Court of King's Bench of Alberta

Citation: Bennett v NE2 Canada Inc, 2024 ABKB 695

Date: 20241125
Docket: 2201 04415
Registry: Calgary

Between:

Marc Bennett

Plaintiff

- and -

NE2 Canada Inc. and Timothy Gunn

Defendants

And Between:

NE2 Canada Inc.

Plaintiff by Counterclaim

- and -

Marc Bennett, Mandy Burgess, Dario Vigna, Jack Widmer, Charles Douglas, Ryan Beckwermert, Christy See and Modern Commodities Inc.

Defendants by Counterclaim

Memorandum of Decision
of the
Honourable Justice R.A. Neufeld

I. Introduction

[1] This decision concerns two applications. The first application (the "**Strike Application**") is brought by Dario Vigna, Jack Widmer, Charles Douglas, Ryan Beckwermert, and Christy See to strike the following from the court record: (i) an application for security for costs, filed February 22, 2023 (the "**Security for Costs Application**") and materials filed in support of same; and (ii) an application for an order restricting court access, filed October 10, 2023 (the "**Restricted Court Access Application**") and materials filed in support of same (the Security for Costs Application and the Restricted Court Access Application are referred to collectively as the "**Applications**").

[2] The second application is brought by the Defendants in the underlying action, NE2 Canada Inc. and Timothy Gunn. They seek an order clarifying that the Court's direction, which I gave orally in morning chambers on October 20, 2023, was only intended to restrain them from filing certain cross-examination transcripts, as described below, until the Restricted Court Access Application was heard. In the alternative, they seek an order to vary the Court's direction and thereby permit them to file the cross-examination transcripts (the "**Clarification/Variation Application**").

[3] For the reasons that follow, I deny the Strike Application. As for the Clarification/Variation Application, I clarify that there was no outstanding direction of the Court preventing the filing of the cross-examination transcripts as of November 17, 2023. Pursuant to rule 6.7, the Defendants are required to file the transcripts of the following cross-examinations:

(a) The cross-examination of Dario Vigna, which occurred on March 22, 2023;

(b) The cross-examination of Charles Douglas, which occurred on April 18, 2023;

(c) The cross-examination of Ryan Beckwermert, which occurred on April 19, 2023; and

(d) The cross-examination of Christy See, which occurred on April 19, 2023

(collectively, the "Cross-Examination Transcripts").

II. Background

[4] NE2 Canada Inc. ("**NE2**") is a crude oil brokerage based in Calgary. Its founder is Mr. Timothy Gunn.

[5] Under Mr. Gunn's leadership, NE2 developed a lucrative business. It employed approximately ten brokers, each of whom, as of 2022, were being handsomely rewarded with individual, annual earnings of over $1 million. Mr. Gunn spent time in both Calgary and in an affiliated office in Houston. In early 2020, Mr. Gunn became concerned that his Calgary brokers were getting too close to their energy industry clients and were overpaid. He began preparing to transition the business to a digital trading platform, without the need for individual brokers. This concerned the brokers, as did cutbacks in expense allowances and a decision not to proceed with the installation of a golf simulator at the office.

[6] On February 1, 2022, the two Calgary-based lead executives for the brokerage (Marc Bennett and Mandy Burgess) sent Mr. Gunn a letter detailing a series of changes that needed to be made at NE2. In thinly veiled terms, it invited Mr. Gunn to step aside from the business. This

letter resulted in the termination of Ms. Burgess' employment at NE2 and the resignation of Mr. Bennett.

[7] Shortly thereafter, in mid April 2022, the following brokers resigned from NE2: Dario Vigna, Jack Widmer, Charles Douglas, Ryan Beckwermert, and Christy See (the **"Brokers**"). The Brokers had all signed employment contracts requiring them to take six months of paid "garden leave" before accepting employment elsewhere.

[8] Upon expiry of the garden-leave restrictions, the Brokers accepted employment at a new oil brokerage started by Ms. Burgess, Modern Commodities Inc. ("**Modern Commodities**"). Mr. Bennett also accepted a position at Modern Commodities, as he not only played a leadership role at NE2, but was an oil broker in his own right.

