Court of King's Bench of Alberta

Citation: Olkowski v Nano-Green Biorefineries Inc., 2023 ABKB 441

Date: 20230725
Docket: 1403 14906
Registry: Edmonton

2023 ABKB 441 (CanLII)

Between:

Andrew Olkowski

Applicant/Plaintiff/
Defendant by Counterclaim

- and -

Nano-Green Biorefineries Inc.

Respondent/Defendant/
Plaintiff by Counterclaim

Blaine Kunkel

Respondent/Defendant

Reasons for Decision
of the
Honourable Justice Robert A. Graesser

I. Introduction

[1] On this application, the Plaintiff, Andrew Olkowski, seeks to have the Defendant, Nano-Green Biorefineries ("Nano-Green") held in contempt of Court for breaching the provisions of Rule 5.33 5.33 (the "Implied Undertaking" Rule) by using information obtained from Dr. Olkowski and Dr. Laarveld through record production and questioning in making a

complaint about Dr. Olkowski to the University of Saskatchewan and presenting evidence and information at the University's Hearing Board proceedings.

[2] Dr. Olkowski also applies to have Nano-Green's Counterclaim against him dismissed pursuant to the *Limitations Act*, RSA 2000, c L-12 and because claims against him are barred by the provisions of the *University of Saskatchewan Act,* SS 1995, C U-6.1

[3] Nano-Green cross applies to strike a number of paragraphs in Dr. Olkowski's Amended Amended Statement of Claim and to summarily dismiss some of the allegations.

[4] My understanding is that Nano-Green is not pursuing at this time the aspects of its Cross-Application relating to delay and to Dr. Olkowski's alleged failure to adequately particularize his damages. If I am mistaken in that, I reserve jurisdiction to deal with those allegations.

II. Background

[5] This lawsuit has a long history, dating back to 2010. By this narrative, I am only providing a summary of what the materials before me on this application say has happened. There is a vast quantity of pleadings, affidavits, submissions, and other records that I have reviewed. All may not be described or recorded here. This summary is not intended to be exhaustive.

[6] Dr. Olkowski and a colleague Dr. Bernard Laarveld were professors at the University of Saskatchewan (the "University"). Dr. Olkowski was, in the course of his work for the University, conducting research the processing of animal litter, which is basically animal waste mixed with dry plant matter such as straw, wood shavings, and sawdust.

[7] Dr. Laarveld was at the time also the Chief Technology Officer for Nano-Green. Nano-Green was attempting to create a process to extract the cellulose from the biomass. Believing that Dr. Olkowski's research might be helpful for Nano-Green, Dr. Laarveld introduced Dr. Olkowski to Nano-Green.

[8] In February 2011, Dr. Olkowski and Dr. Laarveld signed a licencing agreement with Nano-Green, which gave Nano-Green the exclusive right to use Dr. Olkowski's technology (the "Licensing Agreement"). Dr. Olkowski believed this was the best way to commercialize his technology.

[9] Work proceeded, but the relationship between Drs. Olkowski and Laarveld and Nano-Green deteriorated as Drs. Olkowski and Laarveld felt that Nano-Green was in breach of its obligations to commercialize the technology. In February 2014, Drs Olkowski and Laarveld attempted to license the technology to another company in Saskatoon. Nano-Green objected and threatened court action to prevent this from happening.

[10] These events led to Drs. Olkowski and Laarveld commencing this action in October 2014. Nano-Green Counterclaim in February 2015 seeking declaratory relief regarding the technology involved in this action, as well as damages for breach of confidence and other wrongs allegedly committed by the Plaintiffs. The Plaintiffs defended Nano-Green's Counterclaim and also filed a reply to Nano-Green's Statement of Defence.

[11] The litigation proceeded through record production and to questioning. In May 2021, Dr. Laarveld settled with Nano-Green. He discontinued his claim against Nano-Green and Nano-Green discontinued their Counterclaim against him. That lead to Dr. Olkowski applying to file an Amended Amended Statement of Claim, an Amended Amended Statement of Defence to the

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Nano-Green Counterclaim, and an Amended Amended Reply to Nano-Green's Amended Statement of Defence. The purpose of this application and the amendments was mainly to remove reference to Dr. Laarveld.

[12] Blaine Kunkel, Nano-Green's chief executive officer, included comments about the litigation and Dr. Olkowski in Notices to Nano-Green's shareholders in February 2015 and October 2017 (the "Nano-Green Shareholders Notices"). Those comments came to Dr. Olkowski's attention.

[13] Comments concerning this litigation were also provided by Mr. Kunkel in a report to the Shareholders of Blue Goose Refineries Inc. ("Blue Goose") on October 31, 2016 (the "Blue Goose Shareholders Notice"). Blue Goose is related to Nano-Green. These Shareholders Notices are collectively referred to as the "Shareholders Notices". Dr. Olkowski also learned about this Notice.

[14] In April 2017, Mr. Kunkel complained to the University that Dr. Olkowski had breached University policies in a number of ways (the "Complaint"). The Complaint resulted in disciplinary proceedings being brought against Dr. Olkowski. The Complaint was dealt with through hearings of the University's Hearing Board over an extended period, ending in June 2019. The Complaint was initially dismissed by the Hearing Board on the basis that the Complaint dealt with matters that took place before the relevant University policy came into effect (July 1, 2013).

[15] Nano-Green appealed that decision, and a new Hearing Board was convened to re-hear the Complaint. On June 4, 2019, the second Hearing Board dismissed the Complaint as "unsubstantiated", having dealt with the Complaint on its merits.

[16] In November 2017, Nano-Green filed an Amended Counterclaim. In response to that, the Plaintiffs (which still included Dr. Laarveld) filed an Amended Statement of Claim in December 2018. Nano-Green filed an Amended Statement of Defence in January 2019, responding to the new allegations in the Amended Statement of Claim.

[17] In January 2021, Nano-Green consented to the Plaintiffs filing an Amended Statement of Defence to Nano-Green's Amended Counterclaim.

[18] On February 4, 2021, Dr. Olkowski filed an application for contempt and seeking that all or parts of Nano-Green's Amended Counterclaim and Amended Statement of Defence be struck out. His notice of application referenced the *Limitations Act*, RSA 2000, c L12 and the *University of Saskatchewan Act*, SS 1995, C U-6.1. That is the application presently before me.

[19] Dr. Olkowski's application was very detailed and included copies of the records and other evidence he referred to in his application.

[20] Dr. Olkowski also swore an affidavit in support of his application on March 25, 2021. That affidavit is exhibited to Mr. Kunkel's Affidavit of May 19, 2021, but does not appear to have been filed with the Court.

[21] Mr. Kunkel swore an affidavit on May 19, 2021, responding to the contempt and striking application as well as to Dr. Olkowski's March 25, 2021 affidavit.

[22] Nano-Green and Mr. Kunkel filed a brief responding to the application on May 20, 2021, relying on Mr. Kunkel's May 19 affidavit.

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[23] On June 3, 2021, Dr. Olkowski commenced a defamation action against Nano-Green and Mr. Kunkel in Saskatchewan (the "Saskatchewan Action"), with respect to the Complaint and the Nano-Green Shareholders Notices.

[24] Nano-Green immediately defended the Saskatchewan Action.

[25] In this action, Dr. Olkowski swore an affidavit on June 25, 2021, replying to

[26] Mr. Kunkel's Affidavit of May 19, 2021 and the Nano-Green brief responding to Dr. Olkowski's application filed May 20, 2019.

[27] Before Dr. Olkowski's applications could be heard, Nano-Green brought an application on August 12, 2021, for an order striking a number of paragraphs in Dr. Olkowski's affidavits of March 25 and June 25 in support of his applications. Nano-Green also applied to adjourn the contempt/striking application set for September 14.

[28] Nano-Green's notice of application states that the March 25, 2021 Affidavit is 609 pages. This has not apparently been filed in Court. They also reference the Affidavit of June 25, provided to them on July 5, 2021, containing some 2,778 pages, but that affidavit does not appear to have been filed in Court either.

[29] Dr. Olkowski swore an affidavit responding to Nano-Green's new application on August 27, 2021.

[30] On September 2, 2021, Dr. Olkowski filed an application to file an Amended Amended Statement of Claim. His application was returnable on September 9, 2021. He provided an affidavit sworn September 1 relating to his amendment application and responding to Mr. Kunkel's Affidavit of May 19.

[31] On September 2, Dr. Olkowski also swore 2 further affidavits in relation to these applications and his application for an adjournment of the Nano-Green application. Another affidavit was sworn by him on September 8.

[32] On September 9, Loparco, J adjourned Dr. Olkowski's applications for contempt and striking to a full day Special Chambers Application, to be scheduled.

[33] Nano-Green filed a brief on September 13 relating to its application to strike the paragraphs in Dr. Olkowski's affidavits. Dr. Olkowski provided a further affidavit sworn that day.

[34] The September 14 court time initially set for Dr. Olkowski's contempt and dismissal application was ultimately used to hear Nano-Green's striking application and Dr. Olkowski's amendment application.

