COURT FILE NUMBER	1601-01675
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF ARGENT ENERGY TRUST, ARGENT ENERGY (CANADA) HOLDINGS INC. and ARGENT ENERGY (US) HOLDINGS INC.
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS (RESPONSE TO APPLICATION OF HE AD HOC COMMITTEE REGARDING OBJECTIONS TO QUESTIONS AND UNDERTAKINGS)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855-2nd Street SW Calgary, Alberta T2P 4K7 Attention: Kelsey Meyer / Sean Zweig Telephone No.: 403-298-3323 / 416-777-3254 Fax No.: 403-265-7219 Client File No.: 68859-14

Special Chambers Application Scheduled for the 25th day of April, 2016
before The Honourable Mr. Justice D. B. Nixon

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I. INTRODUCTION

1. This Brief is in response to the application of the Ad Hoc Committee, delivered to counsel for Argent Energy Trust (the "Trust"), Argent Energy (Canada) Holdings Inc. ("Argent Canada") and Argent Energy (US) Holdings Inc. ("Argent US", and together with the Trust and Argent Canada, "Argent"), at 9:01 p.m. yesterday evening, returnable at 10:00 a.m. this morning, for production of information and documents. Many of the documents and much of the information that the Ad Hoc Committee requests in its application has actually never been requested of Argent.

2. Capitalized terms not otherwise defined herein shall have the meaning given them in the Affidavits sworn in these proceedings.

3. On April 21 and 22, 2016, at the request of counsel for the Ad Hoc Committee, the following individuals were Questioned:

(a) Sean Bovingdon, President and CFO of Argent, on his three Affidavits sworn February 16, 2016 (the "Bovingdon Affidavit No. 1"), February 29, 2016 (the "Bovingdon Affidavit No. 2") and April 14, 2016 (the "Bovingdon Affidavit No. 3");

(b) Harrison Williams of Oil and Gas Asset Clearinghouse, LLC ("OGAC"), on his Affidavit sworn February 29, 2016, and on his Confidential Affidavit No. 2 sworn on April 14, 2016; and

(c) Ross Robertson of Durham Capital. Mr. Robertson voluntarily attended Questioning, akin to a Questioning pursuant to Rule 6.8 of the Alberta *Rules of Court*, in the circumstances where Mr. Robertson has not sworn an Affidavit in these proceedings, is not in any way a party to these proceedings, and was never served with a Notice to Attend or conduct money as required pursuant to Rule 6.8 and the related Alberta *Rules of Court.*

4. Counsel for the Ad Hoc Committee made a number of overly broad, irrelevant, and overly onerous requests for undertakings, none of which will help this Honourable Court in the determination of the Application that was originally scheduled before it to be heard on

April 25, 2016, and which is now scheduled to proceed on May 4 and 5, 2016. Further, the Ad Hoc Committee has now brought an application seeking: (1) responses to information and/or documents that the Ad Hoc Committee originally sought by letter dated February 19, 2016, and which Argent responded to on February 23, 2016 (yet only now does the Ad Hoc Committee apply for production of those responses); and (2) an Order compelling Argent to respond to requests for information and documentation that have never been requested from Argent.

5. The Ad Hoc Committee's application is a haphazard fishing expedition in an attempt to further delay Argent's application for, *inter alia*, approval of the Transaction with BXP and the vesting of the assets purchased by BXP from Argent US. Argent seeks costs, on a solicitor-client basis or such other basis as this Honourable Court determines appropriate, as against the Ad Hoc Committee.

6. Despite the fact that the transcripts from these examinations have been available since April 22nd, and despite counsel for Argent requesting on Sunday April 24, 2016 at 11:18 a.m. that counsel for the Ad Hoc Committee advise as to what "procedural matters" he intended to speak to the following morning (having received advice from counsel for the Ad Hoc Committee in that regard on Friday April 22nd), counsel for the Ad Hoc Committee did not provide any advice in that regard until it served its application at 9:01 p.m. last night.

II. STATEMENT OF FACTS

A. The Sale Solicitation Process has already been approved by the Courts and by the Monitor

7. The Application that is before the Court to which these Questionings on Affidavits and the Questioning of Mr. Robertson pursuant to Rule 6.8 relate seek, *inter alia*, (1) a sale approval and vesting Order, with respect to a Transaction between Argent US and BXP as a result of a court-approved sale solicitation process; (2) an interim distribution Order, with respect to the net proceeds of sale from the Transaction; (3) a sealing Order with respect to confidential exhibits to the Bovingdon Affidavit No. 3 and the Williams Affidavit No. 2; and (4) an extension of the stay of proceedings to June 30, 2016 (the "Application").

8. As is set out in Argent's brief filed in support of the Application on April 21, 2016, section 36 of the *Companies' Creditors Arrangement Act* (the "CCAA") sets out the factors to be considered by the Court in deciding whether to grant the authorization for the sale of assets by a debtor company, which factors include (but are not limited to):

(a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) Whether the monitor approved the process leading to the proposed sale or disposition.

9. It is important to note that in the present case, this Honourable Court has already approved the Sale Solicitation Process, which is the process leading to the proposed sale, twice, through the granting of the Initial Order on February 17, 2016 and the granting of the Amended and Restated Initial Order (and corresponding dismissal of the Ad Hoc Committee's objections to the Sale Solicitation Process) on March 9, 2016. Further, the US Bankruptcy Court has also recognized the Amended and Restated Initial Order and specifically approved the Sale Solicitation Process. Finally, the Monitor also approved the Sale Solicitation Process, and is satisfied that the Sale Solicitation Process was carried out as set out in those Orders. Clearly, where this Honourable Court and the US Bankruptcy Court have already approved the Sale Solicitation Process three separate times, and the Monitor has approved the Sale Solicitation Process itself and the carrying out of the same, the attempts by the Ad Hoc Committee to challenge the Sale Solicitation Process itself is *res judicata*. Further, the fact that the Ad Hoc Committee refuses to accept this demonstrates its apparent contempt for, and abuse of the process of, this Honourable Court and that of the US Bankruptcy Court.

Initial Order granted February 17, 2016.

Amended and Restated Initial Order granted March 9, 2016.

US Bankruptcy Court Order granted March 11, 2016, attached as Exhibit "3" to the Bovingdon Affidavit No. 3.

B. The Ad Hoc Committee has purposely delayed so as to jeopardize the approval of the Transaction

10. On February 19, 2016, the Ad Hoc Committee wrote to counsel for Argent to request, among other things, responses to a number of information and documentary requests. Counsel for Argent responded by letter dated February 23, 2016, providing the requested information or documents where appropriate, but refusing requests for information or documents where the requests were overly broad, unduly onerous, irrelevant, immaterial, or otherwise objectionable, as set out in the February 23 letter. All of this occurred before the "comeback hearing", wherein the Ad Hoc Committee challenged the Initial Order, on March 8 and 9, 2016. However, despite that, the Ad Hoc Committee waited until 9:01 pm on April 24, 2016 (the night before this hearing) to bring an application to compel responses to those information and document requests. This is a blatant attempt to delay the Application, and to jeopardize the closing of the Transaction as a result.

C. The Ad Hoc Committee has never requested some of the Information / Documents it now seeks to compel, on 11 hours' notice

11. In a further blatant disregard for the Alberta *Rules of Court*, the Ad Hoc Committee is applying to compel documents that it has never actually requested in advance of serving its application at 9:01 pm on April 24, 2016 (stated therein to be returnable on April 25, 2016).

12. The Ad Hoc Committee has had ample opportunity to cross-examine Mr. Bovingdon and Mr. Williams on their Affidavits and to serve a Notice of Appointment to Question Ross Robertson of Durham Capital. All of the information that it now requests by way of its application could have been requested by examining the affiants or Mr. Robertson, months ago. While the Bovingdon Affidavit No. 3 and the Williams Confidential Affidavit No. 2 were made available to the Ad Hoc Committee on April 15, 2016[1] (3 days ahead of the filing deadline pursuant to the Commercial Practice Note), all other Affidavit evidence, which the Ad Hoc Committee examined on, has been available since February, and Argent has never received a request for Questioning on those Affidavits until last week.

[1] With respect to the confidential materials in those Affidavits, Argent's counsel offered to provide those to the Ad Hoc Committee on April 15, 2016, on the very same terms of non-disclosure that were ultimately agreed to by the Ad Hoc Committee on April 17, 2016, at which time the confidential materials were provided within 22 minutes.

13. In an apparent effort to improve upon its Questionings on April 21 and 22, 2016, wherein counsel for the Ad Hoc Committee failed to request much of the information that it now seeks by way of its court application, the Ad Hoc Committee now applies for a Court Order requiring Argent to respond to a broad list of documentary requests, many of which were never requested during the Questionings or previous to that. With respect, the Ad Hoc Committee has abused the process of this Honourable Court in conducting itself in this manner.

14. Further, the Ad Hoc Committee has known of the involvement of Durham Capital since long before these CCAA proceedings were commenced. Despite that, the Ad Hoc Committee made no request for the name of the Durham Capital representative responsible for the Argent mandate until last week, nor did it serve that individual with a Notice of Appointment or conduct money as required in accordance with Rule 6.8 of the *Alberta Rules of Court* regarding Questioning of a non-party witness. Despite that, the Durham Capital representative, Ross Robertson, voluntarily agreed to be questioned by the Ad Hoc Committee on April 22, 2016, and attended on that date for the same. There is no mechanism under the *Alberta Rules of Court* where Mr. Robertson can be compelled to give an undertaking in those circumstances.

III. ARGUMENT

A. The Law with Respect to Undertaking Requests in the context of Questioning on Affidavits

15. While the Ad Hoc Committee's application does not actually seek to compel responses to undertakings (instead, it seeks documents that it has never actually requested), Argent submits that the law with respect to the scope of undertakings that may be requested in the context of a Questioning on an affidavit is relevant.

16. In Alberta, the leading case regarding compelling undertakings during a cross-examination is *Dow Chemicals Canada Inc. v. Shell Chemicals Canada Ltd.* ["*Dow*"]. In that case, Master Prowse did a comprehensive review of Alberta jurisprudence on this topic and concluded that during a cross-examination on an affidavit, an undertaking should only be granted 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 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 not likely significantly help the court in the determination of the application.

- *Dow Chemicals Canada Inc. v. Shell Chemicals Canada Ltd.*, 2008 ABQB 671 at para. 37 ["*Dow*"]. **[TAB 1]**

17. The most recent case to interpret *Dow* was the decision of Michalyshyn, J. in *PM&C Specialist Contractors Inc. v. Horton CBI Ltd.* ["*HCBI*"], where the Court considered whether or not to compel undertakings requested during an examination on an affidavit sworn in support of the defendant HCBI's application for security for costs. The Court considered the decision of Graesser, J. in *Rozak Estate v. Demas*, ["*Rozak*"] which considered and followed the test set out in *Dow,* as stated above. In *HCBI*, the Court specifically referenced paras. 41 and 42 of *Rozak* where Justice Graesser stated:

> 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.
>
> To be clear, therefore, I agree with the Master that there is no general prohibition against asking affiants for undertakings on questioning on their affidavits, but that the propriety of any undertaking sought is governed by the tests set out above.

- *PM&C Specialist Contractors Inc. v. Horton CBI Ltd.*, 2015 ABQB 248 ["*HCBI*"] at para. 6. **[TAB 2]**

- *Rozak Estate v. Demas*, 2011 ABQB 239 at paras. 41-42. **[TAB 3]**

18. Michalyshyn, J. then considered the decision in *Medicine Shoppe Canada Inc. v. Devchand*, in which Topolniski, J. considered *Dow* and incorporated the concept of proportionality into the test. Specifically, Topolniski, J., stated that:

> While the scope of questioning is not restricted to the four corners of an affidavit (*Dow Chemical*) there are limited concerning relevance and materiality. This is especially germane where the burden of answering the questions or providing undertakings would be grossly disproportionate to the benefit of the answers (Rule 1.2(4); W.A. Stevenson and JE Cote, Civil Procedure Encyclopedia (Edmonton: Juriliber, 2003) at 6-53).

- *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375 at para. 21. **[TAB 4]**

19. Ultimately, Michalyshyn, J. incorporated the element of proportionality identified in *Medicine Shoppe* into the *Dow* test stating:

> In the end, I am mindful of the test in *Dow Chemical* – that the undertakings relate to an important issue in the application, not be overly onerous to produce and likely significantly help the court determine the application. I am obliged however also to consider those authorities which put the question in somewhat different language: that when examining on affidavit the court should ask if the burden of answering undertakings is grossly disproportionate to the likely benefit of the answer; and that if the merits of the suit are relevant to the application, the scope of cross-examination – and to that I would add the scope of undertakings which otherwise meet the Dow test – is wide.

- *HCBI, supra* at para. 10.

20. Based on Michalyshyn, J.'s reasons in *HCBI*, the two part test from *Dow* still applies, but an element of proportionality has been read into the second part of the test. As such, the test is that an undertaking should only be granted 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 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 (including whether the efforts to produce the undertakings would be grossly disproportionate to the likely benefit of the answers); and

(ii) Would likely significantly help the court in the determination of the application.

21. Rule 5.25 addresses when a question or undertaking may be objected to:

Appropriate questions and objections

5.25(1) During questioning, a person is required to answer only

(a) relevant and material questions, and

(b) questions in respect of which an objection is not upheld under subrule (2).

(2) A party or a witness being questioned may object to an oral or written question during questioning but only for one or more of the following reasons:

(a) privilege;

(b) the question is not relevant and material;

(c) the question is unreasonable or unnecessary;

(d) any other ground recognized at law.

- *Alberta Rules of Court*, r 5.25.

22. Finally, Argent also references Rule 5.2 as to when a document is relevant and material:

When something is relevant and material

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

- *Alberta Rules of Court*, r 5.2.

B. <u>The Law with respect to the requests for communications between Argent and each of PwC, FTI and the Syndicate</u>

23. In *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, the Ontario Superior Court of Justice upheld a Master's decision dismissing the plaintiff's motion for disclosure of communications between a distressed company and its prospective monitor under the CCAA, having found that the communications were covered by solicitor-client privilege. In that case, the Master had found that:

(a) E&Y, as the financial advisor to GMCL worked as part of a team of professional advisors along with legal counsel towards two possible outcomes – restructuring and CCAA filing.

(b) The professional advisors worked seamlessly and collaboratively with the goal to maximize the success of the restructuring option.

(c) E&Y had a much broader role to play as GMCL's financial advisor than simply preparing GMCL to file under the CCAA.

(d) A monitor is commonly retained first as a financial advisor. A monitor's early involvement in a matter is invaluable as the monitor cannot be expected to come up with statutorily required cash flow forecasts if retained at the last minute.

(e) E&Y's role as the prospective monitor made it essential to the legal advice provided to GMCL.

(f) GMCL and E&Y understood and expected all communications to be privileged and confidential. A confidentiality agreement was entered into, highlighting GMCL's expectation in that regard.

(g) Sharing confidential information with professional advisors is normal practice in the industry.

(h) GMCL expected their communications to remain confidential and no waiver was intended.

- *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONSC 4894, dismissing the appeal in *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONSC 1338 ("*Trillium*"). **[TAB 5]**

24. With respect to the Ad Hoc Committee's requests for production of all communications between Argent and FTI Canada Consulting Inc. (now the Monitor in these proceedings, and previously engaged by Argent before it became the Monitor), as well as all communications between Argent and PricewaterhouseCoopers Inc. ("PWC"), a financial advisor engaged by Argent prior to the CCAA filing on February 17, 2016, these documents are solicitor-client privileged and should not be produced.

25. Further, the decision in *Trillium* addresses common interest privilege between a distressed debtor and its source of potential funding. In that case, the sole sources of potential funding for the debtor were the Governments of Canada and Ontario. As stated at paragraph 13 of the decision:

> The sole sources of potential funding for GMCL's restructuring were the governments of Canada and Ontario. An essential component of GMCL's restructuring was the successful negotiation of conditions and agreements under which these governments would invest in GMCL by June 1, 2009. During the first five months of 2009, GMCL worked with both governments to develop a restructuring plan. GMCL shared privileged information that was relevant to the class proceeding with both governments during the course of their negotiations. GMCL claimed that it did not waive privilege by disclosing its
>
> privileged material to governments since the disclosure was made to further the parties' common interest. The Master accepted this submission and agreed that the common interest exception applied to the disclosure of privileged communications between GMCL and the governments of Canada and Ontario.
>
> ...

The Master found that both the governments and the debtor company wanted the same outcome – the survival of the debtor – and therefore that they had a common interest in developing a restructuring plan. That decision was upheld by the Ontario Superior Court of Justice.

- *Trillium, supra*, at paras. 13 and 15 of 2014 ONSC 4894 **[TAB 5]**

26. In the present case, Argent is in the same situation with the Syndicate, its sole source of interim financing. As such, the communications between Argent and the Syndicate are subject to common interest privilege.

C. Argent's Response to the Ad Hoc Committee's Requests

27. Argent responds specifically to the various document requests of the Ad Hoc Committee here:

	Document(s) Requested	**Argent Response**
1.	All e-mails, correspondence, communications and engagement letters between the Applicants and PwC or FTI between November 19, 2015 and February 17, 2016.	The engagement letter between Argent and PwC has been provided in response to an undertaking given by Mr. Bovingdon. Otherwise, these document requests are solicitor-client privileged: *Trillium, supra.* Further, the documents requested are irrelevant, overly broad, unreasonable, unnecessary, and is unlikely to significantly help the court in the determination of the application. If the Ad Hoc Committee wants to know what Argent considered in determining to proceed with these CCAA proceedings, its counsel could have asked Sean Bovingdon about that on cross-examination.
2.	All e-mails, correspondence and communications between the Applicants and PwC or FTI between February 17, 2016 and the acceptance of the successful bid in the Sales Process.	There are no communications between Argent and PwC during the time frame requested. Further, the request is overly broad, is not relevant or material, reasonable, or necessary, and is unlikely to significantly help the court in the determination of the application.
3.	All e-mails, correspondence and communications between the Applicants (including its advisors) and the Syndicate (including its advisors) between November 19, 2015 and February 17, 2016.	These communications are subject to common interest privilege and therefore not producible: *Trillium, supra.* Further, the request is overly broad, is not relevant or material, reasonable, or necessary, and is unlikely to significantly help the court in the determination of the application.
4.	All e-mails, correspondence and communications between the Applicants (including their advisors) and the Syndicate (including its	The request is overly broad, is not relevant or material, reasonable, or necessary, and is unlikely to significantly help the court in the determination of the application.

	advisors) between February 17, 2016 and the acceptance of the successful bid in the Sales Process.	
5.	All e-mails, correspondence and communications between the Applicants (including their advisors) and Oil and Gas Asset Clearinghouse, LLC.	The request is overly broad, is not relevant or material, reasonable, or necessary, and is unlikely to significantly help the court in the determination of the application. The Sale Solicitation Process has been approved by this Honourable Court on two separate occasions, and the US Bankruptcy Court has approved it as well.
6.	All e-mails, correspondence and communications between the Applicants (including their advisors) and Durham Capital Canada Corporation	The Ad Hoc Committee had the opportunity to ask questions of both Argent and a representative of Durham Capital, and has asked about communications between them. The request is overly broad, is not relevant or material, reasonable, or necessary, and is unlikely to significantly help the court in the determination of the application.
7.	All minutes and notes, whether approved or not, of formal and informal meetings of the boards of directors of any Applicant in the CCAA proceedings from December 2015 until March 24, 2016, regarding the Applicants' restructuring initiatives and efforts.	All approved board meeting minutes have already been produced. There are no notes of "informal meetings". Further, Argent responded to an undertaking given by Mr. Bovingdon to produce all documents provided to the Board; those documents have been provided.
8.	Copies of all proposals, bids, term sheets, letters of intent or other written documentation of any kind ("Documentation") received by the Applicants or their advisors in the past 12 months with respect to a sale, refinancing, investment or other restructuring proposal in respect of the Applicants, including, without limitation, copies of all Documentation received by Durham from potential investors, including the names of entities that have	The Ad Hoc Committee had the opportunity to request information from both Argent and the representative of Durham Capital. Proposals, bids, term sheets and letters of intent have already been provided, either by way of response to undertakings given by Mr. Bovingdon, or as marked as Exhibits during that questioning. The names of potential investors that entered into non-disclosure or confidentiality agreements are irrelevant; counsel for the Ad Hoc Committee could have asked about the nature of those potential investors (which was suggested by counsel for Argent during the Questioning), however, counsel for the Ad Hoc Committee chose not to do so. Further, the request is overly broad, is not relevant or material, reasonable, or necessary, and is unlikely to

	entered into non-disclosure or confidentiality agreements with Durham during that time.	significantly help the court in the determination of the application.
9.	All documents and correspondence exchanged between the Applicants and their advisors and the Syndicate regarding the negotiation of the Interim Financing.	This request is duplicative of #3, above. More importantly, the Interim Financing has already been approved by this Honourable Court, both in the Initial Order and, upon consideration of objections by the Ad Hoc Committee at the comeback hearing, in the Amended & Restated Initial Order. The request is overly broad, is not relevant or material, reasonable, or necessary, and is unlikely to significantly help the court in the determination of the application.

28. As such, Argent objects to the Ad Hoc Committee's application for documentation requests, and submits that the application should be dismissed in its entirety.

IV. RELIEF SOUGHT

29. Argent respectfully seeks the following Orders:

(a) An Order dismissing the application of the Ad Hoc Committee for production of responses to undertakings and information requests (a number of which were never actually requested); and

(b) Costs, on a solicitor-client basis or such other basis as this Honourable Court deems appropriate, as against the Ad Hoc Committee, which costs shall not in any way form part of the Ad Hoc Committee First Charge or the Ad Hoc Committee Second Charge, as defined in the Amended and Restated Initial Order.

Calgary, Alberta
April 24, 2016

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Estimated Time for Argument: 20 minutes

BENNETT JONES LLP

Per: _____

Kelsey Meyer / Sean Zweig
Counsel for the Applicants,
Argent Energy Trust, Argent Energy (Canada) Holdings Inc. and Argent Energy (US) Holdings Inc.

V. TABLE OF AUTHORITIES

1. *Dow Chemicals Canada Inc. v. Shell Chemicals Canada Ltd.*, 2008 ABQB 671

2. *PM&C Specialist Contractors Inc. v. Horton CBI Ltd.*, 2015 ABQB 248

3. *Rozak Estate v. Demas*, 2011 ABQB 239

4. *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375

5. *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONSC 4894, dismissing the appeal in *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONSC 1338.

TAB 1

CanLII

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd., 2008 ABQB 671 (CanLII)

Date: 2008-10-29
Docket: 0501 12237
Other citations: 459 AR 68; 97 Alta LR (4th) 182; [2008] CarswellAlta 1685; 174 ACWS (3d) 71
Citation: Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd., 2008 ABQB 671 (CanLII), <http://canlii.ca/t/21bz8>, retrieved on 2016-04-25

Court of Queen's Bench of Alberta

Citation: Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd., 2008 ABQB 671

Date: 20081029

Docket: 0501 12237

Registry: Calgary

Between:

Dow Chemical Canada Inc.

Plaintiff

- and -

Shell Chemicals Canada Ltd. and Shell Chemicals Americas Inc.

Defendants

Reasons for Judgment
of
J.T. Prowse, Master in Chambers

Introduction to the Issue

[1] This action involves a dispute between the plaintiff, Dow Chemical Canada Inc. ("Dow Canada") and the defendants, Shell Chemicals Canada Ltd. and Shell Chemicals Americas Inc. (collectively "Shell"), regarding a pricing formula contained in an agreement for the sale of styrene. Shell applies to this court for summary judgment dismissing Dow Canada's action. In opposition to the summary judgment application, Dow Canada has filed an affidavit of Mr. Barry.

[2] In this motion, Shell applies for an order requiring Mr. Barry to answer undertakings it sought during his cross-examination.

[3] The issue is whether the undertakings sought are sufficiently relevant and, if so, whether a party proffering a deponent can be compelled to provide undertakings with respect to information or documents not within the deponent's knowledge or possession at the time of cross-examination.

Summary of Conclusion with Respect to the Issue

[4] The current case law is not conclusive. A tension exists between two goals of the civil justice system, the first being to obtain all relevant and material evidence upon which to base an adjudication, and the second being to achieve an adjudication in a timely and efficient manner.

[5] 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.

[6] In addition, even where the undertakings sought do concern an important issue, the court should consider the alternative of simply ruling that the refusing party has not met its onus of proof in the underlying application.

Contrasting this Issue with the Issue of the Proper Scope of a Cross-Examination

[7] It is accepted law that a deponent can be cross-examined on any issue relevant to the outstanding application. The examiner is not restricted to the "four corners of the affidavit." Where the application is for summary judgment, then the deponent can be cross-examined on any outstanding issue in the litigation. A number of the authorities put forward by Shell make this point. See for example: ***Heron v. Sawridge Enterprises*** [1990] A.J. No. 886; ***Altaspec Communications v. Nigrin*** 2000 ABQB 571 (CanLII); ***Triple Five v. 358650 Alberta Ltd.*** 9 (1990) 1990 CanLII 5552 (AB QB), 75 Alta.L.R. (2d) 165; ***155569 Canada v. 248524 Alta Ltd.*** 1989 CarswellAlta 505; ***Gill v. 735458 Alberta Inc.*** 2003 ABQB 501 (CanLII); and ***HSBC Bank Canada v. 1100336 Alberta Ltd.*** 2005 ABQB 658 (CanLII).

[8] However, the issue we are looking at in this case is a different one. This issue is whether, when a deponent such as Mr. Barry is questioned on a topic of which he has no personal knowledge, the party who proffered his affidavit (Dow Canada) should be required to produce such documents or information.

Treatment of Undertakings in the Rules of Court

[9] The Rules of Court do not answer this issue.

[10] Rule 314(2) states that, on cross-examination of a deponent on his affidavit:

> "... the procedure on his examination is subject to the same Rules, so far as they are applicable, as the Rules that apply to the examination for discovery of a party." [emphasis added]

[11] Rule 314(2) leaves it up to the courts to determine whether the practice of obtaining undertakings on examination for discovery should be held "applicable" to a cross-examination of a deponent. A cross-examination of a deponent is something which is by its nature quite different from an examination for discovery [see ***Westhill Leasing Corp v. McMillan*** [1980] A.J. No. 498; ***Merck Frosst Canada Inc. v. Canada*** [1997] F.C. J. No. 1847; and ***Alberta (Treasury Branches) v. Leahy*** 1999 ABQB 829 (CanLII), [1999] A.J. No. 1281]. However, if a procedure which allows for undertakings to be compelled from a party proffering a deponent is found to be more consistent with the goals of justice, then Rule 314(2) and the inherent jurisdiction of the court provides sufficient authority for such undertakings to be compelled.

