COURT FILE NUMBER:	2301 16114
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, as amended
	AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF MANTLE MATERIALS GROUP, LTD. and RLF CANADA HOLDINGS LTD.
APPLICANT	TRAVELERS CAPITAL CORP.
RESPONDENT	MANTLE MATERIALS GROUP, LTD.
DOCUMENT:	**BOOK OF AUTHORITIES IN SUPPORT OF APPLICATION TO COMPEL RESPONSES**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP 2100, 222 - 3rd Ave SW Calgary, AB T2P 0B4 Telephone: 403.693.5420/780-969-3501 Fax: 403.508.4349 Attention: Ryan Zahara/Molly McIntosh File: 0160774.00002

TABLE OF AUTHORITIES

A. Legislation and Regulations:

1. *Rules of Court*, AR 124/2010, Rule 5.2.
2. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, section 11.2(4).

B. Case Law:

1. *Re Mantle Materials Group Ltd*, 2023 ABKB 488
2. *Mantle Materials Group Ltd v Travelers Capital Corp*, 2023 ABCA 302.
3. *Edmonton (City) v Gosinel*, 2020 ABQB 546
4. *Alberta (Attorney General) v Alberta Power (2000) Ltd*, 2017 ABQB 195
5. *Marathon Canada Ltd v Enron Canada Corp*, 2006 ABQB 651

Court of King's Bench of Alberta

Citation: Re Mantle Materials Group, Ltd, 2023 ABKB 488

Date: 20230828
Docket: 2301 10358
Registry: Calgary

In the Matter of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as Amended

And in the Matter of the Notice of Intention to Make a Proposal of Mantle Materials Group, Ltd.

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

Introduction

[1] Mantle Materials Group, Ltd. applied for an extension of time to make a proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 50.4(8), approval of various charges on the bankrupt estate ("Restructuring Charges") including the priority of those charges, and approval of the payment of certain pre-filing debts to creditors whose support is required to perform environmental reclamation work that will be integral to the pending proposal. The application was granted with a temporary proviso with respect to the priority of the Restructuring Charges over certain equipment to ensure that Travelers Capital Corp, a secured lender, was not prejudiced prior to the release of these Reasons.

[2] Mantle advises that the proposal that it intends to make will not allow payment to any creditors before Mantle has satisfied its end-of-life obligations stemming from Environmental Protection Orders issued by Alberta Environment and Protected Areas ("AEPA" formerly Alberta Environment and Parks) with respect to several gravel producing properties. Mantle submits that this is what is required by ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 ("*Redwater*") because the environmental remediation obligation is an obligation of the company that must be satisfied prior to distributions to creditors. AEPA supports Mantle's position.

[3] Travelers asserts that it has priority with respect to security in certain equipment and Travelers' ability to realize on its security should not be postponed until after the remediation work has been completed to AEPA's satisfaction and subordinated to the Restructuring Charges. Travelers offers a different interpretation of ***Redwater***. Travelers contends that ***Redwater*** held that an end-of-life environmental obligation need only be satisfied using assets encumbered by or related to the end-of-life obligation. Travelers submits the Court should find that a creditor with security over assets unrelated to assets burdened with the environmental remediation obligation may realize on such security without delay.

Background

[4] Mantle operates 14 gravel pits on public land pursuant to surface material leases issued by AEPA. Mantle also operates 10 gravel pits on private land pursuant to royalty agreements with the landowners.

[5] Mantle acquired its gravel-producing assets in 2021 in the *Companies' Creditors Arrangement Act* proceedings for JMB Crushing Systems Inc. and associated companies.[1] Financial liabilities of JMB were compromised and undesired assets were transferred to a residual company pursuant to a Reverse Vesting Order. The desired assets remained in JMB and its subsidiary 2161889 Alberta Ltd, both of which then amalgamated with Mantle on May 1, 2021.

[6] Following the commencement of the JMB CCAA proceedings, AEPA issued Environmental Protection Orders ("EPOs") to JMB and 216 in respect of some of the gravel-producing properties.

[7] EPOs are issued pursuant to AEPA's authority under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 s 140. An AEPA inspector is permitted to "issue an environmental protection order regarding conservation and reclamation to an operator directing the performance of any work or the suspension of any work if in the inspector's opinion the performance or suspension of the work is necessary in order to conserve and reclaim the land."

[8] An EPO issued by AEPA in respect of end-of-life reclamation is similar in nature to an Abandonment and Reclamation Order ("ARO") issued by the Alberta Energy Regulator ("AER"). Indeed, all the parties in the present case proceeded on the basis that an EPO issued by AEPA had the same legal effect and should be subject to like treatment in insolvency proceedings as an ARO issued by the AER.

[9] The EPOs issued by AEPA to JMB address end-of-life reclamation steps to be taken at various gravel-producing or formerly gravel-producing assets operated by JMB on both public and private land.

[10] The original Reverse Vesting Order presented to the Court in the JMB CCAA proceedings sought to absolve the directors of JMB and 216 of responsibility for the EPOs and sought to usurp AEPA's regulatory role by putting the Court in a supervisory role with respect to

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[1] For a discussion of the restructuring of JMB and the use of a reverse vesting order in that case, see Candace Formosa, "Dampening the Effect of *Redwater* Through a Reverse Vesting Order," in Jill Corrani & D. Blair Nixon, eds., *Annual Review of Insolvency Law,* (Toronto: Thomson Reuters, 2021) 697.

the performance of reclamation work by Mantle and compliance with the EPOs. AEPA objected to the original proposed Reverse Vesting Order.

[11] As a result of AEPA's objections, the Court approved a revised Reverse Vesting Order that provided that the order did not affect the liability of JMB, 216, or the directors of those companies for "Compliance Issues" or performing "Reclamation Obligations" in respect of the various gravel-producing properties. Mantle accordingly remained liable for the EPOs issued with respect to both the properties acquired in the amalgamation with JMB and 216 and the properties now possessed by the residual company. Mantle negotiated a plan with AEPA for the reclamation work to be done to satisfy the EPOs.

[12] Following completion of the JMB CCAA proceedings, Mantle entered a loan transaction with Travelers. Travelers loaned Mantle $1,7000,000 for the acquisition of equipment for use in its operations. Mantle granted Travelers a purchase-money security interest (PMSI) over the equipment. The security interest was registered in the Alberta Personal Property Registry. Pursuant to an agreement between Travelers, Mantle, and Fiera Private Debt Fund V LP, which holds a general security interest in all of Mantle's present and after acquired property, Travelers' security interest in the equipment was designated to have first priority. As of July 21, 2023, Mantle owed Travelers just short of $1.1 million.

[13] Mantle experienced operational problems and was burdened with excessive debt inherited from the JMB CCAA proceedings and incurred in the period following the acquisition of the gravel-producing properties. Mantle's difficulties were compounded by the significant reclamation obligations it was required to complete to satisfy the EPOs. On July 14, 2023, Mantle filed a notice of intention to make a proposal under s 50.4 of the BIA.

[14] On August 15, 2023, I granted an extension of the BIA stay period and the time period to permit Mantle to make its proposal. I further approved the creation and priority ranking of various Restructuring Charges, including an Administration Charge, a Directors & Officers Charge, and an Interim Lending Facility Charge. I was satisfied that the participation of lawyers, insolvency professionals, and directors and officers was required for the proposal to succeed. I was further satisfied that the Interim Lending Facility, which is to be primarily used to fund reclamation work, is necessary for the success of the proposal.

[15] Travelers' argued that the Restructuring Charges should not have priority over Travelers' security interest in the equipment and that Travelers should be able to be paid out or realize on its security without delay. Mantle, supported by AEPA, submitted that the Restructuring Charges were necessary to put the proposal into effect and that the main plank of the proposal was the completion of the reclamation work to satisfy the EPOs. Mantle is of the view that the value of the gravel pits that are still active exceeds the amount of the reclamation obligations. Mantle has also posted more than $1 million as security with AEPA which will be returned upon completion of the reclamation obligations to AEPA's satisfaction. Mantle submits that Travelers should not be permitted to realize on its security prior to the completion of the reclamation work because if it were allowed to do so, that would jeopardize Mantle's ability to complete the reclamation work and thereby jeopardize its ability to make a proposal to its creditors.

[16] I granted an Order to allow work on the pending proposal, including reclamation work, to get underway while preserving Travelers' position pending these Reasons. The Order provided, in part, as follows:

> The Charges shall constitute a security and charge on the Property and, with the exception of the security interests in favour of Travelers registered in the Alberta Property Registry as base registration number 21100725361 (the "**Travelers' Security Interests**"), such Charges shall rank in priority to all other security interests, trusts, liens, charges, deemed trusts, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person, including liens and trusts created by federal and provincial legislation (collectively, the "**Encumbrances**"), provided, however, that the relative priority of Charges and the Travelers' Security Interests is subject to further order of the Court....

Redwater, Manitok, Trident,* and *Stare Decisis

[17] Mantle and AEPA submit that three decisions dictate the outcome of this case: ***Redwater***; ***Manitok Energy Inc (Re)***, 2022 ABCA 117; and ***Orphan Well Association v Trident Exploration Corp***, 2022 ABKB 839. These decisions, they say, stand for the principle that end-of-life environmental obligations must be satisfied before any creditors may recover and that the whole estate of the insolvent entity is to be used to satisfy such end-of-life environmental obligations. This rule leaves no room for those with security in assets unrelated to the environmental condition or damage to realize on that security until end-of-life obligations have been satisfied using, if necessary, the unrelated assets in which they have security.

[18] Travelers submits that Mantle and AEPA are wrong that ***Redwater*** and ***Manitok*** are controlling and that instead the present case is one of "first instance." ***Redwater*** and ***Manitok*** indicate that there is an exception to the rule posited by Mantle and AEPA for assets unrelated to the environmental condition or damage and that it is for this Court to give that exception shape. Travelers, citing ***R v Comeau***, 2018 SCC 15 and ***R v Sullivan***, 2022 SCC 19, further asserts that ***Trident*** at para 66-67 is inconsistent with ***Redwater*** and ***Manitok*** and "violates the doctrine of vertical *stare decisis*...." ***Trident***, Travelers argues, should not be followed because of its conflict with ***Redwater*** and ***Manitok***.

[19] Rather than discussing a basic concept like *stare decisis* in Reasons, I normally just ask what the relevant cases and statutes say the law is and then apply the law to the facts of the case before me. Travelers, however, has raised the issue of *stare decisis* and provided me with some authorities, making it clear that they attach some importance to it.

[20] As a judge of a court of first instance, the principle of vertical *stare decisis* provides that I am bound to follow the *ratio decidendi* of decisions of higher courts. The inimitable Master Funduk explained: "The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around": ***South Side Woodwork v R.C. Contracting***, 1989 CanLII 3384 (AB KB) at para 53.

[21] The Court held in ***Comeau*** at para 26 "[s]ubject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it." None of the exceptions apply in the present case. The issue, as will be come clear later in these Reasons, is whether there is a decision that is on point that must be followed or whether the reasons of the Supreme Court of Canada and the Court of Appeal left the question open.

[22] The principle of horizontal *stare decisis* requires that judges of the same Court pay heed to each others' decisions. This is particularly important in the commercial arena where parties

plan their affairs and make significant investment decisions based on the law that emerges from this Court.

[23] Kasirer J, writing for the Court, observed in ***Sullivan*** at para 65 "Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province.... While not strictly binding in the same way as vertical *stare decisis*, decisions of the same court should be followed as a matter of judicial comity, as well as for the reasons supporting *stare decisis* generally."

[24] Kasirer J explained in ***Sullivan*** at para 75 that a Court should only depart from horizontal *stare decisis* if:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or
3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[25] Vertical *stare decisis* requires me to determine the *ratio decidendi* of ***Redwater*** and ***Manitok*** while horizontal *stare decisis* demands that I determine the *ratio decidendi* of ***Trident*** with respect to the question before me – whether the whole of a debtor's estate, including unrelated assets, must be used to satisfy end-of-life environmental obligations prior to any distribution to creditors.

