Court of King's Bench of Alberta

Citation: Questor Technology Inc v Stagg, 2024 ABKB 377

Date: 20240628
Docket: 1801 11473
Registry: Calgary

Between:

Questor Technology Inc.

Plaintiff/Applicant

- and -

Richard Stagg, also known as Ritchie Stagg, Jeffrey Nelson, also known as Jeff Nelson, Justin Bouchard and Emission Rx Ltd.

Defendants/Respondents

Reasons for Decision
of the
Honourable Justice P.R. Jeffrey

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[1] This case invites the Court to consider, among other things, whether the test for civil contempt is more stringent when the contempt alleged is lying under oath during the litigation process, than civil contempt for breach of a court order, and the scope of permissible inferences for proving beyond a reasonable doubt the intention required for that contempt.

[2] Questor Technology Inc. alleges that during its lawsuit against the Respondents (the "**Action**"), the Respondents knowingly provided false evidence, knowingly withheld evidence, and knowingly misled both Questor and the Court. It also alleges one of the Respondents should be found in civil contempt for breaching an order of this Court.

[3] Questor's Action alleges the three human defendants (the "**Individual Defendants**") breached duties they owed to Questor during and after being in its employ. Questor says this included creating their own competing company, the corporate defendant Emission Rx Ltd. ("**Emission**") (collectively with the Individual Defendants, the "**Respondents**"), and pursuing its interests instead of Questor's.

[4] Questor says the Respondents' behaviour undermined our very system of justice, since it depends on its participants' honesty and integrity to properly function.

[5] Questor says that behaviour resulted in the Court denying Questor's applications, one for an injunction that would have prohibited Emission from competing with it [2020 ABQB 3] (the "**Injunction Decision**"), and another denying Questor's request to preserve Emission's profits [2021 ABQB 644] (the "**Preservation Decision**"), (collectively, the "**Rulings**").

[6] Questor did succeed in another of its earlier pre-trial applications, in which it sought to compel the Defendants to disclose further and better records [2022 ABQB 578] (the "**Records Decision**"). That resulted in the Respondents disclosing a significant number of additional records. They told a different story than had been adhered to by all three Individual Defendants in their various sworn statements. The new records revealed that the Respondents' earlier evidence, given on many occasions, was incorrect.

[7] The Individual Defendants admitted this. Soon after the release of the Records Decision, counsel for the Respondents wrote to the Court and Questor's counsel (the "**Correct the Evidence Letter**"), saying:

> We have been instructed by the defendants to correct the evidentiary record including affidavit evidence, questioning transcripts and answers to undertakings.

The corrections were attached to that letter in three tables, one for each of the Individual Defendants, comprising 16 pages in total of corrections to their sworn evidence (the "**Admissions**"). In July 2023, each of the Individual Defendants filed correcting affidavits in which they swore to the truth of their corrections introduced by the Correct the Evidence Letter.

[8] Questor appended to its formal notice of this application for contempt another 59 pages, also in tabular form, listing what it said were further errors in the Individual Defendants' sworn evidence that these corrections revealed.

[9] Questor says the Admissions in the Correct the Evidence Letter, taken in their factual context, prove numerous times over the civil contempt of each of the Respondents.

[10] The Respondents disagree and vigorously oppose the application.

First Threshold Issue – Case Management

[11] The Action in which these events arise is under case management by a colleague. I am not the justice assigned as case manager.

[12] Rule 4.14(2) of the *Alberta Rules of Court*, Alta Reg 124/2010, requires litigants in an action under case management to set down for hearing with the case managing justice all interlocutory applications. The parties here did that, but by oversight on the Court's part the application was improperly re-assigned to be heard by me.

[13] Upon discovery of this oversight, and pursuant to that Rule, the case managing justice was approached and directed that this application could proceed before another member of the Court. The parties took no issue with that.

Second Threshold Issue – Consolidation

[14] After the parties argued the application and I reserved decision, the parties were invited back to Court to address a question of the Court that arose during deliberations.

[15] The Court became concerned that in order to find the facts relevant to the application issues, some would be the same issues of fact that the trial judge would also have to decide, or at least both triers would have to review a great deal of the same evidence. The trial judge will be better positioned to make such findings about contested facts that are also in issue in this application when trying the underlying Action. Even if not determining the same disputed facts or determining them on the same standard of proof, the trial judge would be retreading much of the same ground.

[16] Thus, there appeared to be a risk of inconsistent findings of fact and a certainty of duplicated work in a time of scarce curial resources.

[17] I invited counsel back to Court to be heard on the prospect of consolidating this contempt application with the trial, pursuant to Rule 3.72. That Rule states:

> (1) The Court may order one or more of the following:
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> a) that 2 or more claims or actions be consolidated;
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> b) that 2 or more claims or actions be tried at the same time or one after the other;
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> c) that one or more claims or actions be stayed until another claim or action is determined;
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> d) that a claim be asserted as a counterclaim in another action.
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> (2) An order under subrule (1) may be made for any reason the Court considers appropriate, including, without limitation, that 2 or more claims or actions
>
> a) have a common question of law or fact, or
>
> b) arise out of the same transaction or occurrence or series of transactions or occurrences.

[18] Most reported cases on Rule 3.72, and its predecessor almost identically worded Rule 229, involve two separate actions or claims alleged to have some significant similarities, not like here where there is an interlocutory application within an action, and that broader Action. Other options are available under the Rules to manage the course of the lawsuit in such circumstances without resorting to consolidation, but maybe in this case only available to the case manager.

[19] The cases considering consolidation of actions remind us that it is a tool the courts might use to enhance the administration of justice: *Alliance Pipeline Limited v Universal Ensco, Inc*, 2007 ABCA 285 at para 6. The Court continued in that decision, saying (underlining added):

> […] A court should consider the possibility of inconsistent verdicts, the prospect of prejudice to the parties and the impact of consolidation and non-consolidation, both at the pre-trial and trial stages on scarce resources, including administrative, judicial and financial. In other words, a court must be able to conclude that having regard to all the circumstances, on balance, it is in the interests of justice that the actions be consolidated. … Each case must be assessed on its own merits and should include consideration, not just of the common claims, but the extent of the distinct claims between the parties. The focus in each case must be on the impact of consolidation on the parties and on the administration of justice.

[20] Moore CJ in *Mikisew Cree First Nation v Canada*, 1998 ABQB 675, at para 2, adopted from the BC Court of Appeal several factors to consider in such applications:

> i) whether there are common claims, disputes and relationships between the parties;
> ii) whether consolidation will save time and resources in pre-trial procedures;
> iii) whether time at trial will be reduced;
> iv) whether one party will be seriously prejudiced by having two trials together;
> v) whether one action is at a more advanced stage than the other; and
> vi) whether consolidation will delay the trial of one action which will cause serious prejudice to one party.

[21] An application to consolidate was denied in a case somewhat more analogous to this one, in that there were not two separate actions in existence but one, commenced by Statement of Claim that had not yet been served, and a separate application between the same parties commenced concurrently by Notice of Motion for more immediate distinct relief. The defendant learned about the action having been commenced but not yet served, by his counsel's diligence. Both claims relied upon the same recent significant financial event. One side said the recent financial event was surely known in advance of it occurring and evidence of it was fraudulently withheld instead of disclosed. The other side said it was not known prior to it occurring and, therefore, could not have been improperly concealed. The latter applied to have both proceedings consolidated. He argued that all the evidence about the recent event would be duplicated in the two proceedings, wasting curial and party resources, and he said there was a risk of inconsistent factual findings.

[22] The consolidation application was denied, primarily on the grounds it would cause significant delay which would be prejudicial to the applicant's request for immediate relief under the Notice of Motion, to have to wait for the outcome from trial of the broader claim commenced by Statement of Claim. The Chambers Justice sensed the application to consolidate was in fact a delay tactic. The chambers denial was upheld on appeal by a two to one majority, the majority

upholding in deference to the assessment of the chambers judge: *Munro v Munro*, 2011 ABCA 279.

[23] Another informative case is *Recycling Worx Solutions Inc v Hunter*, 2018 ABQB 395. That case did not address consolidation but, like here, considered whether to decide contempt allegations right away or put them over to the trial. The Court declined referring them to trial largely on the grounds that the allegations of contempt, if true, warranted the Court calling out the impugned behaviours without delay "to protect the integrity of the administration of justice" (para 96), and to a lesser degree that resolving "a preliminary point of law" would benefit the remaining litigation process (para 95).

[24] After now hearing from counsel on the possibility of consolidating in this case, I am persuaded to not do so, for the following reasons.

[25] First, there is now a reduced risk of inconsistent findings of fact between my conclusions on this application and the trial judge's conclusions on the issues joined in the pleadings for determination at trial. The risk has reduced because Questor has withdrawn the particulars of contempt it alleges that could risk such contrary findings of fact. It relies on the remaining particulars.

[26] Second, as the Respondents point out, the risk of inconsistent findings was only a possibility not a certainty, whereas some prejudice resulting from consolidation is certain. I agree with the Respondents that the latter outweighs the former. One of the reasons the risk of inconsistent findings is only a possibility is that the burden of proof upon Questor in this contempt application is proof beyond a reasonable doubt whereas the burden of proof upon it as plaintiff in the main Action is proof on a balance of probabilities.