[12] In considering the goals of justice, the provision of undertakings arising during the cross-examination of deponents will provide additional evidence to the court, but the

price to pay is additional expense and delay for the litigants. To allow a cross-examiner, as of right, to demand that undertakings be given on any relevant issue, would be to give every respondent in a summary judgment application the right to a full examination for discovery prior to the hearing of the summary judgment application. This would defeat the whole rationale for a summary judgment procedure, which is to allow a meritless position to be disposed of summarily (i.e. without the time and expense typically incurred if the matter proceeded through examinations for discovery to trial).

[13] Will a policy tending to restrict the ability of a cross-examiner to obtain undertakings lead to parties putting forward "uninformed" deponents (i.e. deponents who have no knowledge of certain facts which may go against the party proffering the affidavit)? This should not pose a problem. Consider the following hypothetical example. If a plaintiff sues for goods sold for which it was unpaid, and the defendant both pleads and files affidavit evidence asserting the goods were not fit for the purposes intended, what would be the point of the plaintiff applying for summary judgment utilizing a deponent who can only attest to the invoices issued but not to the issue of fitness for the purpose intended? The court would have two choices:

> (a) direct the plaintiff to provide undertakings as to the issue of fitness, or
>
> (b) dismiss the summary judgment for failure of the plaintiff to meet the necessary standard of proof.

[14] It is suggested that (b) is the better alternative. In other words, controlling the use of uninformed deponents is better done by dismissing an application for lack of proof, rather than by directing undertakings.

Case Law

[15] Existing case law ranges from cases where deponents were ordered to provide undertakings, to cases which assert that deponents cannot be asked to provide undertakings.

[16] In ***College Brand Clothes v. Brown*** 1928 CarswellAlta 11, the Appellate Division of the Supreme Court of Alberta considered certain claims made by a plaintiff. One of the claims was that the defendants were consignees who had sold goods owned by the plaintiffs for $29,056.49 but only remitted $28,030.00, leaving a balance owing of $1,026.49. The defendants applied for security for costs and supported this with the affidavit of Mr. Brown, who deposed that the defendants had a defence to the claim. Presumably Mr. Brown could not have made this assertion without having first consulted the defendants' ledgers as to sales and remittances. Mr. Brown did not bring those records with him and when Mr. Brown was asked to undertake to produce the records, he refused. The court ordered him to do so.

[17] The court's rationale was that, if they allowed discovery at the time of cross-examination, as it would eventually be allowed at examinations for discovery in any event, the undertaking might as well take place now and obviate the need for examination for discovery. With respect to the potential for a resulting delay, the court observed that

under the then existing tariff for costs, there was no allowance for examinations, "which is a sufficient safeguard against it being unnecessarily prolonged." Neither of these rationales would appear to apply today due to changes in litigation practice in the ensuing eighty years. In current practice, it would not be unusual for examinations for discovery to cover ground previously dealt with at interlocutory cross-examinations on affidavit. As well, the tariff of costs now allows for costs for oral discovery, without any limit to the number of days which can be expended in that regard. However, while the changes in litigation practice have altered the basis for the decision in ***College Brand***, the result today ought to be the same. It is clear that Mr. Brown could not have made his assertion regarding a good defence without reference to the records in question, and that by itself is a sufficient reason to compel provision of those records by means of an undertaking.

[18] In ***John Schadeck Construction v. Hudson's Bay*** 1933 CarswellAlta 19, the defendant applied for security for costs. The affidavit in support referred both to a lease and notices to forfeit the lease but the deponent refused to undertake to produce them. He was ordered to do so. Again, where a deponent refers to documents in an affidavit then they must be produced (by way of undertaking if necessary).

[19] In ***Edmonton Savings v. H.R. Miller Homes*** 1986 Carswell 367, the plaintiff applied for summary judgment on an unpaid loan and used an affidavit purporting to set out the amount owing. The plaintiff's deponent was asked to produce the documents which supported the calculation of the amount claimed but refused to do so. The court declined to award summary judgment but instead remitted the matter to trial on the issue of quantum. Effectively, the court controlled the use of an uninformed deponent by ruling that the necessary standard of proof for summary judgment was not met.

[20] In ***General Motors v. Keco*** [1987] A.J. No. 1206, Master Quinn ordered a deponent to undertake to provide documents, however he also granted leave for the deponent to apply for relief from this obligation if the deponent were to take the position that the undertakings sought put a burden on the deponent out of all proportion to the benefit to be gained. The learned Master indicated that, unless the undertakings are clearly irrelevant, the court should direct the undertakings to be answered. With respect, I disagree with that approach. The preferable approach is that undertakings should only be ordered if the party seeking the undertakings has first satisfied the court that they pertain to an important issue and would likely significantly assist the court in the determination of the application.

[21] In ***155569 Can Ltd. v. 248524 Alta. Ltd.*** 1989 CarswellAlta 505, the plaintiff brought an application for foreclosure and supported it with an affidavit from an individual from the plaintiff corporation. The deponent declined to give undertakings and was ordered to do so. Master Quinn considered that it was only fair to order the deponent to inform himself because "it should not be forgotten that if the plaintiff succeeds in obtaining summary judgment, the action will be at an end, and the defendant will have no further opportunity of defending itself." This seems to overlook the other more direct method of handling the situation where the plaintiff has put forward a deponent without knowledge of relevant issue, namely, denying the application for summary judgment, as was done by Master Funduk in the ***Edmonton Savings*** decision (*supra*).

[22] In ***Triple Five Corp. v. 358650 Alberta*** 1990 CarswellAlta 128, the plaintiff was a landlord of commercial premises and brought proceedings against the tenant based on non-payment of rent. The plaintiff sought summary judgment and each side filed affidavits. Each sought undertakings from the other and the court ordered those it considered relevant to be provided pursuant to ***College Brand***, (*supra*).

[23] In ***Moretto v. Haxby*** 1995 CarswellAlta 347 the plaintiffs sued for return of their deposit on a house purchase which did not close because their condition for financing was not met. At issue was whether the plaintiffs had made reasonable efforts to obtain financing. Financing was refused because the lender was not satisfied as to the source of the $10,000.00 deposit on the purchase of the house. On cross-examination of his affidavit in support of summary judgment, one of the plaintiffs took the position that he did not need to produce documents relating to the information, if any, which he provided to the lender in that regard. The court did observe that the deponent was obligated to provide documents, but did not order him to do so. Instead the court dismissed the plaintiffs' application for summary judgment. Again, this illustrates how a court can control an uninformed deponent tactic by holding that, without a production of documents as requested, the affidavit did not have sufficient weight to warrant the relief sought.

[24] In ***CRC-Evans v. O.J. Pipelines*** 1996 CarswellAlta 897, the court declined to order that undertakings be provided by deponents. The rationale for the ruling was that it would be inappropriate to burden non-party affiants with an obligation to provide undertakings.

[25] In ***Xoil Resources v. 657618 Alberta Ltd.*** 1997 CarswellAlta 969, the plaintiff (land owner) sued the defendant who had purchased a mortgage on the land and was foreclosing. The plaintiff alleged that the defendant had been a potential buyer of its land, but when the defendant learned about another third party purchaser, the defendant purchased the mortgage on the land, foreclosed, and directly contacted the third party buyer. The defendant applied for security for costs from the plaintiff and an affidavit was put forward by the defendant asserting that the defendant had a good defence to the action. In this affidavit the defendant asserted that he never offered to sell the land to the third party buyer. When the defendant was asked if he had made telephone calls to the third party purchaser he answered, "I don't recall." The deponent was ordered to produce telephone records to ascertain if such calls had taken place.

[26] In ***N.(B) v. Canada*** 1998 CarswellAlta 902, the plaintiff had been refused entry to the United States by two officials at US Customs. He commenced proceedings against the Government of Canada for having disclosed to US Customs his long since pardoned prior criminal conviction. The Government of Canada applied for summary dismissal and utilized affidavits in support from the two US Customs officials. Cross-examinations were conducted on those affidavits and those officials refused to undertake to provide information not within their knowledge. The court upheld that refusal and stated, "Even litigants who are examined for discovery are not required to inform themselves of matters within the knowledge of someone over whom they have no control."

[27] In ***Klapstein v. AMHC*** 1998 CarswellAlta 483, the plaintiff obtained a deficiency judgment against the mortgagor. The plaintiff was now seeking summary judgment against guarantors of the mortgagor. Extensive cross-examinations of the plaintiff's deponent had already taken place. At issue were a number of questions to which the deponent did not know the answers and which she later declined to research. The Court of Appeal held, "It is clear that the cross-examination has gone on for a long time, and clearer still that to answer virtually any of the questions in dispute would involve an enormous amount of work ... In our view, the record before us shows that the likely burden of answering these questions would be grossly disproportionate to the likely benefit of an answer. Therefore, the decision of the chambers judge not to order them answered should stand." The case supports the proposition that undertakings should not be directed on a cross-examination where they would be overly onerous.

[28] In ***Alberta (Treasury Branches) v. Leahy*** 1999 ABQB 829 (CanLII), [1999] A.J. No. 1281 ATB had obtained a number of ex-parte tracing and freezing orders. West Edmonton Mall ("WEM") brought an application to set aside those orders. During cross-examination of the ATB deponents, counsel for WEM sought an order that those deponents answer undertakings asked of them during cross-examination. The court cited with approval the decision in ***Merck Frosst*** (*supra*) which stated that a cross-examination is different from an examination for discovery in that, in the cross-examination:

> (a) the person examined is a witness not a party;
>
> (b) answers given are not admissions;
>
> (c) absence of knowledge is an acceptable answer; the witness cannot be required to inform himself or herself;
>
> (d) production of documents could 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;
>
> (e) the rules of relevance are more limited.

[29] The requests for undertakings were ultimately dismissed as being either irrelevant or privileged.

[30] In ***Colortech Painting and Decorating v. Toh*** 2000 ABQB 814 (CanLII), [2000] A.J. No. 1345, Colortech filed a builder's lien for work done as a sub-contractor during construction of a house, and the owner filed an affidavit seeking to have the lien discharged. The owner was cross-examined on his affidavit in support of the application to discharge the lien. The lien holder sought an order compelling the owner to answer undertakings requested regarding production of his entire file for the construction of the house, his bank account with respect to payments made and his lawyer's file concerning the builder's mortgage financing on the house. In the end, the court ruled that the undertakings sought were either irrelevant or already answered by documents which the owner agreed to supply.

[31] In ***Luo v. Wang*** 2003 CarswellAlta 572, a defendant moved to set aside an earlier ex-parte freezing order, and cross-examined the plaintiff on her affidavit. The plaintiff gave an undertaking on that cross-examination to produce records from China relating to the tracking of money between the parties. The defendant applied for an order compelling production of the plaintiff's passport, which would show travel dates for her. The court considered various rules of court, the inherent jurisdiction of the court, and earlier Alberta decisions. In the end the court ruled that the questions regarding the passport were a relevant enquiry and "would be within the legitimate scope of an examination on undertakings related to an examination on an affidavit." The decision is supportive of the need for undertakings to be restricted to important issues, as the court observed in that case, the undertakings related to an issue which was "not a peripheral or minor matter in this lawsuit."

[32] In ***Canadian Western Bank v. Alberta*** 2003 CarswellAlta 377 the litigation involved the constitutionality of certain legislation enacted by the Province of Alberta which purported to regulate certain aspects of insurance. An insurers' association obtained intervenor status and they filed an affidavit of the Vice President of the association. The deponent declined to give undertakings when cross-examined. It was noted that the application was to compel answers, and not to produce documents. The court observed that a litigant's obligation to inform himself on a cross-examination on an affidavit, was the same as at examination for discovery. With respect, for the public policy reasons discussed in these reasons, and as indicated in ***Alberta (Treasury Branches) v. Leahy***, the obligation is in fact more restrictive on a cross-examination than on a discovery.

[33] Having reviewed the case law, I will now describe in more detail the facts relevant to this application.

Litigation Background Leading up to the Request for Undertakings from Mr. Barry

[34] Dow Canada commenced proceedings by way of a statement of claim asserting the following:

> (a) It is the purchaser of styrene from Shell under a contract made effective January 1, 1999 (the "Contract").
>
> (b) The price to be paid by Dow Canada was to be determined under a formula, and one price marker in that formula was the price for ethylene, the Ethylene Net Transaction Contract Price (the "NT Price"), defined as being a certain price for ethylene as reported from time to time in a periodic report published by Chemical Market Associates Inc. ("CMAI").
>
> (c) The NT Price has ceased to be available in the "manner, form or time frame" contemplated by the Contract.
>
> (d) The Contract provided that, where the NT Price ceased to be available in the manner, form or time frame contemplated by the Contract, then a new price marker would be either agreed upon or settled by arbitration.

(e) Dow has overpaid Shell by $50 million because of the erroneous continued use of the NT Price in the pricing formula.

[35] Shell filed a statement of defence asserting that the Contract was clear and unambiguous. The Contract calls for repricing only where the information required to determine the NT Price ceases to be available. The Contract defines the NT Price as being the price reported in the periodic report of the CMAI, and that such report has been consistently published and available since the Contract became effective.

[36] Shell then applied for summary dismissal of the claim and provided affidavit evidence of Floyd Koch in support of its motion. Mr. Koch's affidavit attaches a copy of the Contract and a sample of a CMAI report from August of 2007, which provides the then current NT Price. He deposes that similar reports have been published by CMAI from the date of the Contract through August 31, 2007.

[37] Dow responded with the affidavit of Mr. Barry. He asserts that the CMAI itself confirms that the manner in which it is calculating the NT Price has changed over the years. Shell cross-examined Mr. Barry and, where he did not have direct personal knowledge, they sought undertakings. Dow takes the position that the undertakings sought are irrelevant, and in any event need not be given during a cross-examination on an affidavit (as opposed to an examination for discovery).

Background to the Undertakings Sought from Mr. Barry

[38] The affidavit of Mr. Barry, and the answers given during his cross-examination, are used by Dow to support their contention that the manner or form by which the NT Price is calculated is no longer available.

[39] At the risk of oversimplifying, one can draw an analogy to pricing on the sale of automobiles. Typically there is a "list" price - let us assume it is $25,000.00. Given the bargaining which takes place in the marketplace, it is likely that the average sale price for such an automobile would be lower, let us assume it is $24,000.00. You might classify the $24,000.00 as a "discounted" price or perhaps a "net" price.

[40] The gist of Mr. Barry's assertion is that the NT Price as published by CMAI when the Contract was entered into was a discounted or net price, but that over time it has been transformed into something akin to a list price. Mr. Barry deposes in support of that assertion that:

(a) The CMAI itself over time altered the language it uses to describe the NT Price in its publication, previously referring to it as a, "disct'd" (i.e. discounted) price and more recently referring to it as a "non-discounted" value.

(b) A representative of the CMAI sent a letter to Dow confirming that CMAI had changed the way it determined the NT Price.

[41] Shell's primary position is that Mr. Barry's assertion is irrelevant. The Contract specifies that you look to the CMAI publication to ascertain the NT Price, and you need not look any further. Shell's alternative position is that Mr. Barry's assertions are factually inaccurate. It is to pursue this alternative position that Shell has sought undertakings from Mr. Barry.

[42] Shell's alternative position is that, even when the contract began, the NT Price was more akin to a list price, and remains so today. To demonstrate this Shell pressed Mr. Barry to confirm that Dow Canada and its American parent were themselves among the top ten buyers of ethylene in North America (this is the group from whose contracts CMAI was to determine the NT Price) and that Dow Canada and its American parent had frequently entered into contracts with Shell for the sale of ethylene at a discount to the NT Price (again, illustrating that the NT Price had always been and remained akin to a list price). In other words, Shell hopes to use Dow's own contracts (and that of its American parent) with Shell to show that there has not been a fundamental change in how the NT Price is determined.

[43] Mr. Barry did not refuse to answer any question within his knowledge. However, he was not with Dow Canada in 1999 and could not answer questions dealing with Dow Canada's contracts at that time, nor did he bring with him a collection of Dow Canada contracts from 1999. It was at this point that Shell asked him to inform himself and provide that documentation.

Analysis of Specific Undertakings Requested

[44] The only request for an undertaking specifically withdrawn by Shell during argument was undertaking # 7. However, a number of the undertakings sought were clearly of marginal relevance only, more appropriate perhaps for examination for discovery, and Shell's written argument focused on undertakings 9 and 11 - 14.

[45] Shell's argument as to the importance of undertakings 9 and 11 - 14 was as follows:

> "These Undertakings relate primarily to other ethylene supply contracts entered into by [Shell] and Dow, as well as pricing formulae used by [Shell] and Dow, during a period of time preceding the execution of the [Contract]. These other ethylene contracts and pricing formulas are relevant and material to Mr. Barry's assertion that the NT Price represented what the top ten USGC buyers of ethylene were paying for their ethylene in 1999, at the time the [Contract] was signed. Production of these contracts would support the view that, by this time, other buyers were already getting additional discounts of the NT Price and otherwise paying less for ethylene than the NT Price. This proves that the top ten USGC [United States Gulf Coast] buyers were able to get better prices than the NT Price."

[46] To begin with, it is clear that Mr. Barry did not refer to the documents requested in his affidavit, nor had he of necessity previously reviewed these documents in order to make the assertions that he made in his affidavit.

[47] Mr. Barry is not an "uninformed deponent." A review of his transcript indicates that Mr. Barry is generally a well informed deponent. He has extensive knowledge of ethylene marketing, and appeared to answer all questions put to him in a forthright manner. In other words, he was willing to engage in answering questions directed to the issue of how contracts for ethylene were priced during the relevant time period. The only thing about which he had no knowledge was other contracts which Dow Canada had entered into with Shell in the 1995 to 1999 time frame, and it was this topic which primarily founded the undertakings requested.

[48] The next enquiry is whether the documents requested relate to an important issue (which they clearly do) and are likely to significantly assist the court in the determination of the summary judgment application. My conclusion is that the documents would not significantly assist the court in the determination of the summary judgment application.

[49] Mr. Barry's former employer was Union Carbide (since merged into Dow). In the relevant time period Union Carbide was one of the top ten USGC buyers of ethylene. In other words, they were one of the select group from which CMAI would obtain data in arriving at and publishing the NT Price. Mr. Barry acknowledged in his cross-examination (see pages 74 and 75) that during the relevant time period Union Carbide, more often than not, was able to obtain a discount allowing it to purchase ethylene for less than the NT Price (lending some support to Shell's assertion that the NT Price was always more akin to a list price). By means of the undertakings requested, Shell is hoping to "gild the lily" by showing that discounts to the NT Price were also common between Shell and Dow at the relevant time (note that, so far as the evidence appears to this point, Shell and Dow were not among the top ten USGC buyers of ethylene - in other words, were not within the group surveyed by the CMAI in determining its published NT Price). This additional evidence would not likely significantly assist the court in determining the outcome of the summary judgment application.

[50] The undertakings also relate to another issue. Counsel for Shell put to Mr. Barry in cross-examination another contract between Shell and Dow from the same era (not the Contract in issue in this litigation). Mr. Barry could not identify this other contract so it was simply marked for identification. This other contract contained a provision which allowed a price marker, such as the "NT Price," to be reviewed where "in the reasonable opinion of either the seller or the buyer, [the] publication is no longer representative of the market." In other words, Shell will be asserting that Dow would have required this type of clause in the Contract in order (perhaps) to be entitled to the relief Dow now seeks. Using drafting in another contract between the parties to interpret the Contract in issue is of marginal relevance and would not likely significantly assist the court in determining the outcome of the summary judgment application.

Conclusion

[51] For the reasons given above, Shell's application to compel answers to the undertakings requested is dismissed. Counsel may speak to costs.

Heard on the 25th day of September, 2008.
Dated at the City of Calgary, Alberta this 29th day of October, 2008.

J.T. Prowse
M.C.C.Q.B.A.

Appearances:

John Craig
(Bennett Jones LLP)
for the Defendants

Eric Groody
(Code Hunter LLP)
for the Plaintiff

TAB 2

2015 ABQB 248
Alberta Court of Queen's Bench

PM&C Specialist Contractors Inc. v. Horton CBI Ltd.

2015 CarswellAlta 668, 2015 ABQB 248, [2015] A.W.L.D. 2460, 253 A.C.W.S. (3d) 304

PM&C Specialist Contractors Inc, Plaintiff and Horton CBI Limited, Imperial Oil Resources Ventures Limited and Exxonmobil Canada Ltd., Defendants

Peter B. Michalyshyn J.

Heard: April 7, 2015
Judgment: April 17, 2015
Docket: Edmonton 1203-15424

Counsel: Stephen J. Livingstone, for Plaintiff
John N. Craig, Q.C., Brad Nemetz, Q.C., for Defendants

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

X Discovery
X.4 Examination for discovery
X.4.i Production of documents on examination

Headnote

Civil practice and procedure --- Discovery — Examination for discovery — Production of documents on examination

Underlying action related to breach of agreement for construction and development at oil sands — Defendant had already been ordered to answer undertakings, many of which were same undertakings that plaintiff was seeking in current application — Plaintiff claimed that, but for delays in complying with earlier undertakings, it would already have information it said it needed to respond to defendant's security for costs application — Plaintiff applied to compel undertakings requested during examination on affidavit sworn in support of defendant's application for security for costs — Application allowed — Application judge was unable to conclude that undertakings sought in examination on affidavit would be overly onerous to produce — Nor would burden of producing any of them be grossly disproportionate to likely benefit of seeing them answered — Defendant acknowledged information was likely important, relevant and material in main action — Evidence that was acknowledged to be important, relevant and material to main action was important, relevant and material on security for costs application — Defendant was to produce records related to allegations of delay; minutes of meetings; records of Quality Reports against defendant; records concerning alleged non-payment of taxes, union dues, and like; certain change orders and site instructions; information of when so-called Korean Modules arrived on site; and records for access dates.

Table of Authorities

Cases considered by *Peter B. Michalyshyn J.*:

Arhum & Huzaifa Enterprises Ltd. v. 1231993 Alberta Ltd. (2013), 2013 ABQB 333, 2013 CarswellAlta 975, 563 A.R. 335 (Alta. Q.B.) — considered

Attila Dogan Construction & Installation Co. v. AMEC Americas Ltd. (2011), 49 Alta. L.R. (5th) 212, 100 C.L.R. (3d) 213, 504 A.R. 295, 14 C.P.C. (7th) 174, 2011 ABQB 175, 2011 CarswellAlta 407 (Alta. Q.B.) — followed

Autoweld Systems Ltd. v. CRC-Evans Pipeline International Inc. (2011), 2011 ABQB 265, 2011 CarswellAlta 679, 504 A.R. 288 (Alta. Q.B.) — considered

Autoweld Systems Ltd. v. CRC-Evans Pipeline International Inc. (2011), 2011 CarswellAlta 1355, 2011 ABCA 243, 57 Alta. L.R. (5th) 429, 532 W.A.C. 6, 515 A.R. 6 (Alta. C.A.) — referred to

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd. (2008), 2008 CarswellAlta 1685, 459 A.R. 68, 97 Alta. L.R. (4th) 182, 2008 ABQB 671 (Alta. Master) — followed

HSBC Bank Canada v. 1100336 Alberta Ltd. (2005), 2005 ABQB 658, 2005 CarswellAlta 1235 (Alta. Q.B.) — referred to

Krupp Canada Inc. v. JV Driver Projects Inc. (2014), 2014 ABQB 259, 2014 CarswellAlta 710, 33 C.L.R. (4th) 173, [2014] 6 W.W.R. 728 (Alta. Q.B.) — followed

Medicine Shoppe Canada Inc. v. Devchand (2012), 2012 ABQB 375, 2012 CarswellAlta 999, 541 A.R. 312 (Alta. Q.B.) — considered

Parkland Industries Ltd. v. 897728 Alberta Ltd. (2015), 2015 ABQB 10, 2015 CarswellAlta 23 (Alta. Q.B.) — considered

PM & C Specialist Contractors Inc. v. Horton CBI Ltd. (2015), 2015 CarswellAlta 541, 2015 ABQB 209 (Alta. Q.B.) — considered

Rozak Estate v. Demas (2011), 2011 CarswellAlta 577, 2011 ABQB 239, 53 Alta. L.R. (5th) 368, 509 A.R. 337 (Alta. Q.B.) — followed

Xpress Lube & Car Wash Ltd. v. Gill (2011), 2011 ABQB 457, 2011 CarswellAlta 1192, 23 C.P.C. (7th) 193 (Alta. Q.B.) — considered

1251165 Alberta Ltd. v. Wells Fargo Equipment Finance Co. (2013), 2013 CarswellAlta 1720, 91 Alta. L.R. (5th) 273, 2013 ABQB 533 (Alta. Q.B.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Pt. V — considered

R. 4.22 — considered

R. 4.22(c) — considered

APPLICATION by plaintiff to compel undertakings requested during examination on affidavit sworn in support of defendant's application for security for costs.

***Peter B. Michalyshyn J.*:**

1 The plaintiff PM&C applies to compel undertakings requested during an examination on affidavit sworn in support of the defendant HCBI's application for security for costs. For reasons which follow the motion to compel is granted. In the result the security for costs application scheduled to proceed May 4, 2015 is adjourned.

2 Much of the background to this litigation is set out in the very recent case management decision in *PM & C Specialist Contractors Inc. v. Horton CBI Ltd.*, 2015 ABQB 209 (Alta. Q.B.). Those reasons help inform what I am now asked to consider. Indeed HCBI's unwillingness to answer undertakings is a variation of a theme already heard and rejected: that its security for costs application should proceed notwithstanding that HCBI had yet to answer undertakings given in the context of Part V questioning long ago and/or recently ordered. The parties agree that some of the undertaking requests now objected to are at least similar to those already ordered. This decision aligns then with its predecessor in that to force the security application to proceed without giving PM&C a reasonable opportunity to see the fruits of the earlier decision would allow HCBI to achieve indirectly what it was unable achieve directly.

3 I appreciate that PM&C's application was not to adjourn the security for costs application pending HCBI's compliance with the earlier order. And I appreciate that HCBI raises *other* arguments for why many of essentially the same information requests should not be answered now in the context of examination on affidavit. Those arguments do not prevail. They do not in their own right. Nor do they when taken alongside the earlier order, whatever the form of PM&C's application. Put another way, PM&C argues in substance, and I accept, that but for delays in complying with earlier undertakings PM&C would already have information it says it needs to respond to HCBI's security for costs application.