[35] On September 14, Davidson, J heard these applications. By an order filed October 8, 2021, he struck portions of Dr. Olkowski's Affidavit and allowed Dr. Olkowski to file an Amended Amended Statement of Claim. The Amended Amended Statement of Claim was filed on November 4, 2021.

[36] Meanwhile in Saskatchewan, in November 2021, Nano-Green and Mr. Kunkel brought an application in to summarily dismiss the defamation action against them regarding the Complaint and the Shareholders Notices. The application was heard on May 12, 2022 and on February 14, 2023, the Saskatchewan Court of Queen's Bench granted a Fiat (unreported) dismissing most of that action. That decision has since been appealed by Dr. Olkowski. His appeal has not yet been heard.

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[37] No steps were initially taken to re-schedule Dr. Olkowski's 2021 applications. On May 25, 2022, Dr. Olkowski applied to reschedule his applications. That application was returnable on June 15. It is unclear what happened on that date.

[38] On June 22, 2022, Nano-Green brought an application to strike, stay or summarily dismiss paragraphs in the Amended Amended Statement of Claim (the "Impugned Paragraphs") that overlapped with claims advanced against Nano-Green by Dr. Olkowski in the Saskatchewan Action, as well as paragraphs that are allegedly within the sole jurisdiction of the Federal Court or the College of Patent Agents & Trademark Agents. They also sought to strike similar paragraphs in Dr. Olkowski's Amended Amended Statement of Defence to the Amended Amended Counterclaim on the same basis. Nano-Green also sought summary dismissal of the Impugned Paragraphs relating to the Nan-Green Shareholders Notices and the Complaint on the basis of absolute or qualified privilege. Additionally, they sought to strike portions of Dr. Olkowski's Reply to Nano-Green's Amended Statement of Defence Nano-Green containing the Impugned Paragraphs and the patent paragraphs there.

[39] On June 24, 2022, Dr. Olkowski swore an affidavit responding to Nano-Green's new application. He also filed a brief that day.

[40] Ultimately, the parties entered into a consent order scheduling all outstanding applications for March 31, 2023. Additional affidavits and briefs were filed, supplementing those filed in preparation for the September 14, 2021 Application.

[41] Mr. Kunkel swore an affidavit on September 21, 2022, in support of Nano-Green's application to strike. The affidavit was supplemental to his May 20, 2021 Affidavit. Nano-Green and Mr. Kunkel also filed a brief that day.

[42] Dr. Olkowski filed brief responding to the Nano-Green Cross-Application on November 10, 2022, as well as an affidavit sworn that day in support of his position.

[43] Dr. Olkowski then filed a final affidavit on March 2, 2023, which included a re-sworn affidavit in accordance with Davidson J's order striking certain paragraphs from the March 25, 2021 and September 1, 2021 Affidavits.

III. Dr. Olkowski's Applications

A. Contempt

[44] Dr. Olkowski swore affidavits on March 25, 2021 and September 1, 2021 in support of his applications for contempt and summary dismissal of Nano-Green's Counterclaim. He swore an affidavit on March 2, 2023, replacing his affidavits of March 25 in support of his application, and of September 1, 2021, responding to Mr. Kunkel's Affidavit of May 20, 2021. Certain paragraphs and portions of Exhibits in those affidavits were ordered struck as a result of Davidson, J's order following the September 14, 2021 Special Chambers Application.

[45] Dr. Olkowski says that questioning of him in the action starting in January 2016 and continued until 2017. His questioning occupied some 16 days. He says that approximately 80-90% of the questioning time related to Nano-Green's Counterclaim.

[46] He notes that when Nano-Green and Mr. Kunkel sent the Complaint to the University on April 26, 2017, he was still employed by the University.

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[47] The Complaint alleged that Dr. Olkowski had committed the following wrongs:

- Fabricating data, methodologies or findings;
- Plagiarism;
- Mismanaging of the University's policy on conflicts of interest; and
- Failing to comply with relevant policies to obtain appropriate approvals, permits or certifications before conducting certain activities, or failing to obtain appropriate approvals, permits or certifications before conducting these activities.

[48] The University's Hearing Board conducted three hearings in relation to the Complaint. The Complaint against Dr. Olkowski was ultimately dismissed on June 4, 2019. Dr. Olkowski says that the foundations for making the Complaint and the information provided by Mr. Kunkel and Nano-Green at the two Hearing Board proceedings included information in documents and information provided by him and Dr. Laarveld as a result of the discovery process in this action, and that in doing so Nano-Green and Mr. Kunkel violated Rule 5.33.

[49] A contentious issue raised in the competing affidavits and during the hearing before me was when and how Mr. Kunkel learned of the proximity of Dr. Olkowski's office to Dr. Laarveld's office. I cannot resolve that issue on the basis of competing affidavits. That said, there is nothing at all relevant or material to this lawsuit on this information, and even if Mr. Kunkel only learned about this during Dr. Olkowski's questioning, my response would be that this is *de minimus* and not worth the parties' efforts or the Court's time to deal with it.

[50] As for the records specifically addressed by Dr. Olkowski:

- Questioning Exhibit D-46, being a copy of a document entitled "Assignment Back of an Invention and Release" dated November 9, 2016, between the University and Dr. Olkowski; and
- Questioning Exhibit D-48 being a "Reassignment Back to Investors" from the University to Dr. Olkowski dated August 6, 2006. That document includes a number of attachments, one of which is noted to be a "Confidential Report of Invention" dated May 7, 2005. It is largely information from the attachments to this Exhibit that Dr. Olkowski complains about.

[51] He also references information obtained by Nano-Green and Mr. Kunkel from his and Dr. Laarveld's questioning in this action.

[52] Dr. Olkowski references the written submissions to the Hearing Board by Nano-Green and Mr. Kunkel. Those submissions contain a number of references to "questioning". Dr. Olkowski says refers to the questioning of Dr. Olkowski and Dr. Laarveld in this action. That is confirmed by Dr. Olkowski in his affidavit evidence.

[53] Nano-Green's and Mr. Kunkel's submissions include the following statements:

- Under questioning, both Drs. Olkowski and Laarveld affirmed that Dr. Olkowski was solely responsible for the development of the technology described in this Licence agreement, the technology;

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- In questioning, when Dr. Laarveld was asked directly who Dr. Olkowski was working for when he was running reactions following the October 7, 2010 board meeting he said, “The University of Saskatchewan”;
- Under questioning, both Drs. Olkowski and Laarveld affirmed that Dr. Olkowski was sole inventor if the technology described in the License agreement with Nano-Green, the technology submitted in Exhibit A of Dr. Olkowski’s production, and the US Patent in Appendix B of Dr. Olkowski’s production. In fact, Dr. Laarveld disclosed during questioning that after being depose on a related legal matter he decided to petition the patent office to remove his name as an inventor from the patent;
- Now, keeping in mind that Dr. Laarveld obviously has a horse in this race, during his questioning he represented he was fully aware and had full disclosure that Dr. Olkowski was then developing a parallel technology to Nano-Green using the same base chemistry…; and
- During questioning Dr. Olkowski confirmed he was aware Nano-Green was using Fenton chemistry to process biomass prior to October 8, 2010.

[54] Blaine Kunkel’s Affidavit of May 20, 2021, denies that Rule 5.33 was violated by them in any way.

[55] He denies using any of the information obtained from Dr. Olkowski in the discovery process in this action and says that any information provided to the Hearing Board was in his or Nano-Green’s possession before the Hearing Board proceedings were held.

[56] He states at para 13 of his Affidavit sworn September 21, 2021:

> As a general response to the entirety of the June 2021 Affidavit, I deny that Nano-Green obtained information from this litigation and used the same in the U of S complain processes – all information referred to or used in the U of S complaint process was already known to me prior to the Questionings in this litigation or were obtainable and obtained through other public sources.

[57] At the end of the Hearing Board Proceedings, Nano-Green through Mr. Kunkel filed written submissions. The submissions addressed complaints made by Dr. Olkowski to the Hearing Board that Nano-Green was using documents obtained through the Alberta questioning process. They stated:

> All the documents produced in Nano-Green’s document production contain documents that are ours to present. The only documents that we were not directly involved in were NG-0001 and NG-0008. These documents were requested from and provided by the University of Saskatchewan.

[58] From the Hearing Board’s decision, it is clear that NG-0001 is Exhibit D-46 from Dr. Olkowski’s questioning. NG-0002 is part of Exhibit D-46.

[59] Dr. Olkowski responded to Mr. Kunkel’s Affidavit in his Affidavit of September 1, 2021 stating that at the hearing, Mr. Kunkel asked him and Dr. Laarveld to confirm or affirm statements deposed at questioning. He refers to a particular passage in the Closing Statement as follows:

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> In fact, Dr. Laarveld disclosed during questioning that after being deposed on a related legal matter he decided to petition the patent office to remove his name as an inventor from the patent.

