KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 153**

Date: **2024 08 28**
Docket: QBG-MF-00051-2021
Judicial Centre: Melfort

BETWEEN:

BOURGAULT INDUSTRIES LTD.

PLAINTIFF

- and -

KEVIN GRAHAM, JODI GRAHAM, DAVID GRAHAM and 102053515 SASKATCHEWAN LTD. carrying on business under the firm name and style BUFFALO AG

DEFENDANTS

Counsel:

Kenneth A. Ready, K.C.	for Bourgault Industries Ltd.
Abby R. Holtslander	for Kevin Graham
Terry J. Zakreski, K.C.	for Jodi Graham, David Graham and 102053515 Saskatchewan Ltd.

FIAT
August 28, 2024

MORRALL J.

Introduction

[1] The parties in this matter are currently vying to dismiss aspects of the other parties' claims and to secure specific records as part of the discovery process during the initial stages of litigation. While affidavits of documents have been

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exchanged, questionings have not yet begun.

[2] Currently, there are four separate applications, the first of which was filed on January 19, 2024, seeking various orders.

[3] Following oral arguments and discussions with the court at the hearing for these applications on April 9, 2024, Bourgault Industries Ltd. [BIL] filed an amended statement of claim with the other parties' consent. As a result of this amended claim, Kevin Graham amended his application.

[4] The parties' extensive arguments regarding these complex matters have left no stone unturned.

Background

[5] To contextualize these applications properly, it will be helpful to provide some additional information about the parties' pleadings.

[6] BIL issued a claim on May 6, 2021, against Kevin Graham, Jodi Graham, David Graham and 102053515 Saskatchewan Ltd. carrying on business under the firm name and style Buffalo AG [Claim]. In the Claim, BIL states that they manufacture farm products, including cultivators and air seeders. These products use an attachment referred to as a "Tip" [BTT Tip] manufactured by Bourgault Tillage Tools Ltd. [BTT].

[7] The Claim alleges that, in 2018, BIL entered into negotiations with BTT to purchase BTT. Kevin Graham, who at that time was employed by BIL as a Contracts Negotiator and Materials Leader, was an active participant in the decision-making process and, in so doing, had unrestricted access to BTT's books and records, including confidential information in relation to the manufacturing, distribution, and sales of the BTT Tip.

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[8] No suitable agreement was ever reached between BIL and BTT regarding BIL's attempted purchase of BTT.

[9] BIL then alleges that Kevin Graham proceeded to disclose confidential information about the BTT Tip to Jodi Graham, Kevin Graham's spouse, and David Graham, Kevin Graham's brother, without BIL's knowledge and contrary to Kevin Graham's lawful contractual and common law obligations as an employee. On April 22, 2020, all the defendants incorporated 102053515 Saskatchewan Ltd. and registered the business name Buffalo AG. Both Jodi Graham and David Graham are officers, directors, and shareholders of Buffalo AG. I will hereinafter describe Jodi Graham, David Graham, and 102053515 Saskatchewan Ltd. as "Buffalo AG" or "the Buffalo AG defendants".

[10] BIL posits that Buffalo AG used this confidential information unlawfully acquired from Kevin Graham regarding the BTT Tip to manufacture an equivalent product to the BTT Tip that Buffalo AG marketed as the Buffalo AG Tip.

[11] They allege that Kevin Graham failed to act in accordance with his duty of fidelity and good faith and, in doing so, caused injury to BIL and loss and damages to BIL's business reputation, which is not compensable in damages.

[12] BIL then alleges that all defendants committed the tort of civil conspiracy by conspiring together to gain from the confidential information belonging to BTT financially and knowing that this use of confidential knowledge would cause injury, loss and damages to BIL directly and indirectly in its business relationship with BTT. BIL also states that it is at risk of being held vicariously liable for the misconduct of Kevin Graham in the misuse of confidential information and suffers resulting loss and damages. Further, and in the alternative, BIL alleges that this misuse of confidential information caused reputational risk and damage to BIL as an honourable and trustworthy entity, and the defendants knew or ought to have known that injury to BIL

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was likely to result.

[13] BIL then alleges that the conduct of all the defendants directly interfered with BIL's economic relations with BTT and any future business relating to the manufacturing, distribution, marketing, and sales of the BTT Tip. They state that the tort of interference with economic relations was committed individually and as part of a conspiracy, which caused BIL loss and damages.