[27] Third, there remains the possibility that the underlying lawsuit may not require a trial to resolve, in which case the Court would lose the opportunity to denounce the behaviour Questor says should offend the Court. Where warranted, the Court has an obligation to exercise its power to punish for contempt of court: *Ilnicki v Hill*, 2020 ABCA 327 at para 7.

[28] Relatedly, if Questor is correct about its allegations of contempt, the range of potential consequences includes inviting the Case Management Justice to revisit some of his decisions and the Rulings – or the effects of them – before litigation on the Action resumes. Questor says the false evidence and the withheld evidence played a role in the Court's Rulings. It says that both decisions had adverse consequences on its interests in the litigation process. Therefore, it is conceivable that justice may require a remedy for Questor that includes a course correction to the remaining litigation. See, similarly, the reasoning in *Recycling Worx* at paras 87 – 90.

[29] Fourth, the record on this application for civil contempt is now closed. The parties informed me when speaking to the possibility of consolidation, that on October 20, 2023, the Case Management Justice declared by order that the evidence on the contempt application was complete. Therefore, if I consolidated this civil contempt application with the trial of the Action, the trial judge would be in no better position than I am now.

[30] Fifth, the parties have already expended considerable time, energy, and expense in preparing and presenting their positions on the contempt application. While the Court might avoid

some duplication of effort by consolidating, the parties would not. In aggregate it appears they would bear an increase in load. This is as important as trying to economize on curial resources, and also militates against consolidating, *ceteris paribus*.

[31] Sixth, all parties oppose consolidation.

[32] Having regard to all the circumstances, on balance, consolidation here is not in the interests of justice.

Civil Contempt Law

[33] To succeed in proving civil contempt for breach of a court order, an applicant must prove each of the following three things (*Carey v Laiken*, 2015 SCC 17 at paras 32 – 37):

i. The order states clearly and unequivocally what the Respondent must do or must not do.

ii. The Respondent had actual knowledge of that requirement.

iii. The Respondent intentionally failed to satisfy that requirement.

[34] This has long been the test, though in Alberta it has been stated more broadly since civil contempt can occur in a broader range of ways than just breaches of a court order. The Alberta Court of Appeal said in *Envacon Inc v 829693 Alberta Ltd*, 2018 ABCA 313 at para 32:

> […] The leading Alberta case is *Point on the Bow Development Ltd v William Kelly & Sons Plumbing Contractors Ltd*, 2006 ABQB 775 at para 19, 405 AR 1 where the court listed the elements of contempt as "(1) an existing requirement of the court; (2) notice of the requirement to the person alleged to be in contempt; and (3) an intentional act (or failure to act) that constitutes a breach of the requirement". These are the same requirements set out in *Carey*.

[35] The Respondents say this is not the correct test here. They say when the behaviour alleged to constitute civil contempt is lying under oath, then the correct test is the one for perjury, which also requires proof of the intention to mislead or deceive the court.

[36] Perjury offences have some similarity to the kind of contempt alleged by Questor here, in that the particulars of the alleged contempt involve providing a statement under oath in a legal process, knowing it to be false. But perjury is a criminal offence requiring proof beyond a reasonable doubt of one additional thing: the intention to mislead the court. This is the added mental element the Crown must prove in a perjury prosecution, as stated in *Calder v The Queen*, [1960] SCR 892, at para 13:

> In the case at bar it was incumbent upon the prosecution to prove beyond a reasonable doubt three matters, (i) that the evidence, specified in the indictment, given by the appellant on September 16, 1958, before Greschuk J. was false in fact, (ii) that the appellant when he gave it knew that it was false, and (iii) that he gave it with intent to mislead the Court.

[37] Section 131(1) of the *Criminal Code*, RSC 1985, c C-46 states (underlining added):

> [...] every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

Section 136(1) prohibits giving contradictory evidence in judicial proceedings that is "intended to mislead." Section 137 prohibits those who "with intent to mislead" fabricate anything intending it be used as evidence in a judicial proceeding by any means other than perjury.

[38] In both *Carey* (at para 38) and *Envacon* (at para 37) the courts are clear that intending to mislead the court, the third element of perjury in the *Calder* formulation, is not an element of civil contempt. The Court in *Carey* refers to this type of *mens rea* as "contumacious intent" and says that if it is present then the consequences of the civil contempt may be greater: "...contumacy or lack thereof goes to the penalty to be imposed" (para 38). But it is not a prerequisite to a court finding civil contempt. As the Alberta Court of Appeal put in *Envacon*, in its discussion of *Carey*, "it is not the intent to disobey the order that constitutes contempt, it is the disobedience itself" (at para 35).

[39] The Respondents accept that that test applies for other kinds of contempt cases, like breach of the court order at issue in *Carey*, but maintain that cases where lying is alleged are different. They say the nature of the intention element that must be proven in such cases includes the additional element of contumacious intent. They rely on five cases for this proposition: *D M Zall Co v Transwest Helicopters (1965) Ltd*, 1986 CarswellBC 2759; *Kumar v R*, 2004 TCC 521, affirmed in 2005 FCA 222; *Lessard-Gauvin v Canada (Attorney General)*, 2019 FC 979, affirmed 2019 FCA 233; *Estate of Paul Penna*, 2010 ONSC 4730; *TJL v AAL*, 2012 BCSC 1037; and put it this way in their brief:

> [...] intent to deceive is an essential element of contempt involving allegations of perjury. The evidence must demonstrate beyond a reasonable doubt that there was a deliberate attempt to mislead or deceive the Court.

With respect, to be correct and reflect the cases they cite, it should read as follows:

> [...] intent to deceive the Court is an essential element of ~~contempt involving allegations of~~ perjury. Proof of perjury encompasses proof of civil contempt. But proof of civil contempt does not require proof beyond a reasonable doubt that there was a deliberate attempt to mislead or deceive the Court.

[40] I disagree with the Respondents' statement of the law of civil contempt for lying for the following reasons.

[41] First, it is contrary to *Carey*. The main legal issue in *Carey* was whether contumacious intent must be proven before a court may conclude someone acted in civil contempt. As described above, the Supreme Court of Canada concluded it did not need to be proven. I acknowledge that *Carey* was not a case dealing with allegations of lying as the act of contempt, rather it was about contempt by breach of a court order. Nevertheless, in discussing the required intention for civil

contempt the Supreme Court refers to civil contempt generically. It makes no reference to any exception when the contempt is by lying. It said in respect of the required *mens rea*, at para 38:

> It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission….

It is not like the Supreme Court to omit exceptions to a rule when they exist. I infer no exception exists for contempt by lying.

[42] Second, the principles described in the Supreme Court's ensuing reasons in *Carey*, for concluding contumacious intent is not a required element that a moving party must prove, indicate strongly that it would reach the same conclusion for contempt by lying if that was the fact situation before it (see paras 40 – 43).

[43] Third, by lying under oath in court processes, the public harm to respect for our system of justice and its courts as an organ of the state, and to the efficacy of its processes, is both more insidious and of broader harm than the primarily private adverse effects resulting from a breach of a court order (recognizing that breaches of court orders do still have *some* adverse effects on the public's respect for the role and authority of our courts: *Vidéotron Ltée v Industries Microlec Produits Électroniques Inc*, [1992] 2 SCR 1065 at 1075). Therefore, it would be counter-intuitive for proof of intentional lying under oath to have to overcome a higher bar. Common sense would suggest that the law would not give contempt by lying under oath more latitude to proliferate than it does contempt by breach of a court order.

[44] Fourth, the five cases relied upon by the Respondents, cited above, do not stand for the proposition the Respondents say they do. The Respondents say, "where the assertion of contempt is based upon perjury, a different and unique two-part test is applied." In support of this proposition they cite *Transwest Helicopters* at para 7, which does *not* say that a different and unique two-part test is applied. All it says is:

> In order to find the defendant in contempt of Court, I must be satisfied that the affidavit filed by the defendant Vegsund was false and was known to be false …. It is tantamount to asking me to make a finding of perjury against the defendant.

[45] I take the latter "tantamount" comment to express the writer's view of the comparable severity of the two offences, not to say they are two different labels for the same thing. The Court there, in saying what is required to prove civil contempt for lying, does not say 'plus intent to mislead the court'.

[46] The Respondents then describe what they say is the special two-part test for contempt by lying as (i) knowingly providing false evidence and (ii) doing so with the deliberate intent to mislead or deceive. The first of those is part of the test. The second is not; it is the contumacious intent spoken of by the Supreme Court.

[47] The remaining four cases relied upon by the Respondents refer to the essential element around intention for perjury, not for civil contempt. The Respondents conflate the two. However, perjury is not the same as civil contempt.