[60] Amongst other specifics given, Dr. Olkowski's Affidavit refers to the first para on p 6 of the Complaint, which reads:

> Dr. Olkowski failed to disclose to the ILO, that he had invented a Fenton assisted cellulose extraction process for biorefining lignocellulosic biomass prior to October 2010.

[61] He says that was based on information obtained from Dr. Laarveld's questioning, quoting the questions and answers posed. Those questions and answers were ordered removed from Dr. Laarveld's affidavit by Davidson J in September 2021 (presumably on the basis that only questioning party may use the transcripts). Unfortunately, I do not have the benefit of Davidson J's reasons for striking this information from Dr. Laarveld's affidavit.

[62] Dr. Olkowski continues in his affidavit:

> Without information deposed at questioning, Mr. Kunkel would have no knowledge that we did not report this aspect of research to the University Industry Liaison Office (ILO).

[63] Another example directly from para 2 on page 6 of the Complaint is:

> Dr Olkowski appears not to have followed U of S policies regarding the use of confidential information obtained directly or indirectly during his employment and the discoveries resulting from same. This is specifically concerning the intellectual property Nano-Green disclosed to the U of S under the 2007 NDA that Dr. Olkowski was directly or indirectly exposed to at the U of S through academic discussion, consultation, emails or observation of experiments in shared lab space with Dr. Laarveld.

[64] Dr. Olkowski say that this was based "precisely on information obtained from (his) questioning". His original Affidavit contained excepts from his and Dr. Laarveld's questioning transcripts. Again, these excerpts were ordered removed from the affidavit by Davidson J for the purposes of this application.

[65] Dr. Olkowski references para 39 of Mr. Kunkel's responding Affidavit of May 20, 2021, where Mr. Kunkel says he obtained information about AB Ceres "during litigation", citing Dr. Laarveld's transcripts and specifically appending them as Exhibit M to his Affidavit.

[66] Dr Olkowski cites the following cases in support of his contempt application:

> ***Iozzo v Weir***, 2004 ABQB 259;
>
> ***Juman v Doucette***, 2008 SCC 8
>
> ***Hunter Financial Group Ltd v Maritime Life Assurance Company***, 2009 ABQB 448;
>
> ***Kent v Martin***, 2010 ABQB 479; and
>
> ***Gault Estate (Re)***, 2017 ABQB 182.

[67] Nano-Green and Mr. Kunkel cited no additional authorities and distinguished the cases cited by Dr. Olkowski.

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B. Analysis

[68] Civil contempt in Alberta is provided for in Rule 10.52(3):

> **10.52(3)** A judge may declare a person to be in civil contempt of Court if
>
> (a) the person, without reasonable excuse,
>
> (i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,
>
> (ii) is before the Court and engages in conduct that warrants a declaration of civil contempt of Court,
>
> (iii) does not comply with an order served on the person, or an order of which the person has actual knowledge, to appear before the Court to show cause why the person should not be declared to be in civil contempt of Court,
>
> (iv) does not comply with an order served on the person, or an order of which the person has actual knowledge, to attend for questioning under these rules or to answer questions the person is ordered by the Court to answer,
>
> (v) is a witness in an application or at trial and refuses to be sworn or refuses to answer proper questions, or
>
> (vi) does not perform or observe the terms of an undertaking given to the Court,
>
> or
>
> (b) an enactment so provides.

Remedies or sanctions for contempt are set out in Rule 10.53:

> **10.53(1)** Every person declared to be in civil contempt of Court is liable to any one or more of the following penalties or sanctions in the discretion of a judge:
>
> (a) imprisonment until the person has purged the person's contempt;
>
> (b) imprisonment for not more than 2 years;
>
> (c) a fine and, in default of paying the fine, imprisonment for not more than 6 months;
>
> (d) if the person is a party to an action, application or proceeding, an order that
>
> (i) all or part of a commencement document, affidavit or pleading be struck out,

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> (ii) an action or an application be stayed,
>
> (iii) a claim, action, defence, application or proceeding be dismissed, or judgment be entered or an order be made, or
>
> (iv) a record or evidence be prohibited from being used or entered in an application, proceeding or at trial.
>
> **(2)** The Court may also make a costs award against a person declared to be in civil contempt of Court.
>
> **(3)** If a person declared to be in civil contempt of Court purges the person's contempt, the Court may waive or suspend any penalty or sanction.
>
> **(4)** The judge who imposed a penalty or sanction for civil contempt may, on notice to the person concerned, increase, vary or remit the penalty or sanction.

[69] Breach of the Implied Undertaking contained in Rule 5.13 is treated differently from most other breaches of obligations under the *Rules of Court*. Breaches of the *Rules* are normally dealt with on a balance of probabilities basis.

[70] ***Juman v Doucette***, 2008 SCC 8, makes it clear that the "undertaking" on which the Rule is based is an undertaking to the Court, and may be treated like breach of a court order. ***Juman*** is cited at paras 16 – 19 in ***Kent v Martin***, 2010 ABQB 479:

> [16] In ***Juman v. Doucette*** 2008 SCC 8, the Supreme Court of Canada confirmed the existence of the implied undertaking rule under which evidence compelled during pre-trial discovery from a party to civil litigation can be used by the parties only for the purpose of the litigation in which it was obtained.
>
> [17] Binnie J. writing for a unanimous court at paras. 23 - 28, observed that there are two rationales for the rule. Firstly, it is recognized that the compelling of information from a litigant is a breach of privacy, which privacy rights are trumped by the public interest in getting at the truth. The invasion of privacy is thus legally limited to the level of disclosure necessary to satisfy that purpose and that purpose alone.
>
> [18] Secondly, litigants will provide more complete discovery if given the assurance that disclosure will not be used for collateral purposes.
>
> [19] Significantly, the undertaking is to the court and as noted in para 29 a breach of the undertaking may be remedied:
>
> > **29** Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court.

[71] Thus, remedies or consequences for contempt of court are in play for breaches of Rule 10.33, as confirmed in Rule 10.52(3)(vi).

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[72] It is clear from the caselaw under that Rule and generally in dealing with contempt of court, civil contempt must be proven beyond a reasonable doubt.

[73] I recently dealt with civil contempt in ***Ford v Jivraj***, 2023 ABKB 92 and need not describe the principles involved in a contempt application for the purposes of this case (although I understand that decision is under appeal).

[74] The issue before me is a simple one: did either or both Mr. Kunkel and Nano-Green breach the Implied Undertaking Rule?

[75] Like in criminal proceedings, it is the intent to commit the act or acts in question that must be proved beyond a reasonable doubt. Dr. Olkowski does not need to prove that Mr. Kunkel and Nano-Green intended to breach the Rule. He does not have to prove to any standard of proof that Mr. Kunkel and Nano-Green were aware that their acts may be in breach of the Rule.

[76] All he has to prove, beyond a reasonable doubt, is that acts complained of occurred, they were voluntarily committed, and those acts breached Rule 5.33.

[77] At the outset, Nano-Green did not attempt to distance itself from Mr. Kunkel and suggest that when he communicated with the University and appeared before the Hearing Board he was not acting in his capacity as an officer of Nano-Green. Mr. Kunkel's affidavit describes himself as President and Chief Executive Officer of Nano-Green. So, Nano-Green is responsible for actions done by its President and Chief Executive Officer. Dr. Olkowski does not need to prove anything in that regard.

[78] Mr. Kunkel cannot avoid responsibility by saying that he was only acting under instructions from and for Nano-Green. Here, Mr. Kunkel is personally responsible for his actions, and Nano-Green is responsible for his actions.

[79] Mr. Kunkel's Affidavit deals expressly with the use of "information" obtained from Dr. Olkowski from either his Affidavit of Records or his questioning. He says that all information used in the Hearing Board proceedings was "theirs to use" as they used nothing from record production or questioning that was not already in their possession or publicly available.

[80] Mr. Kunkel says in his Affidavit that references to "questioning" in the submissions refers to questioning of Dr. Olkowski at the hearings before the Hearing Board. There is no transcript available from the Hearing Board proceedings.

[81] He gave by way of example the portion of his submissions that states:

> In the second day of the hearing I had two questions for Dr. Olkowski. I was asking for clarification as to what he said at the end of my day 1 questions…

[82] It is clear from the Hearing Board decision that Dr. Laarveld also gave evidence at the Board hearings.

[83] The common law "Implied Undertaking Rule" was discussed in ***Iozzo v Weir***. That case (as well as the other cases on the Implied Undertaking by Dr. Olkowski) predated the new *Rules of Court*, which came into effect in November 2010. With the new *Rules*, Rule 5.33 replaced the Implied Undertaking and essentially codified it for Alberta. That Rule is clear as to what the Implied Undertaking covers:

> **5.33(1)** The information and records described in subrule (2) must be treated as confidential and may only be used by the recipient of the information or record

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for the purpose of carrying on the action in which the information or record was provided or disclosed unless

(a) the Court otherwise orders,

(b)the parties otherwise agree, or

(c) otherwise required or permitted by law.