[14] Finally, BIL alleges that all the defendants committed the tort of unjust enrichment and that BIL is entitled to an accounting for the monies received as a result of the defendants' unlawful actions. Further, and in the alternative, they submit that all the defendants hold the profits from their unjust enrichment in a constructive trust in favour of BIL.

[15] In Kevin Graham's statement of defence filed June 14, 2021, he denies that he, either individually or in conjunction with the other defendants, committed any of the torts alleged by BIL. Further, he puts BIL to the strict proof of their claims.

[16] Kevin Graham also filed a counterclaim against BIL on June 14, 2021. He alleges wrongful dismissal and claims that he was terminated on May 11, 2021, without just cause and reasonable notice.

[17] In addition, this counterclaim alleges that Kevin Graham entered into an agreement with BIL regarding the establishment of a manufacturing facility in China. The agreement indicated that the facility would be operated by an entity known as Bourgault Yantai Manufacturing Ltd. [BYML], which was owned by Bourgault Chn Investments Inc. [BCII], a wholly owned subsidiary of BIL. Pursuant to the agreement, BIL agreed to provide Kevin Graham with a ten percent ownership interest in BCII.

[18] Kevin Graham alleges he fulfilled his obligations under the agreement, but BIL has failed to provide him with his promised ownership interest in BCII.

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Therefore, he claims that he is entitled to all amounts received or disbursed in relation to his entitlement interest in BCII or, in the alternative, claims that BIL was unjustly enriched by Kevin Graham's work in establishing the manufacturing facility and he is entitled to compensation on a *quantum meruit* basis.

[19] Buffalo AG filed a statement of defence on July 12, 2021, denying the receipt of any confidential information from Kevin Graham and being involved in any unlawful conspiracy, unlawfully interfering with the economic relations between BIL and BTT, or being unjustly enriched in any fashion.

[20] BIL filed a statement of defence to Kevin Graham's counterclaim on February 14, 2022. They allege he was lawfully terminated for just cause on May 11, 2021. Further, they deny that Kevin Graham had any entitlement to an ownership interest in BCII. However, if there is found to be a contractual entitlement to a percentage of BCII, they claim that as a result of Kevin Graham not fulfilling his lawful obligations as an employee of BIL, which was a condition precedent of the agreement, he is no longer entitled to any ownership interest.

[21] With the consent of all parties, BIL filed an amended statement of claim on May 23, 2024 [Amended Claim]. This amendment occurred as a result of discussions between counsel and the court during oral argument with respect to the initial chambers appearance related to all four separate applications. With this amendment, BIL removed all allegations in their Claim against all the defendants that referenced the tort of interference with economic relations. Further, the Amended Claim now specifies that, insofar as loss and damages are concerned, the general and special damages alleged only refer to injury and the resulting loss and damage to the business reputation of BIL.

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The Applications

[22] I will now briefly outline the contents of the four applications, including the amendment to Kevin Graham's application.

[23] In its application filed on January 19, 2024, BIL applied pursuant to Rules 5-6, 5-12, and 5-14 of *The King's Bench Rules* for document production from Kevin Graham, including cell phone and laptop data and records that BIL alleges were or are in his possession. Further, or in the alternative, they ask that Kevin Graham submit to cross-examination on his affidavit of documents.

[24] In his application filed on February 13, 2024, Kevin Graham applied pursuant to Rule 5-12 for document production from BIL related to the alleged economic loss suffered by BIL. This included various financial records and documents relating to the relationship between BIL and BTT, as well as documents pertaining to Kevin Graham's counterclaim, including financial statements and corporate records of BCII and BYML.

[25] This application was amended on May 10, 2024, so that the document production request no longer focuses on BIL's economic loss but on the damage that occurred to BIL's business relationship with BTT and BIL's business reputation. It contains some additional requests for documents on that amended basis. There is also an additional request for costs thrown away as a result of the Amended Claim.

[26] In its application filed on March 12, 2024, BIL applied pursuant to Rule 7-9(2)(b), 7-9(2)(c), 7-9(2)(d) and 7-9(2)(e) to strike paragraphs 10 to 18 of Kevin Graham's counterclaim as it relates to a purported agreement between BIL and Kevin Graham that Kevin Graham would receive specific compensation involving shares of other companies for work that he did in China.

