COURT FILE NO.	2501-19283
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	COMPEER FINANCIAL, PCA
DEFENDANTS	SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA ENTERPRISES INC., RAY PRICE, DEBBIE UFFELMAN, CRAIG THOMPSON, DAVID PRICE, ARTHUR PRICE, and GLEN PRICE
DOCUMENT	**BRIEF OF THE RESPONDENT, COMPEER FINANCIAL, PCA**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500, 855 – 2nd Street S.W. Calgary, Alberta T2P 4K7 Attention: Keely Cameron/Lincoln Caylor/Nathan Shaheen/ Mathieu LaFleche Telephone ANo.: 403-298-3324 Fax No.: 403-265-7219 Client File No.: 099329.1

Clerk's Stamp

Chambers Application Scheduled for December 1, 2025
before The Honourable Justice Lema

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I. INTRODUCTION

1. Sunterra's senior executives have admitted to engaging in cheque-kiting. Sunterra's defence is that Compeer knew of and permitted it to occur. This is not a defence available at law or on this record. As previously agreed by the parties, Compeer's application for judgment is to be determined on December 4 and 5.

2. Sunterra used this application as the basis to request the adjournment of Compeer's summary judgment application and to split the hearing of the Compeer and NBC claims. That request was denied. Sunterra insists on proceeding with this procedural application which has no merit.

3. The negotiated consent order governing the process for Compeer's application for summary judgment does not provide for this application or the relief sought. As Lema, J. said in his reasons interpreting this same consent order: "The parties left some procedural rights on the side when agreeing to a streamlined and intended-to-be-straightforward process."[1] The relief sought in this application by Sunterra arises from such procedural rights that were left on the side. Sunterra ought to be bound by the consent order.

4. Further, the undertaking-refusals, and objections complained of are proper. Sunterra seeks details regarding Compeer's privileged, post-discovery investigation into the fraud, advice from legal counsel and communications with its US Federal regulator protected by statutory bank examiner privilege. The examinations conducted pursuant to Rule 6.8 of Compeer's CEO and CRO do not entitle the examiner to undertakings. Finally, none of the evidence sought is relevant or material to these proceedings.

5. Sunterra's application ought to be dismissed.

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[1] *National Bank of Canada v Sunterra Food Corporation*, 2025 ABKB 606 **[NBC]** at para. 17. **[TAB 1]**

II. STATEMENT OF FACTS

6. The uncontroverted evidence is that on or around February 3, 2025, Compeer Financial, PCA ("**Compeer**"), discovered that there had been approximately $80,000,000 in cheques issued between the U.S. and Canadian Sunterra Entities in a matter of days. Compeer involved in house and external counsel almost immediately for advice and investigation purposes. On February 6, 2025, Compeer staff met with Legal Counsel.[2] By February 10, 2025, Steve Grosland was assigned the matter and told he could not speak to anyone other than his service team, general counsel, and Drew Parrish, Compeer's risk asset attorney.[3] As would be expected, since that time, Compeer's counsel have been heavily involved in this matter, which included interactions with the witnesses who have been examined by Sunterra:

(a) Steve Grosland became involved with the matter on February 10, 2025, and was told he could not speak to anyone other than his service team, general counsel, and Drew Parrish, Compeer's risk asset attorney.[4]

(b) Bill Moore, Compeer's CRO, advised that he first learned of this matter on February 7, 2025.[5] In the questioning of Mr. Moore, it was also confirmed that an investigation was conducted by in-house and external US counsel.[6]

(c) Jase Wagner, Compeer's CEO, advised that he first learned of this matter on February 10, 2025 and only had conversations after learning of the matter with his general counsel, Paul Kohls, and with Mr. Moore where counsel was involved.[7]

7. By March 10, 2025, Compeer had taken legal action through the issuance of notices of default and demands, and by March 18, 2025 Compeer had brought an application for the appointment of a receiver over the U.S. Sunterra Entities.[8]

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[2] Affidavit of Nicholas Rue, sworn on June 19, 2025 at para. 56.
[3] Transcript from the Oral Examination of Steve Grosland, October 22, 2025 **[Grosland Transcript]** at Page 12, Line 20 – Page 13, Line5.
[4] Grosland Transcript, October 22, 2025 at Page 12, Line 20 – Page 13, Line5.
[5] Transcript from the Oral Examination of William Moore, November 13, 2025 **[Moore Transcript]** at Page 35, Line 7 – Page 36, Line 13.
[6] Moore Transcript, November 13, 2025 at Page 33, Line 7-21.
[7] Transcript from the Oral Examination of Jase Wagner, November 13, 2025 at Page 12, Line 21 – Page 14, Line 1-6.
[8] Grosland Affidavit at paras. 37-38.

8. On June 2, 2025, Compeer filed a claim in the Court of King's Bench Action 2503-10998 (the "**Fraud Action**") seeking recovery for losses arising from a cheque-kiting fraud perpetuated by the Defendants.

9. On July 24, 2025, the Honourable Justice M.J. Lema granted a consent order (the "**Consent Order**") that, among other things, permitted the Fraud Action to be heard by way of summary judgment on December 4 and 5, 2025. The Consent Order also enclosed a litigation plan at Schedule "A".[9] The litigation plan provides no procedure for the compelling of responses by either party.

10. In accordance with the litigation plan, Sunterra's witnesses were examined and provided undertaking responses. Despite Sunterra's present complaints, Sunterra's counsel objected to questions on the basis of privilege where legal counsel was involved in discussions[10] and undertakings were refused where they required inquiries of others and to obtain evidence from others, for example Mr. Thompson refused to make inquiries of Sunterra's accounting team and senior management to produce working copies of the spreadsheet he maintained to track the cheque-kiting fraud on a daily basis.

11. In accordance with the litigation plan, Nicholas Rue and Steven Grosland were examined by Sunterra on October 21 and 22, 2025, respectively, on affidavits that they had sworn in June of 2025. Undertaking responses were provided by the date agreed to between the parties: November 3, 2025. No objection was raised at the time with respect to any of the undertaking responses (or any of the objections arising during the cross-examinations).

12. In accordance with the decision of the Court rendered October 17, 2025, counsel agreed on October 28, 2025, that Compeer's CEO, Jase Wagner and CRO, William Moore (collectively, the "**Compeer Executives**") would be examined on November 13, 2025. Sunterra had previously been made aware that neither employee had any direct knowledge of relevant and material information that had not been provided to them after the fact by Compeer's legal team and was invited to select alternative witnesses, which Sunterra refused to do.[11]

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[9] July 24, 2025 Consent Order.
[10] Transcript from the Oral Examination of Ray Price, October 7, 2025 at Page 7, Lines 9-25.
[11] Affidavit of Nicholas Rue, sworn October 14, 2025 at Exhibit F.

13. On November 12, 2025, the parties submitted an amended litigation plan to the Court, setting out the revisions to the process agreed to by the Parties ("**Amended Consent Order**") and confirming that Compeer's "Application shall proceed to judgement on December 4 and 5, 2025".[12] It also provided that the Compeer Executive examinations were to be pursuant to Rule 6.8, which does not permit non-party undertakings. Consistent with this, the Amended Consent Order provided a deadline for undertaking responses that pre-dated the Rule 6.8 examinations of the Compeer Executives. The amended Consent Order also did not provide any procedure for compelling responses. This is in contrast to the consent order between Sunterra and National Bank of Canada which was entered into at the same time and provides:

> 15. If any Party wishes to compel a response to a question asked at questioning to which objection is taken, or an undertaking that is requested and refused, or for a further and better response to an undertaking response, that Party must apply to Justice Lema to compel the response within 7 days of the Questioning or undertaking reply (as the case may be).

14. Clearly, Sunterra never sought, and Compeer did not agree to, such a procedure for the Compeer claim in the Consent Order or the Amended Consent Order. This is despite Sunterra already being aware on November 3 of some of the objections and refusals that Sunterra now seeks to challenge.

15. The examinations of the Compeer Executives proceeded on November 13. Compeer's counsel confirmed no undertakings would be provided, consistent with Rule 6.8. In addition, objections for privilege and bank examiner statutory privilege were made.

16. Between November 17-19, 2025, Compeer filed three brief affidavits:

(a) An affidavit from Mr. Rue correcting an answer that had been provided in cross-examination;

(b) A secretariate affidavit from Stephanie Dumoulin which appends corporate searches showing who the directors of the relevant Sunterra entities were at the key times, (this evidence was previously filed before this Court as part of the National Bank of Canada receivership application but is not on the record in the

[12] November 12, 2025, Amended Consent Order.

CCAA proceedings) and transcripts from the U.S. Receivership Proceedings, which Sunterra is aware of having participated in those proceedings;

(c) An affidavit of Steve Grosland sworn November 19, 2025 which simply provides an updated calculation of the quantum owing to Compeer as the last amounts provided were in February.

(the "**Supplemental Affidavits**")

17. On November 18, 2025, Sunterra's counsel advised for the first time that they would be seeking an adjournment, tying the adjournment to compelling responses and undertakings from the Compeer Executive examinations which had just been reviewed and instructions provided by Sunterra's executives upon their recent return to Calgary.

18. On the next day, Sunterra delivered an application seeking an adjournment and broadening the scope of the relief sought in this application to include compelling responses and undertakings in respect of all of the Compeer witnesses, including those from the examination of Mr. Rue and Mr. Grosland which had taken place nearly a month earlier. With respect to Rue and Grosland, Sunterra has been aware of Compeer's position on privilege since October 21, 2025 and had Compeer's undertaking responses since November 3, 2025. Obviously, the recent return to Calgary of Sunterra's executives does not apply.

III. ISSUES

19. The issues to be determined include:

(a) Does the Amended Consent Order permit the relief sought?

(b) If this Court is prepared to consider the relief sought, are the undertaking-refusals and objections at issue proper?

(c) Should the Supplemental Affidavits be struck?

(d) Should Compeer's Summary Judgment Application by adjourned?

IV. ARGUMENT

A. The Application is Contrary to the Consent Order

20. After previously asking this Court to hold Compeer to the strict terms of the Consent Order (which the Court did), Sunterra seeks to be excused from those terms as it applies to them. It does so, after Compeer has performed its obligations. Sunterra is asking this Court to treat it differently than Compeer.

21. This should not be permitted. The terms of the Amended Consent Order are clear and Sunterra should be held to its bargain. Specifically, it has agreed to the following:

(a) limits on the number of witnesses and the time to conduct examinations. Its three days have been spent and there is no provision for any re-examinations (para. 3);

(b) Both the Consent Order and Amended Consent Order provides that the examinations of Messrs. Wagner and Moore (the "**Compeer Executives**") will occur pursuant to Rule 6.8. As a matter of law, Rule 6.8 excludes the provision of undertaking responses for non-parties, which includes employee witnesses[13]. Sunterra's ability to seek any undertakings can arise only from the questioning of Mr. Rue and Mr. Grosland (as they tendered affidavits) not the Rule 6.8 questionings of the Compeer Executives. This is further underscored by the fact that the Amended Consent Order had a deadline for undertaking responses by November 3 despite the fact that the Compeer Executives would be examined on November 13, 2025 (paras. 2, 4 and 6);

(c) The Amended Consent Order does not include any entitlement for Sunterra to seek to challenge undertakings answered or objections taken. This is despite the fact that such a process was provided for in the NBC consent order which was negotiated at the same time and despite the fact that at the time the Amended Consent Order was entered into, Sunterra was already aware of objections and

[13] *Great North Equipment Inc v Penney*, 2024 ABKB 391 **[Great North]** at para.15-19. **[TAB 2]**

undertaking refusals given that the examinations of Mr. Rue and Mr. Grosland had already taken place (inclusive of answers to undertakings).

(d) Consistent with there being no process to compel the schedule agreed to by the parties, did not provide time for a court application to settle a dispute, with examinations concluding November 13 and briefs being filed November 19 and 28, 2025.

22. As this Court has previously found, the consent orders were intended to provide certainty and discipline leading up to the December hearing.[14] In doing so, both parties compromised on their procedural rights.

23. As this Court has also found, in entering into the Consent Order, if the parties had intended for scrutiny, the order could have been drafted to provide it.[15] It was not and therefore did not.

24. As Compeer was previously directed to live up to its commitment, so to must Sunterra.[16] For this reason alone Sunterra's application ought to be dismissed.

B. Further - The Objections and Refusals Are Appropriate

1. Nature of Objections and Undertaking Refusals

25. Even if the agreed-to process permitted Sunterra's application, Sunterra has not demonstrated that the objections and refusals are improper. A table setting out the objections and refusals, as well as Compeer's justification is set out in Appendix "A" to this Brief.

26. Sunterra challenges:

(a) 24 objections:

(i) 1 based on the question having already been answered;

(ii) 19 of which were objected to on the basis of privilege;

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[14] *NBC, supra* at para 16. **[TAB 1]**
[15] *NBC, supra* at para 25. **[TAB 1]**
[16] *NBC, supra* at para 27. **[TAB 1]**

(iii) 3 of which were objected to on the basis of relevance; and

(iv) 1 was objected to on the basis of being improper as it included an assumption that the U.S. appointed receiver lacked experience which had not been established.

(b) 18 undertaking refusals:

(i) 11 of which pertain to the Rule 6.8 examinations of the Compeer Executives, for which undertakings are not permitted either under the Amended Consent Order or the relevant jurisprudence;[17]

(ii) 1 refusal related to privileged investigation records; and

(iii) 6 which sought responses or records from third parties.

2. Sunterra Seeks Information that is not Relevant or Material

27. Sunterra has the burden of establishing that the objections and refusals were improper and more specifically that the information sought is both relevant and material.[18]

28. Beyond a bald assertion that it is entitled to the information and that Compeer's objections are "frivolous", no specifics are provided to support Sunterra's application. It has not met its burden.

29. Sunterra must establish that the questions sought are relevant and material, and that they are entitled to the information sought. As demonstrated by Appendix "A", the information sought is neither relevant and material, nor are they entitled to the information as in most cases it is protected by privilege.

30. While Appendix "A" provides a specific response to each of the objections and refusals at issue, below is a summary of some of the key principles the Court should consider.

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[17] The Court in *Great North,* held that Rule 6.8 examinations involving employees of a party did not require the provision of undertaking responses. **[TAB 2]**

[18] See, *Hasibullah v Potter*, 2025 ABCA 179, at para. 23. **[TAB 3]**; *Rainville v Pontin*, 2013 ABQB 256, at para. 15. **[TAB 4]**

31. Although the pleadings are the starting point for a determination of relevance, the inquiry does not end there. Some evidence is required; none has been provided. The Court must be cautious not to allow the Applicant to go on a fishing expedition to find some evidence to support the Applicant's allegations.[19]

32. As stated by Master Funduk in *Franco v Hackett*:[20]

> But the test is relevant and material. That now cuts out the old fishing expeditions. There is no fishing without first evidence that there are fish in the pond and a reasonable amount of fish. Defendant has not satisfied me of that. Conjecture is not sufficient.

33. Sunterra is asking the Court to permit it to fish. It seeks answers to a number of similar questions that are not relevant. For example, it seeks disclosure of discussions between Compeer and its regulator. What regulatory obligations Compeer has, or what discussions occurred, are of zero relevance as to the fact that cheque kiting occurred, which has been admitted, or Sunterra's resulting liability. What is relevant and material is whether the fraud occurred, which is admitted by Sunterra.[21] Whether Compeer should have discovered the fraud earlier is not relevant.

34. As set out in Compeer's Summary Judgment Brief, Courts have held that "A person who commits fraud on another person cannot blame the victim by telling him that he should have watched his money more carefully".[22]

3. Sunterra Seeks Privileged Information

35. The bulk of Sunterra's objections seek information that would, in any event, be privileged.

36. Most of the refusals and objections relate to questions or undertakings seek access to privileged information relating to Compeer's investigation and discussions with counsel following the discovery of the fraud, and/or requests for the witnesses to obtain evidence from

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[19] *Honourable Patrick Burns Estate Memorial Trust v P Burns Resources Limited*, 2015 ABQB 459 at paras 26-28. **[TAB 5]**
[20] *Franco v Hackett*, 2000 ABQB 241 at para 34**. [TAB 6]**
[21] See the Summary Judgment Brief of Compeer filed November 28, 2025.
[22] *International Longshore & Warehouse Union Local 502 v. Ford,* 2014 BCSC 65 at para. 12. **[TAB 7]**; *Wilson v. Bobbie,* 2006 ABQB 22 at paras. 20-26. **[TAB 8]**

other individuals who Sunterra chose not to examine. Neither of which is proper and in all cases is not relevant and material to the Summary Judgment Application.

