

Sun v. Bloomex Inc., 2026 CanLII 63894 (FC)

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Docket : T-545-24

Ottawa, Ontario , June 29, 2026

PRESENT: Madam Justice Gagné

PROPOSED CLASS PROCEEDING

BETWEEN:

DIANA SUN

Plaintiff

and

BLOOMEX INC.

Defendant

REASONS AND ORDER

[1] The Defendant, Bloomex Inc., moves to strike the affidavit of Daniel Salgado, arguing it is not impartial, contains inadmissible evidence, and its filing as part of the Plaintiff's certification record constitutes such "exceptional circumstances" that the motion to strike should be entertained at this stage of the proceedings. During a case management conference held on April 21, 2026, it was determined that this motion would be dealt with in writing.

I. Background

[2] Bloomex carries on business in Canada by offering online flower services through its website. In her statement of claim, the Plaintiff, Ms. Diana Sun, alleges that when purchasing flowers and floral products on Bloomex's website, Bloomex represents the price for a variety of their products and, after navigating through the purchase process, a user will see that there is a \$1.99 surcharge added at the end. This surcharge is only presented to the consumer after they have navigated a lengthy process, including choosing the products they wish to buy, signing in or creating an account on Bloomex's website, and selecting a delivery date.

[3] According to Bloomex, this \$1.99 surcharge is used to offset rising costs of the product, including handling and delivery.

[4] Ms. Sun is a resident of British Columbia who purchased a flower bouquet on Bloomex's website and was charged the \$1.99 surcharge that was not disclosed until the end of the purchasing process. On December 22, 2025, she filed a Notice of Motion for Certification on behalf of:

All individuals and legal persons in Canada, excluding residents of Québec, who purchased a Floral Product through www.bloomex.ca from the date on which Bloomex began offering the Floral Products and/or Floral Services in Canada until the date that this action is certified as a class proceeding.

[5] Ms. Sun's motion record included the Salgado affidavit, dated December 18, 2025.

[6] Mr. Salgado is a research analyst employed by the law firm Slater Vecchio LLP, acting for the Plaintiff. In his affidavit, Mr. Salgado details the near-daily monitoring of price representations for select products on Bloomex’s Canadian website, describes how he monitored the price representations, and presents the resulting data. He appends to his affidavit i) screenshots of Bloomex’s Canadian website showing the purchase process, price representations, and star rating representations, and ii) documents from a proceeding involving a parent company in Australia.

[7] The certification motion is scheduled for a three-day hearing beginning on November 16, 2026.

II. Issues

[8] This motion raises the following issues:

- A. Should the Court dispose of this motion at this stage (i.e., pre-certification)?
- B. Is the Salgado affidavit inadmissible because it contains “*quasi-expert*” opinion evidence concerning the Defendant’s website?
- C. Are the documents filed in Australia by a distinct entity admissible in the present case?

III. Analysis

[9] The Court has discretion to strike out affidavit evidence that is improper or prejudicial. [Rule 81\(1\)](#) of the *Federal Courts Rules*, SOR/98-106 requires that affidavits be confined to facts within the deponent’s personal knowledge unless otherwise permitted. Rule 221(1) authorizes striking out pleadings or portions thereof that disclose no reasonable cause of action or constitute an abuse of process.

A. The timing for the Motion

[10] While certification motions are generally the initial procedural step in proposed class proceedings, courts retain the discretion to hear a pre-certification motion in “exceptional

circumstances” (*Berenguer v WOW Air ehf*, 2019 FC 407 (CanLII) at para 20).

[11] Such circumstances were contemplated by Justice Strathy (as he then was) in *Cannon v Funds for Canada Foundation*, 2010 ONSC 146 at paragraph 15:

Without being exhaustive, some of the factors that I consider relevant to the exercise of my discretion [to hear a motion prior to certification] include:

- (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
- (b) the likelihood of delays and costs associated with the motion;
- (c) whether the outcome of the motion will promote settlement;
- (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
- (e) the interests of economy and judicial efficiency; and
- (f) generally, whether scheduling the motion in advance of certification would promote the “fair and efficient determination” of the proceeding (s. 12 of the Class Proceedings Act, 2002, *S.O. 1992, c. 6*).