4 I will also note at this stage, and while not pre-determining the issue, that a line of authorities conclude security for costs may not be granted in relation to steps that have taken place before security was sought. If that's so, then it would arguably capture the questioning under Part V of the *Rules* that was agreed to more than a year ago, and to the undertakings arising from those proceedings and which of course have been ordered to be produced. Again, some of those same Part V undertakings are at least similar if not identical to those now objected to. Arguably then — and again I say arguably because the matter has yet fully to be argued — it may be that no security for costs will be ordered in relation to the undertaking responses yet to be produced. That possible outcome is relevant to the court's exercise of discretion on the application now before me in the context of *Rule* 4.22 to compel the objected-to undertakings.

The scope of undertakings

5 At issue are undertakings requested during a March 24, 2015 examination of an HCBI witness' affidavit filed January 20, 2015.

6 HCBI relies on *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2008 ABQB 671 (Alta. Master) followed by Graesser J in *Rozak Estate v. Demas*, 2011 ABQB 239 (Alta. Q.B.) who commented at paras 37-42 as follows:

> 37 The most detailed analysis of undertakings on questioning on affidavits is Master Prowse's decision in ***Dow Chemical*** [...] He concluded at para. 5:
>
> > 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.

38 I agree with his conclusions. The statement that an affiant cannot be required to inform him or herself is not the law in Alberta. An affiant being questioned is in a similar position to that of a witness being cross-examined at trial. Witnesses are expected to have taken reasonable steps to inform him or herself as to the subject matter on which they are expected to testify. They are expected to bring with them all records in their possession or control which are relevant to the issues in the lawsuit. They may be cross-examined not only on their evidence in chief, but on any other matter within their knowledge.

[...]

41 ... 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.

42 To be clear, therefore, I agree with the Master that there is no general prohibition against asking affiants for undertakings on questioning on their affidavits, but that the propriety of any undertaking sought is governed by the tests set out above.

7 In *Krupp Canada Inc. v. JV Driver Projects Inc.*, 2014 ABQB 259 (Alta. Q.B.) at para 124 Master Robertson revisited the *Dow Chemical* test in these, perhaps more positively-framed terms:

As to informing oneself of the details, the deponent may be questioned. As the nature of the affidavit addresses all aspects of the claim, the questioning can be quite wide-ranging and the witness is expected to provide undertakings on matters where he or she has not fully informed himself or herself in advance, on important issues that would likely significantly assist the court in the determination of the application, just as in a summary judgment application or pre-trial questioning: ***Dow Chemical.***

8 In *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375 (Alta. Q.B.) at para 21 Topolniski J also considered *Dow Chemical* and in doing so brought into view the issue of proportionality:

While the scope of questioning is not restricted to the four corners of an affidavit (***Dow Chemical***) there are limits concerning relevance and materiality. This is especially germane where the burden of answering the questions or providing undertakings would be grossly disproportionate to the benefit of the answers (Rule 1.2(4); WA Stevenson and JE Côté, *Civil Procedure Encyclopedia* (Edmonton: Juriliber, 2003) at 6-53).

9 The same sentiment regarding proportionality is carried forward in the *Civil Procedure Handbook* (Edmonton: Juriliber, 2015, at page 6-61): the burden of answering undertakings must not be grossly disproportionate to the likely benefit of an answer. And earlier at page 6-60 the learned authors comment though in the related context of questioning that the scope of cross examination is wide if the merits of the suit are relevant to an application, e.g., for summary judgment, *security for costs*, or opening up default (emphasis added): *HSBC Bank Canada v. 1100336 Alberta Ltd.*, 2005 ABQB 658 (Alta. Q.B.) per Slatter J (as he then was).

10 In the end, I am mindful of the test in *Dow Chemical* — that the undertakings relate to an important issue in the application, not be overly onerous to produce and likely significantly help the court determine the application. I am obliged however also to consider those authorities which put the question in somewhat different language: that when examining on affidavit the court

should ask if the burden of answering undertakings is grossly disproportionate to the likely benefit of the answer; and that if the merits of the suit are relevant to the application, then the scope of cross examination — and to that I would add the scope of undertakings which otherwise meet the *Dow* test — is wide.

11 HCBI also strongly relies on *Attila Dogan Construction & Installation Co. v. AMEC Americas Ltd.*, 2011 ABQB 175 (Alta. Q.B.) for the proper interpretation of Rule 4.22, which provides:

> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

12 HCBI relies on *Attila Dogan* as authority that to satisfy rule 4.22(c) it need only establish an arguably meritorious defence. No particular inquiry is needed into the merits of the respondent PM&C's case, and no undue advantage should be accorded PM&C for example by compelling undertakings that might well chip away at HCBI's arguably meritorious defences.

13 At para 17 in *Attila Dogan* Wittmann CJ notes the party AD's submission that "Rule 4.22 mandates a more detailed inquiry into the relative strengths of each party's position and a higher standard than a reasonably arguable defence." He then says that:

> Even if this is so, it does not follow that the appropriate and determinative question is which party has a stronger case. This is a highly complex claim. What rule 4.22 requires is an inquiry into the merits. In my view, this suggests that a reasonably meritorious defence, when considered together with the other factors set out in Rule 4.22, is sufficient to weigh in favour of granting security for costs. It is neither possible, nor desirable, for the Court at this stage to determine which party's case is stronger.

14 On a full reading of *Attila Dogan* together with other cases considering rule 4.22(c) I am not persuaded that a court can never or should never consider which party's case is stronger, at least if that articulation then precludes a meaningful inquiry into the reasonable merits of *both* parties' positions, and not just into whether a reasonably meritorious defence has been established.

15 Doubtless the test was correctly stated on the facts of the case before Wittmann CJ and it is probably the correct test in most security applications, as most are probably brought at a very early stage in proceedings, when for example the court is informed only by pleadings and one or more affidavits. But security applications are sometimes brought later in the proceedings, or they are renewed, and in any event they are sometimes accompanied by more evidence as is the case here — where there is Part V questioning of several witnesses and undertakings, many provided and others ordered to be provided. Hall J's decision in *Xpress Lube & Car Wash Ltd. v. Gill*, 2011 ABQB 457 (Alta. Q.B.) at para 11 is an example of the potential relevance of such further questioning on the weight to be given *Rule* 4.22(c) considerations.

16 In saying this I am mindful of a number of decisions post-dating *Attila Dogan* which appear to state somewhat more nuanced tests for the interpretation of rule 4.22(c).

17 For example McMahon J in *Autoweld Systems Ltd. v. CRC-Evans Pipeline International Inc.*, 2011 ABQB 265 (Alta. Q.B.) put the rule 4.22(c) test somewhat differently. With *Attila Dogan* before him, McMahon J commented at para 22 in *Autoweld* that the new factor set out in rule 4.22(c):

> ... broaden[s] the consideration from only the merits of the defence to the merits of the action. It therefore requires a balanced view of the entire action as it then appears.

18 Earlier in the same paragraph McMahon J comments that:

> There is insufficient basis at this early stage to determine which party has the better prospect of success in this commercial dispute.

19 The implication is that such in inquiry may well be justified if the action has reached a stage at which such a determination can be made, as to which party has the better 'prospect of success'.

20 Leave to appeal McMahon J's decision in *Autoweld* was denied in reasons reported at 2011 ABCA 243 (Alta. C.A.), although the interpretation of rule 4.22(c) did not appear to be the issue.

21 McMahon J's decision in *Autoweld* was expressly followed on the rule 4.22(c) point, quoting the very same paragraph 22 as noted above, in *Arhum & Huzaifa Enterprises Ltd. v. 1231993 Alberta Ltd.*, 2013 ABQB 333 (Alta. Q.B.). In that case Lee J reviewed all that was before him, concluded that *both* of the parties had raised serious and arguable issues, and further concluded therefore that there were merits to the action.

22 Graesser J in *1251165 Alberta Ltd. v. Wells Fargo Equipment Finance Co.*, 2013 ABQB 533 (Alta. Q.B.) likewise considered *Attila Dogan* though not, curiously, *Autoweld.* In any event at paras 43-44 he articulated the rule 4.22(c) test as follows:

> 43 Some basic principles can be drawn from the cases, and I do not profess that the following is exhaustive. Rather, the following are some principles applicable to the facts and circumstances of this case.
>
> [...]
>
> 2. The court must attempt to look at the merits of the action, as difficult as that may be on an interlocutory application;
>
> 3. The greater the likelihood of success for the plaintiff (if that can be reasonably assessed) the more the court should consider the potential unjustness of preventing a meritorious claim from proceeding;
>
> 4. The converse is true: the smaller the likelihood of success for the plaintiff (if that can be reasonably assessed) the slower the court should be in denying security when security would otherwise be appropriate...
>
> [...]
>
> 44 As with many applications, this analysis involves a balancing act: balancing the right of a plaintiff to pursue a claim and the right of a defendant to protection from false claims.

23 *Wells Fargo* was cited favourably in *Parkland Industries Ltd. v. 897728 Alberta Ltd.*, 2015 ABQB 10 (Alta. Q.B.) wherein at paras 35-36 Master Hanebury said this about the rule 4.22(c) test:

> 35 ... The rule requires the Court to examine the action as a whole, both claim and defence: Arhum & Huzaifa Enterprises Ltd. v. 1231993 Alberta Ltd., 2013 ABQB 333, para. 25. This is, as is often the case, difficult to assess at an early stage in the action, and in this case, also on the evidence filed: 590863 Alberta Ltd. v. Deloitte Touche Inc., 2012 ABQB 98 (Master), para. 21.
>
> 36 The greater the likelihood of success for the plaintiff, insofar as that can be reasonably assessed, the more the court should take into account the unfairness of an order that would stop a meritorious claim from proceeding: 1251165 Alberta Ltd. v. Wells Fargo Equipment Finance Co., 2013 ABQB 533, para. 43.

24 I do not doubt that *Attila Dogan* can be read consistently with the cases mentioned above. It can be in the sense that a conclusion as to a reasonably meritorious defence can rarely be made without some broader consideration of the merits of the claim — if the likelihood the plaintiff will receive judgment is high, it can hardly be said the defendant has a reasonably meritorious defence; if the plaintiff's claim is weak, it may take relatively little to raise a reasonably meritorious defence. In any event it is hard to conceive of having little or no regard for the strength, or the merits, of *both* parties' positions. And the extent of that regard may depend on the stage of the litigation and on the availability of relevant and material evidence.

25 With my comments regarding *Dow Chemical* and *Attila Dogan* in mind, I then turn to HCBI's opposition to PM&C's motion to compel.

26 I will deal first with the evidence before me touching on how onerous it would be to answer the impugned undertakings, and/or whether on the evidence the efforts to produce them would be grossly disproportionate to the likely benefit of seeing them answered.

Overly onerous

27 What is before the court with regard to how onerous production of the contested undertakings would be?

1 — seeks records which HCBI says are comprised of at least 15 binders. If they've been identified to this extent it is natural to ask why it would be overly onerous to produce them, or why the burden of producing them would be grossly disproportionate to the likely benefit of seeing them answered — mindful of HCBI's acknowledgement that these records, like at least some others requested, are likely important, relevant and material to the main action.

2 — is characterized in HCBI's brief, but not otherwise in any evidence drawn to my attention, as "a very expansive request for records: namely minutes of all meetings between HCBI and Imperial Oil ... and monthly updates submitted by HCBI to Imperial Oil throughout the project". With no more than that representation I am not prepared to conclude that this kind of production will be overly onerous or grossly disproportionate to produce;

3 — the question of what would be overly onerous/grossly disproportionate to produce is not addressed;

4 — as with #2, the HCBI brief merely represents, without any back-up evidence that was drawn to my attention, that the request for Quality Reports is "very expansive" as "one could only assume there would be a large number of quality reports issued throughout the course of the project". Again I am not prepared to assume anything about the number of such reports or about how onerous/grossly disproportionate it would be to produce them;

5, 6, 7, 8 and 9 - the question of what would be overly onerous/grossly disproportionate to produce is not addressed;

10 — HCBI refers to its witness's August 18, 2014 response: that compiling the answer to this particular undertaking response "is an extremely large undertaking which will take months of work to gather and produce" (at page 29 of the current Brief). This was indeed the witness's response to undertaking #11 from Part V questioning conducted March 13-14, 2014. And as stated at TAB 15 of HCBI's Brief filed December 5, 2014 the undertaking request was not refused but was rather conditioned that it would be "undertaken after CBI's application for Security for Costs". Any such condition was declared invalid in *PM & C Specialist Contractors Inc. v. Horton CBI Ltd.*, 2015 ABQB 209 (Alta. Q.B.). The August 18, 2014 response aside, no evidence or more detailed response was brought to my attention to back up the witness's assertion of 'months of work'. Even on HCBI's unqualified test of 'overly onerous' this evidence fails to meet the test.

28 At the end of the day I am unable to conclude that any of the undertakings sought in the examination on affidavit would be overly onerous to produce. Nor would I conclude on the evidence that the burden of producing any of them would be grossly disproportionate to the likely benefit of seeing them answered — again mindful of HCBI's acknowledgement that most if not all of the records sought are likely important, relevant and material to the main action.

Would likely significantly help the court determine the application

29 This is part of the test emerging from *Dow Chemical*. I would equate it to the language of "gross proportionality" cited elsewhere in that it similarly strives to balance the burden of production with the 'likely benefit of seeing the answers'. I am not persuaded, at least in relation to an application on the merits, that to be "significant", as that word is used in *Dow Chemical*, an answer to undertaking must not just 'relate to' but rather must 'eliminate or wipe out' the reasonably meritorious defence raised. I am persuaded rather that to compel answers on an application on the merits it is enough if they will likely significantly help the court determine the security for costs application in the sense that there will be a likely benefit to the court of seeing the answers.

30 What is before the court with regard to the significance of the answers to the impugned undertakings to the application for security for costs? There is some overlap here with the proper test under rule 4.22(c) itself. For now it is enough to repeat that much of the same information now objected to has been ordered produced following Part V questioning. If only for that reason HCBI acknowledges the information is likely important, relevant and material in the main action. The question is whether it is also important, relevant and material information in the context of an inquiry into the merits as directed by *Rule* 4.22(c). I am satisfied that it likely is.

Determining the merits of the action

31 Pursuant to rule 4.22(c) and relying heavily on its interpretation of *Attila Dogan* HCBI argues that I need conclude only one thing: without regard for whose case is stronger, has it or has it not established a reasonably meritorious defence? HCBI says it has adduced more than enough evidence to satisfy its onus in that regard. As such HCBI says that should be the end of the matter. And if it is not so, then HCBI agrees it runs the risk of losing the security for costs application. That is a choice it says it is entitled to make. It should not be forced, in the context of an examination on affidavit, to produce answers to undertakings that will simply help PM&C undermine the reasonably meritorious defences that HCBI says it has already proven for security for costs purposes.

32 HCBI argues essentially for an exclusionary rule. Put another way, it argues that once it has met its legal burden of establishing a reasonably meritorious defence, in the circumstances of this application PM&C should be denied an opportunity to satisfy the evidentiary burden then cast upon it.

33 I am unable to accept HCBI's suggested interpretation of rule 4.22(c) or of the *Attila Dogan* case. As discussed above in my view the rule and the authorities mandate a broader inquiry into the merits of the action. That inquiry may *culminate* in an assessment of whether a reasonably meritorious defence exists. But it is an inquiry that clearly involves a consideration of both parties' positions. And it is one that may require a consideration of evidence that is important, relevant and material to the application, assuming such evidence is available or compellable for the application.

34 Here there is evidence that is acknowledged to be important, relevant and material to the main action and, I would then conclude, is important, relevant and material on the security for costs application. Some of the information has been compelled but only lately on account of the recently-decided Part V application. (Presumably some of that information has yet to be produced.) So it comes as no surprise that as it awaited a decision on the Part V undertakings application PM&C asked for much the same information in the context of the examination on affidavit. It succeeded on the Part V application, and it succeeds here.

35 As to those few requests that do not involve quite the same information earlier requested and recently ordered, with the singular exception of certain emails requested, the balance of requests made should be answered as there was little serious objection that they are if not important then at least they are relevant and material, and there is no evidence they would be overly onerous to produce.

36 Turning then finally to the impugned undertakings themselves, but now in the context of the rule 4.22(c) test as I have framed it earlier:

> # 1 — this request seeks records which PM&C relate to allegations of delay that HCBI has leveled against it both in its defence and in its counterclaim. On its interpretation of rule 4.22(c) HCBI says production is irrelevant in the face the substantial evidence it has already adduced in support of its arguably meritorious defences. For example, HCBI says

PM&C knew before it entered into the agreement between the parties that certain equipment was going to be late, yet HCBI defends on the basis that PM&C was still behind in other work it had agreed to perform to mitigate the delay; what's more, HCBI defends on the additional basis that PM&C's work was deficient in many ways, and that it breached its obligations in many others. These latter points are the subject of at least some of the later contested undertakings. With regard to the records requested in this undertaking, I am satisfied that the records appear to be important, relevant and material to the merits of the action and to the ultimate question of HCBI's arguably meritorious defence, and as such should be produced.

2 — PM&C says the requested meeting minutes are highly relevant, that they go to the heart of its claim and to its defence of HCBI's counterclaim, as these records go to the validity of the parties' respective claims and defences regarding who was behind and/or responsible for delays, and for what reasons. HCBI's response essentially mirrors its position on #1, which I have rejected. The records appear to be important, relevant and material to the merits of the action and to the ultimate question of HCBI's arguably meritorious defence, and as such should be produced.

3 — this request seeks confirmation whether HCBI before the litigation started raised any concerns with the timing of PM&C's workers' compensation coverage for employees. This arises from the HCBI witness's assertion that no such coverage was applied for until November, 2011. While hard to gauge its importance, it is relevant when HCBI raised the WCB issue, and it will hardly be onerous to answer the question. The answer should be produced.

4 — PM&C says it must have records of Quality Reports *against HCBI* to help put into perspective HCBI's defence and counter-claim that the handful of what HCBI has called representative Quality Reports against PM&C are material to that defence and counter-claim. The records appear to be important, relevant and material to the merits of the action and to the ultimate question of HCBI's arguably meritorious defence, and as such should be produced.

5 — these are records going to alleged non-payment of taxes, union dues, and the like, and how and when these were brought to HCBI's attention. PM&C says any such non- payments came only after HCBI terminated its contract. HCBI says otherwise. The answer is clearly important, relevant and material to the merits and to the ultimate question of HCBI's arguably meritorious defence, and as such should be produced.

6 — HCBI's witness referred to a letter but at issue is whether it was ever sent. HCBI says it is barely relevant in the face of much other evidence before the court of PM&C's shortcomings under the agreement between the parties. While on its face the letter may not be determinative of this particular defence, like the WCB record at #3 this record is relevant and it will hardly be overly onerous to produce.

7 — PM&C does not strenuously argue that the issue of as-yet unproduced emails is significant to the security for costs application. The real concern appears to be their non-production from Part V questioning. No further order is therefore made on this application with respect to the emails.

8 — PM&C seeks production of certain change orders and site instructions. HCBI says they are already in PM&C's possession. If the parties agree that this is so, then it is the end of the matter. Otherwise, the information should be produced as it is clearly important, relevant and material to the merits and to the ultimate question of HCBI's arguably meritorious defence.

9 — PM&C seeks production of information when the so-called Korean Modules arrived on site. For reasons largely already expressed I am satisfied that this information is clearly important, relevant and material to the merits and to the ultimate question of HCBI's arguably meritorious defence, and as such should be produced.

10 — PM&C says that HCBI raises as a significant part of its defence that regardless of allegedly late modules there was ample work available that PM&C simply did not do before the parties parted ways. PM&C says this defence fails if as it alleges this work was 'theoretical' in the sense it was not 'released' to PM&C and could not therefore be performed. The requested records for "access dates" will inform this defence raised by HCBI. They should be produced.

37 The application is granted. Matters flowing from this case management decision may of course be spoken to.

Application allowed.

End of Document

TAB 3

2011 ABQB 239
Alberta Court of Queen's Bench

Rozak Estate v. Demas

2011 CarswellAlta 577, 2011 ABQB 239, [2011] A.W.L.D. 2961, [2011] A.W.L.D. 2962, [2011] A.W.L.D. 2964, 200 A.C.W.S. (3d) 969, 509 A.R. 337, 53 Alta. L.R. (5th) 368

Brad Brogden, Administrator Ad Litem of the Estate of Brooklyn Alyssa Rozak (Plaintiff) and Michael Demas, Carl Blashko, Darren Neilson, John Doe, Capital Health, operating a hospital known as The University of Alberta Hospital, Caritas Health Group, operating a hospital known as The Grey Nuns Hospital and the Governors of the University of Alberta (Defendants)

R.A. Graesser J.

Heard: February 23, 2011
Judgment: April 7, 2011 *
Docket: Edmonton 0503-17780

Counsel: Philip Kirman for Plaintiff
David Hawreluk, Alison Archer for Applicants, Kevin Neilson, Lara Ostolosky, Omar Din

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

X Discovery
X.2 Discovery of documents
X.2.h Privileged document
X.2.h.ii Solicitor-client privilege

Civil practice and procedure

X Discovery
X.2 Discovery of documents
X.2.h Privileged document
X.2.h.v Documents prepared in contemplation of litigation

Civil practice and procedure

X Discovery
X.4 Examination for discovery
X.4.j Conduct of examination
X.4.j.iii Objecting and refusing to answer

Headnote

Civil practice and procedure --- Discovery — Examination for discovery — Conduct of examination — Objecting and refusing to answer

Plaintiff took his late wife, B, to hospital because of concerns for her mental well-being and safety — Defendant doctors saw B and discharged her later that evening — B committed suicide shortly after — Plaintiff served statement of claim, and served amended statement of claim when he discovered that he had sued wrong doctor — Plaintiff then sought to amend amended statement of claim — Doctors applied to compel answers to objected-to undertakings, and while plaintiff was ordered to provide answers to two, master declined to order answers to rest — Doctors appealed — Plaintiff cross-appealed — Appeal allowed in part — Cross-appeal allowed in part — Master erred in law in declining to order plaintiff to answer four undertaking requests — However, scope of inquiries were further limited — Subject to privilege issues and relevance issues, it was appropriate to require plaintiff to inform himself as to steps taken on his behalf to identify individuals who may have been involved in B's treatment — Information sought related to important issue in application — Requesting information from counsel was not onerous and would likely be significant in determining application.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Solicitor-client privilege

Plaintiff took his late wife, B, to hospital because of concerns for her mental well-being and safety — Defendant doctors saw B and discharged her later that evening — B committed suicide shortly after — Plaintiff served statement of claim, and served amended statement of claim when he discovered that he had sued wrong doctor — Plaintiff then sought to amend amended statement of claim — Doctors applied to compel answers to objected-to undertakings, and while plaintiff was ordered to provide answers to two, master declined to order answers to rest — Doctors appealed — Plaintiff cross-appealed — Appeal allowed in part — Cross-appeal allowed in part — Master erred in law in declining to order plaintiff to answer four undertaking requests — However, scope of inquiries were further limited — It was not improper to ask what steps solicitors took from time they were retained until relevant date — Plaintiff brought diligence into issue by applying to add doctors as defendants — Further, privilege was waived relating to answer of when plaintiff told his counsel that B was treated by male resident — Plaintiff waived privilege over that communication by putting his diligence into issue.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Documents prepared in contemplation of litigation

Plaintiff took his late wife, B, to hospital because of concerns for her mental well-being and safety — Defendant doctors saw B and discharged her later that evening — B committed suicide shortly after — Plaintiff served statement of claim, and served amended statement of claim when he discovered that he had sued wrong doctor — Plaintiff then sought to amend amended statement of claim — Doctors applied to compel answers to objected-to undertakings, and while plaintiff was ordered to provide answers to two, master declined to order answers to rest — Doctors appealed — Plaintiff cross-appealed — Appeal allowed in part — Cross-appeal allowed in part — Master erred in law in declining to order plaintiff to answer four undertaking requests — However, scope of inquiries were further limited — It was relevant to know what resources plaintiff had readily available, or what resources he obtained for purposes of determining appropriate parties, during relevant time frame — There was no valid objection to plaintiff being asked to enquire of his solicitors what resources they had in their offices to ascertain doctors' identities — If any materials were obtained for purpose of litigation, privilege was waived by plaintiff putting his due diligence in issue.

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R. v. Card (2002), 2002 CarswellAlta 746, 2002 ABQB 537, 3 Alta. L.R. (4th) 92, 307 A.R. 277 (Alta. Q.B.) — referred to

R. v. Fosty (1991), [1991] 6 W.W.R. 673, (sub nom. *R. v. Gruenke)* 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, (sub nom. *R. v. Gruenke)* [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108, 1991 CarswellMan 206, 1991 CarswellMan 285 (S.C.C.) — referred to

Resortport Development Corp. v. Alberta Racing Corp. (2004), 2004 CarswellAlta 1880 (Alta. Q.B.) — referred to

Resortport Development Corp. v. Alberta Racing Corp. (2005), 2005 ABCA 49, 2005 CarswellAlta 143 (Alta. C.A.) — referred to

Smith v. Jones (1999), 132 C.C.C. (3d) 225, 169 D.L.R. (4th) 385, 22 C.R. (5th) 203, (sub nom. *Jones v. Smith)* 60 C.R.R. (2d) 46, (sub nom. *Jones v. Smith)* 236 N.R. 201, 1999 CarswellBC 590, 1999 CarswellBC 591, [1999] 1 S.C.R. 455, (sub nom. *Jones v. Smith)* 120 B.C.A.C. 161, (sub nom. *Jones v. Smith)* 196 W.A.C. 161, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364, 1999 SCC 16 (S.C.C.) — referred to

True Blue Cattle Co. v. Toronto Dominion Bank (2004), 12 C.C.L.I. (4th) 256, 49 C.P.C. (5th) 153, 360 A.R. 117, 2004 ABQB 145, 2004 CarswellAlta 279 (Alta. Q.B.) — referred to

155569 Canada Ltd. v. 248524 Alberta Ltd. (1989), 99 A.R. 100, 1989 CarswellAlta 505 (Alta. Master) — referred to

Statutes considered:

Limitations Act, R.S.A. 2000, c. L-12
Generally — referred to

s. 3(1)(a) — considered

s. 6(1) — considered

s. 6(4)(b) — considered

s. 6(5)(b) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 314(2) — considered

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

Pt. 5 — referred to

R. 6.7 — considered

R. 6.8 — referred to

APPEAL by doctors from decision regarding application to compel answers to undertakings; CROSS-APPEAL by plaintiff from decision regarding application to compel answers to undertakings.

