Clerk's Stamp

COURT FILE NUMBER	2501-06120
COURT	COURT OF KING'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 COMPROMISE OR ARRANGEMENT OF SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., and SUNTERRA ENTERPRISES INC.
APPLICANT	**NATIONAL BANK OF CANADA**
RESPONDENTS	**SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., SUNTERRA ENTERPRISES INC., RAY PRICE, DEBBIE UFFELMAN and CRAIG THOMPSON**
DOCUMENT	**BOOK OF AUTHORITIES TO THE BENCH BRIEF OF NATIONAL BANK OF CANADA FOR THE APPLICATION TO BE HEARD ON OCTOBER 15, 2025 AT 10:00 A.M.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP Suite 4000, 421 7th Avenue SW Calgary AB T2P 4K9 Attention: Sean Collins, KC / Sean Smyth, KC / Pantelis Kyriakakis / Nathan Stewart / Samantha Arbor Phone: 403-260-3531 / 3698 / 3536 / 3534 / 3506 Fax: 403-260-3501 Email: scollins@mccarthy.ca / ssmyth@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca / sarbor@mccarthy.ca

LIST OF AUTHORITIES

Statutes

1. *Bank Act*, S.C. 1991, c. 46, at section 158(1) and (3);

2. *Companies Creditors' Arrangement Act*, RSC 1985, c C-36, at section 11;

3. *Rules of Court*, Alta. Reg. 124/2010, at Rules 1.2(1) and (4), 5.2(1), 5.17(1)(b) and (d), and 6.8;

Case Law

4. *Brookdale International v Crescent Point Energy*, 2023 ABKB 120;

5. *Cana Construction Co. Ltd. v. Calgary Centre for Performing Arts*, 1986 ABCA 175;

6. *Dow Chemical Canada ULC v. Nova Chemicals Corporation*, 2014 ABCA 244;

7. *NAC Constructors Ltd. v. Alberta Capital Region Wastewater Commission*, 2006 ABCA 246;

8. *Pembina Pipeline Corporation v Coney,* 2019 ABQB 699; and,

9. *Weatherill (Estate of) v. Weatherill,* 2003 ABQB 69.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bank Act

Loi sur les banques

S.C. 1991, c. 46

L.C. 1991, ch. 46

Current to September 15, 2025

Last amended on March 8, 2025

À jour au 15 septembre 2025

Dernière modification le 8 mars 2025

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g) élaborer, conformément à l'article 465, les politiques de placement et de prêt et les normes, mesures et formalités y afférentes.

Exception

(3) Paragraphs (2)(a) and (b) do not apply to the directors of a bank if

(a) all the voting shares of the bank are beneficially owned by a Canadian financial institution described in any of paragraphs (a) to (d) of the definition ***financial institution*** in section 2; and

(b) the audit committee or conduct review committee of the financial institution performs for and on behalf of the bank all the functions that would otherwise be required to be performed by the audit committee or conduct review committee of the bank under this Act.

1991, c. 46, s. 157; 1997, c. 15, s. 11; 2001, c. 9, s. 68(F); 2018, c. 27, s. 316.

Exceptions

(3) Les alinéas (2)a) et b) ne s'appliquent pas aux administrateurs de la banque lorsque les conditions suivantes sont réunies :

a) toutes les actions avec droit de vote sont la propriété effective d'une institution financière canadienne visée à l'un ou l'autre des alinéas a) à d) de la définition de ***institution financière*** à l'article 2;

b) le comité de vérification ou de révision de l'institution, selon le cas, exerce pour la banque et en son nom, toutes les attributions qui incombent par ailleurs aux termes de la présente loi à celui de la banque.

1991, ch. 46, art. 157; 1997, ch. 15, art. 11; 2001, ch. 9, art. 68(F); 2018, ch. 27, art. 316.

Duty of care

158 (1) Every director and officer of a bank in exercising any of the powers of a director or an officer and discharging any of the duties of a director or an officer shall

(a) act honestly and in good faith with a view to the best interests of the bank; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Diligence

158 (1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir :

a) avec intégrité et de bonne foi au mieux des intérêts de la banque;

b) avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

Duty to comply

(2) Every director, officer and employee of a bank shall comply with this Act, the regulations, the bank's incorporating instrument and the by-laws of the bank.

Observation

(2) Les administrateurs, les dirigeants et les employés sont tenus d'observer la présente loi, ses règlements, les dispositions de l'acte constitutif et les règlements administratifs de la banque.

No exculpation

(3) No provision in any contract, in any resolution or in the by-laws of a bank relieves any director, officer or employee of the bank from the duty to act in accordance with this Act and the regulations or relieves a director, officer or employee from liability for a breach thereof.

Obligation d'observer la loi

(3) Aucune disposition d'un contrat, d'une résolution ou d'un règlement administratif ne peut libérer les administrateurs, les dirigeants ou les employés de l'obligation d'observer la présente loi et ses règlements ni des responsabilités en découlant.

Qualification and Number — Directors

Administrateurs — Nombre et qualités requises

Minimum number of directors

159 (1) A bank shall have at least seven directors.

Nombre d'administrateurs

159 (1) Le nombre minimal d'administrateurs est de sept.

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

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Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

TAB 3

ALBERTA

RULES OF COURT

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Part 1:
Foundational Rules

Division 1
Purpose and Intention of These Rules

What these rules do

1.1(1) These rules govern the practice and procedure in

(a) the Court of King's Bench of Alberta, and

(b) the Court of Appeal of Alberta.

(2) These rules also govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer.

AR 124/2010 s1.1;218/2022

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2
Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the *Judicature Act*;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 *[Purpose and intention of these rules]* the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

Part 5:
Disclosure of Information

Purpose of this Part

5.1(1) Within the context of rule 1.2 *[Purpose and intention of these rules]*, the purpose of this Part is

(a) to obtain evidence that will be relied on in the action,

(b) to narrow and define the issues between parties,

(c) to encourage early disclosure of facts and records,

(d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and

(e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.

(2) The Court may give directions or make any order necessary to achieve the purpose of this Part.

Information note

This Part does not apply to actions started by originating application unless the parties otherwise agree or the Court otherwise orders. See rule 3.10 *[Application of Part 4 and Part 5]*.

Division 1
How Information Is Disclosed

Subdivision 1
Introductory Matters

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.

(2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

Information note

A party who invokes subrule (4) unreasonably may be ordered to pay costs under rule 10.33(2) *[Court considerations in making a costs award]*. Denials of authenticity must be specific and contain particulars. Blanket denials of authenticity are not an acceptable response.

Undisclosed records not to be used without permission

5.16 A party who

(a) does not disclose a relevant and material record in an affidavit of records referred to in rule 5.6 *[Form and contents of affidavit of records]*,

(b) does not disclose as required by rule 5.10 *[Subsequent disclosure of records]* a relevant and material record that is found, created or obtained, or

(c) does not produce a relevant and material record in accordance with a valid request to do so under rule 5.14 *[Inspection and copying of records]*

may not afterwards use the record in evidence in the action unless the parties otherwise agree or the Court otherwise orders on the basis that there was a sufficient reason for the failure to disclose.

Subdivision 3
Questions to Discover Relevant and Material Records and Relevant and Material Information

People who may be questioned

5.17(1) A party is entitled to ask the following persons questions under oath about relevant and material records and relevant and material information:

(a) each of the other parties who is adverse in interest;

(b) if the party adverse in interest is a corporation,

(i) one or more officers or former officers of the corporation who have or appear to have relevant and material information that was acquired because they are or were officers of the corporation, and

(ii) the corporate representative;

(c) if a litigation representative is appointed for a party,

(i) the litigation representative, and

(ii) with the Court's permission, the person on whose behalf the litigation representative is appointed if that person is competent to give evidence;

(d) one or more other persons who are or were employees of the party adverse in interest who have or appear to have relevant and material information that was acquired because of the employment;

(e) an auditor or former auditor engaged by a party adverse in interest, but not an auditor or former auditor engaged solely for the purpose of the action;

(f) if a partnership is a party adverse in interest, a partner or former partner of the partnership;

(g) in an action with respect to a negotiable instrument or chose in action,

(i) an assignor of the negotiable instrument or chose in action,

(ii) a prior endorser, drawer, holder or maker of the negotiable instrument, and

(iii) an employee or former employee of an assignor of the negotiable instrument or chose in action, and if the assignor is a corporation, an officer or former officer of the corporation.

(2) If a questioning party questions more than one person of a party adverse in interest under subrule (1) and the person questioned is

(a) an officer or former officer of a corporation described in subrule (1)(b)(i),

(b) an employee or former employee of the party adverse in interest described in subrule (1)(d),

(c) an auditor or former auditor described in subrule (1)(e),

(d) a partner or former partner of a partnership referred to in subrule (1)(f), or

(e) an employee, former employee, officer or former officer described in subrule (1)(g)(iii), other than a corporate representative,

the costs of questioning the second and subsequent persons are to be paid by the questioning party unless

(f) the parties otherwise agree, or

(g) the Court otherwise orders.

(3) This rule applies whether the person to be questioned is within or outside the Court's jurisdiction.

Information note

The *Class Proceedings Act* contains limitations on who can be questioned when the action is a proceeding under that Act.

Persons providing services to corporation or partnership

5.18(1) Subject to subrules (2) and (3), if

(a) a party cannot obtain relevant and material information from an officer or employee or a former officer or former employee of a corporation or partnership that is a party adverse in interest,

Questioning witness before hearing

6.8 A person may be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the application, and

(a) rules 6.16 *[Contents of appointment notice]* to 6.20 *[Form of questioning and transcript]* apply for the purposes of this rule, and

(b) the transcript of the questioning must be filed by the questioning party.

How the Court considers applications

6.9(1) The Court may consider a filed application in one or more of the following ways:

(a) in person, with one, some or all of the parties present;

(b) by means of an electronic hearing if an electronic hearing is permitted under rule 6.10 *[Electronic hearings]*;

(c) by a process involving documents only.

(2) Applications may be decided by a judge or applications judge.

AR 124/2010 s6.9;136/2022

Electronic hearing

6.10(1) In this rule, "electronic hearing" means an application, proceeding, streamlined trial or trial conducted, in whole or in part, by electronic means in which all the participants in a hearing and the Court can hear each other, whether or not all or some of the participants and the Court can see each other or are in each other's presence.

(2) An electronic hearing may be held if

(a) the parties agree and the Court so permits, or

(b) on application or on the Court's own motion, the Court orders an electronic hearing.

(3) The Court may

(a) direct that an application for an electronic hearing be heard by electronic hearing,

(b) direct that an application, a streamlined trial or a trial be heard in whole or in part by electronic hearing,

(c) give directions about arrangements for the electronic hearing or delegate that responsibility to another person,

(d) give directions about the distribution of documents and the practice and procedure at the electronic hearing, or

(e) order that an electronic hearing be completed in person.

(4) The court clerk must participate in an electronic hearing unless the Court otherwise directs.

AR 124/2010 s6.10;23/2021;126/2023

TAB 4

Court of King's Bench of Alberta

Citation: Brookdale International v Crescent Point Energy 2023 ABKB 120

Date:
Docket: 1501 07942
Registry: Calgary

Between:

Brookdale International Partners, L.P. by its general partner BIP GP LLC and Brookdale Global Opportunity Fund

Plaintiff/Respondent

- and -

Crescent Point Energy Corp. and Legacy Oil + Gas Inc.

Defendant/Applicant

Reasons for Judgment
of the
Honourable Justice K.M. Horner

Introduction

[1] The within application concerns undertakings and objections at questioning. The main action is a 'fair value' claim under Alberta's *Business Corporations Act*, RSA 2000, c B-9 (*ABCA*), wherein the Plaintiffs, Brookdale International Partners, LP by its general partner BIP GIP LLC (Brookdale International) and Brookdale Global Opportunity Fund (Brookdale Global) (jointly referred to as the Plaintiffs, Brookdale or the Brookdale Entities), are seeking judicial determination of the fair value of their shares in the Defendants, Crescent Point Energy Corp. ("Crescent Point") and Legacy Oil + Gas Inc ("Legacy").

[2] On June 21, 2022, Brookdale's corporate representative, Mr. William Michael Garrity IV, was questioned by the Defendants. Mr. Garrity is employed by Weiss Asset Management LP ("Weiss") through its general partner WAM GP LLP ("WAM"). Pursuant to Investment Management Agreements, Weiss is the Investment Manager for the Brookdale Entities.

[3] During the questioning of Mr. Garrity, Brookdale's counsel objected to certain questions and refused certain undertakings requested.

[4] Legacy submits that the Plaintiffs' objections and refusals are improper, and that the Plaintiffs should be compelled to answer the questions and provide the undertakings sought.

[5] Brookdale opposes the within application, arguing that the questions and related undertakings seek to obtain evidence on which the Plaintiffs may rely on at trial, rather than facts that are independently known by the Plaintiffs. They maintain that the objections and refusals are appropriate.

Procedural History and Nature of the Claim

[6] In July 2015, Brookdale International and Brookdale Global commenced proceedings against Crescent Point and Legacy via Originating Application seeking the judicial determination of the "fair value" of their Legacy shares pursuant to s. 191 of the *ABCA*. This followed Legacy accepting an offer from Crescent Point in May 2015 and entering into a court approved Plan of Arrangement whereby all of the shares of Legacy were exchanged for shares in Crescent Point. Brookdale filed a dissent in accordance with the court order approving the sale.

[7] Subsequently pleadings were filed, with Brookdale filing a Statement of Claim in April 2017, Legacy filing a Statement of Defence in May 2017, and Brookdale filing a Reply in June 2017.

[8] Extensive discovery has taken place over the years since the pleadings were filed. Counsels' submissions suggest that there is no dispute on the fundamental issue of entitlement to be paid fair value of the shares, and that determination of fair value will largely turn upon expert evidence.

[9] Legacy submits that Brookdale's Statement of Claim pleads the determination of fair value, but added at paragraphs 6 though 8 of the Statement of Claim "significantly new allegations impugning the judgment and conduct of Legacy, its board of directors and their independent advisors". Further allegations were added in the Reply. Legacy submits that these allegations raise new areas of proper questioning. They argue that Brookdale's corporate representative refused to answer basic questions about "generalized but very serious allegations" that are set out in the pleadings.

[10] Brookdale takes the position that the Defendants' application seeks to compel Mr. Garrity to review all the evidence which the Plaintiffs' obtained through their discovery of the Defendants and to advise which of that evidence they intend to rely on. They submit that in this type of claim, there is "a natural asymmetry as to the evidence possessed by the Plaintiffs than that possessed by the Defendants". This asymmetry arises as the Plaintiffs, while knowing that they owned shares and dissented, would not have independent knowledge of their own account of the facts relevant to the live issues set out in the pleadings. The crux of their position in opposing this application is that while the Plaintiffs are required to provide the facts they know of their own account, they are not required to provide evidence of how they will prove their case.

Issue

[11] The within application deals with the permitted scope of questions at questioning. The questions seek information generally in two main categories: (a) questions concerning background and witness information about the Plaintiffs; and (b) questions about the pleadings.