[26] Justices Côté, Brown, and Rowe writing for themselves and Wagner CJC in dissent in ***R v Kirkpatrick***, 2022 SCC 33 at para 127 explained what the *ratio decidendi* of a decision is:

> The *ratio decidendi* of a decision is a statement of law, not facts, and "[q]uestions of law forming part of the *ratio* . . . of a decision are binding . . . as a matter of *stare decisis.*" A question of law cannot, therefore, be confused with the various factual matrices from which that question of law might arise [citations omitted].

[27] The *ratio decidendi* of a case can be difficult to separate from *obiter dictum*, which is an expression of opinion that is not essential to a decision. Binnie J explained in ***R v Henry***, 2005 SCC 76 at para 52: "the submissions of the attorneys general presuppose a strict and tidy demarcation between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which they say may safely be ignored. I believe that this supposed dichotomy is an oversimplification of how the common law develops."

[28] The discussion that follows shows that the issue in the present case is not one of distinguishing between *ratio decidendi* and *obiter dictum*; rather, it is to what extent the Court is bound by what ***Redwater*** and ***Manitok*** imply or, perhaps more accurately, what the parties infer from those decisions. With ***Trident***, the question is whether the *ratio decidendi*, which is clear, applies on the facts of the present case.

[29] What does *Redwater* say about environmental obligations and unrelated assets? Wagner CJC, writing for the majority, pointed out that Redwater's environmental liabilities were not required to be satisfied with unrelated assets. He held at para 159:

> it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them [emphasis added].

[30] Travelers submits that Wagner CJC chose his words carefully and that the only plausible inference from those words is that unrelated assets cannot be conscripted to satisfy end-of-life environmental obligations. Though he may have chosen his words carefully in the sense that he did not want to foreclose a scenario where assets were so unrelated to an environmental obligation that they should not be called upon to satisfy the environmental obligation, he did not provide any guidance as to what he meant by "assets unrelated" or how unrelated the assets must be to escape the reach of the regulator.

[31] The Court of Appeal in ***Manitok*** addressed the question of whether a debtor's oil and gas assets could be divided into two pools, one consisting of valuable assets and the other consisting of assets burdened by environmental obligations. The Court viewed the situation in ***Manitok*** to be the same as in ***Redwater*** where the proceeds of the sale of valuable oil and gas assets "had to be used by Redwater's trustee to satisfy abandonment and reclamation obligations before any distribution to secured creditors" (para 31). The Court went on at para 31 to explain how it interpreted ***Redwater***:

> The point is that the outcome of ***Redwater*** demonstrates that the Supreme Court of Canada did not treat Redwater's assets as falling into different pools. All of the oil and gas assets were treated collectively as being contaminated, and they all had to answer for the abandonment and reclamation obligations attached to the disclaimed assets. None of the other oil and gas assets were 'assets unrelated' to the other oil and gas assets. Manitok is in exactly the same position. The 'substantial assets' of Manitok are the same as the 'substantial assets' of Redwater.

[32] Though the Court of Appeal adverted in ***Manitok*** to the question of whether in theory unrelated assets could not be called upon to satisfy environmental obligations it deferred the question because it did not have to be decided given the Court's conclusion that all of Manitok's substantial assets were related to the environmental obligations. The Court held at para 36:

> ***Redwater*** confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day [emphasis added].

[33] Mantle and AEPA argue that Wagner CJC's words in para 159 must be viewed in the context of the whole ruling in ***Redwater***. Wagner CJC held that environmental obligations are a corporate or estate obligation that must be satisfied before any creditor claims (para 98; see also, ***Manitok*** at para 17, 30, & 35). According to Mantle and AEPA, the logic of this ruling leaves no room for the exception for assets unrelated to the environmental condition or damage asserted by Travelers.

[34] The reference to "assets unrelated" in ***Redwater*** unaccompanied by any explanation followed by the Court of Appeal's statement in ***Manitok*** that it was leaving the issue for "another day" indicates that there is no *ratio decidendi* in those cases that binds me in the present case. As I will explain below, the facts of the present case do not require me to decide whether Travelers is correct that some category of assets unrelated to the environmental condition or damage in issue may not be used to satisfy environmental regulatory obligations or Mantle and AEPA are correct that all the assets that comprise the estate of a debtor must be used to address environmental regulatory obligations before creditor claims are paid.

[35] That Redwater and Manitok's substantial assets were all oil and gas assets was not surprising. Many oil and gas companies do not own much in the way of assets other than oil and gas rights and the equipment required to produce oil and gas from those interests in land such as compressors, pumpjacks, and tanks. And even this kind of equipment may be leased instead of owned. Jack R Maslen & Tiffany Bennett, "Going Green? New Interpretations of Redwater from Canada's Natural Resource Sectors" in in Jill Corrani Nadeau & D. Blair Nixon, eds., *Annual Review of Insolvency Law*, (Toronto: Thomson Reuters, 2022) 105 concluded at 119, "based on *Manitok*, assets or proceeds that relate in any way to the debtor's oil and gas business will be used to satisfy non-monetary end-of-life obligations. For most oil and gas producers, this likely means all of their property." A question to be considered later in these Reasons is whether Mantle, a gravel company, is any different than oil and gas companies like Redwater and Manitok.

[36] Whether assets of an oil and gas company other than oil and gas rights are unrelated assets was tested in ***Trident***. Justice Neufeld in ***Trident*** was required to consider whether a receiver was required to allocate proceeds of the sale of assets, including "non-licensed assets such as real estate and equipment" (para 80) to satisfy environmental obligations in priority to municipal tax claims. Neufeld J took a pragmatic approach, refusing to get engaged in a debate over how to draw a line between related and unrelated assets of an oil and gas company. He concluded that because Trident had one business, oil and gas exploration and production, that all assets were related to the environmental obligation. He wrote at para 67:

> I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had certain real estate assets that were used for office or equipment storage and the like. However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in ***Manitok*** to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based.

[37] Neufeld J's statement of the law in ***Trident*** is consistent with ***Redwater*** and ***Manitok*** though his application of the law breaks new ground. Whereas in ***Redwater*** and ***Manitok***, it was held that all oil and gas assets should be treated as related to environmental obligations that attached only to some of the oil and gas assets, ***Trident*** extended this principle to other assets used in an oil and gas business even if they were not directly involved in oil and gas production (e.g. the real estate used to store equipment).

[38] None of the exceptions to the principle of horizontal *stare decisis* apply to ***Trident***. The decision was fully considered, carefully reasoned, and has not been undermined by appellate

authority. That means that the question in the present case is whether Mantle's equipment subject to the Travelers security interest is analogous to the equipment and real estate in ***Trident***.

[39] Warren Miller, Vice President of Structured Finance and Capital Markets at Travelers, deposed that it was his understanding that Mantle sought financing from Travelers so that it could "purchas[e] the equipment necessary to operate its business (instead of renting it)." Mr. Miller's Affidavit attached as part of an exhibit a Notice of Intention to Enforce Security which listed all Mantle's equipment that Travelers had financed. The descriptions include the following: Jaw Crushing Plant, Cone Crushing Plant, Screen Plant, Aggregate Feeder, Aggregate Surge Bin, Material Washer, Conveyor, Truck Scale, Articulated Dump Truck, Tracked Excavator, and the like. The equipment in which Travelers has a security interest appears to be part to Mantle's gravel production business.

[40] In my view, no sensible distinction can be made between the equipment and real estate in ***Trident*** and the equipment in the present case. The equipment over which Travelers has a security interest is as much a part of Mantle's gravel business as the equipment and real estate in ***Trident*** was a part of Trident's oil and gas business. Based on this factual finding, I am bound by the principle of horizontal *stare decisis* to follow ***Trident***. In finding that the equipment in the present case is part of Mantle's gravel business, I make no comment on how in theory a line should be drawn between related and unrelated assets or even if a line should be drawn. As the Court of Appeal said in ***Manitok***, that "can be left for another day."

[41] Travelers advanced policy arguments as to why it should not have to wait to realize upon its security until after Mantle completes the reclamation work required by the EPOs. Mantle and AEPA responded with policy arguments supporting the deferral of realization of all secured creditors, including Travelers, until after the satisfactory completion of the reclamation work. Given my conclusion that the equipment subject to the Travelers security interest is related to the assets to which Mantle's environmental obligations pertain in the sense that the equipment is used in gravel production, it is not necessary to explore these policy arguments.

[42] Though I decline to debate the wisdom of the policy of effectively subordinating secured creditors to environmental obligations in these Reasons, it is noteworthy that the evidential record shows that Travelers conducted due diligence prior to entering the financing arrangement with Mantle. Among the materials available to Travelers as part of that due diligence process were documents indicating the existence of Mantle's environmental reclamation obligations and the security posted by Mantle with AEPA. Prior to entering the financing arrangement, Travelers had the opportunity to assess the risk of doing business with Mantle, make an informed decision whether to do business with Mantle, and to negotiate a cost of borrowing that reflected the risk inherent in Mantle's business.

Conclusion

[43] The Travelers security interest in the equipment must be subordinated to the Restructuring Charges because the Restructuring Charges are necessary to the completion of the environmental remediation work that is an important part of the pending proposal. Travelers cannot realize on its security until the environmental reclamation work is completed to AEPA's satisfaction and the only way that such work can be done is with the support of the officers and directors of Mantle, lawyers and insolvency professionals, and the interim lender who are all protected by the Restructuring Charges.

[44] Paragraph 10 of the Order dated August 15, 2023 shall be amended to provide that the Restructuring Charges have priority over the Travelers security interest in the equipment identified in the Travelers security registration.

Heard on the 15th day of August, 2023.
Dated at the City of Calgary, Alberta this 28th day of August, 2023.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Tom Cumming & Stephen Kroeger, Gowling WLG
for Mantle Materials Group, Ltd.

Alexis Teasdale & Joel Schachter, Lawson Lundell LLP
for Travelers Capital Corp

Pantelis Kyriakakis, McCarthy Tétrault LLP
for the Proposal Trustee, FTI Consulting Canada Inc.

Doug Nishimura, Field LLP,
for Alberta Environment and Protected Areas

Darren Bieganek, Duncan Craig LLP
for 945441 Alberta Ltd

In the Court of Appeal of Alberta

Citation: Mantle Materials Group, Ltd v Travelers Capital Corp, 2023 ABCA 302

Date: 20231023
Docket: 2301-0216AC
Registry: Calgary

Between:

Mantle Materials Group, Ltd

Respondent

- and -

Travelers Capital Corp

Applicant

Corrected judgment: A corrigendum was issued on October 24, 2023; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision of
The Honourable Justice William T. de Wit

Application for Permission to Appeal

Reasons for Decision of
The Honourable Justice William T. de Wit

Introduction

[1] Travelers Capital Corp (Travelers) applies for a declaration that leave is not required to appeal the August 28, 2023 decision of Feasby J or alternatively, applies for permission to appeal that same order.

[2] The respondent, Mantle Materials Group, Ltd. (Mantle), opposes the application and cross applies for a lifting of a stay in the event that leave is granted.

[3] Alberta Environment and Protected Areas (AEPA), the provincial ministry responsible for environmental issues, supports Mantle in opposing the application.

Facts

[4] This application arises in the context of Mantle's insolvency proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*). Mantle operates gravel pits on lands both public and private, some of which are subject to Environment Protection Orders (EPO) issued by the AEPA.

[5] After conducting due diligence, Travelers financed Mantle's purchase of equipment for use in its operations and Mantle granted Travelers a purchase-money security interest over the equipment, and pursuant to an agreement, Travelers' security interest in the equipment was designated to have first priority. As of the date of this application, Mantle owes Travelers over $1 million.

[6] Financial difficulties led Mantle to file a notice of intention to make a proposal under section 50.4 of the *BIA*. On August 15, 2023, Mantle was granted an order extending time to make a proposal. In addition, the order approved various charges on the bankrupt estate including the priority of those charges, and approval of the payment of certain pre-filing debts to creditors whose support is required to perform environmental reclamation work that will be integral to the pending proposal. The application was granted without prejudice with respect to the priority of the charges that Travelers holds over the equipment until the chambers judge released his reasons regarding Travelers' priority claim.

[7] Mantle's intended proposal will not allow payment to any creditors before Mantle has satisfied its end-of-life obligations stemming from EPOs. Mantle submits this is required by the Supreme Court of Canada decision known as *Redwater* or *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, which held the environmental remediation obligations must be satisfied prior to distributions to creditors.