[48] The Respondents rely on a case (*Kumar*) in which it was argued that the Minster of National Revenue should be held in contempt – for committing perjury. The case then addressed whether perjury was proven, based on the test for perjury, in order to prove there had been civil contempt. The moving party in that case set about to prove more than it had to prove for a finding of civil contempt. The Court did not say it was the test for civil contempt. *Kumar* does not say perjury and civil contempt are the same thing. It does not say intent to deceive is an essential element of civil contempt but rather describes it as a requirement for perjury.

[49] The Respondents have read something into *Kumar* that is not there. But they appear to be in good company in that regard, because the second case they cite does the same thing. *Lessard-Gauvin* cites *Kumar* as setting out the required mental element for civil contempt when, as I say, it does not. It chronicles what the moving party before it set up for itself to prove. It describes the required mental element for perjury. Both decisions were upheld on appeal. Both appeal decisions were decided on other grounds.

[50] The paragraphs cited by the Respondents from *Estate of Paul Penna* do not say that an intention to deceive the court is required before there can be a finding of civil contempt for lying; they merely find as a fact that in the case before the Court there "was a deliberate attempt to mislead the Court" and "Landen then deliberately lied in that Affidavit ... to deceive the Trustee and the Court as to ...". It does not say proof of such contumacious intent was required to prove civil contempt, only that the contumacious intent was proven.

[51] In *TJL*, the last of the five cases cited by the Respondents for their proposition that civil contempt for lying requires proof of contumacious intent, the Court says first that the alleged contemnor "deliberately placed false evidence before the court" (para 63), which would be enough for the intention element of civil contempt. But the Court then denies the application on the grounds that the applicant failed to meet "the onus of proving, beyond a reasonable doubt, that Ms. L. created and filed a false version of the separation agreement in order to deceive the Court, or that Ms. L. attempted to deceive the Court in any way" (para 64). Here, the Court implies the Respondents' understanding of the test is correct, that without proof of contumacious intent, civil contempt is not made out. It appears, however, that in so finding, the Court held the moving party to a higher standard than required at law and, importantly, a higher standard than the Court itself said is required when summarizing the law near the outset of its decision. The Court in *TJL* did not say the law requires proof of intent to mislead for civil contempt, saying (at paras 6 and 7):

> Contempt is the intentional doing of an act which is prohibited by the order of the court. The act of contempt is "deliberate conduct that has the effect of contravening the order": *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316 at para. 14; *Topgro Greenhouses Ltd. v. Houweling*, 2003 BCCA 355.
>
> Here, Mr. L., as the applicant for orders finding Ms. L. in contempt of court, must establish, beyond a reasonable doubt, that she wilfully disobeyed a court order that was clear and precise in its meaning: *Jackson v. Honey* at para. 13.

If one ignores in *TJL* the Court's statement of the test, then it would seem to support the Respondents' understanding of the test for civil contempt when lying is involved.

[52] In none of the five cases cited by the Respondents does a court say the test for civil contempt involving lying requires proof of contumacious intent. It appears to be implied by the Court in TJL when giving its reasons for denying the application, but not when it articulates the actual test. That is the closest we get to case authority in support of the Respondents' understanding of the applicable law.

[53] In any event, four of the five cases relied upon by the Respondents were decided before *Carey* and the fifth (*Lessard-Gauvin*) makes no reference to *Carey* and conflates the treatment in *Kumar* of the test for perjury with the test for civil contempt.

[54] Fifth, if the Respondents are right that contumacious intent is a required element in proving civil contempt involving lying under oath, then civil contempt for lying under oath is no longer a quasi-criminal offence but a criminal offence. Proof of perjury requires proof of contumacious intent – an intention to mislead. There would remain no space for denouncing by civil contempt lying under oath in a court process where there is no intention to mislead or deceive.

[55] In summary on the *mens rea* of civil contempt, the intention that must be proven is only that the act or omission said to constitute contempt of the court was volitional. The impugned conduct was knowingly and intentionally done, or knowingly and intentionally omitted from being done. Proof of contumacious intent is not required.

[56] Civil contempt is also not the same as criminal contempt. In *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, it had been argued that it is impossible to distinguish between civil and criminal contempt. The Court disagreed, saying that while both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process (page 931):

> The distinction between civil and criminal contempt rests in the concept of public defiance that accompanies criminal contempt.
>
> [...]
>
> A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal.

The Court then explained proof of each (page 933):

> To establish criminal contempt the Crown must prove beyond a reasonable doubt that the accused defied or disobeyed a court order in a public way (the actus reus), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the mens rea).

The distinction between the two, then, is not that civil contempt is reserved for breaches of court orders and criminal contempt for other manifestations of contempt, with the more stringent intention element. A breach of a court order can attract both civil and criminal

contempt consequences, depending on the presence or not of public defiance of the court's process. The Supreme Court added (page 932):

> The gravamen of the offence [of criminal contempt] is not actual or threatened injury to persons or property; other offences deal with those evils. The gravamen of the offence is rather the open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court.

[57] McEachern CJA, in *MacMillan Bloedel Ltd v Brown*, 1994 CanLII 3254 (BCCA), distinguished criminal contempt from civil contempt (at paras 91 and 92):

> [...] The mental element of civil contempt is that the disobedience must have been deliberate or reckless, that is, the possibility that the act would be disobedient must have been foreseen and ignored.
>
> Criminal contempt contains all the elements of civil contempt. In addition, the act of disobedience must have been undertaken in a public way; and the deliberate or reckless act of disobedience must have been undertaken with an intention that such a public act of disobedience would tend to depreciate the authority of the courts, or, alternatively, with foresight that it might do so and indifference to whether it did so or not.

[58] A person facing allegations of civil contempt is entitled to certain *Charter* and procedural protections (*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11). The Court in *Oesterlund v Pursglove*, 2015 ONSC 6145, said at paras 6 – 8:

> […] motions for contempt are often said to be *strictissimi juris*, i.e. that all proper procedures must be strictly complied with (*Bell Express Vu Ltd. Partnership v. Torroni*, 2009 ONCA 85 … at para. 20).
>
> Justice Gordon set out the proper procedural protections afforded to a party faced with civil contempt at para. 3 of *Vale Inco Ltd. v. U.S.W., Local 6500*, 2010 ONSC 3039…:
>
> 1. The right to be provided with particularized allegations of the contempt;
> 2. The right to a hearing;
> 3. The right to be presumed innocent until such time as guilt is proven beyond a reasonable doubt;
> 4. The right to make full answer and defence, including the right to retain and instruct counsel, the right to cross-examine witnesses and the right to submit or call evidence;
> 5. The right not to be compelled to testify at the hearing.
>
> The right not to be compelled to testify at the hearing is also consistent with s.7 of the *Canadian Charter of Rights and Freedoms*…. Section 7 of the *Charter* provides that a person shall not be deprived of his liberty except in accordance with the

> principles of fundamental justice. The principles of fundamental justice protect the right against self-incrimination (*Vidéotron Ltée v Industries Microlec Produits Électroniques Inc*, [1992] 2 SCR 1065 … at para. 24).

[59] A single member of the Alberta Court of Appeal recently granted leave to appeal on whether section 11(b) of the *Charter*, and the 30 months presumptive ceiling set in *R v Jordan*, 2016 SCC 27, applies to civil contempt proceedings: *Lymer v Jonsson*, 2023 ABCA 367 at paras 21 – 37. Therefore, it may also be recognized as available as of right to persons accused of civil contempt.

[60] A finding of civil contempt represents a final disposition, so it should not be based on hearsay evidence: *Kulyk v Wigmore*, 1987 ABCA 127 at para 3. The supporting evidence "must conform to trial rules of admissibility": *Northwest Clean Air Company Inc v Harbour Stainless Ltd*, 2009 BCSC 1496 at para 4.

[61] An applicant must prove each essential element of civil contempt beyond a reasonable doubt: *Bhatnager v Canada (Minister of Employment and Immigration)*, [1990] 2 SCR 217 at 224; *Carey* at para 32; *Envacon* at para 42. This is true regardless of the nature of the alleged contempt: *Brown v Arès*, 2005 ABCA 438 at para 5; *Arrow-West Equipment Ltd v GDT Trading Ltd*, 2006 ABQB 762 at para 31.

[62] A reasonable doubt is a doubt based on reason and common sense. It is not an imaginary or frivolous doubt. It is a doubt that arises after considering all the evidence, based not only on what the evidence indicates but also on what that evidence does not indicate. It is "logically connected to the evidence or absence of evidence": *R v Lifchus*, [1997] 3 SCR 320 at para 36.

[63] Proof beyond a reasonable doubt is not the same as probably so, or likely so. Neither is it proof beyond any doubt. It is nearly impossible to prove anything with absolute certainty. Something less than absolute certainty is required but something more than "probably so" is required, for something to be proven beyond a reasonable doubt. The standard of proof beyond a reasonable doubt lies between these two — of absolute certainty at the high end and "probably so" at the low end. Proof beyond a reasonable doubt lies much closer to absolute certainty than to more probable than not.

[64] Proof beyond a reasonable doubt does not require direct evidence. It is possible for something to be proven beyond a reasonable doubt without there being any direct evidence of it, based entirely upon circumstantial evidence. But great caution must be exercised. To be particularly avoided are mere conjecture and speculation: *R v Kuenzler*, 2010 ONSC 2567 at para 39; *R v Chanmany*, 2016 ONCA 576 at para 45; and *R v Wheyee*, 2019 ABQB 548 at paras 98 – 99.