Overview of Legal Principles

[12] Disclosure has numerous defined and important purposes as outlined at Part 5 of the Alberta *Rules of Court* Disclosure of Information:

> (a) to obtain evidence that will be relied on in the action;
>
> (b) to narrow and define the issues between the parties;
>
> (c) to encourage early disclosure of facts and records;
>
> (d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute; and
>
> (e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.
>
> [rule 5.1]

[13] ***Wesley First Nation v Alberta***, 2013 ABQB 344 (aff'd 2015 ABCA 76) at paragraph 12 describes the many functions fulfilled by questioning and discovery that are recognized in the case law:

> Case law also recognizes that many functions fulfilled by questioning and discovery include obtaining admissions, facilitating the proof of the matters at issue between parties, and obtaining full and fair disclosure. Discovery also assists the examining party in finding out what case the party has to meet, allowing parties to assess the merits of their own and the opponent's position, defining issues early in the proceedings, determining facts relied on in support of that case, limiting the generality of the pleadings and avoiding parties being taken by surprise at trial.
>
> [citations omitted]

[14] In ***Ironside v Wong***, 2003 ABQB 161 at paragraph 21, the Court stated that the purpose of questioning is to allow the opposing party to learn the case to be met, to narrow the issues to be dealt with at trial, to prevent surprise at trial, and to allow parties to assess the strengths and weaknesses of the case.

[15] A person is only required to answer questions that are relevant and material, and questions in respect of which an objection is not upheld under rule 5.25(2).

[16] Rule 5.2 sets out when something 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.
>
> **(2)** The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

[17] The pleadings are the starting point for determining relevance and materiality, along with the context and nature of the claim: ***Mustard v Brache***, 2006 ABCA 265 at para 10; ***Wesley*** at para 21. Discovery of records is confined to eliciting facts of primary relevance, i.e., facts that are directly in issue, or of secondary relevance, i.e., facts from which the existence of the primary facts may be directly inferred. Both primary and secondary relevance are determined by reference to the issues raised by the pleadings: ***Mustard*** at para 11.

[18] In ***Geophysical Service Incorporated v NWest Energy Corp***, 2017 ABQB 232, Justice Nixon held that rule 5.2 should be construed narrowly, with information being disclosed only if it would significantly help determine the issues raised in the pleadings. Where relevance is determined by the pleadings, materiality is more a matter of proof: ***Geophysical*** at para 24.

[19] Counsel may object to questions posed by examining counsel, with rule 5.25 setting out the parameters for appropriate questions and objections. 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; or
>
> (d) any other ground recognized at law.

[20] Valid objections subsumed under "other grounds recognized by law" include: questions of expert opinion; questions of law or mixed fact and law, or the legal interpretation of documents; questions that ask a witness to interpret a document they did not author; questions that require the witness to hypothesize, speculate or reach conclusions; and, questions that offend the rules of privilege: ***Wesley*** at para 17.

[21] In ***Weatherill Estate v Weatherill***, 2003 ABQB 69, Justice Slatter espoused a pragmatic view of the scope of discovery. In interpreting the *Rules* as they then were, he indicated that the court should avoid creating an artificial situation where a litigant is not entitled to obtain information on discovery which the litigant could clearly introduce at trial. Through objections, limits are placed on what questions may be asked to avoid abusive, excessive and unnecessarily expensive questioning, not to prevent legitimate lines of inquiry:

> ...In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question. At an interlocutory stage of proceedings, the Court should not measure counsel's proposed line of argument too finely; if counsel can

> disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry.
>
> [***Weatherill*** at para 16]

[22] A further limit on questioning requires a distinction between facts and evidence. Facts, which enable a party to know what the case is, are discoverable. Evidence, which enables a party to know how the case will be proved, is not: see ***Can-Air Services Ltd v British Aviation Insurance Co***, 1988 ABCA 341; ***Millott Estate v Reinhard***, (2000) 84 Alta LR (3d) 387, 2000 CarswellAlta 704 at para 28.

[23] In ***Can-Air*** the issue before the court was whether a party examined for discovery may be asked the facts on which he relies for part of his pleading. Justice Côté held that questioning "may seek facts only, not argument": ***Can-Air*** at para 7. If a pleading is unclear, the remedy is to ask the lawyer who wrote it to clarify it, either informationally or formally through a motion to amend or strike out or give further particulars: ***Can-Air*** at para 14. The Court disallowed questions framed as "upon what facts do you rely for para. x of your pleading", stating that it was always improper because it requires a witness to select facts, thus becoming an inquiry into evidence.

[24] In ***Millott Estate***, the defendants sought to compel the plaintiffs to provide facts relevant to the allegations of negligence plead in the Amended Statement of Claim relating to a motor vehicle collision. The plaintiffs argued that the "facts" sought were actually evidence, outside the plaintiffs' knowledge, and that the only possible source from which the plaintiffs could inform themselves is privileged information. The defendants acknowledged that the plaintiffs had no personal knowledge of the collision because they were not present at the accident, and tragically, the only person on the plaintiffs' side who would have had personal knowledge was deceased: ***Millott*** at para 26.

[25] ***Millott*** discusses what facts a plaintiff must properly inform themselves of, relying on the principles set out in ***Can-Air***. Plaintiffs do not need to inform themselves of facts that are otherwise privileged: ***Millott*** at para 22. Distinguishing between privileged and non-privileged facts becomes the important determination. Justice Moore cited ***Blair v Wawanesa Mutual Insurance Co et al*** (1997), 209 AR 81:

> Facts, not otherwise privileged, are those facts that a party knows of on its own account, in the ordinary course of affairs or from its own involvement in the events which are the subject matter of the dispute. The facts acquired by counsel or agents, acting on behalf of counsel (in this case documents and reports obtained or authored by the insurance adjuster and the private investigator and counsel) are not discoverable because they are covered by the litigation privilege, i.e. they are facts which are otherwise privileged.

[26] At paragraph 30, ***Millott*** summarizes the key principles relating to discovery of facts versus evidence:

> ...Once a party has a certain amount of information regarding a pleading, the search for more facts becomes a thinly-disguised quest for evidence. If the plaintiffs were forced to disclose all the facts they had learned from all witnesses

> and investigations, the defendant would have fairly complete knowledge of how the plaintiffs plan to prove their case.

[27] Facts enable a party to know what the case is, whereas evidence enables a party to know how the case will be proved: ***Millott*** at para 28. In ***Millot***, Justice Moore held that the facts sought by the defendants were actually evidence in that they would indicate how the plaintiffs would prove its case. Documents available to both parties had information giving a basis for each of the negligence allegations. Further, the facts sought by the defendants related to the actions of the defendants, and were necessarily fully known to the defendants: ***Millott*** at para 31.

[28] In ***Tolko Industries Ltd v RailLink Ltd***, 2003 ABQB 349, Justice Slatter considered the permissible scope of questions at discovery. One of the issues arose from questions relating to the pleadings. The format of the two questions in ***Tolko*** was "Provide whatever information Tolko has that relates to the [allegations in paragraph of the pleadings]." Justice Slatter held that the Plaintiff was justified in refusing to give these two undertakings because it was a single compendious question about all the detailed allegations in the specific paragraph of the pleadings, rather than a question of fact about particular allegations in the Statement of Claim: ***Tolko*** at paras 22, 26-28.

[29] These general principles outlined above guide my analysis of the within application.

Application of the Principles to the Facts

[30] The objections and undertakings can be divided into two general categories: (a) objections concerning background and witness information about the Plaintiffs, and (b) objections and undertakings related to the pleadings.

[31] At the hearing, Legacy withdrew its request for Undertakings 11, 12, 13 and 15. These are not considered in the analysis below.

A. Objections concerning basic background and witness information about the Plaintiffs, and basic details about the Plaintiff's Investment in Legacy

i. Objections 1, 2, 3, 4

[32] The following four questions requesting the names of various directors and officers of the Plaintiff corporations, and of an associated non-party corporation were objected to:

> **Objection 1:** And who are the directors of BIP?
>
> **Objection 2:** And who are the directors and officers of Brookdale Global?
>
> **Objection 3:** Who are the directors and officers of WAM?
>
> **Objection 4:** There's been a refusal to tell me who the president is. Will you tell me who the managing directors are?

[33] Legacy submits that the Plaintiffs are refusing to provide information about possible witnesses within their companies or related entities. They state that they are simply asking for names, and it would be pragmatic to provide answers to Objections 1 2, 3 and 4. They rely on ***Loos, O'Keefe, Ruckaber, Bothwell, Williams, Sprentz, Enns and Reeves v Leader-Post Ltd and Williams***, 12 ACWS (2d) 321, 12 Sask R 195 **[*Leader-Post*]**, in particular, paragraph 5:

> ... a party examined for discovery may not refuse to give the names of employees who have personal knowledge touching the questions at issue acquired by virtue of that employment.

[34] ***Leader-Post*** was an action for libel against the defendants in respect of a publication in the defendant's newspaper. The plaintiffs brought an application to compel the defendant Williams, the editor of the newspaper, to answer certain questions refused at Questioning. Mr. Williams refused to provide the identity of the person who wrote the article, the identity of the person who obtained the information directly from a Mr. Robbins (which was the basis for the article), and the identity of the person who wrote the story. The Court compelled Mr. Williams to provide the identity of the persons in question because the identity of the reporter(s) who wrote the stories was a substantial part of a material fact disputed by the defendants: ***Leader-Post*** at para 7.

[35] Legacy also relies on ***Wray v Schwartz***, [1981]119 DLR (3d) 489, citing it for the proposition that "the defendants are clearly entitled as of right, to examine for discovery those employees of the plaintiff who have knowledge and the defendants are not required to rely on the information of the officer as to what the employees said or did.": ***Wray*** at para 5. In that case, the applicants sought the names of employees of the plaintiff corporation "who in the course of their employment performed certain functions and made certain decisions relevant to the issues raised in the proceedings". Counsel for the plaintiff objected to the "disclosure of names of the employees who undoubtedly had personal "knowledge touching the questions at issue acquired by virtue of that employment": ***Wray*** at para 4. Relying on then rule 200(1) (which is similar to current rule 5.17(1)(d)), the Court directed that the corporate officer of the plaintiff re-attend and provide the names of the employees requested.

[36] A distinguishing factor is that the former rule 200(1) referred to "touching the matters in question", whereas our current rules have narrowed the scope of relevance and materiality, as was pointed out by Justice Nixon in ***Geophysical***.

[37] Rule 5.17(1)(d) provides:

> 5.17(1) A party is entitled to ask the following persons questions under oath about relevant and material records and relevant and material information:
>
> ...
>
> > (d) one or more other persons who are or were employees of the party adverse in interest who have or appear to have relevant and material information that was acquired because of the employment.

[38] The basis for Brookdale's objection is that no foundation has been laid for why or how the identification of the officers and directors of the Brookdale entities or WAM, or the managing directors of Weiss, would or could possibly be relevant or material to the determination of any of the remaining live issues in the action. They state that there is no evidence that these individuals have any personal or independent knowledge that is relevant and material. They raise a further concern that providing these names could result in requests to conduct questioning of individuals with no knowledge.

[39] I direct that Brookdale provide answers to the questions resulting in Objections 1, 2, 3, and 4, and am guided by the comments in ***Weatherill*** wherein the court cautions applying a too formalistic approach to the rules. Where pragmatic counsel is called upon to produce a document

which is arguably irrelevant, or at least not materially relevant, if the document is truly harmless, the pragmatic counsel will produce it rather than fight over it: ***Weatherill*** at para 13. In this case, Legacy has requested the names of various directors and officers of the plaintiff corporations. In my view, these are foundational questions and a pragmatic approach is warranted. With respect to Brookdale's concern regarding requests to question individuals without knowledge, simply providing the names of these individuals does not require Brookdale to produce said individuals for questioning. Pursuant to rule 5.17(1)(d), only individuals who have or appear to have relevant and material information may be questioned. Should such a request to question arise, Legacy must ensure its request complies with the Alberta *Rules of Court* and Brookdale has recourse available through them.

[40] As such, I direct that Brookdale provide answers to the questions resulting in Objections 1, 2, 3 and 4.

ii. Objection 19

[41] Counsel for Brookdale objected to the following question:

> **Objection 19:** Now, if you are not an employee, officer, or director of Weiss or WAM, can you tell me how you believe that you have authority to give evidence that binds the plaintiffs?

[42] Legacy wants to know how Mr. Garrity, who does not work for the Plaintiffs, came to be the corporate representative. They argue that this information is necessary to understand who is being questioned and whether it may be necessary or important to question other individuals, given that Mr. Garrity is not an employee of the Brookdale Entities, and it is unclear how he came to have authority to bind those entities. Legacy agrees with Brookdale that Legacy has not challenged Mr. Garrity's position as corporate representative. However, they submit that this does not mean that Legacy is then precluded from asking information about Mr. Garrity's position as corporate representative.

[43] Brookdale objects to the question on the basis that Mr. Garrity is not required to give a legal opinion on the source of his authority to be the Plaintiffs' corporate representative. They state that no rule requires the corporate representative to be an employee of the party. Rule 5.4 states that a corporate party can choose its own corporate representative and the evidence of the corporate representative is the evidence of the corporation.

[44] Brookdale also relies on what they describe as a "failed argument" advanced by Legacy before the Court of Appeal: see ***Brookdale International Partners, L.P. v Crescent Point Energy Corp.***, 2018 ABCA 221 **[*Brookdale ABCA*].** In ***Brookdale ABCA*** at paragraph 41 in reference to the chambers judge's concerns about the authority of Mr. Garrity to give evidence, the Court stated "Any person is presumed to be a competent and compellable witness, and does not need "authority" to give relevant evidence: *Alberta Evidence Act*, RSA 2000, c. A-18, ss. 3-4."

[45] Brookdale further asserts that the information Legacy seeks can be found in the Investment Management Agreements (IMAs) between Weiss and the Brookdale Entities. Mr. Garrity's evidence at questioning is that he is employed by Weiss as an investment analyst, and that investment decisions for the Brookdale Entities are made through a contractual relationship with Weiss, through its general partner WAM. Section 7 of the IMA between Weiss and Brookdale Global provides Weiss with the power to act on behalf of and exercise all rights of the

company, similar to the powers set out in the IMA between Weiss and Brookdale International (Tab 2 of the Evidence Book). Legacy states that this is a partial answer, but seeks to have Brookdale point out the portions of the IMAs that give Mr. Garrity his authority.

[46] In my view, the question resulting in Objection 19 as stated is not permissible. Firstly, based on the materials before me, there appears to be confusion regarding Mr. Garrity's employment. The question resulting in Objection 19 indicates that Mr. Garrity is not an employee, officer or director of Weiss or WAM. Legacy's brief at page 8 paragraph 25(e) states that Mr. Garrity is an employee of WAM GP LLP. Tab 3 of the Evidence book includes an excerpt from questioning of Mr. Garrity on October 1, 2015 wherein he confirms under oath that he is an employee of Weiss Asset Management LP (page 8, line 3-5), that he speaks "on behalf of Weiss Asset Management, the investment manager of Brookdale – of the Brookdale funds" (page 8, line 13-15), and that Weiss Asset Management LP, as investment advisor of the Brookdale Funds, the role is pursuant to a contract (page 8 lines 16-27, page 9, line 1). The excerpts from questioning of Mr. Garrity on June 21, 2022 at Tab 6 of the Evidence Book confirms that Mr. Garrity answered under oath that he is an employee of Weiss Asset Management LP, not an employee of WAM (page 12, lines 21-24). In my opinion, this needs to be clarified in the question resulting in Objection 19.

[47] Secondly, the term "authority" lends towards Mr. Garrity opining on a question of law (i.e. what is your legal authority to be a corporate representative for Brookdale). As previously stated, questions of law are not permissible. Rule 5.4 requires that every corporation that is a party must appoint a corporate representative and their evidence is evidence given by the corporation: rule 5.4(1) and (3). Rule 5.4(6) allows the Court to appoint an additional or a substitute corporate representative for a party that is a corporation if the appointed corporate representative is not suitable, or has failed to inform himself or herself of relevant and material records. No such application is before me, and Legacy, as stated above, has not challenged Mr. Garrity as corporate representative.

