

**SUPREME COURT OF CANADA**

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| **Citation:** Brine *v.* Industrial Alliance Insurance and Financial Services Inc., 2016 SCC 9, [2016] 1 S.C.R. 72 | **Motion heard:** February 25, 2016  **Order:** February 25, 2016  **Docket:** 36809 |

Between:

Bruce Brine

Applicant/Respondent on the motion

and

Industrial Alliance Insurance and

Financial Services Inc.

Respondent/Applicant

**Coram:** Côté J.

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| **Reasons for Order:**  (paras. 1 to 11) | Côté J. |

Brine *v.* Industrial Alliance Insurance and Financial Services Inc., 2016 SCC 9, [2016] 1 S.C.R. 72

Bruce Brine Applicant/Respondent on the motion

v.

Industrial Alliance Insurance and

Financial Services Inc. Respondent/Applicant

**Indexed as: Brine *v.* Industrial Alliance Insurance and Financial Services Inc.**

2016 SCC 9

File No.: 36809.

2016: February 25.

Present: Côté J.

motion to strike

*Civil procedure — Motion to strike affidavit in support of application for leave to appeal — Affidavit opinion evidence lacking proper foundation and therefore inadmissible — Evidence consisting largely of sworn argument addressing ultimate questions in issue on proposed appeal and improperly attacking correctness of Court of Appeal decision below — Affidavit evidence rarely relevant and useful to Court in deciding whether application for leave to appeal raises issues of public importance — Motion granted — Rules of the Supreme Court of Canada, SOR/2002-156, r. 89.*

**Cases Cited**

**Applied:** *Aecon Buildings v. Stephenson Engineering Ltd.*, 2011 SCC 33, [2011] 2 S.C.R. 560; **referred to:** *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595; *Ballard Estate v. Ballard Estate*, S.C.C., No. 22499, July 2, 1991 (reproduced in *Bulletin of Proceedings of the Supreme Court of Canada*, 1991, p. 1998).

**Statutes and Regulations Cited**

*Rules of the Supreme Court of Canada*, SOR/2002-156, r. 89.

*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1).

MOTION to strike an affidavit in support of the application for leave to appeal and to strike portions of the applicant’s memorandum of argument. Motion granted.

Written submissions by Barry J. Mason, *Q.C.*, and *Glenn E. Jones*, for the applicant/respondent on the motion.

Written submissions by Michelle Awad, *Q.C.*, and *Kevin Gibson*,for the respondent/applicant.

The following order was delivered by

[1] Côté J. — The respondent, Industrial Alliance Insurance and Financial Services Inc. (“Industrial”), has brought a motion for an order striking the affidavit of Professor Bruce Feldthusen, which has been filed by the applicant, Bruce Brine, in support of his application for leave to appeal in this Court.

[2] The application seeks leave to appeal from a decision of the Nova Scotia Court of Appeal concerning a dispute over disability insurance between an insured, Mr. Brine, and an insurer, Industrial. The trial judge found Industrial had breached its contractual obligations and duty of good faith, awarding Mr. Brine contractual damages, $30,000 for mental distress, $150,000 in aggravated damages and $500,000 in punitive damages (2014 NSSC 219, 346 N.S.R. (2d) 315). The Court of Appeal allowed Industrial’s appeal, in part, reducing the combined mental distress and aggravated damages to $90,000, and the punitive damages to $60,000 (2015 NSCA 104).

[3] Mr. Brine contends there is an issue of public importance raised by this case warranting the granting of leave by this Court, namely whether Canadian courts should be awarding higher punitive damage awards in order to adequately deter insurers from acting in bad faith. In particular, he asserts that the Court of Appeal’s reduced punitive damages award in this case is grossly inadequate and will do little to deter future misconduct by Industrial or other insurers. He includes the impugned affidavit of Prof. Feldthusen in his application to support his contentions.

[4] Industrial requests that the affidavit be struck, along with portions of the applicant’s memorandum of argument that make reference to it, on the following basis: the affidavit is irrelevant to the issue of whether leave to appeal should be granted pursuant to s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, and the contents of the affidavit are argument and inadmissible evidence contrary to Rule 89 of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

[5] Rule 89 sets out the requirements for affidavits filed in support of a proceeding in this Court, including applications for leave to appeal:

**89 (1)** An affidavit shall be filed to substantiate any fact that is not a matter of record in the Court.

**(2)** An affidavit to be used in a proceeding shall be limited to the statement of facts within the knowledge of the deponent, but statements based on information or belief that state the source of the information or the grounds for the belief may be admitted by the Court, a judge or the Registrar.