[65] Inferences are drawn from the entirety of the evidence. The Saskatchewan Court of Appeal said, in *R v Armbruster*, 2010 SKCA 25 at para 26:

> […] The "beyond a reasonable doubt" standard of proof is not applied to individual pieces of testimony. Rather, it is brought to bear on the evidence as a whole for the purpose of determining whether each of the necessary elements of an offence have

> been established. See: *R v Morin*, [1988] 2 SCR 345; *R v Ménard*, [1998] 2 SCR 109.

[66] The trier must be satisfied beyond a reasonable doubt that a particular fact, for which there is only circumstantial evidence, is the only reasonable inference to be drawn from that evidence or from the absence of evidence: *R v Villaroman*, 2016 SCC 33 at para 30. The Court in *Villaroman* summarized this point as follows, at para 30:

> The inferences that may be drawn … must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

The Alberta Court of Appeal, in *R v Cardinal, Joey*, 2024 ABCA 200, noted some Supreme Court jurisprudence since *Villaroman* which further illumines this line between permissible and impermissible inferences where proof beyond a reasonable doubt is required, saying at para 6:

> [...] "The 'only reasonable inference' criterion obviously does not mean that guilt had to be the only possible or conceivable inference.": *R v Vernelus*, 2022 SCC 53 at para 5, 414 CCC (3d) 269. A trier of fact is not obliged to give effect to a possible interpretation of the facts that the trier of fact considers unreasonable, and, indeed, should not do so: *Morasse v Nadeau-Dubois*, 2016 SCC 44 at para 105, [2016] 2 SCR 232.

[67] Sometimes all three elements of civil contempt are obvious and proven beyond a reasonable doubt, from the proven conduct itself, or the surrounding conduct of the alleged contemnor. An example of this can be found in *Lemay v Zen Residential Ltd*, 2023 ABKB 682 at paras 25 and 26 (italics in original):

> So, *in his own sworn evidence*, Mr. Botar has stated as fact that he breached the prohibition against not interacting with the Court of King's Bench of Alberta Clerks. And if there were any question about whether that was the case, the November 3, 2023, Affidavit of Service is commissioned by a Clerk of the Court of King's Bench of Alberta, who confirmed the identity of Mr. Botar via photo ID. This document can only mean one thing. On November 3, 2023, Mr. Botar went into the Edmonton Law Courts, stood at the Court of King's Bench of Alberta Clerk's Counter, had a Clerk witness and commission Mr. Botar's signature, that was then confirmed by the Clerk signing and stamping this document.
>
> *By his own evidence, and by the document he himself filed*, Mr. Botar has explicitly operated in breach of the February 5, 2018, Order. Here, Mr. Botar is not simply *prima facie* in contempt of court. By his own declaration, he is in contempt of court, and the same is true for two other Affidavits of Service he filed on November 14 and 17, 2023. Both of those Affidavits of Service were also commissioned in person by other Court Clerks. Mr. Botar's rejection of this Court's authority is a further reason for him to be prohibited from any further role in the Rental Dispute, and any other litigation in the Court of King's Bench of Alberta in which Mr. Botar is not a party.

[68] Contempt cannot be found where the moving party fails to prove the absence of a reasonable excuse for the alleged non-compliance. Rule 10.52(3)(a) Of the *Alberta Rules of Court* says (underlining added):

> A judge may declare a person to be in civil contempt of Court if
>
> a) The person, <u>without reasonable excuse,</u> ...

The courts in both *Envacon* and *Carey* recognized this added consideration, with the Court of Appeal in *Envacon* saying, at para 40:

> [...] as Cromwell J acknowledged [in *Carey*], acting in good faith in taking reasonable steps to comply may rightly avoid a finding of contempt where it would work an injustice in the circumstances of the case.

[69] The burden of proving the absence of a reasonable excuse is on the moving party, here Questor. The absence of any reasonable excuse can "in many cases" also be inferred from proving beyond a reasonable doubt the knowing non-compliance with an existing requirement of the court: *Envacon* at para 45.

[70] Finally, though a moving party may prove beyond a reasonable doubt all three elements of civil contempt, and the absence of any reasonable excuse, finding a party in civil contempt is still discretionary. Rule 10.52(3), above, uses the words "may declare". The Court is not to use its contempt power routinely to obtain compliance, but rather cautiously. "It is an enforcement power of last rather than first resort": *Carey* at para 36.

Background Facts and Context

[71] Questor is described as "an environmental technology company in the waste gas combustion business".

[72] Questor employed the three Individual Defendants. Stagg was Director of Sales and Marketing until his employment was terminated April 5, 2018. Bouchard was a junior engineer until he resigned May 18, 2018. Nelson served as Engineering Manager until he resigned June 1, 2018. While employed at Questor, Nelson and Bouchard were tasked with designing and engineering a low-pressure waste gas burner for use in Questor's combustors. The evidence suggests that they did so before their departure.

[73] Before the Individual Defendants left Questor's employ, they collaborated on starting up their own company (Emission) and on developing for Emission a new low-pressure waste gas combustor (the "**New Technology**"). Emission was incorporated November 14, 2017.

[74] Questor sued the defendants alleging they breached the duties they owed to it during and since their employment at Questor. They allege in the Action, among other things, that the Individual Defendants developed the New Technology for Emission while they were still employed by Questor.

[75] Questor considers to be important to its claim, information revealing the timing of the conduct of the Individual Defendants' collaboration on starting up Emission and of their developing its New Technology. Questor believes the outcome of the Action will largely turn on what the Individual Defendants said and did when, in respect of creating Emission, and in respect of developing the New Technology. That is, what was done and when are relevant and material to Questor's claims. These are the very things Questor says the Respondents, under oath, falsified, withheld and distorted, in contempt of the Court.

[76] The Individual Defendants had occasion to swear on oath to such things numerous times, in affidavits accompanying their records disclosures, in affidavits in resistance to the injunction application, in affidavits in resistance to the preservation of revenues application and in affidavits in resistance of the further and better records disclosure application, and in being cross-examined under oath about the issues in those applications following their swearing the supporting affidavits, and in attesting to responses given to undertakings made during cross-examinations.

[77] They did so between roughly 2019 and 2021, inclusive, maintaining the truthfulness of all their information given under oath throughout that time.

[78] On September 8, 2022, that changed. On that date Questor's application to compel further records was granted. That Records Decision required the Individual Defendants to provide Questor access to their personal email accounts for entries between March 2018 and September 2018 and to disclose any correspondence related to the development of Emission's designs.

[79] On November 7, 2022, counsel for the Respondents informed the Court of some errors in its prior evidence, by sending to it the Correct the Evidence Letter. At that time all three Individual Defendants swore Supplemental Affidavits of Records.

[80] In July 2023 each of the Individual Defendants also filed correcting affidavits in which they swore to the truth of their corrections that had been introduced by the Correct the Evidence Letter.

[81] Questor says the Respondents' admissions in the Correct the Evidence Letter, taken in context, prove beyond a reasonable doubt the Individual Defendants knowingly withheld evidence, knowingly falsified evidence, and knowingly misled the Court and Questor. It seeks findings of civil contempt against each Respondent and a further hearing to set the appropriate consequences.

Alleged Instances of Civil Contempt

[82] Questor alleges a great many instances of contempt by the Individual Defendants, but for purposes of this application selects certain examples and groups them in the following 6 categories:

1. Falsifying evidence in the May 2019 affidavits, by Stagg, Nelson and Bouchard (5 examples mentioned – (a) through (e) in para 27 of Questor's initial brief and addressed in the parties' columns in Schedule B).

2. Nelson & Bouchard presenting misleading evidence in sworn testimony and in undertaking responses:

a. Nelson breaching a June 2019 Court Order to respond to "Undertaking 2" by withholding evidence when doing so.

b. Bouchard falsifying evidence in cross-examination June 2019

3. Stagg, Nelson & Bouchard withholding evidence by their July 2019 affidavits of records.

4. Bouchard & Stagg falsifying and providing misleading evidence in August 2019 affidavits:

a. Bouchard falsifying and withholding evidence of combustor design and fabrication in January and February 2018.

b. Stagg falsifying the source of one of the contacts in common between his customer list and Questor's customer list.

5. Nelson & Stagg falsifying and providing misleading evidence by their further affidavits of records in February 2020.

6. Bouchard persisting under oath in the fiction that Emission had been fulsome in its record production and, in cross-examination thereafter, falsifying evidence on Emission's use of software licensed to Questor, on who and when a complete combustor stack was fabricated for Emission.

[83] Incident 2 a. above is the one referred to earlier in this decision which alleges the intentional breach of a clear and known requirement of the Court. All the rest allege contempt by lying under oath in a court process.

Has Questor Proven all Three Elements of Civil Contempt Beyond a Reasonable Doubt?