[12] While the above factors arise out of the Courts in Ontario, they have been subsequently adopted by this Court on several occasions (*Gottfriedson v Canada*, 2013 FC 1213 at para 43; *Berenguer* at para 20; *Sabbag v Canada (Attorney General)*, 2025 FC 148 (CanLII) at para 11; and *Chabanne c Wal-Mart Canada Corp*, 2025 CF 949 (CanLII) at para 13).

[13] In my view, the most important factor to be considered in this case is the impact of the motion on the entire proceeding, as the Plaintiff’s two expert witnesses, Dr. Mayzlin and Dr. Zeithammer, relied on the Salgado affidavit as a factual foundation for their opinions. Dr. Mayzlin discloses at page 8 of her affidavit that she relied upon the Salgado affidavit in preparing her report, while Dr. Zeithammer acknowledges at pages 8 and 9 of his affidavit that the Salgado affidavit was provided to him by the Plaintiff and that he was expressly instructed to assume that Mr. Salgado’s factual allegations regarding the Defendant’s website were true. If the Salgado affidavit is struck, then there is a high likelihood that the expert affidavits of Dr. Mayzlin and Dr. Zeithammer will not stand, as they would be left without an evidentiary foundation.

[14] This militates in favour of disposing of this motion pre-certification.

[15] The Court's discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances (*Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 29). In *Board of Internal Economy*, the Federal Court of Appeal stated that "exceptional circumstances" justifying the striking of affidavit evidence arise when the affidavit evidence is "so clearly out of bounds" that early intervention is necessary to prevent material prejudice to a party or to maintain the orderly conduct of the hearing (*Board of Internal Economy* at paras 29-32).

B. *Does the Salgado affidavit contain "quasi-expert" opinion evidence?*

[16] The Defendant submits that the Salgado affidavit should be struck as, despite him not being tendered as an expert witness, his analysis extends beyond mere facts and contains expert or quasi-expert opinion evidence.

[17] In his affidavit, Mr. Salgado presents a series of screen captures and other documents that detail a monitoring he made of Bloomex's online representations, including his data collection method, pricing representations, and spreadsheets showing daily price records for monitored products. The affidavit also presents summaries compiled by Mr. Salgado. In this way, Bloomex argues that it extends beyond facts within his personal knowledge and ventures into the realm of "quasi-expert" opinion, not permitted unless the witness is properly qualified, independent, and impartial.

[18] I disagree.

[19] First, quasi-expert evidence does not exist *per se*; affidavit evidence either contains opinion evidence, or it does not.

[20] Qualified experts are an exception to the exclusionary rule prohibiting opinion evidence, as they can provide technical knowledge that the trier of fact cannot properly assess (see Sidney

Lederman et al, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at 1.23).

[21] In contrast, the Salgado affidavit sets out non-controversial factual observations and exhibits that are simply his own observations of what appeared on Bloomex's website at different moments in time, as well as how often particular price presentations appeared in the materials he reviewed. Considering that the information displayed on websites evolves overtime, the facts conveyed in the Salgado affidavit are directly relevant to the underlying proceeding: what representations Bloomex made to the public during the relevant period.

[22] In my view, the Salgado affidavit does not provide anything other than facts. Mr. Salgado did not need any specific expertise to do what he did and to collect the information he collected. His affidavit is simply presenting observations of what consumers would see if they visited Bloomex's website, and how often a particular price representation appeared during the purchase process.

[23] Paragraphs 1 to 2(2) and 3 to 20, as well as Exhibits A to U are, in my view, admissible evidence.

C. Are the Australian documents admissible?

[24] Mr. Salgado appends to his affidavit the following documents:

- a) Exhibit V: Copy of the affidavit of Dmitri Lokhonia affirmed on September 26, 2023, and filed with the Federal Court of Australia on September 27, 2023, in the file *Australian Competition and Consumer Commission v Bloomex Pty Ltd* (ACN 147 609 443), Victoria Registry, No. VID721/2022 (the "Australian Proceeding");
- b) Exhibit W: Copy of the affidavit of Dmitri Lokhonia affirmed on November 10, 2023, and filed in the Australian Proceeding;
- c) Exhibit X: Copy of a Statement of Agreed Facts filed with the Federal Court of Australia in the Australian Proceeding.

