Court of King's Bench of Alberta

Citation: RK v GSG, 2024 ABKB 487

Date: 20240808
Docket: 2103 00231
Registry: Edmonton

Between:

RK

Plaintiff

- and -

GSG, GW, MG, APG, SP, ST and Others

Defendants

And Between

GW

Plaintiff by Counterclaim

- and -

RK, SK and Others

Defendants by Counterclaim

- and -

SK and Others

Third Party Defendants

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Reasons for Decision on Three Desk Applications
of the
Honourable Justice Douglas R. Mah

A. Background

[1] It was agreed between counsel and myself that the within applications should be dealt with by me as desk applications as a matter of efficiency. The three applications are:

- application on behalf of SP to compel a refused undertaking from RK;
- application on behalf of SP to strike certain evidence obtained or put forward on behalf of RK; and
- application on behalf of RK to compel production of the letter written by SP's counsel to myself on November 23, 2023 and the "other" withheld document.

[2] Both counsel provided written submissions and referred me to extensive evidentiary material in the record in respect of each application. My written decision reported as ***RK v GSG***, 2024 ABKB 121 provides context and background. I am the case management judge in this matter. I would describe this litigation as a feud between the two sides. As I noted elsewhere, there is a great deal of antipathy, bad feelings, and recrimination between RK and the defendants. The two sides are deeply suspicious of one another. At times, this attitude of dislike and suspicion has spilled over to the positions taken by counsel in this series of applications.

[3] The defendant SP is represented by Mr. Pruski and the plaintiff RK by Mr. Mielke.

B. Application to Strike Certain of RK's Evidence

[4] This application by SP seeks to strike three pieces of evidence put forward on RK's behalf. The purpose of the application is to define the admissible evidence that is properly before the Court for the purposes of an upcoming summary dismissal application. The three disputed items of evidence consist of:

1. the first 103 paragraphs and paragraphs 110 and 111 of RK's November 4, 2022 affidavit opposing the summary dismissal;
2. the third-party evidence of SD; and
3. Exhibit "L" to RK's November 4, 2022 affidavit.

1. The Affidavit

[5] Rule 3.68(4) governs the content of affidavits. The Court may strike out all or part of an affidavit that contains frivolous, irrelevant, or improper information. SP says that:

- the first 103 paragraphs of the affidavit do not implicate SP in any wrongdoing and are therefore irrelevant; and
- paragraphs 110 and 111 consist of opinion, speculation, argument, or conclusion and are improper.

[6] RK responds that:

- the first 103 paragraphs provide not only permissible but necessary background to the litigation and are therefore relevant to the summary dismissal application; and
- impugned paragraphs 110 and 111 contain facts which enable a determination of SP's credibility.

[7] I'll deal first with the relevancy question regarding the initial 103 paragraphs. I need to bear in mind that the focus of this application is to define the record for the purposes of an upcoming summary dismissal application. SP has both the threshold and ultimate burden to establish that summary judgment is appropriate and that there is no genuine issue for trial. As such, the Court must be careful in considering a pre-emptive motion to strike evidence: ***H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd***, 2023 ABKB 659 at para 21. Without pre-deciding a summary dismissal application yet to come, I will venture to say that SP likely will meet the threshold burden by denying participation in any malicious conspiracy against RK. Having done so, the paradigm under ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47 then triggers an obligation on RK's part to "put his best foot forward" to demonstrate from the record that there is a genuine issue requiring a trial.

[8] I accept that there is a complicated set of facts underlying RK's lawsuit involving several parties (some of whom are related by blood, marriage or business) and disparate events occurring over a nearly 13-year period, which events include business disputes, various civil lawsuits, regulatory complaints, purported internet defamation, a purported made-up murder plot and an ultimately failed sexual assault prosecution against RK. These components comprise the allegation of malicious conspiracy to injure that lies at the heart of RK's action.

[9] I also appreciate the submission made on RK's behalf that the initial 103 paragraphs, although prolix, provide purposeful context or narrative that assist in understanding the allegations: ***Questor Technology Inc v Stagg***, 2021 ABQB 636 at para 66; ***Alberta Treasury Branches v Leahy***, 1999 ABQB 185 at para 84. In my view, it would be wrong of me at this point to deprive RK of his ability to "put his best foot forward" in the summary dismissal application that looms. Explaining the whole sordid chain of events is, I feel, unfortunately

necessary to place the allegations against SP in proper context. I decline to strike the first 103 paragraphs.