(2) For the purposes of subrule (1) the information and records are:

(a) information provided or disclosed by one party to another in an affidavit served under this Division;

(b) information provided or disclosed by one party to another in a record referred to in an affidavit served under this Division;

(c) information recorded in a transcript of questioning made or in answers to written questions given under this Division.

[84] This Rule includes records produced through another party's Affidavit of Records or as a result of questioning, and information obtained during questioning or from written interrogatories of another party.

[85] A novel question (at least to me) is whether a defendant can use information from the record production and questioning of a former co-plaintiff, or from a co-plaintiff in an application or proceeding that does not involve the co-plaintiff. It is obvious from the submissions made by Mr. Kunkel that he made liberal use of information and records received from Dr. Laarveld, Dr. Olkowski's former colleague and an original co-plaintiff in this action.

[86] There is nothing in the affidavit evidence suggesting that Dr. Laarveld did or did not consent to using information disclosed by him. There is no evidence of any court order releasing Mr. Kunkel and Nano-Green from their obligations regarding Dr. Kunkel's discovery evidence. While in criminal proceedings the Crown sometimes has to prove the absence of a defence (such as consent in a sexual assault case or self-defence in a murder case) the proceedings here are quasi-criminal.

[87] While there is no burden of proof on a respondent in contempt proceedings, case law in Alberta since ***Hryniak v Mauldin*** dealing with summary proceedings makes it clear that the parties are expected to put their best foot forward on the proceeding. See, for example, ***Weir-Jones Technical Servicers Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 and ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343. Failure to respond is not something that a respondent can be criticized for, but failure to respond leaves only the applicant's version of the facts for the trier of fact to consider.

[88] The Court expects in a civil contempt application that the respondent will put their best case forward. That would mean, for example, that if they had somehow obtained a court order exempting them from the operation of Rule 5.33, they would have mentioned it. And if they had obtained consent from Dr. Laarveld to use his information despite Rule 5.33, that would have been trumpeted loudly. Either of these would be an absolute defence to complaints about them using information from Dr. Laarveld's discovery.

[89] In a summary civil contempt proceeding, I consider that I have the ability to draw adverse inferences. The absence of any mention of a court order or consent from Dr. Laarveld leads me to conclude that no such things happened.

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[90] Rule 5.33 protects any use of information obtained in the discovery process in the action. It does not distinguish between or among parties producing the information. As a result, absent consent from Dr. Laarveld, I make no distinction between records and information Nano-Green and Mr. Kunkel obtained from Dr. Laarveld in the discovery process and records and information received from Dr. Olkowski.

[91] Rule 5.33 contains exceptions:

(a) Obtaining Court permission orders;

(b) Obtaining the other party's consent or agreement; or the parties otherwise agree, or

(c) as may otherwise be required or permitted by law.

[92] No court order was obtained. Neither Dr. Olkowski nor Dr. Laarveld consented to the use of any information from the discovery process. Indeed, Dr Olkowski raised objections to the use of some documents and information by Mr. Kunkel at the Hearing Board Proceedings.

[93] The Board Decision shows that the Hearing Board itself was alive to concerns about proper use of information from other proceedings. Mr. Kunkel himself specifically addressed this in his written submissions.

[94] I will deal with Dr. Olkowski's alleged instances of breach of Rule 5.33.

C. Mr. Kunkel's Affidavit of May 20, 2021

[95] It is interesting that, as pointed out by Dr. Olkowski, Mr. Kunkel admits to using information from Dr. Laarveld's questioning. He acknowledges that he "learned more about Dr. Olkowski's involvement with AB Ceres" through Dr. Laarveld's questioning on January 8, 2016. He specifically attaches copies of Dr. Laarveld's questioning transcript.

[96] This is a clear admission that Mr. Kunkel breached the Implied Undertaking.

[97] It may be that Mr. Kunkel did not think anything he learned from Dr. Laarveld's record production and questioning was protected and that he could use what he learned from Dr. Laarveld against Dr. Olkowski. If that was the case, he was in error. The undertaking is given to the Court, not the parties. The only way to avoid the undertaking is to obtain the appropriate party's consent or get a court order. Neither was done here.

[98] This admission by Mr. Kunkel seriously taints his response to Dr. Olkowski's allegations.

D. Records used in Discipline Proceedings

[99] With respect to the improper use of records, Mr. Kunkel's Affidavit is general and is a blanket denial. The best evidence on the subject comes from Mr. Kunkel's submission to the Hearing Board. He represents to them:

> The only documents that we were not directly involved in were NG-0001 and NG-0008. These documents were requested from and provided by the University of Saskatchewan.

[100] What Mr. Kunkel does not say is that the documents were obtained from the University on April 18, just before the Hearing Board proceedings commenced. That is clear from Exhibit B to Mr. Kunkel's May 19, 2021 Affidavit. When he says in his affidavit that some of the records he used were publicly available, I assume that he is referring to these two records.

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[101] It is an obvious inference from this that Mr. Kunkel learned about these two documents from the questioning of Dr. Olkowski and Dr. Laarveld. He may have obtained copies directly from the University, but this was after he lodged the Complaint. But for the questioning and record production, Mr. Kunkel would not have known about the existence of these records, or to ask for them to be produced by the University.

[102] Mr. Kunkel swears in his Affidavit dated May 19, 2021, that Exhibit D-48 (Document NG-0023), the August 2006 "Offer to Reassign", was received from Dr. Laarveld on April 4, 2014. There is no basis to reject that evidence, and I am accordingly not satisfied that this record was used in contravention of Rule 5.33.

[103] However, I am satisfied beyond a reasonable doubt that Mr. Kunkel and Nano-Green breached the Implied Undertaking by using records produced in discovery and marked in questioning to obtain copies of the same documents (NG-0001 and NG-0008) directly from the University so they could use them at the hearing of the Complaint without having to use the Exhibits.

[104] That does not end the matter. The Complaint itself contains information that Dr. Olkowski says could only have come from his questioning or questioning of Dr. Laarveld, such that Dr. Olkowski failed to disclose to the ILO his involvement with the Fenton process, and the 2007 NDA. Regarding the latter, Dr. Olkowski says the information on that in the Complaint comes directly from his and Dr. Laarveld's questioning. While the actual transcript records were expunged, that is the only evidence before me. Mr. Kunkel's affidavits on the subject do not deal with the Complaint letter itself.

[105] I am satisfied beyond a reasonable doubt that Rule 5.33 was breached in these portions of the Complaint, as alleged by Dr. Olkowski.

E. Submissions to Hearing Board

[106] The submission make reference to "questioning". The issue here is whether Mr. Kunkel was referring to the questioning in this action or the questioning at the Hearing Board proceedings. Dr. Olkowski says one thing; Mr. Kunkel another. There is no record of the Hearing Board proceedings to see exactly what questions were asked of Dr. Olkowski and Dr. Laarveld, and what answers they gave.

[107] Absent oral questioning before me, or cross-examination transcripts from any cross-examination of Mr. Kunkel on his Affidavit, I have no basis on which to reject his evidence and accept Dr. Olkowski's evidence. Mr. Kunkel's affidavit evidence at least raises a reasonable doubt on this issue. Since the burden of proof is on Dr. Olkowski, Mr. Kunkel and Nano-Green are entitled to the benefit of any doubt on this issue.

F. Questions asked of Dr. Olkowski before the Hearing Board

[108] Dr. Olkowski says that Mr. Kunkel asked him to confirm answers given during questioning in this litigation. That, he says, is evidence that Rule 5.33 was breached, essentially because Mr. Kunkel would not have known to ask the questions, or frame them in the way he did, without the benefit of the litigation questioning in itself.

[109] Again, there are no transcripts before me of the Hearing Board proceedings, or the subsequent appeal and final hearing before another Hearing Board. If the questions asked of Dr. Olkowski were the same as asked in questioning, or if they were leading questions repeating Dr. Olkowski's answers to questions, that would be a breach of Rule 5.33.

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[110] I am suspicious that the Implied Undertaking was breached in this manner, but in the absence of transcripts of the relevant proceedings or oral testimony by both parties on this, I find that Dr. Olkowski has not proven these allegations beyond a reasonable doubt.

G. Remedy for Contempt

[111] Dr. Olkowski has established that Mr. Kunkel and Nano-Green violated Rule 5.33 in several ways during the disciplinary proceedings. The timing of the completion of questioning and the filing of the Complaint was not coincidental. Mr. Kunkel and Nano-Green obviously used records and information learned in the discovery process to formulate their complaint.

[112] Ultimately, however, Dr. Olkowski points to no particular harm done to him in those proceedings by these breaches. The first Hearing Board dismissed the Complaint without considering the merits at all. Following a successful appeal by Mr. Kunkel and Nano-Green, a new Hearing Board dismissed the application on the merits, finding that the matters complained of had not been proven on a balance of probabilities.

[113] Undoubtedly, Dr. Olkowski feels hard done by being put through three University hearings where his integrity was challenged. His only remedy was the dismissal of all claims against him.

[114] However, there is no information provided by Dr. Olkowski that he has been harmed or disadvantaged in this litigation in any way by the breaches of Rule 5.33.