***R.A. Graesser J.*:**

I. Introduction

1 This is an application by Drs. Neilson, Ostolosky and Din (the "doctors") by way of an appeal from the decision of Master Wachowich dated June 1, 2010 dismissing their application to compel the Plaintiff to answer certain objected-to undertakings from his examination for discovery. Mr. Brogden cross-appeals Master Wachowich's decision with respect to the two objected-to undertakings he was required to answer.

2 The application before Master Wachowich turned on relevance, solicitor - client privilege and solicitor's work product privilege.

II. Background

3 The Plaintiff is the widower of the late Brooklyn Alissa Rozak and is the Administrator Ad Litem of her estate.

4 Ms. Rozak had been admitted to the Grey Nuns Hospital in Edmonton on May 30, 2005 for psychiatric observation and treatment. She was discharged on June 3, 2005. Later that day, she was taken to the University of Alberta Hospital by her husband because of concerns for her mental well-being and safety.

5 At the University Hospital, she was initially seen by Dr. Neilson, an emergency doctor. He concluded that she should have a psychiatric consultation, and she was then seen by a resident, Dr. Din, and the staff psychiatrist, Dr. Ostolsky.

6 Following the psychiatric consultation, Ms. Rozak was discharged later that evening.

7 On June 5, 2005, Ms. Rozak committed suicide.

8 Mr. Brogden sought legal advice in August, 2005 and signed consents for the release of Ms. Rozak's medical records and information. Mr. Brodgen's counsel wrote the University Hospital on November 8, 2005 requesting patient files and records.

9 The University Hospital records were provided to counsel under cover of a November 14, 2005 letter. The records clearly show that "Dr. Neilson" requested a medical consultation from "Dr. Ostolosky" on June 3, 2005.

10 On the Outpatient Chart, there is a signature under "Doctor" but no printed name. Dr. Kevin Neilson has deposed that is his signature. Whether his signature is legible is in issue on the underlying application.

11 On a similar form in the records, there are notes and above "Consultant's Signature" is a signature and the printed name "Omar Din". Whether either the signature or printed name is legible is in issue on the underlying application.

12 A Statement of Claim was issued on June 1, 2007, naming Dr. Michael Demas, the University Hospital and the Grey Nuns Hospital. It was amended later that day to include Drs. Carl Blashko and Darren Neilson. The action has been since discontinued against Dr. Darren Neilson.

13 The Statement of Claim was not immediately served. It was served on the University Hospital on April 24, 2008 and on Dr. Darren Neilson on May 6, 2008.

14 Shortly after the University Hospital had been served, in-house counsel notified Mr. Brogden's counsel that the wrong Dr. Neilson had been sued. Dr. Darren Neilson was an emergency doctor at the Grey Nuns Hospital, and had no dealings at all with Ms. Rozak. Rather, his brother, Dr. Kevin Neilson, an emergency doctor at the University Hospital, was the emergency doctor who had seen Ms. Rozak on June 3, 2005.

15 Following that correspondence, Mr. Brogden's counsel had the Amended Statement of Claim served on Dr. Kevin Neilson on July 2, 2008, along with a letter advising Dr. Kevin Neilson of Mr. Brogden's intention to amend the Statement of Claim to substitute him for his brother Darren as a defendant.

16 On November 3, 2008, Dr. Ostolosky was served with the Amended Statement of Claim, along with a letter advising her of Mr. Brogden's intention to amend the Statement of Claim to add her as a defendant.

17 An application was filed on November 14, 2008 on behalf of Mr. Brogden to amend the Amended Statement of Claim by substituting Dr. Kevin Neilson for Dr. Darren Neilson and adding Dr. Ostolosky.

18 Mr. Brogden had Dr. Din served with the Amended Statement of Claim in mid-February, 2009 along with notice that he intended to add Dr. Din as a defendant.

19 Drs. Kevin Neilson, Ostolosky and Din have objected to the amendments to the Amended Statement of Claim and have raised the *Limitations Act*, R.S.A. 2000, Ch. L-12.

20 Mr. Brogden was cross-examined on his affidavit in support of his application for the amendments, and a number of undertakings were requested but refused.

21 Following the refusals, counsel for the doctors applied to compel answers to the objected-to undertakings. Master Wachowich gave oral reasons for decision and ordered that Mr. Brogden provide answers to two of the undertakings. He declined to order answers to the rest.

22 The doctors appeal the dismissal of some of the requested undertakings; Mr. Brogden cross-appeals with respect to the two he was required to answer. Over the course of preparing for this appeal, the parties have reduced the number of undertakings in dispute.

III. Standard of Review

23 The parties are agreed that the issues in the appeal are questions of law, and thus attract a correctness standard of review.

IV. Undertakings in Dispute

24 The following undertakings are the ones still in dispute:

Undertaking 6:	Advise if there was more information received or obtained to determine that Carl Blashko and Darren Neilson should be added as defendants prior to filing the Amended Statement of Claim.
Undertaking 8:	Make inquiries and determine what steps were taken on Brad Bogden's behalf to determine why Darren Neilson was named as defendant and what further determinations, if any, were made to confirm that he was properly named a defendant between June 4, 2005 and June 1, 2008.
Undertaking 9:	Make inquiries to determine what steps were taken on behalf of Brad Brogden between June 4, 2005 and June 1, 2008 to determine whether any other physician should be named as defendants in the lawsuit, particularly Dr. Ostolosky and Dr. Din.
Undertaking 10:	Make inquiries to determine whether or not there was anything preventing Brad Brogden's counsel from contacting the University of Alberta Hospital at any time between the time they were retained in August of 2005 until June 1, 2008 to ake

	inquiries with respect to the names of the physicians that were involved in caring for Ms. Rozak on June 3, 2005.
Undertaking 13:	Make inquiries of Brad Brogden's counsel as to what medical directories are available in their office and did have available in their office between August of 2005 and June 1, 2008.
Undertaking 16:	Make inquiries and determine when it was that Brad Bogden first advised counsel that he had a recollection of Ms. Rozak being seen by an intern or resident of the middle eastern descent.
Undertaking 22:	Make inquiries with Brad Bogden's counsel to determine if there was something preventing him from determining or recognizing that there was a resident involved in Ms. Rozak's care at any point after they received the records on November 16, 2005.

25 The Master ordered answers to 13 and 16, and refused to order answers to 6, 8, 9, 10 and 22.

V. Issues

26 This appeal only deals with the objected-to undertakings, and not the underlying application to amend the Amended Statement of Claim.

27 The issues on this appeal relate to whether the undertakings may be directed on questioning on an affidavit, the relevance of the requested undertakings, and whether Mr. Brogden should be required to answer some or all of them having regard to solicitor and client privilege, as well as his solicitor's litigation and work product privilege.

28 Rule 6.7 deals with questioning. It provides:

> A person who makes an affidavit in support of an application or in response or reply to an application may be questioned, under oath, on the affidavit by a person adverse in interest on the application, and
>
> (a) rules 6.16 to 6.20 apply for the purposes of this rule, and
>
> (b) the transcript of the questioning must be filed by the questioning party.

29 Old Rule 314(2), which was in effect when the questioning took place, provided:

> The deponent may be required to attend in the same manner as a party being examined for discovery and the procedure on his examination is subject to the same Rules, so far as they are applicable, as the Rules that apply to the examination for discovery of party.

30 Having regard to the foundational rules, I see no purpose or basis to change the scope of questioning on an affidavit in support of an application: questions relevant and material to the underlying application will be permitted and if refused, will be ordered to be answered:

> *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1981] 4 W.W.R. 760 (Alta. Q.B.), at paras. 4 and 6
>
> *155569 Canada Ltd. v. 248524 Alberta Ltd.* (1989), 99 A.R. 100 (Alta. Master) at paras. 11-13
>
> *Bland v. Canada (National Capital Commission)*, 1989 CarswellNat 170 (Fed. T.D.), at para. 16
>
> *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.* (2008), 97 Alta. L.R. (4th) 182 (Alta. Master) at para. 5

31 Repetitive and abusive questions have never been allowed; questioning must now be both relevant and material to the application having regard to the narrowing of the scope of questioning generally from "touching the matters in question" to "relevant and material".

32 Nevertheless, to determine relevance and materiality, the issues on the underlying application must be reviewed.

VI. Undertakings on Questioning on Affidavits

33 The threshold issue on this application is whether (or the extent to which) an affiant may be required to undertake to provide further evidence or documents. There is much authority to suggest that an affiant may not be required to inform him or herself following the questioning on questions that could not be answered - following up on answers "I don't know".

34 *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, 1997 CarswellNat 2661 (Fed. T.D.) (holds that "absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself" (at para. 4).

35 That is an often-quoted statement, and has been followed in *Alberta Treasury Branches v. Leahy*, 1999 CarswellAlta 1027 (Alta. Q.B.), and *Bruno v. Canada (Attorney General)*, 2003 CarswellNat 3375 (F.C.).

36 However, there are also a number of cases in Alberta where affiants have been require to inform themselves, and provide answers following the questioning.

37 The most detailed analysis of undertakings on questioning on affidavits is Master Prowse's decision in *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2008 ABQB 671 (Alta. Master). He concluded at para. 5:

> 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.

38 I agree with his conclusions. The statement that an affiant cannot be required to inform him or herself is not the law in Alberta. An affiant being questioned is in a similar position to that of a witness being cross-examined at trial. Witnesses are expected to have taken reasonable steps to inform him or herself as to the subject matter on which they are expected to testify. They are expected to bring with them all records in their possession or control which are relevant to the issues in the lawsuit. They may be cross-examined not only on their evidence in chief, but on any other matter within their knowledge.

39 One key difference is that witnesses at trial does not usually have the ability to inform themselves during cross-examination on questions they are unable to readily answer. That may work to their great disadvantage, as a witness who is unable to provide an answer to something reasonably expected to be in his or her knowledge may be seen as unprepared, unhelpful, unintelligent, or even untruthful.

40 Because questioning on affidavits generally takes place some time before the underlying application is heard, an affiant does have the opportunity to shore up his or her testimony by providing a further affidavit. Where the affiant has knowledge or access to knowledge which may be helpful to the other side, there is no policy reason to have a *bar* against requiring the affiant to obtain the answer for a question that was properly put to the affiant on questioning.

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.

42 To be clear, therefore, I agree with the Master that there is no general prohibition against asking affiants for undertakings on questioning on their affidavits, but that the propriety of any undertaking sought is governed by the tests set out above.

43 This does not prevent an affiant or counsel on his or her behalf from agreeing to provide undertakings on a voluntary basis. As noted by the Master, it may be in the affiant's advantage to provide such information, as the information will be used on the underlying application. Giving undertakings, and complying with them, may avoid the underlying motion from failing for want of evidence.

44 I also agree with the Master's conclusion that the courts should be slower in requiring affiants to inform themselves than is the case with witnesses being questioned in the disclosure process under Part 5 of the New Rules.

45 Here, I am satisfied that, subject to privilege issues and relevance issues as to each inquiry requested, it is appropriate to require Mr. Brogden to inform himself as to steps taken on his behalf to identify the individuals who may have been involved in Ms. Rozak's treatment at the University Hospital.

46 In relation to this application, Mr. Brogden can only assert that he has been reasonably diligent in identifying the appropriate defendants by informing himself from his counsel as to what was done by them on his behalf. The information sought relates to an important issue in the application - the commencement date for the limitation period - and requesting the information from counsel is not onerous and would likely be significant in determining the application.

47 Thus both alternatives in the test in *Dow Chemical* are satisfied here.

VII. Relevance

48 It should be noted that the Plaintiff does not argue that the naming of Dr. Darren Neilson was a misnomer. The Plaintiff intended to sue someone else, not Dr. Darren Neilson, so this is not a case of mis-spelling the person's name.

49 The doctors are resisting the underlying application on the basis of the *Limitations Act*. There are two provisions in the *Limitations Act* which are brought into play: s. 3(1)(a) dealing with the basic two year limitation period from discovery of the cause of action, and sections 6(1) and 6(4)(1)(b) dealing with adding defendants to an existing lawsuit after the two year period has run.

50 S. 3(1)(a) provides:

> Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

51 S. 6(1) states:

> Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

52 S. 6(4)(b) states:

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

53 Additionally, s. 6(5)(b) provides that:

the defendant has the burden of proving that the requirement of subsection 3(b) or 4(b), if in issue, was not satisfied.

VIII. Onus and Arguments

54 As this is an application to add defendants, to which s. 6(4)(b) applies, the doctors acknowledge that the onus is on them to demonstrate that their identities were discoverable by Mr. Brogden *before* the dates identified below, citing *Resortport Development Corp. v. Alberta Racing Corp.*, 2004 CarswellAlta 1880 (Alta. Q.B.), at para. 3, aff'd 2005 ABCA 49 (Alta. C.A.).

55 The test for discoverability is set out in *De Shazo v. Nations Energy Co.*, 2005 ABCA 241 (Alta. C.A.):

A cause of aciton arises for purposes of a limitation period when the material facts on which it (the cause of action) is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. (At para. 26)

. . .

The claimant must know or have been reasonably able to discover that: (i) the injury occurred; (ii) the injury was attributable to the conduct of the defendant; and (iii) the injury warrants bringing a proceeding. (At para. 28)

56 In this case, there are different arguments with respect to each of the doctors:

Dr. Kevin Neilson

57 The Plaintiff argues that Dr. Neilson was served within two years from the discovery of an arguable cause of action against him. The University Hospital records only show "Dr. Neilson"; materials relied on by the Plaintiff for the purpose of preparing and issuing the Amended Statement of Claim showed only Dr. Darren Neilson as an emergency doctor in Edmonton. The first the Plaintiff learned of Dr. Kevin Neilson was a June 20, 2008 email from counsel for the doctors, who advised that "He (Dr. Darren Neilson) tells us that Dr. Kevin Neilson, however, was on shift. Darren believes that Kevin should be the named Defendant."

58 If June 20, 2008 is the appropriate date for the discoverability of Dr. Kevin Neilson's identity and involvement, the application to amend (November 14, 2008) was within the discoverability date.

59 Alternatively, if Dr. Kevin Neilson is to be treated as a party to be added after the limitation period has expired, the test is whether he learned of a possible claim against him within the appropriate limitation period, plus the time for service of the Amended Statement of Claim under the Rules of Court.

60 In the latter circumstance, the Amended Statement of Claim was issued on June 1, 2007. It had to be served (or renewed) before June 1, 2008. But using discoverability principles, the Plaintiff argues that the earliest commencement time would be November 16, 2005, the date the November 14, 2005 correspondence from the University Hospital enclosing Ms. Rozak's medical chart was received by Mr. Brogden's counsel. Thus, the Statement of Claim should have been issued and served on Dr. Kevin Neilson by November 16, 2008.

61 As such, even if the limitation period has expired, since Dr. Kevin Neilson had knowledge of the possible action against him on July 2, 2008, the application to add him as a defendant to the existing action is not barred by the *Limitations Act*.

62 Dr. Neilson argues that the limitation period began to run on June 4, 2005, the date of Ms. Rozak's death. Alternatively, he argues that Mr. Brogden has not established that he was reasonably diligent in obtaining the University Hospital's chart and in

determining that the Dr. Neilson referred to in it was Dr. Kevin Neilson and not Dr. Darren Neilson. He argues that his signature is clearly identifiable in the chart, and he is shown in the readily-available Alberta Health and Wellness Statement of Benefits Paid as having provided services to Ms. Rozak on June 3, 2005.

63 The Statement of Benefits Paid was not ordered until October 20, 2008, and was received by Mr. Brogden's counsel on November 12, 2008.

64 Dr. Neilson argues that the limitation period expired much before November 16, 2005 and that Mr. Brogden has not proven that he was reasonably diligent in obtaining records and determining the correct defendants to name in the Statement of Claim.

65 Essentially, his argument is that the limitation period expired on June 3, 2007. For the purposes of s. 6(4)(b) of the *Limitations Act*, Dr. Kevin Neilson would have had to have known about the possible claim before June 3, 2008. Mr. Brogden has not proven that he was reasonably diligent in obtaining the necessary information; thus there should be no extension of the June 3, 2007 limitation period. Thus, when Dr. Kevin Neilson learned of the possible claim against him on July 2, 2008, it was too late under s. 6(4)(b).

66 To succeed in adding Dr. Kevin Neilson, Mr. Brogden will have to establish that it was not unreasonable for him to have taken no steps to identify the doctors involved in Ms. Rozak's treatment at the University Hospital before July 2, 2005 and that the limitation period under s. 3(1)(a) commenced then or later.

Dr. Ostolosky

67 Mr. Brogden argues that the discoverability period for Dr. Ostolosky began to run on November 16, 2005 when the hospital records identifying her and her involvement were received by his counsel. Thus, so long as she had notice of the possible claim against her by November 16, 2008, the claim against her is not barred under the *Limitations Act*. Since she was served with the Amended Statement of Claim and was advised that Mr. Brogden intended to have her added as a defendant by letter of November 3, 2008, there is no limitations defence for her.

68 Dr. Ostolosky responds in similar fashion to Dr. Neilson: Mr. Brogden has not discharged the onus on him of showing reasonable diligence in obtaining the medical records and the relevant date should not be extended beyond the basic limitation period of June 3, 2005. That would have required notice to her by June 3, 2008. Since she did not receive notice until November 3, 2008, the application to add her as a defendant under s. 6(4)(b) of the *Limitations Act* must fail.

69 For Mr. Brogden to succeed in adding Dr. Ostolosky, Mr. Brogden will have to establish that it was not unreasonable for him to have taken no steps to identify the doctors involved in Ms. Rozak's treatment at the University Hospital before he consulted counsel in August, 2005 (two or so months after Ms. Rozak's death) *and* that it was not unreasonable for his counsel to take until November 16, 2005 to obtain the University Hospital chart or otherwise identify the doctors involved in her treatment. Essentially, that the limitation period under s. 3(1)(a) did not begin to run until November 16, 2005 or later.

Dr. Din

70 Mr. Brogden argues that Dr. Din's name and involvement could not reasonably be determined from the University Hospital chart, and his name does not appear on the Statement of Benefits Paid.

71 Mr. Brogden met him on June 3, 2005 when Dr. Din interviewed Ms. Rozak and (as confirmed on his cross-examination on September 15, 2009 that he was aware of the involvement of a white male emergency doctor and an East Indian or Middle Eastern male psychiatrist.

72 Mr. Brogden deposed in his affidavit sworn November 13, 2008 in support of his application to add Dr. Ostolosky as a defendant, that he did not then know the identity of the East Indian or Middle Eastern psychiatrist or resident. Attached to his affidavit was a request by his counsel to the University Hospital's counsel is a letter dated October 20, 2008 requesting the name of the "consultant's signature".

73 He argues that the discoverability period with respect to Dr. Din had not expired by October 20, 2008. While no formal application has been made to add Dr. Din as a defendant, that is not necessary because under s. 6(4)(b), he can still be added as a defendant. He had notice of the possibility of this action against him in mid-February, 2009 which was well within the limitation period, let alone any added service period.

74 Dr. Din's counsel argues that the limitation period against him expired on June 3, 2007. Mr. Brogden has not satisfied the onus on him of showing reasonable diligence in seeking out his identity and involvement. His involvement (but not necessarily his name) was known to Mr. Brogden on June 3, 2005 when they met. At the latest, discoverability for Dr. Din might run to November 16, 2005 when the hospital charts were provided to Mr. Brogden's counsel. The chart clearly identifies Dr. Din. Thus, the latest limitation period for Dr. Din would have expired on November 16, 2007. For s. 6(4)(b) of the *Limitations Act* to apply, he would have had to have had notice of the possible claim before November 16, 2007. Since he only had such notice in mid-February, 2009, the action is clearly barred against him and the application to add him under 6(4)(b) is doomed to fail.

75 For Mr. Brogden to succeed in adding Dr. Din, it appears that he will have to establish that it was not unreasonable for his counsel to have not identified Dr. Din from the University Hospital records provided to them on November 16, 2005, and further that it was not unreasonable for them to take no further steps to identify doctors involved in Ms. Rozak's treatment at the University Hospital until after mid-February, 2006 (despite Mr. Brogden's knowledge that an East Indian or Middle Eastern psychiatrist was involved). Essentially, that the limitation period under s. 3(1)(a) did not begin to run until mid-February, 2006 or later.

76 Mr. Brogden also has arguments that could lead to similar result as are argued with respect to Dr. Kevin Neilson and Dr. Ostolsky: that sufficient information was not learned about Dr. Din's involvement until late 2008 or even 2009 such that the period under s. 6(4)(b) has not yet run. For the purpose of this application, those arguments do not need to be dealt with.

77 Thus, the issues for Dr. Kevin Neilson are:

1. Whether the limitation period based on discoverability expired July 2, 2007 or later.

2. Has Dr. Neilson satisfied the onus on him that Mr. Brogden should, with reasonable diligence, have discovered that he had a possible cause of action against Dr. Kevin Neilson before July 2, 2005 (a month after Ms. Rozak's death and before he sought legal counsel in August, 2005)?

78 For Dr. Ostolovsky:

1. Whether the limitation period based on discoverability expired November 12, 2007 or later.

2. Has Dr. Ostolovsy satisfied the onus on her that Mr. Brogden should, with reasonable diligence, have discovered that he had a possible cause of action against Dr. Ostolovsky before November 12, 2005 (before Mr. Brogden's counsel received the University Hospital chart identifying Dr. Ostolovsky)?

79 For Dr. Din:

1. Whether the limitation period based on discoverability expired before mid-February, 2008.

2. Has Dr. Din satisfied the onus on him that Mr. Brogden should, with reasonable diligence, have discovered that he had a possible cause of action against Dr. Din before mid-February, 2006 (three months after the University Hospital chart with his signature and printed name was received by Mr. Brogden's counsel)?

80 It is reasonable to assume that Mr. Brogden left the identification of possible defendants to his counsel after August, 2005, so issues as to his diligence or reasonableness in trying to identify the correct defendants are really issues as to the diligence or reasonableness of his counsel. Thus the application and the evidence is destined to bump up against solicitor - client privilege and solicitor's work product privilege.

IX. Master's Decision

81 The essence of the Master's ruling is found at pages 2 and 3 of his decision:

> Further comment from the BC Appellate Court in *Hodgkinson v. Simms* 1988 CarswellBC 437:
>
> > If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.
>
> In my view, there might be an appropriate case to allow for that type of questioning, but it would have to be a rather severe case, and it would have to be a situation where justice cried out for that type of inquiry to be answered. In this case, it is clear from the hospital record that Kevin Neilson should have been named as a defendant as should have Dr. Ostolosky and as should the resident. So in this case there is no obligation for Mr. Brogden in the context of a cross-examination on affidavit to answer undertakings, especially where, as her, it would require Mr. Brogden to inform himself of making inquiries of his counsel in order to provide the answer. In my vies, the Court should lean towards protecting the file of counsel for the plaintiff, and, as I say, in an appropriate case, it might be that the Court would rule otherwise.
>
> Dealing now with the undertakings in question, I do not think it is necessary to go through them one by one. I have already indicated which way I am headed on this, so that undertaking number 6, 8, 9, and 10 do to have to be answered.
>
> Undertaking 13 is to make inquiries of Brogden's counsel as to what medical directories are available in his lawyer's office. That does not go into the lawyer's brief. That is a straightforward matter, and I direct that that be provided.
>
> Undertaking number 16 is to make inquiries and determine when it was that r. Brogden first advised counsel that he had a recollection of Ms. Rozak being seen by a male intern, a resident of Middle Eastern Descent. That is relevant material, and it shall be provided.
>
> Eighteen is, my view, going into plaintiff's counsel's file or worse yet, asking him to ask his lawyer to provide an answer to that question, and that will not be provided.
>
> Twenty-one, again it is asking Mr. Brogden to seek information from his counsel, and that will not be provided.
>
> I should say a number of these matters for them not to be provided does not mean that the information sought is not available in one form or another to be provided to the Court should this matter proceed to trial or to summary judgment.
>
> Twenty-two is make inquiries of Brogden's counsel to determine if there was something preventing him from determining or recognizing that there was a resident involved. I mean, again, that is asking the plaintiff to get information from the counsel. It is evident from the possible record that there was a resident involved, so the evidence is already there.

82 He determined that undertaking requests 6, 8, 9, 10 and 22 need not be answered because they involved solicitor's work product privilege, and he was not satisfied that such privilege had been waived.

83 With respect to undertaking requests 13 and 16, he directed that they be answered, on the basis of relevance.

X. Specific Undertakings Requests

84 The onus of showing that Mr. Brogden failed to exercise reasonable diligence in discovering the identities of the doctors involved lies on the doctors. It is also clear that knowledge as to what Mr. Brodgen knew and when he knew it would not be known to the doctors, and the only way of finding out such information would be to obtain it from him, or from persons acting on his behalf.

85 The issues of knowledge, diligence and timing are clearly relevant and material to the underlying application in a general way, and specifically with respect to those issues to those specific dates discussed above.

Undertaking 6

86 Request 6 seeks any more information received or obtained to determine that Carl Blashko and Darren Neilson should be added as defendants prior to filing the Amedned Statement of Claim.

87 Firstly, there is no issue regarding Dr. Blashko on the underlying application, so information regarding him is not relevant and need not be provided. As regards Dr. Darren Neilson, the relevant date for the purpose of the underlying application is July 2, 2005.

88 It may be that the plaintiff was not diligent in seeking counsel. It may be that counsel was not diligent in identifying the doctors involved in Ms. Rozak's care at the University Hospital. But a statement of claim was issued within the time for the earliest possible limitation period to expire. Dr. Darren Neilson was therefore sued in time, although it is clear that there was no cause of action against him.

89 Therefore, the underlying application clearly involves s. 6(4)(b) of the *Limitations Act*, and the only relevant date for Dr. Kevin Neilson is July 2, 2005. Any lack of diligence after that date does not affect the outcome of the underlying application.

90 The undertaking which might be required to be answered would be "what information was received or determined that Darren Neilson should be added as a defendant prior to July 2, 2005". Because counsel was not retained until August, 2005, the answer to that undertaking would be solely in Mr. Brogden's knowledge, and he should be required to answer it.

Undertaking 8

91 Request 8 seeks information as to what steps were taken on Mr. Brogden's behalf to determine why Darren Neilson was named as a defendant.

92 As the answer to that question relates to a period long after July 2, 2005, I do not see any relevance to it and it need not be answered.

Undertaking 9

93 Request 9 seeks information as to what steps were taken on Mr. Brogden's behalf between June 4, 2005 and June 1 2008 to determine whether any other physician should be named as defendants in the lawsuit, particularly Dr. Ostolosky and Dr. Din.