[48] However, this does not equate to Legacy being precluded from asking questions about Mr. Garrity and his role. As will be seen in these reasons, a corporate representative has an obligation to inform him or herself of the issues between the parties, and in this case, Mr. Garrity's link or connection to the Plaintiffs is central. In my view, Legacy is entitled to understand the connection between Mr. Garrity and the Plaintiffs. As such, the question could be rephrased as follows: Are you relying on the IMAs for your connection to Brookdale to appear as their corporate officer? If Brookdale is relying on certain portions of the IMAs, I agree that it would be pragmatic to indicate the specific portions relied upon, as it appears they have done in their Brief.

[49] Accordingly, while I dismiss Legacy's application with respect to Objection 19, Legacy is permitted to rephrase the question in accordance with the reasons set out above and put it to Mr. Garrity.

iii. Objection 6

[50] During questioning, Legacy put to Mr. Garrity a document taken from Weiss' website, and asked him the following question, to which Brookdale objected:

> **Objection 6:** This is a public document published by Weiss concerning its operations and expertise, is that fair?

[51] In their Brief, Legacy states that they "seek to pragmatically explore some foundation facts about the litigants to this action but have been entirely stonewalled in that regard." They submit that Weiss, on behalf of Brookdale, "is impugning the business judgment of the Legacy board and its financial advisors." At the hearing, Legacy's counsel submitted that the question was purely a 'know your witness' question.

[52] Brookdale objects on the basis that the content from Weiss' website in 2022 is not relevant to a matter arising in 2015, and that Weiss' operations, its business and its expertise are not an issue in the action. I agree with Brookdale. Weiss is not a litigant in the action. While true that Weiss is the investment manager on behalf of Brookdale, and it may have been pragmatic to answer this question, I fail to see how the information sought from this question is relevant or material to the fair value claim. In my view, Brookdale's objection is proper and I dismiss Legacy's application with respect to Objection 6.

iv. Objections 23 and 24

[53] Brookdale objected to the following questions:

> **Objection 23:** Now, on what date in April 2015 was Weiss's first investment made in Legacy?
>
> **Objection 24:** Weiss's second investment was made on May 28th, 2015, right?

[54] Legacy submits that these are basic questions about the Plaintiff's investment in Legacy. They refer to paragraph 3 of the Statement of Claim wherein the Plaintiffs alleged that the Brookdale Entities were registered shareholders of Legacy with respect to the following shares[...], with Brookdale International allegedly having held 5,652,594 shares and Brookdale Global allegedly having held 2,308,806 shares – the ownership of which would entitle the Plaintiffs to fair value. Legacy submits that the Defendants should be entitled to build a foundational record of the exact same nature through the Plaintiff's corporate representative, indicating that when its corporate representative was asked questions of a similar nature, it answered the undertakings without objection and provided additional information upon request. Legacy further states that the date on which the Brookdale Entities invested in Legacy is necessary because Brookdale seeks extraordinary prejudgment interest.

[55] Brookdale states that the date on which the Plaintiffs purchased shares is irrelevant and immaterial. It is not in dispute that Brookdale Entities were shareholders on June 30, 2015, and thus entitled to remedies pursuant to the *ABCA*. Brookdale relies on the Alberta Court of Appeal decision ***Brookdale ABCA*** wherein the Court stated at paragraphs 26:

> [26] ...Investors make their own decisions on the merits of investments, and are entitled to buy securities they think will increase in value, for whatever reason...any form of transaction is presumptively legitimate.

[56] At paragraph 28, the Court of Appeal held:

> [28] It follows that it was an error in principle to treat the appellants differently because they bought shares immediately before the Plan of Arrangement was announced, and immediately thereafter but before the Plan of Arrangement closed. Investing in anticipation of future events, or in anticipation of the effects

> of announced changes in the issuer, is a legitimate form of investment. Further, there are not different levels of rights to dissent, because the ABCA does not distinguish between different classes of investors...All are bound by the ABCA, and entitled to the remedies set out in it.

[57] While it would have been pragmatic on the part of counsel to simply provide answers to Objections 23 and 24, I agree with Brookdale that the date that Brookdale bought the shares is irrelevant. It is not disputed that Brookdale owned certain shares at the material time that entitles it to the remedies set out in the *ABCA*, and in particular s. 191. As such, I dismiss Legacy's application with respect to Objections 23 and 24. As for prejudgment interest sought by Brookdale, the time frame is clearly set out in the Statement of Claim at paragraph 30(c): as from June 29, 2015 until the date on which the Amount is paid.

B. Objections related to the pleadings

[58] Brookdale takes the position that Legacy continues to seek answers to questions about topics which the Plaintiffs do not have any independent knowledge of. Their position is that to the extent the Plaintiffs have knowledge of the "facts" that Legacy seeks, this knowledge is from obtaining evidence through the discovery of the Defendants or other means covered by privilege. They submit that the facts sought by Legacy are almost entirely facts only they themselves have knowledge of. Brookdale points to the excerpts from Questioning at Tab 6 of the Evidence book to demonstrate that Mr. Garrity as corporate representative and Plaintiffs have limited to no personal knowledge of certain events and matters raised in the pleadings.

[59] Legacy submits that it is at liberty to ask questions of fact about particular allegations in the Statement of Claim, relying in ***Can-Air*** and ***Tolko Industries***, 2003 ABQB 349. Legacy states that it is not seeking the Plaintiff's strategy, evidence or legal opinions; it asked "discrete questions about discrete factual claims in the Statement of Claim."

[60] In ***Tolko***, the question in dispute was phrased as "provide whatever information Tolko has that relates to certain allegations...". At paragraph 27, the Court stated:

> The Defendant is perfectly at liberty to ask questions of fact about particular allegations in the Statement of Claim. For example, the Defendant could ask for all the facts known by the officer about the presence of dead grass on the right of way. However to ask a single compendious question about all of the detailed allegations in para. 18 of the Statement of Claim goes too far.

[61] While true that Legacy has not asked their questions about the pleadings in a single compendious question, the real issue is that the facts and information that they seek from the question are not within Mr. Garrity's knowledge or in respect of which he otherwise has a duty to inform himself.

[62] The duty of a corporate representative to inform themselves on matters outside of their control is relevant here. An individual examined for discovery must only inform themselves on matters within the knowledge of anyone under their control, including employees and agents. There is no obligation to attest to information outside their knowledge, or to inform themselves on matters outside their control: ***Real Estate Council of Alberta v Moser***, 2019 ABQB 106 at para 8, citing ***Wright v Schultz***, 1992 ABCA 305.

i. Paragraph 7 of the Statement of Claim

[63] Undertakings 6, 7, 8, 9, 10 and Objections 79, 80, 59, 60 relate to paragraph 7 of the Statement of Claim:

> 7. While the Asset Sale process was still ongoing and generating competitive asset bids, Legacy changed course and refocused the Process on achieving a corporate transaction in respect of the whole of the company (a "Corporate Transaction"). From this point forward, Legacy only considered a Corporate Transaction with Crescent Point to the exclusion of other alternatives, including an Asset Sale or a Corporate Transaction with different counterparty, and it did so in a time-limited way.

[64] The Undertakings and Objections related to paragraph 7 of the Statement of Claim are set out here below:

> **Undertaking 6:** To identify in the production and give the facts within Mr. Garrity's knowledge or in respect of which he has an obligation to inform himself regarding the allegation that there were competitive asset bids [including identifying the bids]
>
> **Undertaking 7:** To identify the competitive asset bids alleged generically in paragraph 7 of the statement of claim, and to provide the facts within Mr. Garrity's knowledge or in respect of which he has an obligation to inform himself that they were competitive bids, and to advise why
>
> **Undertaking 8:** To advise of all the facts within Mr. Garrity's knowledge or in respect he has an obligation to inform himself in support of the allegation that Legacy as a matter of fact changed course and refocused its process on achieving a corporate transaction
>
> **Undertaking 9:** To advise of all the facts within Mr. Garrity's knowledge or in respect he has an obligation to inform himself that from that point forward, Legacy only considered a corporate transaction with Crescent Point to the exclusion of other alternatives, including identifying those alternatives
>
> **Undertaking 10:** To disclose all the facts and the knowledge of Mr. Garrity as corporate representative or in respect of which he has an obligation to inform himself that this was done in a time-limited way, as alleged in paragraph 7
>
> **Objection 80:** Mr. Garrity, what does it mean by "a time limited way" in the end of paragraph 7?
>
> **Objection 79:** It says: (as read) "Only considered a corporate transaction with Crescent Point to the exclusion of other alternatives." Now, with that clarification, Mr. Garrity, you will recall this morning that we saw the financial advisors and Legacy considering the Yanchang expression of interest in parallel with considering the Crescent Point offer. In fact, they compared the pros and cons, didn't they?
>
> **Objection 59:** Are the plaintiffs – do the plaintiffs have any information or belief that there was ever any kind of offer made to buy a Legacy asset or to buy

> Legacy, the company, that was made, in fact, and that was rejected by Legacy but should have been accepted?
>
> **Objection 60:** Do the plaintiffs know or believe that there was an offer to buy the company Legacy that was rejected by Legacy?

[65] Legacy argues that through Undertakings 6, 7 and 8 it is "rightfully seeking to close the doors in terms of any factual evidence that the Plaintiffs may seek to tender at trial." They want to know what the competitive bids were. They submit that Undertakings 9 and 10, and Objection 80, address the allegations in paragraph 7 of the Statement of Claim that Legacy considered a "corporate transaction" with Crescent point to the exclusion of alternatives "in a time limited way". They want to know what these alternatives are and do not want to be surprised.

[66] Brookdale's position with respect to Undertakings 6, 7, 8, 9 and 10 is that Mr. Garrity has expressly advised, as evidenced in the Undertaking responses provided at Tab 5 of the Evidence Book, that "neither he nor others within the Plaintiffs have independent knowledge of:

> (a) the Process or factors considered or acted on by Legacy in carrying out the Process;
>
> (b) what asset bids, competitive bids or otherwise, were received by Legacy as part of the Process;
>
> (c) the allegation that Legacy changed course and refocussed the Process on achieving a corporate transaction;
>
> (d) the allegation that Legacy only considered a corporate transaction with Crescent Point to the exclusion of other alternatives; and
>
> (e) the allegation that Legacy only considered a corporate transaction with Crescent Point in a time-limited way."

[67] They submit that these questions seek evidence that the Plaintiff's have learned from the Defendants which the Plaintiffs' may rely on with respect to the allegations.

[68] Tab 5 of the Evidence book sets out the Answers to Undertakings provided by Brookdale. The Answers for Undertakings 6, 7, 8, 9 and 10 follow the same general format:

> **Answer:** To the extent that the question goes beyond a request for facts that Mr. Garrity, or others in the Brookdale Entities, know of their own account, or asks for evidence in support of a fact or how the Brookdale Entities propose to prove a fact, or for privileged information, the Undertaking is refused. However, Mr. Garrity advises that to the best of his information and knowledge neither he nor others within the Brookdale Entities have independent knowledge of what asset bids were received by Legacy as a part of that process.

[69] The final sentence for Undertakings 8, 9 and 10 reads:

> **Answer:** [...] However, Mr. Garrity advises that to the best of his information and knowledge neither he nor others within the Brookdale Entities have independent knowledge of the process followed by Legacy. Mr. Garrity did review the Circular provided by Legacy that does speak to Legacy's description of the process.

[70] The Undertaking responses as set out in the Evidence Book demonstrate that the Plaintiffs have advised that Mr. Garrity, nor others within the Plaintiffs, have independent knowledge that would allow Mr. Garrity to answer the questions sought by Legacy. As outlined above, a corporate representative has no obligation to attest to information outside their knowledge, or to inform themselves on matters outside their control. Mr. Garrity is not required to review the evidence of others and provide an answer. The facts sought are not known to Mr. Garrity or others within the Plaintiffs in the ordinary course or from their own involvement. In my view, this is a response to the information sought by Legacy. ***Millott*** at paragraph 30 speaks to this very issue. Plaintiffs are not required to disclose all the facts they have learned from all witnesses and investigations. It is limited to the facts that is within the ordinary course or from their own personal knowledge.

[71] While it is possible that the Plaintiffs have knowledge of certain facts regarding the information sought by Legacy, if these facts are not ones that Mr. Garrity or others within the Plaintiffs knows of on its own account, in the ordinary course of affairs or from its own involvement in the events which are the subject matter of the dispute, but are instead facts learned through the evidence of the Defendants or acquired by counsel, these facts are not discoverable: see ***Millott***, citing ***Blair v Wawanesa Mutual Co et al*** (2000), 265 AR 50 at para 25.

[72] Further, Undertakings 6 and 7 refer to "competitive asset bids", and I am of the view that whether the asset bids were competitive calls for opinion evidence. That said, while it is not proper for Legacy to ask what asset bids were competitive, they are entitled to know generally about the asset bids referred to in Brookdale's statement of claim. As such, with respect to Undertaking 7, the question can be rephrased to ask Brookdale to identify the asset bids within Mr. Garrity's knowledge as corporate representative or in respect of which he has an obligation to inform himself occurring during the Asset Sale process. I note that counsel for Brookdale has offered for Legacy to identify all offers and bids received by Legacy and that Brookdale would subsequently have Mr. Garrity advise whether he is aware of any other offers or bids. I leave it to Legacy to determine whether they wish to pursue this approach.

[73] With respect to both Objections 59 and 60, Legacy submits that it is "entitled to explore this line of questioning generally", and that Brookdale "must now identify any alleged specific offers that were made and rejected by Legacy". As in ***Blair*** and ***Millott***, the facts sought by Legacy relate to the actions of Legacy itself – whether there was or were offers to buy Legacy that Legacy rejected is information that Legacy would have. Brookdale submits that the question of whether there were other alternatives calls for expert opinion and thus is improper, and if the question relates to what offers or bids Legacy received, then the knowledge is something Legacy itself has. In my view, Objections 59 and 60 are proper.

[74] With respect to Objection 79, Legacy submits that the question was put to Mr. Garrity along with a document that in their view contradicted the pleadings. Brookdale argues that the question is factually incorrect and misleading due to the use of the word "parallel". It submits that Crescent Point made an offer on May 12, but the Yanchang offer was not received in writing until May 13, thus the offers were not considered in parallel and the question is misleading. I direct that with respect to Objection 79, the question shall be rephrased to remove the words "in parallel", can be rephrased to include terms such as 'entertaining the offers at the same time' and may be put to Mr. Garrity for an answer. It may well be that Mr. Garrity's answer is that neither

he nor others in the Brookdale Entities have independent knowledge, but does not mean that Legacy is not entitled to put the question to him.

[75] Therefore, I dismiss Legacy's application with respect to Undertakings 6, 8, 9 and 10 and Objections 59, 60 and 80. With respect to Undertaking 7 and Objection 79, the respective questions shall be rephrased as outlined above and shall be put to Mr. Garrity to answer.

ii. Paragraph 8 of the Statement of Claim

[76] Undertakings 14, 16, Objections 81 and 86 relate to paragraph 8 of the Statement of Claim:

> 8. The Process, as followed by Legacy, failed to provide fair value for shareholders of Legacy, including Brookdale International and Brookdale Global. In particular, but without limitation, Legacy and its officers, directors, employees and Advisors:
>
> (a) Failed to allow sufficient time for the Asset Sale to unfold and maximize value through the sale of assets;
>
> (b) Failed to conduct a process that would provide fair value, whether through an Asset Sale, Corporate Transaction or otherwise;
>
> (c) Negotiated a Corporate Transaction with Crescent Point that did not provide fair value and prejudiced the ability of Legacy to obtain fair value for its shareholders;
>
> (d) During the Process, acted on factors not consistent with obtaining fair value, including:
>
> (i) Concerns related to an activist shareholder;
>
> (ii) Negotiation of severance and other entitlements as part of a Corporate Transaction with Crescent Point;
>
> (iii) Avoiding further scrutiny related to guaranteeing a personal loan in favour of Legacy's CEO; and
>
> (iv) Such other factors as are within the knowledge of Legacy and its officers, directors, employees and Advisors.