37. The majority of objections based on privilege are response to questions which sought:

(a) Information regarding communications with counsel which is protected by solicitor-client privilege;[23]

(b) Information related to an investigation involving counsel into the fraud which is protected by litigation privilege and solicitor-client privilege;[24] and

(c) Information related to discussions between Compeer and its regulator which as discuss below, is protected by statutory privilege.[25]

38. Sunterra seeks amongst other things, details of Compeer's discussions with counsel. It purports to request details of the "purpose" of those discussions to ascertain whether privilege actually applies.

39. It is clear in this case, that the communications and investigations for which information is sought involved legal counsel (Melissa Cross and Drew Parrish) and resulted in demands and the commencement of receivership proceedings, little over a month after the discovery of the fraud.

40. The meetings with Ms. Cross and Mr. Parrish are the subject matter of a quarter of the objections.

41. Privilege receives significant protection during the discovery process and should be protected in this case.[26]

42. Communications with Compeer's regulator are protected by statutory bank examiner's privilege. The Code of Federal Regulations explicitly provides in respect of Farm Credit Administration (Compeer's Regulator):

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[23] *Real Estate Council of Alberta v Moser*, 2019 ABQB 106 at para. 19 **[TAB 9]**
[24] *Talisman Energy Inc v Flo-Dynamics Systems Inc,* 2015 ABQB 561. **[TAB 10]**
[25] *TD Bank, N.A. v Lloyd's Underwriters*, 2016 ONSC 4188. **[TAB 11]**
[26] *Real Estate Council of Alberta v Moser*, 2019 ABQB 106 at para. 21. **[TAB 9]**

> § 602.24 Responses to demands served on non-FCA employees or entities.
>
> If you are not an employee and are served with a demand or a subpoena in a legal proceeding directing you to produce or testify about an FCA report of examination, other document created or adopted by FCA, or any related document, you must object and immediately tell the General Counsel of such service, the testimony or documents described in the demand, and all relevant facts. You also must object to the production of any documents on the basis that they are FCA's property and cannot be released without FCA's consent. You should tell the requester the production of documents or testimony must follow the procedures in this part. [27]

43. Canadian Courts have previously recognized that this Court does not have inherent jurisdiction to remove or waive statutory privilege[28] and has provided comity to statutory privilege created under US laws.[29]

4. Sunterra Seeks to Indirectly Examine Additional Individuals

44. As to the request for information from individuals other than the witnesses, Sunterra agreed to the Amended Consent Order which limited the number of individuals that they could examine and gave them the choice of selecting two additional witnesses. They chose the Compeer Executives even after being forewarned that all of their information was learned after the fraud was discovered and protected by privilege.

45. Sunterra has sought to do an end-run around the process through seeking undertaking responses that require information and/or records to be obtained from third parties, which Sunterra chose not to examine. A party being questioned on an affidavit has no duty to attest to information outside of their knowledge or control.[30] Here, Sunterra seeks, by way of undertaking, to have Mr. Rue make inquiries of other employees and report their information back in response. Had Sunterra wished to obtain evidence from another employee, it could have done so directly and was in fact expressly offered that opportunity. Sunterra chose not to

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[27] United States, Office of the Federal Register, Electronic Code of Federal Regulations, 12 CFR § 602 (2025) **[TAB 12]**
[28] *Edmonton (Police Service) v Szybunka*, 2019 ABQB 854 at para 29-30. **[TAB 13]**
[29] *TD Bank, N.A. v Lloyd's Underwriters*, 2016 ONSC 4188 at para. 30-32. **[TAB 11]**
[30] *Kostic v Scott Venturo Rudakoff LLP*, 2022 ABQB 188 at para. 25. **[TAB 14]**

do so and now is attempting to expand the scope of a cross-examination both indirectly and improperly.

46. In the circumstances, the objections and refusals as more fully set out in Appendix "A", are appropriate and should be maintained. Sunterra's requests are not provided for under the Consent Order, the information sought is not relevant and material and, in any event, not producible.

C. <u>The Affidavits should be Permitted</u>

47. The Supplemental Affidavits were provided for the benefit of the Court and do not introduce new substantive evidence.

48. The Court has the discretion to accept this evidence, which was filed more than two weeks in advance of the hearing, and for which Sunterra will have the ability to respond and argue as to the weight to provide the evidence.

49. Mr. Rue's correcting affidavit was provided out of an abundance of caution to ensure that Mr. Rue's answer to a question asked at his examination was clear. Compeer will consent to it being struck.

50. Mr. Grosland's Second Affidavit provides updated calculations for the damages claimed.

51. Stephanie Dumoulin's Affidavit simply appends publicly available information as to who the directors of Sunterra were at the relevant periods according to corporate searches, as the searches on the Court record currently post-date the fraud and name different directors. Additionally, it also encloses a motion and court decision from the U.S. Receivership proceeding which provide context for Sunterra's complaints regarding the U.S. Receiver and the U.S. sale of the Sunterra assets. All of this information is on the public record, and this Court has already recognized the U.S. Receivership proceedings through granting the U.S. Receiver's Foreign Recognition application.

52. While Compeer believes that the timing of service of evidence contained in the Affidavits is not prejudicial to Sunterra, Compeer does not oppose the striking of the

Affidavits, which were provided for the assistance of the Court, should the Court determine such information not to be required.

D. Any Further Request for an Adjournment Request should be Denied

53. Sunterra has known the case it has to meet since June of this year when it received both Compeer's Statement of Claim, and affidavits in support of its Summary Judgment Application.

54. Commercial Practice Note 1 confirms that counsel is expected to be ready to proceed with matters for which hearing times have been agreed to and set, and adjournments will only be granted in special circumstances for material reasons. [31] No special circumstances or material reasons exist. Rather, this is simply an attempt to delay the agreed to and set proceedings at great prejudice to Sunterra's stakeholders.

55. An adjournment to provide for the answering of questions or providing of undertaking responses would be greatly disproportionate to the value that could possibly be obtained. To the extent answers were determined to be necessary, Compeer could respond in advance of the application.

56. Very little progress has been made in these restructuring proceedings. As Compeer's application has been used as an excuse by Sunterra to delay the advancement of a sale and investment solicitation process, it is critical that a decision be made, so that these proceedings can advance.

[31] Commercial Practice Note 1 – Commercial Chambers.

V. RELIEF SOUGHT

57. Sunterra's application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 28th day of November, 2025.

Estimated Time for Argument: 20 minutes

BENNETT JONES LLP

Per: _____

Keely Cameron / Lincoln Caylor / Nathan Shaheen / Mathieu LaFleche,
Counsel for the Respondent,
Compeer Financial, PCA

VI. APPENDIX "A"

Examination of Nic Rue			
Transcript Page and Line No.	**Question**	**Objection**	**Justification**
Page 68, line 18	You had access to the outgoing cheques to make that determination [that they were intercompany cheques], correct?	Asked and Answered	Asked and Answered page 49, line 21-page 50, line 20. He had already advised that it would not have been part of his normal job. In *Real Estate Council of Alberta v. Moser*, 2019 ABQB 106 **[*Moser*]**, the court confirmed that the objection of "asked and answered" is a valid objection and that repetitive and abusive questions are not allowed (paras. 6-7)
Page 96, line 1	What was the purpose of the February 6 meeting?	Privilege	Counsel was entitled to object to this question on the grounds that it concerns privileged communications with legal counsel. The evidence on the record is that the February 6, 2025 meeting was with Compeer legal counsel following the discovery of the kiting. Permitting the question to be answered could have disclosed legal advice. *Moser*, *supra* at paras. 19-21
Page 96, line 11	Were any notes taken during the February 6 meeting?	Privilege	Pursuant to Rule 5.25(2)(a), Counsel was entitled to object to this question on the grounds that it concerns privileged information. Further, even if Mr. Rue had answered the question, as the document is shielded the answer is not relevant and material. *Dow Chemical Canada ULC v Nova Chemicals Corporation,* 2014 ABCA 244 [***Dow***] at paras. 17-21.

Examination of Mr. Grosland

Transcript Page and Line No.	Question	Objection	Justification
Page 18, line 3	Were you informed of the reason for your involvement [in the Sunterra matter]?	Privilege	Pursuant to Rule 5.25(2)(a), Counsel was entitled to object to this question on the grounds that it concerns privileged information. Mr. Grosland's evidence is that when he was involved, he was advised that the matter was highly confidential and he was to limit his discussions to two team members and legal counsel (Page 12, line 20 – Page 13, line 3). In any event, the answer is not relevant and material to these proceedings. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21.
Page 26, line 1	What was your conversation [on February 12, 2025] with Drew Parrish, your initial conversation?	Privilege	Pursuant to Rule 5.25(2)(a), Counsel was entitled to object to this question on the grounds that it concerns a privileged conversation with in-house counsel for Compeer. In any event, the answer would not be relevant and material to these proceedings *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21.
Page 26, line 4	Did [Drew Parrish] advise you as to the purpose of why you were to discuss the matter with him?	Privilege	Pursuant to Rule 5.25(2)(a), Counsel was entitled to object to this question on the grounds that it concerns privileged communications. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21.
Page 26, line 12	Had you formulated any ideas in your own mind with respect to why	Privilege	Pursuant to Rule 5.25(2)(a), Counsel was entitled to object to this question on the grounds

	[Drew Parrish] wanted to speak with you [on February 12, 2025], prior to speaking with Drew?		that it concerns privileged communications. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21. In any event, his opinion as to what his discussion with counsel was to be about is irrelevant and inadmissible. [See e.g., *PetroFrontier Corp v Macquarie Capital Markets Canada Ltd*, 2021 ABQB 54]
Page 27, line 19	What were your previous dealings with[Drew Parrish]?	Privilege	Pursuant to Rule 5.25(2)(a), Counsel was entitled to object to this question on the grounds that it may disclose privileged information. Further it was not relevant and material. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21.
Page 28, line 5	On February 12, prior to speaking with [Drew Parrish] had you come to any determinations yourself with respect to whether this matter was going to litigation	Privilege	Pursuant to Rule 5.25(2)(a), Counsel was entitled to object to this question on the grounds that it concerns privileged information. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21. Moreover, questions about a witness's understanding is not relevant or material to what the actual meeting was about or whether the discussion with counsel was privileged [See e.g., *PetroFrontier Corp v Macquarie Capital Markets Canada Ltd*, 2021 ABQB 54]

Examination of Mr. Moore			
Transcript Page and Line	**Question**	**Objection**	**Justification**
Page 32, line 7	Yeah. And you were -- and at the time, that	Privilege	Counsel was entitled to object to this question on the grounds

	time being in February of 2025, you were conducting -- and you being Compeer -- was conducting an internal investigation into whether there was cheque kiting, correct?		that it concerns privileged information. It is clear on the record that legal counsel was involved by February 6, 2025 and that the investigation included legal counsel. Courts have held that the provision of legal advise need only to be one of the purposes of the investigation. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21; *Prosser v Industrial Alliance Insurance*, 2024 ABKB 87 [*Prosser*] at paras. 22-32.
Page 33, line 11	One of the primary purposes of the investigation was to investigate whether, in fact, cheque kiting had occurred, correct?	Privilege	Counsel was entitled to object to this question on the grounds that it concerns privileged information. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21; *Prosser, supra* at paras. 22-32.
Page 34, line 2	To your knowledge, what triggered -- or what event triggered the investigation?	Privilege	Counsel was entitled to object to this question on the grounds that it concerns privileged information. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21; *Prosser, supra* at paras. 22-32.
Page 42, line 11	During your discussions with the Farm Credit Administration relating to the Sunterra matter, has the Farm Credit Administration made Compeer aware of any potential regulatory breaches with respect to Compeer's conduct?	Statutory Privilege	The communications the Defendants seek are communications between Compeer and federal agencies concerning Compeer's regulated banking activities. These are protected from disclosure under the bank examiner's privilege. *TD Bank, N.A. v Lloyd's Underwriters*, 2016 ONSC 4188; *The Code of Federal Regulations*, § 602.24

			Discussions between Compeer and its regulator are not relevant and material. *Dow,* supra at paras. 17-21.

Mr. Wagner			
Transcript Page and Line	**Question**	**Objection**	**Justification**
Page 23, line 23	Have you had any interactions whatsoever with respect to the Farm Credit Administration regarding any matter whatsoever relating to Sunterra?	Statutory Privilege	The communications the Defendants seek are communications between Compeer and federal agencies concerning Compeer's regulated banking activities. These are protected from disclosure under the bank examiner's privilege. See, e.g., *TD Bank, N.A. v Lloyd's Underwriters*, 2016 ONSC 4188; *The Code of Federal Regulations*, § 602.24 Discussions between Compeer and its regulator are not relevant and material. Counsel for Sunterra acknowledged that the "nature of these communications arise independently and unrelated to anything in this litigation." (page 26, line 3). *Dow,* supra at paras. 17-21.
Page 25, line 11	When you say "required paperwork," what do you mean?	Privilege	Counsel was entitled to object to this question on the grounds that it concerns privileged information related to protected communications. *Moser*, supra at paras. 19-21; *Dow,* supra at paras. 17-21.

Page 25, line 18	What was the purpose of the communication with the FCA?	Privilege	Pursuant to Rule 5.25(2)(a), Counsel was entitled to object to this question on the grounds that it concerns privileged information. Counsel for Sunterra acknowledged that the "nature of these communications arise independently and unrelated to anything in this litigation." (page 26, line 3). *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21. These are also protected from disclosure under the bank examiner's privilege. See, e.g., *TD Bank, N.A. v Lloyd's Underwriters*, 2016 ONSC 4188; *The Code of Federal Regulations*, § 602.24
Page 25, line 23	I'm going to suggest to you that Compeer has regulatory compliance obligations with the FCA, correct?	Relevance and materiality/Improper	Calls for a legal conclusion. The Defendants have not provided justification on how an answer to this "could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings; or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings". Counsel for Sunterra acknowledged that the "nature of these communications arise independently and unrelated to anything in this litigation." (page 26, line 3). *Dow, supra* at paras. 17-21.

Page 28, line 6	Are you aware of any underlying facts which would support a claim from Compeer as against NBC?	Relevance and materiality	The Defendants have not provided justification on how an answer to this "could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings; or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings" which do not relate to NBC. *Dow, supra* at paras. 17-21.
Page 19, line 24	Do you recall that Compeer asked the Court to appoint a receiver who had little to no experience acting as a receiver?	Improper question	The Defendants have not provided justification on how an answer to this "could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings; or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings". The question seeks to collaterally attack a decision made by the US Court. Further the question was based on an assumption which had not been established. *Dow, supra* at paras. 17-21.

Page 31, line 11	To your knowledge, what obligations exist between lending institutions with respect to advising of material risks to other lending institutions?	Relevance and materiality; asking for a legal conclusion	Questions about conclusions of law are not proper questions and are irrelevant because that is the domain of legal argument, judicial interpretation and determination. *PetroFrontier Corp v Macquarie Capital Markets Canada Ltd*, 2021 ABQB 54
Page 32, line 24	What have you prepared for the Bord of Directors [of Compeer] about Sunterra?	Privilege	Counsel was entitled to object to this question on the grounds that it concerns privileged information. It is also not relevant and material. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21.
Page 34, line 8	Who prepared that written material [Provided to the compeer board of directors]?	Privilege	Counsel was entitled to object to this question on the grounds that it concerns privileged information. It is also not relevant and material. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21.
Page 34, line 14	Why was it prepared?	Privilege	Counsel was entitled to object to this question on the grounds that it concerns privileged information. It is also not relevant and material. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21.
Page 34, line 20	What was prepared?	Privilege	Counsel was entitled to object to this question on the grounds that it concerns privileged information. It is also not relevant and material. *Moser*, *supra* at paras. 19-21; *Dow, supra* at paras. 17-21.

UNDERTAKINGS

Mr. Rue			
Transcript Page and Line No.	**Undertaking Requested**	**Answer to Undertaking**	**Justification**
Page 22, line 8	To speak with Ms. Jessica Ziegler and ask her what steps she took with respect to performing due diligence regarding the October 2024 renewals and advise of same	Refused	The Defendants had an opportunity to choose who to examine and chose not to examine Ms. Ziegler. Moreover, there is no obligation on a party to inform himself from those people over whom he has no control. Further the question is improper as any response provided would be hearsay and inadmissible. *Moser*, *supra* at paras. 8-10; *Proprietary Industries Inc. v Workum* [***Workum***], 2005 ABQB 610 at paras. 21-22; *Demb v Taylor*, 2017 ABQB 257 [***Demb***] at paras. 28-30.
Page 26, line 21	To ask Ms. Ziegler if, as part of the due diligence review, whether there was a specific due diligence review regarding fraud or potential fraud issues with the US Sunterra customers at the time of said diligence	Refused	The Defendants had an opportunity to choose who to examine, and chose not to examine Ms. Ziegler. Moreover, there is no obligation on a party to inform himself from those people over whom he has no control and any response from Ms. Ziegler would be inadmissible as hearsay. *Moser*, *supra* at paras. 8-10; *Workum*, *supra* at paras. 21-22; *Demb, supra* at paras. 28-30.