[84] For all the foregoing 6 categories of instances alleging civil contempt, Questor has satisfied the first two elements of the test. In respect of each instance alleged, listed above, I am satisfied beyond a reasonable doubt that (i) the Court required that Stagg, Nelson and Bouchard be entirely truthful; and (ii) that each of them knew that. The first page of each of the affidavits here, and of the transcription of the cross-examinations under oath, all refer to this Court and its file number for this Action. Affiants are informed, or reminded, of the Court's requirement to tell the truth in the standard process of their being sworn in at the outset of cross-examination. The questions put to such a person include asking if they promise to be truthful in the evidence they are about to give. This is the same when swearing to the truth of their written evidence before a Commissioner or Notary Public. The questions put to a person in the process of swearing their oath ask them if the contents of their affidavit are true. If the affiant answers in the negative, the process ceases. No oath is sworn; no attestation of Commissioner or Court Reporter or Notary Public is affixed.

[85] As O'Ferrall JA said in *Vaillancourt v Carter*, 2017 ABCA 282, at para 18:

> I note that Mr. Carter had access to legal advice when he swore his Form 13. Under s. 2(b) of the *Schedule to the Commissioners for Oaths Regulation*, Alta Reg 219/2014, a commissioner for oaths must not "participate in the preparation or delivery of any document that is false, incomplete, misleading, deceptive or

> fraudulent." It is incumbent on lawyers to ensure that their clients understand their obligations to truthfully disclose the information required to be sworn in a statutory declaration […]

The same is true of affidavits as for a Form 13 that the lawyer's client is swearing. And the law is the same for notarizing documents. When, as is often the case with affidavits used in litigation, a lawyer will have played a role, sometimes a very significant role, in the organizing and articulating of the document's content, the commissioning lawyer will require the affiant to review their affidavit first for accuracy before swearing their oath. At that time the commissioning or notarizing lawyer reminds the affiant of the potential consequences of inaccuracy and of falsehood.

[86] I have no reason to believe that was not done here. Indeed, the Respondents are not strenuously opposing this application on the grounds Questor has not proven beyond a reasonable doubt that they knew the Court required their complete honesty when testifying orally and in writing, or that portions of that earlier evidence were in error and had to be corrected.

[87] The critical issues in this application surround the intention element Questor must prove beyond a reasonable doubt. In this case this entails proving that at the time the Individual Defendants were each testifying under oath, their impugned statements were in fact false and were deliberately or recklessly uttered while known to be false. By recklessly is meant the possibility that the act would be disobedient must have been foreseen and ignored. As explained above, Questor need not prove that the allegedly false statements were made with contumacious intent, just intentionally uttered.

[88] Questor has not proven the third element beyond a reasonable doubt in respect of alleged instance of contempt 4 b. above. I start with this one since it is unique from all the others in that it is not included in the Correct the Evidence Letter; it is not the subject of any later correction. This allegation of contempt lacks that admission (by Stagg, in this instance) of earlier error that characterizes all the other alleged instances of contempt, including the breach of an order allegation in 2 a.

[89] While the truth of those original statements of Stagg have been called into question by subsequent Questor evidence, they have not been admitted as erroneous originally. I am not satisfied beyond a reasonable doubt that they are in fact false. There are several reasonable plausible explanations for the inconsistency between the affidavits of Stagg and Dr. Moore inconsistent with Stagg lying. Dr. Moore could be the one lying, not Mr. Stagg. Mr. Stagg could be mistaken about whom Stagg met or about which trade show Moore did or did not attend. Either of the two might have remembered incorrectly, as opposed to intentionally lied. Conflicting affidavit evidence on a material point does not enable the Court to make a final finding, *ceteris paribus*. It certainly precludes a final finding on a standard of beyond a reasonable doubt.

[90] For the remaining impugned incidents, in the 6 categories of allegations of civil contempt, I am satisfied beyond a reasonable doubt that the evidence first given is false. The Admissions prove that beyond a reasonable doubt. The remaining point Questor must prove beyond a reasonable doubt on each is that they were known to be false at each of the times Stagg, Nelson and Bouchard swore their individual statements to be true.

[91] The 5 instances of alleged contempt in category 1 are itemized in para 27 of Questor's Application Brief; I am following that list here. In 1 a. Bouchard, Nelson and Stagg allegedly lied when saying "between late October 2017 and February 2018 no steps were taken to move [Emission] forward in any real or substantive way", beyond actions limited to "incorporation, obtaining a website domain name, and preliminary discussions about technology viability, business plans and sources of funding".

[92] The subsequent correction changed February 2018 to December 2017.

[93] The words defining the limiting categories are too imprecise and vague, open to differing reasonable interpretations and to differences of opinion, for the change to the period of inactivity on such vague parameters, of a few months from February to December, to persuade me beyond a reasonable doubt the affiants knowingly falsified this evidence. So too are the words "any real or substantive way." Further, upon reviewing the perspective offered by the Respondents to Questor's Schedule B on this allegation, I also have more than a reasonable doubt.

[94] In 1 b. the correction is again to a time frame, changing "between April and May" to "between January and February", all 2018. Like 1 a., in 1 b. the term "conceptualized" in the original statement later corrected, is too subjective for Questor to satisfy me beyond a reasonable doubt that the affiants were intentionally falsifying when swearing to the first set of months. Moreover, Questor's argument in support of an inference of lying behind all the statements they later corrected, that the Respondents were motivated by self-interest in the Action and the pending interlocutory applications, would not apply here as the originally stated dates, though a few months later than the corrected dates, still fall within the affiants' period of employment at Questor (Nelson and Bouchard). To the extent that the Respondents thought their employment duties of fealty to Questor ended the moment they departed Questor's employment, this inaccuracy of timing gained them nothing.

[95] I also find alleged instances 1 c. through e. too subjective to sustain proof beyond a reasonable doubt of an inference of intentionality. Each of them turns on what is meant by "Emission Rx's technology" or "Emission Rx's commercial technology."

[96] But regardless of that subjectivity, what constitutes Emission's New Technology and what in fact may or may not have contributed to its development (part of the statements made in all 3 of these instances) are issues of fact at the crux of the Action. Until this factual dispute is determined, the truth value of the impugned statements, before and after correction, is indeterminate. I take it, therefore, that these are incidents of civil contempt that Questor withdrew from its application at the time of making submissions about consolidation.

[97] Regarding alleged instance 2 a., the requirement in the Court's Order of June 24, 2019, was that Nelson fulfill an undertaking of his that had been contested. That undertaking required Nelson "to produce any records of his discussions and research and other activities in relation to Emission for the time period between incorporation and when he left Questor." In other words, Nelson was ordered to produce every record of his activities related to Emission, of any kind, between November 14, 2017, and June 1, 2018. Nelson responded to that Order as quickly as possible because the parties were back in Court within days of the release of that Order, on one of the interlocutory applications. In light of that imminent next hearing, Nelson responded in tranches,

apparently disclosing records as able, not waiting until all were assembled for a single release. Some were produced within 2 days of the Order. More were produced a week later. He produced, say the Respondents, over eight hundred pages.

[98] But in the Correct the Evidence Letter of November 7, 2022, he corrected that response. Four hundred records were disclosed in the November 2022 correction, 269 of which were new. Upon reviewing a great many of them, I am hard pressed to conceive of how they would not fit within the identified category of "any records" of Nelson's activities relating to Emission. Some he appears only to have been copied on, but such communications fall within the stated category. That did not change between June 2019 and November 2022. Some reveal activities occurring at times when all three Individual Defendants were still employed by Questor, and much earlier than all three had maintained under oath up to and after June 2019, so those were not disclosed until November 7, 2022. Some contained Nelson suggesting to Stagg that he be the one to do something "Given you are free of the Q ...", and to Bouchard and Stagg about only taking a half day off from Questor for a meeting with a third party about Emission as "[we] don't want to draw attention with both of us taking a full day", speaking of both he and Bouchard. Another finds Nelson stating to Bouchard and Stagg he "ran some Questor numbers and used some de-rated factors to try and put a valuation on [Emission]."

[99] The Respondents say I should have a reasonable doubt about the Individual Defendants intentionally withholding these records, since they did not destroy them. The reasoning implied goes as follows: if they intended to withhold the records from the Court, then they would have destroyed them to permanently conceal them. Since they were not destroyed, they must not have intentionally withheld them. They make this argument in respect of all the allegations of civil contempt for not disclosing records.

[100] This reasoning suffers from the fallacy of affirming the consequent. I will explain by way of a simpler example, one that is not phrased in the negative: If I have too much caffeine (the antecedent), then I will be awake all night (the consequent). I was awake all night, therefore I had too much caffeine. The fallacy in this reasoning is that just because I was awake all night does not mean I had too much caffeine. If I have too much caffeine, it is a certainty that I will be awake all night. But if I am awake all night, it is not a certainty that I had too much caffeine. There could be any number of other possible reasons I may be awake all night. Therein lies the fallacy. So too here, there may be any number of other possible reasons why the Individual Defendants elected not to destroy records. The fact they were not destroyed does not prove the Individual Defendants did not intentionally withhold them.