[9] The departure of Mr. Bennett, Ms. Burgess and the Brokers has spawned over two years of rather nasty litigation. Much dirty laundry has been aired, some of which is of a highly personal nature.

[10] At this stage, the primary question to be determined is whether the Brokers should be allowed to withdraw evidence from the court record (or prevent its filing) that is embarrassing to them, and which, according to their current counsel, consists of responses to questions that should have been objected to, and an affidavit that ought not to have been filed. They say this is necessary to prevent the litigation process from being weaponized to destroy reputations.

[11] To decide that question, I must determine whether such a novel and creative request is consistent with the open court principle and the requirements of the *Alberta Rules of Court*, with limited case authority to assist me. I have decided that it is not. Potential personal embarrassment of a party is not a sufficient reason to keep applications, supporting affidavits, and cross-examination transcripts off the court record. It may be a reason to seek a restricted court access order under Part 6, Division 4 of the *Alberta Rules of Court*, but no such application is expressly before me. Even if such an application was made, it would be unlikely to succeed. I am also unmoved by the argument that cross-examination transcripts should be withdrawn from the record (or prohibited from being filed) because of second thoughts or a second opinion of counsel regarding the relevancy of questions put to an affiant.

[12] My reasons begin with a summary of the rather twisted history of pre-trial applications leading to my decision.

III. Litigation History

A. Bennett Statement of Claim and NE2 Counterclaim (April & June 2022)

[13] After leaving NE2, Mr. Bennett commenced an action against the company and Mr. Gunn, claiming constructive dismissal. Among other things, Mr. Bennett claimed that Mr. Gunn had created a toxic workplace at NE2, engaged in verbal and physical harassment, and had sexually harassed company employees. These allegations were reported in May 2022 by the media outlet Bloomberg, which also reported that after Mr. Bennett's "dismissal," six brokers resigned. Citing anonymous sources, Bloomberg suggested that the reasons behind the Brokers' mass exit aligned with the claims in Mr. Bennett's lawsuit.

[14] NE2 counterclaimed against, amongst others, Mr. Bennett, Ms. Burgess, and the five departing Brokers. In its counterclaim, NE2 denied that the departures were due to a toxic

environment created by Mr. Gunn. Instead, NE2 alleged that the Brokers created the toxic workplace. NE2 also alleged that Ms. Burgess, Mr. Bennett and the Brokers had conspired against the company and Mr. Gunn to unlawfully start a competing brokerage—in breach of Ms. Burgess' and Mr. Bennett's fiduciary duties—and to take NE2's clients and business opportunities for themselves.

[15] Defences to counterclaims were filed by all involved, in the Summer of 2022.

B. Interim Injunction Application (December 2022)

[16] In December 2022, NE2 and Mr. Gunn applied for an interim injunction to prevent Modern Commodities from starting up. They claimed that the Respondents to that application had pilfered NE2's client list and trading platform, and that NE2 would suffer irreparable harm unless an injunction was granted.

[17] In response, a series of affidavits were filed by the Respondents to the interim injunction application, including Christy See, Dario Vigna, Ryan Beckwermert, and Charles Douglas. The Respondents denied having taken confidential information or intellectual property owned by NE2 when they left its employment. The Brokers attested that they had each complied with their employment contracts, and had accepted employment with Modern Commodities only after their garden leaves had expired. The Brokers' affidavits referenced the existence of a toxic workplace environment at NE2 and the misconduct of Mr. Gunn, in similar terms to the allegations in the Bennett statement of claim and reiterated in various defences to counterclaims.

[18] On December 16, 2022, I heard the injunction application. There had not yet been any cross-examination on the affidavits sworn by the Respondents or by Mr. Gunn. In the circumstances, the application was argued and decided on an interim interim basis, given its urgency and the absence of such cross-examination. I denied the application, finding that the tripartite test had not been made out, but left the door open for a renewed application following questioning. The alleged misconduct of Mr. Gunn was a factor in my decision to deny the injunction application, but only on an interim basis.

[19] NE2 and Mr. Gunn chose not to proceed with another injunction application.