Page 45, line 2	Further to the previous undertaking, once Mr. Rue identifies who at the fraud department had contacted him with respect to that issue, to request of that person to provide all of their emails and internal written notes with respect to that issue	Refused	There is no obligation on a party to inform himself from those people over whom he has no control or to obtain records from them. *Moser*, *supra* at paras. 8-10; *Workum*, *supra* at paras. 21-22; *Demb, supra* at paras. 28-30.
Page 66, line 16	To make inquiries of Lisa Johnsrud with respect to her communications with CSR, and to the extent that she has written correspondence, to produce same	Refused	The Defendants had an opportunity to choose who to examine, and chose not to examine Ms. Johnsrud. Moreover, there is no obligation on a party to inform himself from those people over whom he has no control. *Moser*, *supra* at paras. 8-10; *Workum*, *supra* at paras. 21-22; *Demb, supra* at paras. 28-30.
Page 86, line 20	Having reference to paragraph 56 of the Transcript of Mr. Rue, and the $80 million of cheques, to undertake to ask Doug how that was brought to his attention and to produce any response	Refused	The Defendants had an opportunity to choose who to examine, and chose not to examine Mr. Kridner. Moreover, there is no obligation on a party to inform himself from those people over whom he has no control. *Moser*, *supra* at paras. 8-10; *Workum*, *supra* at paras. 21-22; *Demb, supra* at paras. 28-30.
Page 87, line 9	To inquire as to whether Doug Kridner has any written correspondence or any written notes whatsoever with respect to his investigation leading to the discovery of the $80 million in cheques	Refused	The Defendants had an opportunity to choose who to examine, and chose not to examine Mr. Kridner. Moreover, there is no obligation on a party to inform himself from those people over whom he has no control.

			Moser, *supra* at paras. 8-10; *Workum*, *supra* at paras. 21-22; *Demb, supra* at paras. 28-30.

Mr. Grosland			
Transcript Page and Line No.	Undertaking Requested	**Answer to Undertaking**	**Justification**
Page 42, line 22	To review Mr. Grosland's records and to provide any notes or any emails that were obtained in the course of his investigation between February 10th, 2025, and June 23	Refused	Contents of Mr. Grosland's investigation are protected by privilege. In any event, they are not relevant and material. The fraud has been admitted and the investigation is not relevant and material to the summary judgment application. *Talisman Energy Inc v Flo-Dynamics Systems Inc*, 2015 ABQB 561

Mr. Moore			
Transcript Page and Line No.	**Undertaking Requested**	**Answer to Undertaking**	**Justification**
Page 11, line 11	Make reasonable efforts to produce email from February 2025, sent to Compeer employees including Doug Kridner, with respect to Compeer's decision to honour third company cheques on the Sunterra accounts	Refused	Mr. Moore is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examinations of Mr. Moore.
Page 13, line 14	Make reasonable efforts to produce all written communications to which Mr. Moore was a part that concerned the Sunterra matter after February 2025, subject to claims of privilege.	Refused	Mr. Moore is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any

			undertakings is prior to the examinations of Mr. Moore.
Page 15, line 25	**Produce underwriting narratives created for the Sunterra transactions**	**Refused**	**Mr. Moore is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examinations of Mr. Moore.**
Page 17, line 15	Produce all notes written by Mr. Moore with respect to the Sunterra matter that were not prepared in relation to advice from legal counsel.	Refused	Mr. Moore is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examinations of Mr. Moore.
Page 29, line 15	Inquire and advise if there was a credit committee for Sunterra on or around March 13, 2025	Refused	Mr. Moore is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examinations of Mr. Moore.
Page 37, line 17	Advise when Compeer first discovered	Refused	Mr. Moore is not a party to these proceedings. There is no

	suspicious activity relating to Sunterra		entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examinations of Mr. Moore.

Mr. Wagner			
Transcript Page and Line No.	**Undertaking Requested**	**Answer to Undertaking**	**Justification**
Page 8, line 4	Produce all communications exchanged with Mr. Wagner that relate to the Sunterra matter following February 7, 2025, subject privilege, and relevance and materiality.	Refused	Mr. Wagner is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examination of Mr. Wagner.
Page 12, line 7	Produce copies of historical credit narrative received by Mr. Wagner relating to the Sunterra matter	Refused	Mr. Wagner is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examination of Mr. Wagner.
Page 24, line 25	Produce required paperwork filed with the Farm Credit Administration insofar as it pertains to Sunterra	Refused	Mr. Wagner is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*,

			2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examination of Mr. Wagner.
Page 27, line 25	Make inquiries and advise as to whether Compeer has filed an action against the National Bank of Canada relating to the Sunterra matter.	Refused	Mr. Wagner is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examination of Mr. Wagner.
Page 35, line 1	Produce any materials prepared for the Board of Directors of Compeer with respect to the Sunterra matter	Refused	Mr. Wagner is not a party to these proceedings. There is no entitlement to undertakings at examinations conducted pursuant to Rule 6.8 [*Great North Equipment Inc v Penney*, 2024 ABKB 391]. Further, undertakings are not provided for under the Consent Order as the deadline for providing any undertakings is prior to the examination of Mr. Wagner.

VII. TABLE OF AUTHORITIES

Tab	Jurisprudence
1.	*National Bank of Canada v Sunterra Food Corporation*, 2025 ABKB 606
2.	*Great North Equipment Inc v Penney*, 2024 ABKB 391
3.	*Hasibullah v Potter*, 2025 ABCA 179
4.	*Rainville v Pontin*, 2013 ABQB 256
5.	*Honourable Patrick Burns Estate Memorial Trust v P Burns Resources Limited*, 2015 ABQB 459
6.	*Franco v Hackett*, 2000 ABQB 241
7.	*International Longshore & Warehouse Union Local 502 v. Ford,* 2014 BCSC 65
8.	*Wilson v. Bobbie,* 2006 ABQB 22
9.	*Real Estate Council of Alberta v Moser*, 2019 ABQB 106
10.	*Talisman Energy Inc v Flo-Dynamics Systems Inc,* 2015 ABQB 561
11.	*TD Bank, N.A. v Lloyd's Underwriters*, 2016 ONSC 4188
12.	United States, Office of the Federal Register, Electronic Code of Federal Regulations, 12 CFR § 602 (2025)
13.	*Edmonton (Police Service) v Szybunka*, 2019 ABQB 854
14.	*Kostic v Scott Venturo Rudakoff LLP*, 2022 ABQB 188

TAB 1

Court of King's Bench of Alberta

Citation: National Bank of Canada v Sunterra Food Corporation, 2025 ABKB 606

Date: 20251017
Docket: 2501 06120
Registry: 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 Farms Enterprises Ltd., and Sunterra Enterprises Inc.

Between:

National Bank of Canada

Applicant/Cross-Respondent

- and -

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

Respondents/Cross-Applicants

Compeer Financial, PCA

Respondent

Endorsement
of the
Honourable Justice Michael J. Lema

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[12] Third, the scheduling order does not contemplate an objection to a witness selection or a process (e.g. a court application) for resolving the dispute over a selected witness. As distinct from clause 15, which provides a dispute-resolution mechanism for objected-to questions and for disagreements over undertakings.

[13] Given what I infer was painstaking attention to mapping out the steps to the December hearings, finding that the parties intended an independent scrutiny of whether Rule 5.17 was satisfied, implicitly involving a court application to resolve disputes, would amount to rewriting the agreement.

[14] Fourth, the order's timeline confirms that the selection governs e.g. with affidavits due from selected persons (i.e. if they choose to provide one) within one week of being selected i.e. with no realistic time built in for a court application to settle a dispute.

[15] Fifth, the street runs both ways, at least on the NBC front. Per clauses 11 and 12, NBC has, and apparently exercised, the same selection power for Sunterra witnesses, apparently with no objection from them that an independent Rule 5.17 analysis was required i.e. to the extent any reasonable debate on that issue may have existed.

[16] Overall, I find that, by agreeing to the scheduling order, NBC effectively abandoned its right to challenge the Sunterra witness selections. The order was intended to provide certainty (via identifying the steps allowed en route to the December hearings) and discipline (i.e. the sequencing and strict timing of those steps) in the lead-up to the December hearing

[17] The parties left some procedural rights on the side when agreeing to a streamlined and intended-to-be-straightforward process. Including setting aside inquiries into whether selected witnesses (i.e in the category at issue here) necessarily pass the Rule 5.17 test.

[18] Mr. Ferreira is a current NBC employee (in fact, the apex one). It may turn out that he does not have much, if any, relevant and material information to provide. Or any that is incremental i.e. beyond what other NBC witnesses have provided or will provide.

[19] And I acknowledge his undoubted heavy workload and responsibilities.

[20] However, NBC committed to the scheduling order, including what I have found are clear and unconditional selection rights for the Sunterra Parties. Which entitle them to examine him.

[21] I will leave the scheduling details to the parties, other than directing that Mr. Ferreira's examination be conducted remotely and at a time or times convenient to him. I am not setting a time limit on the examination. I anticipate that the Sunterra Parties' counsel will conduct the examination in an efficient and organized manner and that NBC's counsel will be equally engaged to make it so.

B. Compeer's president and chief risk officer

[22] Concerning the equivalent application by Sunterra on the Compeer side, I grant that application too, as it is even clearer per that scheduling order that the only preconditions to the two Compeer executives (Mr. Jase Wagner – Chief Executive Officer, and Mr. Bill Moore – Chief Risk Officer) being examined are that they are Compeer employees and that Sunterra has selected them for examination.

[23] The reasons above are generally applicable here and are even more compelling with no reference to Rule 5.17 in the scheduling order, instead one to Rule 6.8, which in the present

context (i.e. the way in which that rule is folded into this scheduling order) does not require any independent assessment of the proposed witnesses' likely relevant and material evidence (if any).

[24] Given the overall structure of the procedural order, I find that that reference to Rule 6.8 is purely to invoke its procedural mechanics (including associated Rules 6.16 to 6.20) i.e. not to subject a given selection to independent "likelihood of relevant and material information" scrutiny.

[25] As with the NBC order, if the parties had intended that there be such scrutiny, the order would have been crafted differently.

[26] Accordingly, and here too recognizing the undoubted heavy workload and responsibilities for both Compeer executives, Compeer signed on to this protocol, presumably (as I found with NBC) deciding that its advantages outweighed its disadvantages i.e. was overall the best possible process that could be negotiated.

[27] And, as with NBC, Compeer must live up to its commitment.

[28] I direct that these examinations be conducted remotely, with no timing restriction i.e. other than as reflected in the scheduling order. I will leave the other scheduling details to the parties, making the same observations as above on the anticipated organized and efficient conduct of them.

III. NBC's Application

[29] Concerning NBC's application for an order compelling examinations of KPMG personnel, I grant that application, accepting and adopting the arguments outlined by NBC in its separate brief on this front and rejecting Sunterra's arguments that no illumination of relevant and material matters is likely to come from such examinations, emphasizing here KPMG's central role as the auditor of the Sunterra Parties up to at least 2023.

IV. Closing note

[30] I invite Sunterra's counsel to prepare and submit an order on the first and second aspects above and NBC's counsel to do the same on the third aspect.

[31] To the extent any party seeks costs of these applications, any such requests can be raised and addressed at the December hearings, by which time the approved examinations will have been conducted and their ultimate utility can be gauged.

Heard on October 15, 2025.
Dated at Calgary, Alberta on October 17, 2025.

TAB 2

Court of King's Bench of Alberta

Citation: Great North Equipment Inc v Penney, 2024 ABKB 391

Date: 20240627
Docket: 2301 08144
Registry: Calgary

Between:

Great North Equipment Inc. and 1185641 BC Ltd.

Applicants/Plaintiffs

- and -

Bradley Penney, Neil Macdonald, Dustin Monilaws, Paloma Pressure Control LLC, Paloma PC Holdings LLC, Indeed Oilfield Supply LLC, and Indeed Alberta Corp.

Respondents/Defendants

Scott Luscombe, Nthan Underwood, and Leah Carlson

Rule 6.8 Respondents

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

I. Introduction

[1] The Applicants examined three individuals who are not parties to this action pursuant to Rule 6.8 to obtain evidence to support their application to extend an interlocutory injunction preventing the Respondents from soliciting their employees and clients. During the examinations, the Applicants requested that the non-party witnesses give undertakings to produce records and information. The undertakings were taken under advisement and subsequently refused.

(a) the deponent has referred to information or documents in the affidavit, or could only have made the assertions contained in the affidavit after having reviewed the information or documents being sought, or

(b) the undertakings relate to an important issue in the application, and the provision of such information:

(i) would not be overly onerous, and

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

[14] Alberta's departure from a strict rule against undertakings in cross-examinations is prudent and consistent with the foundational rules of the *Rules of Court* which prioritize proportionality and efficiency so that matters may be "fairly and justly resolved in ... a timely and cost-effective way": Rule 1.2. Justice Graesser in ***Rozak (Eatate)***, 2011 ABQB 239 at para 40 explained that requiring a deponent to answer undertakings as contemplated by Master Prowse levelled the playing field because a deponent is often able to supplement their evidence with a further affidavit prior to the application being heard. The Alberta approach to undertakings arising from cross-examinations on affidavits is pragmatic, not permissive.

IV. Rule 6.8 and Undertakings

[15] The Applicants submit that the pragmatic approach to Rule 6.7 should be adopted for Rule 6.8. They submit that the purpose of Rules 6.7 and 6.8 is the same, to obtain evidence to assist the Court in deciding applications. They cite the fact that witnesses being examined pursuant to Rule 6.8 may be required to bring records to the questioning: Rule 6.16. The Applicants contend that requiring witnesses examined pursuant to Rule 6.8 to answer undertakings would "incentivize" them "to meet their preparation obligations at first instance." They further raise the spectre of inefficiency of what they say the logical alternative is, serving a new notice to attend that requires the witnesses to re-attend for examination with the missing records.

[16] There is a fundamental difference between witnesses examined pursuant to Rule 6.7 and Rule 6.8. Witnesses who have sworn an affidavit have consented to taking an active role in the litigation; they are either parties or have agreed to assist a party. It is reasonable to ask such witnesses to answer undertakings in the circumstances stated by Master Prowse in ***Dow Chemical***. Indeed, their choice to provide an affidavit implies their consent to provide information and records referred to in their affidavit and to provide other information that would significantly assist the Court so long as it is not overly onerous to do so.

[17] Witnesses who are examined pursuant to Rule 6.8 are strangers to the litigation in the sense that they are not parties. Witnesses examined pursuant to Rule 6.8, as in the present case, have a connection to the events in dispute but, for whatever reason, have not been joined to the litigation as parties. Such witnesses have not consented to taking an active role in the litigation and it is reasonable that they be treated differently than witness who have provided an affidavit. A Rule 6.8 examination should be no more intrusive than necessary – this is a theme that runs through the principles governing Rule 6.8 examinations identified by Feth J, as he then was, in ***Gow Estate (Re)***, 2021 ABQB 305 at para 15.

[18] The Ontario analogue to Rule 6.8 is Rule 39.03 of the *Rules of Civil Procedure*, RRO 1990, Reg 194. Though Ontario discovery and applications evidence practice is different and generally more restrictive than in Alberta, it is still worth noting that undertakings are not given on examinations pursuant to Rule 39.03. Associate Justice Todd Robinson observed in ***Xie v. Gross***, 2022 ONSC 5359 at para 35:

> Generally, the scope of a witness' examination under rule 39.03 is limited to information that is within their personal knowledge. Witnesses examined under rule 39.03 are not required to take steps to inform themselves of matters beyond their personal knowledge or make inquiries of others, and they are not obliged to give undertakings: *Magnotta Winery Corporation v. Ontario (The Alcohol and Gaming Commission)*, 2020 ONSC 561 at paras. 52 and 57; *Arnold v. Arnold*, 2021 ONSC 7983 at para. 6.

[19] Maintaining a rule against undertakings in the context of Rule 6.8 balances the interests of litigants in obtaining evidence for their application and the interests of strangers to litigation to minimize their involvement. The rule is also consistent with the principle that the presentation of oral evidence obtained in advance of an application to the Court follows the model for presentation of *viva voce* evidence in Court on an application or trial.