[101] In addition to the argument not persuading me Nelson did not intentionally withhold records, neither does it leave me with a reasonable doubt on the point. In addition to the flaw in reasoning underlying the argument, the entirety of the context persuades me that these Respondents did not really know which evidence might favour their legal outcomes and which might not. Accordingly, they lacked sufficient confidence to destroy a bunch of records they later may wish they had for some other use in the Action or for other purposes. I find that they chose not to destroy relevant records in case they may need them later for other purposes. In keeping with that approach, Nelson demonstrated this by retaining records that belong to Questor for his own purposes, while knowing he should not have them. He explained his retention of them after his departure on the basis he might need them professionally if called upon to defend that work or

refresh his memory about that work. Further, destruction of records would be harder to later rationalize than withholding. Finally, it is apparent the Individual Defendants each thought they could maintain their agreed false narrative without detection. Therefore, they would see no reason to destroy the withheld records.

[102] I find Nelson intentionally withheld these additional records. I infer the requisite intentionality for civil contempt to Nelson's non-disclosure of these records at the time he disclosed the others in compliance with the Court Order, because of the volume of them, the common thread to them implying intentional selectivity to which records would be withheld and, in the circumstances, I can conceive of no reasonable plausible alternate explanation for their withholding. Nor has Nelson offered any. For example, there is no suggestion it was done on counsel's advice, a possibility that crossed my mind, theoretical only, nothing I consider at all likely in this case. The common thread to them is they contain information appearing adverse to the positions they were taking in the Action or to the evidence they had previously given under oath thus far in the litigation of the Action. For example, concealing all record of Aero-Tech's involvement prior to their departure from Questor.

[103] The comments of the Respondents about this, around Nelson's haste in trying to get as many out as fast as possible before the next Court hearing (intimating perhaps, without ever saying it to be a cause, that in that haste some (hundreds) were missed – nor is there any evidence of that being the cause), would warrant consideration as an alternate inference or even as a possible reasonable excuse, if soon after the dust had settled on that frenetic pace, and the Respondents' likely pre-occupation with the latest interlocutory application, the omitted records were then produced. But that is not what happened. It took over 3 years, and the unique nature of the Court requirements in the September 2022 Records Decision, for the withheld records to be disclosed.

[104] Regarding alleged incident 2 b., that Bouchard offered intentionally false and misleading evidence, I agree. A review of his correcting Affidavit of July 2023 makes it obvious. Some examples are, under oath during his cross-examination on June 3, 2019, there were the following questions and answers around what Bouchard calls the "expired patent prototype", with his later comments indicated and my comments in [*italics*]:

> A, I started gathering materials in April-ish [*corrected November 2022, to "March/April"*] 2018. I had an idea for how we could put together something very simple together for testing to see if we can move forward ~~and then upon my leave from Questor~~ [*deleted November 2022*], I – I assembled the expired prototype patent as we called it, to prepare it for initial testing. That was basically an intent to get a baseline test of --
>
> Q. And so, you gathered – started gathering materials in April 2018? Keeping in mind now that in April of 2018, that's when it turns out that Aero-
> Tech had actually fabricated the prototype, and upon leaving Questor, you assembled the expired patent prototype. Can you give me any more of a sense of when fabrication began and when it was completed?
>
> A. ~~Yeah, it was kind of a loose fabrication. I -- I personally did most of it. So, I mean some of it was just setting pipes up on concrete blocks and stuff. It was not heavily fabrication involved but I do recall ordering a few parts in April sometime~~

~~and assuming a lead time of 2 to 4 weeks, for those it would put me mid-May and then I -- I actually assembled and put the parts on the expired patent in late May – mid to late May~~. [*deleted November 2022*]

Q. Okay. And were there any other parties involved in the actual fabrication other than --

A. ~~No.~~ Yes.

Q. -- than yourself?

A. ~~No.~~ Yes.

[105] In November 2022 he changed both "No" answers to "Yes". He also added just prior to them:

> I gathered parts for the expired patent prototype through March/April and did a test in April. It visually did not work well, so we went back to the drawing board which led to the new prototype build (drawing dated May 25, 2018).

[106] During the cross-examination, the false evidence continued:

Q. Okay. And another –

A. I should clarify that. Later on, in -- it would have mid-July, my expired patent prototype was not very well. I'm not a great welder so I did pull in a third party at that time to kind of reconstruct what I botched.

Q. Okay. And who was that?

A. It would have been Aero-Tech Fabrication.

[107] To say "I should clarify" indicates those comments were volunteered – intentionally offered. That 'clarifying' evidence was later also corrected to insert the word "modified" so that it would read: "...mid-July, my *modified* expired patent prototype was not ...". It was corrected to now be clear that during this time frame it was not the very first expired patent prototype being attempted. That was done earlier. In mid-July it was a later iteration as they worked to develop a viable product. The falsehoods at the first cross-examination continued:

Q. Okay. And so, Aero-Tech fabricated the new prototype at that time?

A. No. They basically ground out welds that I had put in that were failing and just re-did it so that it was safe.

[108] The corrected evidence shows that Aero-Tech was not brought in in July, and was not brought in to fix what Bouchard said he botched, but in fact Aero-Tech not Bouchard made the expired patent prototype, and not in July but before Bouchard left the employ of Questor.

[109] Bouchard changed his evidence in his affidavit sworn August 18, 2021, before correcting it all November 2022, saying he set about building a prototype waste gas combustor based on the expired patent. In cross-examination about that on September 2, 2021, he testified that he built it all in one day, on May 19, 2018, the day after he left Questor. He was asked:

> Q. Is it your evidence, Mr. Bouchard, that in one day you built this stack?

[110] To which he answered: "Yes, absolutely." In the November 2022 corrections that became: "No. I cut larger openings and stood it on its end." Further corrections then disclosed that the work on May 19 was not about the first attempt, based on the expired patent, at all. The corrected evidence says the expired patent prototype was built in March 2018 by Aero-Tech. Bouchard's corrected cross-examination answers revealed:

> A. As of May 19, Aero-tech had fabricated the original prototype. Work performed on May 19 involved modifying the combustor to improve air intake. This work was based on trial and error and was not completed with reference to any design diagrams.

[111] Bouchard persisted in his falsehoods, digging himself deeper with each successive opportunity to offer truthful evidence under oath. He perpetuated the original false narrative on the litigation record for another 3 years before compliance with the Records Decision necessitated coming clean about it and correcting all the erroneous evidence.

[112] I can conceive of no reasonable alternate inference to draw from these responses than that the falsehoods were knowingly uttered under oath intentionally.

[113] Regarding allegations of contempt 3, Stagg, Nelson and Bouchard supplied affidavits of records in July 2019 swearing that, other than their listed records, they did not have any others. Nelson did, as already described above – almost 270 others. Those and others were disclosed to the Court for the first time November 2022 with the Correct the Evidence Letter. From out of those, Questor lists (at para 35 of its Application Brief) 11 examples of actions taken by the Individual Defendants while employees of Questor that are disclosed by the new records, all of which were every bit as relevant and material to the issues in the Action in July 2019 as in November 2022.

[114] I find that they were withholding evidence. From the volume of the withholding, the content of the information withheld, and that all three of them not just one of them withheld the information, I can conceive of no alternate reasonable inference to draw than that each did so intentionally.

[115] In allegation 4 a., Questor says Bouchard falsified and withheld evidence of combustor design and fabrication in January and February 2018, when he swore his further affidavit on August 1, 2019, in which he again concealed the activities of the Individual Defendants progressing Emission and product design, involvement of Aero-Tech, all while in Questor's employ. This was admitted deficient by November 2022 corrections. Here it is disclosed on his behalf that they designed a combustor in January and February 2018 and manufacturing costs were investigated also in February 2018. For the same reasons as on earlier alleged instances of contempt, I infer these falsehoods and selective withholding of evidence were intentional.

[116] In allegation 5, Questor says both Nelson and Stagg supplied amended affidavits of records in February 2020, that should have but did not disclose all the omitted design records, and the correspondence revealing all the early activities of the Respondents, described above. This was another opportunity to tell the truth. Each chose not to, knowing the existence of the further

relevant records. I find this similarly lends itself to only one reasonable inference and that is of the intention required for civil contempt. However, for these purposes I group it in with category 3.

[117] In allegation 6, Questor refers to Bouchard under oath in cross-examination persisting in the fiction that Emission had been fulsome in its record production through the time of the injunction proceedings, and falsifying evidence on Emission's use of software licensed to Questor, plus on who and when a complete combustor stack was fabricated for Emission.

[118] Regarding the first of those, Bouchard's persisting in his stance that all required records had been produced, I find it proven and intentional, but I categorize it as a part of the earlier document withholding instance that persisted for over 3 years, and therefore also part of category 3 above. The false evidence around the timing of designing and fabricating combustor stacks for Emission I included in allegation 2 b above. The evidence of these further examples increases my confidence in the intentionality of the Individual Defendants' scheme to mislead, conceal and falsify.