C. Security for Costs Application (February 2023)

[20] In February 2023, the Brokers brought the Security for Costs Application. In support of the Security for Costs Application, the Brokers relied on nine affidavits, seven of which were filed previously in opposition to the injunction application. Counsel for NE2 and Mr. Gunn cross-examined the Brokers (except for Mr. Widmer) on their affidavits between March and April 2023 (the "**Cross-Examinations**"), leading to the production of the Cross-Examination Transcripts.

[21] The Cross-Examinations were broad ranging. Counsel for NE2 and Mr. Gunn questioned the affiants on the allegedly toxic work environment at NE2, as well as the behaviour of individual brokers towards other employees and clients. NE2 and Mr. Gunn now argue that the evidence given under cross-examination demonstrates that the Brokers engaged in or accepted the very behaviour that they say gave them such offence when accusing Mr. Gunn of creating a toxic work environment.

[22] The Cross-Examination Transcripts contain information regarding misconduct that would be hurtful and potentially damaging to individuals who are not part of this lawsuit if disclosed.

This includes the names of third parties who were victimized by the conduct in question, and clients of the company who were in some fashion or another involved in misbehavior. This led to discussion between counsel, and on March 20, 2024, Applications Judge Mason granted a partial consent order (the **"Mason Order**"). The Mason Order requires that certain non-parties be identified by initials and that redactions be made to all documents filed in the action.

D. Restricted Court Access Application (October 2023)

[23] Prior to the Mason Order, the Brokers had filed the Restricted Court Access Application on October 10, 2023. They were seeking redactions to the Cross-Examination Transcripts not only to remove third parties' names and the market information, as previously agreed to by counsel, but also to redact sections of the Cross-Examination Transcripts that had not been previously discussed.

[24] In support of that application, Mr. Vigna affirmed a new affidavit on September 29, 2023 (the "**Vigna Affidavit**"), which was filed with the Court on October 10, 2023. Appended as exhibits to the Vigna Affidavit were the Cross-Examination Transcripts with the Brokers' proposed redactions. Also appended were documents marked as exhibits during the Cross-Examinations, which included records of telephone calls, Ice Chat messages, and text messages between brokers, all of which was subject to production in the action.

[25] Mr. Vigna attested that reputational and personal harm would result if the transcripts and exhibits were not redacted.

[26] On October 20, 2023, the parties appeared before me in morning chambers to argue the Restricted Court Access Application. The application was adjourned to November 17, 2023, to allow counsel for NE2 and Mr. Gunn to cross-examine Mr. Vigna on the Vigna Affidavit. I directed that, in the meantime, the Cross-Examination Transcripts would not be filed. On October 31, 2023, Mr. Vigna was cross-examined on the Vigna Affidavit.

E. Strike Application (May 2024)

[27] The Restricted Court Access Application was not argued on November 17, 2023, and remained in abeyance for many months thereafter. In April 2024, counsel for the Brokers advised opposing counsel that they would not be proceeding with the Restricted Court Access Application and the Security for Costs Application. On May 31, 2024, the Brokers filed their Strike Application, as described above.

F. Clarification/Variation Application (August 2024)

[28] In June 2024, counsel for NE2 and Mr. Gunn advised that they would be taking steps to vary my direction of October 20, 2023, as it was unclear whether the direction continued to apply to prevent them from filing the Cross-Examination Transcripts. In support, they provided opposing counsel with an extensive, unfiled affidavit sworn by Mr. Gunn on June 14, 2024 (the "**Gunn Affidavit**"). The affidavit addresses the toxic environment issue once again and attests that when cross-examined on their affidavits, certain Brokers made significant admissions of misbehavior. It attaches as exhibits excerpts of questioning for discovery and related exhibits, such as records of chat messages between brokers. It also describes, in narrative form, admissions of misconduct made during the Cross-Examinations.

[29] The Brokers fear that Mr. Gunn will use his affidavit to publicize the misconduct of the Brokers to reclaim his reputation and destroy theirs, while avoiding liability for defamation by virtue of qualified privilege. This fear has generated a series of applications.