[20] The risk inherent in a rule against requiring undertakings in Rule 6.8 examinations is that witnesses will be deliberately ill-informed and uncooperative. This risk can be addressed through other means. For example, the Court has the power to compel a witness to re-attend for questioning pursuant to Rule 6.38. And, in extreme cases, the contempt power may be used to compel compliance.

V. The Undertakings Requested

[21] An underlying issue with the records request and the undertakings for which answers are being sought in this application is that they more closely resemble the type of questions advanced in Part 5 questioning than the type of questions asked in questioning in advance of an application. The request to bring records in the Notices of Application issued to the non-party witnesses in the present case was broad and the disputed undertaking requests are more intrusive and onerous than typically seen on a cross-examination on affidavit.

[22] The Applicants' approach is understandable. The application for which the questioning is being done is an interlocutory injunction and the first part of the tripartite injunction test requires the court to assess, on a preliminary basis, the strength of the plaintiff's case. The scope of questioning is, therefore, co-extensive with Part 5 questioning – it goes to all aspects of the action. The Applicants are being thorough and diligent in seeking as much information as possible to support their position.

[23] Just because the Applicants' approach is rational in the circumstances does not mean that the Court should permit Part 5 questioning. An interlocutory injunction is an interim remedy pending trial. If full Part 5 questioning is conducted before every interlocutory injunction application, then we might as well just skip straight to the trial. The Court's consideration of the strength of a plaintiff's case in an interlocutory injunction application is done on a preliminary basis because it is understood that a more robust evidential record will be available at trial. Parties must often make their best case to the Court on an imperfect evidential record. Again, it

TAB 3

In the Court of Appeal of Alberta

Citation: Hasibullah v Potter, 2025 ABCA 179

Date: 20250522
Docket: 2501-0081AC
Registry: Calgary

Between:

Ghulam Hasibullah

Appellant

- and -

Dylan Potter

Respondent

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Jolaine Antonio
The Honourable Justice Joshua B. Hawkes

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice A.L. Froese
Dated the 18th day of February, 2025
Filed on the 5th day of March, 2025
(Docket: 1701-00949)

Memorandum of Judgment

The Court:

[1] The issue in this appeal is the proper scope, in a personal injury claim, of questioning for discovery and record production relating primarily to the appellant's medical history.

Facts

[2] The parties agree they were in a motor vehicle accident on February 26, 2016. The appellant sued the respondent for damages allegedly suffered, pleading that the respondent negligently caused the accident. The statement of defence filed by the respondent pleads that it was the appellant who caused the accident.

[3] During questioning and record production it emerged that the appellant had been involved in a number of other motor vehicle accidents. Two of them were before the accident which is the subject of these proceedings: one in 2009 and one on August 10, 2012. It appears from the record that the appellant fell off a ladder on October 20, 2016, and was involved in at least three later motor vehicle accidents: August 7, 2017, July 30, 2018, and February 23, 2023.

[4] The appellant served an affidavit of records which included some medical records. He also acknowledged a responsibility to provide updated affidavits of records as new relevant and material records came into existence prior to trial. At questioning he objected to answering questions about other accidents and his present financial circumstances.

[5] The chambers judge directed that some of the questions, and related undertakings, be answered as they were relevant and material to the issues pleaded. The questions still in issue are outlined below. The chambers judge concluded that some other questions need not be answered. There is no cross-appeal on that part of the order.

[6] The chambers judge confirmed that relevant and material records must be produced, and rejected the proposition that there was a limit on production of records created more than three years before the accident. She declined to deal with any issue of settlement privilege and directed that all questions that raised the issue of privilege be decided at a future application.

The Scope of Questioning

[7] The parties agree that a party adverse in interest must produce records and answer all relevant and material questions, and that the scope of disclosure is outlined in the *Rules of Court*:

> 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. . . .
>
> 5.5(1) Every party must serve an affidavit of records on each of the other parties in accordance with the time period specified in subrule (2), (3) or (4). . . .
>
> 5.6(1) An affidavit of records must
>
> > (a) be in Form 26, and
> >
> > (b) disclose all records that
> >
> > (i) are relevant and material to the issues in the action, and
> >
> > (ii) are or have been under the party's control. . . .
>
> 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; . . .

The rules on pre-trial disclosure are wider than what might be admissible at trial, but they are not so wide as the test of "touching on the matter" found in the earlier *Rules*.

[8] The *Rules* include an overall discretion in the court to prevent improper or grossly disproportionate questioning:

> 5.3(1) The Court may modify or waive any right or power under a rule in this Part or make any order warranted in the circumstances if
>
> > (a) a person acts or threatens to act in a manner that is vexatious, evasive, abusive, oppressive, improper or tediously lengthy, or
> >
> > (b) the expense, delay, danger or difficulty in complying with a rule would be grossly disproportionate to the likely benefit. . . .

This discretion is in addition to the base requirement that the litigant only has to produce relevant and material records, not every record "touching the matter".

[9] A plaintiff in a personal injury action cannot refuse to answer relevant and material questions because the topic is personal or confidential. A personal injury plaintiff who seeks damages puts his or her health in issue, and cannot decline to provide the defendant with answers to relevant and material questions about their health and the damages they claim: ***Cook v Ip*** (1985), 52 OR (2d) 289 at p. 292, 1985 CanLII 163; ***Hay v University of Alberta Hospital*** (1990), 73 Alta LR (2d) 391 at para. 25, 105 AR 276, 1990 CanLII 2619; ***Burton v Brice (cob FB Services)***, 2006 ABQB 523 at para. 8, 47 CPC (6th) 173. Section 4(5)(b) of the *Personal Information Protection Act*, SA 2003, c P-6.5, exempts from its operation "information available by law to a party to a legal proceeding", so the statute does not enable a party to refuse to answer relevant and material questions: ***Royal Bank of Canada v Trang***, 2016 SCC 50 at para. 25, [2016] 2 SCR 412.

[10] A ruling by a chambers judge on the proper scope of questioning is entitled to deference on appeal and will not be reversed unless it is unreasonable, based on a misapprehension of the facts, or tainted by an error of principle: ***Dow Chemical Canada ULC v Nova Chemicals Corp***, 2014 ABCA 244 at para. 11, 12 Alta LR (6th) 162.

The Disputed Questions

[11] In general terms, the plaintiff in a personal injury action must prove (a) negligence of the defendant, (b) damage suffered by the plaintiff, and (c) that the negligence of the defendant is what caused the claimed damage. The primary issue here relates to the issue of "causation". Most of the disputed questions and records relate to the appellant's involvement in other motor vehicle accidents, and whether those accidents might be the cause of the injuries he now experiences. It follows that questions which are relevant and material to the source of the appellant's injuries must be answered.

[12] The appellant objects that relevance is to be determined primarily by the pleadings: ***Dow Chemical*** at para. 17; ***Weatherill (Estate) v Weatherill***, 2003 ABQB 69 at paras. 16-7, 11 Alta LR (4th) 183, 337 AR 180. The statement of defence filed in this action does not contain any specific pleading denying causation or alleging that the appellant's injuries relate to other accidents. While the statement of defence could have been more specific, it does contain a general denial covering "each and every allegation contained in the Statement of Claim". The requirement that the appellant prove causation has not taken him by surprise.

[13] Materiality relates to whether the information can help, directly or indirectly, prove a fact in issue: ***Dow Chemical*** at para. 17. This involves a balancing of considerations. The questioner need only outline a plausible line of argument and is not required to prove that the information requested will turn out to be material. On the other hand merely speculative questioning, without

> b. UNDERTAKING 12 - To provide all records in Ghulam Hasibullah's power to obtain or in his custody with respect to any injuries and the facts or circumstances surrounding the 2012 motor vehicle accident.

First of all, these requested undertakings are overbroad. The appellant is only required to produce records that are "relevant and material". There is no obligation on him to produce records just because they are in his "power to obtain or in his custody".

[21] The appellant submits that in personal injury actions there should be a fixed limit on production of records prior to the date of the accident, and suggests that a window of three years prior to the accident is sufficient. Obviously the more distant the records or questions are from the accident and the trial, the less likely it is that the information will be material. For example, it will likely be relevant and material if symptoms from the earlier accidents were still manifesting themselves on the date of this accident. However, there can be no arbitrary temporal cut off to questioning or record production; if records are relevant and material they must be produced. The age of the records may well be a relevant consideration, but there is no automatic cut off.

[22] The appellant has recognized an obligation to produce copies of his medical records subsequent to the accident of February 26, 2016. A plaintiff may also have to produce medical records and answer questions for a period of time prior to the accident in issue, but only to the extent they are relevant and material to any issue in the litigation. The appellant concedes that records for three years prior to the accident of February 26, 2016 are producible, but the respondent argues he has produced no records prior to the date of the accident. The order under appeal contains no ruling on this issue, and accordingly it is not an issue in this appeal.

[23] As noted, in this case it was up to the appellant to determine which of his medical records prior to February 26, 2016 (including those relating to the 2009 or 2012 accidents) are relevant and material in the present action. If the respondent wants additional records, he must demonstrate that the request is more than just a fishing expedition, and there is some reason why earlier records may be relevant and material. The justification for additional records may emerge from questioning, the records produced, expert reports, or other sources. Just because the appellant acknowledges being involved in other accidents does not justify a blanket request for all his prior medical records.

[24] There is also no obligation on the appellant to produce all other records relating to the "facts or circumstances" of the other accidents. He is only required to produce records that are relevant and material to the present claim. The two disputed undertakings should accordingly be amended as follows:

TAB 4

Court of Queen's Bench of Alberta

Citation: Rainville v. Pontin, 2013 ABQB 256

Date: 20130429
Docket: 0803 14738
Registry: Edmonton

Between:

Robert Rainville and Laura Rainville

Plaintiffs

- and -

Thomas Pontin and Johanna Pontin

Defendants

And Between:

**Thomas Pontin, Johanna Pontin,
Timothy Pontin and Jackie Pontin**

Plaintiffs by Counterclaim

- and -

**Robert Rainville, Laura Rainville,
James Henning and Margaret Henning**

Defendants by Counterclaim

**Memorandum of Decision
of the
Honourable Mr. Justice R.P. Marceau**

---

1. Introduction

[1] In earlier proceedings, as case manager, I ordered the sale of a parcel of land, referred to as the "Fanta Property", owned:

[14] Document 3-18 is an email from the Coggans to William Hogle about April 22, 2009, and a without prejudice response from William Hogle. Mr. Hogle at this point is acting for the Rainvilles. Document 3-19 is a letter from present counsel for the Pontins in this action to the County of Wetaskiwin concerning an application by the Rainvilles to seek court access across what I believe is the Coggan land, NW19-47-24-W4. Document 3-20 is a response by Laura Rainville addressed to the same County of Wetaskiwin official as Mr. Bilsland's letter. Johanna Pontin could not remember how these documents came into her possession and she refused to make inquiries to determine where she obtained the documents. It is fairly obvious that some of the documents were part of Thomas Pontin's file as well as on Len Zalapaski's file.

[15] Document 3-19 is part of Mr. Bilsland's file and Document 3-18 is part of Mr. Hogle's file. These documents are all relevant to the easement over the Coggan land and have to do with the dispute between the parties about access to the Fanta land. However, the onus is on the Rainvilles to show that how the manner in which Johanna Pontin came to have these documents in her possession or power will significantly help determine an issue between the parties. Mr. Hogle has failed to identify what issue will likely be determined by obtaining this information and therefore the refusal to comply with this undertaking is upheld.

Undertaking #24 - To advise where Documents 4-137 to 4-143 in Johanna Pontin's Affidavit of Records came from and what they relate to.

[16] In the transcript at page 124 to 126, Johanna Pontin testified she had not seen these documents before. Then she identified 4-142 and 4-143 as relating to the purchase of a snow plow flag that the tenants of the Fanta land required. She testified she had purchased this flag herself.

[17] Document 4-138 is a record of a purchase at a Canadian Tire store in Leduc on 12/18/2010. A debit card was used and part of the numbers identified as 8294. Various pieces of hardware were purchased. Mr. Hogle has not identified the issue that might be determined if Johanna Pontin was able to say how this document came into her possession. Similarly, 4-139 is a record of a purchase on 2011/01/14 for $44.71 at the Leduc Co-op. Document 4-140 is a receipt for a purchase at Leduc Rona Home Centre for $22.92 on 18/12/10. The goods are brackets and screws and a dowel. Document 4-141 records a purchase of goods that can only be described as miscellaneous hardware on 10/12/28 for $127.95 at IKEA, Edmonton. The card number ending with the numbers 8294 is used in each of the transactions recorded as Documents 4-138 through 4-141. My comments with respect to Document 4-138 apply equally to these four documents and the objection is upheld.

[18] Document 4-142 is a County of Wetaskiwin receipt for $40.00 for snow plow flags paid for by cash on 2011/01/14 and Document 4-143 is a receipt for $60.00 which includes $40.00 for snow plow flags on 2010/12/14. While Johanna Pontin testified she had purchased a snow plow flag for the tenants of the Fanta Property, it is not clear to which invoice she was referring. Mr. Hogle has not indicated how learning how these documents came into the possession of Johanna Pontin may determine an issue in this action. The objection to giving that undertaking his upheld.

TAB 5

Court of Queen's Bench of Alberta

Citation: Honourable Patrick Burns Estate Memorial Trust v P Burns Resources Limited, 2015 ABQB 459

Date: 20150716
Docket: 1201 07264
Registry: Calgary

Between:

Royal Trust Corporation of Canada in its capacity as the Trustee of the Honourable Patrick Burns Estate Memorial Trust

Plaintiff

- and -

P. Burns Resources Limited, P. Burns Coal Mines Limited, Patrick D. Burns, Lawrence T. Farrell, John L. Horan, Timothy E. McGee and Craig A. Sparrow

Defendants

Memorandum of Decision
of
A. R. Robertson, Q.C., Master in Chambers

Background

[1] This application is for directions as to what is "relevant and material" for the purposes of record production and answering undertakings. As well, the plaintiff is looking for affidavits of records from each of the defendants, but the main issue in dispute is the scope of relevance and materiality.

his control that are different than records within the control of other directors. They may, for example, have personal notes that are relevant and material. And each should be exposed to possible cross-examination on his own affidavit of records.

[23] However, that is not the dispute that brought parties to court. The defendants acknowledge that if they are required to deliver separate affidavits of records, they are more than willing to do so.

The Evidence in Support

[24] The defendants argue that the plaintiff must file an affidavit to seek the relief it seeks, and the only evidence before the Court is the defendants' affidavit in support of its summary judgment application and the transcript of the cross-examination on it. They argue that their own evidence should not be used for this application.

[25] Rule 13.25 addresses this point directly: it provides that any affidavit may be used on an application. If the affidavit may be used, then the transcript of a cross-examination on it may also be used. In *Franssen v. Thule Towing Systems LLC*, [2012] A.J. No. 1453, 2012 ABQB 657, 84 Alta. L.R. (5th) 316, Master Laycock mentioned that several Rules of Court require affidavit evidence, but he was making the point that without any evidentiary basis for doing so, in many cases the court will not make an order. He was not saying that the applicant must file an affidavit if the evidence is already properly before the court. That would be inconsistent with Rule 1.2(1)(b). The basic rule is no evidence, no order.

[26] In an examination under rule 5.2 to determine whether a question is "relevant and material", the starting point is to look at the pleadings: *Tirecraft Group Inc. (Receiver of) v. High Park Holdings ULC*, 2010 ABQB 653 at paragraph 11.

[27] It is not just some aspect of the pleadings in isolation, but all of the pleadings that the court must examine when deciding this issue: *Hepworth v. Canadian Equestrian Federation*, 277 A.R. 138 (C.A. 2000) at para. 7, as cited in *Stone Sapphire Ltd. v. Trans-Global Communications Group Inc.*, 2007 ABQB 238 at paragraph 63.

[28] But the inquiry does not end at the pleadings. Some evidence is required. The "Court must be cautious not to allow the applicant to go on a fishing expedition to find some evidence to support the allegations it is making": *Tirecraft* at para. 26, quoting *Franco v. Hackett*, 2000 ABQB 241 (M.C.). There must be some underlying factual foundation on which the allegation is based in the first place: *Tirecraft* at para. 26. To determine whether the information sought could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, we look at the evidentiary basis.