[115] There is thus no rational basis to penalize Mr. Kunkel and Nano-Green by striking pleadings or disallowing their prospective use of certain records and questioning transcripts in this action.

[116] At this stage, I do not intend to impose any sanctions or consequences on Mr. Kunkel or Nano-Green as to how they defend Dr. Olkowski's claim or how they pursue their Counterclaim. That would be disproportionate to any harm.

[117] In the Complaint and the resulting proceedings before the Hearing Boards, Mr. Kunkel and Nano-Green were self-represented. They obviously had some knowledge of the Implied Undertaking rule and appear to have attempted to avoid breaching it by getting copies of documents they had obtained in the discovery process by other means. They may have felt that anything obtained from Dr. Laarveld's discovery was not problematic in proceedings against Dr. Olkowski. That may be why they did not name Dr. Laarveld in the Complaint and proceeded only against Dr. Olkowski.

[118] I am speculating on the latter thoughts, but in any event, I do not find that the breaches were flagrant or particularly egregious.

[119] This is a situation where a fine payable to the Court may be appropriate. The trial judge will have a far better appreciation than I as to the magnitude of the fine that should be imposed, if a fine is determined by them to be the correct sanction. I conclude that it is appropriate to leave the ultimate consequences of Mr. Kunkel's and Nano-Green's breaches to the trial judge in their discretion. If the trial judge concludes that I am the one that should determine the appropriate consequences, that can be referred to me following the trial.

[120] Dr. Olkowski successfully established that Rule 5.33 was breached. Nano-Green and Mr. Kunkel vigorously opposed that finding. It is appropriate that Dr. Olkowski's costs be awarded in any event of the trial, and in my view, should be paid forthwith.

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[121] Rule 10.31(5) says that the Court may award costs to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C. Schedule C generally ties costs to the amount in issue, which is for interlocutory matters when costs are awarded before trial, based on the amount claimed in the statement of claim or counterclaim, as the case may be.

[122] Dr. Olkowski claims damages "in an amount to be proven at trial". Nano-Green's Counterclaim seeks damages in amounts to be proven at trial.

[123] Where no specific amount is claimed in the pleadings, Column 1 is often used as a "default". For a one-day special chambers application, Column 1 sets $2,025.00 as the tariff fee. This application was complicated only because of the large volume of materials and the number of issues raised.

[124] I do not intend to have the parties embark on a new process to set these costs. Column 1 represents an appropriate award of costs to Dr. Olkowski on this aspect of the application. He was not successful on his other applications. Nevertheless, Column 1 is a modest contribution to the real costs of litigation and is largely based on proportionality. These were serious issues for the parties in a lawsuit that could have significant consequences for any of them. Dr. Olkowski should have disbursements relating to the contempt proceedings, but not regarding his other applications, or defending the Nano-Green applications. He will have incurred significant photocopying costs, courier expenses, filing fees and perhaps other out-of-pocket expenses. I will arbitrarily award $500 in disbursements, inclusive of GST. I accordingly award Dr. Olkowski costs as follows: Fees of $2,025.00. GST on those fees of $101.25, and $500.00 for disbursements, totaling $2,626.25 payable forthwith and in any event of the cause.

H. Summary Dismissal of the Nano-Green Counterclaim

[125] Dr. Olkowski says that all of the events in the Counterclaim occurred between 2007 and 2011, and as such, claims arising from those events are barred by the *Limitations Act*, RSA 2000, c L-12.

i. *Limitations Act*

[126] Dr. Olkowski says that the *Limitations Act*, RSA 2000 applies to Nano-Green's Counterclaim, which was filed on February 10, 2015. The general limitation period in Alberta is two years from the date the wrong was committed. Dr. Olkowski's Statement of Claim was filed in October 2014.

[127] The Counterclaim alleges that Dr. Olkowski caused Nano-Green loss as a result of filing his Statement of Claim against them. The Counterclaim was filed well within the limitation period relating to that cause of action.

[128] The Counterclaim also alleges generally that Dr. Olkowski misused confidential information. Generally, the Counterclaim would catch any such breaches committed within two years before the filing of the Counterclaim, or after February 11, 2013. There is an exception to that general provision, and that is if any breach did not come to the knowledge of Nano-Green until a later date. So long as that date is after February 11, 2013, the *Limitations Act* would have no application. It is not clear in the information before me on this application which specific acts on the part of Dr. Olkowski are complained of, and when those acts occurred and when Nano-Green learned of those actions.

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[129] The Counterclaim further alleges that Dr. Olkowski shared confidential information with others. The same comments as above apply to these allegations. I do not have enough information to determine whether some, any, or all of these allegations predate February 11, 2013.

[130] No portions of Nano-Green's questioning by Dr. Olkowski were put before me on this application. The Counterclaim is not specific on dates, and I do not know from the affidavits filed on this application whether there was a demand for particulars of specific dates and events by Dr. Olkowski, or whether any of these were established during the questioning.

[131] I accept Nano-Green's submissions that the Amended Counterclaim does not clearly add new claims or new causes of action to the existing Counterclaim. Even if they did, as noted by Nano-Green, the basic two-year *Limitations Act* period for commencing action, can be extended in accordance with the "discovery principle" described in s 3(1)(a) of that *Act*. Simply referencing events that happened outside the standard limitation period does not mean them to be true and cannot relate to the "conduct, transaction or events" as described in s 6(2) of the *Limitation Act*.

[132] As such, Dr. Olkowski has not satisfied me that there is any proper basis to dismiss any portions of the Amended Counterclaim in summary proceedings on the basis that any portions are clearly barred by the passage of any limitation periods.

[133] Any limitation issues will have to be dealt with at trial.

[134] This portion of Dr. Olkowski's application is dismissed.

ii. *University of Saskatchewan Act* defence

[135] Dr. Olkowski acknowledges that at all times referenced in the Counterclaim, he was an employee of the University of Saskatchewan. Nano-Green does not challenge that in any way. Dr. Olkowski argues that s 80 of the *University of Saskatchewan Act* provides him immunity from being sued.

[136] As a result of these circumstances and the above legislation, Dr. Olkowski says that the Counterclaim against him should be dismissed.

[137] The *University of Saskatchewan Act* provides in s 80:

> 80 No action lies or shall be instituted against the board, any member of the board, the senate, any member of the senate or officer or employee of the university where the board, member of the board, member of the senate, officer or employee is acting pursuant to the authority of this Act or the bylaws, for any loss or damage suffered by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done, by any of them, pursuant to or in the exercise or supposed exercise of any power conferred by this Act or the bylaws or in the carrying out or supposed carrying out of any duty imposed by this Act or the bylaws.

[138] Dr. Olkowski suggests that he is entitled to the benefit of this provision.

[139] Nano-Green submits that there is no merit to Dr. Olkowski's argument. They note that there appears to have been only one case dealing with s 80 of the *University of Saskatchewan Act*: ***Busch-Vishniac v Wall***, 2019 SKQB 120. In that case, the Defendant, Wall, was a Board member of the University of Saskatchewan. The Plaintiff sued the University and various Board

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members relating to her dismissal by the Board of Directors. The Defendant Board members sought to strike the claim against them, on the basis of s 80 and because the Plaintiff had no reasonable chance of success against them. The Plaintiff argued that the Board members had acted in such a fashion as to take them outside the protection of s 80, including that they had acted in bad faith and had acted outside the scope of their role as Board Members, having abdicated their responsibilities by being improperly influenced by the then Premier.

[140] Popescul, CJ dismissed the application, stating at para 27:

> While the allegations against the Board Members are somewhat sparse, there are sufficient averments, supported by enough factual allegations, to permit the action to go forward against the Board Members. This takes into account the low threshold that reflects the reluctance of courts to short-circuit a plaintiff's claim on the basis of no reasonable chance of success, except in the most clear and obvious cases.

[141] Also cited by Mr. Kunkel and Nano-Green are:

> ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343;
>
> ***Nation v Canada; Samson Indian Nation and Band v Canada***, [2007] 2 CNLR 51;
>
> ***Crane v Brentridge Ford Sales Ltd***, 2007 ABQB 669; and
>
> ***DeSoto Resources Limited v EnCana Corporation***, 2010 ABCA 110.

IV. Analysis

[142] There is absolutely no merit to Dr. Olkowski's submissions on s 80 of the *University of Saskatchewan Act*. The operative wording of the section is "where the …employee is acting for the purposes of this Act".

[143] The relationship between Dr. Olkowski and Nano-Green had nothing to do with Dr. Olkowski's employment with the University. His dealings with Nano-Green were as a private citizen contracting with a third party. He was in no way acting as an employee of the University in his dealings with Nano-Green.

[144] This statutory provision is aimed at avoiding officers and employees being named in lawsuits against the University for matters done in the course and scope of their employment or authority, or where the officer or employee is entitled to indemnification from their employer as a result of being sued for something done in the course of their employment or their responsibilities as officers.

