

# COURT OF APPEAL FOR ONTARIO

CITATION: Formula First Collision v. Aviva Canada, 2026 ONCA 109

DATE: 20260212

DOCKET: M56526 (COA-25-OM-0405)

Coroza J.A. (Motion Judge)

BETWEEN

Formula First Collision

Responding Party

and

Aviva Canada

Moving Party

Alexander G. Rodriguez and Jordan Conway, for the moving party

W. Xavier Navarrete, for the responding party

Heard: December 19, 2025

## REASONS FOR DECISION

### I. OVERVIEW

[1] This is a motion brought by Aviva Canada seeking an order striking the November 27, 2025 affidavit of Frank Gobatto, the owner of Formula First Collision. Formula First, an autobody shop, filed the affidavit and relies on it in its factum in support of a motion for leave to appeal a decision of the Divisional Court.

[2] Motions for leave to appeal are heard in writing by a panel of this court. The panel considers several factors, as set out in *Sault Dock Co. v. Sault Ste. Marie (City)*, [1973] 2 O.R. 479 (C.A.). The granting of a second appeal is exceptional. That said, leave may be granted where special circumstances raise matters of public importance.

[3] Formula First relies on Mr. Gobatto's affidavit with respect to the question of public importance. The affidavit has not been admitted. It is the panel considering the motion for leave to appeal that decides whether to admit the evidence when considering the leave motion. However, a motion to strike the affidavit may be properly brought before a chambers judge: *Canada Mortgage and Housing Corp. v. Iness* (2002), 62 O.R. (3d) 255 (C.A.), at para. 15.

[4] For the reasons that follow, the affidavit of Mr. Gobatto is struck. Consequently, it is not necessary to consider the request by Aviva to cross-examine Mr. Gobatto on the affidavit.

## **II. BACKGROUND**

[5] The underlying proceeding was an appeal of a Small Claims Court decision. Cars in need of repairs were either driven or towed to Formula First's shop at the direction of the cars' owners. At Formula First's request, each of the owners signed a document titled "Assignment". The document purported to assign to Formula

First any and all rights of action for damages with respect to repairs and other costs arising out of a contract with Aviva.

[6] In each case, Formula First prepared a preliminary estimate for the repairs. Aviva also prepared its own estimate for the repairs, outlining the work that it considered necessary and the amount that it was willing to pay for that work. Formula First proceeded to repair the vehicles. In five cases, invoices were rendered for an amount greater than the amount Aviva said it would pay, leaving balances owing on each of the invoices, the total of which Formula First sued for in Small Claims Court.

[7] The Small Claims Court dismissed Formula First's claim. On appeal to the Divisional Court, Hebner J. dismissed the appeal.

[8] As noted above, Formula First has now moved for leave to appeal to this court.

### **III. POSITION OF THE PARTIES**

[9] Formula First argues that the Gobatto affidavit is "central to demonstrating systemic implications of the Divisional Court's interpretation, which affects all policyholders and the integrity of [the] FSRA's ['Financial Services Regulatory Authority of Ontario'] regulatory framework".

[10] According to Formula First, the Gobatto affidavit sets out information related to:

- (1) The regulatory context;
- (2) The importance of the automotive repair industry and small and medium businesses;
- (3) Aviva's conduct since the Divisional Court decision; and
- (4) The effect of the Divisional Court decision on other cases.

[11] The crux of Formula First's position on the leave motion is expressed at paragraphs 4 and 5 of the Gobatto affidavit:

4. The decision of the Divisional Court requires an insurer to prepare a repair plan/estimate and the shop must take it or leave. This will lead to insured's taking their vehicles to preferred insurance shops, rather than independent shops. It elevates the decision of an insurance company on a repair plan to a higher status than the repair plan prepared by the independent repair shop.

5. Furthermore, if the insured wishes to proceed with the repair he/she must pay out of pocket for any additional amounts. This incentivize [sic] an insured to choose an insurance preferred shop over an independent shop. This will result in the eventual decimation of the independent repair shops in Ontario.

[12] For its part, Aviva submits that the affidavit contains improper opinion evidence, as well as irrelevant, scandalous, and unfounded allegations of misconduct on the part of Aviva. It therefore moves to strike the affidavit in its

entirety, along with paragraphs 59, 60, 61, 62, 63, and 64 of Formula First's leave factum that reference it.<sup>1</sup>

#### IV. ANALYSIS

[13] The governing principles that are relevant to this motion were helpfully reviewed by Zarnett J.A. in *Optiva Inc. v. Tbaytel*, 2021 CanLII 78438 (Ont. C.A.).