[29] Accordingly, in an enquiry as to whether a particular record must be produced, or a particular question must be answered, the court would normally expect to see some evidence. Normally the evidence in support of an application such as this involves correspondence between counsel that has been sent after counsel has reviewed the opponent's affidavit of records, asking for production of a certain body of records that relates to the dispute; or the transcript leading up to the request for information or the production of a record giving a context to the request; or an affidavit from the applicant explaining the background of the dispute, and why a particular record should be produced or a question answered.

TAB 6

Franco v. Hackett, 2000 ABQB 241

Date: 20000417
Action No. 9803 19068

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

BETWEEN:

TRACY FRANCO

Plaintiff

- and -

LUISITA HACKETT

Defendant

REASONS FOR DECISION
of M. FUNDUK, Master in Chambers

APPEARANCES:

Ms. K. Mah
Frieser Robinson
for the Plaintiff

W. A. Hanson
Fraser Milner
for the Defendant

[1] These are two applications, one by each party.

[2] The lawsuit is a motor vehicle negligence lawsuit.

Plaintiff's application

> prepare and produce a written report comparing the results of the tests ordered by the Respondent on each of the three occasions.
>
> The Respondent cannot be compelled to prepare and produce a document which does not exist. It does not appear that the Appellant disputes the Respondent's sworn statement that his Affidavit on Production lists the relevant documents in his possession.

[26] I would emphasize what this application is not about. It is not about a litigant having information stored in her computer or some other information storing system being asked to produce a hard copy of that information.

[27] This is all about whether the Plaintiff is required to ask a third party, over whom she has no control, to prepare a document from information stored in that third party's equipment, whatever kind of equipment the reporter used to record the examination for discovery.

[28] The answer is no.

[29] There is no "possession, custody or power" by the Plaintiff.

[30] The so - called private reporters are officers of the Court, appointed by the Attorney-General pursuant to Rule 724. Court officers are not subject to the control of any litigant.

[31] This part of the application is dismissed.

[32] My decision is confined to whether the Plaintiff can be ordered to "order" a transcript from the reporter. Whether the Defendant can get a transcript some other way, assuming that it is relevant and material, is a different issue and is not before me.

Two

[33] Between August 1991 and October 1995 the Plaintiff saw Dr. Boldt a number of times. Dr. Boldt is an obstetrician.

[34] I agree with Ms. Mah that the charts of Dr. Boldt are not relevant to this lawsuit. There are no gynaecological claims in this lawsuit. Mr. Hansen offers the usual submission that because the Plaintiff claims loss of income there might be something in Dr. Boldt's charts relevant to that. But the test is relevant and material. That now cuts out the old fishing expeditions. There is no fishing without first evidence that there are fish in the pond and a reasonable amount of fish. The Defendant has not satisfied me of that. Conjecture is not sufficient.

[35] This part of the application is dismissed.

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *International Longshore & Warehouse Union Local 502 v. Ford,* 2014 BCSC 65

Date: 20140116
Docket: S126733
Registry: Vancouver

Between:

International Longshore & Warehouse Union Local 502 and New Westminster Longshoremen's Holding Society

Plaintiffs

And

Robert Victor Eric Ford, Teressa Dee Ford also known as Teressa Dee Prentice, Connor Ford, Mitchell Ford, James Ford, Jane Doe #1 and Jane Doe #2

Defendants

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiffs:	H. Mickelson, Q.C. A. Dosanjh
Teressa Dee Ford appearing on own behalf and on behalf of: Mitchell Ford, James Ford and Connor Ford:	T. D. Ford
Counsel for Defendant, Robert Victor Eric Ford:	S. Pedlow
Place and Dates of Hearing:	Vancouver, B.C. June 25 - 27, August 13 - 16, 2013
Place and Date of Judgment:	Vancouver, B.C. January 16, 2014

forensic accountant whose opinions are clearly set out and persuasive. Although Ms. Blacklock's opinions have been heavily criticised in argument, no defence opinion was offered. I am persuaded on considering the whole of the application record that the issues are narrow and there is a reliable and objective body of evidence on which the facts can be found.

ANALYSIS

Is Mr. Ford liable for the misappropriation of the Union Local's funds?

[11] There can be no doubt Mr. Ford took a considerable amount of money from the Union Local, well beyond his own salary and expenses as secretary-treasurer. His defence, at least in part, is that he had authority to take it because the Union Local had long-standing practices which he followed and there was no wrongful taking on his part. The evidence does not support that contention. There was no practice that if known to the members of the Union Local could have led them to authorize Mr. Ford to appropriate for his own use sums of money which greatly exceeded his aggregate salary and benefits for the years 2006 through 2012. The only real issue in regard to Mr. Ford's conduct is the amount of the judgment that ought to be given against him, and even that is readily resolved on the evidence.

[12] Mr. Ford's six years of misappropriation of the Union Local's money was not accomplished by a clever and complex plan. He was in part enabled to perpetrate his dishonest scheme because of the lax accounting practices of the Union Local. That cannot excuse his conduct. A person who commits fraud on another person cannot blame the victim by telling him that he should have watched his money more carefully: *United Services Funds v. Richardson Greenshields of Canada Ltd*., [1988] 48 D.L.R. (4th) 98, B.C.J. No. 123.

[13] In part, Mr. Ford was able to take large sums of money because the Union Local paid its bills mainly by cheque which Mr. Ford could manipulate to his advantage, and it frequently dealt in cash. There was a long-standing practice throughout much of Mr. Ford's time as secretary-treasurer by which he would obtain cheques signed in blank by another signing officer, usually the president of the

TAB 8

Court of Queen's Bench of Alberta

Citation: Wilson v. Bobbie, 2006 ABQB 22

Date:20060111
Docket: 9603 24116
Registry: Edmonton

Between:

Frank John Wilson

Plaintiff

- and -

Jeffery John Bobbie

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice Frans F. Slatter

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[1] This is an application by the Defendant to open up a judgment given in default of appearance. The underlying issue is whether provocation can constitute contributory negligence in a tort action for assault, or whether provocation otherwise reduces damages.

Facts

[2] On November 5, 1995, the Defendant assaulted the Plaintiff in the parking lot of a bar. The Plaintiff suffered serious injuries, and was in a coma for approximately 26 days.

[3] On December 5, 1996, the Defendant was convicted of aggravated assault, and was sentenced to three years in prison.

[18] This case, of one assault leading to another, is not the only way this issue can arise. If the plaintiff breaks into the tortfeasor's house, and the tortfeasor beats him beyond what is reasonably necessary for defence of self or property, can the tortfeasor claim that the plaintiff has contributed to his own injuries? If a motorist changes lanes unsafely, so as to commit an offence under the *Traffic Safety Act*, R.S.A. 2000 c. T- 6, and at the next stop light the tortfeasor beats him in a fit of road rage, can the tortfeasor claim that the plaintiff has contributed to his own injuries? If a wife insults and enrages her husband, and he hits her, can he argue that she brought the beating on herself? If a husband finds his wife with another man, is he justified in beating his wife or her lover? Is the damage or loss "caused" by the precipitating conduct of the plaintiff? This raises issues of causation and policy.

[19] The *Contributory Negligence Act* was enacted to reverse the common law rule that a plaintiff who sued in negligence, but was himself contributorily negligent to even the slightest degree, could not recover anything. The common law did not apportion liability. While the *Act* was directed to this specific problem, the *Act* does not mention "negligence" except in the title, and uses the word "fault" instead. The law on the scope of the word "fault" is unclear. Interpreted literally, it could cover any legal or moral delict. It has been held to include breach of fiduciary duty (***Penner v. Yorkton Continental Securities Inc.*** (1996), 183 A.R. 5), breach of contract (***Finance America Realty Ltd. v. Speed & Speed*** (1979), 38 N.S.R. (2d) 374,12 C.C.L.T. 4 (App. Div.)), and intentional torts like trespass (***Bell Canada v. Cope (Sarnia) Ltd.*** (1979), 11 C.C.L.T. 170 aff'd (1980), 31 O.R. (2d) 571 (C.A.)).

[20] The Court of Appeal has however held that there can be no contributory negligence in deceit: ***Kelemen v. El-Homeira***, 1999 ABCA 315, 73 Alta. L.R. (3d) 399, 250 A.R. 67. It is no defence that the plaintiff foolishly believed the lies told by the defendant. Likewise in ***United Services Funds (Trustees) v. Richardson Greenshields of Canada Ltd.*** (1988), 22 B.C.L.R. (2d) 322 it was held that negligence by the plaintiff is not a defence to fraud. The Court rejected a wide definition of "fault":

> But I do not find anything in that chapter [of Glanville Williams, *Joint Torts and Contributory Negligence*] which supports the proposition that the English Act or any of the other Acts was intended to create a defence of want of care where none had existed before the statute.
>
> Therefore, in my view the matter should be approached by asking whether these defendants could have raised at law or in equity any defence the rationale of which is that a man who is the author of his own misfortune cannot put his loss upon the asserted tortfeasor for that is what "fault" means in the case of a person suffering loss.

The Court limited the meaning of "fault" strictly to the situations at law where a plaintiff would be precluded from recovering because of contributory negligence. The result, if not the reasoning, was approved in ***Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.***, [2002] 1 S.C.R.678, 2002 SCC 19. The fraud cases may however be seen as unique, because the essence

of fraud is to trick the plaintiff into doing something foolish, and to allow a defence of contributory negligence would be inconsistent with the tort itself. The fraud cases do however show the problems of apportioning liability in cases of intentional torts: the exercise always amounts to suggesting the victim of an intentional act is responsible for his or her own damage, even though that damage was the result intended by the defendant.

[21] In other contexts, it is no defence to an intentional tort that the plaintiff himself is a tortfeasor. If the plaintiff was injured by a spring gun, it was no defence that the plaintiff was a trespasser. An intentional injury could not be justified, even though at common law the owner of land owed a very low duty to trespassers: ***Herrington v. British Railways Board***, [1972] A.C. 877 at pp. 904-6, 919. At common law contributory negligence was not a defence to an intentional tort: ***Horkin v. North Melbourne Football Club Supporters Club***, [1983] 1 V.R. 153, at pp. 159-61, 164.

[22] Contribution has been ordered between tortfeasors under the *Tortfeasors Act*, R.S.A. 2000, c. T-5, in cases where one or more defendants were liable for intentional torts: ***S. (C.) (Next Friend of) v. Miller***, 358 A.R. 196, 2004 ABQB 137; ***Sitko v. Hartum***, 366 A.R. 75, 2004 ABQB 854, at para. 22. But these cases do not involve shifting blame for an intentional act to the party that suffered the damage, and do not engage the same concerns as using contributory negligence to shift fault to a plaintiff.

[23] In ***Gordon v. Levi***, [1993] E.W.J. 693 (C.A.) the Court considered whether provocation could constitute contributory negligence. The Court discussed the unreported decision in ***Barnes v. Nayer*** in which years of acrimony and provocation had finally resulted in the murder of one of the plaintiff's family members by the defendant. The defendant pleaded the maxims *ex turpi causa* and *volenti non fit injuria*. The Court in ***Gordon*** held at para. 51:

> At this point of his judgment [in ***Barnes v. Nayer***] May L.J. seems to envisage that provocation might in certain circumstances amount to fault contributory to the injury caused by the trespass to the person and that it was really a question of degree or a comparison between the conduct of the victim and that of the aggressor. I regret that I find this a step which I find impossible to take. The older authorities clearly exclude provocation as a defence unless it amounts to conduct qualifying under one or other of the maxims. Thus, according to existing authority as I understand the position, for conduct to amount to fault contributing to the injury sustained, it must have a direct physical connection with the trespass concerned ("contributing fault"). It is not sufficient if the provocation derives merely from the contextual background. Thus the assaults upon the defendant or his family in ***Barnes v. Nayer*** were provocation but not contributory fault by the deceased or her family.

This obiter remark implies that the victim of a crime does not contribute to his or her own damage. It should also be noted that the English statute differs in some important respects, particularly that it has a definition of "fault".

[24] A number of courts have held or assumed that provocation is "fault" within the meaning of the *Act*. The cases cover various forms of provocation: ***McCluskey v. Metrotown Hotel Inc.***, [1994] B.C.J. No. 459, [1994] B.C.W.L.D. 917 (intoxicated plaintiff assaulted bouncers at bar and was beaten); ***Norman v. Kipps***, [1994] B.C.J. 97 (defendant convicted for beating plaintiff after a road rage incident); ***Berntt v. Vancouver (City)***, [1997] 4 W.W.R. 505, 28 B.C.L.R. (3d) 203 at paras. 162-65, reversed on other grounds 174 D.L.R. (4th) 403, 1999 BCCA 345, action dismissed on re-trial, 2001 BCSC 1754, 209 D.L.R. (4th) 494 (plaintiff incited a riot which resulted in police battery of plaintiff).

[25] In my view provocation itself is not a "fault" within the meaning of the *Act*. There is no crime of "provocation" in the *Criminal Code*. There is no tort of "provocation". The original purpose of the *Act* was to reverse the common law rule that if the plaintiff was contributorily negligent even to the smallest degree, the claim would fail. This rule would not have operated merely because the plaintiff had in some way annoyed or aggravated the defendant, leading to the assault, because provocation was not recognized as a tort. The true issue is whether the original assault by the Plaintiff is "fault". Clearly an assault is a tort, and usually a crime. Where the provocation is itself a tort, then the provocation would be "fault". The next question is whether the precipitating assault falls into the words "where by the fault of two or more persons, damage or *loss is caused to one or more of them*".

[26] There are strong policy reasons for not allowing a person convicted of a criminal offence to shift the blame to the victim or other third parties. In ***H.L. v. Canada (Attorney General)***, 2005 SCC 25, [2005] 1 S.C.R. 401 the plaintiff had been abused as a child, and was convicted of various crimes when an adult. In his tort action for abuse, he claimed loss of income for the time he was in prison, arguing that the abuse had driven him to a life of crime. The Court rejected this claim (at para. 137), both on grounds of causation, and on the basis that it is contrary to public policy: ". . . to compensate an individual for loss of earnings arising from criminal conduct undermines the very purpose of our criminal justice system".

[27] The same point was made in ***State Rail Authority of New South Wales v. Wiegold*** (1991), 25 N.S.W.L.R. 500 (C.A.) at p. 514:

> If the plaintiff has been convicted and sentenced for a crime, it means that the criminal law has taken him to be responsible for his actions, and has imposed an appropriate penalty. He or she should therefore bear the consequences of the punishment, both direct and indirect. If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at nought. It would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.

TAB 9

Court of Queen's Bench of Alberta

Citation: Real Estate Council of Alberta v Moser, 2019 ABQB 106

Date: 20190219
Docket: 1801 09968
Registry: Calgary

Between:

Real Estate Council of Alberta

Applicant

- and -

Robyn Moser

Respondent

Endorsement
of the
Honourable Madam Justice L. Bernette Ho

---

[1] This matter arises from an Originating Application filed by the Real Estate Council of Alberta ("**RECA**" or the "**Council**") on July 16, 2018. In support of its Originating Application, RECA submitted affidavits from 4 individuals, being Bohdan (Bob) Myroniuk (RECA's Executive Director), Brian Klingspon, Krista Bolton and Christine Zwozdesky (collectively, the "**Affiants**"). In October and September of 2018, the Respondent's counsel questioned the Affiants for a total of five and a half days.

[2] Ms. Moser now seeks an Order compelling the Affiants to provide answers to: (1) undertakings given but not answered, (2) undertakings refused or taken under advisement and not answered, and (3) questions refused or taken under advisement at the cross-examinations on the affidavits.

[16] In response to the request for an interim injunction, counsel for Ms. Moser indicated that she intends to raise a defence based on the equitable doctrine of "clean hands". As such, Ms. Moser argues that the scope of relevance is expanded for the purpose of questioning to encompass this defence.

[17] While counsel for RECA does not contest Ms. Moser's ability to question the Affiants on information relevant to the "clean hands" doctrine, she correctly submits that the doctrine captures a limited range of conduct. In ***Hongkong Bank of Canada v Wheeler Holding Ltd***, [1993] 1 SCR 167 at 188, the Supreme Court of Canada stated that the wrongful conduct that triggers the doctrine must have an "immediate and necessary relation to the equity sued for". More recently in ***DeJesus v Sharif***, 2010 BCCA 121 at paragraph 86, the Court cites a passage from Spry's *The Principles of Equitable Remedies*, 6th ed (UK: Sweet & Maxwell, 2001) indicating that for the doctrine of "clean hands" to apply, the particular wrongful conduct must be not only connected, but the very ground upon which the transaction took place.