[8] Travelers submitted that it has priority with respect to security in certain equipment and its ability to realize on its security should not be postponed until after the remediation work has been completed. Travelers takes the position that *Redwater* held that an end-of-life environmental obligation need only be satisfied using assets encumbered by or related to the end-of-life obligation. A creditor with security over assets unrelated to assets burdened with the environmental remediation obligation may realize on such security without delay.

[9] The chambers judge disagreed with Travelers and amended his August 15, 2023 order to provide that the various approved charges on the bankrupt's estate have priority over Travelers' security interest in the equipment. The reasons of the chambers judge can be found at *Re Mantle Materials Group, Ltd*, 2023 ABKB 488.

Is Leave Required?

[10] Travelers submits that leave to appeal is not required because section 193(c) of the *BIA* provides "an appeal lies to the Court of Appeal from any order or decision of a judge of the court . . . if the property involved in the appeal exceeds in value ten thousand dollars". As it is owed over $1 million, Travelers submits it is entitled to appeal as of right.

[11] Travelers is required to obtain leave. Case authorities have held that section 193(c) is not satisfied simply where the value of the property exceeds $10,000. In *Manitok Energy Inc (Re)*, 2022 ABCA 260 (*Manitok leave decision*), this court held that an appeal is not available under section 193(c) in situations where the order is procedural in nature (para 27). Where the order does not result in a gain or loss to an interested party, the order is procedural in nature: *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 at para 15; *Manitok leave decision* at para 30.

[12] Travelers has not filed evidence showing the value of the equipment at issue and has not shown that its recovery is in jeopardy. The order it seeks to appeal is an order extending time to make a proposal, approved various charges on the bankrupt estate, and approved payment of certain pre-filing debts. The order is procedural in nature and section 193(c) does not apply to give Travelers a right to appeal.

Test for Leave to Appeal

[13] As set out in *Athabasca* at paras 17-18, the following factors are considered on an application for leave to appeal under section 193(e) of the *BIA*:

a) whether the point on appeal is of significance to the practice;

b) whether the point raised is of significance to the action itself;

c) whether the appeal is *prima facie* meritorious or frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy.

[14] The test essentially requires that the proposed appeal must be on a point of significance for which there is at least an arguable case. I find that is where the application fails.

[15] Travelers points to paragraph 159 in *Redwater*, where Wagner CJC for the majority stated that the Alberta Energy Regulator's orders and assessment of liability "did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage".

[16] This court in *Manitok Energy Inc (Re)*, 2022 ABCA 117 (*Manitok*), viewed the situation in the appeal before it to be the same as in *Redwater* and at paragraph 31 explained *Redwater*:

> The point is that the outcome of *Redwater* demonstrates that the Supreme Court of Canada did not treat Redwater's assets as falling into different pools. All of the oil and gas assets were treated collectively as being contaminated, and they all had to answer for the abandonment and reclamation obligations attached to the disclaimed assets. None of the other oil and gas assets were 'assets unrelated' to the other oil and gas assets. Manitok is in exactly the same position. The 'substantial assets' of Manitok are the same as the 'substantial assets' of Redwater.

[17] Whether in theory unrelated assets could not be called upon to satisfy environmental obligations did not have to be decided by this court given that all of Manitok's substantial assets were related to the environmental obligations. As this court stated at paragraph 36:

> *Redwater* confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day.

[18] Travelers argues that the unaddressed issue arises in its case because the equipment over which it has a secured interest was not affected by an environmental condition or damage and

therefore, it should not have to wait for Mantle to complete its environmental obligations before Travelers can realize upon its security.

[19] Travelers' proposed arguments on appeal ignore a basic principle arising from *Redwater* and reiterated in *Manitok* that abandonment and reclamation obligations are binding "on the bankrupt estate": *Redwater* at para 93, 98, *Manitok* at para 17. The obligation was not tied to the type of asset.

[20] In *Redwater* and *Manitok* all the assets were oil and gas assets and none were "assets unrelated" to the other oil and gas assets. Distinguishing oil and gas assets from non-oil and gas assets as "assets unrelated to the environmental condition or damage" was argued in *Manitok* and rejected by this court at paragraph 35:

> One could read para 159 of *Redwater* as excluding resort to "unrelated" non-oil and gas assets to cover abandonment and reclamation costs. However, as was pointed out by the Orphan Well Association, the reasons in *Redwater* refer repeatedly to the "assets of the estate", without drawing any such distinction: see for example *Redwater* at paras 76, 102, 107, 114. Further, there is no clear boundary between licensed assets and other assets. For example, the sale to Persist (like many similar sales) included not only licensed assets but oil and gas rights, royalty rights, intellectual property, seismic data, vehicles and other chattels. *Redwater* gives no support to the municipalities' argument.

[21] Travelers is in no different position in its proposed appeal. As the chambers judge found, the equipment in which Travelers has a security interest is part of Mantle's gravel production business: "Jaw Crushing Plant, Cone Crushing Plant, Screen Plant, Aggregate Feeder, Aggregate Surge Bin, Material Washer, Conveyor, Truck Scale, Articulated Dump Truck, Tracked Excavator, and the like" (para 39 and see paras 40-41). These are "vehicles and other chattels" as referred to in *Manitok* quoted above. Moreover, the equipment is being used in the reclamation efforts. Mantle is not an oil and gas company but that distinction does not change the application of the reasons in *Redwater* or *Manitok*. Mantle's only business is gravel production. It has no assets unrelated to those operations. While the question of what are "assets unrelated to the environmental condition or damage" and the policy concerns related to financing businesses that have environmental obligations are significant matters, they are not arguable on the facts of this case.

[22] Additionally, Travelers cannot satisfy the factor that an appeal will not unduly hinder the progress of the action. Section 195 of the *BIA* automatically stays proceedings until an appeal is disposed of. Staying the proceedings would cause significant harm to Mantle as it is required to complete the EPOs by November 1, 2023, and it cannot continue once winter freeze sets in.

Conclusion

[23] The application for leave to appeal is dismissed. As leave has not been granted, there is no need for Mantle's cross-application.

Application heard on October 18, 2023

Reasons filed at Calgary, Alberta
this 23rd day of October, 2023

de Wit J.A.

Appearances:

T.S. Cumming
S.P. Kroeger
for the Respondent

A.E. Teasdale
for the Applicant

T.A. Batty
for Alberta Environment and Protected Areas

P. Kyriakakis
for the Proposal Trustee

Corrigendum of the Reasons for Decision

Page 6, counsel's name "S.J. Kroeger" has been corrected to "S.P. Kroeger".

Court of Queen's Bench of Alberta

Citation: Edmonton (City) v Gosine, 2020 ABQB 546

Date: 20200917
Docket: 2003 09491
Registry: Edmonton

Between:

The City of Edmonton

Applicant

- and -

Terrence Oneal Gosine a.k.a. Terrence O'Neal Gosine a.k.a. Terrence Gosine, Harinder Singh Sandhu a.k.a. Harinder Sandhu; Capital Sign Rentals Inc., Jagprit Grewal a.k.a. Jay Grewal, Rupinder Grewal a.k.a. Rupinder Sandhu a.k.a. Rupinder Sandhu Grewal, Kuljit Kaur Sandhu, and Amrik Sandhu

Respondents

Reasons for Decision
of the
Honourable Mr. Justice Douglas R. Mah

A. Background

[1] This application concerns whether three of the Defendants who were cross-examined on their affidavits (Gosine, Sandhu and Grewal) should be required to answer certain questions that were objected to and respond to certain undertakings that were refused. The cross-examinations and undertakings requested are in service to the Plaintiff City's application to confirm an Attachment Order originally granted *ex parte* against the Defendants.

[2] By way of background, I indicate the following:

- In this litigation, the Plaintiff City sues two of its former employees (Mr. Gosine and Mr. Sandhu), along with four of Mr. Sandhu's relatives and a corporation.
- The City says that the Defendants Gosine and Sandhu engaged in a fraudulent invoicing scheme through a corporate vehicle known as Capital Sign Rentals Inc (CSR), also a Defendant.
- The City alleges that it paid CSR invoices for temporary traffic control devices that were not supplied, and that Mr. Gosine and Mr. Sandhu conducted this scheme while they were City employees between 2015 and 2019.
- The Defendant Grewal, Mr. Sandhu's brother-in-law, is named as the sole director of CSR. The Defendant Rupinder Grewal is Mr. Sandhu's sister, the wife of Mr. Grewal, and also alleged to be an operating mind of CSR.
- The Defendants Kuljit Sandhu (Mr. Sandhu's wife) and Amrik Sandhu (Mr. Sandhu's father) are named as transferees in 2017 of an Edmonton residence, which transfer is said to be a fraudulent conveyance.
- The alleged fraud came to light in late 2019 by way of a whistleblower complaint. The complaint was investigated, primarily by a City auditor named Leslie Glasbeek, who concluded that through CSR, some of the Defendants defrauded the City of about $1.6 million.
- On June 24, 2020, prior to the issuance of the statement of claim, the City obtained a without notice combined Attachment Order/Mareva Injunction from Justice Gill with respect to assets belonging to the Defendants, consisting primarily of real property and bank accounts. I refer to the combined order as the Attachment Order for convenience.
- In furtherance of Justice Gill's order, the individual Defendants completed and swore Form 13s. Mr. Sandhu completed and swore a Form 14 on behalf of CSR.
- The Attachment Order was twice extended, more latterly by Justice Topolniski on July 24, 2020. In order to respond to the second extension application, three of the Defendants (Mr. Gosine, Mr. Sandhu and Mr. Grewal) swore affidavits attaching the Form 13's and Form 14 for CSR and briefly describing the effect the Attachment Order has had on them.
- I think it fair to say that none of the deponents intended to provide any response, in their respective affidavits, to the merits of the Attachment Order (except to the extent of deposing to sufficiency of assets). I describe each of the affidavits as minimalist in content.
- Nonetheless, the filing of the affidavits provided an opportunity to counsel for the City to examine each of the deponents with regard to the whole of the merits of the Attachment Order.

- The cross-examinations on affidavits of Mr. Gosine and Mr. Grewal took place on July 21, 2020. The cross-examination of Mr. Sandhu on his affidavit occurred on August 4, 2020.
- Although the affidavits are paltry and do not address the merits of the Attachment Order beyond disclosing assets, the cross-examinations in each case were extensive and far-ranging. For example, in the case of Mr. Gosine, his affidavit was a meagre six paragraphs covering in total less than one page but the cross-examination thereon resulted in some 88 pages of transcript and he gave some 37 undertakings, some of which were initially refused or taken under advisement. In the case of Mr. Sandhu, his less than two-page affidavit resulted in a cross-examination that stretches across 150 pages of transcript, along with some 62 undertakings, many of which were refused or taken under advisement.
- In fairness, each of the affidavits exhibited a Form 13, and in the case of Mr. Sandhu exhibited a Form 13 for himself along with those of his two immediate family members and the Form 14 for CSR. Therefore, the questioning on affidavit in each case delved into the content of those Forms.
- During each of the cross-examinations, there were objections to questions and undertakings refused either at the time or ultimately refused. It is these objections and refused undertakings that are the subject-matter of this application.
- An application to confirm the Attachment Order is scheduled to be heard by me October 15, 2020.
- The statement of claim was filed on July 15, 2020. The Defendants have not as yet filed a statement of defence and the litigants, of course, have not as yet exchanged production.

B. Scope of Cross-Examination on Affidavit

[3] I will next refer to some general principles regarding the scope of cross-examination on affidavit, followed by an application of those principles to the matter at hand, which is an application for confirmation of the Attachment Order, and which I will also refer to as the comeback hearing. In so doing, I will of necessity refer to some of the individual questions objected to and undertakings refused, although I will follow the practice of counsel and group the items into the same more manageable categories.