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[27] In their application filed on March 25, 2024, Buffalo AG applies pursuant to Rule 7-9(2)(a), 7-9(2)(b), and 7-9(2)(e) to dismiss the entirety of BIL's claim as it relates to the Buffalo AG defendants in considerable measure due to the fact that BIL's claim is premised on a threatened claim being brought against BIL which has not materialized and BTT has commenced proceedings against Buffalo AG in Federal Court alleging an infringement of intellectual property rights from the sale of the Buffalo AG Tip.

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The Issues

[28] Given the substance of these applications, I would frame the issues for this court to determine as follows:

1) Should I order the production of the records sought by BIL in their application of January 19, 2024?

2) In any event of my decision above, do I order the cross-examination of Kevin Graham on his affidavit of documents?

3) Should I strike paragraphs 10 to 18 of Kevin Graham's counterclaim?

4) Should I strike all references to the Buffalo AG defendants in BIL's Amended Claim?

5) Should I order the production of the records sought by Kevin Graham in his application of February 13, 2024?

6) What quantum of costs, including costs thrown away, should be awarded?

The Evidence

[29] As all the affidavits filed in these four present applications and the prior judicially decided applications may contain relevant evidence related to the present

applications, I will generally outline all the evidence before the court. However, I will not detail every fact but attempt to provide a helpful overview of the factual landscape.

[30] The affidavit of William Glanville, sworn May 6, 2021, was filed in conjunction with BIL's interim injunction application, which BIL later abandoned. Mr. Glanville is the Vice President of Manufacturing at BIL. Justice Layh previously reviewed this affidavit, striking out significant portions in a fiat dated August 18, 2021. His summary of the affidavit material and rulings on the various paragraphs are found in paragraphs 8 to 37 of his decision. However, there is little in the surviving paragraphs of the affidavit that adds any factual context to the allegations asserted in the Claim.

[31] The affidavit of Jodi Graham, sworn June 7, 2021, indicates that she is the secretary/treasurer of 102053515 Saskatchewan Ltd. [3515 Sask] and Kevin Graham's spouse. She swears that 3515 Sask has three business arms selling wood product manufacturing, plant pot stands, and manufacturing replacement parts for agricultural machinery. The manufacturing business uses the name "Buffalo AG". She denies receiving any confidential information from Kevin Graham or conspiring with others to misappropriate and use such confidential information.

[32] The affidavit of David Graham, sworn on June 7, 2021, mimics Ms. Graham's affidavit in considerable measure. He is Kevin Graham's brother. He notes that the production and sale of replacement parts for agricultural machines, including those manufactured by BTT for BIL, is commonplace. He provides four examples of similar products from other companies. He denies that 3515 Sask's "Buffalo AG" business arm relied on any confidential information obtained through Kevin Graham in developing the BTT Tip or that he conspired with others to commit any of the alleged wrongful acts.

[33] The affidavit of Kevin Graham, sworn on June 8, 2021, notes that he was employed by BIL for 15 years, starting as a Design Engineer and becoming Materials

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Leader in 2017. Further, Gerard Bourgault is the President of BIL, while Joseph Bourgault, Gerard's brother, is the President of BTT. Throughout his employment with BIL, BIL and BTT had an ongoing business relationship where BIL routinely purchased tools directly from BTT, which were then attached to farm implements sold by BIL. He states that he does not recall ever being provided with any information with respect to the manufacturing, distribution or sales of the BTT Tip and has never had in his possession, outside of his employment with BIL, any confidential information in relation to the BTT Tip. While he is related to the owners of 3515 Sask, he is not a director, shareholder, employee or contractor of that company. He denies the allegations of conspiracy and interference with economic relations in the Claim.

[34] The affidavit of William Glanville, sworn March 21, 2023, is related solely to a matter decided by Justice Bardai (as he then was) on May 17, 2023, and is of little relevance to the issues now before the court.

[35] The affidavit of Kenneth Ready, K.C., sworn January 15, 2024, exhibited some correspondence between counsel from July 12, 2023, until November 7, 2023. In the attached correspondence, Kevin Graham's counsel stated on September 25, 2023, that his client informed him that he did not delete any documents from his company phone before returning the phone to BIL.