[6] In his affidavit, Prof. Feldthusen makes a number of statements about alleged misconduct by insurers that, in his view, is exacerbated by inordinately low punitive damages awards. He lists the names of 12 cases in which he says punitive damages were awarded against insurers since this Court’s decision in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, as well as the amount of punitive damages awarded in those cases. He then concludes on that basis that misconduct is “very common in Canada” and that insurers consider low punitive damages awards to be a “mere license fee and a low cost of doing business”. Prof. Feldthusen sets out no further facts or analysis in respect of the cases cited. Neither does he provide additional statistics or other corroborating evidence to support his belief that bad faith and misconduct by insurers is related to the “modest and conservative” punitive damages awards that have failed to deter insurers “from engaging in ‘malicious’ and ‘high handed’ conduct”. This opinion evidence is inadmissible because it is lacking in proper foundation.

[7] Moreover, the affidavit is not helpful to the Court in deciding whether or not leave to appeal should be granted, per the principles in *Aecon Buildings v. Stephenson Engineering Ltd.*, 2011 SCC 33, [2011] 2 S.C.R. 560. While that decision concerned a motion to adduce fresh evidence and not a motion to strike, Binnie J.’s observations on when affidavits will be useful to the Court in considering whether or not to grant leave have application in the present circumstances:

Generally speaking, our Court takes the view that the question whether a legal issue is of public importance within the meaning of s. 43 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, is not a matter on which affidavit evidence is helpful. The practice is not invariable however. In some cases it may not be apparent from the rest of the leave materials why, for example, the decision sought to be appealed is alleged to establish a precedent that is unworkable in practice, or otherwise is likely to have a problematic impact or jurisprudential importance not apparent on its face. Here, however, the issues are straightforward. . . .

. . . The [evidence sought to be filed] does not indicate any conflict in the authorities or suggest that there are good reasons, policy or jurisprudential, not readily apparent from the material already filed, for finding that the application raises a legal issue of public importance. [paras. 4-5]

[8] Even assuming the leave application raises the issues as framed by the applicant, which is for the leave panel to decide and about which I make no comment and express no opinion, the affidavit does not assist the Court with whether those issues are of public importance by, for example, pointing to conflicting decisions or otherwise unworkable legal principles resulting from the Court of Appeal decision. Neither does it provide the Court with background material relevant to the general importance of the case which, in some instances, might be helpful. Rather, it consists largely of sworn argument, addressing the ultimate questions the applicant seeks to put in issue on the proposed appeal. As Binnie J. suggested in *Aecon*, only rarely will affidavit evidence on an application for leave be useful to the Court. In the vast majority of cases, as here, that evidence will be irrelevant to deciding the public importance of the case.

[9] Finally, the affidavit amounts to an improper attack on the correctness of the Court of Appeal decision below: see *Ballard Estate v. Ballard Estate*, S.C.C., No. 22499, July 2, 1991 (reproduced in *Bulletin of Proceedings of the Supreme Court of Canada*, 1991, at p. 1998), in which Cory J. granted the motion to strike, finding “the affidavits filed on this case seek by way of experts’ opinion, to buttress an attack on the decisions from which leave to appeal is sought”.

[10] I note that, as an alternative to granting the motion as requested, the applicant could have been given the opportunity to file an amended affidavit curing the deficiencies set out above, as an alternative to striking the affidavit in its entirety without leave to amend. However, considering that in this case the affidavit evidence is not helpful in assisting the Court on the issue of public importance, that option would not be the appropriate result. The same is true with respect to providing the respondent with the opportunity to cross-examine and file its own insurance expert affidavit to counter the one filed by the applicant.

[11] The motion is therefore granted, with costs to the respondent in any event of the cause. The affidavit of Prof. Feldthusen and the relevant portions in the applicant’s memorandum of argument that refer to the affidavit are struck out, without leave to amend. The respondent shall have 30 days from the date of this order to serve and file its response to the application for leave to appeal.

*Motion granted with costs.*

Solicitors for the applicant/respondent on the motion: Pressé Mason, Bedford, N.S.

Solicitors for the respondent/applicant: McInnes Cooper, Halifax.