[10] I turn to the other objection. The law regarding affidavit content in Alberta is clear since the Court of Appeal's decision in ***Alberta (Human Rights and Citizenship Commission) v Alberta Blue Cross Plan***, 1983 ABCA 207 at para 8: The purpose of affidavit evidence is to place the necessary facts before the Court and should not contain argument, opinions or conclusions; it is the Court's function, not the affiant's, to draw conclusions from the evidence.

[11] The sentiment in this well-established case law seems more to be observed in the breach in this province. Routinely, lawyers and SRLs alike place affidavits before the Court that are rife with the affiant's opinion, argument, and conclusions and not just fact. Sometimes the affiant will recite (what should be) counsel's various legal arguments and opine on the inferences and conclusions that should be drawn, the chain of logic the judge should follow as well as the decision that the judge should make. Judges (including me) have become inured to this fact-of-life in our Courts and practiced at ignoring or disregarding these objectionable parts of affidavits.

[12] It appears that the entirety of RK's affidavit is couched in terms of the malicious conspiracy, and its component parts, having actually occurred as fact. While I accept that in RK's mind, or belief, the individuals in question did engage in a malicious conspiracy to cause him harm, whether the remaining causes of action are proven in fact and law are determinations yet to be made by the Court.

[13] There are several areas in the balance of the affidavit, some identified by SP and some not, that are potentially problematic. It could be said that:

- RK's opinion (at para 110) that SP is lying is conclusory and therefore non-probative.
- His statement repeated at para 111(a) that SP is lying is a conclusion yet to be drawn by the Court. His reliance in the same paragraph on an email between two third parties to support his own truth-telling (and thereby impugn SP's credibility) appears to be both hearsay and engages the issue of collateral fact.
- The statement in para 111(c) that SP is withholding relevant documents is both opinion and speculation.
- RK believes that SP is more involved with GSG in harming RK than SP is letting on because of what he perceives is a discrepancy between something SP's lawyer told RK's lawyer and then repeated by RK's lawyer to RK and what RK understood SP's evidence to be at SP's questioning on affidavit. In order to accept RK's conclusion, I would need to resolve what part of the discussion between the lawyers was privileged or not and whether there has been waiver or mutual waiver, none of which is clear to me at this point.
- The conclusion RK urges in para 111(d) that SP assumed the fictional identity of ST in order to defame RK on Facebook is supported only by the fact that SP knew how to use Facebook in 2019. The inference sought to be drawn, based on this evidence, is tenuous.

[14] Rather than strike any of the impugned paragraphs at this point, I make a point to be mindful of and to self-instruct, when hearing the summary dismissal application, as to which

parts of the affidavit are impermissible (and therefore should be disregarded) because they are opinion, argument, speculation or conclusion or reflect some other evidentiary defect. I am cognizant of and will follow the Court of Appeal's direction regarding affidavit content *when the time comes*. Where RK asks that I draw inferences, I will determine whether there is sufficient circumstantial evidence to support those inferences. All to say, I am reluctant to strike in the face of an impending summary dismissal application where the main issue is the adequacy of the record and whether a genuine issue to be tried is presented. That is, I should not pre-determine whether the record is sufficient and reserve that decision to the actual summary dismissal application. Both counsel should and will have the opportunity to argue at the summary dismissal application whether the record, with RK having put his best foot forward, permits summary dismissal.

[15] The matter of whether the affidavit content is irrelevant or improper is an exercise of judgment and discretion, including when and how to deal with objectionable affidavit content. That is less so the case with the next two objections, for which there are specific Rules for the procurement or use of the evidence in question. I am asked to determine whether those Rules have been or should have been followed.

2. The Third-Party Evidence

[16] SD is a resident of Halifax, NS. He was a guarantor along with RK, GSG, GW, SP, and another in 2014 of a commercial condominium business. The relevant part of his evidence relates solely to who was in the room when the joint guarantee was signed by the guarantors and then the notary. SP testified in his September 12, 2022 questioning on affidavit that all the guarantors were present in the office of the notary (a third party lawyer) when the guarantee was signed, including RK. RK says he was not present and never met the purported notary. Similarly, SD recalls signing the guarantee but says he was not present with the notary at the time.