[119] Regarding the evidence of Bouchard about use of software licensed to Questor, I am not satisfied beyond a reasonable doubt of intentional lying regarding the SolidWorks license timing. Bouchard likely was attempting to respond consistently with the trio's earlier false narrative, rather than honestly. This was the false narrative that downplayed their actual activities around Emission and the New Technology prior to their departing Questor. But proving "likely" falls short of proving beyond a reasonable doubt. He also volunteered in his cross-examination close in time to his affidavit that it may have been obtained in April not May 2018.

[120] I reach a similar conclusion regarding his testimony on the timing of his use of the OnShape software. I am not satisfied beyond a reasonable doubt that he was intentionally providing erroneous evidence about that, not unintentionally mistaken as to timing that the dates on a select few accounting records later clarified.

[121] Questor says the Individual Defendants' intentionality in testifying to what they knew was false is the only reasonable and plausible possibility that I can infer from the evidence in aggregate. They say motive can provide a basis to infer intent and applies here. They say the pervasive nature of the admitted errors take this far outside of any category of one-off slip or lapse in judgment. They say the selective nature of the items falsified and withheld militate strongly against inferring inadvertence. Finally, they say the Individual Defendants' persistence in perpetrating their erroneous evidence is consistent only with the intention required for civil contempt.

[122] I agree with those arguments in respect of those instances I have indicated above that Questor has proven all three requirements for civil contempt beyond a reasonable doubt. Particularly compelling is the very selective nature of the content of the withheld records – by all three Individual Defendants maintaining this fiction. All the withheld records and distorted and falsified evidence appear collectively designed by all three to downplay anything they did or said prior to their departure from Questor in respect of Emission or the New Technology, or else it was completely irrelevant information like social media posts, marketing spam and Facebook messages. Nothing among the latest disclosures were records that might be taken to support Emission's positions in the Action. It seems those records all made the cut for the initial affidavits.

[123] Stagg, Nelson and Bouchard acted seemingly in consort, in accordance with a pre-designed common objective of downplaying, as I said, anything they had done or said in respect of Emission or the New Technology prior to their departure from Questor.

[124] The selective recollection by each of Stagg, Nelson and Bouchard, of anything consistent with a favourable outcome in the Action, and their collective suppression of anything inconsistent with it, goes to the heart of the dispute in the Action in which they face personal liability. This precludes from being a reasonable alternate explanation that it was, say, sloppy disregard (just coincidentally by all three), uber-inattention (just coincidentally by all three), or convenient loss of a digital filing cabinet that only contained records adverse to their posited narrative in the Action (just coincidentally by all three).

[125] The three each persisted in maintaining that their erroneous evidence was true, in the face of questions for Questor to confirm a statement was true, and even after it applied to compel more records. These would normally cause most any litigant to do a double check. Had any one of these three done so, and not as here holding to the plan and intentionally maintaining under oath their erroneous evidence, they would have discovered something overlooked and brought it forward. Or they would have at least taken anything uncertain to their lawyer for guidance on producibility. That never happened. The fact that the Individual Defendants each time affirmed what they now admit to have been in error, strongly and only implies intentionality. It strongly and only implies knowledge of the erroneous testimony and a conscious choice to perpetuate the deceptions.

[126] By virtue of the common thread to the evidence each Individual Defendant, each acting similarly to the other two, in all the circumstances of this case, it necessarily follows that they did so with intentionality.

[127] This lone reasonable inference is made all the stronger by the timing of the corrections. The corrections were made only after release of the Records Decision. None were made after Questor in cross-examination asked, in effect, are your sure? None were made after Questor filed its application to compel further records. That was strenuously resisted. The corrections came about only after the Records Decision shone a spotlight on their erroneous evidence and forced their hand.

Respondents' Arguments

[128] The Respondents say in respect of all the incidents of alleged civil contempt, that (i) they merely corrected their evidence in accordance with Rule 5.27 – that it is not contempt of court to make a mistake; and (ii) the requisite intentionality cannot be inferred from this record. They also caution the Court not to find contempt here for several further reasons. I address each of these arguments next.

[129] I agree that it is not contempt to make a mistake. But I disagree with the Respondents' implication that in this case Questor is over-reacting to just normal course litigation kind of stuff, expected by Rule 5.27. The Respondents say their corrections were made early into the preliminary stages of the litigation process – questioning for discovery has not yet even commenced and the parties have much to do before any trial of the Action can be heard.

[130] Rule 5.27 of the *Alberta Rules of Court* states:

> (1) A person who is or has been questioned must, by affidavit, correct an answer if
>
> (a) the answer was incorrect or misleading, or
>
> (b) the answer becomes incorrect or misleading as a result of new information.
>
> (2) The correcting affidavit must be made and served on each of the other parties as soon as practicable after the person realizes that the answer was or has become incorrect or misleading.

[131] By suggesting the Admissions were just a typical Rule 5.27 correction, the Respondents' mis-characterize what actually happened. The timing of the Correct the Evidence Letter, in the context of this litigation, belies the Respondents' suggestion that this was simply normal course compliance with Rule 5.27.

[132] There were months and months of silence about all the errors and then, only after the September 8, 2022, Court requirement in the Records Decision, the Respondents delivered the very significant volume of error corrections. The Records Decision was clearly the trigger, nothing else. The Respondents' counsel informally notified Questor's counsel in mid-October that they would be providing some corrections to the record. Then on November 7 came Supplemental Affidavits of Records and the formal lengthy list of corrections in tabular form, accompanying the Correct the Evidence Letter.

[133] The timing of the Admissions was not "as soon as practicable" after realization because, by my findings above, the evidentiary falsehoods were known at the time of their utterance. The errors may have been first disclosed to Questor and then to the Court as soon as practicable after they were drawn to the Respondents' counsel's attention, but for the reasons I have given, it was not as soon as practicable after the utterances were known to be in error. They were known by the Respondents at the times of their erroneous testimony. Also, the affidavits correcting the errors on the record, that Rule 5.27 requires, did not come until July 2023.

[134] I find the known errors were admitted only after the Individual Defendants concluded they would soon all be discovered as a consequence of the Records Decision. These were not the immediate disclosures of some isolated errors just noticed after reviewing a transcript of one's recent cross-examination. They were not raised after one of the three walked away from being cross-examined, replayed what had occurred, and felt they may have left the wrong impression. Not 15 pages of errors listings and not hundreds of previously undisclosed and clearly relevant records. It was only after the Respondents learned they would soon become known anyway, by their recent forced disclosure, that the Respondents brought them forward. It was not driven by the requirements of Rule 5.27. Suggesting it was is not credible. Nothing in the Correct the Evidence Letter refers to Rule 5.27. Nothing in the July 2023 affidavits of each of the Individual Defendants refers to Rule 5.27. A litigant need not refer to Rule 5.27 when following it to correct their evidence, but if as their counsel suggests the Respondents were merely complying with Rule 5.27 one would think their communication to the Court would say so. The Individual Defendants were motivated by self-interest to correct the record without further delay once the effect of the Records Decision would reveal the errors. They were mitigating the fallout of their conduct once having been found out.

[135] Finally on the Respondents invoking Rule 5.27 as their rationale for correcting the record, even if that Rule did play a role in charting their approach once they decided to correct the record, it does not mean there should no longer be a finding of civil contempt for them originally lying to the Court. It cannot be a serious argument to suggest it is no longer civil contempt if the record is later corrected in accordance with the Rules. Saying that by having complied with Rule 5.27 there should now be no finding of civil contempt, is saying that compliance with Rule 5.27 absolves a contemnor for earlier lying to the Court. Such an approach is sure to invite proliferation of such civil contempt by all litigants, with impunity and with disastrous consequences for the efficacy of the system.

[136] On the second objection to all the instances of civil contempt, the Respondents say that the intention required for civil contempt cannot be validly inferred from the evidence before the Court. The Respondents say that for the Court to infer the intention to lie, it would have to accept as fact Questor's as yet unproven allegations of fact and accept its theory of the case in the overall Action, which would be contrary to the law I describe above.

[137] The Respondents are correct about there not being undisputed facts from which intention can be validly inferred for a few of the alleged instances of contempt. I have not found civil contempt proven on those instances for that reason. See the discussion above in respect of allegations 1. c. to e. and 4. b.

[138] However, I disagree with the Respondents that this flaw plagues all the allegations of civil contempt. It does not manifest itself in the instances I have found to be proven beyond a reasonable doubt. As I explain above, the proven facts, based alone on the Individual Defendants' own Admissions in light of the overall context of their impugned utterances and their later Admissions, including their selective content being the same for all three separate witnesses, lend themselves to no other reasonable or even plausible inference than intentionally presenting as true while under oath information known to be false.

[139] The Respondents spent time explaining how the corrected evidence, in their view, does not help Questor in the Action. They imply that, therefore, no inference of intentional lying can be drawn because those issues of the Action have yet to be decided. The Court would be drawing an inference from disputed facts, they argue. Just as one of the many such assertions by the Respondents, they said in their oral arguments:

> Well, again, the evidence doesn't show, it never has shown, and still doesn't show that they substantially developed Emissions technology while employees at Questor.