[36] The affidavit of William Glanville, sworn January 11, 2024, notes the documents provided by Kevin Graham in his affidavit of documents dated August 29, 2023. He avers that Mr. Kevin Graham was provided with a cell phone as part of his employment with BIL and that he returned this cell phone upon being terminated. Upon the return of this cell phone, BIL's Intellectual Technology department attempted to "open" the cell phone but needed a passcode to do so. Further, he avers that it was clear that the cell phone had been "wiped" remotely so that the contents were no longer available.

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[37] Also, BIL paid for a laptop computer for Kevin Graham's exclusive use in his position with BIL. Upon termination, this laptop computer, which is BIL's property, remained in Kevin Graham's possession. He also believes that Kevin Graham had access to third-party storage devices, which he used to store documents that only he would have access to. As a result of this information, it does not appear that all relevant documents and records have been disclosed in these proceedings.

[38] In his affidavit, sworn on February 12, 2024, Kevin Graham avers that he did not save any documents related to BIL or BTT on any third-party servers. BIL also used its computer servers but did not allow employees to connect their devices to this network as they could only access this network through a VPN, so they could not save BIL's files on their own devices. Therefore, he was unable to save any of BIL's information on either his laptop or his phone. He confirms that he did not "wipe" his cell phone or delete or destroy any documents before returning the cell phone to BIL. He no longer remembers the username or password of his cell phone.

[39] With respect to the laptop, he admits that he received a laptop from BIL but has lost it and, to the best of his knowledge, no longer possesses the laptop.

[40] After reviewing BIL's affidavit of documents, which were served on his counsel on July 20, 2022, he noted the following missing documents:

1) Documents related to the shares he was to receive in BCII and the profits of BYML that were to be allocated to him, including:

    a) Financial Statements of BCII, BYML, and BIL from 2018 to the present;

    b) The corporate books and records, including the minute books of BCII and BYML.

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2) Documents relating to the alleged economic loss suffered by BIL as a result of his alleged interference with BIL's economic relations with BTT, including:

a) Copies of each purchase order made by BIL to BTT from the years 2018 to the present; and

b) Work outsourced from BIL to BTT from 2018 to the present.

[41] His counsel requested these documents from BIL in a letter dated April 10, 2023.

[42] He then exhibits correspondence that his counsel received from counsel for BIL, indicating why they are refusing to provide the above-noted missing documents.

[43] In the affidavit of William Glanville, sworn March 8, 2024, he generally agrees with the characterization of the business relationship between BIL and BTT related in the affidavit of Kevin Graham, sworn June 8, 2021. He then advises that after the abandonment of the proposed share purchase by BIL of BTT, Kevin Graham and an employee of BIL by the name of Jun (Joey) Han [Mr. Han] put forward an idea to the senior management at BIL to reduce costs by incorporating a manufacturing business in China. Part of the proposal would be for Kevin Graham and Mr. Han to play a direct management role in this to-be-incorporated China corporation as well as direct shareholders. He then exhibits documents entitled Memorandum of Understanding dated November 29, 2018, annotated Memorandum of Understanding dated November 29, 2018, Corporate Share Memorandum dated December 18, 2018, and Corporate Structure Memorandum dated June 12, 2019.

[44] He avers that while this proposition was discussed in some detail, by April 2021, BIL had not agreed to any proposition with Kevin Graham despite the fact

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that the manufacturing and supply of the product from China to BIL through BCII and BYML was underway. In April 2021, BIL identified a conflict of interest in Kevin Graham's plan and delineated what arrangement BIL believes might be acceptable going forward. At no time was there an agreement or future commitment to arrange for Kevin Graham to be an officer, director, manager or shareholder of BCII or BYML. Further, there was no agreement to commit to a specific compensation amount or provide shares or financial benefits as alleged in the counterclaim.

[45] In a similar affidavit sworn on March 8, 2024, William Glanville averred many of the same things as in his other affidavit of the same date. Additionally, he focused on Kevin Graham's request for corporate information from BIL, BCII, and BYML.

[46] He avers that BIL does not publish or disclose to members of the public any documents, including competitors' financial information, including costs, product sales margins, expenses and related information of a proprietary, competitive and confidential nature, as it would be detrimental to the business interests of BIL. He states that the transactional relationship between BTT and BIL has no indirect or direct bearing on the quantification of any specific claim for loss and damage by BIL in the Claim. The recovery of the documents demanded by Kevin Graham would require significant cost and disruption to collect and collate. Further, for its purpose, BIL does not require the requested documents for its evidence at the trial of this action.