94 The relevant date for Dr. Ostolosky is November 12, 2005. The relevant date for Dr. Din is mid-February, 2006.

95 If steps were taken on Mr. Brogden's behalf other than by or for his lawyers, that information should be provided as regards Dr. Ostolsky to November 12, 2005 and as to Dr. Din to February 15, 2006.

96 With respect to steps taken on Mr. Brogden's behalf by his counsel, solicitor-client privilege and solicitor's work product privilege are raised.

97 At the outset, I need not weigh into whether solicitor's work product privilege is or is not a subset of litigation privilege or a stand-alone privilege of lesser. Whether as a subset of litigation privilege or standing on its own, work product privilege has lesser standing than solicitor-client privilege. *Blank v. Canada (Department of Justice)*, 2006 SCC 39 (S.C.C.), *R. v. Card*, 2002 ABQB 537 (Alta. Q.B.), *Hudson Bay Mining & Smelting Co. v. Cummings*, 2006 MBCA 98 (Man. C.A.), *Moseley v. Spray Lakes Sawmills (1980) Ltd.* (1996), 39 Alta. L.R. (3d) 141 (Alta. C.A.), are to that effect.

98 Privilege can be waived by giving evidence of a privileged communication, or where a party, by his testimony or pleading voluntarily raises a defence or asserts a claim which makes information provided by his solicitor relevant. Selective waiver is not permitted:

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. [1992 CarswellAlta 86 (Alta. Q.B.)], 1992 CanLII 6132; *True Blue Cattle Co. v. Toronto Dominion Bank*, 2004 ABQB 145 (Alta. Q.B.), *Petro Can Oil & Gas Corp. v. Resource Service Group Ltd.*, [1988] A.J. No. 336 (Alta. Q.B.), aff'd (1988), 32 C.P.C. (2d) xlvi (note) (Alta. C.A.); *Alberta Wheat Pool v. Estrin*, [1986] A.J. No. 1165 (Alta. Q.B.), aff'd (1987), 17 C.P.C. (2d) xxxix (note) (Alta. C.A.); *Marion v. Wawanesa Mutual Insurance Co.*, 2004 ABCA 213 (Alta. C.A.).

99 Positions cannot be taken that are inconsistent with maintaining privilege; privilege on a particular issue or point cannot be waived selectively or unfairly.

100 I hasten to add that preservation and protection of solicitor client privilege (and to a lesser extent litigation privilege and solicitor's work product privilege) is important, and privilege should not be interfered with other than in the few exceptional circumstances recognized by the courts:

Pritchard v. Ontario (Human Rights Commission), 2004 SCC 31 (S.C.C.), *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), and *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.).

101 Where the issue of diligence has been legitimately raised (as it has here because of the Plaintiff's application to add the doctors as defendants after the standard without-discoverability period of two years from the injury), the Plaintiff's diligence as well as his solicitor's diligence becomes relevant. As the only way the doctors have of testing such diligence is through cross-examination on Mr. Brogden's affidavit and seeking undertakings with respect to his counsel's actions (unless the doctors wanted to risk examining the Plaintiff's counsel under Rule 6.8 as their witness rather than through cross-examination), solicitor client privilege may well have to yield on issues relating to knowledge of doctors, and the diligence of the solicitors in informing that knowledge. It would be unfair to allow the plaintiff to essentially say "I didn't do anything, I left it all to my lawyers" and then refuse to say what the lawyers have told him they did, or even ask them about it.

102 That is not to say that the resulting waiver or loss of privilege extends to anything beyond diligence in discovering the identity of the doctors involved. Mr. Brogden's affidavits do not go beyond diligence issues, and anything beyond that would be irrelevant to the underlying application let alone being an unwarranted incursion into privilege.

103 In the context of the undertaking sought, as modified by me above, I do not see that it is improper to ask what steps the solicitors took from the time they were retained until the relevant date specified above. Mr. Brogden has brought diligence into issue by applying to add the doctors as defendants, and discoverability is necessary to extend the limitation period for suing each of the doctors to or beyond the relevant dates.

Undertaking 10

104 Request 10 seeks information as to whether there was anything preventing Mr. Brogden or anyone on his behalf from contacting the University Hospital to make inquiries as to the identities of the doctors who were involved in Ms. Rozak's care.

105 I see this as a question of diligence - was there some reason why Mr.Brogden's counsel did not contact the University Hospital or its solicitors to determine specifically which doctors were involved, particularly after receipt on November 16, 2005 of the University Hospital chart in which Dr. Kevin Neilson's signature, Dr. Ostolosky's name and Dr. Din's signature and printed name are found (legibility issues aside).

106 As regards Dr. Kevin Neilson, the question is irrelevant as the relevant date for him had passed before counsel was retained.

107 As regards Dr. Ostolosky, the relevant date is November 12, 2005. In my view, the undertaking should be answered with respect to her to November 12, 2005. My view on privilege is the same as with requested undertaking 9.

108 As regards Dr. Din, the relevant date is February 16, 2006, and the undertaking should be answered with respect to him to February 16, 2006.

109 Any times after February 16, 2006 are simply not relevant to the application to amend.

Undertaking 13

110 In request 13, the doctors seek information as to what materials were available to Mr. Brogden's counsel between August, 2005 and June 1, 2008 (when the Amended Statement of Claim was issued). Mr. Brogden objects to this as it is part of his solicitor's work product.

111 Firstly, as with the other undertaking requests, times after February 16, 2006 are not relevant to the application to amend. So the time frame is in any event narrowed to August, 2005 to February 16, 2006. Diligence is in issue. It seems to me that it is relevant to know what resources the plaintiff (or his counsel) actually had readily available to them, or obtained for the purposes of determining the appropriate parties, during this relevant time frame. Certainly the doctors are free to argue what sources of information *might* have been available to the plaintiff or his counsel, but it is clearly relevant to know what information they actually *had*.

112 Mr. Brogden's counsel has already advised that they had the 2005 Canadian Medical Directory in their offices and that they consulted it regarding Dr. Darren Neilson. There are issues relating to his identity, as well as whether Dr. Din's identity is ascertainable from the University Hospital Chart. I see no valid objection to Mr. Brogden being asked to enquire of his solicitors what resources they had in their offices to ascertain doctors' identities during this period.

113 As to privilege, if any materials were obtained for the purpose of this litigation in this period, privilege has been waived by the plaintiff putting his due diligence in issue. If materials (such as directories) are simply part of counsel's library, I do not see that it could be claimed that they were obtained for the dominant purpose of this litigation. In that regard, I do not see the request as being any more objectionable than asking if counsel had the Western Weekly Reports or the Supreme Court Reports in their offices. They may be there for litigation purposes generally, but no one file specifically. It would be difficult to see how a "dominant purpose" test for privilege could be met.

114 The requested undertaking should be answered, but limited to the period ending February 16, 2006.

Undertaking 16

115 In request 16, the doctors want to know when Mr. Brogden told his counsel that Ms. Rozak had been treated by a male resident or intern of East Indian or Middle Eastern descent. This was objected to on the basis of the answer being a protected solicitor-client communication.

116 Doubtless the question goes to the a well-protected area: communications between solicitor and client for the purpose of giving and receiving legal advice. However, in my view the privilege relating to the answer has been waived by the issue of due diligence in determining Dr. Din's involvement and identity being brought into issue by Mr. Brogden. If the answer relates to a period after February 16, 2006, the specific date or circumstances need not be disclosed as being irrelevant. But if such a disclosure was made before February 16, 2006, the doctors are entitled to know that.

117 22 The doctors want to know why Dr. Din's involvement and identity were not recognized by counsel following receipt of the University Hospital records on November 16, 2005. Ordinarily, what was done with the records, or how they were interpreted, would be the subject of work product privilege. In some cases, obtaining records would be included in that privilege. That would not apply here, however, as the records were obtained from one of the parties to the lawsuit.

118 Again, because Mr. Brogden's diligence is in issue, any privilege relating to the records as to that issue has been waived. The doctors are entitled to know why Dr. Din's identity and involvement were not recognized after November 16, 2005, and whether there were any impediments to following up on the records until at least February 16, 2006.

XI. Conclusion

119 In the end, I find that the learned Master erred in law in declining to order that Mr. Brogden inform himself from counsel and advise as to undertaking requests 6, 9, 10 and 22. The answers to those requests fall within the exceptions to privilege - whether solicitor and client or litigation privilege or work product privilege. Number 8 need not be answered, but on the basis of relevance rather than privilege.

120 I agree with the Master's conclusion on Number 13.

121 While I agree with his decision on Number 16, he did not deal with privilege. The question was clearly relevant, but the response strikes directly at solicitor-client communications and would clearly be privileged but for waiver. As noted above, Mr. Brogden waived privilege over that communication by putting his diligence into issue.

122 I also agree with the Master's comment that "the Court should lean towards protecting the file of counsel". Privilege is an essential part of our legal system, and must be protected, subject to waiver and the very limited exceptions described in the case law.

XII. Costs

123 Despite the fact that I have directed that all but one of the requested undertakings be answered, I have in all cases limited the scope of the inquiries. The doctors sought information for periods much later than is relevant on the application to amend. I thus view the result as having mixed success for both sides: the plaintiff has to provide more information than he was prepared to, and the doctors will receive less information than they sought.

124 As a result, costs of this application, and the application before the Master, should be in the cause.

Appeal allowed in part; cross-appeal allowed in part.

Footnotes

* A corrigendum issued by the court on April 11, 2011 has been incorporated herein.

TAB 4

2012 ABQB 375
Alberta Court of Queen's Bench

Medicine Shoppe Canada Inc. v. Devchand

2012 CarswellAlta 999, 2012 ABQB 375, [2012] A.W.L.D. 4626, [2012] A.W.L.D. 4637, [2012] A.W.L.D. 4709, 215 A.C.W.S. (3d) 826, 541 A.R. 312

Medicine Shoppe Canada Inc., Plaintiff and Neil Anil Devchand, Rocky Mountain Wholesale, 927051 Alberta Ltd.. O/a Rocky Mountain Wholesale, Defendants

Neil Anil Devchand and Heritage Hill Pharmacy Inc., Plaintiffs by Counterclaim (Applicants) and Medicine Shoppe Canada Inc. and Katz Group Canada Inc., Defendants by Counterclaim (Respondents)

J.E. Topolniski J.

Judgment: June 7, 2012
Docket: Edmonton 1103-05878

Counsel: Roger C. Stephens, for Applicants
Ellery Lew, for Respondent, Medicine Shoppe Canada Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Public; Evidence; Contracts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Alternative dispute resolution

III Relation of arbitration to court proceedings
III.3 Stay of court proceedings
III.3.a General principles

Civil practice and procedure

X Discovery
X.4 Examination for discovery
X.4.d Procuring attendance of person to be examined
X.4.d.iii Application for order for examination
X.4.d.iii.A General principles

Evidence

VII Documentary evidence
VII.10 Business records
VII.10.f Miscellaneous

Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — General principles

Summary judgment exemption — Application by plaintiff by counterclaim for order compelling answers to questions posed to officer of defendant by counterclaim — Cross-application by defendant by counterclaim for temporary sealing order of documents containing trade secrets — Plaintiff was pharmacy store franchisee and defendant was franchisor — In

main action, which had been resolved by consent, defendant sought to enjoin plaintiff from breaching restrictive covenants — Only counterclaim remained, in which plaintiff sought accounting of all incentives, program funds and benefits — License agreement included arbitration clause that only exempted claims for injunctive relief concerning enforcement of restrictive covenants — Rather than defending counterclaim, defendant applied for stay pending arbitration and officer swore bare bones affidavit that referenced and attached license agreement — During questioning, officer refused to answer questions relating to merits of counterclaim, prompting application — Plaintiff argued stay application brought summary judgment exemption into play so it could elicit information from officer to show matter was suitable for summary judgment — During questioning, plaintiff put highly confidential documents forward — Application dismissed — Cross-application allowed — Plaintiff was trying to employ questioning of officer to marshal sufficient evidence to make out summary judgment application — However, stay application was not same as summary judgment — If plaintiff wanted to contend summary judgment exemption applied, it had to first bring an application for summary judgment with supporting affidavit — Questions posed were not relevant to stay application — Documents undoubtedly contained confidential trade secrets that would cause serious harm to defendant if exposed — Public and private interests were at stake given need for commercial certainty and protection of proprietary information — If defendant did not comply with Part 6, Division 4 of Rules of Court (Alta.), sealing order would expire in seven days — If defendant complied, sealing order would remain in effect pending outcome of stay application.

Evidence --- Documentary evidence — Business records — Miscellaneous

Sealing order — Application by plaintiff by counterclaim for order compelling answers to questions posed to officer of defendant by counterclaim — Cross-application by defendant by counterclaim for temporary sealing order of documents containing trade secrets — Plaintiff was pharmacy store franchisee and defendant was franchisor — In main action, which had been resolved by consent, defendant sought to enjoin plaintiff from breaching restrictive covenants — Only counterclaim remained, in which plaintiff sought accounting of all incentives, program funds and benefits — License agreement included arbitration clause that only exempted claims for injunctive relief concerning enforcement of restrictive covenants — Rather than defending counterclaim, defendant applied for stay pending arbitration and officer swore bare bones affidavit that referenced and attached license agreement — During questioning, officer refused to answer questions relating to merits of counterclaim, prompting application — Plaintiff argued stay application brought summary judgment exemption into play so it could elicit information from officer to show matter was suitable for summary judgment — During questioning, plaintiff put highly confidential documents forward — Application dismissed — Cross-application allowed — Plaintiff was trying to employ questioning of officer to marshal sufficient evidence to make out summary judgment application — However, stay application was not same as summary judgment — If plaintiff wanted to contend summary judgment exemption applied, it had to first bring an application for summary judgment with supporting affidavit — Questions posed were not relevant to stay application — Documents undoubtedly contained confidential trade secrets that would cause serious harm to defendant if exposed — Public and private interests were at stake given need for commercial certainty and protection of proprietary information — If defendant did not comply with Part 6, Division 4 of Rules of Court (Alta.), sealing order would expire in seven days — If defendant complied, sealing order would remain in effect pending outcome of stay application.

Civil practice and procedure --- Discovery — Examination for discovery — Procuring attendance of person to be examined — Application for order for examination — General principles

Refusals — Application by plaintiff by counterclaim for order compelling answers to questions posed to officer of defendant by counterclaim — Cross-application by defendant by counterclaim for temporary sealing order of documents containing trade secrets — Plaintiff was pharmacy store franchisee and defendant was franchisor — In main action, which had been resolved by consent, defendant sought to enjoin plaintiff from breaching restrictive covenants — Only counterclaim remained, in which plaintiff sought accounting of all incentives, program funds and benefits — License agreement included arbitration clause that only exempted claims for injunctive relief concerning enforcement of restrictive covenants — Rather than defending counterclaim, defendant applied for stay pending arbitration and officer swore bare bones affidavit that referenced and attached license agreement — During questioning, officer refused to answer questions relating to merits of counterclaim, prompting application — Plaintiff argued stay application brought summary judgment

exemption into play so it could elicit information from officer to show matter was suitable for summary judgment — During questioning, plaintiff put highly confidential documents forward — Application dismissed — Cross-application allowed — Plaintiff was trying to employ questioning of officer to marshal sufficient evidence to make out summary judgment application — However, stay application was not same as summary judgment — If plaintiff wanted to contend summary judgment exemption applied, it had to first bring an application for summary judgment with supporting affidavit — Questions posed were not relevant to stay application — Documents undoubtedly contained confidential trade secrets that would cause serious harm to defendant if exposed — Public and private interests were at stake given need for commercial certainty and protection of proprietary information — If defendant did not comply with Part 6, Division 4 of Rules of Court (Alta.), sealing order would expire in seven days — If defendant complied, sealing order would remain in effect pending outcome of stay application.

Table of Authorities

Cases considered by *J.E. Topolniski J.*:

Alberta (Securities Commission) v. Institute for Financial Learning Group of Cos. (2005), 2005 ABCA 268, 2005 CarswellAlta 1092, 14 C.P.C. (6th) 192, 371 A.R. 144, 254 W.A.C. 144 (Alta. C.A.) — referred to

Alberta Treasury Branches v. Leahy (1999), 1999 ABQB 829, 1999 CarswellAlta 1027, (sub nom. *Alberta (Treasury Branches) v. Leahy)* 254 A.R. 263 (Alta. Q.B.) — referred to

Balancing Pool v. TransAlta Utilities Corp. (2009), 18 Alta. L.R. (5th) 284, 2009 ABQB 631, 2009 CarswellAlta 2034, 492 A.R. 344 (Alta. Q.B.) — referred to

Bullex Developments Ltd. v. Terra Mines Ltd. (1984), 1984 CarswellAlta 46, 31 Alta. L.R. (2d) 93 (Alta. Master) — referred to

Burndy Canada Ltd. v. Brown (1978), 5 C.P.C. 266, 1978 CarswellOnt 384 (Ont. H.C.) — referred to

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd. (2008), 2008 CarswellAlta 1685, 459 A.R. 68, 97 Alta. L.R. (4th) 182, 2008 ABQB 671 (Alta. Master) — referred to

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1981), 1981 CarswellAlta 267, [1981] 4 W.W.R. 760 (Alta. Q.B.) — followed

Gardener v. Katz Corp. (2002), 2002 ABQB 758, 2002 CarswellAlta 1012 (Alta. Master) — referred to

Kerrigan Ventures Corp. v. Reynolds, Mirth, Richards & Farmer (1996), 178 A.R. 246, 110 W.A.C. 246, 1996 CarswellAlta 59 (Alta. C.A.) — referred to

Klapstein v. Alberta Mortgage & Housing Corp. (1998), (sub nom. *Alberta Mortgage & Housing Corp. v. Klapstein)* 216 A.R. 335, (sub nom. *Alberta Mortgage & Housing Corp. v. Klapstein)* 175 W.A.C. 335, 1998 CarswellAlta 483, 1998 ABCA 185 (Alta. C.A.) — considered

Sehdev v. Colours by Battistella Inc. (2008), 2008 ABQB 248, 2008 CarswellAlta 507 (Alta. Q.B.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v.*

Sierra Club of Canada) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — referred to

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Statutes considered:

Arbitration Act, R.S.A. 2000, c. A-43
Generally — referred to

s. 7 — considered

s. 7(1) — considered

s. 7(2) — considered

s. 7(2)(e) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 314 — referred to

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

Pt. 5 — referred to

Pt. 6, Div. 4 — referred to

R. 1.2 — considered

R. 1.2(1) — referred to

R. 1.2(4) — referred to

R. 1.4 — referred to

R. 1.7 — considered

R. 5.2(1) — considered

R. 5.3(1) — considered

R. 5.3(1)(b) — considered

R. 5.25 — considered

J.E. Topolniski J.:

I. Introduction

1 There are two applications before the Court.

2 The first is brought by Neil Devchand, a pharmacy store franchisee, and his company Heritage Hill Pharmacy Inc. (collectively Devchand), for an order compelling answers to questions posed to an officer of the franchisor, the Defendant Medicine Shoppe Canada Inc. (Medicine Shoppe). The Defendant Katz Group Canada Inc., which did not participate in the applications, is a former shareholder of Medicine Shoppe.

3 The questions which the officer refused to answer arose in questioning on an affidavit made in support of an application by Medicine Shoppe to stay a counterclaim pending arbitration. The counterclaim was issued in litigation commenced by Medicine Shoppe to enjoin Devchand from allegedly breaching a contractual restrictive covenant. The main action has been resolved by consent.

4 The second application is brought by Medicine Shoppe, which applies for a temporary sealing order of documents containing trade secrets.

II. The Issues

5 The issues to be dealt with are:

1. Is the questioning permissible?

2. Is a temporary sealing order warranted?

III. The Factual Background

6 A brief overview of the parties' relationships and the triggers for their respective applications is required.

7 On March 10, 1993, the parties entered into a license and franchise agreement which included an arbitration clause that only exempts claims for injunctive relief concerning the enforcement of restrictive covenants (Agreement). In April 2011, Medicine Shoppe sued Devchand for alleged breach of a restrictive covenant precluding Devchand from buying pharmaceutical products from any third party. The claim was for declaratory and injunctive relief. Devchand defended and counterclaimed, alleging breaches of contract, trust and fiduciary duty among other claims (Counterclaim). The relief sought in the Counterclaim includes an accounting of all incentives, program funds and benefits under the Agreement since inception.

8 Rather than defending the Counterclaim, Medicine Shoppe applied for a stay pending arbitration (Stay Application). Medicine Shoppe's officer, Ross McKay, swore a bare bones affidavit in support of the Stay Application that referenced and attached the Agreement.

9 During questioning on his affidavit, McKay refused to answer any questions which related only to the merits of the Counterclaim, thereby prompting Devchand's application. In the course of that questioning, Devchand put to McKay various documents which Medicine Shoppe considers highly confidential. As a result, Medicine Shoppe now seeks a temporary sealing order in relation to those documents.

A. The Motion to Compel Answers to Questions on Affidavit

1. Statutory backdrop

10 Rules 1.2, 1.7, 5.25, and 5.3(1) of the *Alberta Rules of Court* (*Rules*) and s 7 of the *Arbitration Act*, RSA 2000, c A-43 are germane.

11 Rule 1.2(1) describes the purpose of the *Rules* generally as being a means for identifying the real issues in dispute and providing a fair, just, expedient, and cost-efficient means for the resolution of claims. The notions of proportionality (Rule 1.2(4)) and contextual interpretation (Rule 1.7) are embodied in the *Rules*.

12 Part 5 of the *Rules* speaks to disclosure of information which includes questioning. Rule 5.2(1) explains that questions are relevant and material only if the answer could significantly help determine one or more of the issues raised in the pleadings. Rule 5.25 provides that questions may be objected to if irrelevant and immaterial, if the answer is privileged or if the questions are unreasonable or unnecessary. Rule 5.3(1)(b) allows a variance from application of the *Rules* if compliance would cause expense, delay, danger or difficulty grossly disproportionate to the likely benefit of compliance.

13 Section 7(1) of the *Arbitration Act* mandates that the Court grant a stay of proceedings if the parties have contracted to have their disputes arbitrated, subject to limited discretionary exemptions described in s 7(2). Section 7(2)(e) provides that the court may refuse to stay the proceedings if the matter in dispute is a proper one for default or summary judgment (Summary Judgment Exemption).

14 It is common ground that the arbitration clause in the Agreement requires disputes of the nature alleged in the Counterclaim to be arbitrated. At issue is whether Devchand can elicit evidence by questioning McKay on his affidavit to show that the matter is suitable for summary judgment.

15 With this backdrop I turn to the parties' positions and the analysis.

2. The parties' positions

16 According to Devchand, McKay refused to answer questions on the following issues:

(i) Must Devchand buy generic medications from manufacturers chosen by Medicine Shoppe?

(ii) Is Medicine Shoppe negotiating contracts which provide for allowances to Devchand and is it entitled to or paid a fee for same?

(iii) Is Devchand entitled to an accounting?

(iv) Is Medicine Shoppe entitled to a fee for these negotiations?

17 Devchand's view is that the broad scope typically afforded a questioner on questioning an affiant permits exploration of the merits of the Counterclaim since the Stay Application brings the Summary Judgment Exemption into play. Further, since a stay is analogous to summary dismissal, all of the issues raised in the McKay affidavit and the Counterclaim are relevant and, therefore, subject to questioning.

18 In turn, Medicine Shoppe submits that the questions posed to McKay are irrelevant to the Stay Application and constitute an abuse of process. In Medicine Shoppe's view, Devchand's motive for the questioning has nothing to do with the Arbitration Clause and everything to do with avoiding the onus of establishing that the Summary Judgment Exemption applies.

3. Analysis

19 A brief review of the (sometimes competing) fundamental principles in the *Arbitration Act* and the *Rules* is warranted.

20 A respondent to a motion need not file a responsive affidavit before questioning the applicant and may elect to proceed without any responsive affidavit (WA Stevenson and JE Côté, *Alberta Civil Procedure Handbook* (Edmonton: Juriliber, 1997), c 45, Pt N; *Bullex Developments Ltd. v. Terra Mines Ltd.* (1984), 31 Alta. L.R. (2d) 93 (Alta. Master) at paras 5-6; *Triple D & G. L. Ranches Ltd. v. Duncan*, 2011 ABQB 401 (Alta. Q.B.) at para 56). This applies equally to a party resisting an application for a stay.

21 While the scope of questioning is not restricted to the four corners of an affidavit (*Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2008 ABQB 671 (Alta. Master) at para 7, (2008), 459 A.R. 68 (Alta. Master)), there are limits concerning relevance and materiality. This is especially germane where the burden of answering the questions or providing undertakings would be grossly disproportionate to the benefit of the answers (Rule 1.2(4); WA Stevenson and JE Côté, *Civil Procedure Encyclopedia* (Edmonton: Juriliber, 2003) at 6-53).

22 In *Klapstein v. Alberta Mortgage & Housing Corp.*, 1998 ABCA 185, 216 A.R. 335 (Alta. C.A.), at 336 , Côté JA observed that questioning cannot be carried to an excessive or abusive extent, stating:

> Though a number of cases were cited on the broad scope of examinations for discovery, this is not an examination for discovery. It may well be that the deponent cross-examined in this particular case could be required to inform herself on certain topics, and to produce certain documents. But the decided cases on cross-examination on an affidavit say that it cannot be carried to an excessive or abusive extent. Furthermore, rule 255 and rule 216.1 say much the same thing...

23 The court has inherent discretion to control the process of a proceeding, including cross-examination on an affidavit (*Alberta Treasury Branches v. Leahy*, 1999 ABQB 829 (Alta. Q.B.) at para 29, (1999), 254 A.R. 263 (Alta. Q.B.), citing *Burndy Canada Ltd. v. Brown* (1978), 5 C.P.C. 266 (Ont. H.C.), at 274). This is codified in Rule 1.4.

24 A number of authorities discuss the principles governing contractual arbitration clauses and the Summary Judgment Exemption. These principles can be summarized as follows:

> (i) The competing policies at play with the Default/Summary Judgment Exemption are upholding contractual arrangements and expeditious dispute resolution (*Balancing Pool v. TransAlta Utilities Corp.*, 2009 ABQB 631 (Alta. Q.B.) at paras 40 and 47, (2009), 492 A.R. 344 (Alta. Q.B.)).
>
> (ii) The party moving for a Summary Judgment Exemption bears the onus of establishing that summary judgment would be successful on the evidence then before the court (*Balancing Pool* at para 58). The court cannot consider what evidence might be advanced later (*Balancing Pool* at para 48).
>
> (iii) The Summary Judgment Exemption is to be granted only in the clearest of cases, "...where it is readily and immediately demonstrable on the record that the responding party to the proposed summary judgment motion has no basis whatsoever for disputing the claim or claims of the moving party" (*Sehdev v. Colours by Battistella Inc.*, 2008 ABQB 248 (Alta. Q.B.) at para 23).