[145] Raising s 80 as a defence to the Counterclaim by Nano-Green for things done by Dr. Olkowski, is completely outside the course and scope of his employment at the University and would be like an employee attempting to use this as a defence to a foreclosure action on a home purchased in Saskatoon so they could live closer to their work. I use this analogy without suggesting that Dr. Olkowski has ever defaulted in any obligation, but to demonstrate the obvious flaws in his submissions about the scope of s 80.

[146] This application is dismissed.

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V. Nano-Green Applications

A. Striking portions of Amended Amended Statement of Claim

[147] Nano-Green seeks to have the Impugned Paragraphs of the Amended Amended Statement of Claim struck or summarily dismissed because they duplicate a claim brought by Dr. Olkowski in Saskatchewan. Paras 55 to 67 relate to the complaint letter sent by Mr. Kunkel and Nano-Green to the University of Saskatchewan on April 26, 2017.

[148] Alternatively, Nano-Green says this particular cause of action should be stayed pending the outcome of the Saskatchewan litigation.

[149] Further, Nano-Green applies to have para 50 of the Amended Amended Statement of Claim struck because they relate to the Patent Prosecution process and should accordingly be dealt with in Federal Court (the "Patent Prosecution Claim").

[150] The Amended Statement of Claim was filed by Dr. Olkowski in December 2018, following an application for leave to file the Defamation Claim. Included in the Amendments were defamation claims against Mr. Kunkel and Nano-Green relating to shareholders communications sent by Mr. Kunkel to Nano-Green and to the shareholders of a related corporation, Blue Goose Biorefineries Inc., commenting on this action. The Amendments also included defamation claims against Mr. Kunkel and Nano-Green relating to the Complaint letter sent by Mr. Kunkel to the University of Saskatchewan on April 26, 2017. Mr. Kunkel was added as a Defendant in this Amended Statement of Claim.

[151] Dr. Olkowski then applied to amend the Amended Statement of Claim in a number of respects, including removal of some of the allegations against Mr. Kunkel and Nano-Green, relating to the Shareholders Communications and the Complaint. In particular, the allegations of "defamation" have been removed. Those changes were made following the application before Davidson J in the fall of 2021. The Amended Amended Statement of Claim was filed on November 4, 2021.

[152] What remains in the Amended Amended Statement of Claim are allegations that the Complaint:

- Was false;
- Relied on information used contrary to the "Implied Undertaking" in Rule 5.33;
- Was not "bona fide" and was sent for "improper, collateral means"; and
- Was published in bad faith and was published for an improper purpose.

[153] As a result, Dr. Olkowski seeks exemplary, aggravated and punitive damages and solicitor and client costs. He relies on the *Tort-feasors Act*, RSA 2000, c T-5.

[154] By the time of filing the Amended Amended Statement of Claim, Dr. Olkowski had already started an action in Saskatchewan seeking damages and other remedies for defamation against Mr. Kunkel and Nano-Green, relating to the Shareholder Communications and the Complaint which are the subject matter of the 2018 Amendments in this action. The Saskatchewan action was commenced on June 3, 2021. That Claim included a claim arising from a shareholder communication sent by Mr. Kunkel to Blue Goose in December 2019, which Dr. Olkowski claims is defamatory and evidence of bad faith and improper actions against him.

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[155] Presumably, Dr. Olkowski removed the Defamation Claim from the Alberta action so that he could pursue that in Saskatchewan. He likely felt that he could keep the basic facts of the Shareholder Communications and the Complaint letter in the Alberta action to support his claim for aggravated and punitive damages, and solicitor and client costs.

[156] Nano-Green and Mr. Kunkel brought an application to have that lawsuit dismissed. Their application was based on the *Saskatchewan Limitations Act*, SS 2004, c 16.1 and an absolute privilege defence. The application was heard on May 12, 2022.

[157] After the application was filed but before it was heard, Dr. Olkowski obtained leave to amend his Statement of Claim. On March 16, 2022, Dr. Olkowski filed an Amended Statement of Claim in the Saskatchewan action. The Amended Statement of Claim referenced further allegedly defamatory communications by Mr. Kunkel to the University of Saskatchewan in 2018, which Dr. Olkowski claimed were "fraudulently concealed" from him until May 2021.

[158] In a fiat granted by Clackson J on February 14, 2023, Nano-Green largely succeeded in its application, although the claims arising from the 2019 Blue Goose Shareholder Communication were not struck and they were allowed to proceed. Nano-Green and Mr. Kunkel were given leave to reapply for summary dismissal of those claims on bringing further evidence, if available. The claims arising out of the earlier Shareholder Communications to Nano-Green shareholders and from the Complaint to the University of Saskatchewan were summarily dismissed on the basis of the *Saskatchewan Limitations Act*. That decision is under appeal, and I have no information as to the status of the appeal.

[159] To summarize the current status of these claims:

1. There is no defamation action in Alberta based on the Shareholder Communications to Nano-Green's shareholders and the Complaint letter to the University of Saskatchewan;
2. The defamation action based on those communications has been dismissed in Saskatchewan, although that decision is under appeal;
3. The action in Saskatchewan arising out of the shareholder communication to Bio-Green is still "alive";
4. No defamation action has been commenced in Alberta relating to the 2019 shareholder communication to Bio Green; and
5. The Amended Amended Statement of Claim references the Shareholder Communications to Bio-Green and the Complaint letter to the University of Saskatchewan in the context of claims for punitive, aggravated and exemplary damages, and solicitor and client costs for specified and unpled torts.

[160] In support of their position, Nano-Green and Mr. Kunkel cite:

Kalmring v Alberta, 2020 ABCA 81;

Britannia Airways Ltd v Royal Bank of Canada, 2005 (CanLII 7 ONSC);

Ladner v Ladner, 2004 BCCA 366;

Zukowski v Royal Insurance Co of Canada, 2000 ABCA 165;

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Chevron Canada Resources v Canada (Indian Oil and Gas Canada), 2006 ABQB 945;

Tican v Alamgir, 2022 ABKB 626;

Merit Consultants International Ltd v Chandler, 2014 BCCA 121;

Chen v Sable Fish Canada Inc, 2010 BCSC 444;

Liboiron v Majola, 2007 ABCA 18;

Big Bear Hills Inc v Bennett Jones Alberta Limited Partnership, 2010 ABQB 764;

Elliott v Insurance Crime Prevention Bureau, 2005 NSCA 115;

Horn Abbot Ltd v Reeves, 2000 NSCA 88; and

GH(R) v Christison, 1996 CanLII 6791 (SKQB)

[161] Dr. Olkowski's responding brief filed November 10, 2022, cites a number of authorities in his response:

Whiten v Pilot Insurance Co, 2002 SCC 18;

Hill v Church of Scientology of Toronto, 1995 SCC 59;

Elgert v Home Hardware Stores Limited, 2011 ABCA 112;

Luft v Zinkhofer, 2016 ABQB 182;

[162] Nano-Green argues that the Impugned Paragraphs and the Patent Prosecution Claim (a) should be struck under Rule 3.68 for lack of jurisdiction or a cause of action; or (b) alternatively the Impugned Paragraphs should be struck or stayed because of overlap with the Saskatchewan action and the doctrine of *res judicata*; or (c) these paragraphs should be struck or dismissed for "lacking a meritorious cause of action".

B. Rule 3.68 and *res judicata*

[163] Rule 3.68 provides:

> **3.68(1)** If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;
>
> (b) that a commencement document or pleading be amended or set aside;
>
> (c) that judgment or an order be entered;
>
> (d) that an action, an application or a proceeding be stayed.
>
> **(2)**The conditions for the order are one or more of the following:
>
> (a) the Court has no jurisdiction;
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
>
> (c) a commencement document or pleading is frivolous, irrelevant or improper;

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> (d) a commencement document or pleading constitutes an abuse of process;
>
> (e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.
>
> **(3)** No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).
>
> **(4)** The Court may
>
> (a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;
>
> (b) strike out all or any pleadings if a party without sufficient cause does not
>
> (i) serve an affidavit of records in accordance with rule 5.5,
>
> (ii) comply with *rule 5.10*, or
>
> (iii) comply with an order under *rule 5.11*.

[164] They cite ***Kalmring v Alberta***, which notes at para 22 that a claim will only be struck if the facts disclose no reasonable cause of action so there is no reasonable prospect of success. At para 23, Applications Judge Mason noted that in an application under this Rule, the Court must accept as true the facts on which the other party relies.

[165] Nano-Green argues that the Patent Prosecution Claim falls within this Rule, noting that Dr. Olkowski has admitted in his Amended Statement of Claim that the Patent Prosecution Claim he would "most likely…have to file a separate action in Federal Court" to deal with that Claim.

[166] Dr. Olkowski responds to Nano-Green's argument on the basis that he is not looking for patent remedies as he realizes that can only occur in Federal Court. He says that the patent issues are raised in this litigation are in the Amended Amended Statement of Claim which are to support his claim for damages against Nano-Green because of their "high-handed conduct" towards him, and the troubles they have put him through.