[47] The affidavit of Jodi Graham, sworn on March 22, 2024, noted that a statement of claim was issued by BTT against Buffalo AG in the Federal Court of Canada on April 4, 2023, and she believes that the Claim contains overlapping relief similar to the Federal Court action. She also swears that paragraph 24 of the affidavit of William Glanville sworn on May 6, 2021, which indicated that BTT advised BIL on April 5, 2021, of the alleged breach of confidence by Kevin Graham, demonstrates

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inadequate disclosure because this alleged communication was not disclosed in BIL's affidavit of documents. Further, despite a letter dated May 7, 2021, from BTT's legal counsel to BIL advising that they reserve the right to initiate legal proceedings against BIL for this alleged breach of confidentiality, she notes no such legal action has been undertaken to date, nor were any other complaints supporting a damaged relationship between BTT and BIL disclosed.

[48] The affidavit of Kevin Graham, sworn on April 4, 2024, provides his version of the agreement between BIL and himself and Mr. Han in relation to receiving an interest in BCII and BYML.

[49] He states that from the summer of 2018 to the winter of 2018, Gerard Bourgault, Mr. Han, and himself began planning for a manufacturing facility in China that would make seed boots in China and save BIL a lot of money. He agreed to take on the responsibility of establishing and commencing operations at the manufacturing facility and acting as a supervisor for Mr. Han. BYML was the company that operated the facility in China, and Mr. Han was the executive director/executive manager.

[50] Gerard Bourgault asked him how he wanted to be compensated for the work he would undertake on behalf of BYML. He indicated that he wanted to receive an ownership interest in BCII, and Gerard Bourgault agreed that he and Mr. Han would receive a 25 percent interest in BCII, which would be split 60/40. BCII would wholly own BYML, and BIL would wholly own BCII until he and Mr. Han purchased 25 percent of BCII's equity using BYML's profits. Three Memorandums of Understanding were prepared, and he told Gerard Bourgault that the second version of the Memorandum of Understanding "captures the spirit of our agreement" on December 2, 2018. At that time, he was already in China working on setting up the manufacturing facility. Gerard Bourgault sent a revised third version of the Memorandum of Understanding. He told him that he would be sending this third

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version to BIL's lawyer and accountant so they could "apply their expertise so that we can achieve the objectives laid out in the MOU". Kevin Graham believed this to be a binding agreement.

[51] Production began in the Chinese manufacturing facility in July 2019, and he continued to supervise Mr. Han in the evening through lengthy phone calls after his full-time hours at BIL. He also traveled to China and reviewed BYML's financial statements every month. Throughout this time, he indicated that Gerard Bourgault assured him that BIL's accountants and lawyers were working on preparing the formal agreement until March and April 2021, when Gerard Bourgault suddenly stated a desire to change the terms of the agreement.

[52] The affidavit of Kevin Graham, sworn May 10, 2024, relates to the request made in his amended application of May 10, 2024, for costs thrown away as a result of his counsel's belief that changes were necessary to their original application of February 13, 2024, as a result of the Amended Claim. He avers that he incurred $6,786.05 in costs in relation to the work his counsel did, which is now immaterial due to the amendments to BIL's Claim.

Analysis

BIL's Request for Cell Phone and Laptop Data

[53] BIL argues that Kevin Graham should be ordered to identify and disclose documents that were in his past and present possession related to confidential information that he acquired and stored on his cell phone and laptop and/or that he downloaded to an external third-party source. They believe that Mr. Graham has either deleted these documents or they are presently contained on third-party storage servers as the confidential information alleged to be stolen is absent from Kevin Graham's affidavit of documents. Given the actionable misconduct alleged in their Amended

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Claim, BIL states that this material is relevant and, therefore, disclosable.

[54] Kevin Graham submits that BIL's broad and unspecific request for disclosure of confidential information offends the principle of proportionality given the unascertainable sweeping nature of the documents requested. Further, given the sworn evidence that Kevin Graham provided indicating that he no longer possesses the laptop, never obtained any confidential information other than that which he already disclosed, and never stored any confidential information on third-party servers, there is nothing further in his power, possession, or control to disclose.