[18] Consequently, the doctrine of "clean hands" cannot be used by counsel to expand the scope of relevant evidence to launch an inquiry into all past alleged misconduct on the part of RECA. Without some basis of suspicion that the misconduct is related to the injunction sought by RECA in this matter, such questions would amount to a fishing expedition. As Master Robertson noted in ***Milavsky*** at paragraph 138: "no fishing allowed without evidence of fish in the pond".

Solicitor-Client Privilege

[19] Solicitor-client privilege attaches to confidential communications between a lawyer and their client for the purpose of seeking legal advice: ***Descôteaux v Mierzwinski***, [1982] 1 SCR 860 at 872-3; ***AARC Society v Sparks***, 2018 ABCA 177 at para 2.

[20] This privilege extends to in-house counsel acting in their capacity as lawyers by giving advice or seeking instructions: ***NEP Canada v MEC OP LLC***, 2013 ABQB 540 at para 25. Whether the privilege attaches to a communication with in-house counsel depends on: (a) the nature of the relationship, (b) the subject matter of the advice, and (c) the circumstances in which the advice is sought and rendered: ***R v Campbell***, [1999] 1 SCR 565 at para 50.

[21] This privilege receives significant protection during the discovery process. Where a party asserts privilege over a document, the "obligation to provide sufficient information to indicate how a record fits within the claimed privilege does not require a degree of particularity that would defeat the privilege": ***Canadian Natural Resources Ltd v ShawCor Ltd***, 2014 ABCA 289 at para 56.

Solicitor-Client Privilege and Directors

[22] When a corporation obtains legal advice, control over the privilege rests with its officers and directors: Adam M Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis, 2014) at 410. Thus, a Board of Directors as an entity enjoys "the right of unfettered access to legal advice provided to the corporation": *ibid* at 411

[23] However, this right is truncated when a Director is in an adversarial position to a corporation. In support of this proposition, the parties pointed this Court to two American authorities: ***Kalisman v Friedman***, 2013 Del Ch LEXIS 100, 2013 WL 1668205; ***Chambers v Gold Medal Bakery Inc***, 464 Mass 383 (Mass SC), 983 NE (2d) 683. This statement of the law

TAB 10

Court of Queen's Bench of Alberta

Citation: Talisman Energy Inc v Flo-Dynamics Systems Inc, 2015 ABQB 561

Date: 20150904
Docket: 1301 11549
Registry: Calgary

Between:

Talisman Energy Inc.

Plaintiff

- and -

Flo-Dynamics Systems Inc., Flo-Dynamics Water Management Inc., Tryon North Surveying Ltd., Tryon Engineering Inc., David John Elliott, Andrew William Hall, Gentian Toska, Elena Toska, 1634644 Alberta Inc., A. Hall Land Surveying Inc., 0847047 B.C. Ltd., John Doe and ABC Company Ltd.

Defendants

- and -

David John Elliott, Gentian Toska, Flo-Dynamics Systems. Inc. and Elena Toska

Plaintiffs by Counterclaim

- and -

Talisman Energy Inc.

Defendants by Counterclaim

[31] The onus is on Talisman to adduce sufficient evidence to establish case-by-case privilege. A good example of the type of detailed evidence expected to be provided by a party asserting case-by-case privilege is found in ***Straka v. Humber River Regional Hospital***, 2000 CarswellOnt 4114, 137 O.A..C. 316, 1 C.P.C. (5th) 195, where the party provided a detailed affidavit in support of the four Wigmore criteria, and was cross-examined on them. Here Talisman did not lay an evidentiary foundation for the claim of case-by-case privilege, and declined to answer a number of questions directed towards that topic in cross-examination.

[32] It is my view that Talisman has not adduced sufficient evidence to satisfy me that case-by-case privilege should be recognized in the circumstances of this case. Talisman cannot decline to produce documents (except if they are covered by another ground of privilege) nor refuse to answer questions as to the identity of the informant in question on the ground of case-by-case privilege.

Legal advice privilege

[33] Are the documents involved in the 2013 investigation subject to legal advice privilege?

[34] Legal advice privilege is a separate concept from litigation privilege. Just because Talisman has not succeeded in establishing litigation privilege, this does not preclude the possibility that the same documents may be subject to legal advice privilege. See ***Poirier v. Wal-Mart Canada Corp.***, 2004 CarswellBC 2898, 2004 BCSC 1592, at para. 9 and ***Singh v. Edmonton (City)***,1994 CarswellAlta 421, 30 C.P.C. (3d) 277, at para. 8.

[35] Legal advice privilege attaches to communications between a solicitor and client for the purpose of obtaining legal advice. It can exist between a client such as Talisman and an in-house lawyer just as it can exist between client and its outside counsel. See ***Domcan Boundary Corp. v. Enron Canada Corp.***, 2005 CarswellAlta 618, 2005 ABQB 338, at para. 19; ***Pritchard v. Ontario (Human Rights Commission)***, 2004 SCC 31 at para's 19 – 21; ***Santa Ursula Navigation S.A. v. St. Lawrence Seaway Authority***, [1981] F.C.J. No. 428, 25 C.P.C. 78 at para. 7.

[36] Talisman appointed an in-house lawyer to head the investigation which commenced on May 3, 2013, and at least one other in-house counsel was involved. Does this establish conclusively that the investigation carried out under the direction of in-house counsel was subject to legal advice privilege?

[37] In ***Singh***, *supra*, the Alberta Court of Appeal considered whether legal advice privilege applied to investigative materials in the following situation:

> The plaintiff had a management position in the transit service of the defendant city. Top officials heard that the plaintiff might have been taking financial benefits from persons who had business dealings with the plaintiff's part of the transit service. The officials decided to investigate, and did so, creating a confidential file with no copies, kept under lock and key. Part of it contained witness statements, part of it notes about what steps to take next in the investigation. In due course the city fired the plaintiff, who then brought the present suit alleging wrongful dismissal.

[38] The Court of Appeal held that the investigative materials were subject to legal advice privilege, stating as follows:

> . . . legal advice is not confined to merely telling the client the state of the law. It includes advice as to what should be done in the relevant legal context. It must, as a necessity, include ascertaining or investigating the facts upon which the advice will be rendered. Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services. As the United States Supreme Court acknowledged:
>
> > The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.
> >
> > [*Upjohn Co. v. United States* 449 U.S. 383 1981) (S.C.) at para. 23]
>
> ... In my opinion, the Commissioner and the chambers judge erred in finding that the College's lawyer was not acting in her capacity as a lawyer when she investigated the Applicant's complaint. She was acting on her client's instructions to obtain the facts necessary to render legal advice to the SMRC concerning its legal obligations arising out of the complaint. As such, she was engaged in giving legal advice to her client. (emphasis added)

[41] The defendants cite a 1993 decision of the Court of Queen's Bench in support of the proposition that documents created in order for legal counsel to assess the advisability of future litigation are not subject to legal advice privilege. See ***Gainers Inc. v. Canadian Pacific Ltd.***, [1993] 4 W.W. R. 609, 15 C.P.C. (3d) 260. In my respectful opinion, the ***Gainers*** decision is inconsistent with the Court of Appeal's later decision in ***Singh***, which I am bound to and chose to follow.

[42] The evidence is clear that one of the purposes of the investigation which was pursued by Talisman was to ascertain the facts in order to get legal advice from their in-house counsel and, if the matter proceeded further, their outside counsel. As such, the investigative file is subject to legal advice privilege.

When did the legal advice privilege arise?

[43] Talisman's representative first received information from an anonymous individual on May 3, 2013. Initial inquiries were made. Then, later that day, a formal communication was sent out setting in course the investigation. Even though the investigation which followed is subject to legal advice privilege, the documentation concerning the receipt of the initial information is not.

TAB 11

CITATION: TD Bank, N.A. v. Lloyd's Underwriters, 2016 ONSC 4188
COURT FILE NO.: CV-14-495750
DATE: 20160628

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TD BANK, N.A., Plaintiff

AND:

LLOYD'S UNDERWRITERS" THAT SUBSCRIBE TO POLICY NUMBER MMF/1710, PRIMARY LONDON REFERENCE NUMBER B0509QA025509 AND EXCESS LONDON REFERENCE NUMBERS QA025609, QA025709, QA025809, AND QA025909, ANTARES UNDERWRITING LIMITED FOR ITSELF AND ON BEHALF OF ALL MEMBERS OF LLOYD'S SYNDICATE 1274 (AUL)FOR THE OPERATING YEAR OF 2009, CATLIN SYNDICATE LIMITED FOR ITSELF AND ON BEHALF OF ALL MEMBERS OF LLOYD'S SYNDICATE 2003 (SJC) FOR THE OPERATING YEAR OF 2009, NOVAE CORPORATE UNDERWRITING LIMITED AND/OR NOVAE SYNDICATES LIMITED FOR THEMSELVES AND ON BEHALF OF ALL MEMBERS OF LLOYD'S SYNDICATE 2007 (NVA)FOR THE OPERATING YEAR OF 2009, ACE CAPITAL LIMITED, AVE CAPITAL IV LIMITED, AND ACE CAPITAL V LIMITED FOR THEMSELVES AND ON BEHALF OF ALL MEMBERS OF LLOYD'S SYNDICATE 2488 (AGM) FOR THE OPERATING YEAR OF 2009, BRIT UW LIMITED FOR ITSELF AND ON BEHALF OF ALL MEMBERS OF LLOYD'S SYNDICATE 2987 (BRIT) FOR THE OPERATING YEAR OF 2009, CHAUCER CORPORATE CAPITAL (NO. 3) LIMITED, CHAUCER CORPORATE CAPITAL (NO. 2) LIMITED, AND/OR IRONSHORE CORPORATE CAPUTAL LTD. FOR THEMSELVES AND ON BEHALF OF ALL MEMBERS OF LLOYD'S SYNDICATE 4000 (PEM) FOR THE OPERATING YEAR OF 2009, ASPEN INSURANCE UK LIMITED, GREAT LAKES REINSURANCE (UK) PLC, LEXINGTON INSURANCE COMPANY, AIG INSURANCE COMPANY OF CANADA (FORMERLY KNOWN AS AIG COMMERCIAL INSURANCE COMPANY OF CANADA), AIG COMMERCIAL INSURANCE COMPANY OF CANADA, CHARTIS EXCESS LIMITED (FORMERLY KNOWN AS AIG EXCESS LIABILITY INSURANCE INTERNATIONAL LIMITED), ALLIED WORLD ASSURANCE COMPANY LTD., ARCH INSURANCE COMPANY, AXIS SPECIALTY INSURANCE COMPANY, AXIS SPECIALTY LIMITED, CHUBB INSURANCE COMPANY OF CANADA, HOUSTON CASUALTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, MARKEL BERMUDA LIMITED (FORMERLY KNOWN AS MAX BERMUDA LTD.) AND OR MAX BERMUDA LTD., XL INSURANCE COMPANY PLC (FORMERLY KNOWN AS XL INSURANCE COMPANY LIMITED) AND OR XL INSURANCE COMPANY LIMITED and ENDURANCE SPECIALTY INSURANCE LTD., Defendants

BEFORE: S. F. Dunphy, J.

COUNSEL: *W. G. Scott, H. Afarian and S. C. D'Souza*, for the Plaintiff

G. Luftspring and S. Sasso, for the Defendants Underwriters and Axis

J. Halfnight and A. Juntunen, for the Defendant Liberty Mutual Insurance

P. Green and D. Vaillancourt, for the Defendant AIG

C. Reain, for the Defendant ARCH Insurance

G. Gill, for the Defendant Allied World

HEARD: June 7, 2016

ENDORSEMENT

[1] This is a motion brought by the defendants seeking to compel the plaintiff to include in its (yet to be delivered) affidavit of documents three categories of documents that the plaintiff claims it cannot produce by reason of various prohibitions existing under United States law. The claim is before me as case management judge and in the context of an insurance claim brought by the plaintiff Toronto-Dominion Bank arising from operations of a subsidiary in the United States.

[2] For the reasons that follow and in the particular circumstances of this case, I find that the foreign (US) laws in question in fact prohibit the plaintiff from producing and, in some cases, from disclosing even the existence of the documents in question. The plaintiff is subject to and not the beneficiary of the laws in question. It can neither waive the laws nor consent to production of the documents. This court will not lightly require parties to violate foreign laws where these have been found to merit the respect and assistance of this court. It is common ground that avenues exist for the defendants to seek leave or third-party consent for the production of some or all of the documents in question. I am directing the plaintiff to provide reasonable co-operation and assistance in facilitating the identification and production of the documents in question should the defendants chose to seek leave or consent of the relevant authorities and shall request the aid and assistance of the relevant United States court in doing so.

Factual overview

[3] A Florida subsidiary of TD was found to have become implicated in a Ponzi scheme perpetrated on a number of investors in Florida by a name-partner of a now-bankrupt law firm ("Rothstein"). The Rothstein firm was a client of TD's subsidiary. A former employee of that subsidiary (Mr. Spinosa) was alleged to have knowingly aided and assisted Rothstein in the carrying out of the fraud. The TD employee pleaded guilty to some but not all charges made against him as part of a plea bargain. He was given a term in jail. The law firm became

bankrupt and the name-partner who was the mastermind of the scheme has been given an exceptionally long sentence as a guest of a local penal institution to consider whether crime pays.

[4] The fraud was also the object of investigations by two United States regulators supervising TD's operations – the Office of the Comptroller of the Currency (or "OCC") and the Financial Crimes Enforcement Network (or "FinCEN"). These investigations also resulted in adverse findings against TD.

[5] While the penal and administrative/regulatory consequences of the scheme were swiftly attended to, the civil aspects took somewhat longer.

[6] A number of the defrauded investors sued TD and claimed that it was vicariously liable for Mr. Spinosa's role in the scheme. TD notified its fidelity insurers (the defendants in this case) but they declined to undertake TD's defence. The first such civil case to get to trial (*Coquina Investments v. TD Bank et al.*) resulted in a jury verdict in favour of the plaintiff investor which verdict included a substantial award of punitive damages. After an unsuccessful appeal, TD found it more advisable to settle the remaining civil claims rather than run the risk of still further adverse jury verdicts.

[7] All told, TD spent almost $500 million (including costs) to resolve its potential exposure under the various civil actions brought by the investors. TD commenced this action in 2015 against its insurers under its fidelity policy. The insurers have initially denied coverage also challenge the reasonableness of the settlements reached. TD is claiming the right to recover $300 million of its loss under the relevant policies having regard to claims limits and the applicable deductible.

[8] This action is still at an early stage. Neither side has produced an affidavit of documents. At my direction, the parties have begun exchanging documents and having their clerks collaborate in formulating an electronic discovery plan to maximize litigation and trial efficiency despite a number of issues pertaining to the finalization of the affidavit of documents that have been identified as requiring resolution. TD has delivered approximately 20,000 documents thus far and there will be many, many more to be delivered regardless of the outcome of this motion.

[9] In the process of preparing its affidavit of documents, TD advised the defendants that it would not be able to produce the following categories of potentially relevant documents:

a. "Regulatory Investigation Documents" (documents provided to or received from OCC or FinCEN in connection with their investigation of the Ponzi scheme in question);

b. "Unredacted Banking Documents" (documents from its client – the now-bankrupt law firm – revealing full transaction details including names and account numbers of third parties transacting with TD's client law firm that are protected by state and Federal privacy laws); and

c. "Protected Documents" (documents marked "confidential" that were produced on discovery by plaintiffs in the settled civil suits against TD that are subject to various Protective Orders issued by the relevant US court).

[10] The defendants accept that TD is in fact prohibited by United States (Federal or state) law or by the Protective Orders from producing documents in these three categories (subject to some minor caveats and nuances). They also accept that there are avenues available either to the defendants or TD to seek consent or leave from the relevant authorities to produce the documents for purposes of this litigation.

[11] The defendants take the position that TD, having chosen to bring this case in Ontario, has the same obligation of all litigants in this jurisdiction to produce an affidavit of documents listing all documents relevant to any matter in issue over which it has power, possession or control, whether or not a privilege is claimed: Rule 30.02(1) of the *Rules of Civil Procedure*. If, as and when TD is able to demonstrate that it has been unable to obtain permission of the relevant court or authority in the US to produce the documents, this court may then consider whether the circumstances then-existing warrant relieving TD of its obligation to produce the documents. It follows, they suggest, that TD should be required to turn over every stone and make every reasonable effort to remove the legal impediments in the United States to the production or identification of these documents and should seek relief from this court only as and when they have been rebuffed.