[17] RK asserts that since his version is corroborated by SD, then SP is a liar.

[18] SD's evidence was the result of remote questioning (by videoconference) in this action on October 6, 2022 while SD was apparently in Halifax and the questioner, Mr. Mielke, was in Edmonton.

[19] SP contends the transcript of SD's questioning, which has been submitted by RK in response to the summary dismissal application, should be struck because:

- SD's evidence was coerced by threats;
- the transcript is inaccurate; and
- the proper process for procuring the evidence under the Rules was not followed.

[20] I don't have a sufficient basis on which to conclude that the legitimacy of SD's evidence is vitiated by coercion. SD was told that if he refused to be questioned, he could be forced to do so by Court Order and made to pay costs. That is no more a threat or coercion than in any other instance of a civil demand. In the end, SD thought the better of it and decided to cooperate.

[21] Even though now SD might suggest that the transcript does not accurately capture what was said during the questioning, I similarly have no basis on which to conclude that the transcript is unreliable. The recording was not made available to me for comparison. The court reporter certified the accuracy of the transcript.

[22] But there is more. First, what is problematic is how the questioning of SD took place without Mr. Pruski's knowledge and participation, particularly since he had impressed upon Mr. Mielke his wish to be present in any such evidence gathering exercise in relation to his motion to summarily dismiss RK's action.

[23] It does appear that SD was properly served with an appointment. I acknowledge this passage from ***Guillevin International Co v Barry***, 2022 ABCA 144 at para 35, cited by Mr. Mielke, is apposite:

> Any party has a *prima facie* right to examine a witness under R. 6.8 without consent or Court order. Obtaining evidence from a recalcitrant witness supports the Court's truth-seeking function and is exactly what the rule is for: ***Neill v Millar***, 2021 ABQB 305 at paras. 12-14, 48-49. … While a chambers judge can set aside such an appointment if it is an abuse of process, the burden of showing an abuse is on the witness. The appointment should not be set aside unless there are no more proportionate remedies. On this record there was no sufficient reason for the chambers judge to set aside the notice under R. 6.8.

[24] However, the Rules go further. Rule 6.8(a) itself says that Rules 6.16 to 6.20 apply to a questioning under Rule 6.8. Rule 6.16(2)(b) directs that the Notice of Appointment be served on each of the other parties. Further, Rule 6.20(1) provides that a person questioned under this Part may also be questioned by any other party during the same questioning. While the latter rule is permissive, obviously the "may" is to be exercised by the other party. In this case, neither SP or his counsel knew about the questioning nor was ever given the chance to question SD. It is no answer to say that SP can now, of his own accord, question SD himself under Rule 6.8. That is not how Rules 6.8, 6.16 and 6.20 are supposed to operate.

[25] Even more problematic is that SD resides in and was apparently questioned while physically present in Halifax. Rule 6.22 specifically governs situations in which evidence from outside Alberta is sought to be used in proceedings within Alberta.

[26] I accept based on ***Guillevin International*** that, generally speaking, consent or a Court Order is not required for a party to question a witness under Rule 6.8. But there is no indication that ***Guillevin International*** dealt with an out-of-province witness. Rule 6.22 deals more specifically with out-of-province evidence and calls for both an application and a Court Order. A genuine conflict exists between the two Rules when it comes to questioning an out-of-province witness: one Rule as interpreted does not require a Court application, the other manifestly does. Thus, as stated in statutory construction canon, the specific overcomes the general.[1]

[27] It might seem quaint and outdated in the digital age that a litigant needs permission from the Court to use an internet hook-up to remotely question a witness. Nonetheless, from my plain reading, that is what the Rule requires when the witness is out-of-province. It is up to the Rules of Court Committee and the Provincial Cabinet to determine whether technology has outpaced the usefulness of the Rule. I apply the Rules as given.