[4] Before I go too much further, I want to touch upon a point that Ms. Miller made in her rebuttal submissions. This point concerns whether the Court of Appeal in the recent case of ***Bank of Nova Scotia v Five-Star Motor***, 2020 ABCA 244 correctly quoted itself from ***Secure 2013 Group Inc v Tiger Calcium***, 2017 ABCA 316 in relation to what evidence is admissible in a comeback hearing. The Court states that para 33 of ***Five-Star Motor***:

> When an *ex parte* order is brought forward for review, the defendant has an unlimited opportunity to introduce new evidence. Having been denied an opportunity to make representations and produce evidence at the original *ex parte* application, there is no basis on which the defendant's ability to do so can be limited: ***Tiger Calcium*** at para. 171. Whether the original applicant should be

> allowed to introduce new evidence to support the Attachment Order is a matter of judicial discretion. It can potentially be unfair to allow the applicant to provide a justification for the Attachment Order that was not known or relied on at the *ex parte* stage of the proceedings. Allowing bootstrap evidence can have the effect of undermining the obligation of the *ex parte* applicant to make full and complete disclosure to the Court. The reviewing judge can, however, allow such evidence: ***Tiger Calcium*** at paras. 171-6.

[5] What the Court actually said at para 176 ***Tiger Calcium*** is:

> [176] Attempts by the original applicant to bootstrap the record by putting in additional evidence that was available at the time of the initial without notice application should be treated with caution. As noted earlier in these reasons, the duty to present all evidence, including available defences, means that such evidence should have formed part of the original application. That said, the "fruits of the search" have been considered on applications to review an *Anton Piller* Order: *Peters* at para 8. Whether that approach is inappropriate in the circumstances of a particular case is a matter to be considered by the chambers judge on such an application.

[6] So it seems that the word "not" inadvertently crept in to para 33 of ***Five-Star Motor***. The comment that directly follows regarding the *ex parte* applicant's obligation to make full and complete disclosure only makes sense if the word "not" is removed from the previous sentence.

[7] Paras 171 to 176 of ***Tiger Calcium*** deal with whether new evidence from the original applicant should be admitted. I leave it to the parties to decide for themselves whether they wish to argue this issue at the hearing on October 15, 2020.

[8] As a starting point, I note the authorities are agreed that the scope of cross-examination on affidavit is somewhat less than that of questioning on discovery. ***Merck Frosst Canada Inc v Canada (Minister of Health)***, 1997 CarswellNat 2661at paras 3-4, which was quoted with approval in ***Alberta Treasury Branches v Leahy***, 1999 ABQB 829, notes the five main differences:

- the person examined as a witness not a party,
- the answers given are evidence not admissions,
- absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
- production of documents can only be required on the same basis as for any other witness, i.e. if the witness has the custody or control of the document, and
- the rules of relevance are more limited.

[9] ***Leahy*** elaborates on the foregoing by cautioning (at para 23) that:

> Thus, cross-examination on affidavit should not be utilized as a gate into the field of examination for discovery; discovery has broader purposes and the concomitant broader scope of relevancy in that context is well settled.

[10] Although the five points from ***Merck Frost,*** as quoted in ***Leahy***, continue to be quoted as part of Alberta law, the third point relating to whether the witness should be required to inform himself or herself, is modified somewhat in what I refer to as the modern approach. This approach is described by Graesser J in ***Rozak Estate***, 2011 ABQB 239 at paras 36 to 37 where he adopts the reasoning of Master Prowse in ***Dow Chemical Canada Inc v Shell Chemicals Canada Ltd***, 2008 ABQB 671 at para 5 and states that the evidence of deponents who are cross-examined can be subject to undertakings. However, as Graesser J says in ***Rozak,*** again adopting Master Prowse in ***Dow Chemical*** at para 41:

> That being said, I am also in agreement with Master Prowse that the Court should be slow to direct that an affiant be directed to inform him or herself after the questioning and provide further answers, and that generally witnesses being questioned on an affidavit are treated differently (i.e. with greater restraint as to undertakings) than witnesses being questioned under Part 5 of the New Rules of Court.

[11] Master Prowse at para 5 of ***Dow Chemical*** concludes:

> After a review of the relevant case law, I have come to the conclusion that the Court should be reluctant to direct that undertakings be provided by a party proffering a deponent who is unable to answer all questions put to the deponent during a cross-examination. It should be more difficult to have undertakings directed on a cross-examination than at examinations for discovery. Undertakings should only be directed on a cross-examination where:
>
> > (a) the deponent has referred to information or documents in the affidavit, or could only have made the assertions contained in the affidavit after having reviewed the information or documents being sought, or
> >
> > (b) the undertakings relate to an important issue in the application, and the provision of such information:
> >
> > > (i) would not be overly onerous, and
> > >
> > > (ii) would likely significantly help the Court in the determination of the application.

[12] See also ***Alberta (Attorney General) v Alberta Power***, (2000) Ltd, 2018 ABQB 100 at paras 13-14.

[13] Further, with regard to scope, Justice Mason in ***Leahy*** adopted these comments:

> [24] Both ATB and WEM referred to ***Ed Miller Sales and Rentals Ltd.* v. *Caterpillar Tractor Co., et al.* ,** 1981 CanLII 1203 (AB QB), [1981] 4 W.W.R. 760 as a leading authority on the scope of cross-examination on affidavits under Rule 314. In that case, Justice Feehan reviewed a number of earlier authorities in this jurisdiction and provided a very helpful statement of the law defining the scope of cross-examination in this context. He noted that cross-examination can be searching, thorough and not bound strictly to the material set out in the four corners of the affidavit. However, Feehan J. also noted that such cross-

examination is limited to the issues arising from the affidavit as they relate to the motion to which the affidavit was filed in support.

[25] Feehan, J. went on to say at page 762:

> It must be kept in mind at all times that the reason for the examination on the affidavit is to assist the Court to decide the application, and questions and answers which would not assist the Court and would not be relevant to the determination of the issue on the motion nor question the truth of the statement contained in the affidavit or the credibility of the affiant and are obviously questions that should be put on examination for discovery should not be allowed (page 762).

[14] In addition, simply invoking the concept of credibility does not turn the deponent into an open book. Of necessity, while credibility is a legitimate foundation for questions, the scope of the credibility inquiry is limited to what is contained in the affidavit itself or, as Justice Borins says in ***Moyle v Palmerston Police Services Board***, (1995) 25 OR (3d) 127 (Div Ct) at page 133, quoted at paragraph 26 of ***Leahy***:

> However, to the extent that credibility is a relevant issue, all questions may be asked which tend to expose the errors, omissions, inconsistencies, exaggerations or improbabilities of the deponent's testimony contained in his or her affidavit. Such cross-examination is intended to challenge the truth or accuracy of a fact deposed to by removing the foundation for the fact. As such, it is intended to neutralize the probative value of the fact. If successful, the result may be to eliminate any contradictory evidence in respect to the fact, thereby making it possible for the motion judge to decide the application. However, a broader cross-examination designed to impeach the character of the witness, such as that discussed in the ***Rowbotham*** case, *supra*, would rarely, if ever, be proper as, unlike a trial judge, a motion judge is prevented from ruling on the credibility of a deponent. [emphasis added]

[15] See also ***Blough v Busy Music Inc***, 2018 ABQB 560 at paras 37-38.

[16] Drawing these authorities together, I summarize the applicable principles as follows:

1. The scope of cross-examination on affidavit is more restrictive than on questioning for discovery, given the different objectives and purposes of each. The former should not be used as an impermissible gateway to a foray in the latter.
2. Having said that, cross-examination on affidavit is not confined to the four corners of the affidavit. The test is relevancy and whether the information sought will help the Court to determine the application before it.
3. Credibility is a legitimate field of inquiry in an examination on affidavit, but is restricted to the credibility of statements in the affidavit.
4. A deponent may be required to inform himself or herself after cross-examination on affidavit by way of responding to undertakings in circumstances where:

- the deponent referred to or relied upon documents or other information in making the affidavit; or
- where the undertakings relate to an important issue in the application, would not be too onerous to respond to and would significantly assist the Court in its determination of the application.

[17] These principles, I say, are applicable to the scope of cross-examination on affidavit in totality, which would include determining whether questions objected to should be answered and whether undertakings refused should be fulfilled. It can be readily seen that the key concept underlying these principles is relevance and materiality to the application before the Court.

C. Claim for a "Money Judgment"

[18] The matter before the Court is whether the Attachment Order should be confirmed. The City continues to bear the onus of establishing that the Attachment Order is necessary. The fact that there was an earlier *ex parte* order does not diminish this burden: ***Five-Star Motor*** at para 31.

[19] According to section 17(2) of the ***Civil Enforcement Act***, this onus consists of satisfying the Court of these twin requirements, that:

- there is a reasonable likelihood that the claimant's claim against the defendant will be established, and
- there are reasonable grounds for believing that the defendant is dealing with the defendant's eligible property, or is likely to deal with that property,
    - other than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and
    - in a manner that would be likely to seriously hinder the claimant in the enforcement of the judgment against the defendant.

[20] From the wording of the statute, it can be readily ascertained that the purpose of this prejudgment remedy is to ensure that an eventually successful plaintiff has access to the assets of the defendant in order to enforce the judgment.

[21] Accordingly, the answers to the objected-to questions and responses to the refused undertakings must assist in addressing whether there is a reasonable likelihood that the claim will be established and whether there are reasonable grounds for believing that the Defendants in question are dissipating their property.

[22] The City contends that the disputed questions and undertakings relate to their action against the Defendants and speak to whether the Defendants are likely to dissipate their property. Accordingly, the questions and undertakings are proper and require responses.

[23] I turn next to what it is exactly before the Court in the comeback application. The first requirement speaks to a reasonable likelihood of establishing the claimant's claim. In section 16(2) of the ***CEA***, the word "claim" is defined as follows:

> "claim" means a claim that may result in a money judgment being granted if the claim is established…

[24] Here, the City's claim against the Defendants in question consists of its allegation of conducting a fraudulent invoicing scheme as particularized in paragraphs 20 through 23 of the statement of claim. Proof of that claim would lead to a "money judgment."

[25] Paragraphs 24 through 45 provide various legal characterizations of the same fraudulent scheme or the legal paths to liability for various of the Defendants. The concepts discussed include breach of fiduciary duties, conspiracy, breach of contract and inducing breach of contract, deceit, negligence, and unjust enrichment.

[26] Paragraphs 28 through 30 invoke trust concepts, in particular a constructive or resulting trust on the real property owned by some of the Defendants. The City says it is entitled to trace its misappropriated funds into their current form, which the City says is real property. The Supreme Court of Canada in ***Lac Minerals v International Corona Resources***, [1989] 2 SCR 574 at pp 673-4 described a constructive trust as a remedy for unjust enrichment.

[27] In terms of remedies, in addition to a money judgment of about $1.6 million, the City seeks a number of declarations, declaring that Mr. Sandhu and Mr. Gosine have breached their fiduciary duties, declaring the existence of a constructive or resulting trust, declaring the Defendants to be trustees *de son tort*, directing the Defendants to account, disgorge or provide restitution of misappropriated money and any profits derived therefrom.

[28] Paragraphs 46 to 50 speak of an alleged fraudulent conveyance of residential property from Mr. Sandhu and Kuljit Sandhu to themselves and Mr. Sandhu's father. While there is nothing wrong with having the fraudulent conveyance allegation litigated in the same action as the fraud action, it is a separate transaction. The City would only be entitled to set aside the transaction if it became a creditor Mr. Sandhu and Kuljit Sandhu.

[29] In short, the task at hand for the Court is to determine whether there is a reasonable likelihood that the City's claim will be established. By statutory definition, a claim is something that leads to a money judgment. There are several other aspects within the City's statement of claim that are related to the money judgment that the City hopes to get but they constitute other forms of relief that are declaratory in nature, not money judgments.

[30] Furthermore, allegations about breach of fiduciary duties, conspiracy, breach of contract and inducing breach of contract, deceit, negligence, piercing the corporate veil and unjust enrichment are differing legal characterizations of the same core complaint, which is the fraudulent invoicing scheme. If the City is ultimately successful in proving that the fraudulent invoicing scheme deprived it of some $1.6 million, then the City will obtain a money judgment. It may well be that it has a choice of legal paths to reach that outcome. That remains to be seen.

[31] In the event that money judgment is obtained, how the City then goes about collecting on that judgment is a separate question. It may be that equitable remedies are available that will allow the City to recover specific assets currently in the names of the Defendants. However, that will depend on the City obtaining declaratory relief in respect of those assets. That is also separate from a money judgment.

