

**CITATION:** Garrick v. Dalzine, 2015 ONSC 2175  
**COURT FILE NO.:** CV-13-1757-00ES  
**DATE:** 2015-04-07

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE:** Martha Garrick Applicant

v.

Randolph Raymond Dalzine, Rayah Dalzine and Ayana Dalzine,  
a minor by her litigation guardian, the Children’s Lawyer

**BEFORE:** Bloom, J.

**COUNSEL:** Christopher M. B. Graham, Counsel for the Moving Party, Rayah  
Dalzine

Charles M. Loopstra, Q.C., Counsel for the Responding Party,  
Martha Garrick

**HEARD:** March 10, 2015

**ENDORSEMENT**

[1] The motion at bar seeks to strike out the affidavit of Daron L. Earthy, sworn October 31, 2014, filed in support of a motion brought by the Applicant and adjourned pending determination of this motion.

[2] The Moving Party asserts three grounds for this motion: (1) that the affidavit in question was an improper use of a solicitor’s affidavit; (2) that the

affidavit contained inadmissible material, including frivolous, vexatious, and scandalous attacks on the integrity of counsel; and (3) that the affidavit contained material which was inadmissible by reason of settlement privilege.

## APPLICABLE PRINCIPLES

A brief summary of the applicable principles is in order.

[3] As noted by Myers J. in *Ferreira v. Cardenas*, 2014 ONSC 7119 quoting from *Mapletoft v. Christopher J. Service*, 2008 CanLII 6935 at para. 15: “If it is necessary to rely on the information or belief of counsel with the carriage of the file, it is preferable for counsel to swear the affidavit and have other counsel [ in the firm] argue the motion. This approach will not be appropriate for highly contentious issues that may form part of the evidence at trial.”

[4] In *876502 Ontario Inc. v. I. F. Propco Holdings (Ontario) 10 Ltd.*, 1997 CarswellOnt 4721 Dambrot J. discussed the concepts of scandalousness, frivolousness, and vexatiousness. He held at paragraph 17 that “[s]candal refers to indecent or offensive matters or allegations made for the purpose of abusing or prejudicing the opposite party, allegations ...bearing cruelly on the moral character of an individual ...irrelevant material is not, for that reason alone, scandalous.”

[5] He held at paragraph 18 that “frivolous and vexatious material will only be struck where it could procure no legitimate advantage to the party advancing it, and only in the clearest of cases.”

[6] In *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 S.C.R. 623 at paragraph 13 Abella J. for the Court stated: “Settlement negotiations have long been protected by the common law rule that ‘without prejudice’ communications made in the course of such negotiations are inadmissible.”

#### **PRINCIPLES APPLIED TO THE CASE AT BAR**

[7] The affidavit in question was a solicitor’s affidavit sworn by Ms. Earthy to provide a factual background for an estates motion; the motion was brought to determine a number of questions including directions on certain issues, certain costs questions, and certain expense issues. The affidavit was based to a large extent on a review of the law firm file. The Applicant, herself, could have prepared the same affidavit, and perhaps some of the issues before me today would have been avoided. However, I am not prepared to strike the affidavit in its entirety as an improper solicitor’s affidavit. It was conceived as a recitation of largely non-contentious background for a motion, not as evidence on contentious issues to be litigated. There may well be differences on the return of the motion

between the parties on facts alleged, but the essential nature of the affidavit is to provide background and is not improper.

[8] Nor is there in the affidavit scandalous, or frivolous and vexatious material, as alleged. Factual errors or inadequately sourced information do not fit into those categories; those matters have been pointed to by the Moving Party on this motion. The judge trying the motion on which the affidavit was filed in support, can and should determine the admissibility and weight of evidence subject to all of those attacks mentioned in this paragraph.

[9] There may be material in the affidavit based on information subject to settlement privilege in respect of discussions with the Children's Lawyer representing Ayana Dalzine. However, these discussions are so intertwined with other material likely not subject to such privilege, that they should not be struck from the affidavit of Ms. Earthy, and should be considered by the judge hearing the motion on which the affidavit is filed.

[10] Accordingly, I dismiss the motion before me and award costs to the Applicant, Martha Garrick, in the cause.

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Bloom, J.

**DATE:** April 7, 2015

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Children’s Lawyer –  
Respondents

**BEFORE:** Bloom, J.

**COUNSEL:** Christopher M. B. Graham,  
Counsel for the Moving Party,  
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Counsel for the Responding  
Party, Martha Garrick

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**ENDORSEMENT**

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Bloom, J.

**DATE:** April 7, 2015