25 It is well established that summary judgment may be suitable if the facts are clear and undisputed, or if the outcome hinges on the interpretation of a statute or document, or some other issue of law that arises from undisputed facts (*Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.) at para 11, (2006), 401 A.R. 88 (Alta. C.A.)). There is no question that the bar for summary judgment is high.

26 In the leading case on the scope of cross-examination on affidavits under the old Rule 314, *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1981] 4 W.W.R. 760 (Alta. Q.B.), Feehan J held that cross-examination is limited to the issues arising from the affidavit as they relate to the motion for which the affidavit was filed in support (see also: *Alberta Treasury Branches* at paras 24-25; *Gardener v. Katz Corp.*, 2002 ABQB 758 (Alta. Master) at para 2; *Kerrigan Ventures Corp. v. Reynolds, Mirth, Richards & Farmer* (1996), 178 A.R. 246 (Alta. C.A.); and *Alberta (Securities Commission) v. Institute for Financial Learning Group of Cos.*, 2005 ABCA 268, 371 A.R. 144 (Alta. C.A.)).

27 It appears that Devchand is seeking to employ the questioning of McKay to marshal sufficient evidence to make out the Summary Judgment Exemption without filing additional evidence.

28 In my view, if a plaintiff wishes to contend on an application for a stay pending arbitration that the Summary Judgment Exemption applies, the plaintiff must first have filed a summary judgment application together with the supporting affidavit.

Until that time, the Summary Judgment Exemption is not in issue. Devchand has not done so. Accordingly, the questions posed of McKay are neither material nor relevant to the Stay Application.

29 It is only where a plaintiff seeking to rely on the Summary Judgment Exemption files evidence in support of the summary judgment application and the defendant elects to file a responsive affidavit that questioning of that affiant on the defence to the claim is appropriate.

30 I reject the proposition advocated by Devchand that the stay application is akin to one for summary dismissal (and presumably entitling him to a broad scope of questioning on the merits of the Counterclaim). The stay application is just that — it is for a stay. The merits are not determined. It does not constitute a final disposition of the case as summary dismissal would. In the context of a case involving arbitration clauses, the stay application is akin to an application to determine the *forum conveniens*.

31 In the result, Devchand's application to compel answers to the disputed questions is denied.

B. The Motion for a Temporary Sealing Order

1. Documents sought to be sealed

32 The documents shown to McKay at questioning and sought to be temporarily sealed are:

(a) a "franchise prospectus";

(b) versions of formulary setting out drugs that must be purchased and e-mails relating to changes to the formulary;

(c) documents relating to changes to an incentive program and payments made under the incentive program;

(d) budgets showing incentives as a percentage of profits; and

(e) excerpts from an operations manual.

2. The parties' positions

33 Medicine Shoppe's view is that the confidential and commercial information contained in the documents warrants the order while Devchand effectively takes no position.

3. The Governing principles

34 Part 6, Division 4 of the *Rules* deals with applications to seal or unseal court files.

35 A sealing order is a discretionary and extraordinary remedy. It may be justified in cases concerning commercial interests only if it is required to prevent a serious risk to an important interest and when the salutary effects of the order outweigh the deleterious effects (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) at para 53, [2002] 2 S.C.R. 522 (S.C.C.)).

36 The undisputed evidence is that the documents sought to be sealed contain confidential trade secrets that, if released into the public domain, would cause serious harm to Medicine Shoppe. In my view, both public and private interests are at stake given the need for commercial certainty and protection of proprietary information. Further, the salutary effects of temporarily sealing the documents outweigh any deleterious effects.

37 Compliance with Part 6, Division 4 of the *Rules* was not addressed by Medicine Shoppe at the hearing of the application. Consequently:

i. If Medicine Shoppe did not comply with Part 6, Division 4 of the *Rules*, the temporary sealing order will expire in 7 days;

ii. If Medicine Shoppe did comply with Part 6, Division 4 of the *Rules*, the temporary sealing order will remain in effect pending the outcome of the Stay Application, and if successful, the arbitration.

IV. Costs

38 If they cannot agree, the parties may speak to costs within 20 days.

TAB 5

2014 ONSC 1338
Ontario Superior Court of Justice

Trillium Motor World Ltd. v. General Motors of Canada Ltd.

2014 CarswellOnt 2571, 2014 ONSC 1338, [2014] O.J. No. 1004, 238 A.C.W.S. (3d) 56

Trillium Motor World Ltd. v. General Motors of Canada Limited and Cassels Brock & Blackwell LLP

Master Joan M. Haberman

Heard: December 2, 2013
Judgment: March 3, 2014
Docket: 10-397096CP

Counsel: Vermette, M.A., for Moving Party / Plaintiff
Morritt, D., for Responding Party / Defendant, General Motors of Canada Limited

Subject: Civil Practice and Procedure; Contracts; Evidence

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — General principles

Defendant experienced financial difficulties — Defendant worked to avoid filing for protection under Companies' Creditors Arrangement Act — Ultimate goal was for defendant to secure financial assistance from federal and provincial government and information was shared — Defendant offered wind down agreements to each dealer and each dealer would receive payment and sign removal allowance — Plaintiff brought class action arising from defendant's actions taken to ensure its ongoing survival — Defendant produced documents in redacted form claiming privilege — E & Y would have been defendant's monitor had it sought protection under Act — Defendant asserted common interest privilege that was not waived because all of professional advisors worked together towards common goal — Plaintiff brought motion for production of documents listed in defendant's affidavit of documents and for unredacted version of documents that defendant produced — Motion adjourned — Redacted portions of documents remained protected — Common interest privilege existed and there was sound basis for application of common interest privilege — Defendant entered into confidentiality agreements with both levels of government such that documents were shared with parties under guarantee of confidentiality — Defendant shared with both levels of government common goal of keeping defendant afloat — There was no evidence of clear intent to waive privilege — Intention was to contrary of waiving privilege in view of confidentiality agreements signed — Privilege over documents shared with E & Y was properly claimed and was not waived — Confidentiality was expected and waiver was not intended — Commercial reality dictated that this type of information was protected by privilege and privilege was not waived by virtue of information having been shared with prospective monitor — Professional advisors with whom defendant shared information also shared defendant's goal of successful negotiation with both levels of government leading to restructuring — Nothing in pleadings gave rise to

claim that privilege was waived — Part of motion dealing with redactions made because disclosure would create serious commercial and competitive harm to defendant was adjourned for further submissions.

Table of Authorities

Cases considered by *Master Joan M. Haberman*:

Barrick Gold Corp. v. Goldcorp Inc. (2011), 2011 ONSC 1325, 2011 CarswellOnt 7453 (Ont. S.C.J. [Commercial List]) — followed

Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority (2011), 2011 BCSC 88, 2011 CarswellBC 112, 102 L.C.R. 162 (B.C. S.C.) — referred to

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2001), 6 C.P.C. (5th) 281, 2001 CarswellOnt 514 (Ont. S.C.J.) — followed

Creative Career Systems Inc. v. Ontario (2012), 2012 CarswellOnt 797, 2012 ONSC 649, 27 C.P.C. (7th) 172 (Ont. S.C.J.) — followed

Fraser Milner Casgrain LLP v. Minister of National Revenue (2002), 6 B.C.L.R. (4th) 135, 2002 BCSC 1344, [2002] 11 W.W.R. 682, 2003 D.T.C. 5048, 2002 CarswellBC 2208 (B.C. S.C.) — considered

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241, 124 O.A.C. 356, 45 O.R. (3d) 321, 38 C.P.C. (4th) 203, 1999 CarswellOnt 2898 (Ont. C.A.) — followed

Guelph (City) v. Super Blue Box Recycling Corp. (2004), 2004 CarswellOnt 4488, 2 C.P.C. (6th) 276 (Ont. S.C.J.) — considered

Maximum Ventures Inc. v. de Graaf (2007), 2007 BCCA 510, 2007 CarswellBC 3231, (sub nom. *Maximum Ventures Inc. v. De Graaf)* 247 B.C.A.C. 215, (sub nom. *Maximum Ventures Inc. v. De Graaf)* 409 W.A.C. 215 (B.C. C.A.) — considered

Pitney Bowes of Canada Ltd. v. R. (2003), 2003 CFPI 214, 2003 CarswellNat 1063, [2003] 3 C.T.C. 98, 2003 D.T.C. 5179, 2003 FCT 214, 2003 CarswellNat 361, (sub nom. *Pitney Bowes of Canada Ltd. v. Canada)* 229 F.T.R. 277, 225 D.L.R. (4th) 747 (Fed. T.D.) — followed

Pritchard v. Ontario (Human Rights Commission) (2004), 2004 SCC 31, 2004 CarswellOnt 1885, 2004 CarswellOnt 1886, 12 Admin. L.R. (4th) 171, 47 C.P.C. (5th) 203, 72 O.R. (3d) 160 (note), 49 C.H.R.R. D/120, 2004 C.L.L.C. 230-021, [2004] 1 S.C.R. 809, 19 C.R. (6th) 203, 33 C.C.E.L. (3d) 1 (S.C.C.) — considered

Simcoff v. Simcoff (2009), 466 W.A.C. 7, 245 Man. R. (2d) 7, 2009 MBCA 80, 2009 CarswellMan 357, 49 E.T.R. (3d) 302, 82 R.P.R. (4th) 22, [2009] 9 W.W.R. 248 (Man. C.A.) — followed

SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co. (2003), 24 C.L.R. (3d) 186, 2003 CarswellOnt 213, 63 O.R. (3d) 226, 31 C.P.C. (5th) 371, 46 C.C.L.I. (3d) 281 (Ont. Master) — followed

Supercom of California Ltd. v. Sovereign General Insurance Co. (1998), 37 O.R. (3d) 597, 1998 CarswellOnt 788, 18 C.P.C. (4th) 104, 1 C.C.L.I. (3d) 305 (Ont. Gen. Div.) — referred to

Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1997), 32 O.R. (3d) 575, 1997 CarswellOnt 1268, (sub nom. *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Bankrupt))* 31 O.T.C. 267 (Ont. Gen. Div. [Commercial List]) — considered

Toronto Star Newspapers Ltd. v. Canada (2005), 2005 CarswellOnt 7522, 204 C.C.C. (3d) 397 (Ont. S.C.J.) — considered

United States v. American Telephone & Telegraph Co. (1980), 642 F.2d 1285, 206 U.S.App.D.C. 317 (U.S. D.C. Ct. App.) — considered

578115 Ontario Inc. v. Sears Canada Inc. (2013), 2013 ONSC 4135, 2013 CarswellOnt 8258 (Ont. S.C.J.) — followed

Statutes considered:

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3
Generally — referred to

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31
Generally — referred to

MOTION by plaintiff for production of documents listed in defendant's affidavit of documents and for unredacted version of documents that defendant produced.

***Master Joan M. Haberman*:**

1 Trillium moves for production of various documents listed in General Motors of Canada Limited's (hereinafter referred to as GMCL) affidavit of documents, as well as for an unredacted version of documents that they have produced.

2 These Reasons deal with the first hearing day of three. All of these motions arose in the context of a hotly contested class action flowing from actions taken by GM Canada to ensure its ongoing survival. My recitation of the facts as set out below applies to all three days of these motions, although additional facts may be added with respect to the particular issues before me on days 2 and 3.

The Backstory

Introduction to the Issues

3 For the most part, the following factual matrix is derived from affidavit evidence filed by GMCL. Though the plaintiffs filed a 7- binder motion record and a Reply record, they filed only three brief affidavits. The first and the third, filed in reply, simply refer to the documents attached to it. The second, contained in volume 7, is a brief affidavit from an expert and relates to the refusals to be argued on day 3. As a result, it appears that much of what follows is not disputed.

4 In 2009, GMCL found itself in severe financial difficulties and during the course of that year, they came perilously close to having to make a CCAA filing.

5 In the months leading up to the events that resulted in this action, GMCL retained financial and legal advisors to assist them in going down one of two possible roads. On the one hand, they began exploring ways to restructure the company in order to prepare for such a filing. At the same time, they investigated how they might avoid taking this drastic step.

6 During what appears to have been a highly pressurized and compressed time frame, GMCL and their lawyers worked closely with their financial advisor, Ernst & Young ("E & Y") and with E & Y's legal counsel, Stikeman Elliot (SE)

7 Ultimately, a CCAA filing was avoided, as GMCL managed to overcome what they perceived to have beenthree serious hurdles, as more fully described below (in the Lopez evidence). One of the possible obstacles in their path involved reaching settlements with the class members, in the form of a Wind-Down Agreement ("WD Agreement"). Their ability to achieve this settlement was among the factors that ultimately facilitated GMCL's successful negotiation of financing agreements with both the federal and provincial governments. It is now the focus of this litigation.

8 During the course of the work involved in either restructuring or filing under the CCAA, certain categories of documents were created by and for GMCL and its advisors. Some of these documents were apparently shared among GMCL staff and their own counsel, as well as with various outside professional advisors, and in some cases, with legal counsel working with these professional advisors.

9 At the end of the day, the ultimate goal was for GMCL to secure financial assistance from both levels of government. To that end, financial information was shared, draft agreements exchanged and other information conveyed to government bodies.

10 Whether or not privilege arose and if it still applies to the documents shared with professional advisors and their counsel and with the two levels of government areamong the issues on this portion of motion.

11 These Reasons also deal with whether GMCL is deemed to have waived privilege by putting its state of mind in issue, and with the propriety of GMCL having produced two categories of documents in redacted form.

May 2009 — the Wind-Down Agreement (WD Agreement)

12 On May 20, 2009, GMCL sent a letter via e-mail to approximately 240 of its dealers across Canada. The purpose of the letter was to advise that, due to financial pressures affecting GMCL and its parent, GMCL was required to restructure its dealership network. An aspect of that restructuring would involve each of the dealers contacted to agree to the premature surrender of their respective Dealer Sales and Service Agreements (hereinafter referred to as the DSS Agreement), each of which was otherwise due to expire on October 31, 2010, with a right of renewal.

13 Attached to each May 20 letter was the WD Agreement. The WD Agreement was presented asa time-limited offer of compensation for the premature surrender by each dealer of their rights under their respective DSS agreements. In exchange for their acceptance of this offer, each dealer would receive two things: 1) a payment based on the number of vehicles that dealer had sold in the preceding year, and 2) a sign removal allowance.

14 Payment under the WD Agreement would be made in three instalments to each dealer, subject to a number of conditions, which included:

- Sale of the dealer's entire inventory;
- Removal of all signs;
- Cessation of all business operations; and
- Compliance with various post-termination obligations before release of the final installment.

15 The May 20 letter indicated that 100% of the contacted dealers would have to accept the offerand sign the WD Agreement in order for it to apply to any of them, subject to GMCL's right to waive that condition. The letter also noted that there was a strong possibility that GMCL would have to file under the CCAA in the event of their failure to achieve 100% acceptance.

16 The offer was outstanding only until 6:00 pm on May 26, 2009, but before any dealer could accept it, they were required to obtain a certificate indicating that they had obtained independent legal advice. They were also required to provide a full waiver

and a release of their right to sue GMCL and its affiliates. Each release confirmed that acceptance of the offer had been made voluntarily and with a full understanding of the implications.

17 In the end, approximately 84% of the contacted dealers signed the WD Agreement before the expiry of deadline. GMCL ultimately waived the requirement of 100% participation for it to apply to those dealers who had accepted it. Those dealers who did not sign do not form part of the class of plaintiffs in this action. Most of the remainder do.

GMCL's Documents

18 GMCL has produced in excess of 5,100 documents to-date, totalling more than 40,000 pages. They have also disclosed, and asserted privilege over, a further 3,049 documents.

19 In addition, GMCL produced 391 documents in redacted form, claiming that what has been redacted is protected by privilege. Much of that has been resolved, such that, at this time, only 35 of the redacted documents remain in issue. These redactions are based on GMCL's position that they have redacted out only those portions of the documents in issue that are both irrelevant and commercially sensitive.

GMCL's Position regarding Privilege

20 Throughout 2009, GMCL and its former parent, General Motors Corporation ("Old GM"), undertook efforts to restructure the business while preparing for insolvency proceedings in Canada and in the US. Both continued to carry on business during extremely challenging economic times, GMCL supported solely by the governments of Canada and Ontario.

21 GMCL's treasurer, *Tyrone Lopez*, provided detailed evidence regarding GMCL's situation at that time. He notes that from December 2008 until June 2009, he worked closely with finance, treasury and other GMCL personnel, as well as with Old GM, in preparations for insolvency proceedings in both countries. In the event that the company managed to avoid CCAA proceedings in Ontario and was, instead, restructured, it was understood that this would necessarily involve financial assistance from both the federal and provincial governments.

22 In the context of preparing for both eventualities, Lopez also worked with:

- GMCL and Old GM legal in-house staff;
- GMCL's outside counsel, Osler, Hoskin& Harcourt LLP ("Osler's");
- Old GM's outside legal counsel, Weil Gotshal&Manges; and
- a number of other professional advisors including E & Y, AlixPartners LLC, Encore Inc. and Morgan Stanley & Co.

23 Lopez refers to three primary obstacles that GMCL had to overcome by June 1, 2009 in order to avoid having to file under CCAA, as follows:

1) the GMCL dealership network had to be restructured so as to reduce the total number of dealers across Canada to ensure GMCL's long term viability;

2) they had to reach agreement with the CAW to arrive at competitive labour costs; and

3) they had to resolve claims by certain unsecured note holders issued by GM Nova Scotia.

24 None of the three appeared to be easily achievable. As a result, GMCL continued to worksimultaneously towards a CCAA filing up until the last minute while dealing with these obstacles to restructuring. They therefore claim that the work that went into both options is effectively a unit, so that documents created in relation to a possible CCAA filing cannot be severed from those dealing with restructuring.

25 GMCL also takes the position that the documents not yet produced that were shared with either level of government and with its various professional advisors are protected by privilege as they and the governments were working together towards a common objective — saving GMCL, with all that that encompassed.

The Statement of Claim

26 The statement of claim in this action was issued on February 10, 2012 and amended on April 29, 2011. As the action currently stands, the plaintiffs' claim against GMCL revolves around their interpretation of their rights under the *Arthur Wishart Act (Franchise Disclosure), 2000* S.O., c.3. In that regard, they seek, among other things:

- a declaration that to the effect that GMCL is a franchisor under that Act;
- a declaration that the class members are entitled to the benefit of the statutory duty of fair dealing and right of association;
- damages in an aggregate amount not exceeding $750 million based on breach of their duty of fair dealing; interference with the right of association and failure to provide disclosure documents as required; and
- a declaration that the WD Agreement is null, void and unenforceable as against the class members and that it can be rescinded.

27 Another aspect of the claim for relief as against GMCL is the plaintiffs' request for an order directing individual hearings in respect of compensation or damages for each member of the class.

28 Essentially, the plaintiffs indicate that they were pushed to the wall when the WD Agreement was presented and a response was required within days. They assert that what they were offered was not even sufficient, in many cases, to cover employee severance obligations and other costs associated with the ownership of a dealership. Many dealers, they say, were left with multi-million dollar, single purpose buildings, some of which had been recently purchased or developed at great cost.

29 The plaintiffs also assert that there was no need for them to have been placed in such a pressurized situation as GMCL knew at least a month earlier that they intended to reduce their dealership network by approximately 42% as this was the subject of a public statement. The dealers assert that GMCL intentionally waited until late May 2009 to convey the offer in order to maximize pressure on the affected dealers and to minimize the dealers' opportunity to get adequate advice and then to attempt to negotiate better terms with GMCL.

30 Turning to CB, the plaintiffs raise CB's retainer in relation to GMCL, claiming that though the latter was aware that CB represented the affected dealers, they then pre-selected them as their counsel. This resulted in the dealers did not getting the kind of representation they needed at this critical time.

31 The plaintiffs' claim against CB is structured as a breach of contract action and it is based on CB's alleged breach of their duty to class members. A further sum, not to exceeding $750 million for the class, is sought.

32 The foundation for the claim against CB is the plaintiffs' assertion that the Canadian Automotive Dealers Association ("CADA") had retained CB in April 2009 to represent its interests in the event of a restructuring, in view of the public statements being made by GMCL to that effect. Many of the affected dealers were members of CADA, so in their view, they had retained CB indirectly through CADA.

33 In the context of this retainer, CADA acted as CB's agent for the purpose of collecting monies from dealers for a Legal Fund, a fund created at CB's request in order to ensure their payment. Within a short time, it is alleged that several million dollars was raised.

34 One of the reasons that CADA selected CB for this brief was their previous involvement on behalf of GMCL's Saturn-Saab dealers in a franchise matter.

35 The plaintiffs allege that they were unaware that, during this time frame, CB also represented the federal government throughout the GMCL auto bailout. They claim that this dual retainer placed CB in a position of conflict and affected the nature and quality of advice CB provided during a critical and short time frame.

36 Instead of providing advice, GMCL claims that CB advised each dealer to obtain independent legal advice from their local lawyers in the 48 hours that remained until the expiry of the deadline. CB also refused to sign any of the certificates attesting to the dealers having obtained independent legal advice from them.

37 The plaintiffs therefore allege that CB is in breach of both fiduciary and contractual duties.

Certification and Common Issues

38 The action was certified as a class action by order of Strathy J. on March 1, 2011. An abbreviated form of the common issues that were certified follows. Note that the term "Act" is used to denote the applicable franchise legislation in each of the affected areas of the country:

a) Is GMCL a franchisor within the meaning of the applicable *Act?*

b) Are all class members entitled to the benefit of a statutory duty of fair dealing and a right of association under the *Act?*

c) If GMCL owes a duty of fair dealing to the class members, did they breach it (in one of 6 ways)?

d) Did GMCL have a duty to disclose material facts concerning its restructuring to franchisees at the time of soliciting the WD Agreement? If so, did they breach it?

e) If all class members had a statutory right to associate, did GMCL interfere with, prohibit, restrict, penalize, attempt to penalize or threaten to penalize class members who exercised this right (in one of 6 ways)?

f) Are the waiver and release in the WD Agreement null, void and unenforceable?

g) Was GMCL required to deliver to each class member a disclosure document within the meaning of the *Act* at least 14 days before the class member signed the WD Agreement?

h) Do rescission rights arise as a result of GMCL's failure to deliver disclosure documents?

i) Are all class members who deliver a notice of rescission or cancellation, as the case may be, entitled to compensation under the *Act?*

j) Did CB owe contractual duties to some or all class members and, if so, did they breach those duties?

k) Did CB owe fiduciary duties as lawyers to some or all class members, and if so, did they breach those duties?

l) Did CB owe duties of care to some or all class members and, if so, did they breach those duties? and

m) What is the amount of pre-judgement and post-judgment interest applicable to any damage award?

39 Although he was not prepared to certify the issue of damages as a common issue, Strathy J. did note in his Reasons that the trial judge still retained authority to do so. Alternatively, the trial judge could determine that participation of individual class members was required in order to fashion a fair remedy for each of them on an individual basis. He added:

> If damages have to be dealt with individually, the task will not be insurmountable. On the other hand, depending on the findings of the trial judge, there may be a basis for an aggregate assessment of damages against either GMCL or Cassels. **I therefore leave the issue of aggregate assessment to the common issues judge.**

40 The plaintiffs rely on this passage as basis for their submissions that disclosure, at this stage, should not be restricted to the common issues, in that it remains open to the trial judge to convert damages to a common issue at trial. They rely on this, despite their pleading, in which they ask for damages to be assessed on an individual basis.

The Issues:Specific Factual Context for Each

41 The plaintiffs presented 4 issues for the court's determination on Day 1. The first two involve their assertion that privilege cannot be made out with respect to certain documents flowing, first, between GMCL and the two levels of government and secondly, as between GMCL, E & Y and E & Y's counsel, SE.

Issue 1: Documents Shared with GMCL and the Governments

42 The plaintiffs take the position that GMCL has waived privilege over communications with government actors in view of having shared certain information with them. In their submission, GMCL cannot escape waiver by relying on "common interest" privilege, as it does not constitute a separate category of privilege. They state further that to the extent that such a privilege does exist, it does not apply on these facts.

43 The only evidence filed by the plaintiffs on point was a letter dated July 10, 2009 from Dalton McGuinty to a GM dealer, located in the plaintiffs' reply record. In the letter, the former Premier stated that the governments of Ontario and Canada did not ask GMCL to reduce their dealer network. Rather, *the company decided it was an important change to ensure the long-term viability of its operations in Canada.*

44 The plaintiffs claim that the two levels of government were driven by a broader public interest and not by GMCL's purely commercial interest. In this regard, they rely on the fact that the governments were also involved in the Chrysler restructuring. The plaintiffs rely on another letter contained in their Reply record, this one from Sandra Pupatello to Joanne Fordham, dated August 13, 2009. There is no quotation from that letter in their factum nor was it referred to in oral argument.

45 This is effectively the sum total of evidence filed by the plaintiffs on this point.

46 In contrast, GMCL filed two affidavits that address this issue and that provide factual context for their assertion of common interest privilege. The first is from *Tyrone Lopez*, GMCL's treasurer. He states that, from January until May 2009, GMCL worked with the Canadian and Ontario governments to develop a restructuring plan that could help ensure GMCL's future sustainability and competitiveness. An essential element for GMCL going forward required both levels of government to invest in the company so agreement had to be reached with each about what the governments expected to see from GMCL before they would commit.

47 Lopez was involved in analyzing the terms the government proposed to secure their financial support. From his involvement in this work, Lopez asserts as follows:

> **I firmly believe that GMCL and the governments of Ontario and Canada had a common interest in the successful restructuring of GMCL** to support the future viability of GMCL and in the successful completion of the transactions to provide GMCL with the financing required to carry out its restructuring.

48 To support his belief, Lopez relies on various statements made by each level of government in which each expresses their commitment to working with Old GM and GMCL to ensure GMCL's future sustainability.

49 In Ontario, for example, Premier McGuinty issued a statement on December 8, 2008, in which he referred to the thousands of people and their families who relied on the auto industry to put food on their tables and a roof over their heads as one reason why the Ontario government was concerned about GMCL's survival.