[32] If indeed $1.6 million was paid over in this fraudulent invoicing scheme, then "What happened to it?" is a perfectly legitimate question but one that is better left to questioning on discovery. The City incurred its loss and thereby suffered damages when it was deprived of its money. What happened to its money, and whether it was converted into assets now held by the Defendants, might be relevant for the application of these other legal doctrines referred to in the

statement of claim but is not necessary for the purposes of being satisfied that it is reasonably likely that the City will be able to establish that the fraudulent invoicing scheme occurred.

D. A Fishing Expedition?

[33] The City also says that the objected-to questions and refused undertakings address whether some of the Defendants are likely to dissipate their assets. They say that past conduct is predictive of future conduct. If any of these Defendants can be shown to have acted in a deceitful way in receiving and dissipating or concealing misappropriated funds, then there may be an indication that they will try to dissipate their assets in future in order to avoid payment of a judgment.

[34] These Defendants (Gosine, Sandhu and Grewal) say that it is demonstrated through the financial disclosure that the Defendants have assets, free and clear, more than necessary to satisfy a potential judgment. Further, there is no actual evidence before the Court suggesting that the Defendants have been or will be engaged in dissipation. Much of what the City now seeks as additional information in this application relates to assets and money coming into the hands of the Defendants, and scrutiny of personal financial transactions occurring over the course of the last five years as reflected in bank account statements and other personal transactions such as gifts.

[35] The Defendants say that to root through all of their personal financial transactions for the last five years on the off-chance that some indication of past nefarious dealings might be uncovered is merely a fishing expedition. Such demands for disclosure, the Defendants contend, expand well beyond the permitted scope of cross-examination on affidavit and, in effect, convert the questioning on affidavit into a far-ranging and unrestricted interrogation that more befits a questioning for discovery.

[36] Despite the phrase “fishing expedition” frequently being used in legal cases as a metaphor for unnecessary or unreasonable inquiries, I was unable to find any jurisprudential definition. Therefore, I will attempt one. To me, a fishing expedition consists of an inquiry that is without foundation other than conjecture or speculation. Other features of a fishing expedition would be dubious relevance, placing an onerous burden on the party examined and lack of demonstrated materiality – negative elements which align with those identified by Master Prowse in ***Dow Chemical***.

[37] I realize there is authority for the notion that if it is reasonably likely that the claim will be established under the first part of the test, that may support an inference that the Defendant is likely to deal with assets in a way that will satisfy the second part of the test: ***Five-Star Motors*** at para 18. Thus, it could be argued the fact of the fraudulent invoicing scheme itself, as particularized in the affidavit of Ms. Glasbeek, could form a foundation for detailed inquiries into the financial transactions of these Defendants during the last five years. However, that would be a case of putting the cart before the horse, since I have not as yet made a finding that it is reasonably likely that the claim will be established. That is a question for October 15, 2020.

[38] Stated otherwise, I should not conflate what I am doing in this decision with what I will be doing in the comeback hearing. I cannot use a conclusion I have not reached yet as a foundation for ordering additional disclosure.

[39] At this point, the Defendants have not yet filed a statement of defence. They have not conceded that any funds were misappropriated by them from the City, or at least they are not conceding any particular amount. They have not yet revealed what their defence is. To now force them to basically reveal and explain all of their personal financial transactions over the last five years past, in advance of filing a defence and before questioning for discovery, would be unfair to these Defendants. Applying the ***Dow Chemical*** framework, compelling this additional disclosure at this point:

- does not naturally arise from the content of the affidavits or even the Form 13s and 14, remembering that these Forms document current assets, not how the assets came into being;
- might, based only on conjecture thus far, relate to the issue of whether these Defendants are likely to dissipate their assets;
- would be overly onerous, not just in compiling the documents but in trying to remember or justify the purpose of every transaction in a bank account; and
- only might, based solely on conjecture thus far, assist the Court in determining the issue to some unknown degree.

[40] Given, at this stage, the significance of the requested information is based merely on speculation, the Court in ordering this disclosure would be sanctioning a fishing expedition.

[41] In the result, objected-to questions and refused undertakings relating to whether, through the instrumentality of CSR, a fraudulent invoicing scheme as described in the statement of claim was conducted, will be allowed. In particular, information about who was involved in this alleged scheme will be allowed. As well, the objected-to questions and refused undertakings relating to the clarification of what assets are disclosed in the Form 13's are allowed. Questions or undertakings requested about how these Defendants acquired the assets disclosed in their Forms or relating to personal financial or personal transactions will not be allowed as not currently relevant and as not having a foundation beyond speculation.

[42] As Defendants' counsel submitted at the hearing, an Attachment Order can be applied for and granted at any stage of the proceedings. If, at a later point in these proceedings, following production of documents or questioning for discovery (the latter having much wider scope), it may well be that some of the informational areas now sought to be explored will be demonstrated by expanded evidence to be relevant to either or both of the two branches of the test. This is not a case of "never say never". Rather, it is early days in this litigation, in fact pre-statement of defence, and the basis for seeking this information may well, at some point as the litigation matures, evolve from mere conjecture to a foundation of substance.

E. Specific Application of Principles

[43] I will now apply what I have generally concluded above to the specific objected-to questions and refused undertakings, as I said, using the same groupings as counsel:

CSR email account

[44] The email account relates to Objection # 1 and the third group of refused undertakings. Whether or not a fraudulent invoicing scheme actually occurred is a legitimate area of inquiry

that supports the first branch of the test in section 17(2), that is, whether there is a reasonable likelihood that the claim will be established.

[45] The Defendants have already agreed to produce or may have already produced whatever exists by way of bank records of CSR. I place the emails in more or less the same category, that is, the content of the emails may tend to show or not show that there was a fraudulent invoicing scheme in place. The producible emails are those relating to business between the City and CSR.

[46] To an extent, Mr. Sandhu has already answered the objected-to question by saying that the email account was shut down prior to June 2020. Counsel for the City seeks a more precise date. Since I have concluded that all of the emails of CSR relating to its dealings with the City ought to be produced, the answer to the objected-to question may become evident.

[47] Mr. Sandhu in his cross-examination was unable to say whether the Gmail account had been deleted or was merely inactive. I do not know if a deleted Gmail account can be recovered, but either way, an inquiry with Google (by consulting its policies) to that effect or simply going back into the Gmail account if it is still open, does not seem to me to be onerous.

[48] If the Gmail account has indeed been deleted and is not capable of restoration because of the passage of time, then that may well be the answer to this entire group of undertakings.

[49] To be clear, I am directing that Mr. Sandhu or someone on his behalf make inquiries with Google to determine whether the CSR Gmail account has been deleted or is merely inactive. If deleted, the inquiry will extend to determining whether that Gmail account can be restored. If the account is deleted but can be restored or is merely inactive, then all emails pertaining to business between CSR and the City should be produced. That would extend to any hardcopy versions that Mr. Sandhu might personally still have in his possession.

[50] If the Gmail account has been deleted and cannot be restored, then beyond the question of the date of deletion (if that can be ascertained), that will be the end of the matter. If that is the case, counsel can argue on October 15 as to whether I should draw any inference from the deletion.

[51] Based on the direction given, Mr. Sandhu may or may not be able to determine the date on which the account was deleted if it was deleted. If that date can be determined, it should be disclosed.

[52] Further, if the emails are still capable of production, then the date of the last email will indicate the date on which the Gmail account was last used.

[53] Finally, on this topic, I direct that emails within that Gmail account that do not pertain to business between CSR and the City or purely personal in nature do not have to be produced. If counsel for Mr. Sandhu has any doubt about a particular email in that regard, then both counsel and myself can discuss a process for sorting that out.

Objection number 2 & 4- 10

[54] In my view, all of these objections fall into the category of personal financial transactions of the Defendants relating to the acquisition of current assets and, without more, are not relevant or material at this stage.

Objection number 3

[55] This objection relates to a question about whether Mr. Gosine spoke to Mr. Grewal at all by telephone. The rationale cited by the City for wanting a response is Mr. Gosine's credibility, given a statement attributed to him during the interview with Ms. Glasbeek. The form of credibility in question is credibility generally and not credibility with regard to a statement made in Mr. Gosine's affidavit. Therefore, the question is disallowed.

Undertakings related to personal financial or other personal transactions

[56] For clarity, these undertakings consist of the following as described in para 59 of page 10 of the City's brief, being sub-paras a., b., f., g., h. and i.:

- undertakings relating to the payment of mortgages on properties owned by the Defendants;
- undertakings relating to the possible dissipation or location of other undisclosed assets (despite the description, these undertakings all relate to personal financial or other personal transactions involving mortgage applications and gifts that Mr. Gosine may have given to his partner);
- undertakings relating to historical bank account statements
- undertakings relating to payments to and from Kuljit and Sandhu's joint TD bank account
- undertakings relating to the purchase of the Legends condominium; and
- undertakings relating to income tax.

[57] In my view, the undertakings requested here, without more, do not have relevance and materiality at this stage and are based only on speculation. I decline to order compliance.

CSR's GST account

[58] The City's rationale for requesting information pertaining to the GST account is that this evidence would assist the Court in assessing whether CSR operated a legitimate business or not. With respect, that is a side question at this point. Whether CSR complied with all the statutory requirements of running a *bona fide* business does not assist the Court in determining whether CSR, along with some of the other Defendants, engaged in the fraudulent invoicing scheme alleged by the City. This group of undertakings is disallowed.

Undertakings relating to the creation and legal ownership of CSR

[59] In my view, this set of undertakings is relevant to the question of who was involved in the alleged fraudulent invoicing scheme and therefore is responsive to the first branch of the test. Accordingly, I direct that this group of undertakings be complied with.

Undertaking related to Mr. Mr. Grewal's Form 13

[60] This undertaking seeks to clarify what Mr. Grewal deposed to in his Form 13. The cross-examination was squarely on an issue contained in the affidavit, namely disclosure of Mr. Grewal's current assets. This information speaks to whether the Defendants currently own sufficient assets to satisfy any future judgement. Accordingly, I direct that this undertaking be complied with.

F. Conclusion

[61] I have now covered all of the disputed areas. If there is any difficulty in the implementation of the directions given, counsel are free to approach me at any time.

[62] Further, the matter of costs of this application will be dealt with at the comeback hearing on October 15. I ask Ms. Miller to prepare the order.

[63] Finally, there was no separate argument regarding whether the objected-to questions and refused undertakings are necessary to be answered for the purposes of a Mareva Injunction. Both sides were content to address their argument with regard only to the statutory elements found in section 17(2) of the ***CEA***. In the course of the hearing, it was accepted that obtaining an Attachment Order under the ***CEA*** attracts a lower standard of proof than obtaining the equitable remedy of Mareva Injunction. In view of this, my ruling above on the objected-to questions and refused undertakings apply equally to the Mareva Injunction aspect.

[64] This written decision is an almost *verbatim* transcription of the oral reasons for decision that I delivered on September 14, 2020. I have only added formatting, some additional words for clarity and proper legal citations. In any case, the official reasons of this Court are the oral reasons previously delivered.

Heard on the 10th day of September, 2020.
Dated at the City of Edmonton, Alberta this 17th day of September, 2020.

Douglas R. Mah
J.C.Q.B.A.

Appearances:

Lindsey E. Miller
Field LLP
for the Applicant

Robyn L. Graham
David A. Pope
Bryan and Company LLP
for the Respondents

Court of Queen's Bench of Alberta

Citation: Alberta (Attorney General) v Alberta Power (2000) Ltd, 2017 ABQB 195

Date: 20170321
Docket: 1601 12358
Registry: Calgary

Between:

The Attorney General of Alberta

Applicant

- and -

Alberta Power (2000) Ltd.
ATCO Power (2000) Ltd.
ATCO Power (2010) Ltd.
ATCO Power Canada Ltd.
ENMAX PPA Management Inc.
Balancing Pool
Alberta Utilities Commission

Respondents

Reasons for Decision
of the
Honourable Chief Justice
Neil Wittmann

Introduction

[1] Two applications have been brought arising out of the questioning on Affidavit of John Heaney, whose Affidavit was made in support of an Originating Application for Declaratory Relief and for Judicial Review, filed by the Attorney General of Alberta ("AG"), July 25th, 2016. One application has been brought to compel Heaney to provide undertaking answers to

undertakings objected to while being questioned by the Respondent, ENMAX PPA Management Inc ("ENMAX"). The other application is brought by the Respondent, Alberta Utilities Commission ("AUC") to compel Heaney to return, to answer questions objected to, during his questioning on his Affidavit.