[167] With respect to the defamation paragraphs, Nano-Green references *res judicata* as a basis for striking them. They cite ***Britannia Airways Ltd v Royal Bank of Canada***, which deals with *res judicata,* issue estoppel, and abuse of process.

[168] ***Zukowski v Royal Insurance Co of Canada*** is cited for the doctrine of merger, which ***Ladner v Ladner*** includes as a form of *res judicata*.

[169] ***Chevron Canada Resources v Canada (Indian Oil and Gas Canada)*** deals with abuse of process. ***Tican v Alamgir*** deals with vexatious litigators and abuse of process.

[170] Alternatively, Nano-Green seeks summary dismissal of the Impugned Paragraphs on the basis of qualified privilege, absolute privilege and witness immunity. They cite ***Merit Consultants International Ltd v Chandler***, where a claim against the directors of a mining corporation for an allegedly defamatory press release was dismissed. Qualified privilege was recognized as applying to things like press releases in certain circumstances.

[171] ***Chen v Sable*** applied qualified privilege to Shareholder Communications.

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[172] Nano-Green also submits that absolute privilege applies to "all individuals involved in judicial or quasi-judicial proceedings", citing ***Liboiron v Majola***. Absolute privilege in the context of witnesses is also discussed in ***Big Bear Hills Inc v Bennett Jones Alberta Limited Liability Partnership*** and ***Elliott v Insurance Crime Prevention Bureau***.

[173] Dr. Olkowski did not cite any authorities regarding the *res judicata* arguments by Nano-Green.

C. Patent Prosecution Claim

[174] Nano-Green's application is based on the premise that the relief sought by Dr. Olkowski can only be obtained in Federal Court.

[175] The simple answer to this aspect of the application is that Dr. Olkowski is looking for costs relating to an action he has not yet commenced and which he may never commence. The costs and damages he seek can only be awarded for patent litigation in a court that deals with patent claims.

[176] Paras 49 and 50 of Dr. Olkowski's Amended Amended Statement of Defence to Counterclaim shed more light on the nature of his Claim. It appears that Nano-Green is not the only likely defendant in his claim, as he suggests Nano-Green's patent lawyer improperly used the Patent Office rules, and that a third party was added as an inventor.

[177] I assume that if Dr. Olkowski commences an action in Federal Court, these other people will be defendants.

[178] I agree with Nano-Green that para 50 of the Amended Amended Statement of Claim should be struck, along with paras 49 and 50 of the Amended Amended Statement of Defence to Counterclaim, on the basis that the pleadings are entirely hypothetical and in any event, can only be dealt with in the Federal Court.

[179] Dr. Olkowski's response that the patent issues are part of a campaign against him by Nano-Green and are relevant to damages is not made out by the pleading. He is looking for costs in an action that has not yet been commenced. In my view, there is no proper basis to include this Claim in this litigation. No cause of action in contract or tort is made out.

[180] The Patent Prosecution Claim is an unnecessary and improper distraction. It should be struck from the Amended Amended Statement of Claim, as well as the Amended Amended Statement of Defence to Counterclaim. Any remedy Dr. Olkowski seeks in this regard can only be obtained in Federal Court.

D. Impugned Paragraphs

[181] It is axiomatic that a litigant cannot pursue the same claim in different actions in different courts. A plaintiff has to choose the forum in which it wants to pursue a specific claim.

[182] I do not see the appropriate remedy here as being part of *res judicata*. That doctrine applies to issues or claims that have already been resolved in other litigation. From my perspective, the area of law to deal with this sort of duplication in advance of any decision having been made is abuse of process. That doctrine would apply to stay proceedings in other litigation where the same claims have been raised to avoid the same claims being pursued concurrently. That would attempt to avoid any waste of court resources and the risk of conflicting decisions from different courts. No useful purpose would be served by allowing that to happen, and at a minimum, the foundational *Rules* would be engaged.

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[183] Certainly, if Justice Clackson's decision to dismiss Dr. Olkowski's claims relating to the Claim and the Nano-Green Shareholder Communications is upheld by the Saskatchewan Court of Appeal, *res judicata* might apply. But we are not there yet. And in any event, a decision to dismiss in Saskatchewan would not automatically make those defamation claims *res judicata* for the purpose of other proceedings, whether in Saskatchewan, Alberta, or elsewhere.

[184] As I understand Justice Clackson's decision, those claims were dismissed on the basis of the Saskatchewan *Limitations Act*, not on the merits of the claims. While other defences were discussed, the decision in relation to these claims was that they were brought out of time.

[185] Here, Dr. Olkowski started defamation proceedings in Alberta arising out of the Complaint and the Nano-Green Shareholder Communications. He deliberately amended his Amended Statement of Claim to remove any claim for defamation relating to those communications. By the time Davidson J allowed him to file his Amended Amended Statement of Claim, he had already sued Mr. Kunkel and Nano-Green in Saskatchewan on the identical communications alleging the identical cause of action.

[186] Essentially, Dr. Olkowski "made his bed" in Saskatchewan and now has to live with it. It may be that his appeal will succeed and he will be able to carry on with his defamation action, or if not, he will only be able to proceed with that action relating to the Bio-Green Shareholder Communication.

[187] That said, a specific circumstance may give rise to a number of potential causes of action. A communication may be false, but not defamatory. A qualified privilege defence might prevail. However, a communication may also amount to a tort other than, or in addition to, defamation.

[188] A communication may be made with an intent to cause economic harm to someone. It may be made as part of an intention to cause a breach of contract or interfere with contractual relations. The *Tortfeasors Act* does not purport to describe all torts in Alberta, leaving the common law to fill that in.

[189] Communications between the parties leading up to or during the litigation between them may be relevant to costs, and they may be relevant to the quantum of damages.

[190] While Mr. Kunkel and Nano-Green may not have to worry about defamation in Alberta, on the evidence before me, I cannot conclude that the Complaint and the Shareholder Communications could not be part of a plan on Mr. Kunkel's or Nano-Green's part to cause economic harm to Dr. Olkowski.

[191] I therefore dismiss Mr. Kunkel's and Nano-Green's application to strike those paragraphs from the Amended Amended Statement of Claim and other pleadings where similar claims have been made.

[192] Regardless of what the Saskatchewan Court of Appeal does with the appeal from Justice Clackson's fiat, any defamation issues as described in that action will be fully and finally dealt with in that Province.

[193] The Impugned Paragraphs are relevant only as they relate to matters outside of the tort of defamation.

E. Summary Dismissal on the basis of Privilege

[194] Even though I have determined that the Impugned Paragraphs do not deal with defamation for the purposes of this action and that they may remain in the Amended Amended

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Statement of Claim as they may be relevant to other torts alleged against Mr. Kunkel and Nano-Green, as well as quantification of damages and for costs, I will deal with Nano-Green's privilege claims in the event I am mistaken as to the scope of the Impugned Paragraphs.

[195] I agree with Nano-Green that qualified privilege may apply to Shareholder Communications. As described in ***Merit v Chandler***, communications made by a person in the discharge of some public or private duty or even furthering a private interest to someone who has a corresponding interest in receiving, is privileged.

[196] Here, the Complaint to the University likely falls within that category of privilege, as would the various Shareholder Communications.

[197] However, qualified privilege has limitations. It is lost where malice is involved. It is also limited by the communication does not "go beyond the exigency of the occasion" and is "reasonably necessary to achieve the purpose for which the privilege is given" (***Merit v Chandler*** at para 29).

[198] If the communication is tainted by malice, or goes beyond necessity and reasonableness, the privilege is lost.

[199] In ***Merit v Chandler***, Merit sued the directors of a corporation (the corporation itself having gone into bankruptcy) for defamation allegedly contained in a news release issued by the corporation outlining why it had terminated Merit's contract on a construction project. Merit's claim for defamation was dismissed on the basis that the underlying communication had not been "published" by the corporation's directors and that even if they were considered to be publishers for the purpose of defamation, the communication was subject to qualified and absolute privilege.

[200] On appeal, Merit argued that these findings were wrong, and that the trial judge had erred by not considering malice in the context of the privileges being asserted by Mr. Chandler.

[201] The Court of Appeal dismissed the appeal on the basis that the claim advanced went beyond the scope of directors' liability for the actions of a corporation.

[202] The Court of Appeal went on to consider the circumstances where qualified privilege may be lost, referencing at para 29, *Brown on Defamation* (2nd ed., looseleaf):

> As Brown also observes, the privilege does not extend to statements that go beyond the "exigency of the occasion" (§13.1) and offers protection only where the communication is "reasonably necessary to achieve the purpose for which the privilege is given." (§13.2(1).) Elsewhere the author elaborates:
>
> To be privileged, a publication must not exceed the limits of the duty or interest created by the occasion. A person must be careful to go no further than his or her duties or interests require. The communication must be "reasonably germane and appropriate to the occasion". If a person goes beyond the necessities of the occasion, the communication may not be protected. The privilege may be lost both for excessive distribution and inappropriate content. [At §13.7.]

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[203] The Court of Appeal also noted that the privilege may be lost if the communication is "not reasonably appropriate to the legitimate purposes of the occasion" (at para 30), citing ***Botiuk v Toronto Free Press***, 1995 CanLII 60 (SCC).