[30] As mentioned above, the Brokers' Strike Application seeks to strike from the court record the Security for Costs Application and any materials filed in support thereof, as well as the Restricted Court Access Application and any materials filed in support thereof. Additionally, the Brokers applied on an urgent basis for an interim injunction to enjoin the filing or dissemination of the Gunn Affidavit and to seal the Vigna Affidavit pending determination of the Strike Application.

[31] On July 3, 2024, Justice Horner granted an interim injunction preventing dissemination of the Gunn Affidavit pending hearing of the Strike Application. She also granted an interim order sealing the Vigna Affidavit. Because media were not present at the injunction hearing, Justice Horner stated that the sealing order would expire in two weeks and instructed the parties to appear in morning chambers to determine, with proper media notice, if it should be extended.

G. Justice Carruthers' Endorsement (July 2024)

[32] The parties appeared in morning chambers before Justice Carruthers on July 19, 2024, to argue the continued sealing of the Vigna Affidavit. After argument, Justice Carruthers reserved her decision. On July 24, 2024, she issued a written endorsement. She held that the application was in substance an application for restricted court access. Thus, it engaged the tripartite *Sherman Estate* test: ***Sherman Estate v Donovan***, 2021 SCC 25. She concluded that the application to extend the sealing of the Vigna Affidavit did not meet the requirements for a discretionary limit on court openness and must be denied.

[33] On August 26, 2024, NE2 and Mr. Gunn filed the Clarification/Variation Application to seek clarification or variation of my direction of October 20, 2023, relating to the filing of the Cross-Examination Transcripts. That was set to be heard before me on September 6, 2024.

[34] By agreement, the date for argument of the Strike Application was moved from November 20, 2024, to September 6, 2024. This allowed both the Strike Application and the Clarification/Variation Application to be heard at the same time.

IV. Disposition of the Clarification/Variation Application

[35] At the outset of the hearing on September 6, 2024, I invited counsel to make submissions regarding the intention of the Court in making its direction of October 20, 2023. After hearing those submissions and having reviewed the written briefs, I instructed counsel that the intention of the court on October 20, 2023, was to adjourn the hearing of the Restricted Court Access Application to the agreed upon date of November 17, 2023, and to direct counsel not to file the Cross-Examination Transcripts in the meantime. Accordingly, the direction was temporary, and it expired on November 17, 2023. It was open to NE2 and Mr. Gunn to file the Cross-Examination Transcripts in the ordinary course, pursuant to rule 6.7, subject to redactions required by the Mason Order.

V. Disposition of the Strike Application

[36] As discussed earlier, the Strike Application has two components: the application to strike from the court record the Security for Costs Application and supporting materials, and the application to strike from the court record the Restricted Court Access Application and the Vigna Affidavit. These raise somewhat different issues given the history of litigation in this case. For convenience, I will commence with the request to strike the Restricted Court Access Application and to "unfile" the Vigna Affidavit.

A. Restricted Court Access Application

[37] As mentioned, the Vigna Affidavit was filed in support of the Restricted Court Access Order on October 10, 2023. Enclosed as an exhibit to the Vigna Affidavit are copies of the Cross-Examination Transcripts and exhibits that have been redacted to remove market information, client names, and business or personal matters not related to the Security for Costs Application or the underlying action. Some of the information that remains unredacted, as described in the Brokers' brief, is "scandalous information related to Brokers' personal lives."

[38] The Brokers, however, have already attempted to have the Vigna Affidavit made inaccessible to the public. In her decision of July 24, 2024, Justice Carruthers was called on to decide whether the Vigna Affidavit should continue to be sealed. In making that decision, she articulated the foundational principles underlying the factors set out in ***Sherman Estate***. She then enumerated the three factors that a person seeking to limit court openness must establish:

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects: ***Sherman Estate*** at para 38.

[39] Justice Carruthers found as follows. First, the Brokers failed to establish a serious risk to an important public interest. Some of the contents of the Vigna Affidavit might cause embarrassment and reputational effects, but that is often the case in civil litigation. Second, it was not necessary to seal the Vigna Affidavit and exhibited materials. Redaction had already been completed and was a less intrusive and adequate alternative to continued sealing. Third, the sealing order would not be proportional, as it is harder to justify when the information the applicant seeks to protect is directly related to a central allegation in the lawsuit. In this case, a central issue in the litigation appears to be the toxic workplace environment and culture at NE2, making the Vigna Affidavit and the Cross-Examination Transcripts highly relevant.

