Date: 20120118

Dockets: A-219-11
A-331-11

Citation: 2012 FCA 18

Present: STRATAS J.A.

Docket: A-219-11

BETWEEN:

PLURI VOX MEDIA CORP.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-331-11

BETWEEN:

PLURI VOX MEDIA CORP.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 18, 2012.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The appellant moves for an order settling the contents of the appeal book. In support of that motion, the appellant wishes to tender an affidavit of its lawyer who is also presenting argument on the motion. Leave under Rule 82 of the *Federal Courts Rules*, SOR/98-106 is required to do that. Accordingly the appellant has moved for leave.

A. The motion under Rule 82

[2] Rule 82 provides as follows:

82. Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.	**82.** Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

[3] The purpose of Rule 82 is to prevent, as much as is reasonably and practically possible, the invidious circumstances that can arise when lawyers act as both witnesses and advocates in the same matter. Rule 82 reflects accepted rules of professional conduct developed by lawyers' governing bodies across Canada. Accordingly, Rule 82 should be interpreted in light of those rules.

[4] As the solicitor in this case is resident in Ontario, it is appropriate to refer to the Law Society of Upper Canada's Rules of Professional Conduct on the issue of lawyers acting as both advocates

and witnesses in the same matter. On this issue, the Law Society of Upper Canada's rules are very similar to those existing in other Canadian jurisdictions.

[5] Rule 4.02 of the Law Society of Upper Canada's Rules of Professional Conduct provides as follows:

> **4.02** (1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal.
>
> (2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

[6] The rationale for this rule is set out in the accompanying commentary:

> A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

[7] Problems can arise when a lawyer acts on a motion both as a witness on controversial matters of fact and as an advocate. An unacceptable conflict can ensue:

- On the one hand, clients expect that their lawyer will be capable of being believed and trusted by the court. After all, the lawyer is an officer of the court.

- But, on the other hand, when the lawyer enters the fray by testifying on factual matters, the lawyer runs the risk of his or her testimony being disbelieved, with the effect of undercutting the lawyer's believability and trustworthiness as an advocate for the client's cause. Further, the lawyer seems less of an officer of the court and more as a partisan with a stake in the outcome of the case. Finally, the lawyer may be in conflict or may appear to be in conflict by trying to defend his or her own credibility as a witness, rather than single-mindedly advancing the client's cause.

Further, a lawyer has certain obligations of fairness and responsibility as an advocate (see, *e.g.*, Rule 4.01 of the Law Society's Rules of Professional Conduct). Many of these have the potential to be broken if the lawyer becomes a participant in the fray.

[8] When the Court interprets and applies Rule 82, concerns such as these should be front of mind. The more that these concerns are present, the more the Court should exercise its discretion against allowing a lawyer's affidavit. The Court should also consider whether the evidence can be supplied by a person other than the lawyer.

[9] In this case, the lawyer wishes to act as a witness by filing his own affidavit on the motion and to act as an advocate by filing written submissions under his name on this same motion. Thus, Rule 82 is triggered. The lawyer is in the position of making submissions based on facts supplied by his own testimony.

[10] The situation would be different if the lawyer were to testify in a particular motion but intends to make submissions at a later motion, trial or hearing, as the case may be and his testimony does not form part of the evidentiary record in those later matters. Rule 82 would not apply there. Rule 82 is aimed at the lawyer who wishes to make submissions in a matter based on facts supplied by his own testimony.

[11] Applying Rule 82 to this case, I note that the lawyer is the sole shareholder of the appellant. The lawyer's affidavit merely exhibits three documents for use on the motion to settle the appeal book. The lawyer's affidavit does not comment in any way on the three documents, nor does it recount any other facts that might be controversial.

[12] These three documents are uncontroversial and of minimal importance on this motion:

- The first two documents exhibited in the lawyer's affidavit are correspondence passing among the parties. These merely recount the parties' positions concerning the contents of the appeal book.

- The third document exhibited in the lawyer's affidavit is simply one of the documents that the appellant would like to include in the appeal book.

[13] In this case, assuming the lawyer has a law partner, associate lawyer, student-at-law or legal assistant, it would have been preferable if the three documents were exhibited in an affidavit from one of those persons.

[14] Given the uncontroversial nature of these documents, their minimal importance to the motion, and the straight-forward nature of this motion, I am prepared in the circumstances of this case to allow the lawyer's affidavit under Rule 82.

B. Motion to settle the contents of the appeal book

[15] The dispute between the parties concerns three documents. The appellant wishes to include them in the appeal book. The Crown disagrees, noting that these documents were not in the record of the first instance court and, therefore, cannot appear in the appeal book. The Crown also notes that only one of the three documents was exhibited in the lawyer's affidavit. As a result, only that one document is before the Court on this motion. The other two are not properly before the Court.

[16] Normally, only those documents that were part of the record of the first instance court are eligible for inclusion in the appeal book: *Stawicki v. Canada (Canada Revenue Agency)*, 2006 FCA 262. The three documents that the appellant wishes to include in the appeal book were not part of the record of the first instance court. Therefore, they are not eligible for inclusion in the appeal book.

[17] Some of the appellant's submissions smacked of an attempt to argue that these documents meet the test for inclusion into the appeal book as fresh evidence. Rule 351 of the *Federal Courts Rules* governs that. The applicable test is whether the evidence was not "discoverable with reasonable diligence before the end of the trial," is "credible" and is "practically conclusive of the appeal": *Canada v. Canada (Canadian Council for Refugees)*, 2008 FCA 171 at paragraph 8. If this three-fold test is not met, *Canadian Council of Refugees* allows for the admission of fresh evidence in unusual circumstances where "the interests of justice require it."

[18] In my view, the appellant has not satisfied the three-fold test. The Crown submits, and I agree, that the three documents were available and discoverable before the end of trial. I would add that there are no usual circumstances here where the interests of justice require the admission of these three documents.

[19] The Crown does not otherwise object to the contents of the appeal book proposed by the appellant in Exhibit 1 of the lawyer's affidavit. Therefore, the appeal book shall contain the documents listed in the appellant's proposal, but not the three documents that were in dispute in this motion.

[20] I would bring to the appellant's attention that the documents listed in its proposal are not arranged in the order required by Rule 344(1).

[21] The Crown does not seek its costs and so none shall be awarded.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-219-11
STYLE OF CAUSE:	Pluri Vox Media Corp. v. Her Majesty the Queen

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	January 18, 2012

WRITTEN REPRESENTATIONS BY:

Martin Reesink	FOR THE APPELLANT
Tamara Watters	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister Ottawa, Ontario	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

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