[204] The Court of Appeal noted that while malice was not expressly dealt with by the trial judge, Merit had put no evidence forward of ulterior motive, "ill will" or reckless indifference on the part of the directors. As Merit was required to put its "best foot forward" on the application for summary judgment against it, Merit's failure to do so rendered it unnecessary for the trial judge to deal with malice. (at para 34).

[205] I would simply observe that in that case, there was no basis for the trial judge to deal with absolute privilege and the Court of Appeal decision did not discuss absolute privilege. The law is, I believe, clear that no absolute privilege exists for complaints, press releases, or shareholder communications. Those are within the realm of qualified privilege only.

[206] Here, Dr. Olkowski's Amended Amended Statement of Claim is replete with allegations that Mr. Kunkel and Nano-Green acted improperly towards him. Paragraph 49, for example, alleges that the Shareholder Communications were made for the purpose of harming the reputations of Drs. Olkowski and Laarveld in the business community and interfering with their economic goals.

[207] The Complaint is dealt with in para 63, where Dr. Olkowski alleges that the Complaint was sent by Mr. Kunkel and Nano-Green for the purpose of exerting pressure on him in this Action, and "in an attempt to gain a favourable litigation outcome through improper, collateral means".

[208] He specifically alleges in para 64 that the Complaint was published in bad faith and with malice.

[209] Paragraph 39 of Dr. Olkowski's Affidavit sworn June 24, 2022, responding to Nano-Green's Cross-Application says that the Complaint "was made for the purposes of a desperate attempt to find any glimmer of support for claims spoken in (their) Counterclaim". That clearly speaks of a collateral purpose and could be seen as evidence of malice.

[210] There is obviously conflicting evidence on Mr. Kunkel's and Nano-Green's motives for making the Complaint and publishing the various Shareholder Communications. That cannot be resolved through affidavit evidence.

[211] Absolute privilege is a somewhat rare privilege and extends to speech in Parliament, Provincial Legislatures and Municipal Council meetings, as well as what is spoken in court or quasi-judicial proceedings. It also covers pleadings and court filings in litigation.

[212] Nano-Green and Mr. Kunkel cite ***Horn Abbot Ltd v Reeves*** in relation to Dr. Olkowski's claims about the Complaint to the University of Saskatchewan.

[213] In para 15 of that case, the Nova Scotia Court of Appeal referenced absolute privilege and the "witness immunity rule":

> [15] After the hearing of the application before Justice Hood, the appellant sent her a copy of this court's decision in ***Martini v. Wrathall*** (1999), 1999 NSCA 105 (CanLII), 180 N.S.R. (2d) 38, and submitted a new argument, that is, that the evidence given by Reeves on discovery was protected by an absolute privilege. In the **Martini** case, this court approved of the following statement of

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> the witness immunity rule in ***Dooley v. Weber (C.N.) Ltd. et al.*** (1994), 1994 CanLII 7300 (ON SC), 19 O.R. (3d) 779:
>
> ... an absolute privilege attaches to the pleadings and they may not form the basis for a cause of action, even for abuse of process. The development of this privilege has been consistent and without exception, applying in England, Canada and other common law jurisdictions to judges, witnesses, counsel and litigants. The privilege extends to statements made in court, the evidence of witnesses, to submissions, to addresses, to statements in court by counsel, to pleadings (as in this case) and perhaps even to statements made to investigators in the preparation of a prosecution.

[214] Absolute privilege may apply to complaints to regulatory bodies. For example, in ***Hung v Gardiner***, 2003 BCCA 257, the British Columbia Court of Appeal dealt with complaints made against Ms. Hung to the Institute of Chartered Accountants of British Columbia and the Law Society of British Columbia. Ms. Hung was a practicing member of both professions. She sued a number of persons and entities arising out of those complaints.

[215] The Court of Appeal dismissed her appeal, holding that the complaints made to these professional regulatory bodies were protected by absolute privilege. A distinction was made, however, with complaints made to complaints sent to an *administrative body* and not a quasi-judicial body.

[216] That distinction was drawn in ***Lincoln v Daniels***, [1962] 1 QB 237 (CA) where a compliant to the Benchers of the Inns of Court, which had disciplinary power was protected by absolute privilege, while a complaint to the Bar Council, which was purely administrative, was not so protected. An analogy here would be complaints to the Law Society of Alberta and the Canadian Bar Association. The Law Society complaint would be protected; the CBA complaint would not.

[217] In this case, the availability of an absolute privilege defence depends on whether the University of Saskatchewan is an administrative body or a quasi-judicial body. Mr. Kunkel addressed the Complaint to the "Interim Associate Vice-President of Research at the University of Saskatchewan".

[218] It is not obvious from the caselaw I have seen that a vice-president of research at a university would be a "quasi-judicial body", although it is possible that the Hearing Board might be determined as one. A case with some similarities, ***Busch-Vishniac v Wall***, 2019 SKQB 120, did not deal with privilege issues.

[219] In this regard, Dr. Olkowski cited a publication *Rules of Natural Justice (January 2011)* from Concordia University. It says that committees of the University are not judicial or quasi-judicial bodies (at p 26). That publication is not a legal authority but is an example of how one university considers the role of its committees.

[220] In any event, this point was not argued before me, and it is better left for another day, presumably in Saskatchewan. On the absence of evidence or submissions as to the characterization of the Interim Associate Vice-President, I would simply direct that this issue be dealt with at trial.

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[221] As far as I understand Dr. Olkowski's claims, he is not pursuing any remedies as to what was said to the Hearing Boards, or in the written submissions to them, other than in relation to Dr. Olkowski's belief that Mr. Kunkel and Nano-Green used documents and information from this litigation in those proceedings, contrary to Rule 5.33.

[222] No immediate remedy is available to Mr. Kunkel or Nano-Green in this action on the basis of absolute privilege.

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VI. Conclusion

[223] Dr. Olkowski's application to have Mr. Kunkel and Nano-Green held in contempt for violating Rule 5.33 is allowed. Mr. Kunkel and Nano-Green violated that Rule in several ways. Any remedy or consequences for this will be determined by the trial judge, or by me, at the direction of the trial judge following the trial of this action.

[224] Dr. Olkowski's application to have the Nano-Green Counterclaim against him on the basis of the Alberta *Limitations Act* is dismissed.

[225] Dr. Olkowski's application to have Nano-Green's Counterclaim against him on the basis of s 80 of the *University of Saskatchewan Act* is dismissed.

[226] Nano-Green's application to have para 50 of Dr. Olkowski's Amended Amended Statement of Claim struck (the Patent Prosecution Claim) is granted. Also struck are paras 49 and 50 of Dr. Olkowski's Amended Amended Statement of Defence to Nano-Green's Counterclaim.

[227] Nano-Green's application to have the Impugned Paragraphs relating to the Complaint, the Nano-Green Shareholder Communications and the Bio-Green Shareholder Communication is dismissed, as is the alternative remedy sought for a stay of those proceedings.

[228] Nano-Green's alternative application for summary dismissal of Dr. Olkowski's claims relating to the Complaint and the Shareholder Communications on the basis of qualified privilege or absolute privilege is dismissed.

[229] Dr. Olkowski is free to pursue defamation remedies against Mr. Kunkel and Nano-Green in Saskatchewan relating to the Complaint and the Shareholder Communications as he is doing. Dr. Olkowski may pursue other remedies as plead, excluding defamation remedies, relating to the Complaint and the Shareholder Communications.

[230] Similarly, Dr. Olkowski is free to pursue his Patent Prosecution Claim in Federal Court if he so chooses. No remedy is available to him in Alberta.

VII. Costs

[231] Dr. Olkowski has been successful on one of his Applications. Nano-Green was successful on one of its Cross-Applications. There has been divided success. Nano-Green was successful in defeating Dr. Olkowski's other two applications. Dr. Olkowski was successful in defeating most of Nano-Green's Applications and they only succeeded on part of their striking Application. As discussed above, Dr. Olkowski is awarded costs in any event payable forthwith for the Contempt Application. Costs for the balance of this Special Chambers Application and related proceedings (if any) shall be determined by the trial judge.

VIII. Observation

[232] This is an action that has been delayed by these applications for over two years litigating these issues. Nothing of any significance to the ongoing litigation in Alberta has been achieved by either party through these applications.

[233] It is not clear if questioning is complete and whether this matter is otherwise ready to be set for trial. It is a complicated matter and will undoubtedly take many days to try.

[234] I suggest that the parties, or either of them, approach the Associate Chief Justice to have him direct a Rule 4.10 Case Conference to assist them in getting the matter set for a trial that will undoubtedly be some years from now.

[235] I would also encourage the parties to get to the merits of the Claims and stop the pre-trial proceedings other than as necessary to prepare for a trial.

Heard on the 31st day of March, 2023
Dated at Edmonton, Alberta this 25th day of July, 2023.

Robert A. Graesser
J.C.K.B.A.

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