

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20160906**

**Docket: A-21-16**

**Citation: 2016 FCA 221**

**CORAM: TRUDEL J.A.  
NEAR J.A.  
RENNIE J.A.**

**BETWEEN:**

**KELLY O'GRADY**

**Appellant**

**And**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on September 6, 2016.

Judgment delivered from the Bench at Ottawa, Ontario, on September 6, 2016.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**RENNIE J.A.**

**Federal Court of Appeal**



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**BETWEEN:**

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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Ottawa, Ontario, on September 6, 2016)**

**RENNIE J.A.**

[1] The appellant appeals from the Order of the Federal Court, dated January 5, 2016 (2016 FC 9). In that decision, the Judge dismissed the appellant's motion to have an adverse inference drawn from affidavit evidence filed by the respondent in the underlying judicial review application. The Judge also refused to consider the appellant's reply affidavit on the motion,

declined to hear her allegation of bias and dismissed her request under Rule 371 that the respondent's affiant testify.

[2] The admissibility of affidavit evidence is a question of law, and therefore is reviewed on a standard of correctness. The remaining issues, being discretionary decisions of a motions judge, are reviewable only if a palpable and overriding error is established: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215.

[3] This appeal arises in the context of an application for judicial review of the decision of the Privacy Commissioner of Canada to dismiss the appellant's complaint under the *Privacy Act*, R.S.C. 1985, c. P-21. Her complaint related to a Statistics Canada study which linked birth records to census data during a prescribed period of time. The appellant gave birth in Ontario during one of the prescribed periods, and her specific complaint is that information from her birth records was intentionally used without her consent. The respondent argues that the appellant's records were not used in the study, and filed two affidavits by the responsible Director General at Statistics Canada in support of its position.

[4] The appellant appeals on the basis that she was owed procedural fairness on the motion, which was breached when the Judge disregarded her reply affidavit and allegation of bias. She argues that disregarding her reply affidavit caused her prejudice, and that the Judge could not come to a proper determination on whether to draw an adverse inference thereafter. Further to the adverse inference issue, the appellant alleges that the Judge erred in law by applying the wrong legal test by introducing a requirement on admissibility into his analysis, improperly

merged the adverse inference analysis with the test for a motion to strike and, among other things, misapprehended and misapplied relevant legal principles and case law.

[5] Three of these grounds of appeal may be readily disposed of.

[6] The Judge found that the appellant raised no special circumstances, as would be required, to compel the affiant to testify under Rule 371. This was a motion in writing to be decided without an oral hearing and the appellant previously cross-examined the affiant. The appellant has not demonstrated any reviewable error in this decision.

[7] Similarly, the decision of the Judge to disregard the appellant's affidavit filed in reply under Rule 369(3) is unassailable. Rule 369(3) is clear that the moving party is only permitted to file written representations in reply, and leave would be required to depart from this Rule. Leave was not sought. There is no error in the Judge's exercise of discretion.

[8] Finally, with respect to the appellant's allegation of bias, the Judge correctly recognized that the issue of bias was a substantive one, to be determined by the application judge.

[9] The appellant's motion requested the Judge draw an adverse inference from the fact that the affidavits filed by the respondent were based on information and belief, as permitted by Rule 81(2).

[10] While the appellant in the present case brought a motion for an adverse inference to be drawn, the Judge, in effect, conducted an admissibility analysis based on the personal knowledge of the affiant. In our view, there is no error in his decision that the affidavits were admissible. The judge correctly determined that the affiant, by virtue of her responsibilities in the Government of Canada, was in a position to depose to the matters in question without necessarily having personal knowledge: *Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823.

[11] Whether or not evidence is within an affiant's personal knowledge under Rule 81(1) bears on the admissibility of the affidavit. However, whether an adverse inference should be drawn from otherwise admissible evidence is a matter better left for the application judge, who has the benefit of the complete record and the arguments of counsel. To this extent, we would clarify the reasons given by the Judge. The question of what inference, adverse or otherwise, is to be drawn remains open to the application judge hearing this matter on the merits.

[12] The appeal will be dismissed.

[13] In light of the appellant's partial success, we would make no order as to costs.

"Donald J. Rennie"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED  
JANUARY 5, 2016, DOCKET NO. T-2587-14 (2016 FC 9)**

**DOCKET:** A-21-16

**STYLE OF CAUSE:** KELLY O'GRADY V. ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** SEPTEMBER 6, 2016

**REASONS FOR JUDGMENT OF THE COURT BY:** TRUDEL J.A.  
NEAR J.A.  
RENNIE J.A.

**DELIVERED FROM THE BENCH BY:** RENNIE J.A.

**APPEARANCES:**

Kelly O'Grady APPELLANT

Sarah J. Sherhols FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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