[12] TD for its part suggests that its production obligations are not nearly as absolute or harsh as suggested. Our courts have a long history of extending comity to courts in the United States. The documents in question came into TD's possession in the course of carrying on business in the United States and while subject to its laws. The impediments to producing the documents under United States law are broadly similar to a number of prohibitions existing under Canadian law. The documents requested are not in the power of TD being in the United States and subject to the legal requirements of that jurisdiction. The defendants have avenues available to them if they seek production and TD has offered to extend reasonable co-operation to assist them in obtaining consent or leave as the case may be. There is no evidence that TD is in a better position than the defendants nor, given the means of the parties and the stakes of this litigation, is cost of the process a real objection. TD objects to the suggestion that it must make applications itself for documents sought by the defendants while a sword of Damocles is suspended over its head suggesting that if its efforts are not judged satisfactory by the defendants it might be held to account and run the risk of sanctions in Ontario simply for obeying US laws that the insurers knew or ought to have known it was subject to when insuring those same US operations of TD.

[13] For the reasons that follow, I have decided to cut the Gordian knot and adopt a simple but pragmatic approach. It matters little whether TD is excused from producing the documents because they are deemed not in TD's power or control by reason of US law affecting them or whether by reason of those same laws and the application of principles of comity TD should be excused from producing them. The outcome is the same. I can see no cause to harness TD to the wheel and compel them to perform feats before US regulators or courts under vague threat of future sanctions if its performance is not judged by the defendants to have been adequate in

hindsight. There is no evidence TD is better situate to obtain production of the documents free of US law than the defendants who actually seek the documents and desire their production.

[14] I have fashioned an order designed to permit the defendants to obtain what they seek, but requiring them to take the initiative of doing so (with some narrow exceptions).

Issues to be decided

[15] This motion raises the question of what recognition ought this court to extend to prohibitions against the production of the admittedly relevant documents under foreign law.

Analysis and discussion

[16] The defendants were by and large willing to concede that the legal impediments under US law raised by TD were serious and real and the consequences of ignoring them would be quite serious as well. Their own expert evidence suggested some possible exceptions might be available here or there, but accepted that in the main, the pleaded legal impediments were both serious and real. While arising under foreign law, they are of a quite familiar sort since our own jurisdiction imposes largely similar restrictions in similar circumstances.

[17] In light of this, the defendants were required to concede that there is vanishingly little chance that I could be persuaded to order TD to breach US law that it is quite ordinarily and validly subject to. Comity is a value that runs deep on both sides of our border and is the product of a very long, peaceful and cooperative history and common legal culture. The US is by no means the only jurisdiction to whom we ordinarily extend comity, but it can perhaps be considered to occupy a pre-eminent ranking in the list.

[18] Our courts have always sought means of accommodating the reasonable requirements of foreign law in matters pertaining to the production of documents in litigation. They do so whether by way of recognizing statutory privileges under foreign law or by way of extending comity. I am persuaded by the sentiments expressed by Brooke J.A. in *Frischke et al. v. Royal Bank of Canada et al.*, (1977) 17 O.R. (2d) 388 where he found (at para. 26):

> "An Ontario Court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We respect those laws. The principle is well recognized."

[19] This case is not at all similar to the situation faced by Master Albert in *McAvan Holdings v. BDO Dunwoody Ltd.*, 2003 CanLII 64222 (ON SC) where the defendant's consent to the production of the documents was all that was wanted to gain access to the documents protected by law (in this instance, Canadian law) from production. It is common ground in the present case that TD cannot consent to the production of these documents. Either the consent of the relevant regulator, third party or court is required and TD has no power to compel such consent or leave to be provided. TD has only the power to ask – something the defendants are equally well situated to do.

[20] For reasons that I have yet to fathom, the real dispute between the parties appeared to come down to who, as between the plaintiff and the defendants, should actually make the relevant applications to determine whether the legal prohibitions under US law can be lifted or relaxed. If the foreign law prohibition is bona fide and of a sort that ought to attract comity from this court, this court ought not to hold a plaintiff who is subject to that valid prohibition as a sort of hostage bound to seek waivers of that law in the absence of compelling evidence that the plaintiff has some material advantage in seeking the documents compared to the defendants. If the prohibition is deserving of comity, comity should be extended without adding a price tag to be paid by the plaintiff who is merely caught in the middle of a legal conflict it did not create.

[21] I shall turn now to a consideration of each of the three categories of documents and my more detailed disposition of each.

(a) Regulatory Investigation Documents

[22] In connection with reporting to its regulators and assisting in their investigations of the Rothstein Ponzi scheme, TD sent documents to and received documents from both OCC and FinCEN.

[23] TD's expert, Ms. Hernandez, provided a report describing the sources and extent of the privileges attached to communications with these two regulators.

[24] In relation to the OCC, Ms. Hernandez' option provides:

> "There is a specific and strict communication privilege that exists between banks and their respective federal banking regulator, such as the OCC, TD Bank's primary federal regulator. This communication privilege, known as the "supervisory privilege" prohibits the disclosure of regulatory documents, including Reports of Examination, correspondence with regulators and other non-public supervisory information regarding a financial institution".

[25] FinCEN receives "Suspicious Activity Reports" from regulated financial institutions including TD. FinCEN considers the SAR's themselves *and even the fact that a SAR was filed* to be confidential information that may not be publicly disclosed. Unauthorized disclosure of a SAR or any information concerning a SAR is punishable by civil and criminal penalties.

[26] At least some of the friction between the parties and their respective experts on this issue appeared to me to be the result of miscommunication. The defendants feared that TD was claiming that documents that were not otherwise privileged from production in this litigation somehow *acquired* privilege solely by virtue of having also been produced to OCC or FinCEN. That fear appeared to me to be entirely misplaced and TD readily agreed. Documents created or recorded for some other purpose but that were also provided to OCC or FinCEN are producible (although the actual communication of those documents to the regulators is not). While there may well be minor disputes around the margins, the well-known "dominant purpose" test would appear to me to be a very serviceable litmus test for determining whether a document was created for the purpose of being given to the regulators or for some other purpose and then

subsequently disclosed to the regulators. If the dominant purpose underlying the creation of a particular document was to report to the regulators, its production ought to be conditioned by that dominant purpose.

[27] Both expert reports concur that routes exist for either TD or the defendants to seek consent of these regulators to the production of some or all of the information that TD is otherwise prohibited from disclosing.

[28] The regulatory privilege claimed in this case is neither of a type nor breadth that is unknown in our domestic law. The S*ecurities Act*, RSO 1990, s. S.5 s. 13, the Regulations under the *Insurance Companies Act*, SC 1991, c 47, the *Office of the Superintendent of Financial Institutions Act*, RSC 1985, c 18, s. 39.1 all may be referred to for similar restrictions.

[29] The details of these and other statutes are of course not identical, but their essential goals are similar. Fostering the necessary degree of open dialogue between regulated institutions and regulators is to be protected and encouraged by the creation of broad zones of confidentiality. The privilege is not absolute and grounds may exist in certain cases to disregard it. However, it would seem clear that the jurisdiction that has created the privilege and foreseen a mechanism to seek departures from it is better situate to judge when and in what circumstances the policy in favour of confidentiality ought to cede to the policy in favour of affording litigants full access to documents needed to establish their case or rebut the case made against them.

[30] There is nothing in the evidence before me to suggest that TD has any kind of advantage in seeking consent to the production of this category of documents for the purposes of this litigation. The claimed privilege is one that satisfies the Wigmore test for assessing communications worthy of protection applied by the Supreme Court of Canada in *Slavutych v. Baker et al.*, [1976] 1 SCR 254, 1975 CanLII 5 (SCC). The communications originated in confidence, the maintenance of that confidence is necessary, the relation is one that ought to be fostered having regard to our own similar mosaic of laws and the injury that would ensue from disclosure outweighs the benefit. In the case of the latter criteria, there is no reason to expect the privileged regulatory exchanges would communicate *facts* not able to be obtained from other sources. Admissions made in confidence to regulators may prove beyond reach, but the facts needed to justify them can be obtained by other means.

[31] In my view, the regulatory privileges created under the relevant US laws in favour of communications with OCC and FinCEN ought to be recognized and afforded comity in the circumstances of this case and the avenues for obtaining exceptions to or waivers of the privilege available under those same laws are best situate to weigh the competing interests.

[32] I can see no basis to require TD to bear the initiative of bringing applications to seek consent for production before these regulators, particularly where I have no reason to assume TD's application will be successful or more successful than an application brought by the defendants. I am not prepared to order production of this category of documents. I reserve the right to require TD to provide reasonable assistance to the defendants in processing any applications they may be minded to bring and in that connection the defendants ought to be entitled to proceed with the benefit of a request from this court for aid and assistance if need be.

(b) Unredacted Banking Documents

[33] TD's Florida banking subsidiary is subject to both Federal and State law that protect the privacy of certain banking documents. As argument progressed, the gaps between the positions of the parties appeared to narrow.

[34] TD's customer in this case was a law firm that is now bankrupt. The account information of the Rothstein firm – including transaction records - has already been made public in a redacted format as part of the bankruptcy proceedings. TD does not object to producing the redacted account information of its own customer since this is already public. What the defendants are seeking is the *unredacted* version of those public documents that will reveal the identity and account numbers of *all* parties transferring funds into the law firm's accounts and the identity of parties receiving funds transferred out. Funds electronically transferred in or out of the accounts would generate an electronic trail indicating the name of the sending or receiving financial institution, the name of the account holder and the holder's own account information. All of this data is subject to privacy laws not unlike our own.

[35] The defendants are unable at this point offer more than speculation as to what relevance much of this information will have. Some of the information will be duplicative of the next category of documents (documents produced by the defrauded investors in support of their now-settled claims against TD). Other transactions will reflect ordinary course transactions of parties dealing with the law firm that is quite unrelated to the fraud. The defendants claim they are handicapped by not knowing what they don't know. Without more, they will be unable to undertake any kind of forensic analysis of the accounts although precisely what forensic analysis they intend to undertake and to what purpose is not yet clear.

[36] The expert evidence of both sides concurred that the relevant Federal regulation is the "*Gramm-Leach-Bliley Act*" and "*Regulation P*" that prohibits a financial institution from disclosing a consumer's non-public personal information to a non-affiliated third party except in limited circumstances. While the defendants suggest that few of the transactions in the law firm account at TD will involve "consumers" as defined in the *Gramm-Leach-Bliley Act*, TD counters that this cannot be determined in advance. The consequences of breach of the statute are potentially grave.

[37] Florida law also protects the privacy of banking information and, unlike its Federal counterpart, is not restricted to consumers. Florida's *Privacy Law* (Fla. Stat. Section 655.059) restricts the disclosure of a financial institutions books and records including customer information and imposes criminal sanctions for violations of it. It is not clear under Florida law whether an Ontario court would be considered a "court of competent jurisdiction" that could compel production notwithstanding the *Privacy Law*.

[38] I am satisfied based upon the expert evidence provided to me that these two statutes prohibit TD from producing the Unredacted Banking Documents without running a serious risk of criminal sanctions.

[39] The defendants' expert suggested that there may be arguments available to TD to support the possible grounds for producing some of the Unredacted Banking Documents. An Ontario court order *might* provide justification under US law. Or it might not. It cannot yet be said how a Florida court would consider the matter.

[40] In my view, this is a case where the privacy interests protected by Florida and US law ought to be accommodated as far as reasonably practicable. The following factors, among others, appear to me to be influential ones:

a. The fact that the policy of the two foreign laws in question is analogous to similar policies finding expression in our own law[1] even if the expression of that policy is not in all respects identical;

b. The fact that Florida and the United States have the closest and most real connection with the creation and custody of the documents and the privacy interests being protected belong to parties who are largely if not exclusively resident there as well; and

c. The fact that the insurance policy that is the subject-matter of this action was issued by insurers who voluntarily chose to extend coverage to the operations of an insured in the jurisdiction where the documents they now seek were created and stored.

[41] The penalty for violating either statute is potentially very severe and the risk is by no means imagined or fanciful. This court is not in the habit of ordering litigants to breach foreign law. Whether I conclude that the documents are beyond the power or TD to produce by reason of the legal impediments or whether I exercise my discretion to grant comity to the foreign rules and relieve TD from its obligations to list and produce these documents would appear to me to be a distinction without a difference.

[42] In my view, the preferred course of action in this case is (i) to recognize that TD is prohibited by Florida and US law from producing the redacted information from the transaction records of its customer; (iii) to recognize that such privacy laws are entitled to comity from this court; and (iii) to grant the defendants an order seeking the aid and assistance of the courts of the United States to secure the production of the unredacted information. Such an order *may* take the form of an order directed to TD to produce the information provided that the order is conditional upon such order being recognized by a court of competent jurisdiction in the United States which the defendants shall be at liberty to seek. I leave it to the parties to seek advice from the experts as to how best to formulate the request.

[43] I find that the privacy interests of parties engaging in what may well be entirely un-related transactions with TD's Florida customer is an interest deserving to be recognized and

[1] See for example *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

fostered having regard to the Wigmore criteria. TD is justified in not violating US law to produce the documents of such uncertain value in Canada. A US court will be better situate than this court to weigh the potential harm of disclosure against the as-yet uncertain benefits to the litigation process of production. The confidentiality of the documents in these circumstances ought to be respected subject to the discretion of the relevant US court to consent to their production. I can see no reason in such a case to hold TD hostage to obtain the consent of US courts over which it has no control. The initiative to seek consent to the production of the documents ought to be borne by the defendants seeking them.

[44] I leave it to the parties to work out the form of order and request best suited to facilitate the defendant's application to gain access to the redacted information after seeking appropriate US legal advice including restrictions, if any, on the use of the documents in Canada.

c. Protected Documents

[45] The deemed undertaking rule that protects documents produced in the course of discovery from being used for other purposes is contained in Rule 30.1 of the *Rules of Civil Procedure*. In many jurisdictions in the United States, a similar result is obtained, but following a process of crafting disclosure orders on a case-by-case basis. While the orders are customized somewhat, they follow a broadly similar template.

[46] In general terms, where the producing party has designated a particular document or class of document as "confidential", the Protective Orders under which TD obtained possession of these documents offers only two routes by which the documents may be produced: (i) TD may seek the consent of the producing party; or (ii) the court issuing the Protective Order may amend or vary its order to permit production.

[47] I can see little reason to treat Protected Documents any differently from the Unredacted Banking Documents or the Regulatory Investigation Documents. If this court will be slow to require TD to violate applicable Federal and State banking laws in order to accommodate the discovery requests of the defendants in the circumstances of this case, it will not be any swifter in requiring TD to breach the Protective Orders.

[48] In a perfect world, TD would have destroyed these documents soon after the litigation that caused them to be produced was settled. They were not. TD is, in effect, the accidental custodian of documents belonging to litigants who produced them under compulsion (and subject to the protection) of the Protective Orders and legal process.

[49] I am persuaded by the reasoning of Masuhara J., in the case of *Bryar Law Corporation v. Samsung Electronics Co. Ltd.*, 2010 BCSC 1661 (CanLII) where he expressed what was in my view appropriate reluctance to "grant discovery in contravention of a Protective Order from the California court. As a matter of respect, courts should refrain from interfering with the orders of courts in other jurisdictions" (at para. 47).

[50] The case of *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, 2001 CanLII 28239 (ON SC); affirmed sub nom. *Ford v. Hoffmann-La Roche Ltd.*, 2003 CanLII 30349 (ON CA) is

also instructive. In *Vitapharm*, it was the plaintiffs who were seeking to obtain access to discovery documents produced in US litigation from the defendants. The plaintiffs had brought motions to vary the US Protective Orders before the judge who had made them. The moving party defendants sought an order from the Ontario court restraining the plaintiffs from seeking those documents in the United States. The case was thus, to an extent, the mirror of this one. Cumming J. declined to interfere with the efforts of the plaintiffs in the US and his order was affirmed by the Court of Appeal.

[51] In my view, the Protective Orders are entitled to comity from this court. The defendants are free to follow the example of the plaintiffs in *Vitapharm* and apply to obtain production in the manner prescribed by the Protective Orders. It is my understanding that the defendants have copies of the relevant Protective Orders. These should be produced if they do not.

[52] If and to the extent an order of this court or the co-operation of the plaintiff becomes necessary or desirable to pursue an application for production of the documents through the relevant United States court, the defendants may apply for an order on evidence of what is required and why.

[53] While I would generally be of the view that the initiative ought to be taken by the defendants seeking access to documents belonging to third parties covered by the Protective Orders, it seems to me to be reasonable to require TD to request the consent of the relevant US litigants before requiring the defendants to bring application in the United States. Such a comparatively simple step may well bear fruit. Some or all of the litigants in the US may prefer to negotiate terms under which the documents are produced or they may be satisfied with the provisions of our deemed undertaking pursuant to Rule 30.1 of the *Rules of Civil Procedure* once informed of it. I cannot assume they will be obdurate for the sake of it nor can I presume to know what reasonable objections they may have.