[25] The Defendant argues that the Salgado affidavit improperly includes documents from a penal proceeding involving a parent company in Australia. This foreign evidence does not meet the legal

requirements for admissibility in Canada which, according to the Defendant, is subject to the hearsay test enunciated in *R v Hawkins*, 1996 CanLII 154 (SCC) 3 SCR 1043, and *Ayangma v Canada*, 2002 FCT 707 (paras 24-25). Accordingly, the Court should apply the test to determine whether prior testimony can be admitted in subsequent proceedings as outlined in *Ayangma* at paragraph 25 (the former-testimony rule):

- i. The current opposing party must have had the opportunity to cross-examine the witnesses at the previous proceeding;
- ii. The material issues to which the evidence relates must be substantially the same in both proceedings; and
- iii. The two proceedings must be between the same parties.

(see also *The Law of Evidence in Canada* at 6.426 – 6.429)

[26] The Plaintiff submits that the former-testimony rule applies where only prior testimony is tendered for the truth of its contents in a later proceeding, which is not what the Plaintiff is doing here. In any case, this issue has already been dealt with by then-Chief Justice Crampton in *Sun v Bloomex, Inc*, 2025 FC 1239 [*Bloomex 2025*].

[27] I disagree with the Plaintiff.

[28] In *Bloomex 2025*, an affidavit from Mr. Lokhonia filed in the Australian proceeding was admitted for the narrow purpose of responding to a motion to strike the Plaintiff's Further Amended Statement of Claim under Rule 221(1)(c), to establish that it was not "plain and obvious" that the claims were "scandalous, frivolous or vexatious" on the grounds that (i) it contains no possibility of producing an evidentiary foundation, (ii) is entirely deficient in factual material, and therefore, (iii) those claims are impossible to answer (*Bloomex 2025* at para 83). The Court was explicit that in that specific context, the Plaintiff did not rely on those statements for the truth of their contents, but only as evidence that Bloomex could understand and answer substantially similar allegations (*Bloomex 2025* at para 89).

[29] The issue before me is totally different. The Plaintiff is relying on two affidavits from Mr. Lokhonia as well as an agreed statement of facts that concern different proceedings, between

different parties, in a foreign jurisdiction, as part of her certification motion.

[30] As such, the Plaintiff seeks to use that evidence to establish "some basis in fact" for the certification criteria under Rule 334.16(1)(b)–(e). Thus, the Plaintiff seeks to admit the prior testimony from the foreign proceeding for the truth of its contents, or to establish a factual foundation. That question was not before the Court in *Bloomex 2025*, and it cannot be resolved by reference to it.

[31] The application of the test in this instance is reasonably straightforward. First, the Defendant did not have the opportunity to cross-examine the evidence at the previous proceeding, as it was in a foreign jurisdiction (Australia). Second, the material issues in both cases are different, as they arise in different contexts under different legislations. Lastly, the parties are different: the Australian case involved a regulator and Bloomex Pty Ltd (a parent company incorporated under the laws of Australia), while the Canadian action involves a proposed class representative and Bloomex.

[32] I agree with the Defendant that admitting this evidence would deprive it of any meaningful opportunity to challenge its accuracy and would be fundamentally prejudicial to the Defendant.

[33] In my view, the Plaintiff's attempt to introduce this evidence through the Salgado affidavit fails to meet any of the criteria for admissibility. Therefore, paragraphs 2(3) and 21, as well as Exhibits V, W and X will be struck out before certification.

IV. Conclusion

[34] For the above reasons, the Defendant's motion to strike is partially granted and paragraphs 2(3) and 21, as well as Exhibits V, W and X are struck out from the file. Considering the mitigated result, no costs are granted.

ORDER IN T-545-24

THIS COURT ORDERS that :

1. The Defendant's motion to strike is granted in part.
2. Paragraphs 2(3) and 21 of the affidavit of Daniel Salgado affirmed on December 18, 2025, as well as Exhibits V, W and X filed in support thereof, are struck out.
3. No costs are granted.

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"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET : T-545-24

STYLE OF CAUSE: DIANA SUN v BLOOMEX INC.

MOTION IN WRITING CONSIDERED IN OTTAWA, PURSUANT TO RULE 369 OF *THE FEDERAL COURTS RULES*

REASONS AND ORDER: GAGNÉ J.

DATED: JUNE 29, 2026

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