[55] In relation to document production, the court in *Bell v Insulation Applicators Ltd.*, 2023 SKCA 128 [*Bell*], comprehensively reviewed the governing legal principles regarding disclosure of information under Part V of *The King's Bench Rules* at paragraphs 26 to 46. The basic principle involved is that "The law has long recognized that parties to civil actions have an obligation to disclose to other parties to the litigation all relevant documents in their possession, and to produce those documents, subject to privilege or other recognized exceptions". (*Bell*, para 26).

[56] At this stage of the proceeding regarding these requested documents, it is clear that the first hurdle for BIL to overcome is to prove whether these requested documents exist or existed in the past, as Kevin Graham has sworn that he never retained or kept records of BTT's confidential information. It is BIL's onus to satisfy the court of the existence of these confidential documents.

[57] From my review of the affidavit material, aside from bare allegations and an oblique but as yet unsupported reference in an April 5, 2021, document apparently still in the possession of BIL referred to in the affidavit of Jodi Graham, there is no evidence to contradict Kevin Graham's assertion that he neither possesses nor possessed any confidential information belonging to BTT. In its Amended Claim, no doubt BIL will rely on inferences that could perhaps be drawn to infer possession of

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confidential material by Kevin Graham by citing the similarity of the Buffalo AG Tip to the BTT Tip, the temporal connection as they relate to the production of the Buffalo AG Tip and Kevin Graham's alleged exposure to the BTT manufacturing process, and his familial connection to Buffalo AG. However, no meat has been put on the bones of these inferences. Without further sworn detailed evidence, the court is not in a position to act on these inferences as there are no evidentiary details demonstrating how it may be more likely than not that Kevin Graham possesses this confidential information.

[58] Simply making allegations does not drive a court to action in these circumstances. Perhaps once a complete questioning has occurred of all the various parties to the litigation, some progress may have been made in establishing a factual foundation for this application. I note the following common sense approach taken by the court in *Dearborn v Dearborn*, 2019 SKQB 192 [*Dearborn*], in response to a similar situation:

> *(a) Should an order be made for disclosure of documents that the husband and/or third party say do not exist?*
>
> [12] With respect to Mr. Dearborn, the wife seeks copies of surface lease agreements, tenancy agreements, mortgage interest transfers and/or any agreements relating to the purchase of a mortgage interest affecting the title to specific property. Mr. Dearborn does not object to provide some of these documents but, in a supplementary reply, indicates that he made his best efforts to locate them and to his knowledge they do not exist. The wife appears satisfied with this response and seeks no further order.
>
> [13] On the other hand, the wife does seek a production order with respect to a number of documents that the husband states do not exist. Specifically, she seeks historical bank statements, personal income tax returns, corporate financial statements and returns, documents relating to an investment in a grain elevator, documents relating to the property in Hawaii and copies of any property related settlement agreements with his former spouse, Maxine Dearborn. Remarkably, the husband indicates in his reply and other sworn materials that these documents do not exist. He says he never had a bank account before 2013, choosing to operate his farm and personal affairs solely on a cash basis. Further, according to the husband, he has not filed an income tax return personally nor for his corporation since 2008. Also, according to the husband, he does not own property in Hawaii, nor

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> does he have an interest in a grain elevator and, therefore, has no documentation respecting either. Further, in direct contradiction to other sworn materials, he says there was never any written agreement between his former spouse and himself setting out the details of their separation, support or property division.
>
> [14] I appreciate that the husband's response is frustrating to the wife and creates suspicion. However, seeking or obtaining a court order compelling the production of documents which a party says do not exist is unlikely to be illuminating. A formal response has been provided and is on the record. Any nuances are best hashed out at a questioning, keeping in mind that the wife may bring back such requests for disclosure thereafter if further information/context becomes available. Furthermore, she is free to advance an argument at trial that adverse inferences should be drawn should the appropriate legal and evidentiary foundation for such an argument present itself.
>
> [15] Ultimately, if it turns out that the husband's denial that certain documents exist is based purely on a technical reading of the request for disclosure, he should be cautioned that any further efforts to garner same may be met with a substantial award of costs.
>
> [Emphasis added]

[59] Given that Kevin Graham has sworn that certain documents do not exist and it would be impossible for him to comply with other requests, it would be utterly fruitless to attempt to order the production of documents, apparently relevant or not, that he avers were never in his possession, knowledge or control. As stated in the underlined portion of the excerpt from *Dearborn*, this process is "best hashed out" in questioning, given that a court order will not produce "illuminating" results.