[54] Accordingly, I direct:

i. The plaintiff shall provide copies of all relevant Protective Orders to the defendants;

ii. The plaintiff shall send a letter (in form reasonably satisfactory to the defendants) requesting litigants whose documents they possess through one or more Protective Orders requesting their consent to the production of such documents to the defendants in this litigation; and

iii. The defendants shall be authorized to bring such motions to vary the Protective Orders before the courts that issued them to obtain production of the Protected Documents as they wish.

Disposition

[55] Given the customized nature of my order in respect of each separate category of documents, this is one case where it seems most appropriate to provide "Order Accordingly" and

leave the parties some space to work out the precise terms of one or more orders best suited to accomplish the objectives expressed in these reasons.

[56] While TD has been largely successful on this motion, I am of the view that it is most appropriate to award costs in the cause in this instance. This is a large and complex case. There will doubtless be a number of issues arising that the parties will need assistance on. To their credit, they have shown a fairly high level of civility and cooperation in developing this case thus far. I am disinclined in a case such as this to issue a number of what could only be (in the scale of this case at least) nuisance costs awards that will simply create distractions and minor annoyance where motions have been reasonably brought and conducted. Such awards will neither incent better behaviour from the parties than I am able to monitor and secure as case management judge nor would they materially advance the principle of indemnity. If either side is of the view that a particular motion is deserving of different treatment as regards costs, they are of course invited to signal that position to me in their written or oral argument.

S.F. Dunphy, J.

Date: June 28, 2016

TAB 12

Title 12 —Banks and Banking
Chapter VI —Farm Credit Administration
Subchapter A —Administrative Provisions

§ 602.24 Responses to demands served on non-FCA employees or entities.

If you are not an employee and are served with a demand or a subpoena in a legal proceeding directing you to produce or testify about an FCA report of examination, other document created or adopted by FCA, or any related document, you must object and immediately tell the General Counsel of such service, the testimony or documents described in the demand, and all relevant facts. You also must object to the production of any documents on the basis that they are FCA's property and cannot be released without FCA's consent. You should tell the requester the production of documents or testimony must follow the procedures in this part.

Subpart E—Release of Records in Public Rulemaking Files

§ 602.25 General.

FCA has a public rulemaking file for each regulation. You may get copies of documents in the public rulemaking file by sending a written request to the Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090. We will charge fifteen cents a copy for each page. We will waive fees of $15.00 or less.

[64 FR 41770, Aug. 2, 1999, as amended at 81 FR 47692, July 22, 2016]

TAB 13

Court of Queen's Bench of Alberta

Citation: Edmonton (Police Service) v Szybunka, 2019 ABQB 854

Date: 20191108
Docket: 1903 13004
Registry: Edmonton

Between:

Rod Knecht, Chief of the Edmonton Police Service and Karl Mayer

Applicants

- and -

Lena Szybunka and Don Szybunka and Her Majesty the Queen in Right of Alberta

Respondents

Memorandum of Decision of the Honourable Mr. Justice V.O. Ouellette

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I. Introduction

[1] This is a judicial review of a ruling by a fatality inquiry judge that the involuntary statement of a police officer was not privileged for the purposes of the fatality inquiry.

II. Issues

[2] The issues are as follows:

> (b) any document or other thing,
>
> that is relevant to the purposes of the public fatality inquiry...

[26] It would appear therefore that the judge invoked this section and found that, while the statement was involuntary and inadmissible, it would also be relevant for the purposes of the fatality inquiry. However, the judge did not refer to s 40(3) of the *Fatality Inquiries Act*, which states the following:

> 40(3) Nothing is admissible in evidence at a public fatality inquiry that would be inadmissible in a judicial proceeding by reason of any privilege under the law of evidence.

[27] In this case, the judge clearly found correctly that the involuntary explanatory statement was inadmissible and privileged pursuant to s 51 of the *Police Act*. Yet, no mention was made of the exception regarding privilege, nor why s 40(3) of the *Fatality Inquiries Act* was not applicable.

[28] Once privilege has been established, as is the case here under s 51 of the *Police Act*, or established in any other fashion, that privilege does not diminish or lose its importance depending on the nature of the proceedings. The only exception that may overcome privilege is in the criminal context where the issue is innocence at stake.

[29] A similar privilege to the one created by s 51 of the *Police Act* is the statutory privilege accorded to a statement given by a driver involved in a motor vehicle accident (see *Traffic Safety Act*, RSA 2000, c T-6 at ss 11, 71). That statutory privilege was discussed in ***Klassen v Dachyshyn***, 1998 ABQB 39, which involved the *Motor Vehicle Administration Act*, an earlier iteration of the *Traffic Safety Act*. Lewis J noted the following about statutory privilege at para 9:

> In this case, Dachyshyn gave the statement to the police that the Plaintiffs are now seeking, pursuant to s 77 of the MVAA and thus the statutory privilege applies to it. He has refused to waive this privilege. The privilege applies to the whole of the statement... The police want the driver or occupant of a motor vehicle involved in a motor vehicle accident to be candid and make full disclosure of his or her view of the accident. The MVAA is designed for such purpose. If parts of the statement were severable and did not enjoy the privilege label and could be viewed by others in whole or in part, then this would defeat the purpose of the statute...

[30] Lewis J later noted at para 14, in response to an argument that the court should use its inherent jurisdiction to permit disclosure of the privileged statement in full or in part: "In my view, this Court does not have the inherent jurisdiction to remove or waive a statutory privilege. Only the person making the statement has this authority and power."

[31] The importance of the claim of privilege applies to all legal proceedings. The Supreme Court of Canada in ***AM v Ryan***, [1997] 1 SCR 157, noted the following at para 19:

> The common law principles underlying the recognition of privilege from disclosure are simply stated. They proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle

TAB 14

Court of Queen's Bench of Alberta

Citation: Kostic v Scott Venturo Rudakoff LLP, 2022 ABQB 188

Date: 20220303
Docket: 1901 06547
Registry: Calgary

Between:

Liliana Kostic

Plaintiff

- and -

Scott Venturo Rudakoff LLP, Dominic Venturo, Dan Horner, Katrina Edgerton-McCutchan also known as Katrina Edgerton-McGhan

Defendant

Memorandum of Decision of the Associate Chief Justice J.D. Rooke

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I. Introduction & Prime Issues for Decision

[1] This Memorandum of Decision (Decision) is about the limits, on the cross-examination and requests for undertakings, by Liliana Kostic (Kostic), of an affidavit sworn by the Defendant, Katrina Edgerton-McGhan (KEM) on June 8, 2021 (the KEM, or KEM's, Affidavit) filed on behalf of the Defendants (Applicants in this application), Scott Venturo Rudakoff LLP et al (SVR), in their cross-application, under Rules 4.22 – 4.23, for Security for Costs (filed the same date). The cross application is in response to a Summary Judgment Application (filed May 11, 2021) by Kostic against SVR on its defence to the within action commenced by Kostic on May 9, 2019. All of this culminated, after filing further affidavits and briefs, in a hearing on

Alberta cases, and, certainly, there are, as noted, other instructive cases in jurisdictions outside Alberta, although I will not go to those, except incidentally.

[25] Without making this Decision a thesis on this subject, I draw the following principles (not in any particular order) from these cases (generally working from the most recent to the oldest decision):

a. an objection to a question as being previously "asked and answered" (or the equivalent) is a valid objection: ***Moser*** at para 6, relying on ***Milavsky v Lashyn***, 2016 ABQB 410 at para 180, and ***Allan v Epp***, 2018 ABQB 85 at para 65;
b. repetitive and abusive questions have never been allowed: ***Moser*** at para 6, relying on ***Rozak (Estate),*** 2011 ABQB 239 at para 31, ***Allan*** at para 65, and ***Milavsky*** at para 183;
c. there is an exception to the previous principle where the question has not actually been answered, despite being asked, and new information is revealed that calls for re-visiting previous testimony and/or counsel is simply reminding a witness of a topic previously discussed and confirming a previous answer; ***Moser*** at para 7, relying on ***Allan*** at para 65, ***Braden v Knisley Estate,*** 2010 SKQB 335 at para 43, and ***Milavsky*** at paras 180-2;
d. on cross-examination on an affidavit, a witness must only inform themselves on matters within their knowledge, and there is no obligation to attest to information outside their knowledge, or to inform themselves on matters outside their control: ***Moser*** at paras 8 – 9, relying on ***Wright v Schulz***, 1992 ABCA 305 at para 25 and ***Canadian Western Bank v Alberta***, 2003 ABQB 254 at para 12;
e. while hypothetical questions are not improper in themselves, they cannot become speculative, unrealistic or lack an air of reality, and, even there, cannot go beyond the pleadings, or ask a patently overbroad or vague question, or ask for comments on other persons actions or inactions: ***Moser***, at paras 10 - 12, relying on ***Maple Trade Finance Inc v Euler Hermes Canad***a, 2015 NSSC 37 at para 47, ***Dow Chemical Canada ULC v Nova Chemical Corporation (Dow/Nova)***, 2014 ABCA 244 at paras 17 & 21, and on Fradsham, *Alberta Rules of Court* Annotated 2019 (Toronto: Thomson Reuters, 2018) at 119, for the proposition that questions on an affidavit must not "extend to matters wholly immaterial and irrelevant to the affidavit;
f. questions on cross-examination on an affidavit need not be confined to the "four corners of the affidavit", but must be relevant to the underlying application [here one of security for costs], and, if within this scope, may be ordered to be answered: ***Moser*** at paras 13 - 14, relying on ***Rozak*** at paras 30 & 32, ***Dow Chemical Canada ULC v Shell Chemicals Canada Ltd (Dow/Shell)***, 2008 ABQB 671 at para 7, and ***Bond Street Properties Inc v Alberta Permit Pro***, 2010 ABQB 416, at para 45;
g. there are limits concerning relevance and materiality, especially where answering the questions or providing the undertakings [note the restrictions referenced below] would be grossly disproportionate[11] to the benefits of the answers: ***Moser*** at para 32, and ***Gas Plus*** at para 52, each referencing ***PM & C #1*** at paras 8, where Michalyshyn J., in turn, referenced ***Medicine Shoppe Canada Inc v Devchand***, 2012 ABQB 375 at para 21 and ***Dow/Shell***; see also ***PM & C #1***, at para 9 &10, in reference, in support,

[11] I will discuss proportionality in a separate section on the law, below.

to *Civil Procedure Handbook* (Edmonton: Juriliber, 2015) at pp 6-60-61 and ***HSBC Bank Canada v 1100336***, 2005 ABQB 658;

h. Part 6 of the Rules, applicable to examination on an affidavit filed relevant to an application (specifically, Rules 6.7 and 6.20) provides guidance on the form of questioning on an affidavit and is "distinct from questioning for discovery in an action" pursuant to Part 5[12], and "cross-examination on an affidavit should not be utilized as a gate into the field of examination for discovery[13]: ***Blough*** at paras 35 – 37, relying on ***Colortech Painting & Decorating Ltd v Toh***, 2000 ABQB 814 at para 26, and ***Luo v. Wang***, 2003 AQBB 356 at para 72; ***Bond*** at para 45; ***Bechir;*** and ***Rozak*** at para 30;

i. relevant to a security for costs application itself, not this application on required answers or production of undertakings, it is noted that security for cost may not be granted in relation to steps that have taken place before security was sought: ***PM & C #1*** at para 4;

j. undertakings should only be directed on a cross-examination on an affidavit where the affiant has referred to information or documents in the affidavit or could only have made the assertions contained in the affidavit after reviewing same, or the undertakings relate to an important issue in the specific application in play (one that would significantly help the court in determining the application), all that would not be overly onerous to provide; the court should be slow to direct an affiant to inform him/herself after the questioning and provide further answers; and there is greater restraint than on undertakings taken on questioning for discovery under Part 5 of the Rules: ***PM & C #1***, at para 6, relying on ***Dow/Shell***, followed by, and quoting from ***Rozak***, at paras 37 – 42; see also ***Bechir*** at para 33, referenced at para 42 of the SVR Nov 22 Brief; ***BH-BC Holdings Ltd*** at paras 3 - 4, referring in the latter to ***Gosine*** at para 16, where Mah J stated:

> 1. The scope of cross-examination on affidavit is more restrictive than on questioning for discovery, given the different objectives and purposes for each. The former [cross examination on affidavit] should not be used as an impermissible gateway to a foray in[to] the latter [questioning for discovery]. (Emphasis added.)
> ...
> 2. Credibility is a legitimate field of inquiry in an examination on affidavit, but is restricted to the credibility of statements in the affidavit. (Emphasis added).

k. especially for security for costs applications brought early in a proceeding, what is required under Rule 4.22(c) is not a question of "which party has a stronger case", but rather "an inquiry into the merits ... that suggests that a reasonably meritorious defence, when considered together with the other factors set out in Rule 4.22, is

[12] SVR asserts, at para 35 of the SVR Nov 22 Brief, that "No Part 5 questioning has taken place". That is consistent with the Court record, although Kostic tried to convert the cross-examination on KEM's Affidavit under Part 6 to a questioning for discovery under Part 5.

[13] Here, at Bar, the affiant, KEM, is both a party and an affiant, but her examination, I find, is not one of questioning for discovery, and thus, at best, her answers are only binding on her as a party (see the discussion at D15 – TR27/17-27). I will deal later in this Decision with the issue of questioning of other of the Defendants.

sufficient to weigh in favour of granting security for costs", remembering that in such cases it may be "neither possible, nor desirable, for the Court at this stage to determine which party's case is stronger"[14], with focus on the "relative strengths of each party's position": ***Bechir*** at paras 14 (quoted at para 44 of the SVR Nov 22 Brief) & 17; and ***PM & C #1*** at paras 11 – 15, referencing and quoting from ***Attila***, at paras 17; and

l. a "more nuanced" analysis is to a "balanced view" of both the claim and defence, early in the proceedings: ***PM & C #1*** at paras 16 – 24, referencing ***Autoweld*** at para 22, ***Arhum***, ***Wells Fargo***, at paras 43-4, and ***Parkland*** at paras 35 – 6.

[26] Picking up on the issue of disproportionate or proportionate in g above, this requires further analysis. In ***Dow/Shell***, the Court, at paras 11 – 12, addresses the "goals of justice" and, I find, the balance is set (not just in undertakings, but also in relevance and materiality in cross-examination, on affidavits in relation to security for cost applications), extremely relevant to the case at Bar, in the statement at para 12:

> ... the provision of undertakings arising during the cross-examination of deponents will provide additional evidence to the court, but the price to pay is additional expense and delay for the litigants. To allow a cross-examiner, as of right, to demand that undertakings be given on any relevant issue would be to give every respondent in a summary judgment application the right to a full examination for discovery prior to the hearing of the summary judgment application. This would defeat[15] the whole rationale for a summary judgment procedure, which is to allow a meritless position to be disposed of summarily (i.e., without the time and expense typically incurred if the matter proceed through examinations for discovery to trial). (Emphasis and double emphasis added).

[27] The same principle applies also to merits relative to the actual security for costs application (not merely this application on cross-examination) – if every detail of the merits of an action or a summary judgment application were required to be answered before one looked at the ability of the respondent to pay costs of unmeritorious/unsuccessful positions, that would defeat the very purpose for a security for costs application – the lack of logic is self supporting, and "would go around and around in circles", as I tried to articulate at D15 TR 123/14-26 & 130/40-131/10-15 & 131/36-132/3 &133/12-21.

[28] Other cases relevant to the actual determination of a Security for Costs application, not before me on this application relevant only to cross-examination on affidavits in support, include: ***Xpress Lube & Car Wash Ltd. v Gill***, 2011 ABQB 457 at paras 8-10; ***Patton v Horse Racing Alberta***, 2019 ABCA 182 at paras 12-14; ***Freeman v Kooimann***, 2019 ABQB 857 at paras 48 & 54; ***Hashman v Kanji***, 2020 ABCA 283 at para 9; ***Matty v Rammasoot***, 2013 ABCA 170 at para 17; and ***Jager Estate v Deadman***, 2019 ABCA 99, at para 29.

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[14] With this in mind, I will do a separate analysis on the issue of relative merits below, where, at an early stage in the litigation, they cannot really be determined on any basis, or are neutral. It appears from Kostic's submissions at para 58 of her Reply Brief, filed Dec 9, 2021, that she agrees.

[15] See also ***Bechir*** and para 40 of the SVR Nov 22 Brief as to "defeating the very purpose of the security for costs application".