[77] The Undertakings and Objections are as follows:

> **Undertaking 14:** To disclose all the facts and the knowledge of Mr. Garrity as corporate representative or in respect of which he has an obligation to inform himself that Legacy negotiated severance and other entitlements as part of a corporate transaction with Crescent Point
>
> **Undertaking 16:** To disclose all the facts and the knowledge of Mr. Garrity as corporate representative or in respect of which he has an obligation to inform

himself that during the process Legacy acted on other factors that are within the knowledge of its officers, directors, employees and advisors, as alleged

Objection 81: Now, in paragraph 8, the second sentence, Mr. Garrity says: (as read) "In particular, without limitation..." And then it provides particulars of the allegation that the process failed to provide fair value. Now is the time to deal with the without limitation and tell me if there's anything else to be added to this list in paragraph 8

Objection 86: I'm asking now for the witness, or for you, if you want to help with this, Mr. Foster, is there anything other than roman numerals (i) through (iv) in support of 8(d)

[78] With Undertakings 14 and 16, Legacy runs into the same hurdle as noted with the Undertakings related to paragraph 7 of the Statement of Claim. Brookdale's response to Undertakings 14 and 16 at Tab 5 of the Evidence book is:

Answer: To the extent that the question goes beyond a request for facts that Mr. Garrity, or other sin the Brookdale Entities, know of their own account, or asks for evidence in support of a fact or how the Brookdale Entities propose to prove a fact, or for privileged information, the Undertaking is refused. However, Mr. Garrity advises that to the best of his information and knowledge neither he nor others within the Brookdale Entities have independent knowledge of the process followed by Legacy. Mr. Garrity did review the Circular provided by Legacy that does speak to Legacy's description of the process.

[79] Facts learned through the evidence of the Defendants or acquired by counsel are not discoverable: see ***Millott*** and ***Blair***. Therefore, I dismiss Undertakings 14 and 16.

[80] With respect to Objections 81 and 86, Brookdale at paragraph 8 of its Statement of Claim has outlined the process Legacy followed that they allege resulted in a failure to provide fair value for Legacy shareholders, including Brookdale. If what Legacy seeks is whether Brookdale will be amending their claim to add anything further to the enumerated grounds in paragraph 8, Mr. Garrity is directed to answer this. To the extent that the intent of the question is to obtain information beyond the scope of what Mr. Garrity knows or has an obligation to inform himself, the question is improper.

iii. Paragraph 9 of the Reply to Defence

[81] Undertakings 18 and 19 relate to paragraph 9 of the Reply to Defence:

9. The Plaintiffs deny the allegations stated in paragraph 33 of the Statement of Defence and say:

(a) There was no urgency to accept the Crescent Point offer, or any offer, on May 12, 2015;

(b) Asset bids had been received that were sufficient to address any concerns about Legacy's level of debt, and if accepted could still allow Legacy to increase shareholder value;

(c) Crescent Point's offer was not a firm offer and did not provide fair value for Legacy shareholders; and

> (d) As of May 12, 2015 a competitive bid process for a Corporate Transaction had not been allowed to develop.

[82] Undertakings 18 and 19 and Brookdale's responses are as follows:

> **Undertaking 18:** To advise what specific asset bids are being pleaded in paragraph 9(b) of the reply to defence pleading
>
> > **Answer to Undertaking 18:** This Undertaking is Refused. The question asks for opinion evidence. Further, to the extent that the question goes beyond a request for facts that Mr. Garrity, or others in the Brookdale Entities, know of their own account, or asks for evidence in support of a fact or how the Brookdale Entities propose to prove a fact, or for privileged information, the Undertaking is refused. However, Mr. Garrity advises that to the best of his information and knowledge neither he nor others within the Brookdale Entities have independent knowledge of what asset bids were received as part of the process followed by Legacy. Mr. Garrity did review the Circular provided by Legacy that does speak to Legacy's description of the process.
>
> **Undertaking 19:** To identify and advise of the facts within Mr. Garrity's knowledge or in respect of which he otherwise has a duty to inform himself that asset bids have been received that were sufficient to address any concerns about Legacy's level of debt, and, if accepted, could still allow Legacy to increase shareholder value
>
> > **Answer to Undertaking 19:** This Undertaking is refused. The question asks for opinion evidence. Also see Answer to Undertaking #8.

[83] I disagree with Brookdale that Undertakings 18 and 19 are asking for opinion evidence. Legacy is asking, and is entitled to know, what asset bids Brookdale is referring to at paragraph 9(b) of its Reply, and the facts upon which Brookdale relies. Therefore, I direct Brookdale to provide an answer to the questions resulting in Objections 18 and 19. I note that at the hearing, Legacy suggested that if Brookdale prefers, it could provide particulars to the pleadings. I leave it to counsel as to whether they wish to proceed in that fashion.

iv. Paragraph 30(c) of the Statement of Claim

[84] The unnumbered Objection at page 108 and Objection 77 relate to paragraph 30(c) of the Statement of Claim and paragraph 18(c) of the originating application (which are identical):

> 30. An order pursuant to Subsections 191(13) and (17) of the *ABCA*:
>
> …
>
> (c) directing the Defendants to pay interest of 11 percent on the Amount, representing the approximate dividend yield on shares of Crescent Point, or such other rate as may be directed by this Honourable Court, calculated from June 29, 2015 to the date on which the Amount is paid;
>
> …
>
> **Objection at page 108 (unnumbered):** So can you please tell me all the facts regarding this claim for 11 percent, including the basis there about the dividend,

within your knowledge or in respect of which you have an obligation to inform yourself?

Objection 77: Looking at paragraph 18(c) in the originating application, sir, and paragraph 30(c) of the statement of claim, there is an allegation that 11 percent represents the approximate dividend yield, on shares of Crescent Point, calculated from June 29, 2015, to date. Can you please tell me the facts in that regard within your knowledge or in respect of which you have an obligation to inform yourself?

[85] At the hearing, counsel for Legacy stated that they are seeking the calculation for the 11 percent dividend yield alleged. In response to Brookdale's assertion that this has been answered and is information known by Legacy, counsel for Legacy stated that this is an allegation made by Brookdale so they should provide the calculation.

[86] In my view, both of these questions seek the same thing – Legacy is simply asking where Brookdale came up with the figure of 11 percent that it states in their pleadings. Legacy is entitled to know the facts that Brookdale relies on. As such, I direct Brookdale to provide an answer to the question giving rise to the unnumbered Objection at page 108 and Objection 77.

Conclusion

[87] In summary, for the reasons outlined above:

a) I allow Legacy's application with respect to Objections 1, 2, 3 and 4 and direct that Brookdale provide an answer.

b) I allow Legacy's application with respect to Objection 19, permitting Legacy to rephrase the question in accordance with these reasons and direct Brookdale to provide an answer to the rephrased question.

c) I dismiss Legacy's application with respect to Undertakings 6, 8, 9, 10, 14, 16 and Objections, 6, 23 and 24, 59, 60 and 80.

d) I allow Legacy's application with respect to Undertaking 7, permitting Legacy to rephrase the questions as outlined in these reasons.

e) I allow Legacy's application with respect to Objection 79, permitting Legacy to rephrase the question as outlined in these reasons.

f) I dismiss Legacy's application with respect to Objections 81 and 86 as the question is currently phrased, but direct that Brookdale advise whether it will be amending their claim to add anything further to the enumerated grounds in paragraph 9 of its Statement of Claim.

g) I allow Legacy's application with respect to Objection 18 and 19, to the unnumbered Objection at page 108 and Objection 77.

Costs

[88] With respect to costs, success was divided. Therefore, costs shall be in the cause.

Heard on the 9th day of December, 2022.
Dated at the City of Calgary, Alberta this 2nd day of March, 2023.

K.M. Horner
J.C.K.B.A.

Appearances:

Steven Leitl, KC
Chase Holthe
Norton Rose Fulbright Canada LLP
for Crescent Point Energy Corp.

D. B. Foster, KC
Andrew Wilkinson
Rose LLP
for Brookdale International

TAB 5

In the Court of Appeal of Alberta

Citation: Cana Construction Co. Ltd. v. Calgary Centre for Performing Arts, 1986 ABCA 175

Date: 19860805
Docket: 18290
Registry: Calgary

Between:

Cana Construction Co. Ltd.

Plaintiff
(Appellant)

- and -

Calgary Centre for Performing Arts

Defendant
(Respondent)

The Court:

The Honourable Mr. Justice Haddad
The Honourable Mr. Justice Kerans
The Honourable Madam Justice Hetherington

Reasons for Judgment of The Honourable Mr. Justice Kerans
Concurred in by The Honourable Mr. Justice Haddad
Concurred in by The Honourable Madam Justice Hetherington

APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE W.G.N. EGBERT OF THE COURT OF QUEEN'S BENCH OF ALBERTA DATED THE 28TH DAY OF APRIL, 1986, FILED THE 28TH DAY OF APRIL, 1986.

COUNSEL:

W. E. Code, Q.C. and G. Laviolette, for the Appellant

G. S. Dunnigan, for the Respondent

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE KERANS

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[1] This case requires us to decide whether an unpaid volunteer who performs key and relevant executive responsibilities for a corporate party can be examined for discovery as "any officer of a corporate party" or "any person who is or has been employed by any party" within the meaning of Rule 200(1) of the Rules of the Court of Queen's Bench of Alberta.

[2] The respondent defendant Centre is a charitable corporation which undertook the construction of a building for use by the performing arts at Calgary. A contract for construction was made with the appellant plaintiff builder. The Centre had delegated the supervision of its construction program to a committee and named Mr. Albert Bell as chairman. The function of the committee was to:

> (a) review all costs related to the construction of the Calgary Centre for Performing Arts;
>
> (b) review all tenders prior to their awarding;
>
> (c) ensure that the design criteria outlined in the Yellow Book was followed, with noted exceptions; and
>
> (d) participate in daily discussions relating to capital cost controls.

[3] The builder unsuccessfully sought an order in Queen's Bench compelling Mr. Bell to appear for examination for discovery pursuant to Rule 200(1). The Rule provides:

> Any party to an action, any officer of a corporate party and any person who is or has been employed by any party to an action, and who appears to have some knowledge touching the question at issue, acquired by virtue of that employment whether the party or person is within or without the jurisdiction may be orally examined on oath or affirmation before the trial of the action touching the matters in question by any person adverse in interest without order.

[4] The builder sought an order in Queen's Bench on the basis that Mr. Bell was an employee. Before us, it sought leave to expand its original application and now bases its request on his being either an officer or an employee. Mr. Dunnigan, with great fairness, concedes that this procedure offers no prejudice to the Centre which cannot be compensated for by costs. The question before us, therefore, is whether Mr. Bell was either an officer or an employee. It is obvious that he is a person who has knowledge touching the questions at issue which was acquired by virtue of his relationship with the defendant.

[5] I wish to make it clear at the outset that a distinction must be made between the use of the word "officer" in Rule 200 and in Rule 214. Rule 200 affords the party opposite an

opportunity to discover in advance the evidence to be given at trial by likely witnesses. The purpose of the other Rule is not merely to gain information but to gain formal admissions from the party opposite. It provides that a corporate party may select the officer for this purpose but Rule 214(2) permits the Court to intervene if a "proper" officer has not been named. Sound policy reasons are available for judicial regulation of officers selected in order to see that the purpose of that Rule is not undermined, and in that respect courts can and have given a narrow interpretation to the word "officer". Those cases have no bearing on Rule 200. This was long ago recognized by Harvey. C.J.A. in Nichols & Shephard v. Skedanuk [1912] 2 W.W.R. 1002 (Alta. S.C.) at p.1004 when he quotes this passage with approval:

> If the depositions could … have been read against the corporation…. I would not have put so wide a construction upon the rule.

[6] The leading case on the scope to be given rules like Rule 200 is Elliott v. Holmwood & Holmwood Ltd. [1915] 9 W.W.R. 490. (B.C.S.C.) where Macdonald, J. said:

> It is not limited to the higher or governing officer only. The object of the rules is to discover the truth relating to the matter in question in the action, and the examination ought to be of such "officer" of a defendant company as is best informed as to such matters.

[7] This approach has been applied by the British Columbia Court of Appeal in Bell v. Klein (No. 3) 13 W.W.R. (N.S.) 193, and the Saskatchewan Court of Appeal in Rennie v. Municipality of Elma [1946] 1 W.W.R. 411. It appears also to be the approach in Manitoba. See Neon Products Ltd. v. Wiebe [1974] 3 W.W.R. 567 (Man. C.C.).

[8] Because the object of the Rule is to force pre-trial disclosure of vital information which is not privileged, the limiting factor in the Rule - that the person to be examined have some connection with the party as officer or employee -should be given a wide application. As was said by O'Halloran, J. in Bell v. Klein (No. 3), the test:

> … seems to be whether the person sought to be examined can be regarded as an officer or servant in any permissible sense if he is the one person connected with the company best informed of matters which may define and narrow the issues between the parties at the trial.

[9] This view is consistent with decisions in Alberta. For example, a station agent of a railway was held to be an officer in Eggleston v. C.P.R. (1904) 5 Terr. L.R. 503. An honorary fire guard was held to be an officer of a municipality in Rocky Mountain Ranch Ltd. v. Municipality of Foothills [1973] 6 W.W.R. 190 (Alta. C.A.). The respondent relies upon the decision of this Court in Marine Pipeline & Dredging Ltd. [1964] 48 W.W.R. 462 (Alta.

S.C.A.D.). This case is of little assistance because the narrow question put to the Court in that case was whether all indicia of employment were present. The Court was not asked to decide whether the persons in question were officers within the meaning of Rule 200.

[10] Applying this approach, it is clear that Mr. Bell should be called an officer and make himself available for discovery. I do not decide that he is the appropriate officer to be selected pursuant to Rule 214, as that issue is not before us.

[11] It is argued for Mr. Bell that he was a volunteer who took on this task from a sense of commitment to the community and in a spirit of generosity. No doubt all of this is quite true; it unfortunately does not excuse him from attendance in Court in connection with litigation in which he is caught because of his generosity.

[12] I would accordingly allow the appeal and require that he be presented for examination.

[13] In the circumstances, there is reason to believe that this appeal - and indeed the original application - would not have been necessary had it proceeded on a proper footing. Accordingly, I would award the unsuccessful respondent Centre the costs both here and at Queen's Bench in any event of the cause.

DATED AT CALGARY, ALBERTA
THIS 5th DAY OF August, A.D. 1986.

