Federal Court Cour fédérale

**Date: 20180731**

**Docket: T-431-16**

**Citation: 2018 FC 805**



**Ottawa, Ontario, July 31, 2018**

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

**BETWEEN:**

**DAN PELLETIER**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

# ORDER AND REASONS

## I. Overview

[1] Dan Pelletier (the "Plaintiff") has brought a claim against Her Majesty the Queen (the "Defendant") for a program in which the Defendant, her agents or her instrumentalities are alleged to be discharging toxic particles into the Canadian airspace. The Defendant has responded with a motion for summary judgment and motion to strike. The Plaintiff now asks that this Court grant leave to admit Dr. J. Marvin Herndon's ("Dr. Herndon") affidavit (the "Herndon

Affidavit") dated May 4, 2018, as part of the Plaintiff's response to the motion for summary judgement and motion to strike. For the reasons that follow, I decline to grant leave to admit the Herndon Affidavit.



## II. Background

### A. *The Claim*

[2] The Plaintiff's claim has been summarized by Justice LeBlanc in *Pelletier v Canada*, 2016 FC 1356 at paras. 2-3, and thus I do not propose to reproduce it here. However, as the statement of claim has since been amended, it is useful to briefly summarize the claim.

[3] The Plaintiff proposes a class proceeding against the Defendant for the spraying of substances into the atmosphere by means of "Aerosol Injection Aircrafts." He claims that these aircraft have been releasing white particulate matter into the atmosphere, which are visible and have been observed in the skies over southern Alberta. According to the Plaintiff, the discharge is said to be toxic and can be absorbed into the human body. Notably, the Plaintiff says that the program causes or contributes to neurological impairments, respiratory distress, and increased exposure to ultraviolet radiation. The spraying activities are allegedly being carried out by the Canadian military or parties authorized or contracted by the Canadian military. The purpose behind the spraying, according to the Plaintiff's claim, is to manipulate weather, tectonic phenomena, conduct biological experimentation, and/or for utilization as a weapon of war. The Plaintiff also pleads that the Defendant is engaged in the spraying activity to "influence the viewpoint and reasoning capacity of the population, through chemical and/or electromagnetic

means (Amended Statement of Claim, para 19).” He pleads the torts of negligence, nuisance, and trespass.

[4] The Plaintiff seeks relief in the form of a declaration that the alleged aerial discharge activities are contrary to the *Canadian Charter of Rights and Freedoms*, an order that the Defendant immediately cease and desist its alleged aerial discharge activities, and punitive, aggravated and exemplary damages in an amount greater than $50,000.



B. *The Herndon Affidavit*

[5] Dr. Herndon avers that he is an interdisciplinary scientist and President and Chief Executive Officer of Transdyne Corporation in San Diego, California. He states that, from his home in San Diego, he has observed aircraft engaged in spraying on a near daily basis and that the discharges are the same or similar to those which have been observed and recorded by the Plaintiff. He says that, in his view, the discharge is very likely comprised of the same toxic and poisonous material. He describes spraying activities as a form of deliberate air pollution and notes that fine-particle pollution is associated with a number of illnesses.

[6] Dr. Herndon explains that his concern over the discharge of particulate matter has prompted him to publish scientific, peer-reviewed research on the topic. Attached to his affidavit as Exhibit B are ten such articles, two of which he claims were “under questionable, suspicious and contentious circumstances, and not withstanding [his] objections, caused to be retracted” (Herndon Affidavit, para. 14). Although he requested explanations for those retractions, he was not provided with the verbatim criticisms of his research.

III. Plaintiff's Position

[7] The Plaintiff seeks leave to admit the Herndon Affidavit as expert evidence. The facts that the Herndon Affidavit seeks to establish are that aerial discharges (a) constitute an act of deliberate air pollution, and (b) that the discharges captured in the Plaintiff's photographs are comprised of toxic and poisonous materials (Plaintiff's Written Arguments, para 4). If granted, the motion will also make journal articles authored or co-authored by Dr. Herndon part of the Plaintiff's motion record on the motion to strike and the motion for summary judgement.

[8] The Plaintiff recalls that he was not extended an affidavit by Dr. Herndon when it was requested in June 2016, but that Dr. Herndon agreed to do so in April 2018. He stipulates that Dr. Herndon is not from Canada and has significant professional demands on his time, and reminds the Court of the time sensitive and urgent nature of the claim in question. The Plaintiff further notes that the commissioned affidavit was forwarded to the Defendant immediately upon receipt on May 4, 2018. The Plaintiff relies on this Court's decision in *Ab Hassle v Canada (Minister of National Health and Welfare)*, 2000 CanLII 15409 [*Ab Hassle*] for the authority that, in such circumstances, leave can be granted to permit the filing of additional expert evidence.

[9] Finally, the Plaintiff notes that the Defendant should not be prejudiced by the inclusion of the Herndon Affidavit because it is familiar with it and it has the opportunity to assess and cross-examine on it should it wish to do so.

## IV. Defendant's Position

[10] The Defendant submits that the Herndon Affidavit contains an opinion that does not meet the requirements for the admissibility of expert evidence. Relying upon the Supreme Court of Canada's decision in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 [*White Burgess*] at para 19, it submits that late inclusion of expert evidence into the Plaintiff's motion record should only be permitted where that evidence is reliable, necessary, and sufficiently beneficial to the trial process. It also submits that, in the context of a motion to submit further evidence, the moving party must further establish the exceptional circumstances that warrant the inclusion of the evidence contrary to the Court's order on timelines: *Ab Hassle* at para 15.