[40] As was the case in their appearance before Justice Carruthers, the Brokers' current request to strike the Restricted Court Access Application and the Vigna Affidavit remains, in essence, a renewed request to bar public access to these materials. In other words, it is a repackaging of the application that was before Justice Carruthers and refused.

[41] While I am not bound by the decision made by Justice Carruthers, I do agree with it.

[42] The Vigna Affidavit was prepared under the advice of counsel and provides extensive evidence that was not only relevant to the Restricted Court Access Application, but is also relevant and material to the broader claims before the Court, despite the embarrassing nature of

the information. To that end, even with the proposed redactions, the Vigna Affidavit is hundreds of pages long with numerous exhibits.

[43] Between the filing of the Vigna Affidavit and the filing of the Strike Application, the Brokers retained new counsel. Since obtaining new counsel, the Brokers now appear dissatisfied with the approach taken by their former counsel in relation to the Vigna Affidavit and the Cross-Examinations. Specifically, the Brokers assert that it was a mistake for previous counsel to have filed the Cross-Examination Transcripts as part of the Vigna Affidavit. They also allege that their previous counsel failed to object to cross-examination questions relating to personal, commercial, and third-party information that, in their view, was irrelevant to the security for costs issues.

[44] However, disagreement with a previous counsel's approach does not "justify rebutting the strong presumption favouring open courts": ***Sherman Estate*** at para 55. Moreover, personal privacy alone does not constitute an important public interest: ***Sherman Estate*** at paras 46-47. Instead, the information must strike at the "biographical core" of an individual, thereby threatening their integrity, for a serious risk to an important public interest to be recognized in a privacy context: ***Sherman Estate*** at para 75. Thus, I agree with Justice Carruthers' finding that the information in the Vigna Affidavit "is no doubt embarrassing and, in today's social climate, potentially damaging in a professional context. That does not, however, meet the test for a sealing order."

[45] Turning to the second part of the ***Sherman Estate*** test, reasonable alternative measures are available to prevent any harm resulting from the Vigna Affidavit remaining on the court record. Clearly the Brokers, when represented by previous counsel, considered that redaction of certain sensitive information was a reasonable alternative, and indeed it appears that all counsel were close to an agreement regarding the redactions as of October 2023.

[46] When considering the third ***Sherman Estate*** factor (the proportionality assessment), the relevance and materiality of the evidence proposed to be sealed or, in this case, withdrawn from the public record entirely, is an important consideration. In this case, the Brokers and Ms. Burgess chose to put Mr. Gunn's behaviour and reputation into issue by alleging that NE2's work environment was toxic, and that the toxicity was due to Mr. Gunn's bad behaviour. Mr. Gunn responded by denying responsibility for toxicity and pleading that if there was toxicity, it was due to the behaviour of the Brokers under Mr. Bennett's and Ms. Burgess' leadership. Although the Brokers have since retained new counsel, who may have a different view of the situation, relevance and materiality is determined by the pleadings, not by the views of counsel.

[47] In the circumstances, while redaction of market information and the names of victims and clients is appropriate and has already been agreed to, to go further would unnecessarily impinge on the open court principle and create a risk of an unlevel playing field between the litigants. Mr. Gunn's alleged misbehaviour would continue to be a matter of public record and interest, while the alleged misbehaviour of the opposing parties would be kept secret. This is not fair.

[48] I also cannot accept the argument that the public interest in an open court would be maintained following the withdrawal of the Vigna Affidavit because the information contained within it could still be presented at trial, subject to relevance, materiality, and admissibility considerations. It seems to me that such an argument could be made in any situation where a litigant considers it preferable to keep evidence private. That is not part of the ***Sherman Estate*** analytical framework, nor should it support a request for withdrawal of an already filed affidavit.