[1] This well-known rule of statutory construction is found in the various editions of Sullivan, ***The Construction of Statutes*** and is cited in Alberta cases such as ***Agrium v Orbis Engineering Field Services***, 2022 ABCA 266 at para 150 (Wakeling JA in dissent) and ***Byron Hills Resources Ltd v Alberta (Sustainable Resource Development)***, 2009 ABQB 292 at paras 64 & 65.

[28] I take some solace from the Court of Appeal's recent decision in ***2007513 Alberta Ltd v Pet Planet Franchise Corp***, 2022 ABCA 310 (***Pet Planet***). This case involved a proposed class action by franchisees against the parent company. The franchisees believed a witness then resident in Arizona could provide evidence that would assist in their certification efforts. The witness said he would only give information if compelled to do so by Court Order requiring him to be examined under oath. The franchisees then applied to the case management judge for an Order permitting a virtual examination of the witness in Arizona. The case management judge refused the Order and on appeal, the Court stated:

> [7] Little case law exists on either Rule 6.22 or its predecessor, Rule 270. The test for such an order under Rule 270 was articulated in ***WIC Premium Television Ltd v General Instrument Corp et al***, 1999 ABQB 335 at para 8, 243 AR 324 [***WIC***]: there is a heavy onus on the party seeking the order; the evidence sought must be material and not merely corroborative; particulars of evidence to be given must be provided and it must be shown what the evidence will be; the applicant need not show all other avenues have been exhausted and hearsay evidence may be used in support of the application. This test was later adopted and applied to Rule 6.22 in ***HZ v Unger***, 2013 ABQB 639 at paras 50-51.
>
> [8] Even if the applicant meets the test, the Court may decline to grant the order. The particular circumstances of the case will inform the exercise of the Court's discretion.

[29] This was not a case involving commission evidence to be taken by an official in another jurisdiction. Like the present case, it involved a virtual questioning (that was to be) conducted using computers and internet. It would not be enough to say that in ***Pet Planet,*** the witness was recalcitrant and that is the reason for the Rule's invocation while in the case before me, the witness ultimately decided to cooperate, so the Rule isn't required. In my view, a Court application is still necessary under Rule 6.22 because adverse interests are at stake. Those parties with adverse interests should be allowed to make submissions as to why obtaining out-of-province evidence is necessary or not. Furthermore, as the cases noted above indicate, there is a heavy onus on the party seeking the order.

[30] It is clear from para 20 of ***Pet Planet*** that the Court must apply a legal test and give the parties an opportunity to argue their case even in a case of out-of-province questioning to be done virtually:

> While his reasons are brief and somewhat conclusory, it is evident the case management judge was aware of the correct test governing an order under Rule 6.22. Further, it is clear from review of the transcript that the case management judge provided the parties with an opportunity to fully argue their positions and was actively engaged in the process.

[31] It would be quite another thing if the party adverse in interest in this case agreed that the out-of-province evidence could be taken. That did not happen here. As to the dearth of caselaw, my surmise is that these applications are generally dealt with by way of Consent Order.

[32] I realize I have jurisdiction under Rule 1.5 to cure any contravention, non-compliance, or irregularity but I refrain from doing so for two reasons. First, the evidence is (in my view) of marginal probative value in any event. Second, I doubt the Order would have been granted if

applied for because of (in my view) what would have been RK's inability to meet the heavy onus. In either instance, it seems to me the evidence is not material but merely corroborative and the fact it seeks to prove (who was present in the room when the guarantee was signed by the respective signatories) is purely collateral. Moreover, SP's evidence about who was present is already contradicted, by RK himself.

[33] Ultimately the Court's role as evidentiary gatekeeper is to balance probative value against prejudicial effect. The latter may include prejudicial effect upon the justice system itself. To overlook non-compliance of the Rules in two different ways that remove rights, in order to admit evidence of marginal value, would have that prejudicial effect.

[34] Like many if not most cases, the Court here is called upon to resolve and balance competing values and principles. Sometimes those values and principles are societal in nature. Sometimes, as in this case, they involve the proper functioning of the justice system. I am conscious of and address my mind to the requirement that a plaintiff must put his best foot forward to resist a summary dismissal application and therefore the Court should be hesitant in paring away the plaintiff's evidence. I am hesitant. I have been hesitant throughout these reasons. On the other hand, I am also quite reluctant to condone the contravention of the evidence-gathering Rules in a way that deprives the relevant defendant of procedural rights inherent in those Rules. In the end, the integrity of our Rules and the fairness in the justice system that the Rules represent prevail here.