TAB 6

In the Court of Appeal of Alberta

Citation: Dow Chemical Canada ULC v Nova Chemicals Corporation, 2014 ABCA 244

Date: 20140805
Docket: 1401-0045-AC
Registry: Calgary

Between:

Dow Chemical Canada ULC and Dow Europe GmbH

Respondents
(Plaintiffs)

- and -

Nova Chemicals Corporation

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Order by
The Honourable Chief Justice Neil C. Wittmann
Dated the 21st day of January, 2014
Filed on the 19th day of February, 2014
(2014 ABQB 38, Docket: 0601-07921)

Memorandum of Judgment

The Court:

[1] The issue on this appeal is whether certain questions posed by the defendant Nova are "relevant and material", such that the plaintiffs' representatives must provide answers. The case management judge held that the questions need not be answered: ***Dow Chemical Canada Inc. v Nova Chemicals Corporation***, 2014 ABQB 38.

Facts

[2] The factual background is complex, and it is set out in greater detail in the reasons of the chambers judge. The plaintiffs Dow Canada and Dow Europe are part of an international corporate conglomerate ultimately controlled by The Dow Chemical Company (TDCC). The Dow group operates various chemical facilities, including ethylene and polyethylene facilities, in various places in North America and elsewhere in the world (reasons, paras. 2-4).

[3] There are three ethylene plants near Joffre, Alberta, called E1, E2 and E3 by the parties. These plants make ethylene using ethane as a feedstock. Nova owns E1 and E2, whereas E3 is jointly owned by Nova and Dow. E3 is operated by Nova. There is no pipeline to ship ethylene outside Alberta, so it must all be processed here. The central allegations made in this litigation by the plaintiffs Dow Canada and Dow Europe are that a) Nova has been improperly misappropriating some of the ethylene from E3 owned by the plaintiffs, and that b) Nova has failed to optimize production at E3. The Dow plaintiffs claim damages equal to the market value of the ethylene, as well as the profit that the Dow plaintiffs would have made by upgrading the ethylene into other products (reasons, paras. 2-3).

[4] Dow Canada also owns a polyethylene plant called LP7 at Prentiss, Alberta (which is adjacent to Joffre). Ethylene from E3 owned by the Dow plaintiffs is sent to LP7 for processing into polyethylene. Dow also has a contractual option, referred to as the "E1 Toll", of sending its ethane to Nova's E1 plant for conversion into ethylene, which can then be sent to LP7. The bulk of the plaintiffs' polyethylene (85% - 90%) is sold to TDCC, at a transfer price fixed by contract. TDCC also has its own ethylene and polyethylene production facilities on the U.S. Gulf Coast and elsewhere, and can sell polyethylene to its customers, or process it further into other products (reasons, paras. 3, 5).

[5] The entire Dow group, including Dow Canada, Dow Europe, and TDCC, is managed on a global basis. LP7 is part of the polyethylene business unit, and is managed by a Value Center Team out of Switzerland and Houston along with all of the other Dow polyethylene business components. The Value Center Team makes all of the decisions about the production, pricing, and sourcing of polyethylene, and will shift the sourcing of ethylene and the production of polyethylene around the world depending on production and cost advantages (reasons, para. 6). The Dow plaintiffs confirm that TDCC would calculate the cost of the last incremental pound of

ethylene in Canada, including at Joffre, to determine if at any point in time it was advantageous to use that ethylene to produce polyethylene. TDCC would shift production between LP7 and the Gulf Coast based on this analysis.

The Application for Better Answers

[6] During the pre-trial discovery process, the Dow plaintiffs refused to answer any questions about production at the U.S. Gulf Coast facilities that are part of the TDCC conglomerate. Nova argues that this information is relevant and material under R. 5.2, as it relates to the quantum of the plaintiffs' claimed damages for the value of misappropriated ethylene, and the lost profit from upgrading that ethylene. Since the Value Center Team in Houston might divert production from Canada to the U.S. Gulf Coast, Nova argues that the decisions made by it are relevant to the damages claimed by the plaintiffs.

[7] The case management judge determined that any records of TDCC were records of a non-party, and had to be applied for under R. 5.13. Documents of the plaintiffs, on the other hand, had to be produced by them under R. 5.5. Even though Nova had not brought a formal application under R. 5.13, the case management judge dealt with the application on that basis (reasons, para. 14).

[8] The case management judge concluded that the requested records of TDCC are not "relevant and material" (reasons, para. 17). He noted that the plaintiffs do not own any production facilities in the United States, and they sell virtually all of their production to TDCC at the border. He held that how TDCC made its own decisions about where to source polyethylene was not relevant to whether or not the plaintiffs suffered any damage. The case management judge found that there was no air of reality to the suggestion that the plaintiffs might have mitigated their damages by purchasing derivative products in the United States to resell to TDCC.

[9] The plaintiffs claimed litigation privilege over a series of spreadsheets. These spreadsheets had initially been developed before this litigation started, but after this litigation commenced the plaintiffs alleged that they had been modified for use in the litigation. The case management judge accepted that the new versions of the spreadsheets were protected by litigation privilege.

[10] The case management judge therefore dismissed the entire application, and this appeal followed.

Standard of Review

[11] The interpretation of the Rules of Court is a question of law, and the standard of review is correctness: ***Housen v Nikolaisen***, 2002 SCC 33 at para. 8, [2002] 2 SCR 235. The application of the Rules to a particular set of facts is a mixed question of fact and law, and the standard of review is palpable and overriding error: ***Housen*** at para. 36. To the extent that there is a

discretion involved in determining if questions should be answered or documents produced, the decision will only be interfered with on appeal if it is based on an error in principle, a misapprehension of the facts, or it is unreasonable: ***Husky Oil Operations Ltd. v Anadarko Canada Corp.***, 2004 ABCA 154 at paras. 8-10, 31 Alta LR (4th) 229, 354 AR 16; ***Blood Tribe v Canada (Attorney General)***, 2010 ABCA 112 at paras. 11-12, 487 AR 71.

Categorization of the Records

[12] Under R. 5.5 each party is required to produce all of the records under its control that are relevant and material to the litigation. It is possible for the parties to obtain copies of records in the hands of non-parties, but those types of records must be obtained by a specific application made under R. 5.13.

[13] The Dow plaintiffs have made extensive production of the records under their control. They resist producing records that are under the control of TDCC. Nova argues that since the Dow conglomerate is operated as a single business unit, the plaintiffs are required to produce all relevant and material documents relating to polyethylene production by any part of the Dow group, and the corporate structure is not determinative. The case management judge concluded that the plaintiffs did not have to answer questions relating to the operations of other parts of the TDCC conglomerate.

[14] The records relating to production decisions at the plaintiffs' facilities should be treated as documents under their control, no matter who has possession of them. The plaintiffs Dow Canada and Dow Europe have certain ethylene and polyethylene facilities. They have placed the management of those facilities in the hands of the Houston Value Center Team, but the facilities still belong to the plaintiffs, and are the foundation of this litigation. How decisions are made about production at those facilities is under the control of the plaintiffs. A litigant cannot insulate itself from record production and questioning by the simple expedient of putting the management of its business in the hands of a third party. Here the plaintiffs have obviously delegated management of their facilities to TDCC and the Value Center Team, but the decisions made still *prima facie* relate to the plaintiffs' business, not the business of any third party. Documents relating to the business operations at the plaintiffs' facilities are producible. The case management judge did not disagree with these concepts.

[15] What the case management judge correctly held was that records that do not relate to the business and operations of the plaintiffs, but that relate to the business and operations of another corporate member of the Dow group, are not under the control of the plaintiffs. They are not *prima facie* producible, although as the chambers judge recognized they might be producible under R. 5.13 if they were relevant and material.

[16] The trial judge did not commit any reviewable error with respect to this ground of appeal. The essential question is whether the disputed documents are relevant and material, and that test is the same under R. 5.5 and R. 5.13.

Relevance and Materiality

[17] The rules require the production of documents, and the answering of questions, if they are 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.

As the wording of the rule implies, relevance is primarily determined by the pleadings, whereas materiality relates to whether the information can help, directly or indirectly, to prove a fact in issue: ***Briggs Bros. Student Transportation Ltd. v Collacutt***, 2009 ABCA 17 at para. 10, 100 Alta LR (4th) 17, 446 AR 191; ***Weatherill (Estate) v Weatherill***, 2003 ABQB 69 at paras. 16-7, 11 Alta LR (4th) 183, 337 AR 180; ***Canadian Natural Resources Limited v ShawCor Ltd.***, 2013 ABQB 230 at para. 18, 90 Alta LR (5th) 169, 559 AR 66.

Relevance

[18] The decision of the case management judge, and the factums filed, identify the following as being the key issues and pleadings underlying this appeal:

(a) The alleged misappropriation of ethylene by the appellant. The quantum supposedly misappropriated, and the price or value of that ethylene would be relevant issues.

(b) The alleged failure to optimize production at E3, and the resulting damage to the respondents. The potential quantum of production that was lost, the price that could have been obtained, and the potential demand for the lost production would be relevant.

(c) The alleged lost profit from upgrading ethylene into other products.

Questioning that is not relevant to one of these issues is not permissible for the purposes of this appeal.

Materiality

[19] The second part of the test is "materiality". Previously, discovery was available on anything "touching the matters" in issue. Questioning under the Rules is now limited to topics that are "relevant and material" in order to reduce the scope and expense of pretrial procedures.

There is no fixed standard of what is "material". An element of judgment is required, and questioning is not permitted just because some remote and unlikely line of analysis can be advanced.

[20] The appellant Nova argues that the plaintiffs might have been able to purchase derivative products on the U.S. Gulf Coast, and then resell them to TDCC. In the decision under appeal, the case management judge at para. 19 declined to allow questions relating to such "re-sourcing" on the basis that it was "not a realistic proposition". The case management judge noted that the plaintiffs have no facilities in the United States, and that there is no means of transporting ethylene from Alberta. The appellant argues that by this ruling the case management judge essentially summarily dismissed one aspect of its case. This, however, does not follow.

[21] It is not sufficient for a litigant to show some theoretical line of argument in order to establish "materiality". The case management judge is fully entitled to reject lines of pretrial discovery that are unrealistic, speculative, or without any air of reality. As R. 5.3(1)(b) implies, the case management judge is allowed to reject questioning where the expense involved is disproportionate to the likely benefits that will result. At an interlocutory stage of proceedings, the court should not measure counsels' proposed line of argument too finely: ***Weatherill*** at para. 16. But that does not mean that a proposed line of questioning must be accepted at face value. The case management judge's decision that this line of questioning was not sufficiently material to warrant the expense involved in discovery is entitled to deference, and discloses no reviewable error.

The Corporate Structure

[22] TDCC operates through a complicated corporate structure, apparently designed to minimize tax liabilities. Notwithstanding that complicated corporate structure, however, decisions are made on a global basis, without regard to the structure. The objective is to maximize the overall profit of the TDCC group, without worrying about whether profit in any particular corporation or entity is maximized.

[23] As previously noted (*supra*, paras. 14-5), the blurring of corporate personalities in decision making has an impact on which documents are "in the control" of the plaintiffs. Just because the respondents have delegated management of their businesses to other entities within TDCC does not reduce their obligation to produce documents in this litigation.

[24] The separate corporate structure has another consequence. Only losses incurred by Dow Canada and Dow Europe can be recovered in this litigation; they are the only plaintiffs. Losses incurred by TDCC, and other legal entities within the Dow group, cannot be recovered. Thus, any losses incurred by TDCC from its inability to upgrade ethylene or polyethylene into other products because of a shortage of production from E3 are not recoverable in this litigation. Questions directed at such losses are not relevant. Only lost opportunities to upgrade ethylene of these plaintiffs are recoverable.

[25] That being said, the interrelated decision making processes incorporated by TDCC complicates the analysis of which of the disputed questions are relevant and material in this litigation.

Damages from Lost Profit Opportunities

[26] Dow Canada and Dow Europe claim lost profits from lost production. The appellant Nova argues there are no losses, because even if there had been more feedstock, the respondents could not have produced more, because there was no demand. In this context "demand" can mean several things:

a. Worldwide consumer demand for the product.
b. The general demand of TDCC to meet its needs.
c. The specific amount that TDCC was ready, willing and able to buy from the respondents.

It is primarily this last type of "demand" that is relevant. There is no pipeline to ship ethylene outside Alberta, and the Dow plaintiffs sell 85% - 90% of their production to TDCC. If they had production that was beyond what TDCC was prepared to purchase, they could theoretically sell it to other customers in Canada. It is clear, however, that their primary customer was TDCC.

[27] It follows that Nova is entitled to ask questions about what quantities of polyethylene and derivatives TDCC was ready, willing and able to buy from the Dow plaintiffs, and could not buy due to the alleged undersupply of feedstock ethylene. That will be relevant to the level of damage suffered by Dow Canada and Dow Europe due to the alleged breaches. The Houston Value Center Team would make those decisions based on the cost of the last incremental pound of ethylene in Canada. The appellant Nova is entitled to ask questions directed to the quantities that TDCC would have purchased.

[28] On the other hand, it is not relevant to know how TDCC made up any shortfall if it could not obtain what it was ready, willing and able to buy from the Dow plaintiffs. That is not relevant to this litigation, and accordingly of no concern to Nova. TDCC was entitled to mitigate its losses by buying elsewhere, by "re-sourcing", or by just "doing without", but that would not relieve Nova of the obligation to pay damages to the Dow plaintiffs based on what they could have sold to TDCC. The mitigation efforts, opportunities and strategies of TDCC are not relevant. What TDCC would have bought from the plaintiffs is relevant, and the quantities TDCC "re-sourced" would be indirect material evidence of that.

[29] It is also not material for Nova to know the details about how TDCC decided to purchase any particular quantity from the Dow plaintiffs. The Houston Value Center Team was entitled to make those decisions without having to reduce the exposure of Nova to damages as a result. Since there was apparently no "take or pay" arrangement, TDCC could buy as much or as little as it wanted from the Dow plaintiffs. The Dow plaintiffs are entitled to say they would have satisfied any demand that the Houston Value Center Team chose to throw their way, but neither they nor Nova are entitled to second guess the basis on which the Houston Value Center Team

made those decisions. Questions that test the accuracy of the evidence as to what production the Value Center Team would have allocated to the plaintiffs would be material.

[30] The scope of permissible discovery can thus be stated in general terms, although there are obviously grey areas where the nature of information may overlap.

Specific Disputed Questions

[31] A number of questions were asked about TDCC's operations, capacities, and decisions relating to its facilities on the Gulf Coast and elsewhere. For the reasons given (*supra*, paras. 15, 24, 28-9) these questions are not relevant and material. They include Schedule A Undertakings 5, 9, 10, 78:22, Schedule A Interrogatories 107-110, 123, 124, 143, 294, 295, 304, 311, 341, 356, 357, 360-1, 128(b), 146-8, 385-8, 442-7, 449 and 458.

[32] Some questions related to production capacity outside Alberta, which are not relevant nor material, at least in part due to the absence of a pipeline to ship ethylene outside Alberta (*supra*, paras. 3, 20). They include Schedule A Undertakings 9, 78:13, 124 and 360-1.

[33] Some questions also appear to relate to losses or mitigation of losses that are not those of the Dow plaintiffs (*supra*, paras. 24, 28): They include Schedule A Undertaking 78:13, Schedule A Interrogatories 107-110, 143, 360 and 128(b).

[34] Questions were posed with respect to "demand" in the broader sense of the term, for example:

> 297. Advise as to the percentage of decrease in Polyethylene sales in North America from 2000 to 2001.

Conceptually, if demand for polyethylene was "weak" across the entire marketplace, on a global scale, that might have a bearing on how much TDCC wanted or needed to buy from the Dow plaintiffs. That might have a bearing on the Dow plaintiffs' losses, assuming production at E3 was not optimized. This kind of broad, market-based statistical information is not sufficiently related to the business of the Dow plaintiffs that they should be required to extract it for the appellant. It is not "under the control" of the Dow plaintiffs as that term is used in the Rules, and is the type of information that would generally be brought forward through expert evidence. As such, it is not sufficiently material to compel an answer. Questions of this type include Schedule A Undertakings 297, 301, 304, 306 and 309.