It must be emphasized that the Vigna Affidavit is already redacted, and there is no evidence that since it was filed in October 2023, any damage has been done.

[49] Accordingly, I find that the application to strike the Restricted Court Access Application and the supporting Vigna Affidavit must be denied. The Vigna Affidavit will remain in its filed, redacted form on the court record.

B. Striking the Security for Costs Application

[50] When the Brokers changed legal counsel in early 2024, their new counsel reviewed the file and concluded that the evidence given by the Brokers during the Cross-Examinations went beyond the scope of that which was relevant and material to the Security for Costs Application. They also concluded that given the sensitive nature of the evidence, they should offer to abandon the Security for Costs Application in return for the Cross-Examination Transcripts not being filed. This offer was made to counsel for NE2 and Mr. Gunn. It was not accepted.

[51] Notwithstanding the refusal of the offer, the Brokers proceeded to abandon the Security for Costs Application, in addition to the Restricted Court Access Order

[52] This was done in favour of proceeding with the Strike Application. This is based in part on an argument that because both have been abandoned, the Applications, supporting affidavits, and Cross-Examination Transcripts are no longer relevant and material to the action. Thus, the Brokers argue that the Applications and supporting affidavits should be withdrawn, and the Cross-Examination Transcripts should not be filed.

[53] This is a novel tactical manoeuvre. There is very little Alberta caselaw to support the "unfiling" of material placed on the public record, even where the underlying action has been discontinued. Reported cases include two decisions of Justice Lee of this Court in which he reluctantly allowed material to be withdrawn from the court record on consent, and in a family law matter: ***Campbell v Beekman***, 2011 ABQB 437; ***Ariss v Ariss***, 2011 ABQB 435. I was also referred to a decision by former Associate Chief Justice Rooke, in which he granted leave to a party to bring an application to have certain improper affidavits withdrawn and replaced by ones that were in conformity with the *Alberta Rules of Court*: ***Piikani Nation v Raymond James Ltd,*** 2017 ABQB 102.

[54] The most instructive case is ***Ariss***. As mentioned, this was a family law decision. While granting the application, Justice Lee, relying on ***Gill v Gill***, 2004 BCSC 518, listed several factors to be considered when determining whether affidavits should be removed from the court record. These include:

a) whether the affidavit was filed by mistake;

b) whether the affidavit had been used in the sense of having been before the court during the course of considering an application;

c) whether there was a pending application before the court for which a party intended to rely on the relevant affidavit;

d) whether the application to withdraw the affidavit was being made as a strategic or tactical decision to deny the other party access to relevant information;

e) whether the other party would be prejudiced by the withdrawal of the affidavit;

f) whether there were policy reasons which would weigh against withdrawing the affidavit; and

g) whether the administration of justice would be adversely affected by the withdrawal of the affidavit: ***Ariss*** at para 5.

[55] The Brokers argue that the factors articulated in ***Ariss*** favour a finding that the Applications should be struck from the record, along with the supporting affidavits and other materials amounting to nearly 2,500 pages. They say that these materials referred to or were the result of questioning on subjects that were not relevant and material to the action, such as discussions between the Brokers and their clients that would cause personal embarrassment. Hence, they say the first ***Ariss*** factor—whether the materials were filed in error—favours the Applications being struck.

[56] They also emphasize that with the Applications having already been abandoned, there are no pending applications before the court for security for costs or restricted court access. They deny that their Strike Application is used for strategic or tactical purposes to deny the other party access to relevant information, saying that the information would be available at trial if relevant and material. For the same reason, they say that NE2 and Mr. Gunn would not be prejudiced by withdrawal of the Applications, nor would the administration of justice be adversely affected.

[57] I do not accept these arguments for several reasons.

[58] First, both components of the Strike Application are driven by the Applicants' strategic desire to restrict public access to the court record. As such both engage the same public interest factors regarding the balancing of the open court principle with privacy interests, as per ***Sherman Estate***, and lead to the same conclusion: the application must be denied.

[59] Second , I do not agree that evidence regarding the behavior of those working at NE2 is irrelevant to the action or the now abandoned Security for Costs Application. All of the parties have put workplace toxicity into issue, and NE2 was entitled to cross-examine the Affiants on that issue. While current counsel might have objected to questioning along those lines, previous counsel did not and, in my view, were justified in taking that approach.