[11] The Defendant argues that the Herndon Affidavit is not relevant. It points out that the amended statement of claim deals with claims of pollution in Canadian airspace, affecting the Canadian public and Canadian environment. The Herndon Affidavit, on the other hand, speaks to a hypothesis based on data which have been collected in places outside of Canada. For this reason, the Defendant posits that there is no nexus to Canada.

[12] The Defendant further argues that the Herndon Affidavit is not necessary. It submits that the document contains no evidence or opinion to support the Plaintiff's allegations against the Canadian military.

[13] The Defendant also argues that the affidavit contains impermissible hearsay. Citing s. 81(1) of the *Federal Court Rules*, SOR/98-106 [the "*Rules*"], the Defendant states that affidavits on a motion for summary judgment must be confined to the personal knowledge of the affiant, and where it is based on belief the affiant should identify the source of the information and explain for the basis for relying upon that information. It takes issue with the fact that Dr. Herndon avers to a belief (i.e. that the spraying discharge he has observed is the same or similar to those documented by him or his co-authors) without any relevant facts that are within his personal knowledge.



[14] Moreover, the Defendant submits that Dr. Herndon is not a properly qualified expert because his affidavit was not accompanied by a certificate in Form 52.2 as required by the *Rules*. It further questions the reliability of the science upon which Dr. Herndon's opinion is based.

[15] Finally, the Defendant says that even if the Herndon Affidavit meets all of the threshold requirements discussed above, the Court should decline to exercise its discretion to admit the document. It states that there are no exceptional circumstances present in this case, and that Dr. Herndon's earlier refusal to provide an affidavit does not meet the high threshold of exceptional circumstances.

## V. Analysis

[16] The Plaintiff has provided scant argument that would justify the admission of the Herndon Affidavit. His argument is essentially two-fold: 1) the Herndon Affidavit was not previously extended to him, and 2) admission of the Herndon Affidavit is not prejudicial to the

Defendant. True as those positions may be, that is not the legal test. Instead, as the Supreme Court of Canada described in *White Burgess* at para. 23, I am to begin by analyzing the four threshold requirements set out in *R v Mohan*, [1994] 2 SCR 9: relevance, necessity, absence of an exclusionary rule and a properly qualified expert. If those requirements are met, the test requires that I balance the potential risks and benefits of admitting the evidence: *White Burgess* at para. 24.



[17] The Plaintiff's request for leave quite obviously fails at the first stage of the inquiry. As noted above, one requirement is that an expert be properly qualified, which plainly has not been done in the case at bar. In oral argument, the Plaintiff's counsel urged that precluding the admission of the Herndon Affidavit on the absence of Form 52.2 is to prefer form over substance. I disagree. Form 52.2 plays an important role in ensuring that an expert witness understands and will comply with his or her duty to the Court. In the absence of such a form, there is no basis for me to conclude that Dr. Herndon understands and swears to comply with that duty. On this basis alone, the threshold requirements have not been met and the evidence is inadmissible.

[18] I am particularly driven by this concern in light of the categorical opinion presented in the Herndon Affidavit. It stipulates that the similarities of the aerial discharges in the Plaintiff's photographs are "so striking and are so unambiguous that in [his] view, the only reasonable explanation for the unmistakable and striking similarities is to conclude that the geoengineering trails are the same form and type of poisonous geoengineering trails observed by [him] above [his] home in San Diego [emphasis added]" (Herndon Affidavit, para 17). If this Court is to

accept scientific opinion evidence expressed in such unqualified terms – which effectively draws conclusions about the chemical makeup of contrails based on a simple review of photographs – it ought to be convinced that the expert providing that opinion fully understands his or her obligations to the Court.



[19] I also agree with the Defendant's position with respect to the relevance of the evidence. Having already found that the Plaintiff's request to admit the Herndon Affidavit does not meet a threshold criterion, I need not analyze the other threshold criteria. It shall suffice to affirm that the Plaintiff's claim alleges the existence of an aerial spraying program taking place in Canada, and none of Dr. Herndon's published research appears to have gathered evidence in this country. For that reason, I am not satisfied of its relevance.

## VI. Conclusion

[20] The Plaintiff's motion is dismissed. Leave to admit the Herndon Affidavit is denied. The Herndon Affidavit shall not form part of the Plaintiff's record on the Defendant's motion for summary judgement and motion to strike.

[21] The Defendant has asked for its costs for the instant motion. Having succeeded, it shall have them.

**ORDER in T-431-16**

**THIS COURT ORDERS that**:

1. The motion is dismissed.

2. Costs of the motion to the Defendant.

"Shirzad A."
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-431-16 |
| **STYLE OF CAUSE:** | DAN PELLETIER v HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 29, 2018 |
| **ORDER AND REASONS:** | AHMED J. |
| **DATED:** | JULY 31, 2018 |



**APPEARANCES:**

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| Henry Jurovicsky<br>Tony Vacca | FOR THE PLAINTIFF |
| Jacob Pollice | FOR THE DEFENDANT |

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