[35] As noted, decisions about production were made across the TDCC group by the Houston Value Center Team. Decisions thus made would influence the amount of product that TDCC would demand from the Dow plaintiffs, which would affect their damage claim. Some questions appear to be directed at this issue, for example:

> 307. What DCC facilities had lower operating rates in the last two years in 2002 that reflected reduced run rates in an effort to manage inventory levels?

Efforts to reduce global corporate inventory levels would have an effect on the amount of product that would be demanded from the Dow plaintiffs, and if this is the thrust of this question, it is relevant and material. The appellant is entitled to an answer with respect to general inventory levels, and the cost competitiveness of the Dow plaintiffs' facilities, but not details about the operating costs of other TDCC plants.

[36] Schedule A Interrogatory 133 was only partly answered because it was said to be too vague. To the extent the topic is relevant and material, the remedy is further questioning. The two compendious summaries of questions at ARD P211 #62 and #63 are extremely widely worded, and cover a great many topics. There is potentially some relevant and material information covered, but also quite a bit of information that does not qualify. In their present form, these two questions need not be answered, but that does not preclude the appellant from further questioning if and to the extent that some relevant and material topics remain to be covered.

Privileged Documents

[37] The respondents objected to the production of some spreadsheets on the basis that they were protected by litigation privilege. The Dow plaintiffs allege the spreadsheets were created based on data provided by Nova, when "suspicions" arose as to the quantities of ethylene being delivered. The spreadsheets in question were therefore in use before the litigation commenced, but the Dow plaintiffs allege that after the litigation commenced they were modified by the inclusion of information intended to assist in the prosecution of the action. The case management judge upheld the claim of privilege.

[38] A document will be protected by litigation privilege if the dominant reason for its creation was for use in the litigation: ***Blank v Canada (Minister of Justice)***, 2006 SCC 39 at paras. 59-60, [2006] 2 SCR 319. It is not sufficient that litigation support was one of several purposes. The claim for privilege is tested at the time the document was created. Since the spreadsheets were in existence prior to the present dispute arising, they may have been created for use in managing the respondents' business. In their original form they arguably were not privileged.

[39] The case management judge accepted that for the purposes of production each variation of a dynamic spreadsheet might be treated as a separate document, essentially created each time new data was entered. Thus, a later version of the spreadsheet could be protected by litigation privilege, even if earlier versions were not. If any particular version of the spreadsheet was prepared for the dominant purpose of litigation, it would be privileged. Conceptually, that conclusion reflects no reviewable error. On the other hand, a litigant cannot shield a document from production by inserting information into it about the litigation, and then taking the position that the entire document has become privileged.

[40] In this case it is not clear that the spreadsheets, in their original form, were prepared for the dominant purpose of the litigation. After the dispute started, and after the documents were

apparently modified as a result of that dispute, it does not necessarily follow that the documents were then prepared for the dominant purpose of litigation. They might still have had a significant role to play in the operation of the plaintiffs' business, even though they might equally be helpful in the litigation. Merely because some of the information in a document is there to assist counsel is not sufficient to establish privilege: ***Nova v Guelph Engineering Co***., 1984 ABCA 38 at para. 20, 30 Alta LR (2d) 183, 50 AR 199.

[41] If the spreadsheets play a role in the operation of the business, the claim of privilege is suspect. If a litigant requires spreadsheets with "extra" information in them for the purposes of the litigation, but also requires much of the base data for use in the operation of the business, it may be incumbent on the litigant to maintain separate spreadsheets for the two purposes. Otherwise privilege may be lost. Document production cannot be blocked simply by tainting a business document with litigation information, or by having it reviewed by counsel: ***Allied Signal Inc. v Dome Petroleum Ltd.*** (1995), 176 AR 134 at para. 16, 35 Alta LR (3d) 42.

[42] In this case it is difficult to ascertain whether the spreadsheets are protected by litigation privilege or not. The case management judge accepted the respondents'counsel's assertion about the spreadsheets, but without any affidavit evidence explaining the original, and apparently subsequently changed, use of the documents. As a result, the appellant had no opportunity to cross-examine on the privilege claim. The appeal in this respect should be allowed.

Conclusion

[43] In conclusion, the appeal is allowed with respect to Schedule A Undertaking 307, which should be answered to the extent previously indicated in para. 35. The appeal is also allowed with respect to the documents over which litigation privilege was claimed. The issue of privilege is remitted back to the case management judge for reconsideration. If the respondents continue to assert privilege, it is incumbent on them to file an affidavit supporting that claim. The appeal is otherwise dismissed.

Appeal heard on May 7, 2014

Memorandum filed at Calgary, Alberta
this 5th day of August, 2014

Slatter J.A.

O'Ferrall J.A.

Authorized to sign for: Veldhuis J.A.

Appearances:

B.C. Yorke-Slader, Q.C. and B.R. Crump
for the Respondents

W.J. Kenny, Q.C. and C. Feasby and S. Kelly
for the Appellant

TAB 7

In the Court of Appeal of Alberta

Citation: NAC Constructors Ltd. v. Alberta Capital Region Wastewater Commission, 2006 ABCA 246

Date: 20060825
Docket: 0603-0047-AC
Registry: Edmonton

Between:

NAC Constructors Ltd.

Respondent
(Plaintiff)

- and -

Alberta Capital Region Wastewater Commission

Appellant
(Defendant)

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Mr. Justice Willis O'Leary
The Honourable Mr. Justice Ronald Berger

Memorandum of Judgment

Appeal from the Order of
The Honourable Mr. Justice W.J. Girgulis
Dated the 2nd day of January, 2006
Filed the 9th day of February, 2006
Docket: 0403-10554

Memorandum of Judgment

The Court:

I. Introduction

[1] The Alberta Capital Region Wastewater Commission ("Commission") appeals an order compelling it to answer three questions its representative declined to answer on examination for discovery. The issue is whether the information sought is within the scope of oral examination permitted by the *Alberta Rules of Court*. In our view it is not. The appeal is allowed.

II. Background

[2] Earth Tech Canada Inc. ("Earth Tech") was retained by the Commission as a consultant to assist in the tendering process for the selection of a contractor to construct a wastewater treatment plant. Earth Tech's responsibilities included analyzing the bids and providing advice and recommendations to the Commission. Maple Reinders Inc. ("Maple") and the respondent, NAC Constructors Ltd. ("NAC"), were among those who filed bids. Earth Tech reviewed all the tenders, discussed them with the Commission and prepared and submitted a written summary of them to the Commission. Maple's bid was the lowest and it was awarded the construction contract. NAC's bid was the second lowest.

[3] NAC commenced this action for damages for breach of the implied contract between it and the Commission. It alleges that Maple's bid should have been rejected as non-compliant because it was delivered after the tender closing time, did not name a proposed sub-contractor for control implementation as required by the tender documents, and did not satisfy certain technical tender requirements (no corporate seal, no witness to execution, and failure to state the total bid in words). NAC says its bid ought to have been selected and claims damages for loss of profit and loss of contribution to overhead.

[4] NAC's Amended Statement of Claim raises the following issues: (i) whether Maple's bid failed to comply with the tender conditions as alleged; (ii) whether Maple's bid was capable of being accepted by the Commission even if filed after the closing time; and (iii) whether the Commission breached its implied contract with NAC by not rejecting the Maple bid and awarding the construction contract to it.

[5] In its Statement of Defence, the Commission denies the Maple bid was non-compliant as alleged and pleads that, in any case, NAC's bid did not comply with the tender rules and conditions. No particulars of NAC's alleged non-compliance are pleaded. The Statement of Defence raises several other issues not raised directly by NAC in the Amended Statement of Claim: (i) was the Commission bound to award the construction contract to the lowest compliant bidder; (ii) did the

Commission discharge its implied obligation to NAC to act fairly and equally and in good faith in the tendering process; and (iii) did the Commission reject any tenders received after the tender closing time.

[6] On oral examination for discovery in July, 2004 the Commission's representative testified that none of the bids received was rejected as non-compliant with the established tendering process. Counsel for NAC questioned him concerning three matters related to communications between Earth Tech and the Commission, each of which was objected to and taken under advisement. The Commission later declined to disclose the information requested. On November 1, 2004 NAC applied for an order compelling the Commission to produce the information. NAC did not examine a representative of Earth Tech for discovery until May 10, 2005, almost a year after the Commission representative was examined.

[7] The disputed questions requested the Commission to:

> (i) produce the bid review worksheet prepared by Earth Tech and furnished to the Commission (Undertaking 5);
> (ii) produce the covering letter sent by Earth Tech to the Commission with the bid review worksheet (Undertaking 6); and
> (iii) advise if Earth Tech ever raised with the Commission any issues of non-compliance in respect of the Maple bid, including expression of the total bid in words, identity of the proposed control sub-contractor, names of material manufacturers, existence and particulars of builders' risk insurance coverage, or any other issues identified by Earth Tech as potential instances of non-compliance with the tender conditions (Undertaking 17).

The documents and information described in the Undertakings is hereinafter referred to as "the disputed evidence".

[8] In brief written reasons, the chambers judge ordered the Commission to disclose the disputed evidence. The reasons indicate that the chambers judge was alive to the *Rules* and principles relating to the scope of oral examination.

III. Scope of Discovery

[9] The *Rules* governing the scope of oral examination for discovery were amended effective November 1, 1999 (A/R 172/99). The obligation of a witness to answer questions on oral examination is now limited to questions seeking evidence that is both "relevant and material" within the meaning of those terms in the *Rules*. Rule 200(1.2) states in part that:

> During the oral examination ... a person is required to answer only relevant and material questions.

[10] New Rule 186.1 defines the concepts of relevance and materiality in relation to oral examination for discovery. It says:

> For the purpose of this Part, a question ... is relevant and material only if the answer to the question ... 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.

[11] In ***Johnston v. Bryant*** (2003), 327 A.R. 378 (C.A.), 2003 ABCA 169, the Court observed at para. 12 that " Rule 186.1 is intended to limit the scope of discovery from what it was under previous rules". It is "designed to limit ... tertiary lines of inquiry": ***Auer v. Lionstone Holdings Inc.*** (2005), 363 A.R. 84 (C.A.), 2005 ABCA 78 at para. 30, citing ***Hiltz v. Alberta (Public Trustee)*** (2002), 303 A.R. 25 (C.A.), 2002 ABCA 29. In ***Hepworth v. Canadian Equestrian Federation et al*** (2000), 277 A.R. 138 (C.A.), 2000 ABCA 327 at para. 12, the Court held the disputed questions were proper under both the new and old discovery *Rules*. Issues raised in the pleadings are the basis for determining both relevance and materiality: ***D'Elia v. Dansereau*** (2000), 267 A.R. 157 (Q.B.), 2000 ABQB 425 at para. 17.

[12] Oral examination for discovery is now confined to eliciting facts of primary relevance, that is, facts that are directly in issue, or of secondary relevance, that is, facts from which the existence of the primary facts may be directly inferred. Both primary and secondary relevance are determined by reference to the issues raised by the pleadings. Questions seeking information that could reasonably be expected to lead to facts or records of secondary relevance (that is, questions asking for information that is only of tertiary relevance) need no longer be answered.

[13] In addition to being relevant within the meaning of Rule 186.1, information sought on discovery must be material, that is, be reasonably expected to "*significantly*" help determine one or more of the issues raised in the pleadings. The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: *Black's Law Dictionary*, (6th ed. 1990). Facts or documents may be relevant within Rule 186.1, but, either alone or in combination with other evidence, be of no significant help to the examining party in proving or disproving a fact in issue. As Slatter J. observed in ***Weatherill Estate v. Weatherill,*** (2003) 337 A.R. 180 (Q.B.), 2003 ABQB 69 at para. 17, "... relevance is determined by the pleadings while materiality is more a matter of proof ...". See also ***Tolko Industries Ltd. v. Railink Ltd.*** (2003), 14 Alta. L.R. (4th) 388, 2003 ABQB 349 at para. 6.

IV. Grounds of Appeal

[14] The Commission argues that its refusal to provide the disputed evidence is justified because the evidence is not relevant and material within the meaning of those terms in Rule 186.1. The compliance or non-compliance of the Maple and NAC tenders are questions of law that are ultimately for the court to determine. The Commission maintains that evidence of opinions or advice communicated to it by Earth Tech could not reasonably be expected to (i) "significantly help" the court determine the core issues of compliance or any of the subsidiary issues that flow from them, including the issue of whether the Commission observed its implied obligation to NAC to act fairly and equally and in good faith, or (ii) to "ascertain evidence that could reasonably be expected to significantly help determine" those issues.

[15] NAC submits the disputed evidence is relevant and material to the issues raised in the pleadings, in particular the issue of whether the Commission's award of the construction contract to Maple was a breach of its implied agreement with NAC and other tenderers. It argues that the disputed evidence could reasonably be expected to significantly help determine whether Maple's bid was submitted in time and was otherwise compliant, as well as whether NAC's bid was compliant.

V. Standard of Review

[16] Whether discovery questions are relevant and material within Rule 186.1, in light of the issues raised in the pleadings, is a question of law. Although reasonableness is the applicable standard in reviewing a chambers judge's exercise of discretion (***Decock v. Alberta*** (2000), 255 A.R. 234, 2000 ABCA 122 at para. 13), when the matter in issue is a question of law, the standard of review is correctness: ***Northland Bank (Liquidation), Re*** (1997), 200 A.R. 150 (C.A.) at para. 9.

VI. Analysis

[17] We agree with the Commission's argument. The disputed evidence may comprise opinions and advice that relates to compliance of the Maple and NAC bids, the fundamental and determinative issues raised by the pleadings, and that evidence may be relevant to those issues in a broad sense. But it is not material to them within the *Rules* fixing the scope of examination for discovery. Resolution of the issues of compliance of the tenders does not depend in any way on the opinions and advice communicated by Earth Tech to the Commission. The disputed evidence cannot reasonably be expected to significantly assist in proving or disproving the issues of compliance.

VII. Conclusion

[18] In our view, the chambers judge erred in law in assuming that any opinions or advice expressed by Earth Tech in the disputed evidence could be material within the meaning of Rules 200(1.2) and 186.1.

[19] The appeal is allowed. The Commission cannot be compelled to disclose the disputed evidence.

Appeal heard on June 5, 2006

Reasons filed at Edmonton, Alberta
this 25th day of August 2006

_____
McFadyen J.A.

_____
O'Leary J.A.

_____
Berger J.A.

Appearances:

P.V. Stocco
for the Appellant

P.L. Morrison
for the Respondent

TAB 8

Court of Queen's Bench of Alberta

Citation: Pembina Pipeline Corporation v Coney, 2019 ABQB 699

Date: 20190910
Docket: 1601 00776
Registry: Calgary

Between:

Pembina Pipeline Corporation

Plaintiff/Applicant

- and -

Mark Coney, Marcon Clean Oil Tech, Inc., operating as ACR Solutions Inc, ACR Solutions Ltd., Marcon Clean Oil Technologies Ltd., Dean Palin, D Palin Consulting Inc., Richard Flemke, John Czlonka, Dwain White, Scott Siemens, Siemens Transport Ltd., John Doe and XYZ Corporation

Defendants/Respondents

-and-

Mark Coney, Marcon Clean Oil Technologies Ltd., ACR Solutions Ltd., and Marcon Clean Oil Tech, Inc., operating as ACR Solutions Inc.