[60] Third, I do not agree that having the Cross-Examination transcripts held by counsel pending a determination of relevance and materiality at trial is an appropriate approach. Leaving aside the open court principle, such an approach would not be fair in the circumstances. Mr. Gunn's reputation and behavior has been attacked by Mr. Bennett and the Brokers in their pleadings, affidavits, and questioning. To allow the Brokers to keep embarrassing evidence concerning their own behavior under a notional lock and key pending trial, absent a restricted court access order, would be procedurally asymmetrical.

[61] Leaving aside the ***Arris*** factors, I find that the proper procedure to keep court records secret is not an application for permission to "unfile" documents, or to enjoin them from being filed, especially when they are required to be filed pursuant to the *Alberta Rules of Court*. Such an application might have been appropriate in a family law situation (although such files are not available to the public anyway), in a case of mistake, or as a practical solution for replacing a defective affidavit. However, where the reason for seeking secrecy is protection of the privacy interests of a litigant, the appropriate procedure is to apply for a restricted court access order. This allows a proper balancing of the public's interest in maintaining open court processes and practices, and of the litigants' interests. It also engages an established analytical framework.

VI. The Gunn Affidavit

[62] On June 14, 2024, Mr. Gunn swore an extensive affidavit, the Gunn Affidavit. The stated purpose of the affidavit was in support of the Clarification/Variation Application.

[63] The affidavit essentially sets out Mr. Gunn's version of the events leading to the departure of the Brokers from NE2, as well as reciting the history of litigation to date. It also responds directly to the "toxic environment" allegations made by Ms. Burgess, Mr. Bennett, and the Brokers. Mr. Gunn denies these allegations and attests that it was the Brokers who were guilty of misbehaviour. In doing so, he relies on the Cross-Examination Transcripts, as well as evidence given during questioning for discovery.

[64] The Brokers argue that NE2 and Mr. Gunn should not be allowed to file the Gunn Affidavit (it was provided to the court for the purpose of this proceeding in an unfiled form) and, at minimum, should be enjoined from disseminating it. Their primary argument, aside from contesting the relevance and materiality of Mr. Gunn's evidence, is that the affidavit is being filed for an improper purpose. That is, for the purpose of disseminating it to the media to show that the brokers are "monsters," and to ruin the reputation of those involved. They say that this is why injunctive relief was sought in July of this year. They also argue that if the Court allows the Gunn Affidavit to be filed, it should be subject to an order prohibiting its dissemination. Moreover, the Brokers assert that, like the Cross-Examination Transcripts, the Gunn Affidavit should be subject to the implied undertaking not to use Part 5 questioning evidence for purposes other than furtherance of the action.

[65] NE2 and Mr. Gunn argue that there is no reason not to file the Gunn Affidavit. It was sworn in support of their Clarification/Variation Application. The Brokers' counsel cross-examined Mr. Gunn on his affidavit and it was relied on during the course of argument for the Strike Application and the Clarification/Variation Application. They concede that the Gunn Affidavit should have additional redactions in respect of the names of third parties who may have been subjected to sexual harassment, as per the Mason Order, and have no issue with further redactions of the names of clients, as agreed to previously between counsel. They also deny any improper purpose, arguing that Mr. Gunn was and remains entitled to place on the court record his version of events. His purpose was not to ruin anyone's reputation, but to protect his own.

[66] As discussed earlier, the issue of workplace toxicity is central to the action as pleaded. It follows that affidavit evidence and cross-examination on affidavits concerning that issue is relevant and material to the action as a whole. Given my clarification of the Court's intent in directing that the Cross-Examination Transcripts not be filed until the scheduled hearing of the Brokers' Restricted Court Access Application, it was not necessary to consider variation of that direction, as it was no longer operative. They could be filed without permission of the Court. The Gunn Affidavit and corresponding cross-examination transcript fall into the same category.