I summarize some of the key principles as set out in that decision:

- An affidavit cannot express an opinion that the proposed appeal raises issues of public importance, since that is for the panel to decide.
- An affidavit cannot “seek by way of experts’ opinion, to buttress an attack on the decisions from which leave to appeal is sought”: *Optiva Inc.*, at para. 10, quoting *Ballard Estate v. Ballard Estate*, [1991] S.C.C.A. No. 239.
- An affidavit will only be proper if it sets out facts that may help the panel appreciate the public importance of the issues raised.
- In general, whether a legal issue is of public importance is not something on which an affidavit would be helpful.

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<sup>1</sup> In the alternative, Aviva seeks an order striking paragraphs 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 of the affidavit, and an order permitting it to cross-examine Mr. Gobatto on any remaining portions of it.

- However, an affidavit may in some cases be helpful if it is not apparent from the rest of the 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.

[14] It is unnecessary for me to detail each paragraph that Aviva challenges on this motion. As noted above, the affidavit primarily offers the opinion that, if left undisturbed, the Divisional Court's decision will significantly affect the future of independent autobody shops in the province. In essence, Mr. Gobatto asserts, either implicitly or explicitly, that leave should be granted because the manner in which Aviva determines payment for repair work performed by independent autobody shops is an issue of broader public importance beyond the interests of the parties in this case.

[15] I accept Formula First's submission that the impact of a court's decision beyond the parties and on the wider public is relevant to the issue of public importance. However, as Weiler J.A. noted in *Iness*, at para. 11, relevance is not the only question to consider when granting leave to file affidavits. As *Optiva Inc.* makes clear, the affidavit must confine itself to appropriate factual information as to the effects of a decision that may be of assistance: at para. 11.

[16] Respectfully, an examination of the Gobatto affidavit reveals that it strays well beyond providing factual information for the assistance of the panel deciding leave. Instead, it is replete with argument and opinion. For example, if Formula First wished to rely on the impact that the Divisional Court decision had on independent autobody shops and the wider general public, it ought to have introduced relevant statistical evidence (assuming such evidence existed). While Formula First claims that the Gobatto affidavit goes to the substantive issue of whether this appeal has public importance, the assertions in this affidavit are anecdotal and based merely on the observations of Mr. Gobatto, the owner of Formula First.

[17] Moreover, the affidavit raises allegations of what Aviva has done since the decision of the Divisional Court in eight different matters. These allegations are disputed. In any event, they are not facts that that may help the panel appreciate the alleged wide impact that the Divisional Court's decision apparently has had on independent autobody shops and owners of cars.

[18] In my view, the only non-objectionable portions of the affidavit are at paragraphs 2, 3, 7, 8 and 9. These paragraphs provide information on matters that do not seem to be controversial and are objectively verifiable. But these paragraphs cannot stand on their own. They are provided to give context to the more controversial conclusion that Mr. Gobatto makes at the end of his affidavit:

21. The cumulative effect of the lower court decisions is not limited to my business or other independent repair facilities. The Divisional Court's interpretation affects millions of insured Ontarians, the safety of repaired vehicles on public roads, the competitive structure of the automotive repair market, and the integrity of FSRA's consumer protection framework. These are all matters of clear and substantial public importance. [Emphasis added.]

[19] Fundamentally, the affidavit offers an opinion on the importance of granting leave, an issue that lies squarely within the panel's discretion. It further asserts that, if left intact, the Divisional Court's decision will affect a substantial segment of the population by impacting safety, competition within the autobody industry, and the integrity of consumer protection legislation. It makes these assertions without proper facts, relying on anecdotal assertions rather than supporting data, statistics, or corroborating evidence. Although some portions of the affidavit are non-controversial, the appropriate remedy is to strike the affidavit in its entirety, as those isolated paragraphs cannot meaningfully assist the panel on their own.

## **V. DISPOSITION**

[20] The Gobatto affidavit is struck. Accordingly, it is not necessary to decide whether Aviva should be entitled to cross-examine Mr. Gobatto on his affidavit.

[21] Consequently, I direct Formula First to file a fresh or amended factum on the leave motion to ensure that any references to the affidavit are removed. Formula

First is given an extension of 30 days from the date of release of this decision to re-file its leave factum. Aviva is directed to file responding materials within 25 days of service of Formula First's factum. Formula First's reply factum, if any, must be filed within 10 days of service of Aviva's responding materials.

[22] Aviva is entitled to its costs of the motion in the agreed upon amount of \$2,400.00.

"S. Coroza J.A."