[35] In this case, I strike SD's transcript from the record. Functionally, that means I will disregard it and counsel are not permitted to refer to it during the summary dismissal application. If the matter survives summary dismissal and reaches trial, RK is of course free if he wishes to call SD as a live witness, whether in-person or remotely, admissibility and mode of testimony being subject to the trial judge's discretion.

3. Exhibit "L"

[36] The main complaint here from the SP side is that this record is missing from RK's Affidavit of Records (AOR) but shows up in RK's affidavit in opposition to the summary dismissal application as Exhibit "L". The record consists of a printed version of a Facebook post which discusses the now-dismissed sexual assault charge against RK and which RK says is defamatory. The Facebook post was uttered by someone named ST in 2019 on a Facebook page called "Punjabi Community in Alberta". RK contends ST is the *alter ego* of SP.

[37] SP denies being the author and deposes that he saw the Facebook post for the first time when he reviewed RK's November 4, 2022 affidavit. SP further points out that:

- RK in his Reply to SP's Demand for Particulars of November 21, 2021 referenced a June 2019 Facebook posting with the described content;[2]

[2] RK's November 4, 2022 affidavit at para 111(d) refers to an August 2019 Facebook post, a copy of which is attached as Exhibit "L". The Reply to Demand for Particulars dated November 8, 2021 mentions a June 2019 Facebook post and quotes the content at para 6. Although Exhibit "L" is somewhat blurry, the message as quoted in para 6 seems to be a word-for-word rendition of the verbiage in Exhibit "L". Since there is no mention in the evidence of another Facebook post, I assume the two are one and the same and the discrepancy in dates on the RK side is an error.

- There were no Facebook posts mentioned in either version of RK's AOR and none produced within his producible records;
- When SP was questioned on his June 27, 2022 affidavit filed in support of his summary dismissal application and then questioned for discovery, the Facebook post was not put to him while he was under oath;
- In consequence of all of which (he deposes) the appearance of Exhibit "L" in RK's affidavit was a "complete surprise".

[38] SP suggests that it is obvious from the foregoing that RK was in possession of the Facebook message from at least November 21, 2021 and deliberately withheld it so that it could be sprung on SP in the affidavit opposing the summary dismissal application with no opportunity for SP to respond.

[39] Rule 5.16 states that a relevant and material record that is not disclosed in an AOR may not be used as evidence in the action unless the parties otherwise agree, or the Court otherwise orders on the basis that there was a sufficient reason for the failure to disclose. SP says that:

- the record is relevant and material, since it is being relied upon to establish SP's culpability;
- there is no dispute that it was not disclosed in RK's AOR; and
- RK has offered no reason to account for the non-disclosure.

[40] SP submits that Rule 5.16 provides its own remedy.

[41] For his part, RK concedes that the Facebook message was not disclosed in an AOR but says it is already part of the record (by being inserted in the RK affidavit as an exhibit) and it is therefore inappropriate to now expunge it. He does not say that the SP side has agreed that it should be included in the evidence. The fact of this application shows that SP's side does not agree.

[42] I admit to not fully understanding RK's argument here. The reason the Facebook post is in the record is because RK put it there and, I might add, without agreement and without permission as required by Rule 5.16.

[43] In ***Terrigno v Fox***, 2023 ABKB 89 at paras 77-82, Jones J considered the proper application of Rule 5.16. He relied on the 4-part test established in ***Signalta Resources Limited v Canadian Natural Resources Limited***, 2022 ABQB 89 at para 42:

- The other party would suffer prejudice if the use of the record was permitted;
- There was a reasonable explanation for the non-disclosing party's failure to disclose the record;
- Excluding the record would prevent the determination of the issue on the merits; and
- In the circumstances of the case, the ends of justice require that the record be admitted.