Plaintiffs by Counterclaim

-and-

Pembina Pipeline Corporation

Defendant by Counterclaim

Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] Pembina has applied to limit the number of its current and former employees that the Defendants, collectively referred to as "Coney", are allowed to question in this litigation. Specifically, Pembina seeks an order that four employees that Coney seeks to examine need not be produced for questioning.

[2] Pembina submits that permitting Coney to examine these four employees would not significantly help to determine any of the issues raised in the pleadings, and would not aid Coney to ascertain evidence for that purpose.

[3] Coney originally proposed questioning up to 28 Pembina witnesses. When this plan was challenged, the list shrunk to seven employees plus the corporate representative. Pembina agrees with the smaller list with the exception of four individuals, Ian Buchan, Brad Smith, Mike Zorniak and Mick Dilger, whom Pembina submits do not have relevant or material information. Pembina has also agreed to do its best to have three former employees questioned.

II. Relevant Background

[4] The Defendant Mark Coney, through a contract with his company Marcon Clean Oil Technologies, was retained by Pembina in October 2010 to act as commissioning coordinator of Pembina's Nipisi/Mitsue projects. Mr Coney was responsible for developing and implementing a commissioning plan, organizing training relating to commissioning and start-up, coordinating the commissioning of certain pump stations and pipelines, and leading the start-up of these facilities.

[5] Marcon executed a consulting agreement with Pembina effective January 1, 2012. After Mr Coney completed work on the Nipisi/Mitsue projects, he took on what he describes as a "dual role" with Pembina. He provided construction consulting services to Pembina when he had no commissioning work to perform, and he coordinated commissioning work when that work was needed.

[6] Throughout his time as a consultant to Pembina, Mr Coney worked for Pembina's Major Projects group. After the Nipisi/Mitsue project finished, Mr Coney worked on Pembina's Phase II Expansion project.

[7] In addition to the responsibilities outlined previously, Mr Coney's role at Pembina included estimating costs for commissioning and construction expenses. However, Mr Coney did not develop the larger project budgets for the overall phases of Pembina's expansion project.

[8] For most of his time at Pembina, Mr Coney reported to Michael Massecar, who was the Vice Present of Pembina's Major Projects group. Beginning in May 2015, Mr Coney began reporting to Paul Gabura, a Senior Engineering Manager in the Major Projects group. Mr Massecar and, later, Mr Gabura, oversaw Mr Coney's work and reviewed Marcon's invoices. Mr Coney also reported daily to the Project Managers of the projects on which he worked.

[9] Pembina alleges that, as a result of Mr Coney's unsatisfactory job performance as a commissioning coordinator, and because of issues relating to unsubstantiated costs and invoices, Mr Massecar, Mr Gabura, and another senior Pembina employee, Mr Dowell, decided to terminate Marcon's consulting agreement with Pembina. They planned to terminate the agreement in February 2016.

[10] However, following an internal complaint in October, 2015, Pembina's Internal Audit and Compliance department began investigating the Defendants ACR Solutions Inc and ACR Solutions Ltd., companies related to Mr Coney. Pembina alleges that this investigation identified a conflict of interest involving relationships among the Defendants, and that the investigation disclosed that Mr Coney had abused his position with Pembina for his own financial benefit.

[11] On January 13, 2016, Pembina commenced this action, and obtained an *ex parte* Anton Piller order against some of the Defendants. On January 20, 2016, Pembina terminated the consulting agreement. The Pembina investigation continued after execution of the Anton Piller order, and on March 30, 2017, Pembina obtained an attachment order against some of the Defendants. Pembina alleges fraud in Coney's invoicing. Coney's defence in that the allegations arise from inadvertent mistakes and poor judgment, and that their actions were caused by poor invoicing accounting practices at Pembina. They also allege that they were instructed by Pembina employees to follow the invoicing practices at issue. Some of the Defendants have counter-claimed, alleging that Pembina breached the terms of the consulting agreement, interfered with Coney's contractual relations, and has committed an abuse of process.

III. Analysis

A. General Principles

[12] While the Alberta Rules of Court do not expressly limit the number of corporate witnesses an adverse party may question, Rule 5.19(a) allows the Court to limit the number.

[13] As noted in ***Patel v Patel***, 2011 ABQB 662 at para 38, the foundational Rules deal with fairness, justice, efficiency, economy and proportionality. As a result, the Court noted at para 43 that:

> [p]ermitting a party to avail him or herself of every step contemplated by the rules where there in no likelihood that the outcome of such steps will ultimately assist in resolving the matters, or where the potential benefits are disproportional to the efficiency and expense involved, is contrary to the purpose and intent of the rules.

[14] The scope of questioning for discovery has been narrowed in the Rules from what is "relevant" to what is "relevant and material". The Court of Appeal has cautioned, however, that:

> [a]t an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate line of inquiry: ***Weatherill Estate v Weatherill***, 2003 ABQB 69, at paras 15-16.

[15] Thus, the issue for the Court to grapple with is where to draw the line between legitimate and necessary questioning and questioning that is merely "fishing" for evidence without a reasonable basis or that has been proposed for illegitimate strategic reasons.

[16] During questioning, a person is only required to answer relevant and material questions. A question is relevant and material only if the answer to that question could reasonably be expected either:

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: Rules 5.2(1) and Rule 5.25 (1)(a).

[17] Relevance is primarily determined with reference to the pleadings, while materiality relates to whether the information can help prove a fact in issue: ***Dow Chemical Canada Inc v Nova Chemicals Corp***, 2014 ABCA 244 at para 17.

[18] As noted at paras 19 and 21 of ***Dow Chemical***, a case management judge is entitled to reject lines of pre-trial discovery that are unrealistic, speculative or without any air of reality, or where the expense involved is disproportionate to the likely benefits that will result. The same reasoning applies to requests to question witnesses generally.

B. Specific Proposed Witnesses

1. Mr. Buchan

[19] Mr Buchan was an ECC (Control Centre Department) Console Operator and then Coordinator of Pipeline Systems Outage Planning at Pembina. Pembina asserts, and Coney does not deny, that Mr Buchan did not provide Mr Coney with oversight or instructions, that he did not regularly work with Mr Coney and that he was not part of the Major Projects team at Pembina to which Mr Coney reported. Mr Buchan's role at Pembina initially involved monitoring pipelines, verifying pipeline integrity, scheduling deliveries, and optimizing operating efficiency. Later, he worked with various Pembina personnel to develop an outage schedule for Phase II of the Pembina expansion project.

[20] Mr Coney in an affidavit sworn July 16, 2018 states that:

> Mr Buchan gave instructions as to the urgency for Pembina's projects to be completed so as to enable Pembina to begin charging its customers under take or pay contracts. Mr Buchan gave instructions along the lines of "Get them done at any costs; take or pay contracts far exceed any commissioning cost overruns."

[21] Pembina did not have an opportunity before the application to cross-examine Mr Coney about this statement. It is unclear from the affidavit whether Mr Coney was present at the time the statement was allegedly made.

[22] Mr Coney submits that what he alleges Mr Buchan said is relevant and material because it illustrates:

a) the corporate culture at Pembina;
b) it is an indication of whether Pembina's stated policies were typically followed or not followed;
c) it indicates whether it was common at Pembina to use funds from one project to pay for costs from another project, with incorrect or altered invoices, and whether Pembina managers gave instructions for this kind of practice to be followed; and
d) it illustrates what instructions were given by Pembina management as to the manner in which work was to be carried out, including prioritizing job completion over all other considerations other than safety.

[23] These allegations are set out in paras 11-13 of Coney's Amended Statement of Defence. However, even if it can be established that Mr Buchan made the statements that Mr Coney alleges that he did, this would not establish any of the allegations set out in submissions b) through d). With respect to allegation a), while such a statement may be relevant to the general corporate policy of urgency of completion of projects, this is so general and innocuous in nature that it would not be relevant or material to Coney's defences.

2. Mr Smith

[24] At all material times, Mr Smith's was a Senior Manager, Project Coordination for Pembina's Conventional Pipelines Business Unit. Occasionally, Mr Smith coordinated commissioning and start-up integration for Phase II of Pembina's expansion project with Mr Coney.

[25] Mr Coney states in his July 16, 2018 affidavit that:

> Mr Smith stood in front of large groups of people in several meetings and told us to spare no expense, to have extra crews on standby, and everyone was to help me in any way necessary to get Phase II projects completed enough to say they were online and operating.

[26] For much the same reason as similar evidence of urgency in getting projects completed from Mr Buchan is not material or relevant to Coney's defence, Mr Smith's alleged statements about the importance of completion of the Phase II projects is not relevant and material to Coney's defences or the real issues in dispute in this litigation. Mr Coney has not alleged that Mr Smith instructed Mr Coney to breach Pembina's procurement and invoicing policies, or that Mr Smith instructed Mr Coney to commit the other misconduct enumerated in Pembina's Amended Statement of Claim. Nor is this alleged statement useful in establishing the defences set out in paragraph 11-13 of Coney's Amended Statement of Defence.

[27] Pembina has acknowledged in its brief that completion of the projects was important to Pembina. As noted by Pembina, confirmation of this corporate policy could have been sought from Mr Massecar or Mr Gabura, with whom Mr Coney worked on a regular basis. The statement allegedly made by Mr Smith does not amount to instructions to use funds from one project to pay for costs of another with incorrect invoices, or instructions to prioritize job completion over all other considerations other than safety.

[28] Thus, Coney has not demonstrated that questioning of Mr Smith would produce evidence that is material or relevant.

3. Mr Zorniak

[29] Mr Zorniak was the Senior Project Manager for Phase III (Echo Pipeline) of Pembina's CBU Expansion. He is no longer a Pembina employee.

[30] Mr Coney asserts in his July 16, 2018 affidavit that:

> Mr Zorniak has knowledge about Phase II project expenses being paid with Phase III budgeted funds, as funds were paid for Phase II project expenses from a Phase III Authority for Expenditure ("AFE") for which Mr Zorniak was responsible.

[31] In an earlier affidavit, Mr Coney attached an email thread relating to a discussion about Pembina's acquisition of pipeline materials for a project on an urgent basis, despite the fact that

the project that required those materials had not yet been allocated funds. That discussion involved Pembina's procurement personnel, Mr Zorniak (as responsible Project Manager) and at least two members of Pembina's executive (Mr Murphy and Mr Massecar). This email chain illustrates that a Pembina employee sought executive approval for the purchase of equipment in the circumstances.

[32] What this email exchange indicates is an awareness of the internal policies, and awareness by Pembina employees that they needed executive approval for an unbudgeted expenditure. It has very limited relevance to Coney's defence that it was common at Pembina to use funds from one project to pay costs from another, and the benefits of questions on this alleged statement would be disproportional to the foundational rules of efficiency and expense.

4. Mr Dilger

[33] Mr Dilger is the President and Chief Executive Officer of Pembina. He was Pembina's Chief Operating Officer as of October 2010 when Coney was engaged by Pembina, and then President and COO, and finally CEO during the time periods at issue in this litigation.

[34] Pembina notes that Mr Coney has conceded when cross-examined on his July 9, 2018 affidavit that:

a) Mr Coney did not report to Mr Dilger;
b) Mr Dilger did not provide Mr Coney with instructions or oversee his work;
c) Mr Coney had no direct contact with Mr Dilger; and
d) Mr Dilger was not among the list of people who Coney alleges instructed him to breach Pembina's policies.

[35] Coney submits that the issues raised in the pleadings include whether or not Pembina was complying with regulated accounting and reporting standards.

[36] The issues raised in Coney's Amended Statement of Defence that could be considered relevant to the questioning of Mr Dilger are as follows:

a) that Pembina's corporate culture, business practices and accounting practices were focused on a goal of aggressive expansion, in priority over adhering to accounting standards (para 11(a));
b) although Pembina purported to create internal business and accounting practices to comply with securities regulations, it continued to focus on aggressive expansion in priority to accounting standards (para 13);
c) Pembina knew or ought to have known that the actual business and accounting practices within Pembina were endemically non-compliant with its internal policies and securities law standards (para 23(c)); and
d) to the extent that the actual accounting practices at Pembina were non-compliant with securities legislation and its internal policies, Pembina's Chief Executive Officer failed to take reasonable stops to change its corporate culture to ensure compliance (para 23(d)).

[37] Coney submits that records produced by Pembina indicate that Mr Dilger himself directed or requested expenditures to be made without compliance with internal policies, and that he was provided with information as to widespread breaches of Pembina's policies. In support of this allegation, Coney references an email exchange. The earlier emails relate to an opportunity to move a valve, the cost of which is not in the scope of work for the project in question. The

participants in the email exchange are clearly aware that the issue is that, in accordance with policy, the work should not proceed until internal approvals are in place. After investigations of alternatives and opinions expressed about whether the valve move was necessary, Mr Dilger was finally copied with the email exchange.

[38] A senior manager indicated that the work could be relocated "as part of the Major Projects work at their cost" and that it seemed a shame to miss this opportunity. Mr Dilger indicated as follows:

> Someone please step up and make sure the work gets done if it is necessary and an opportune time to do so and we will decide who should pay for it at the next OLT meeting.

[39] This email exchange illustrates that Pembina management was aware of internal accounting policies and did not proceed with an unbudgeted expenditure until they received approval at the most senior level. It does not illustrate, as claimed by Coney, a corporate culture of ignoring internal policies.

[40] Coney also refers to an email exchange dated October, 2013 which it says implies that Mr Dilger may have been involved in approving an expenditure contrary to internal policies. Mr Dilger was not copied on the email exchange, and in any event, the email exchange does not support Coney's allegation in that regard. Nor does an email exchange dated September 30, 2012 support Coney's allegation that Mr Dilger was involved in discussions about whether internal policies existed: it tends to evidence the opposite.

[41] Coney refers to an email from Mr Dilger dated February 6, 2015 in which he indicates that he wants to initiate a discussion at the next ELT meeting on how Pembina can reduce its reliance on full-time contractors "by either bringing them on as employees or replacing them in due course". He indicates "nothing will occur with urgency...but I just want to discuss the concept with the team".

[42] Pembina submits that Mr Dilger should be made available for questioning on this email because Pembina's counsel objected to Mr Massecar being questioned on the basis that he was not the author. This email exchange occurred in relation to the opportunity to employ an unrelated consultant. Coney submits that it is relevant in that it supports that evidence learned from other Pembina personnel that the decision to terminate Coney's consulting was made prior to the investigation that Pembina alleges uncovered fraud. Pembina concedes that senior Pembina employees had planned to terminate Coney's consulting agreement due to alleged unsatisfactory performance prior to the investigation, so this is not a contested fact. There is nothing in the evidence that connects Mr Dilger's 2015 statement with the allegations of fraud that are at issue in this litigation, and no indication that suggests that Mr Dilger has any evidence that is relevant or material to those issues.

[43] Coney also alleges that Pembina, and Mr Dilger specifically, made public statements in 2015 to the effect that its Phase II LVP expansion was completed on budget. Coney submits that this statement was untrue, relying on a statement he made later in 2015 at a meeting (which did not include Mr Dilger) to the effect that the costs of commissioning work for which he was responsible were larger than had been budgeted. Pembina personnel have indicated that the decision to fire Coney was made, in part, because the increased costs "were undocumented and couldn't be justified". Coney's attempts to link Mr Dilger's statements to Mr Coney's later

allegations on costs of commissioning the project, or to establish some kind of conspiracy to hide a misstatement by firing Coney are insufficient to show either that Mr Dilger was incorrect in his public statements on the basis of information known at the time, or that Coney's claim of higher commissioning costs was justified. Therefore, questioning of Mr Dilger on this issue would be neither relevant nor material to the issues in the litigation.