Background

[2] The AG chose to proceed by way of an Originating Application for Declaratory Relief and Originating Application for Judicial Review in one action.

[3] The AG seeks a declaration that certain Power Purchase Arrangements ("PPAs") were not amended by an August 2000 letter and a subsequent regulation or Order in Council. The PPAs, s.4.3(j), with the amendment bolded below, state as follows:

> Notwithstanding any of the foregoing, to the extent that a Change in Law, after giving effect thereto and to this Section 4.3, could reasonably be expected to render continued performance by the Parties to this Arrangement for the balance of the Effective Term unprofitable **or more unprofitable** to the Buyer in respect of a Unit, having taken account of any compensation entitlement under Section 4.3(i) or any amount due from the Balancing Pool, then the Buyer may terminate this Arrangement and shall not be liable for, nor entitled to any Termination Payment.

[4] A number of PPAs were created pursuant to legislation in 1998 and continued thereafter in an to attempt to increase competition in Alberta's wholesale electricity market by inserting a Buyer between the Owner of a power generating unit and consumers. The Buyer's obligation was to pay the Owner its fixed and variable costs plus a reasonable return. The Balancing Pool, created under legislation, was to accept certain risks that could be transferred to it under some circumstances. A Buyer was allowed to terminate a PPA without a penalty as detailed in Clause 4.3(j) above.

[5] The Originating Notice alleges that ENMAX purported to terminate its PPA, effective January 1st, 2016, by writing the Balancing Pool and ATCO Power, as the Owner of the Battle River Generating Unit, on the basis that a Change in Law had occurred that could be expected to render continued performance "unprofitable or more unprofitable".

[6] The Balancing Pool confirmed ENMAX's entitlement to terminate the Battle River PPA, pursuant to Article 4.3(j), effective January 27th, 2016. There is a dispute between ENMAX and the Balancing Pool as to the effective date of the termination, January 1st, 2016 or January 27th, 2016. ENMAX has an application pending to determine this dispute. In addition, ENMAX has filed an application for Summary Dismissal of the AG's application. A number of other PPA Buyers that have since purported to terminate their PPA are detailed in the Originating Notice.

[7] Not only does the AG seek as a remedy a Declaration that section 4.3(j) of the PPA should read as if the words "or more unprofitable" are not included, but also the AG asks for a Declaration that the regulation purporting to amend section 4.3(j) by adding the words "or more unprofitable" is *ultra vires* and void *ab initio*. An Order in the nature of *certiorari* quashing the 2016 Balancing Pool Decision accepting ENMAX's termination of the Battle River PPA is sought, as well as an Order in the nature of *mandamus* referring the subject matter of that decision back to the Balancing Pool with directions.

[8] As detailed below, the Affidavit of Heaney, in support of the Originating Notice deposes to a number of events, statutes, regulations and information.

The Affidavit of John Heaney

[9] Heaney's Affidavit was sworn October 20th, 2016 and in it he swears that he is the Deputy Minister of the Executive Council of the Province of Alberta and as such has personal knowledge of the matters in his Affidavit except where he states a matter to be based on information and belief. Where that occurs, he states that he has disclosed the source of his information and believes it to be true. Much of his Affidavit concerns the circumstances surrounding the development of the PPAs. He references the governing legislation, namely the ***Electric Utilities Amendment Act***, 1998, SA 1998, c13 and the ***Electric Utilities Act***, SA 2003, cE-5.1. There is reference to the purpose of the PPAs that is inserting a marketer or buyer between the owner of a generating unit and the market into which the electricity is sold and that the Balancing Pool operates as a kind of "back stop" to the PPAs where certain risk can be transferred to the Balancing Pool under certain circumstances. The Affidavit also states that the PPAs were to be determined by an independent assessment team ("IAT") appointed by the Minister of Energy, that there was a public hearing process before the predecessor of the AUC, the Alberta Energy and Utilities Board ("AEUB") to consider the IAT's submission of the PPAs, a decision of the AEUB, August 30th, 1999, submissions, and an Order of the AEUB on May 8th, 2000 approving the PPAs.

[10] With respect to the Change in Law provisions, including s 4.3(j), Heaney deposes that s 4.3(j) was not altered by the AEUB in the public hearing process to form part of the PPAs approved by Order U2000-190 issued by the AEUB.

[11] The circumstances surrounding the amendment of the Change in Law provisions, according to the Heaney Affidavit, resulted from an inquiry as to the interpretation of s4.3(j), asking for clarification. The query included these statements:

> A literal interpretation of this clause could result in a Buyer being precluded from exercising its right to terminate the PPA pursuant to Section 4.3(j) because the Change in Law did not "render" the PPA "unprofitable" where the PPA was already "unprofitable" prior to the Change in Law.
>
> It is proposed that Section 4.3(j) of the PPAs be clarified in a manner that makes it clear the Buyer shall be entitled to terminate the PPA and shall not be liable for, nor entitled to any Termination Payment if a Change in Law renders the PPA unprofitable, <u>or more unprofitable.</u>

[12] The response from the IAT was as follows:

> The IAT has reviewed PPA Section 4.3(j) and confirms that the intention was to provide and [sic] exit provision with no right to or liability for a Termination Payment in the event that a Change in Law rendered a PPA unprofitable ***or more unprofitable***. This intention would be made more clear in the PPAs with the insertion of the following (in bold italics) at s 4.3(j) of the PPAs:
>
> > "Notwithstanding any of the foregoing, to the extent that a Change in Law, after giving effect thereto and to this Section 4.3, could reasonably be expected to render continued performance by the

> Parties to this Arrangement for the balance of the Effective Term unprofitable , ***or more unprofitable***, to the Buyer in respect of a Unit, having taken account of any compensation entitlement under Section 4.3(j) or any amount due from the Balance Pool, then the Buyer may terminate this Arrangement and shall not be liable for, nor entitled to any Termination Payment." [Emphasis in original]

[13] The Heaney Affidavit goes on to say that on August 1st, 2000, the day before the first auction commenced, the Chairman of the AEUB wrote the Minister of the Alberta Department of Resources Development stating that "The Board hereby amends Board Order U2000-190 to include the errata/clarifications", one of which was the amendments to the Change in Law provisions in Section 4.3(j). Thereafter, the Heaney Affidavit deposes that no public notice was given and no public hearings were held in respect of the AEUBs consideration of the amendments; that the August 2000 letter of the Chairman of the AEUB was not published as an Order of the AEUB or as an amendment to U2000-190; that Alberta Regulation 175/2000 was filed on August 18th, 2000, including AEUB Order U2000-190 and the August 2000 letter.

[14] Heaney also states that the August 2000 letter, included in Alberta Regulation 175/2000, was exempted or dispensed with publication by Alberta Regulation 201/2000.

[15] One of the paragraphs in the Heaney Affidavit, which is subject of much dispute, concerns when anyone in the Government of Alberta became aware of the August 2000 letter. Paragraph 47 of the Heaney Affidavit states that Heaney was not aware of the August 2000 letter prior to a meeting of March 14th, 2016 with the Executive Council, when a presentation was made by the Chief Executive Officer of the Balancing Pool who spoke about it. Heaney further states in paragraph 47 that he believes that no one in the Government of Alberta knew about the August 2000 letter prior to that time.

[16] There is also a section in the Heaney Affidavit entitled "Legislative Changes – Change in Law" which refers to the Specified Gas Emitters Regulation ("the SGER") coming into force July 2007 and the Specified Gas Emitters Amendment Regulation coming into force June 25th, 2015, as well as the June 30th, 2015 Ministerial Order 13/2015 issued pursuant to the *Climate Change and Emissions Management Act*, SA 2003, cC-16.7 which increased the cost of contributing to the Climate Change and Emissions Management Fund from $15 per tonne for 2015, to $20 per tonne for 2016, and $30 per tonne for 2017.

[17] In addition, the Heaney Affidavit states: "I am informed by the engineers and economists in the Ministry of Energy and verily believe that" the Battle River 5 PPA was unprofitable for ENMAX and would remain so from December 2015 to December 31st, 2020 even without the SGER Amendment and Ministerial Order 13/2015, and that the SGER Amendment and Ministerial Order 13/2015 "will not render ENMAX's performance of the Battle River PPA unprofitable for the said balance of the PPA term."

The Undertakings

[18] A number of undertakings were asked and responded to by the AG pursuant to an Order of this Court on or before January 31st, 2017. Those undertakings that remain outstanding and are not the subject of a claim for privilege or public interest immunity are set out below, according to the numbering used by the AG. The following undertakings remain outstanding in their entirety or are viewed by ENMAX as incomplete:

Undertaking #2 – To produce all written correspondence between the Balancing Pool and the Government of Alberta relating to the PPA since December 2015, and to provide particulars of any verbal communications between the Government of Alberta and the Balancing Pool related to the PPA since December 2015.

Undertaking #3- To advise what persons from Alberta Energy were advised by ENMAX that there was a potential for termination of the Battle River PPA, the dates in which that occurred, what persons were involved, and what was discussed.

Undertaking #5 – To produce any notes or documents which memorialize the meeting which occurred on December 12, 2015, between John Heaney, grant Sprague, Margaret McCuaig-Boyd, Richard Dicerni, Brian Topp, James Allen, and others

Undertaking #6 – To confirm how the government officials who attended the December 12, 2015, meeting had the knowledge that ENMAX had sent a termination notice with respect to Battle River

Undertaking #7 – To produce any further briefing notes written by James Allen

Undertaking #8 – To produce any and all records in the power, possession, or control of the Government of Alberta with respect to the discussions within the Government of Alberta relating to the ENMAX Battle River PPA termination, as well as the Keephills termination

Undertaking #10 – To check to see if there are any briefing materials prepared by the Balancing Pool with respect to the Battle River PPA termination for the Alberta department of energy or any other government department, and to produce them and any other records between the Balancing Pool and the Government of Alberta in connection with or relating to the Battle River PPA termination

Undertaking #11 – To produce a list of the in-person briefings John Heaney attended touching on PPAs from 2015 onward, including the dates of those meetings, who was in attendance, including their title, and what was discussed in any records in association with those in-person briefings

Undertaking #13 – To provide the names and titles of who John Heaney spoke to prior to swearing his affidavit that he alleges have knowledge of the PPAs, as well as what was discussed

[19] The AG says that it has answered to the best of its ability Undertakings 1, 3, 4, 5, 6 and 12. ENMAX disagrees. The reasons for the disagreement and the articulation of them will be dealt with later in these reasons, after a review of the applicable law.

The AUC Questions Objected To

[20] As stated earlier, there are two applications in this matter, one involving the sufficiency of the responses to undertakings and the other involving objections to questions posed by counsel for the AUC to Heaney.

[21] The disputed questions put by counsel for the AUC to Heaney, using the numbering system put forth in the brief of AUC, are listed below. Questions 18, 19 and 20 were excluded from consideration in this application and adjourned *sine die* at the request of counsel for AUC on the basis the AG may properly assert privilege.

[22] The objected to Questions of the AUC counsel are as follows:

1. 125:11 MR. MACK: In the course of your preparation of your affidavit, sir, did you have occasion to review the issues that gave rise to this legislation in 1998
2. 126:3 I'm asking him whether he has an understanding of what gave rise to these amendments from a policy perspective.
3. 133:15 MR. MACK: Let me put it another way. Is it your understanding as the - - appointed on behalf of the Government of Alberta that the Government pursued those objectives in the amendment to the Electric Utilities Act in 1998?
4. 136.6 Okay. And did you understand there was also an issue of finding a means by which the people of Alberta could get a benefit in terms of trapped or residual benefits.
5. 138:13 Did you understand from your review of the statute the role that the Independent Assessment Team had in the determination of the PPAs? MR. ARVAY: Well, again, you're asking him to interpret the statue. I object.
6. 139:14 Did you understand that under the statute in --- prior to determining, as you've now defined it, the statute prescribed a process of consultation for the IAT?
7. 140:26 MR. MACK: Okay, sir. The question was: Did you understand that the statute prescribed a process of consultation – MR. ARVAY: You see – MR. MACK: -- for the IAT.
8. 143:4MR. MACK: Do you have any information that the statute did not prescribe a consultation process for the IAT? MR. ARVAY: That's an interpretation of the statute.
9. 154:17Did you understand that the powers of the Board, the AEUB, at the time, in terms of review of the work of the IAT, were only described in Section 45.9(1)?
10. 155:14 Did you understand from your review of the statute that it empowered the IAT to include any other terms or conditions that it considered appropriate?