50 In March 2009, the federal government stated that, together with the Government of Ontario and the US Government, they were working to create a viable industry and to maintain Canada's share of Canada- US production going forward. Minister

Flaherty stated that loans were being advanced *to reflect our priorities and both protect our economy and exercise firm oversight over taxpayer dollars.*

51 Lopez maintains that, based on these public statements, it is clear that GMCL and the two governments had a common interest is keeping GMCL alive and thriving. He lists *the benefits that the governments received in exchange for their financial support*, in the form of commitments the governments received from GMCL to:

- produce certain vehicles and automotive parts at Canadian facilities;
- make substantial capital investments in Canadian facilities;
- ensure competitive Canadian labour costs; and
- partner with Canadian suppliers and universities in research and innovation.

52 Both levels of government issued press releases on June 1, 2009, noting *that the governments were "partnering" and "cooperating" with GMCL in order to achieve these benefits.*

53 *Paul Risebrough*, former Director of Dealer Organizations and Network Planning for GMCL from 1996-2011, also provided responding evidence, directed specifically at document and information sharing with the two levels of government.

54 *In his first affidavit* (which deals primarily with the sharing of information issue), he points out that GMCL does not claim privilege over all of its communications with the Ontario and federal governments and their respective lawyers. He then discusses the two categories of documents involving government actors over which privilege has been claimed.

55 *Dealer Damages Analysis:*Risebrough's evidence on this point is hearsay, as he essentially conveys what he learned from Neil Macdonald, GMCL VP, General Counsel and Secretary at the relevant time. However, that has not been challenged nor has the evidence been contradicted.

56 Risebrough states he was advised by Macdonald that GMCL orally shared certain privileged information with the Ontario government from the Dealer Damages Analysis during a briefing regarding the network and the WD Agreement that took place on May 15, 2009. This information was recorded by the government in a briefing note, which was disclosed to GMCL pursuant to the *Freedom of Information and Protection of Privacy Act.*

57 While GMCL has disclosed the document, they have redacted GMCL's privileged information. According to Macdonald, GMCL shared this information with Ontario at that time as the governments were considering GMCL's potential liabilities as part of the financing negotiations. In order to understand the whole package, the governments needed to know how GMCL proposed to deal with its potential liabilities arising from the restructuring of the dealer network. Macdonald's belief was that this information was being shared *in furtherance of the parties' common interest of completing the financing transactions and restructuring GMCL to ensure its long term viability and without the intention of waiving privilege.*

58 *Draft documents*: GMCL and its lawyers exchanged drafts of agreements and other materials with the government and their lawyers in the context of negotiating the loan agreements, as well as with respect to contingency planning for a CCAA filing and sale of GMCL's assets to GMCL Newco.

59 Risebrough states that he was informed by Macdonald that, to the extent that these documents contain or reflect privileged communications or legal work product, GMCL shared this material with the government and their lawyers also *in furtherance of the parties' common interest of completing the financing transaction and restructuring GMCL to ensure its long-term viability and without the intention of waiving privilege.*

60 In view of that belief, GMCL shared this information with the governments on the basis that it be kept confidential. Further, a detailed non-disclosure agreement was entered into between GMCL and each level of government to drive that point home.

61 Thus, it appears that the plaintiffs take a narrow view of what can constitute "common interest", while GMCL takes a broader approach. GMCL's evidence is directed at demonstrating that there was an overall common interest in keeping GMCL operating, as it provided benefits to GMCL, as well as to both levels of governments.

62 In GMCL's submission, the benefits do not have to be identical for a "common interest" privilege to apply. The fact that both the governments and GMCL wanted the same outcome — the survival of GMCL — was enough for the privilege to arise. In other words, though there had to be a shared interest in a particular outcome, each party could have their own individual rationale for wanting that outcome or the benefits that flow from it.

Issue 2: Documents Shared with E & Y and their counsel, SE

63 *Lopez* asserts in his affidavit that GMCL required specialized legal and financial assistance to assist them in their work. They therefore engaged various experts, *creating a team of trusted external advisors to provide critical legal, financial and other advice and assistance* in connection both with the restructuring, as well as for preparation for a Chapter 11 filing in the US and a CCAA filing in Canada. They obtained and relied on that advice.

64 Lopez provides detailed information about how the work was carved up. He states, at paragraph 15 and 16 of his affidavit:

> Both Old GM and GMCL managed the preparations for the filings by developing coordinated workstreams responsible for certain issues and deliverables. Within Old GM, each workstream had a business lead, a legal lead, and a lead from AlixPartners. The leads worked together to achieve a deliverable assigned to their workstreams, each contributing input and analysis from their respective area of expertise. **This approach ensured that each of the required deliverables incorporated the requisite business and legal considerations, with strategic consultancy, drafting and logistical support** from AlixParnters.
>
> Similarly, GMCL adopted a coordinated workstream approach for its preparations for a CCAA filing. In general, each workstream had leads assigned from the relevant GMCL business unit, GMCL's in-house legal team, Old GM's legal leader, Osler, AlixPartners and E & Y.

65 This arrangement made information sharing a necessary and essential component of getting the work done. As Lopez states at paragraph 17:

> **...it was necessary for members of the workstreams, including members from external advisors, to receive communications in furtherance of legal advice to enable Old GM and GMCL's advisors to perform their responsibilities.** In general, and as explained in further detail below, **the input and analysis provided to Old GM and GMCL's lawyers with respect to the financial or other implications of the restructuring was required for legal counsel to provide meaningful legal advice. Similarly, the input and analysis provided by the lawyers with respect to the legal implications of the restructuring was required for the financial and other non-legal advisors to provide meaningful advice to Old GM and GMCL.**

66 GMCL retained E & Y to act as their financial advisor with respect to strategic alternatives, and in particular, a CCAA filing. Their letter of engagement, dated January 23, 2009, lists 5 services for which E & Y was engaged. The first item is to advise regarding alternatives available for financial restructuring and the next three items involve providing detailed financial analysis and information, the last of the 3 highlighting that this would be with a view to identifying potential alternative financing sources.

67 Preparedness for a CCAA filing only appears as the 4th item in the list and is worded as a *contingency plan*, to be relied on only if other strategic initiatives are not successful. Thus, the letter of engagement suggest that E & Y had a much broader role to play than simply getting GMCL ready to file under the CCAA. Learning as much as E & Y could about the company's financial status was, at the same time, seen to be an invaluable asset to GMCL, as part of the plan was to use E & Y as the court appointed Monitor should a CCAA filing be necessary.

68 Lopez confirms this in his evidence. He states that it was understood that E & Y would be appointed as Monitor in the event that a CCAA filing was necessary. E & Y therefore worked very closely with the GMCL business teams, as well as with their in-house and outside lawyers in preparing for the filing. E & Y worked out of GMCL's headquarters for much of the engagement and actively participated in communications with GMCL's legal counsel and other E & Y advisors.

69 E & Y's role as the perspective Monitor made them essential to the legal advice provided to GMCL. In view of their involvement at this stage, it was expected that if GMCL did file under the CCAA, the court would rely heavily on E & Y's view when considering certain restructuring actions, such as the sale of assets to GMCL Newco.

70 E & Y, in turn, retained SE as their lawyers to advise them during the planning for CCAA filing. Lopez believes that SE provided advice to E & Y on draft CCAA materials that were prepared for GMCL and its legal team and SE would have advised them had E & Y ultimately been appointed Monitor.

71 In the end, a CCAA filing was avoided so no Monitor was appointed. It is important to note that E & Y never filled the role of court-appointed monitor.

72 Lopez concludes his evidence regarding outside advisors as follows, at paragraphs 29, 30 and 31 of his evidence. He states that GMCL viewed all external advisors as *members of a team* that E & Y expected to work *seamlessly and collaboratively (with) throughout the process.*

73 More specifically, GMCL *expected their external lawyers and in-house counsel to interact directly with the financial; and other non-legal advisors to that legal advice could be obtained and decisions made as quickly and efficiently as possible.*

74 Lopez completes this portion of his evidence by stating that *the need to ensure close collaboration at times required team members to share privileged documents or advice with external advisors and to include these advisors in privileged communication between Old GM and/or GMCL and their lawyers.* This atmosphere of inclusion was essential in facilitating the legal advice and decision-making required to carry out all aspects of the restructuring and preparing for the Chapter 11 and CCAA filings.

75 Lopez makes it clear that the parties were working under time constraints such that an efficient approach was needed. He states that Old GM and GMCL expected that all matters relating to the restructuring and possible Chapter 11 and CCAA filings would be kept confidential by their own employees and by their external advisors, in particular communications with their in-house and outside lawyers. He adds that none of the lawyers, in-house or external, believed E & Y were waiving privilege when external advisors were present during their discussions or involved with respect to communications.

76 Risebrough also discusses the documents passing between GMCL and its advisors in his evidence. He notes, once again, that a blanket privilege is not being claimed over all documents falling into this category. Once again, he gleans his information from Mr. Macdonald.

77 In particular, it appears that GMCL shared documents relating to the Dealer Damages Analysis with these two entities, at the request of E & Y, for use in the liquidation analysis of GMCL that E & Y was preparing for the CCAA filing.

78 E&Y and SE were also included in communications sent to the broader team preparing for Old GM's Chapter 11 filing as well as GMCL's CCAA filings, *such as communications coordinated the various workstreams preparing for the filing.*

79 *John McKenna*, a senior partner in the Corporate Advisory and Restructuring group of PricewaterhouseCoopers LL.P, submitted expert evidence with respect to this issue by way of affidavit. Neither his qualifications nor his evidence have been challenged.

80 He states that he has spent over 20 years in practice in the area of corporate restructuring and that he has extensive experience working with significant corporations in financial distress, where options must be investigated and assessed.

81 McKenna indicates that he has reviewed the Lopez and Risebrough affidavits and that, in his opinion, *it is expected and "the norm" that information of the type described in the Lopez Affidavit and the Risebrough Affidavit that information that is shared by the company with its professional advisors will be treated as confidential and will not be disclosed to others except with the consent of the company, if it is necessary and appropriate to do so in a court assisted process or it is required by court order.*

82 McKenna also indicates that it is common practice in restructurings of this kind to work in multi-disciplinary teams to explore options in order to achieve the best outcome. In his view, it is essential that the professional advisors and the company work seamlessly as a team and that all members have a clear and current understanding of all of the elements involved that could affect their work. In view of the extreme time pressure under which work of this kind is generally performed, it is crucial that there be a flow of information that is not artificially impeded.

83 McKenna states:

> A successful restructuring requires consideration of not just legal issues in isolation, but financial, operation and other discrete and overlapping issues where specialized legal and non-legal knowledge and experience is required. **If it were not possible, without waiving privilege or preventing privilege from arising, to include other non-legal advisors on the team that considers and advises on the company's position and potential options and works to achieve an effective restructuring, I believe that the ability of the company to be properly advised could be significantly impaired.**

84 McKenna also points out that a monitor is always required in a CCAA filing and is, in fact, a central aspect of the process. He notes that the monitor, *commonly retained first as a financial advisor, as was the case here*, has a unique role as an officer of the court, as it provides assistance and advice to the debtor during the course of the CCAA proceeding. It has a responsibility in assisting the debtor in preparing the statutorily required cash flow forecasts, a task which cannot be performed "*at the last minute". Careful consideration of the results of this analysis takes time.*

85 In his view, neither the company nor the retained professional advisors would expect that privilege would be lost in these circumstances and that if that is the result of this case, they will all have to alter the way in which they communicate regarding the giving and receiving of legal advice and with respect to how professional advisors areused. In McKenna's opinion, this would have *a detrimental impact on the way in which restructurings are undertaken and in their prospects for success.*

Issue 3: Implied Waiver Based on Pleadings

86 This issue flows from the plaintiffs' challenge to the validity of the release signed by each dealer and GMCL's assertion, in defence, that they changed their position in reliance on the fact that these releases were signed.

87 The plaintiffs assert that by pleading reliance on the release provision of the WDA, GMCL has placed its state of mind in issue with respect to the validity and enforceability of these provisions, such that it must now disclose any legal advice received regarding those issues. They rely on the interests of fairness and consistency.

88 GMCL asserts that the plaintiffs have approached the proposition backwards, and that it does not operate as they suggest. The principle of law is as follows: a party puts its state of mind in issue *when it relies on legal advice received as the basis for its state of mind.* In such instance, it is deemed to have waived the legal advice received.

89 In GMCL's submission, a party's reliance on legal advice is core to the principle and they have not asserted that they have done so or that they even received legal advice regarding these issues.

90 Neither party relies on any evidence with respect to this issue.

Issue 4: Redactions

91 *In his second affidavit*, Risebrough explains that GMCL operates in a highly competitive industry, such that it has an important interest in protecting information relating to future predictions and other product planning decisions, its marginal

costs of manufacturing and selling vehicles, its costs and its overall productivity. He provides considerable detail to demonstrate the importance of confidentiality on the basis:

> (1) of ensuring its competitors do not have access to GM's technological developments;
>
> (2) of keeping its relatively high fixed costs out of the public domain, to avoid having its competitors using that information to GMCL's disadvantage; and
>
> (3) that access to GMCL's cost reduction strategies and productivity improvement initiatives would give competitors an advantage in the market.

92 In essence, all three reasons revolve around keeping GMCL's information and numbers from its competitors in the context of a highly competitive industry.

93 Risebrough, himself, was personally involved in the process of collecting, reviewing and producing the relevant documents. He swore GMCL's affidavit of documents and was involved in the redaction process, so that relevant documents were included without what he says was the commercially sensitive information contained within them.

94 He states:

> *Based on my 40 years of experience working in various sales and marketing roles for GMCL,* ***I believe that disclosure of the categories of confidential information listed below would create a risk of serious commercial and competitive harm to GMCL.*** He adds that he believes the information he sought to shield by way of redaction would tend to reveal GMCL's production costs, profit margins, competitive strategies and product planning decisions. Having to disclose the redacted portions *may place GMCL at a significant competitive disadvantage.*

95 Risebrough then goes into further detail regarding each type of information listed.

96 In the end, the plaintiffs withdrew their objection to most categories of redactions that were initially part of this motion. Although submissions were made at large, their concerns now appear to be limited to the following two categories of documents, although this is not entirely clear from their factum:

- detailed financial information (former category E); and
- information relating to the restructuring of the Old GM (part of Category G)

97 This aspect of the motion appears to have been a moving target, so while the factum makes it clear that the plaintiffs no longer question certain areas, in oral submissions, it seems further aspects of this part of the motion were abandoned so there was a need to correlate the numbering yet again. In the context of a 63-page factum, this is not helpful.

98 With respect to GMCL's detailed financial information (Category E), Risebrough points out that GMCL is a wholly owned subsidiary, such that its financial statements are consolidated with those of its parent. The latter are rarely publicly disclosed.

99 Many of the documents in GMCL's productions that fall into this category contain information that is provided to senior management and deals with GMCL's assets and liabilities, as well as their profits and losses. It is used by management to analyze GMCL's business performance and for future panning. By its nature it is commercially sensitive and of potential use by competitors.

100 With respect to documents relating to the restructuring of Old GM (part of Category G), Risebrough's evince indicates that the redactions contain detailed financial, strategic and other confidential and commercially sensitive information relating to the restructuring of GMCL's former parent, Old GM, as well as its affiliates in regions such as Mexico, Latin America and Europe. He continues:

I believe that disclosure of this information could give competitor(s) of GMCL's affiliates in those regions a competitive advantage for the same reason that disclosure of GMCL's confidential financial or strategic information would give GMCL's competitors an advantage.

101 There is no evidence from the plaintiffs about any of this, which is not surprising as they can't be expected to have information about these issues. This has not stopped them, however, from making assumptions about both the relevance and the alleged confidentiality asserted by Risebrough. Though they chose not to cross-examine Risebrough to explore the basis for his concerns, the plaintiffs assert that his evidence is based on the false premise that this information will be disclosed to competitors.

102 In the face of this sworn evidence, the plaintiffs say the following:

- The onus was on GMCL to prove that these partial redactions were proper;
- To satisfy that onus, they had to list each of the affected documents in schedule "B" of their affidavit of documents, setting out the function, role and status of both the sender and recipient of each affected document, but they failed to do so;
- Confidentiality, alone, is not a legitimate ground for redaction;
- The plaintiffs do not agree that all of the information that was redacted is irrelevant;
- Lack of relevance, alone, is not a proper basis for redaction.

The Law, Analysis and Conclusions

Issue 1: Privilege and Document Sharing with GMCL and the Governments

103 The only two categories of documents in issue here are what the parties have referred to as the "Dealer Damage Analysis" and "draft Documents." These documents were disclosed within schedule "B" of GMCL's affidavit of documents, so the debate focuses on:

the plaintiff's assertion, that GMCL has waived privilege over these documents as a result of having shared them with various government entities; and

GMCL's response, that the documents have retained their privileged status by virtue of the doctrine of common interest privilege.

104 The plaintiffs assert that there is no separate category of common interest privilege. Rather, it has been applied to protect privilege from waiver in appropriate cases. Their position is that it does not operate to do so here. While they agree that the court now accepts that this doctrine can apply to commercial interests, the plaintiffs caution that care must be taken to not overextend its application.

105 Further, the plaintiffs deny that there is any form of common interest as between GMCL and the government actors as, in their view, this case is not a "typical" commercial transaction. While GMCL had a private commercial interest to protect, the plaintiffs submit that the governments had a broader public interest to protect, and were dealing with public funds.

106 GMCL counters, stating that for the first five months of 2009, GMCL worked with both levels of government, with the shared goal of developing a restructuring plan that would ensure GMCL's future sustainability, which, in turn, was dependent on its ongoing competitiveness. An essential element of that restructuring involved successfully negotiating the conditions under which both levels of government would agree to invest in GMCL.

107 As GMCL's evidence demonstrates, in order to reach this point, they had to share privileged information orally with the Ontario government regarding the Dealer Damages Analysis, as it was a potential liability. This information found its way into

a government briefing note, which was disclosed to GMCL. GMCL has produced the note, but has redacted certain portions of it which they view as privileged as it pertains to legal advice received. They assert they did not intend to waive that privilege.

108 Similarly, GMCL and its lawyers exchanged draft agreements and other documents as more fully set out above with the two levels of government and their legal counsel in the course of negotiating loan agreements and as part of the contingency planning for a possible CCAA filing. GMCL has redacted those portions of these documents that deal with GMCL's privileged communications or their legal work product. They deny waiver and maintain that disclosure was made in confidence.

109 On GMCL's reading of the cases, common interest privilege is a well-recognized doctrine, not a new approach as the plaintiffs suggest, and the court has applied it to protect privilege in a wide variety of circumstances. They advocate that the court should take a broad approach here to be consistent with the current state of the law.

110 In *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, 2001 CarswellOnt 514 (Ont. S.C.J.), Cumming J. spoke of "common interest privilege" as a principle that applies to legal opinions provided in the context of a corporate transaction. He stated that it may:

> ...attach to documents shared by parties with a common interest **despite the fact that they become adverse in respect of another related action.**

111 To that, he added that the fact that parties may become adverse in interest down the road is not a sufficient basis to deny the existence of the privilege at the outset. Based on his reading of *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.), he stated that a party seeking to override the privilege would have to demonstrate a clear intention to waive privilege.

112 Cumming J. also found that that while common interest privilege implies parties uniting to combat a common foe, their *"common interest" need not be an identical interest* (see *Supercom of California Ltd. v. Sovereign General Insurance Co.* (1998), 37 O.R. (3d) 597 (Ont. Gen. Div.)).

113 The decision of the Federal Court, Trial Division in *Pitney Bowes of Canada Ltd. v. R.*, 2003 CarswellNat 361 (Fed. T.D.) is also of assistance, as O'Reilly J. went into some depth in his exploration of this area of the law. He began by saying that the courts have already recognized that this privilege applies where parties share legal opinions in the context of certain commercial transactions. He then accepted what Lowry J. said in *Fraser Milner Casgrain LLP v. Minister of National Revenue*, [2002] B.C.J. No. 2146 (B.C. S.C.), where Lowrie J. found that *economic and social values inherent in fostering commercial transactions* favoured recognition of a common interest privilege based on the parties' common interest in the *successful completion of a transaction.*

114 O'Reilly J. was clear that that the mere existence of a commercial transaction as the backdrop would not suffice on its own to shield documents shared with third parties from disclosure, so, in his view, *it would be hard to craft a hard and fast rule*. He added that, while a court might want to rule out its application in the context of a merger or other business transactions where the parties were clearly adverse in interest, there were obviously many commercial transactions where *the parties want to negotiate on the footing of a shared understanding of each other's legal position.* If each party to the transaction has an understanding and appreciation of where the others are coming from, negotiations can proceed in an open and informed way. Further, in such instances:

> **The expectation, whether express or implied, will be that the opinions are in aid of the completion of the transaction and, in that sense, are for the benefit of all parties** to it. Such circumstances, in my view, create a presumption that the privilege attaching to the **solicitor-client communications remain intact notwithstanding that they have been disclosed to other parties.**

115 The Supreme Court of Canada recognized the existence of the common interest exception to waiver in *Pritchard v. Ontario (Human Rights Commission)*, [2004] S.C.J. No. 16 (S.C.C.). There, they describe it as having originated in the context of *parties sharing a goal or seeking a common outcome.* Again, there is nothing in that case, where it was found that common

interest privilege could not apply with respect to an administrative board as regards the parties who appear before it, that would dictate that the exception could not apply on the facts before this court.

116 The plaintiffs rely on two cases to assist them in advancing their position. In *Toronto Star Newspapers Ltd. v. Canada*, [2005] O.J. No. 5533 (Ont. S.C.J.), Nordheimer J. had to deal with whether or not various Crown documents had been properly redacted. The documents, reports by various financial experts, had been given to the police and filed with the court, yet the federal Crown maintained that its privilege had not been waived.

117 Nordheimer J. took issue with whether the privilege existed, but he was very specific in stating why:

> No authority was provided to me that holds that litigation privilege in general, and common interest privilege in particular, can be asserted over a document that is **provided to the Crown and the police by a third party for the express purpose of being used to instigate or advance a criminal investigation.**

118 Having found that no privilege existed, he then considered whether, if one had been found, it had been waived in the circumstances of this case. In his view, there was no common interest here. As he saw it, one group had a private commercial interest to protect, while the Crown was protecting a broader public interest, and the only thing they had in common was that the same people were involved regarding the same issues. Accordingly, Nordheimer J. felt these facts did not fall within the common interest exception to waiver as defined in *General Accident* (supra).

119 In view of Nordheimer J.'s initial findings regarding the non- application of privilege, these comments are obiter, and a more detailed examination of the facts provides helpful context. The application before the court was brought by several media organizations, as well as the individuals and a company which had been referred to in four search warrants. All of the applicants sought the Information that had been used to obtain the search warrants, which, at that time, was subject to a sealing order.

120 The Crown had provided an edited version of the warrants, with redactions on about 1500 of the 2000 pages produced. The redactions included information taken from public releases and statements, newspaper reports, published interviews, websites and other public records. The Crown also sought to exempt reports prepared by BDO Dunwoody, used by the RCMP investigators in developing their investigative theory to support their belief that criminal offences had been committed. These reports were, in Nordheimer J.'s words *the fruits of the investigation*, which revealed the material facts on which the Crown attempted to develop its theory of criminal activity. As his Honour put it:

> To withhold these reports would effectively allow the Crown to withhold the sum and substance of its case.

121 In that factual context it is not at all surprising that the court was of the view that these documents had to be disclosed.

122 Though this case also involved the Crown as an actor, the Crown's role was as the protector and prosecuting arm of government. There was no commercial interest involved, no ultimate transaction to consummate and no shared goal. Further, the Crown was subject to certain disclosure obligations in the context of its role as the prosecuting authority and could not claim privilege in order to withhold the *sum and substance of its case.* I fail to see how this case has any application to the matter now before the court.

123 The plaintiffs also rely on the *General Accident* case. *General Accident* was a seminal case of our Court of Appeal, released in 1999, dealing with solicitor-client privilege and how it differs from litigation privilege. The issue of waiver also arose in the context of legal advice obtained for an insurer and provided to their adjuster. This occurred during the investigation of a potential arson case.

124 The Court of Appeal concluded that the legal advice had not been waived by virtue of its having been shared with the adjuster, as the communications were *in furtherance of that function (a function which is essential to the existence or operation of the solicitor-client relationship) and which meet the criteria for client-solicitor privilege.*

125 While the case is clear on its facts, there is nothing in the rationale that suggests that the court intended to restrict the scope of common interest privilege in this particular factual scenario.

126 Indeed, Carthy J.A. cites with approval an extract from the US Court of Appeal decision in *United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285 (U.S. D.C. Ct. App. 1980). It reads:

> Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. **When the transfer to a party with such common interest is conducted under a guarantee of confidentiality, the case against waiver is even stronger.**

127 In the case at bar, confidentiality agreements were entered into with both levels of government, such that the documents were shared with parties under a guarantee of confidentiality. To that extent, this case actually supports GMCL's position.

128 Further, in more recent case law, the developing trend places an increased emphasis on protection from disclosure where solicitor-client communications are involved, where they include communications shared with third parties *in furtherance of a common commercial interest*. Thus, in *Maximum Ventures Inc. v. de Graaf*, 2007 CarswellBC 3231 (B.C. C.A.), the BC Court of Appeal stated:

> Where legal opinion are shared by parties **with mutual interests in commercial transactions,** there is sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group**, even in circumstances where no litigation is in existence or contemplated.**

129 This decision was cited with approval in Ontario by Master Glustein in *578115 Ontario Inc. v. Sears Canada Inc.*, 2013 CarswellOnt 8258 (Ont. S.C.J.). The concept of common interest or "common litigation privilege" was also relied on by C. Campbell J. in *Barrick Gold Corp. v. Goldcorp Inc.*, 2011 CarswellOnt 7453 (Ont. S.C.J. [Commercial List]).

130 The principles that I extract from these cases are as follows:

- The court refers to this concept interchangeably as an exception to waiver of privilege and as common interest or common litigation privilege, though the term "common interest privilege" seems to be the most prevalent. They all involve similar scenarios, so no distinction is merited;

- Common interest privilege in the context of commercial transactions has been clearly recognized by the court;

- This privilege, or exemption from waiver of privilege, has been found to exist because it advances the economic and social value in encouraging commercial transactions. Sharing of information of a legal nature can enhance negotiations as it supports open and informed discussions by putting parties on a common footing;

- It applies where parties share a legal opinion that is in aid of the completion of a transaction; where there is an expectation that that opinion will be kept in confidence; and where completion of a transaction is of benefit to all parties;

- Being of benefit to all means the parties are seeking a shared goal or a common outcome, such as the completion of a transaction. The privilege is not defeated because each party wants this outcome for a different reason;

- Therefore, for this privilege to apply, the common interests need not be identical interests;

- While common interests need not be identical, there must be sufficient common interest and a mutual interest in the commercial transaction;

- The privilege will apply even where parties who share the documents may become adverse in interest in the future or if they are already adverse in respect of another related action;

- There needn't be litigation in existence or even contemplated at the time the information is shared for this privilege to arise; and

- Because the existence of this privilege is so fact-dependant, there can be no hard and fast rules as to when it will or will not arise;

- The mere existence of a commercial transaction will not suffice to create it.