[44] Since ***Signalta*** was based on an analysis of BC law (there being none in Alberta at the time), Jones J added this gloss at para 82 of ***Terrigno***:

> In my view, it follows that, in Alberta, the reasonableness of the explanation for non-disclosure should be viewed as the first line of inquiry, the "basis" for the Court's exercise of discretion. That would suggest that if the Court finds there is no reasonable explanation for non-disclosure, it need not consider the other elements of the Four-Part Test. I will proceed in that manner though, as will become clear, the same result would obtain in either event.

[45] I agree with Jones J that the Court's discretion to admit a record not disclosed in an AOR under Alberta Rule 5.16 is premised on the omitting party (now seeking to adduce it) convincing the Court that there is a sufficient reason for the omission.

[46] Here, no reason has been proffered and no application to adduce has even been made. I agree that Rule 5.16 prescribes its own consequence for failure to disclose, namely that the record may not be used as evidence in the action.

[47] I face less of a conundrum here regarding paring down the record in the face of a summary dismissal application versus requiring litigants to follow the Rules because Rule 5.16 provides no latitude to me in this case. Even if the balance of the ***Signalta*** factors were in play, I would still say that the weakness of the connection between SP and the Facebook post means that RK fails on the full analysis.

[48] I find that the remedy of exclusion inherent in Rule 5.16 applies here such that RK may not adduce the evidence in the summary dismissal application.

C. Application to Compel Production of the "Letter" and the "Other" Document.

[49] The genesis of this dispute lies in two versions of the AOR put forward by SP. The first version, sent by Mr. Pruski (SP's counsel) to Mr. Mielke (RK's counsel) on March 4, 2022 was unsworn and attached a Schedule 1 of producible documents consisting of 6 documents, the last of which was "text message bundle" consisting of 6 pages. The second version, sworn on March 15, 2022, attached a Schedule 1 that listed only 5 documents, omitting mention of the "text message bundle".

[50] SP was questioned about this on July 5, 2022 by Mr. Mielke. The explanation given for the difference is that the first version was a draft, unvetted by Mr. Pruski, and sent in error while the second version was the correct one, with irrelevant documents removed by Mr. Pruski.

[51] Suspecting subterfuge, RK through his counsel made an application for a further and better AOR which was heard by me as part of the proceedings on November 23, 2023. After hearing submissions from counsel, I determined that I could not decide the issue of relevance and materiality of the omitted documents unless I inspected them myself, a process specifically contemplated in Rule 5.11(1) & (2).

[52] Mr. Pruski left the Courtroom to retrieve copies from his office. When he returned, he handed an envelope to me containing what I thought were the documents that had been removed. I took the envelope with me over the lunch break to do the inspection. The documents were indeed in the envelope but there was also a cover letter written by Mr. Pruski addressed to me.

[53] I did look at the letter to the extent of realizing what it was and once so realizing, I made a point of not reading any of the letter. When Court reconvened, I mentioned that the letter had also been enclosed, that I had not read it and I returned the letter to Mr. Pruski. These events are

confirmed by my review of the official audio recording (or FTR) as well as RK's affidavit of May 8, 2024 sworn in support of this application. RK was present in the Courtroom when the events occurred.

[54] It is true that RK and his counsel did not receive a copy of the letter and do not know what it says.

[55] I then gave my ruling on the application for a further and better AOR, ruling that one document was in my view marginally relevant and should be produced while the other was not and should not be produced. The two documents together comprise the 6 pages. I further ruled that SP should swear an additional affidavit attaching the now restored document and that he could be questioned on it. I understand that questioning did take place although a transcript was not put in evidence for this application.

[56] The current application brought by RK is for production of the letter and for production of the remaining document that I already ruled was not relevant.

[57] On June 3, 2024 at the request of Mr. Mielke for clarification as to the Court's expectations with respect to communications from counsel, I wrote to counsel as follows:

> As counsel are aware, the ethical responsibilities of lawyers regarding communications with the Court or any tribunal are set out in the Law Society of Alberta *Code of Conduct*.
>
> My own preference and, in my view, the better practice, is that in any case where counsel conveys substantive content to the Court or makes a request that will affect the rights and obligations of other parties or counsel, even in regard to procedural matters, the counsel making the communication should first show a draft to other counsel or parties as the case may be. Receipt of the draft does not mean that the receiving counsel or party agrees with it or waives any right to respond. However, advance provision of a draft does remove any element of surprise and minimizes argument about inappropriate contact with the Court.
>
> In cases of purely administrative communications with the Court, my preference and I think, the better practice, is to at least concurrently copy other counsel and parties, as the case may be.