[67] As for whether Justice Horner's order prohibiting dissemination of the Gunn Affidavit should continue, I do not consider it necessary or appropriate at this time to continue such a restriction. NE2 and Mr. Gunn deny that they intend to disseminate the Gunn Affidavit to the media. Their position is that they want to have the affidavit on the public record so that anyone examining the court record will have access to their position and evidence regarding the toxicity allegations.

[68] Subject to proper redactions being made, NE2 and Mr. Gunn should be allowed that opportunity without intervention by the Court. Should they go farther than that and publish the Gunn Affidavit by providing it to non-parties, they will risk breaching the implied undertaking rule, as the Gunn Affidavit contains portions of questioning transcripts that are protected by rule 5.33: see e.g. ***Terrigno v Fox***, 2023 ABKB 89 at para 122. The proper approach would be to remove any excerpts from questioning transcripts before filing. I also caution all parties that disseminating information contained in court documents to the press in a manner that exceeds any legitimate purpose could constitute defamation that may not be protected by qualified privilege: see e.g. ***Hill v Church of Scientology of Toronto***, 1995 CanLII 59 (SCC) at paras 154-156, [1995] 2 SCR 1130. Such conduct may also have implications for future costs awards.

VII. Conclusion

[69] In summary, the Brokers' Strike Application is denied. The affidavits and cross-examination transcripts filed in support of the Restricted Court Access Application and the Security for Costs Application contain evidence that is relevant and material to those applications, as well as to the action as a whole. The affidavits were used and relied upon by the Court in making decisions, including denial of an interim interim injunction application made by NE2 and Mr. Gunn to prevent the Brokers, Ms. Burgess, and Mr. Bennett from starting a competing oil brokerage firm. It was expected at that time that the Brokers' affidavits would be subject to cross-examination and the transcripts of those cross-examination would be filed in the ordinary course, as required by the *Alberta Rules of Court*. That the Cross-Examinations were ultimately done in the context of the Security for Costs Application, rather than a renewed application for injunctive relief, makes little difference.

[70] Accordingly, NE2 and Mr. Gunn are entitled to file the Cross-Examination Transcripts. Indeed, they are required to do so by rule 6.7. In accordance with the Mason Order and as previously agreed to between counsel, the Cross-Examination Transcripts are to be redacted to delete the names of non-parties who were subjected to sexual harassment, and I accept the assurance of counsel that client names and sensitive market information will also be redacted.

[71] As of November 17, 2023, there was no outstanding direction of the Court preventing the filing of the Cross-Examination Transcripts, or indeed any cross-examination transcript. The Restricted Court Access Application and supporting Vigna Affidavit with the then-proposed redactions will remain on the public record as well. So too will the transcript of cross-examination on the Vigna Affidavit with redactions, as per the Mason Order, and with the assurances of counsel regarding client names and sensitive market information.

[72] The Gunn Affidavit, sworn on June 14, 2024, and provided to the Court on an unfiled basis, may be filed by Mr. Gunn. The Brokers are required to file the transcript of their cross-examination of Mr. Gunn on that affidavit, again with redactions as per the Mason Order and with the assurances of counsel regarding client names. The order of Justice Horner, dated July 3, 2024, prohibiting the dissemination of the Gunn Affidavit until the Strike Application had been heard will not be continued.

[73] As NE2 and Mr. Gunn have been successful in this proceeding, they are entitled to costs. If the parties cannot agree on costs within sixty days of this decision, the matter can be remitted to me by way of written submissions, not to exceed three pages in length exclusive of authorities.

Heard on the 6th day of September, 2024.

Dated at the City of Calgary, Alberta this 25th day of November, 2024.

R.A. Neufeld
J.C.K.B.A.

Appearances:

James D. Murphy, Susan Fader, Karim Ismail and Marcus Memedovich
for NE2 Canada Inc. and Timothy Gunn

Grant N. Stapon, K.C. and Keely Cameron
For the Defendants by Counterclaim/Applicants, Dario Vigna, Jack Widmer, Charles Douglas, Ryan Beckwermert and Christy See

Abdul Hassan as agent for Cynthia Aoki
For Marc Bennett

Chloe Campbell as agent for Noah Hodgson
For the Defendant, Mandy Burgess