131 The plaintiffs suggest that the common interest here could not have been of a commercial nature, by virtue of the fact that the recipients of the documents were both government bodies, such that the government actors acted in the public interest. They view this principle as having a very narrow scope, such that, if their view is accepted, it is difficult to envisage how documents shared with government in furtherance of a common goal could ever retain their intended privilege. This is contrary to how the courts are currently interpreting this concept. It is also difficult to accept in the context of the evidence filed about what took place here and the rationale for it.

132 It is important to understand that government wears different hats at different times. When it acts as prosecutor in the criminal law context, it acts only in the public interest, and is clearly not engaged in any form of commercial activity.

133 However, all levels of government regularly enter into contracts for goods and services and partake in various other activities that are clearly of a commercial nature. That would include making "bail-out" loans to industry. The fact that governments are entering into to these agreements for the benefit of the public does not make them any less commercial in nature.

134 Providing loans to major Canadian corporations to help them stay afloat following protracted negotiations clearly has a mixed purpose, from government perspective. While the corporations, themselves, had a purely commercial interest in the outcome, the government's interest, though ultimately for the benefit of the public good, also has a commercial component to it. One has to ask one simple question to reach that conclusion.

135 The question, simply put, is: how would keeping GMCL be for the "public good"? There are several answers to this question, many of which have a financial or commercial impact. Keeping GMCL alive meant maintaining jobs for a lot of its labour force in Canadian facilities. Keeping people employed results in a stronger tax base. The agreement reached ultimately provided other benefits for the governments, including a commitment to partner with Canadian suppliers and universities in research and innovation. These also have financial ramifications.

136 While the overriding interest for government may have been "the public good", the public good, in this instance, involved, in large part, financial outcomes. The case law accepts the application of this principle where the common interests are not identical, and where one or both parties may have mixed interests. What is important is that, at the end of the day, what GMCL shared with both levels of government was the common goal of keeping GMCL afloat, and that, on these facts, makes out a sound basis for the application of common interest privilege.

137 Further, there is no evidence of a clear intent to waive that privilege, in fact, quite the contrary, in view of the confidentiality agreements that were signed.

138 The plaintiffs also rely on the decision of the IPC adjudicator dealing with what they say is the same issue: whether common interest privilege can apply as between GMCL and the Ontario government. In his decision, dated January 18, 2013 (Order PO-3154), the adjudicator found that the interests of the ministry and GMCL did not coincide, as the government is charged with managing the economy, while GMCL's mission was to run a business and maximize profits or minimize losses, for the benefit of its shareholders.

139 This narrow approach, of characterizing a government participant by focusing solely on the basis of its public function without looking at its role in the particular situation, is not consistent with case law, which for many years has acknowledged that the Crown has obligations analogous to those of other legal persons when it enters into contractual and commercial agreements.

140 It also ignores the current approach of focusing on the common goal of the parties, rather than on their respective reasons for achieving that common goal - that there can be a common goal of sustaining GMCL despite different rationales for that goal. That does not detract for the fact that GMCL and the governments were engaged in a common mission to save GMCL,

though their reasons for doing so may not have been identical. The fact that their interests, or reasons for working together, were not identical, is not an impediment to the application of public interest privilege on these facts.

141 I am not bound by the IPC adjudicator's decision, not do I find it persuasive in the light of current jurisprudence. I therefore decline to follow it.

142 I find that common interest privilege exists and the redacted portions of the documents falling into this category remain protected with respect to both categories of documents.

Issue 2: Documents Shared with E & Y and their Counsel

143 The plaintiffs state that GMCL has improperly claimed privilege over 59 documents sent or received by representative of E & Y, and over 46 documents sent or received by E & Y's counsel, SE.

144 There is no dispute that E & Y, while assisting GMCL with its potential restructuring as well as the possible CCAA filing, would have been appointed as GMCL's monitor had the CCCAA filing been necessary. In the end, this was avoided and no monitor was needed so E & Y was never appointed to that office, vis a visGMCL.

145 The plaintiffs rely on various cases which describe the role of the monitor as an officer of the court, responsible and accountable to the court, owing a fiduciary duty to all parties. A monitor must act independently, considering the interests of the debtor as well as those of the creditors. It serves as a neutral, acting in the best interests of all parties, rather than a mouthpiece or surrogate of the debtor-applicant. These duties and obligations, they say, are inconsistent with E & Y having been part of a team that shares information for the benefit of GMCL. Their ultimate obligation would have gone well beyond those of the debtor.

146 I do not believe there is any dispute in this case as to the role of a court-appointed monitor. What is in issue is whether E &Y would ever have been subject to such obligations, in view of the fact that they were never appointed as monitor in this case.

147 The plaintiffs accept GMCL's evidence, to the effect that accounting firms often begin their work before they are formally appointed as monitors. However, they suggest that if the monitor must start its work before being formally appointed as monitor by the court, its duties of independence and neutrality must start before court appointment, thus, it would not have been reasonable for GMCL to expect to keep what it conveyed to E & Y and their counsel confidential. They site no source for this assertion, which runs counter to GMCL's expert evidence and ignores the fact that E & Y never actually functioned as a monitor.

148 The cases discuss these principles in situations where the monitor has already been appointed as such. There is no case I have been taken to that indicates that these duties can arise before that time, regardless of the nature or extent of work being undertaken at an earlier stage and despite the fact that such "early" retainers are common in the industry. Until appointed as monitor, an accounting firmacts in the best interests of the party who retained them, though they may acquire information that could be potentially useful down the road if and when appointed as the monitor.

149 John McKenna submitted expert evidence on behalf of GMCL in this regard. He makes it clear that sharing confidential information with professional advisors is normal practice in the industry and that it is understood by all that the information will be treated as confidential and not disclosed beyond the professional team without the client's consent or court order.

150 McKenna indicates that the monitor is commonly retained first as a financial advisor. As they can't be expected to suddenly come up with the statutorily required cash flow forecasts if retained at the last minute, their earlier involvement in a matter is invaluable.

151 This "prospective monitor" is part of this inter-disciplinary team of experts, where each contributes to the overall picture, each expecting their work to remain within the closed circle of the group. To deviate from this model would have a significant negative impact on a company's ability to get ready in short order for a CCAA filing. This is not a social or economic value that has any appeal.

152 As McKenna puts it, *I believe that the ability of the company to be properly advised could be significantly impaired.*

153 To suggest that sharing this information with financial advisors constitutes waiver of privilege conflicts with case law that deals with the protection afforded to documents contained within the continuum of communications (see *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 CarswellBC 112 (B.C. S.C.) where the court recognized that *teams of individuals with focused expertise ...are a practical reality in major commercial projects.)*

154 To distinguish this case on the basis of E & Y's role as a *potential* monitor when they were never assigned that role is, in my view, an unwarranted stretch and one that could have a chilling effect on the use of financial advisors in instances where the need for monitor down the road may be a possibility, only. If that possibility never comes to fruition, and no monitor is appointed, does the privilege that would otherwise attach to shared documents evaporate in light of the fact that they *may* have been appointed as monitor? I think not.

155 The evidence is clear that E &Y worked as part of a team of professional advisors, along with legal counsel, towards both possible outcomes (restructuring and CCAA filing) simultaneously. The professional advisors worked seamlessly and collaboratively, the goal being to maximize the success of the restructuring option. All communications were understood and expected to be privileged and to remain confidential and a confidentiality agreement was entered into to highlight GMCL's expectation in that regard.

156 In terms of SE, McKenna also makes it clear in his evidence that it is customary for a prospective monitor to retain their own legal counsel, who, as a matter of course, would have to be privy to all that the prospective monitor had learned in order to add value.

157 McKenna's view is that, in cases such as this one, all experts involved in formulating a restructuring plan have an expectation that the information they share will remain confidential, whether or not they are also a prospective monitor

158 GMCL also points out that it has not claimed a blanket privilege over all communications involving E & Y and or SE. Instead, they have restricted their claim of privilege to only those communications that reflect legal advice, or shared legal opinions and analysis, which are prima facie privileged.

159 In summary, GMCL asserts that common interest privilege should be found to exist here, and that it has not been waived, as all of the professional advisors worked together towards a common goal. They rely on *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.*, 2003 CarswellOnt 213 (Ont. Master) for the list of legal propositions articulated in that case, which essentially read as follows:

- Solicitor-client privilege should not be lightly interfered with, and only deemed to be waived in the clearest of cases. The onus on establishing waiver is on the party who asserts that it occurred;
- This approach maintains public confidence in a clients' right to communicate in confidence with counsel;
- Each case must be decided on its own facts;
- Did the client intend to waive privilege or to retain confidentiality despite giving information to a third party?
- Was sharing information with the third party in the client's interests? The standard for showing "interest" is not a high one;
- Is the relationship between the parties such that the third party who received the privileged information can be said to have a common interest with the client?
- Does fairness dictate that waiver should be implied?

160 In the case before the court, the evidence indicates that confidentiality was expected, and waiver was not intended. The professional advisors with whom information was shared also shared GNCL's goal of a successful negotiation with both levels of government leaving to restructuring of the company. Fairness does not dictate a different approach.

161 On the basis of all of the foregoing, I find that commercial reality dictates that information of this type is protected by privilege and that such privilege has not been waived by virtue of the information having been shared it with a prospective monitor. Had a CCAA filing been required, things would have taken a very different direction and certain documents that are the subject of this discussion may have ultimately been shared with the court. In that event, they would have been available to be viewed by the plaintiffs, subject, perhaps, to a sealing order being obtained. That, however, is not this case, as no monitor was ever appointed.

162 Accordingly, I find that the privilege was properly claimed and that it has not been waived in this instance.

Issue 3: Implied Waiver Based on the Pleadings

163 The principle of law that deals with waiver privilege by virtue of placing one's state of mind in issue, is set out in *Creative Career Systems Inc. v. Ontario*, 2012 CarswellOnt 797 (Ont. S.C.J.). There, Perell J. stated:

> ...if a party places its state of mind in issue with respect to its claim or defence and **has received legal advice to help form the state of mind**, privilege will be deemed to be waived with respect to such legal advice.

164 His Honour goes on to make the point that waiver is not automatic simply because legal advice was received. As he put it:

> To justify a party being required to answer questions about the content of privileged communications, the party must **utilize** the presence or absence of legal advice as a material element of his or her claim or defence. The waiver of the privilege occurs when the party **uses** the receipt of legal advice as a material fact in his or her claim or defence. While the waiver is a deemed waiver, it requires **the intentional act that a party makes legal advice an aspect of his or her case.**

165 Perell J. relies on *Simcoff v. Simcoff*, 2009 MBCA 80 (Man. C.A.), which articulates the principle in a similar way:

> However, a mere reference to the receipt of legal advice does not constitute waiver. Waiver must involve something more. It requires not simply disclosing that legal advice was obtained, **but pleading reliance on that advice for the resolution of an issue.**

166 In *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CarswellOnt 4488 (Ont. S.C.J.), Corbett J. pointed out that deemed waiver actually occurs as a matter of a party's choice. It does not occur because a party admits having received legal advice, or because he admits having relied on it. It arises because a party chooses to *use that legal advice as a substantive element or his or her pleading.*

167 The plaintiffs rely on *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1997), 32 O.R. (3d) 575 (Ont. Gen. Div. [Commercial List]), but in that case, the issue arose as an evidentiary ruling in the course of a trial. It was clear that that the plaintiff had placed his state of mind in issue by pleading reliance on the defendants' representations, but he then went further and gave evidence that he received legal advice, which, in part, formed the basis of his state of mind. Reference to and reliance on that legal advice remains at the core of this ruling.

168 In my view, the current state of the law is as stated by Perell J., not as set out in a series of older cases dealing with comfort letters. Not only had GMCL not used legal advice as a substantive element of their pleading, there is no indication that they obtained or relied on such advice as regards these releases. The plaintiffs' proposition is not a correct one and such an extension of this legal principle is not warranted. I therefore find that there is nothing in these pleadings which could give rise to a legitimate claim that privilege has been waived on these facts.

Issue 4: Redaction

169 The evidence from GMCL is that all redactions were done on the basis that what was omitted was both irrelevant and confidential. They have filed Risebrough's evidence, to the effect that disclosure of the categories of documents would create *a serious risk of serious commercial and competitive harm to GMCL.*

170 Although they have not cross-examined Risebrough nor filed conflicting evidence, the plaintiffs take the position that his affidavit is based on a "false premise", to the effect that revealing what has been redacted will be disclosed to GMCL's competitors and the general public. They have also argued that the information is dated, again without having put that proposition to Risebrough.

171 This is a class action, with in excess of 200 participants. At this stage, there is little information regarding each class member as to who is where, doing what. It is not inconceivable that some of them, having already operated car dealerships, are doing just that now, but for non-GMCL motor vehicle manufacturers. Any one of them could be a competitor of GMCL at present. According to counsel for GMCL, many of them are. There is no reference to this in the factum, nor did he take me to any evidence to that effect and this assertion is not accepted by plaintiffs' counsel.

172 The plaintiffs claim that there is adequate protection to keep these materials out of the hands of possible competitors. They rely on Strathy J.'s deemed undertaking order, which they say prohibits counsel and the representative plaintiff from disclosing documents and information produced by GMCL to others, including other class members, except within prescribed parameters.

173 Much turns on the outcome of how this issue is resolved and I am troubled by GMCL's reference to the fact that other class members are, in fact, now their competitors. As this portion of the motion was argued late in the afternoon, the parties did not, in my view, get into a real discussion about the protection afforded by Strathy J's order of July 19, 2012. The fact that GCML applied for it and that that the order was ultimately granted on a consent basis suggests there may well have been evidence before the court to the effect that there are class members who are, indeed, GMCL's competitors at this time. If that is the case, I want to ensure that fact is captured in my Reasons.

174 For this reason, I am adjourning this part of motion for further submissions. I will speak with counsel shortly about how this can be addressed.

Motion adjourned.

2014 ONSC 4894
Ontario Superior Court of Justice

Trillium Motor World Ltd. v. General Motors of Canada Ltd.

2014 CarswellOnt 11941, 2014 ONSC 4894, [2014] O.J. No. 4012, 20 C.B.R. (6th) 332, 244 A.C.W.S. (3d) 41

Trillium Motor World Ltd., Plaintiff and General Motors of Canada Limited and Cassels Brock & Blackwell, LLP., Defendants

General Motors of Canada Limited, Plaintiff by Counterclaim and Trillium Motor World Ltd. and Thomas L. Hurdman, Defendants to the Counterclaim

Chiappetta J.

Heard: August 21, 2014
Judgment: September 2, 2014
Docket: CV-10-397096CP

Counsel: Bryan Finlay, Q.C., Marie-Andree Vermette for Plaintiff / Defendants to the Counterclaim
David Morrit, Karin Sachar for Defendants / Plaintiff by Counterclaim

Subject: Civil Practice and Procedure; Evidence; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Evidence

VII Documentary evidence
VII.5 Privilege as to documents
VII.5.b Solicitor and client privilege
VII.5.b.v Documents revealed to third parties

Evidence

XVII Privilege
XVII.2 Privileged communications
XVII.2.a Solicitor and client
XVII.2.a.v Miscellaneous

Headnote

Evidence --- Privilege — Privileged communications — Solicitor and client — Miscellaneous

Financial advisor during restructuring — Plaintiff commenced action against G Ltd. in relation to period in which by G Ltd. was restructuring in preparation for insolvency proceedings — During restructuring period, G Ltd. retained financial advisor, EY, and G Ltd.'s lawyers worked closely with EY and EY's counsel — Plaintiff sought disclosure of communications between G Ltd., EY, and EY's counsel (subject communications) — G Ltd. asserted claim of solicitor-client privilege with respect to subject communications — Plaintiff took position that solicitor-client privilege could not attach to communications made between distressed company and its prospective monitor under Companies' Creditors Arrangements Act — Master dismissed plaintiff's motion for disclosure of subject communications — Plaintiff appealed — Appeal dismissed — There was no palpable and overriding error in master's findings of fact, including finding that G Ltd. had reasonable expectation of confidentiality in subject communications — Master correctly applied facts she found

to law extending solicitor-client privilege to third parties whose function is essential to solicitor-client relationship — Analysis from leading case carried out by master was correct analysis — In case at bar, EY was not appointed as monitor — It was irrelevant that EY might have been appointed as monitor or what disclosure obligations its pre-monitor activities would have been had it been appointed.

Evidence --- Documentary evidence — Privilege as to documents — Solicitor and client privilege — Documents revealed to third parties

Plaintiff commenced action against G Ltd. in relation to period in which by G Ltd. was restructuring in preparation for insolvency proceedings (action at bar) — During restructuring period, G Ltd. negotiated with governments of Canada and Ontario with respect to government investment in G Ltd. — During these negotiations, G Ltd. shared privileged information that was relevant to action at bar with both governments (subject information) — Master dismissed plaintiff's motion for disclosure of subject information — Master concluded that common interest exception applied to subject information — Plaintiff appealed — Appeal dismissed — Plaintiff did not challenge legal principles of common interest privilege exception as specifically detailed by master — Plaintiff objected only to master's findings of fact as applied to correct legal principles — Master's findings of fact were well supported by evidence and were entitled to deference on appeal.

Table of Authorities

Cases considered by *Chiappetta J.*:

Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority (2011), 2011 BCSC 88, 2011 CarswellBC 112, 102 L.C.R. 162 (B.C. S.C.) — distinguished

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241, 124 O.A.C. 356, 45 O.R. (3d) 321, 38 C.P.C. (4th) 203, 1999 CarswellOnt 2898 (Ont. C.A.) — followed

Pitney Bowes of Canada Ltd. v. R. (2003), 2003 CFPI 214, 2003 CarswellNat 1063, [2003] 3 C.T.C. 98, 2003 D.T.C. 5179, 2003 FCT 214, 2003 CarswellNat 361, (sub nom. *Pitney Bowes of Canada Ltd. v. Canada)* 229 F.T.R. 277, 225 D.L.R. (4th) 747 (Fed. T.D.) — referred to

Trillium Motor World Ltd. v. General Motors of Canada Ltd. (2014), 2014 ONSC 1338, 2014 CarswellOnt 2571 (Ont. S.C.J.) — referred to

Zeitoun v. Economical Insurance Group (2008), 236 O.A.C. 76, 64 C.C.L.I. (4th) 52, 2008 CarswellOnt 2576, 53 C.P.C. (6th) 308, 292 D.L.R. (4th) 313, 91 O.R. (3d) 131 (Ont. Div. Ct.) — referred to

Zeitoun v. Economical Insurance Group (2009), 73 C.C.L.I. (4th) 255, 257 O.A.C. 29, 2009 ONCA 415, 73 C.P.C. (6th) 8, 307 D.L.R. (4th) 218, 2009 CarswellOnt 2665, 96 O.R. (3d) 639 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPEAL by plaintiff from decision dismissing its motion for disclosure.

***Chiappetta J.*:**

Overview

1 The representative Plaintiff appeals from the April 3, 2014 Order of Master Haberman [2014 CarswellOnt 2571 (Ont. S.C.J.)] dismissing its motion for production from General Motors of Canada Limited ("GMCL") of communications shared with: (a) Ernst & Young ("E&Y") and its counsel ("E&Y communications"); and (b) various Government actors and their counsel ("Government communications").

2 The Master found that both sets of communications were protected by privilege. The E&Y communications were covered by solicitor-client privilege. The Government communications were covered by common interest privilege.

3 It was found as an undisputed fact by the Master that if GMCL filed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), E&Y would have been proposed as GMCL's monitor. A monitor in a CCAA proceeding is an officer of the court and owes a fiduciary duty to all of the distressed company's stakeholders. It is contended that if this fiduciary duty arose, it would have been necessary for the monitor to disclose all communications between it and the distressed company.

4 The Plaintiff argues that solicitor-client privilege cannot attach to communications made between a distressed company and its prospective monitor, as the monitor's inevitable disclosure obligations eliminate any reasonable expectation of confidentiality between it and the distressed company. Since the E&Y communications were made at a time when E&Y was a prospective monitor of GMCL, the Plaintiff submits that privilege cannot attach to these communications and the Master erred in finding that it did.

5 The Plaintiff also submits that the Master erred in finding that the Government communications were covered by common interest privilege. The Plaintiff argues that the Master erred in law when she concluded that common interest privilege protected communications made between a government and a distressed company made for the purpose of obtaining government financial assistance.

6 For reasons set out below, the appeal is dismissed. The Plaintiff's objection to the Master's decision relates directly to her findings of fact, not her application of law. Deference is to be accorded to a Master's finding of facts absent a palpable and overriding error (*Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131, 292 D.L.R. (4th) 313 (Ont. Div. Ct.), at paras. 40-41, aff'd 2009 ONCA 415 (Ont. C.A.)). The learned Master carefully reviewed the evidence before her. I am satisfied that she did not misapprehend the evidence or otherwise fall into palpable and overriding error. Her findings are therefore entitled to deference.

E&Y Issue

7 The class action arises out of the 2009 efforts of GMCL and its former parent, General Motors Corporation to restructure their business while preparing for insolvency proceedings in both the United States and Canada. In Canada, the proceeding contemplated was a filing under the CCAA.

8 Prior to the start of the related class proceeding, GMCL retained financial and legal advisors to assist them in their efforts to avoid a filing under the CCAA, and to prepare them in the event that a CCAA filing was necessary. GMCL retained E&Y as a financial advisor. GMCL and their lawyers worked closely with E&Y and E&Y's legal counsel, Stikeman Elliot LLP ("Stikeman"). GMCL ultimately avoided a CCAA filing.

9 The Master accepted the uncontested expert evidence and found as a fact that:

> 1. E&Y, as the financial advisor to GMCL worked as part of a team of professional advisors along with legal counsel towards two possible outcomes - restructuring and CCAA filing.
>
> 2. The professional advisors worked seamlessly and collaboratively with the goal to maximize the success of the restructuring option.
>
> 3. E&Y had a much broader role to play as GMCL's financial advisor than simply preparing GMCL to file under the CCAA.

4. A monitor is commonly retained first as a financial advisor. A monitor's early involvement in a matter is invaluable as the monitor cannot be expected to come up with statutorily required cash flow forecasts if retained at the last minute.

5. E&Y's role as the prospective monitor made it essential to the legal advice provided to GMCL.

6. GMCL and E&Y understood and expected all communications to be privileged and confidential. A confidentiality agreement was entered into, highlighting GMCL's expectation in that regard.

7. Sharing confidential information with professional advisors is normal practice in the industry.

8. GMCL expected their communications to remain confidential and no waiver was intended.

10 The Master then correctly applied the facts she found to the law extending solicitor-client privilege to third parties whose function is essential to the solicitor-client relationship. While she did not refer to the Ontario Court of Appeal's decision in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, 180 D.L.R. (4th) 241 (Ont. C.A.), her reasons reflect the appropriate application of the legal principles therein. The Master, explicitly found that it would be "an unwarranted stretch" to distinguish this case from *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88, 102 L.C.R. 162 (B.C. S.C.), wherein the British Columbia Supreme Court applied the *Chrusz* principles and denied a motion to produce documents from a third party that were covered by solicitor-client privilege.

11 I am unable to identify any palpable and overriding error in the Master's findings of fact; including the Master's finding that GMCL had a reasonable expectation of confidentiality in its communications with E&Y and Stikeman, arising independently of E&Y's role as a prospective monitor. GMCL restricted their claim for privilege to those communications with E&Y that reflect legal advice, or shared opinion and analysis. But for E&Y's status as prospective monitor, the claim of privilege would likely not have been challenged for reasons set out in *Chrusz*.

12 In this case, E&Y was not appointed as a monitor. It is irrelevant that it might have been or what disclosure obligations its pre-monitor activities would have been had it been appointed. E&Y were financial advisors to GMCL working with its solicitors. The *Chrusz* analysis of the Master was the correct analysis.

Government Issue

13 The sole sources of potential funding for GMCL's restructuring were the governments of Canada and Ontario. An essential component of GMCL's restructuring was the successful negotiation of conditions and agreements under which these governments would invest in GMCL by June 1, 2009. During the first five months of 2009, GMCL worked with both governments to develop a restructuring plan. GMCL shared privileged information that was relevant to the class proceeding with both governments during the course of their negotiations. GMCL claimed that it did not waive privilege by disclosing its privileged material to governments since the disclosure was made to further the parties' common interest. The Master accepted this submission and agreed that the common interest exception applied to the disclosure of privileged communications between GMCL and the governments of Canada and Ontario.

14 Common interest is not a separate class of privilege. Rather, it operates to protect privilege from waiver. If the requirements of the common interest privilege exception are not met, then the sharing of the privileged information will constitute a waiver of privilege (*Pitney Bowes of Canada Ltd. v. R.*, 2003 FCT 214, 225 D.L.R. (4th) 747 (Fed. T.D.) at para. 14). The Master acknowledged that the common interest privilege exception is "so fact driven, there can be no hard and fast rule as to when it will or will not arise".

15 The Master found as a fact that the governments were acting in a commercial capacity; both the governments and GMCL wanted the same outcome -"the survival of GMCL" - and that the governments and GMCL had a common interest in developing a restructuring plan. Further, she accepted that the governments and the Canadian public received many benefits as a result of the successful restructuring of GMCL.

16 The Plaintiff submits that the common interest privilege exception does not apply to communications made for the purpose of obtaining government financial assistance. It is argued that there is no precedent to justify extending the common interest privilege exception to these circumstances and the exception is no more applicable in this case than would be to a citizen's application for employment insurance. It is further argued that GMCL and the governments did not have a common interest vis-à-vis the relevant class.

17 The Plaintiff, however, does not challenge the legal principles of the exception as specifically detailed by the Master. Again, the Plaintiff objects only to the Master's findings of fact as applied to the correct legal principles. Her findings of fact were well supported by the evidence and are entitled to deference on appeal.

Disposition

18 For reasons outlined above, the appeal is dismissed.

Costs

19 Counsel agreed that $10,000 is an appropriate award of costs to the successful party on this appeal. Costs are therefore fixed at $10,000 and made payable within 30 days by the appellant to the respondent.

Appeal dismissed.

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