

SUPREME COURT OF NOVA SCOTIA

Citation: *Tobin v. Smith*, 2026 NSSC 9

Date: 20260109

Docket: Syd No. 547295

Registry: Sydney

Between:

Amber Tobin

Applicant

v.

Anthony Smith

Respondent

Judge: The Honourable Justice D. Timothy Gabriel

Heard: January 7, 2026, in Sydney, Nova Scotia

Written Decision: January 9, 2026

Counsel: Amber Tobin, self-represented Applicant (did not appear)
Maria Rizzetto, for the Respondent

By the Court:**Background**

[1] In this proceeding, the Respondent moves for an order pursuant to *Civil Procedure Rule* (“CPR”) 39.04 striking portions of, and in some cases, the entirety of, certain affidavits filed by the Applicant, Amber Tobin.

[2] All of this began as a result of some information contained in an affidavit filed by the Respondent in (another) ongoing matter between the parties in the Supreme Court (Family Division). Because of what was said there, Ms. Tobin initiated this Application in Court under the *Intimate Images and Cyber Protection Act* 2017, c. 7, s. 1.

[3] Ms. Tobin has filed a number of Affidavits in this proceeding. They include an Affidavit filed on October 2, 2025, a “Response to Notice of Contest” filed on October 15, 2025 that is also referred to as an “Affidavit” on page two of the document, a Supplementary Affidavit filed on October 16, 2025, and another Supplementary Affidavit filed on October 27, 2025.

[4] In his “Notice of Motion”, the Respondent seeks an order striking:

1. Paragraphs 5, 7, 8, 9, 11, 14 of the Affidavit of Amber Tobin filed on October 2, 2025;
2. Reply Affidavit of Amber Tobin filed on October 15, 2025 in its entirety;
3. Supplementary Affidavit of Amber Shantel Tobin filed on October 16, 2025 in its entirety; and
4. Supplementary Affidavit of Amber Shantel Tobin filed on October 27, 2025 in its entirety.

[5] Although the Applicant filed materials in response to this motion, she did not attend the hearing.

The applicable principles

[6] What is or is not admissible in an affidavit is not a controversial subject. Consequently, lengthy reasons are not required to explain the Court’s decision in relation to this motion.

[7] To begin with, CPR 39.04 tells us:

39.04 Striking part or all of affidavit

- (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
- (2) A judge must strike a part of an affidavit containing either of the following:
 - (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
 - (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
- (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
- (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
- (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[8] Next, in the oft-cited case of *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)* (1993), 123 N.S.R. (2d) 46 (SC), Davison, J. (as he then was) provided a helpful canvas of the authorities with respect to the principles to be applied when a motion to strike (such as this) is initiated.

[9] These “*Waverley*” principles, as distilled from the authorities, are set forth below:

- (1) Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
- (2) The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
- (3) Affidavits use in applications may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that “I am advised”.

- (4) The information as to the source must be sufficient to permit the Court to conclude that the information comes from a sound source and preferably the original source.
- (5) The affidavit must state that the affiant believes the information received from the source.

(*Waverley*, pp. 11-12)

[10] Additionally, in the case of *Wall v. 679927 Ontario Limited* (1999), 176 N.S.R. (2d) 96 (CA), Cromwell J.A. (as he was then) ruled that an affidavit should have been struck by the Chambers judge who heard the motion at first instance. One of his reasons for doing so was (in effect) that, while a deponent is permitted, in certain circumstances, to set out their belief in the statements obtained from another source, this does not confer a corresponding ability upon them to offer commentary on their assessment of the credibility of others. “Information and belief”, in this context, does not include speculation and innuendo.

[11] The Court concluded in *Wall*:

41. Having reviewed the affidavit and the submissions of the parties, I conclude, with respect, that the Chambers judge erred in failing to make a clear ruling on the admissibility of the Carter affidavit... significant portions of [it] are clearly irrelevant, scandalous or consist of innuendo and conjecture. The affidavit is so fundamentally defective that the Court should not be required to take it apart in pieces to preserve some possibly admissible material. It should have been struck.

[12] Finally, because of its relevance to this motion, CPR 5.15 is also reproduced below:

5.17 No supplementary affidavits

- (1) A party to an application may only file an affidavit within the deadlines under this Rule or set by a judge giving directions, unless the judge hearing the application determines that circumstances exist to justify an affidavit being filed later.
- (2) On a motion to allow a later affidavit, the judge must consider all of the following:
 - (a) the reasons why the affidavit was not filed by the deadline;
 - (b) whether the evidence was known or, by due diligence, could have been known at the deadline;
 - (c) whether the evidence is relevant, in that it bears on a decisive or potentially decisive issue;
 - (d) the prejudice that would be caused to the party who offers the affidavit, if the application proceeds without that affidavit;

- (e) the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice of an adjournment if that would be a result;
 - (f) if an adjournment would result, the public interest in making the best use of court facilities, judges' time, and the time of court staff.
- (3) A judge who allows a late affidavit may order the party filing the affidavit to indemnify each other party for expenses resulting from the filing, including expenses resulting from any adjournment.

Application of these principles to this Motion

[13] I will set out below, in summary chart form, my decision with respect to each of the impugned affidavits and/or portions thereof.

Document and Date	Impugned Paragraphs	Result
Affidavit - October 2, 2025	5	Not struck - merely states why the Applicant says she shared images.
	7-9	All struck - argument, speculation and/or irrelevant.
	11	Struck – argument.
	14	Struck – opinion/argument.
“Response to Notice of Contest” (Chambers Application) October 15, 2025	Entire Document	Not struck – although the document is referred to (on page 2) as an Affidavit, it is unsworn. It consists of submissions on the merits. It is up to the hearing judge whether it will be received as such.
Affidavit - October 16, 2025 (“Supplementary Affidavit Public Good Argument and Cyber Protection Act”)	Entire Document	Entire Affidavit struck. No permission has been obtained to file a “Supplementary Affidavit” (CPR 5.17). Moreover, it consists entirely of legal argument.
Supplementary Affidavit October 27, 2025	Entire Document	Entire Affidavit is Struck – again, no permission obtained to file a Supplementary Affidavit (CPR 5.17). Moreover, it consists entirely of legal argument, and is thus not proper subject matter for an affidavit.

Conclusion

[14] The Respondent's motion is allowed in part. Counsel for the Respondent shall prepare a draft order implementing the above. After having done so, she shall forward the document to myself and simultaneously send it to the Applicant.

[15] Ms. Tobin shall have one calendar week within which to advise the Court of any objections. By way of "objections", since she is unrepresented, I will explain that she is only to concern herself with whether the draft order prepared by Respondent's counsel adequately gives effect to the decision as reflected herein.

Costs

[16] On the subject of costs, the Applicant, despite having been notified of this motion to strike, and, indeed filing materials in response to the motion (dated December 17, 2025) did not attend Court for this hearing.

[17] After the motion was heard, the Court received correspondence from the Applicant, in which she stated:

I am writing to sincerely apologize for my failure to attend court today in relation to the motion to strike. I take full responsibility for my absence and regret any inconvenience this may have caused the Court.

I became confused with the dates and times, in the context of managing multiple ongoing court proceedings ...

[18] Although her absence was indeed regrettable, fortunately this was a matter where the positions of both parties were clear on the basis of previously filed materials. The Court accepts Ms. Tobin's apology.

[19] Costs for the motion will be in the cause, and are fixed in the amount of \$750.

Gabriel, J.