[44] Coney also refers to a 2015 email from Pembina's controller, copied to Mr Dilger and others, that includes a list of "Undisputed Invoices over $25,000." The email states that those invoices cannot be processed because of problems with receipts, a PO order or change order is awaiting approval or an AFE or AFE Supplement is awaiting approval. Again, there is nothing in this email that would give rise to evidence that is relevant or material to the issues in this litigation, particularly as there is insufficient information to connect the email to projects that involved Coney, and no information with respect to how the processing of these invoices was resolved.

[45] Coney submits that it was a breach of securities legislation requirements for Pembina to fail to follow its own policies, and that Mr Dilger should be questioned on this issue. The only evidence referred to by Coney to support this allegation is the previously-described evidence that Pembina management sought higher approval before expending funds that had not originally been budgeted on projects. Mr Coney has admitted in his examination on affidavit that he has no training or expertise in accounting or securities law. His unqualified opinions in that regard have nothing to do with whether Coney defrauded Pembina or whether Pembina was justified in terminating the consulting agreement. They have nothing to do with Coney's defence that he was instructed to invoice Pembina in the way he did. This evidence fails to support either a breach of securities law, or a "chronic" failure to follow internal guidelines.

[46] Finally, Coney complains that Mr Dilger was aware of an audit report involving another contractor that was dealt with differently from the Coney situation. Coney submits that Mr Dilger should be questioned as to why Coney was treated differently. This allegation, even if it is true, is irrelevant to the issues in the litigation.

IV. Conclusion

[47] For the reasons set out herein, I find that Coney's proposed questioning of Mr Buchan, Mr Smith, Mr Zorniak and Mr Dilger cannot be justified, as Coney has not established that these proposed witnesses have any material and relevant information on the issues in this litigation. I therefore grant Pembina's application. If the parties are unable to agree on costs, they may make further submissions on that issue.

Dated at the City of Calgary, Alberta this 10th day of September, 2019.

B.E. Romaine
J.C.Q.B.A.

Appearances:

David Tupper and Ian Breneman
for the Pembina Pipeline Corporation

Patrick Fitzpatrick
for Mark Coney, Marcon Clean Oil Technologies Ltd, ACR Solutions Ltd, Marcon Clean Oil Tech Inc operating as ACR Solutions Inc, John Czlonka, Scott Siemens and Siemens Transport Ltd.

Timothy Froese
for the Dean Palin and D Palin Consulting Inc

TAB 9

Weatherill (Estate of) v. Weatherill, 2003 ABQB 69

Date: 20030128
Action No. 0103 14560

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

MALORA LEE, TRUSTEE OF THE ESTATE OF
MARY LOUISE WEATHERILL

Plaintiff
(Respondent)

- and -

WILLIAM WEATHERILL, DIANE WEATHERILL and BONNIE WALD

Defendant
(Appellants)

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE F. F. SLATTER

APPEARANCES:

G. H. Crowe
for the Plaintiff/Respondent

S. Pride-Boucher
for the Defendant/Appellant

[1] This appeal from the Master involves the question of whether the Plaintiff is required to produce a certain document (a 1998 will of the Plaintiff) as part of the discovery process. The learned Master dismissed the application for production of the will, and the Defendants appeal.

Facts

[2] As this is an interlocutory application, and none of the facts have been proven, I will only comment on them to the extent that is necessary. I am merely repeating the allegations in the pleadings, without making any specific findings about matters in dispute.

[3] This is a family dispute about a particular piece of land. The Plaintiff and her late husband owned the land for many years. There is some evidence on the record that the lands were always “earmarked” for the Defendant William Weatherill. In the 1980's he entered into an agreement to purchase the land, but the agreement was frustrated by the untimely death of his father. At a meeting in 2000 there was a “family agreement” that William should purchase these lands, and not pay the full price in anticipation of an inheritance from the Plaintiff. In May of 2000 the Defendant William and his wife entered into an agreement with the Plaintiff to purchase these lands. On the face of it, the purchase price appears to be below the fair market value of the lands, and this transfer is now challenged. Allegations of undue influence are made in the pleadings, and the pleadings also question the capacity of the Plaintiff to contract at the relevant times.

[4] A little more background is necessary in order to understand the present dispute about discovery of documents. In May of 1998 the Plaintiff attended before a solicitor, Richard Wyrozub, and gave him instructions for the preparation of a will. The will was apparently prepared and executed, and it is the production of this will that is in dispute. It is alleged that after the will was executed the Plaintiff discussed her will with her children, and advised that “the lands would go to the boys”.

[5] In November of 1998 Reginald Weatherill, another son of the Plaintiff and a brother of the Defendant William, had Mr. Wyrozub prepare a farm lease for the lands. This ten-year lease was executed in February of 1999. It is alleged that the other members of the family did not know about this lease. The validity of this lease is also being challenged in collateral litigation between William and Reginald, to which the present Plaintiff has been added as a third party.

[6] The Plaintiff had executed an enduring power of attorney. On September 7, 1999 this power was triggered when her physician issued a declaration of incapacity.

[7] On January 8, 2000, the Plaintiff prepared a holograph will. This will is listed in the affidavit of records filed by the Plaintiff.

[8] In May of 2000, the challenged transfer of the lands took place.

[9] In 2001 a trustee was appointed for the Plaintiff, and this action was commenced. On March 18, 2002, it was ordered that this action and the action concerning Reginald’s lease should be tried together. The Defendants in this action applied for production of a copy of the 1998 will, but on September 23, 2002 the Master dismissed that application. After referring to

Geffen v. Goodman Estate, [1991] 2 S.C.R. 353 the learned Master stated in a brief memorandum that he had "concluded there is nothing in that case that leads me to believe that a will executed in 1998, before the declaration of incapacity [by the physician in 1999], can help the Defendants overcome the presumed undue influence in May of 2000."

The Duty to Discovery Documents

[10] The parties are in agreement as to the duty of a litigant to discover records. The only dispute is over the application of the law to the facts. Both parties note that Rule 187.1(2) requires the parties to "disclose relevant and material records". They both then refer to Rule 186.1 which reads:

> **186.1** For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, 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.

The Defendants argue that the making of the will in 1998 is relevant to the capacity of the Plaintiff in 2000 when the disputed transaction took place. They also argue that the contents of the will are relevant to the issue of undue influence, because the will may show the intention of the Plaintiff to deal with the lands in a way that is consistent with the challenged transaction. In an argument that the Master accepted, the Plaintiff argues that the real issue is the capacity of the Plaintiff in the year 2000, and that the events of 1998 are too remote to be "relevant and material".

[11] Up until 1999 discovery in Alberta was very wide-ranging. Generally discovery was available on anything "touching the matters". This form of discovery was found to be excessive. It was requiring the production of documents and the answering of questions that were only relevant in the remotest sense. It was felt that some parties were abusing the Rule by relying on literal compliance with it; demands were being made for the production of endless lists of documents that had little bearing on any real issue. As a result, the Rules Committee recommended that discovery be limited to matters that are "relevant and material". The purpose of the Rule was to control abuses and to limit the costs of litigation, while still allowing an appropriate degree of pre-trial discovery.

[12] In my view the courts should take a pragmatic view of the scope of discovery. Too formalistic an application of the Rule serves to increase the costs of litigation, rather than decreasing them. This case is a good example. The cost of photocopying the disputed will would have been a few dollars. Instead of that, the parties have spent thousands of dollars

arguing about whether the document is producible. This was not the result intended by the amendment to the Rule.

[13] The pragmatic counsel who is called upon to produce a document which is arguably irrelevant, or at least not materially relevant, will analyze the situation as follows. First of all, the document cannot help or hurt counsel's client. If the document can help or hurt, then it is material. If the document is truly harmless, the pragmatic counsel will produce it rather than fight over it.

[14] The pragmatic counsel might nevertheless decline to produce such harmless documents for a number of reasons:

(a) Floodgates. Counsel may be concerned that the request for one or a few documents is merely a precursor to a flood of similar requests. At some point the floodgates must be closed. Controlling excessive demands for documents was one purpose of the new Rule.

(b) Confidentiality. Harmless documents may be confidential. The confidentiality in question may be personal, or it may relate to business secrets. While confidentiality is not a bar to discoverability, it may be a factor that prompts the pragmatic counsel to decline to produce a record which is not materially relevant, but which could easily and cheaply be produced.

(c) Expense. There may be harmless documents that will be very expensive to collect and obtain. This may be because the document is filed in a way that makes it difficult to access, or it may be in the control of a third party who demands a fee, or for other reasons. In these instances the pragmatic counsel might decline to incur the expense of producing what appears to be a marginally relevant document.

I do not suggest that the Rule over the discoverability of a document should be determined by the expediency of the day. Parties are not required to produce the documents that are not material and relevant, and they should be entitled to refuse to produce if they so choose. However, the above factors can be explored by the Court in trying to understand why production of a particular document is resisted. If the records being requested are modest in number, they are not confidential, and they are not expensive to obtain, then why is the litigant fighting so hard to avoid production, given that the documents are by definition supposedly harmless? Is the production of the document within the mischief the 1999 amendments were designed to prevent? These are factors that can certainly be taken into consideration when costs are considered.

[15] Examination for discovery now is narrower than it used to be. It is however still quite wide, and is perhaps still wider than the test for admissibility at trial. Certainly discovery is not

narrower than admissibility at trial. In interpreting the Rules, the Court should avoid creating an artificial situation where a litigant is not entitled to obtain information on discovery, which the litigant could quite clearly introduce at the trial.

[16] In determining whether a document is relevant and material, the starting point is the pleadings. The pleadings define the issues, and relevance must be determined with respect to the issues. The pleadings are also relevant with respect to the issue of materiality. However, with respect to materiality one must also have regard to the issue in question. Where does the burden of proof lie? Is the issue something that is capable of direct proof, or is it something like a person's state of mind, which can only be proven indirectly. Does one party essentially have to try and prove a negative? How are cases of this type usually proven at trial? The less amenable a fact is to direct proof, the wider will be the circle of materiality. There are some facts that can only be proven by essentially eliminating all the competing scenarios, thereby leaving the fact in issue as the sole logical inference. When a state of mind is in issue, it can generally only be proven by demonstrating a pattern of conduct of the person whose state of mind it is. In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question. At an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry.

[17] That relevance is determined by the pleadings, while materiality is more a matter of proof can be seen by the wording of the Rule. The Rule talks about records that can "help determine" an issue, or that can "ascertain evidence" that will determine an issue. These are words of proof, and materiality must be determined with that in mind.

[18] It is sometimes said that the new Rules prevent the discovery of "tertiary" issues. This is one way of saying that the 1999 amendments were intended to prevent excessive discovery. However, as a working tool the search for "tertiary" issues is unhelpful in many cases. There is no clear dividing line between primary, secondary, and tertiary evidence. As I have indicated, some facts can only be proven by tertiary or even more remote evidence. A good example is an attempt to prove a negative. The application of the new Rule to particular fact situations must be primarily pragmatic.

[19] The Defendants argue that the will is relevant to two issues. The first is the capacity of the Plaintiff. It seems clear from the record that the Plaintiff did not suffer any sudden and catastrophic loss of capacity. At worst she is experiencing the normal effects of the aging process. It is not uncommon for medical experts to testify that this sort of loss of capacity is gradual, and perhaps exists before it is apparent. The passage of time between the will in October of 1998 and the challenged transfer in May of 2000 is not so great that a court might not draw an inference on capacity in 2000, from capacity in 1998. Now that the two actions have been combined for trial, the capacity of the Plaintiff at the time of the 1999 lease is also

in issue. It would seem artificial to say that the will is producible in the lease action, but not in this action. It is not necessary for the purpose of this application to decide if the Court would draw any inferences on capacity in 2000, based on capacity in 1998; it is a possible line of reasoning and not mere speculation, and the record would appear to be materially relevant. It may assist in determining an issue at trial.

[20] The Defendants argue that the contents of the will are not relevant to any issue of capacity. It is true that the circumstances surrounding the making of this will perhaps have more to say about the Plaintiff's capacity than the actual contents. However, if the contents of the will bear a rational relationship to her family's circumstances and her estate as it existed at that time, that is some evidence of her capacity. Evidence of this type is routinely introduced in trials involving capacity and undue influence.

[21] Likewise, the will is relevant to the issue of undue influence. In such cases it is important to know whether it was truly the transferor's intention to transfer the property, or whether that intention was imposed on her. As I have indicated, there is some family history suggesting that these lands were always earmarked for the Defendant. If the 1998 will left the lands to William, that would be compelling evidence. Likewise, if the will said anything about Reginald being entitled to farm the lands, that too would be relevant. If the will is silent, or disposes of the land in some inconsistent way, that is also relevant. Again, whether the trial judge will draw any inferences from this need not be decided at this point; it is only necessary to show that the inference is possible.

[22] The Defendants argue that a person's intention in a testamentary instrument is not necessarily the same as that same person's *inter vivos* intention. That is undoubtedly true, but it is not uncommon for people to commence distribution of their estates prior to their death. The acceleration of inheritances is not unknown. These are all factors that the trial judge must take into account in deciding whether to draw the inferences the Defendants urge. The ability of a party to make the argument at trial should not be foreclosed by too limited a view of discovery.

[23] The Defendants point out that the law suggests that the onus of disproving undue influence will fall on them. There are cases that suggest that undue influence will be presumed where transfers are made at an undervalue and the donee is in a position of confidence with the donor: ***Tulick Estate v. Ostapowich*** (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381. If this law was found to apply to the facts of this case, the Defendants would have the burden of proving a negative, namely that there was no undue influence. They are also required to prove the mental state of the Plaintiff. Such issues are notoriously hard to prove, and they are impossible to prove directly. Accordingly, in a case like this there is a wider category of discovery that would be "material".

[24] It seems clear to me that on this record the Defendants would be entitled to call Mr. Wyrozub at trial as a witness, and ask him how he assessed the Plaintiff's capacity in 1998 when the will and the lease were prepared. It seems unlikely that the trial judge would rule that his evidence is so unlikely to be relevant that he could not even be called. If his evidence can

be called at trial it seems particularly artificial to say that documents surrounding his evidence are not producible on discovery.

[25] Viewed from the other side, no compelling reason has been shown why production would be abusive. Production of the will might well trigger production of Mr. Wyrozub's file, but that in itself would not be a major undertaking. There is no floodgates issue. The Plaintiff protests that the Defendants are asking for something which is "none of their business". The privacy interest in question would be that of the Plaintiff. Having alleged in this claim that she was unduly influenced, she does not have a strong argument that documents relating to her motivation to dispose of her property should now be kept confidential. Furthermore, there is evidence that she discussed the contents of her will with her family. Expense is not an issue. As I have mentioned, the will could be photocopied for a few dollars.

[26] In all of the circumstances, it appears that the document in question might well assist the Court in making the findings of fact that are required regarding capacity and undue influence. Those are notoriously difficult issues to prove, and they are almost invariably proved indirectly and by inference. The production of this document is not within the mischief that the 1999 amendments to the Rules were designed to prevent. I have concluded that the document is relevant and material, and it should be produced.

[27] The parties may speak to costs within 30 days of the date of these reasons, if they are unable to agree.

HEARD on the 21st day of January, 2003.
DATED at Edmonton, Alberta this 28th day of January, 2003.

_____

J.C.Q.B.A.