With respect, it does not matter what the erroneous evidence or the corrected evidence might tend to prove in the Action. This confuses inferences that may be drawn from the erroneous or corrected pieces of evidence for the issues in the Action, with inferences of intentionality or not when the undisputedly erroneous information was first uttered. For the latter inference, it does not matter what use or not the pieces of erroneous or corrected evidence may play in the outcome on the merits of the Action. Whether the intention required for civil contempt can be validly inferred does not depend in any way on how the pieces of evidence may advance either side's position on the

issues in the Action. The inference is drawn from the Admissions, in light of the context factors I have described.

[140] The Respondents say I should bear in mind the broader context as I deliberate and exercise my discretion. They refer to numerous insurmountable flaws in Questor's case on the main Action. These arguments occupy a relatively large portion of the Respondents' Brief. They say the New Technology is very different from anything conceived during their time at Questor. They say Questor has no response to their expert evidence which proves Questor wrong on a crucial element to its claim in the Action. They say their New Technology is not really profitable, so Questor has nothing to gain even if it succeeds in the main Action. They theorize that Questor is realizing how increasingly hopeless its claims in the Action are and pursues contempt as a means of salvaging something out of its Action.

[141] With respect, the requirements of honesty, forthrightness, attorning to the courts' authority and honouring the rule of law do not apply only to parties destined to lose their case. Being in a lawsuit whose favourable outcome is a *fait accompli* is not license to treat the Court or the curial system with contempt. It is not a free pass to lie or to hijack the process to expedite that desired outcome. It is certainly not a valid reason for the Court to exercise its discretion by turning a blind eye to lying under oath. The Respondents' stated considerations are all irrelevant to whether any inference of intentionality is the only reasonable inference that can be drawn.

[142] In their oral arguments, the Respondents also raised many other 'cautions' the Court should regard before making any finding of civil contempt. I will deal with the more memorable briefly.

[143] I find no breach of the Respondents' rights against compelled self-incrimination. Interestingly, the Respondents raised this concern at the same time as they criticized Questor for not having cross-examined the Respondents to compel further evidence onto the record.

[144] Questor's successful arguments are not based upon hearsay.

[145] I find no breach of the Respondents' *Charter* rights and procedural rights.

[146] If the evidence Questor has relied upon in support of its contempt allegations did not satisfy the three-part test above, then the Respondents would not need to adduce any further evidence. They could expect the contempt applications to be dismissed. In this case, however, for the reasons provided above, Questor proved its case to the requisite standard of proof and so there was a case made out that the Respondents needed to meet. They chose not to. The Alberta Court of Appeal said at para 7 of *Cardinal*:

> Another matter is that the appellant did not testify, which is a factor this Court can consider, not as makeweight but as showing that alternatives needing evidence are merely matters of conjecture: see e.g. *R v Eastgaard*, 2011 ABCA 152 at para 22, 276 CCC (3d) 432; aff'd 2012 SCC 11, [2012] 1 SCR 393; *R v Noble*, 1997 CanLII 388 (SCC), [1997] 1 SCR 874, per Sopinka J at paras 101-105. As with the line of authority as old as *R v Jenkins*, (1908) 14 CCC 21 at p 230, referring to an accused being "enveloped" by circumstantial evidence, Moldaver J said in *R v George-Nurse*, 2019 SCC 12, [2019] 1 SCR 570, there was "a case to meet". The case at bar was not like *R v Metzger*, 2023 SCC 5, 423 CCC (3d) 300.

[147] Questor has proven all three essential elements of the identified incidents of contempt without any reliance on the Respondents' silence. Questor has not used the Respondents' silence as makeweight. Questor has similarly proven beyond a reasonable doubt the absence of a reasonable excuse. In choosing to not testify any further on those matters, the Respondents have taken the risk of being found in contempt in the absence of any evidence raising a reasonable doubt on any of the three essential elements or on the absence of any reasonable excuse. Had any of the Respondents wished to adduce further evidence to meet the case against them, for example after seeing it all cogently presented in Questor's brief with detailed particularity, upon request they invariably would have been permitted to do so despite the case manager declaring evidence closed on the contempt issues. They never asked to do so.

[148] Questor has not proven its case by asking that the Court fill in gaps in its case. The Respondents caution me against doing so, but do not point to any such gap. I see none.

[149] The Respondents say they had no motive to lie because many of the pieces of evidence now corrected were known to the Court before it decided various interlocutory applications. In my view, this does not disprove the compelling proof of motive to lie, it just says that the Individual Defendants were unsuccessful in achieving their objective fully. And it was only a small subset of the total number of Admissions that the Respondents point to as becoming known to or deduced by the Court despite the initial erroneous evidence.

[150] The Respondents say their expert evidence from Dr. Chekel has not been countered by Questor and it undermines any motive they would have to lie. That is, in the face of the uncontroverted expert evidence, that the Respondents say is alone dispositive of the Action in their favour, the Respondents had no reason to lie. They are certain to win. They say this undermines any motive to lie and therefore any inference of them having the requisite intention.

[151] The problem with that reasoning is that the Respondents contrived their common objective to not tell the truth well before the apparent origination of Dr. Chekel's expert opinion. Once the Individual Defendants' common purpose was reflected in their early sworn evidence, the die was cast. Thereafter, by their later sworn statements they endeavoured to perpetuate the errors rather than be found out even if by then they may have learned of Dr. Chekel's opinion. Like so many of the arguments raised by the Respondents, this one too had no evidentiary support.

[152] The Respondents say the erroneous evidence did not matter to the merits of any of the interlocutory applications, whereas Questor says they played a role in their losses, perhaps even being dispositive. This argument from each side is relevant to the consequences of the civil contempt, including whether there was contumacious intent, not whether there was civil contempt.

Has Questor Proven the Absence of a Reasonable Excuse Beyond a Reasonable Doubt?

[153] With Questor having satisfied its burden of proof beyond a reasonable doubt of each element of civil contempt, against each of the Individual Defendants on the identified allegations of civil contempt, I now consider whether it has also proven beyond a reasonable doubt the absence of any reasonable excuse.

[154] In my view, this is one of the "many cases" referred to in *Envacon* (at para 69 above), in which the absence of any reasonable excuse can be inferred from Questor proving beyond a

reasonable doubt the knowing non-compliance with an existing requirement of the Court, by the Individual Defendants' Admissions.

[155] The Individual Defendants had an opportunity to present evidence that raises a reasonable doubt on the matter of a reasonable excuse, without it constituting compelled self incrimination. The *prima facie* case has been made out without anything further the Individual Defendants may have said. Such evidence, if presented, would not be 'makeweight.'

[156] The Respondents declined the opportunity, no doubt a careful and difficult decision. Nevertheless, the Court is without its benefit. Their counsels' arguments orally and in their written Brief and in the Schedules thereto suggested things that may have become grounds for a reasonable doubt as to there existing a reasonable excuse for what otherwise will be civil contempt. For example, they say the alleged instances of contempt were not so egregious. They point out the errors have now been corrected (so any contempt has been purged). They refer to the fact some of the errors were already known to the Case Management Justice when he made his earlier Rulings, and so on.

[157] I find in these arguments nothing that raises a reasonable doubt that the Individual Defendants are without reasonable excuse for conduct that was clearly in civil contempt of this Court *at the time* of their testimony.

[158] Finally, I have not been presented with any basis for finding reasonable doubt that finding civil contempt here would work an injustice: *Envacon* at para 40.

Conclusion

[159] For these reasons I find Stagg, Nelson and Bouchard (collectively, the "**Contemnors**") guilty of civil contempt as follows:

- Richard Stagg, for instance 3 and, entailed therein, instance 5;
- Jeffrey Nelson, for instance 2 a., 3 and, entailed therein, 5; and
- Justin Bouchard, for instance 2 b., 3 and, entailed there in 6, and 4 a.

[160] The parties are required to immediately schedule a return attendance before me at the earliest they can arrange with the Court's schedulers. Until then the Contemnors may not leave the Province of Alberta and must relinquish their passports to their counsel in trust.

[161] At that next Court attendance, if any of them wishes, at that time the Contemnors may show cause for why their travel restrictions should be immediately lifted. Further, at that attendance the process leading to the second stage hearing on possible consequences shall be spoken to.

[162] Finally, also at that time all parties shall be invited to address the Court on why it should or should not require each of the Contemnors to provide to the Court during the second stage, a certificate of independent legal advice. That is, the Court is considering requiring each of the Contemnors to consult their own separate counsel, independent of the other Contemnors and of Emission, in respect of the personal liability they now face. I am not at all considering requiring they change their counsel, only that each Contemnor satisfy me that they have consulted separate

counsel in respect of their individual rights now that they *may* find themselves in conflict with the interests of one or more others potentially affected in the second stage process. In the second stage the Court will of course be attempting to ascertain the role each Contemnor played individually in what appears to have been a joint scheme, in assessing their individual degrees of moral culpability, individual contempt gravity and possible differing degrees of contumacious intent. I will benefit from all counsels' views on that before I decide whether to impose such a requirement.

Heard on the 12th and 13th days of December, 2023, and February 27th, 2024.
Dated at the City of Calgary, Alberta this 28th day of June, 2024.

P.R. Jeffrey
J.C.K.B.A.

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