    MR. ARVAY: Object.

    MR. MACK: Did you understand in your historical review that the legislature of Alberta considered that it was giving substantial power to the IAT?

    Mr. ARVAY: I object.

11. 162:16 MR. MACK: Do you have a view on the role of the IAT –

MR. ARVAY: His - -

MR. MACK: - - what their role was?

MR. ARVAY: I object. Irrelevant.

MR. MACK: Do you understand what the role of the IAT was, sir?

MR. ARVAY: I object.

MR. MACK: You're not willing to give any evidence on your understanding of the role of the IAT?

A: As to your prior advice, Mr. Mack, I'm going to follow the advice of my counsel.

12. 167:11 I was simply asking you about the IAT. Are there any procedural processes imposed upon the IAT in its consulting process?

    MR. ARVAY: Outside the statute?

    MR. MACK: Let's start with do you see any in the statute?

    MR. ARVAY: That's not for him to opine on.

    MR. MACK: Are you saying that there's anything in the statute that suggests there are any rules imposed upon the IAT in its consultation process?

    MR. ARVAY: His interpretation of the statute is irrelevant. We can all read it.

13. 168:4 Q All Right. And that was written submissions followed by an oral hearing? **A** Fair enough. Yes. **Q** Okay. We'll call it that. Is that process described

    Mr. ARVAY: Well, it's not for him to tell you what's in the statute.

14. 169:12 A That is set out the AEUB's role and that which it might do post receiving the determined PPAs and report.

    Q MR. MACK: Did you intend to say that the AEUB had a limited power to review the PPAs?

    MR. ARVAY: Well, I don't know what – what he intended or not. The – whether the AEUB has a limited power to approve the PPA is set out in the statute, so I'm not going to let him answer that.

15. 170:12 Okay. The procedure that the Board followed, in terms of the two-step process that we've referred to, is that described in the statute?

    MR. ARVAY: That's a question of statutory interpretation. I object.

    MR. MACK: In your reading of the statute, sir, did you see the procedure adopted by the Board described in the statute?

    MR. ARVAY: I object.

16. 171:21Are you suggesting in these proceedings on behalf of the Attorney General of Alberta that there's a procedure set out in the statute, the Electric Utilities Amendment Act, which is attached to our affidavit?

    MR. ARVAY: He's - - the statute speaks for itself. I object to your question.

17. 204:13 Well, sir, you understand that the statute creates things called "arrangements"? Are you prepared to speak to what an arrangement is?

    MR. ARVAY: I'm not going to have him interpret the statute. (OBJECTION)

    MR. MACK: Do you understand that there is a difference between an arrangement and an agreement?

    MR. ARVAY: If the statute draws that distinction, Mr. Mack, then the statute draws that distinction. (OBJECTION)

    MR. MACK: Do you understand that the arrangements were prescribed by statute and not negotiated between the buyers and the sellers?

    MR. ARVAY: Whatever the statute says.

21. 195:4 And so we're clear, Query Number 8 in the attached responses to queries is where we see the addition of the words "or more unprofitable" to the PPA? MR. ARVAY: The document speaks for itself. MR. MACK: It sure does.

    Q MR. MACK: And so we can agree, then, that at least by July 31, 2000, the Government of Alberta was informed of that change initiated by the IAT?

    MR. ARVAY: Well, I don't think he can answer that question. He answered the question as to whether he had any information other than what is here, and he said he didn't.

22. 198:18 And there's no doubt reading this letter that Mr. McCrank, as chairman of the EUB, informed Mr. Cardinal of the matters described in the letter?

    MR. ARVAY: The letter speaks for itself.

23. 198:27 What we've seen in the materials is that certainly the minister of the department of resource development and Mr. Charach, the director of the electricity branch, had been informed by August 1, 2000, of the change-in-law provision and the addition of the words "or more unprofitable" to the PPA?

    MR. ARVAY: Well, the letter speaks for itself.

    MR. MACK: Are you prepared to agree or disagree with me on that? Do you have any information that the Government of Alberta, by its minister and by Mr. Charach, were not informed on or before August the 1st, 2000?

    MR. ARVAY: The letter speaks for itself as to exactly when they were informed and as to what. He wasn't there in 2000.

    MR. MACK: Do you have any information that they were not informed?

> A Beyond them being the addressees of this letter, Mr. Mack, I'm not really – can't really say a great deal more.

The Applicable Law – Questioning on Affidavit

[23] There are two aspects to the law in terms of questioning on Affidavits. The first is in relation to compelling a witness to answer or to perform undertakings. An undertaking is a promise to leave the oral questioning and gather information. The witness must inform him or herself as to a matter. In Alberta, undertaking answers are customarily provided in writing, whether the undertakings arise from Questioning for Discovery or Questioning on Affidavits. Objections taken to questions asked are customarily subject to an application by the questioner to bring the matter before a Master or Justice of the Court to determine whether the objection was appropriate in the circumstances or whether the witness should be compelled to answer. When the witness is compelled to answer, the practice is usually to have the witness brought back for further questioning. This is so whether the subject matter is Questioning on Discovery or Questioning on Affidavit.

[24] An often misunderstood or misused opportunity is Questioning on Affidavit. Hereafter, I will refer to the old term, Cross-Examination on the Affidavit instead of Questioning on the Affidavit, because in fact that is what it is, and the distinction is significant. It has been said that Questioning on Discovery or an Oral Examination for Discovery, as it used to be known, does not permit true cross-examination**:** ***Paquin v Gainers Inc.,*** 1989 ABCA 312. Rather, it permits questioning in the nature of cross-examination. Although the distinction may be seen as subtle, in practice it is not. True cross-examination can go to credibility. It has also been said that in Questioning on Discovery, questions solely related to the issue of credibility are impermissible**:** ***Drake v Overland and Southam Press Ltd.***, 1979 ABCA 304. Another key difference between Questioning on Discovery and Questioning on Affidavit is that the answers given to questions on an Affidavit form part of the Record before the Court in their entirety. Counsel cannot pick and choose which answer they like and put it before the Court, as "read-ins", which is the practice of tendering the evidence at a trial in respect of Questioning on Discovery.

[25] It was not seriously disputed that the leading cases on the scope of a cross-examination on affidavit in Alberta appear to have been summarized in ***Dow Chemical Canada Inc v Shell Chemicals Canada Ltd***, 2008 ABQB 671, a decision of Master J.T. Prowse, referred to in ***Rozak v Demas***, 2011 ABQB 239. Counsel also referred to ***Gill v 735458 Alberta Inc,*** 2003 ABQB 501, a decision of Master Funduk, as well as ***Ferring Inc v Richmond Pharmaceuticals Inc,*** [1996] OJ 621. As well, counsel put forward ***Marathon Canada Ltd v Enron Canada Corp***, 2006 ABQB 651; ***Alberta Treasury Branches v Leahy***, 1999 ABQB 829; ***PM&C Specialists Contractors Inc v Horton CBI Limited***, 2015 ABQB 248.

[26] From those cases, the following principles are worthy of note:

1. Questioning on Affidavit is cross-examination;
2. Questioning on Discovery is not cross-examination; it is in the nature of cross-examination.
3. The purpose and scope of questioning is distinct in each case;
4. The scope of cross-examination on Affidavit is framed by the motion that the Affidavit is made in support of, but when the motion itself is the entire law

suit, for example with an Originating Notice, permissible cross-examination on the Affidavit can "cover the whole lawsuit": ***Gill*** at para 35;

5. In addition, where the Affidavit puts forward any other matter expressly deposed to or exhibited to the Affidavit, cross-examination can extend to it "even if the matter deposed to is irrelevant to the relief claimed": ***Marathon Canada*** at para 6;

6. The principle of proportionality is a consideration and undertakings otherwise answerable had the deponent had the information available at oral questioning ought to be answered provided the provision of the information would not be "overly onerous" and would likely significantly help the Court in the determination of the application: ***Dow Chemical Canada Inc*** at para 5; ***Rozak Estate*** at para 41; ***PM&C Specialists Contractors*** at paras 9, 21.

Analysis: The Undertakings

[27] The AG's objections to providing answers to the Undertakings are, broadly:

(a) Relevance: the Heaney Affidavit does not refer to the requested documents or information, nor does it make any assertions based upon them; the answers to the Undertakings are not likely to significantly help the Court determine any issue in the Originating Application or in the ENMAX Applications;

(b) Proportionality: the breadth of the requested Undertakings renders them grossly disproportionate compared to the likely benefit in advancing the litigation; and

(c) Privilege: the documents or information requested are privileged.

(a) Relevance

[28] The AG's relevance objection is made in respect of all of the Undertakings, and it relies upon the proposition set out in ***Merck Frosst Canada Inc v Canada (Minister of Health)***, [1997] FCJ No 1847, at paras 7-8 (as cited by Mason J in ***Alberta Treasury Branches***, ***supra***, at para 27):

> Formal relevance is determined by reference to the issues of fact which separates the parties. In an action those issues are defined by the pleadings... cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.
>
> Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted. (I leave aside questions aimed at attacking the witness' personal credibility which are in a class by themselves).

[29] The AG acknowledges that there are two applications to which the Undertakings could relate: the Originating Application, and the ENMAX application for summary dismissal. It is the AG's submission that the timing of when senior officials in the Alberta government discovered the August 2000 letter is not relevant to either Application, and is only referenced in the

Originating Application and in the Heaney Affidavit because it provides context to how this proceeding came to fruition.

[30] The Heaney Affidavit is sworn in support of the Originating Application for Declaratory Relief and the Originating Application for Judicial Review and therefore falls within the proposition set out in ***Gill***: the scope of permissible cross-examination on the Affidavit is broad and may "cover the whole lawsuit".

[31] As ENMAX points out, paragraph 47 of the Heaney Affidavit is the culmination of a 5-paragraph section, entitled "The August 2000 Letter was Unknown to the Public and Government Officials at Key Material Times". In paragraph 47, Heaney states:

> My work with Executive Council made me privy to all but a few in-person briefings of cabinet ministers and all senior officials that touched on PPAs and related issues, as well as to materials prepared for those briefings or otherwise describing or relating to the PPAs. As a result, if a relevant cabinet minister or senior official in the Alberta government at any time before March 14, 2016 knew about the August 2000 Letter, then I verily believe I would have known about it as well. I was present at a March 14, 2016 meeting with the Chief Executive Officer of the Balancing Pool who spoke about the August 2000 Letter and Errata to the Deputy Minister of Executive Council, the Associate Deputy Minister of Executive Council, the Deputy Minister of Energy, the Premier's Chief of Staff and myself. I was not aware of the August 2000 Letter before that moment and, prior to this, had been operating on the understanding that section 4.3 required a Buyer to demonstrate a reasonable expectation of being rendered unprofitable by a change in law to terminate its PPA pursuant to that provision. Further, having discussed these matters with ministers and senior officials, namely, the Minister of Energy, Minister of Environment and Parks, the Attorney General, the Deputy Minister of Executive Council, the Associate Deputy Minister of Executive Council, and the Premier's Chief of Staff, I verily believe that each of those individuals also did not know about the August 2000 Letter until the March 14, 2016 meeting with the Chief Executive Officer of the Balancing Pool, and prior to that meeting had been operating under the same understanding regarding the import of section 4.3 of the PPAs that I had.