[58] My comments above are intended as a settled protocol for counsel and the Court to follow as we move forward with an ongoing case management matter.

[59] RK's position is that production of the letter is necessary to alleviate a reasonable apprehension of prejudice. It is not clear to me how either a reasonable apprehension of prejudice or prejudice itself arises on these facts. I did not read the letter; I do not know what it says, and it could not have affected my thinking in making my earlier ruling. By articulating the protocol, I have dealt with the issue. I have put counsel and the parties on common footing, for the purpose of preventing improper communication with the Court or the accusation of improper communication.

[60] I believe the Court does have jurisdiction to control its own processes, including how and when counsel communicates with the Court. But I do not see how ordering production of this letter at this point would serve any purpose, and I decline to do so.

[61] Moving on to the second part of this application, I have three responses.

[62] First, I agree with Mr. Pruski that I already ruled on the issue of production of the "other" document in my original ruling. That ruling was not appealed. There is no provision in the Rules or the law (having regard to the doctrine of *res judicata*) for a party without more to make an application, once dismissed, a second time before the same judge.

[63] Second, RK contends that he cannot argue relevance unless he sees the document first. However, showing the document to RK and his counsel would destroy the very thing that SP seeks to preserve which is his personal privacy in the document. Rule 5.11 is set up for inspection by the Court, not the opposing side. As Justice Côté said in ***Alberta (Provincial Treasurer) v Pocklington Foods Inc***, 1993 ABCA 69 at para 27 (in relation to a claim of privilege under the predecessor version of Rule 5.11):

> Therefore, inspection by the opposing lawyer would destroy the object of the exercise. It is like pulling up the beets by the roots to see if they are growing well. It helps answer the question but simultaneously makes it academic. We might paraphrase the Red Queen to say autopsy first, diagnosis afterwards.

[64] Third, RK argues that the "other" document must be relevant and material and that I was mistaken in saying it was not. I concede that I am fallible like any judge or person. However, from the FTR, I was reminded that in determining the relevance and materiality of the two documents, I applied the more encompassing liberal test usually reserved for trial and not AOR, so much so that Mr. Pruski protested on-the-spot and asked me to reconsider right there and then using the more restrictive test. I concluded that the one document could possibly be construed as relevant and material to the subject-matter of the litigation, but the other was not. In other words, by using the more liberal test I already gave RK the benefit of the doubt.

[65] In consequence of the foregoing, I dismiss both parts of the application.

D. Application to Compel Undertaking

[66] I saved this one for last because, in my view, it has now become moot in view of rulings earlier made in these reasons. The undertaking sought by SP to be fulfilled by RK relates to production of any written communications between RK and SD. The context of the request is the procurement of SD's questioning evidence, a topic I dealt with at some length above.

[67] Since I have now excluded the SD questioning transcript, the production of these communications ceases to be of concern for the application to exclude (already decided) as well as the summary dismissal application itself. The issues of whether the SD transcript is reliable and whether SD was coerced have also been dealt with above.

[68] There were also issues related to the scope of the undertaking (whether it had been expanded by SP from what was actually requested as an undertaking during RK's questioning) and whether this application is time-barred because of an earlier deadline I had imposed. These additional issues have also become moot and there is no point in deciding them.

E. Costs

[69] I observe that each side accuses the other of litigation misconduct and bad faith. Whether explicitly or not, Counsel are drawn into the accusations as the instrument and agent of their

respective clients. Sections in the briefs were devoted to complaining about the conduct of the other side. It is not my intention to lay blame at this stage for what has transpired so far in this unfortunate litigation.

[70] I will ask Mr. Pruski and Mr. Meilke how they wish to deal with costs of the within applications when the Court, counsel and the litigants next convene on September 17, 2024.

Heard by way of written submissions dated May 8, May 9, May 15, June 6 & June 12, 2024.

Dated at Edmonton, Alberta this 8th day of August, 2024.

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

Appearances:

Matt A. Pruski, Rackel & Company LLP
for SP

Brent W. Mielke, MLT Aikens LLP
for RK