determinations the Court is asked to make on this application are undoubtedly novel in many respects and of significant moment to the parties and the public at large, that itself does not warrant a departure from the normal limits. I acknowledge that producing tighter submissions may require some effort, but I am not satisfied that it is not reasonably possible for the OPC to meet that goal. I also note that the hearing on the merits has been scheduled for three full days, an exceptionally lengthy hearing. The parties will have an opportunity to present their case in full, and will not be prejudiced by being required to present their written argument in a more concise and focussed manner.

ORDER

THIS COURT ORDERS that:

1. The Respondent's oral motion to amend its notice of motion to add Exhibit 13 as a document to be struck is granted.

2. Questions number 13 to 107 and 230 to 259 to the re-attendance on cross-examination of Allison Hendrix, the answers thereto and the documents identified as Exhibits 7 to 15, 17 and 18 to that cross-examination are hereby struck.

3. Those questions, answers, exhibits and all references to them shall be removed from the Applicant's record and from its memorandum of fact and law.

4. The Applicant's motion for leave to file a memorandum of fact and law of up to 55 pages is dismissed.

5. The parties shall, forthwith, confer and submit to the Court a proposed expedited schedule to serve and file their respective application record.

6. With costs in favour of the Respondent on both the motion to strike and the motion to file a longer memorandum of fact and law.

"Mireille Tabib"

Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-190-20
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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING :	NOVEMBER 28, 2022
REASONS FOR ORDER AND ORDER:	ASSOCIATE JUDGE MIREILLE TABIB
DATED:	JANUARY 19, 2023

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