[32] Paragraph 47 of the Heaney Affidavit tracks closely with paragraph 57 of the Originating Application:

> The present Minister of Energy, Minister of Environment and Parks, and Attorney General only became aware of the August 2000 Letter after ENMAX sought to abandon its obligations under the PPA. The concept of the purported "or more unprofitable" amendment was not set out in written or verbal briefings from government officials from May 2015 and the first week of March 2016. The existence of the August 2000 Letter was not communicated to the ministers, by officials of the Government of Alberta or otherwise, until senior government officials first learned of its existence in a mid-March 2016 meeting with the Chief Executive Officer of the Balancing Pool.

[33] The assertions in paragraph 47 of the Heaney Affidavit are also pertinent to allegations in the ENMAX Application for Summary Dismissal, in particular paragraphs 5 and 40:

> 5. The fact that Ministers of the current government are alleged to somehow not have been aware of the AEUB August 2000 Order or the Alberta Regulations relating to the PPAs does not relieve Alberta, and especially the Attorney General, from abiding by a valid AEUB order, its own legislation and regulations. The Crown is presumed to know its own legislation.
>
> 40. It was patently obvious, and should have been obvious to the Crown, that imposing such onerous carbon taxes in a historically low electricity price environment would result in Buyers proceeding to exercise their right to terminate the PPAs without being liable for nor entitled to any termination payment.

[34] As noted above, cross-examination may extend to any matter expressly deposed to or exhibited to an Affidavit: ***Marathon Canada Ltd***, ***supra***, at para 6. Counsel for the AG contends, in effect, that this proposition is overly broad, and should be limited by the principle set out in ***Merck***; that is, the scope of cross-examination, and therefore undertakings, does not extend to a fact sworn to unless the existence or non-existence of that fact can assist in determining whether or not the remedy sought can be granted, or, as the issue is framed in ***Dow Chemical***, ***supra***, at para 5, unless the existence of non-existence of the fact "would likely significantly help the court in the determination of the application". Even if the scope of cross-examination is as limited as counsel for the AG contends, I would not conclude that this should operate to sustain the objections to the Undertakings raised by the AG here. I have some difficulty accepting the proposition that the government's knowledge, and the timing of that knowledge, of the August 2000 Letter and purported amendment to the PPAs is irrelevant to the issues in this Action when the AG itself has made that knowledge and timing a major focus of both its Originating Notice and the Heaney Affidavit.

[35] It is important to note that this Action is in its very early stages. Neither ENMAX nor the AUC have filed formal defences to the government's claims as set out in the Originating Application, although issues have been joined by way of the ENMAX Application for Summary Dismissal. In the circumstances, it is not yet clear what will separate determinative facts from "context". What is clear is that the government is placing its knowledge and the timing of its knowledge of the August 2000 Letter squarely in issue. I agree with ENMAX that it would be unfair to allow the AG to refuse to answer undertakings that directly relate to a central assertion in the Heaney Affidavit and in the Originating Application.

[36] I note that the AG has suggested that only documents that contradict the assertions contained in paragraph 47 of the Heaney Affidavit may be relevant and therefore producible in response to the Undertakings. I reject that proposition. A record is not relevant solely to the extent that it supports or contradicts aspects of the allegations in the action. A record or information is relevant and material if it could reasonably be expected to significantly help determine an issue or ascertain evidence to do so: ***Alberta Rules of Court***, R. 5.2(1).

(b) Proportionality

[37] The AG submits that proportionality must be determined in light of the likely benefit in helping the court determine the issues in the proceeding, and contends that Undertakings 7, 8, 11 and 13 are "especially egregious and seeks vast amounts of documents without any plausible connection to the issues in dispute". As noted above, it my conclusion that the knowledge on the part of the government of the August Letter and the purported amendments to the PPAs, and the timing thereof, are issues relevant to this proceeding. In support of the proposition that the

Undertakings are grossly disproportionate to the benefit of answering, the AG has filed the Affidavit of Sally Yee, paralegal at Farris, Vaughan, Wills & Murphy LLP, which is representing the AG in this Action. Ms. Yee states that five bankers boxes of materials have been received from Alberta Energy that were responsive to the Undertakings, containing approximately 75 bundles of documents, with each bundle having approximately 250 pages worth of material.

[38] As noted above, proportionality is an appropriate consideration, and undertakings otherwise answerable had the deponent had the information available at oral questioning ought to be answered provided the provision of the information would not be "overly onerous" and would likely significantly help the Court in the determination of the application. This Action raises significant issues concerning the regulation of the power industry in Alberta, the conduct of the government and the energy regulator, the validity of government regulations, and the impact of the government's climate change policies. Proportionality in the context of this litigation relates not only to the scale of the production sought by way of the Undertakings but the significance of the issues raised in the Action itself. Document production on the scale described in the Affidavit of Sally Yee is hardly unusual in the context of civil litigation in the energy industry. I am not satisfied by the evidence produced by the AG that responding to the Undertakings would be disproportionate.

(c) Privilege and Public Interest Immunity

[39] Any issues of privilege or public interest immunity may be dealt with by way of a further application if the parties are unable to agree on a disposition.

Analysis: The AUC Questions Objected To

[40] The AG objection in every case to the questions asked by counsel for the AUC is that the questions required Heaney to interpret the statute, and that Heaney's interpretation of the statute is irrelevant.

[41] The AG's objections to the AUC questions may be dealt with shortly. I disagree with counsel for the AG that, in asking Heaney what his understanding of a document or legislation is, the AUC is asking for him for his legal opinion. I agree that issues of law and the proper interpretation of the statutes in issue in this litigation are ultimately for a judge to decide. But it seems to me that this litigation may turn in part upon the various parties' understanding of the relevant legislation, including the PPAs. Whether the PPAs were or were not properly and effectively amended in the wake of the August 2000 Letter is ultimately for the trial judge to decide, but the government's own understanding of the relevant legislation, and the PPAs, has been placed in issue in the Originating Application and in the Heaney Affidavit. In my view it would be unfair to allow Heaney, who acknowledges that he speaks for the government of Alberta in this matter, to attest at length in his Affidavit to the government's understanding of the relevant legislation, the background policies, and the process for approving and amending the PPAs without allowing for cross-examination on those very points.

[42] Counsel for the AUC described the Heaney Affidavit in oral argument as an advocacy affidavit. That description is apt. It is appropriate that the scope of cross-examination on the Heaney Affidavit include canvassing all aspects of the advocacy.

Conclusion

[43] The AG is hereby directed to provide responses to Undertakings 2, 6, 7, 8, 9, 10, 11, 13 and 14, subject to any litigation or solicitor-client privilege or proper claim of public interest immunity by the AG.

[44] The AG is further directed to produce Mr. Heaney for further questioning in response to the objected to questions 1-17 and 21-23.

[45] Costs should follow the event. If the parties are unable to agree, they may seek a determination from the new case management justice.

Heard on the 8th day of February, 2017.
Dated at the City of Calgary, Alberta this 21st day of March, 2017.

Neil Wittmann
C.J.C.Q.B.A.

Appearances:
Joseph J. Arvay, QC
David Wu
for the Applicant

Bruce Mellett
Chris Petrucci
for the Respondent, ATCO

Robert Millard
for the Respondent TransAlta

Dalton McGrath, QC
Michael O'Brien
Geoff Adair
for the Respondent ENMAX

Bernette Ho
for the Respondent Balancing Pool

Perry Mack, QC
for the Respondent Alberta Utilities Commission

Court of Queen's Bench of Alberta

Citation: Marathon Canada Limited v. Enron Canada Corp., 2006 ABQB 651

Date: 20060906
Docket: 0201 07692
Registry: Calgary

Between:

Marathon Canada Limited

Plaintiff
(Defendant by Counterclaim)

- and -

Enron Canada Corp.

Defendant
(Plaintiff by Counterclaim)

- and -

Marathon Oil Company and
Husky Oil Operations Limited

Defendants by Counterclaim

Memorandum of Case Management Decision
of the
Honourable Mr. Justice Dennis G. Hart

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[1] This is an application to compel answers to eight questions and an undertaking request which were objected to by Respondents' counsel during cross-examination on two affidavits filed in support of his motion to amend pleadings.
[2] The questions are set forth in Schedule "A" to the Notice of Motion. Two of them, the 4th and 6th, were dealt with at the hearing of the application on August 30, 2006. I'll deal with the others in the order they appear on Schedule "A".

[3] Before doing so let me discuss, very briefly, two legal areas which bear upon the disputed questions. First, while it is beyond doubt that questions seeking communications between solicitor and client are absolutely protected by solicitor/client privilege, it is equally clear that facts independent of the communications themselves, even though touching upon a solicitor/client relationship, are not *per se* protected. While courts must be careful not to draw the direction too finely for fear of undermining the privilege, the distinction does exist.

[4] The second area deals with the scope of cross-examination on an affidavit filed in support of an interlocutory motion. Stevenson & Coté (2006) say this at p. 323:

> The possible scope of questions in cross-examination is very wide.[3] At trial, cross-examination is not confined to the topics asked in chief, and can cover anything relevant at trial (or to credibility).[4] Similarly, cross-examination on affidavit is <u>not</u> confined to the contents of the affidavit, and covers anything relevant to the pending motion (or to credibility).[5] If the merits of the suit are relevant to the motion (e.g. summary judgment or security for costs), then the scope of cross-examination is wide,[6] but examination cannot be carried on to an abusive or excessive extent, especially where the burden of answering undertakings would be grossly disproportionate to the likely benefit of an answer. That is reinforced by Rr. 4, 255, and 216.1.[8] <u>One can also cross-examine on anything in the affidavit, even if it is irrelevant.</u>[9]
>
> (<u>Emphasis added</u>)

[5] See also the Civil Procedure Enclyclopedia (C.P.E.) Chapter 45, Part 0.4, at page 45-32:

> **4. Irrelevant Matters in Affidavit to be Cross-Examined On**
>
> Even if the witness contends that a topic (such as **quantum**) is not yet relevant (e.g., because liability should be settled first), yet if he refers in his affidavit to matters relevant to it (e.g., his means), he may be cross-examined on that.[1] The deponent can be questioned on everything in his affidavit (and collateral matters arising therefrom), even if some of them are really irrelevant.[2] There are **dicta** applying the rule on splitting discovery in an examination on affidavit, in the **Wofford** case.[3] If the plaintiff resists a motion for security for costs by filing an affidavit saying he has enough assets, the defendant may cross-examine him on his financial situation.[4] If the affidavit was for garnishment before judgment, the defendant's assets and liabilities are relevant. If a document

> is provided (rightly or wrongly) in fulfilment of an undertaking, questions may be asked about the document.[5] And one may cross-examine on a second affidavit exhibited to the one filed, despite allegations of irrelevance.[6]

I accept these passages as an accurate statement of the current law of this province as regards the scope of cross-examination on an affidavit.

[6] Thus, while I agree generally with Mr. Lebo that the scope of relevance for cross-examination on Mr. Mowrey's affidavits is defined by the relief claimed in the associated Notice of Motion (the proposed amendments to the pleadings and whether or not they should be allowed), I also agree with Mr. McGrath that cross-examination can extend to anything expressly contained in or exhibited to the affidavits, even if irrelevant to that relief.

[7] The first question asks whether legal advice was obtained in connection with the preparation of the November 27, 2001 letter. This letter is exhibited to the August 3, 2006 affidavit. I find this to be a proper question and direct that it be answered.

[8] The second and third questions refer to a letter which is not exhibited to either affidavit. It seeks the affiant's interpretation of this letter which was authored not by Mowrey or Marathon, but by Enron. These are not proper questions and the objections are upheld.

[9] The fifth question again deals with a letter which is not exhibited to either affidavit. This is not a proper question and the objection is upheld.

[10] The seventh question deals directly with a letter exhibited to the affidavit of August 3, 2006. It is a proper question and I direct that it be answered.

[11] The eighth question and Undertaking No. 1 again relate to a letter which was not exhibited or referred to in either affidavit. Both the question and requested undertaking are improper and need not be answered.

Heard on the 30th day of August, 2006.
Dated at the City of Calgary, Alberta this 6th day of September, 2006.

Dennis G. Hart
J.C.Q.B.A.

Appearances:

J.L. Lebo, Q.C. / Don Dear
for the Plaintiff

Dalton W. McGrath / Michael O'Brien
for the Defendant