[60] Therefore, I will adjourn this application *sine die* until after the questionings for Kevin Graham and BIL are completed in this matter. At that point, the application can be brought back to chambers on 14 days' notice to the other parties should an evidentiary basis be established for pursuing this application.

Cross-examining Kevin Graham on his Affidavit of Documents

[61] In Justice Layh's fiat of August 18, 2021, at paras 38 to 53, he reviews the legal principles as they relate to the cross-examination of affiants in interim

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applications and ultimately finds that the questions BIL proposed to ask in that matter would do little to "assist in resolving the issue before the court" in accordance with the instructional test outlined in *Wallace v Canadian National Railway*, 2009 SKQB 178, 338 Sask R 174 [*Wallace*]. While the application by BIL in this application is made pursuant to Rule 5-12(5), ultimately, the same legal principles apply to an application under Rule 6-13 (see *Hill Top Manor Ltd. v Tyco Integrated Fire and Security Canada Inc.*, 2020 SKQB 241).

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[62] In reviewing the legal criteria, I find there is a genuine possibility of duplicity of procedure should I order this cross-examination to take place now. Given that I have adjourned BIL's application for documents until after the questioning of Kevin Graham and BIL, it does not make sense to order limited cross-examination on the affidavit of documents to take place when general and wide-ranging questioning will take place shortly thereafter. In my opinion, general questioning will allow for broader and more diverse questions to be asked by BIL than the limited cross-examination pursuant to Rule 5-12(5), which is focused solely on Kevin Graham's affidavit of documents.

[63] Also, when determining whether there is contradictory evidence before the court as part of the test for an order for cross-examination, I find myself in a similar position to that previously facing Justice Layh when he wrote his fiat. I will explain.

[64] Kevin Graham provides direct evidence that he does not possess or control confidential information relating to the BTT Tip, nor did he ever possess or control it. While BIL asserts that Kevin Graham has or had BIL's confidential information in his possession or control, they do not provide any direct evidence to counter Kevin Graham's sworn assertion. Therefore, like Justice Layh, I find that BIL's assertion of contradictory evidence is "illusory". Simply stating "Yes, you do" to another party's "No, I don't" is not proof, in this case, of a contradiction in evidence

because there is no evidence beyond the bare contradiction.

[65] I am reminded of the Monty Python Skit, The Argument, aired in 1972, where the following exchange takes place:

> …
>
> A: Well, argument isn't the same as contradiction
>
> B: Can be
>
> A: No, it can't
>
> B: An argument is a collective series of statements intended to establish a proposition
>
> A: No, it isn't
>
> B: Yes, it is. It isn't just contradiction.
>
> A: Look, if I argue with you. I must take a contrary position.
>
> B: But it isn't just saying No, it isn't
>
> A: Yes, it is
>
> B: No, it isn't. Argument's an intellectual protest. Contradiction is just the automatic opposite of any statement the other person makes.
>
> A: No, it isn't
>
> …

[66] Like the Monty Python skit, questions about the bare contradiction will likely not be helpful in furthering the litigation, given the present state of the evidence. If BIL had tendered proof in relation to how BTT came to find out about Kevin Graham's breach of confidence in April 2021, then I might have ruled differently, as there might have been an evidentiary basis on which to ask clarifying and relevant questions. While BIL may properly rely on reasonable inferences to advance its Amended Claim, I do not find that they demonstrate a contradiction in Kevin Graham's denial at this point. The court requires more than vague assertions about Kevin Graham "wiping" his cell phone at some unknown time using some unknown method or belief

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that Kevin Graham procured confidential information in the face of his uncontradicted evidence that he swore such procurement to be impossible.

[67] In addition, I must also be mindful of the criterion outlined in *Wallace* that leave to cross-examine will be sparingly granted and generally ought not to be granted on interim applications.

[68] Therefore, in consideration of all these factors, I am dismissing BIL's application to cross-examine Kevin Graham pursuant to Rule 5-12(5).

BIL's Application to Strike

[69] BIL argues that the portions of Kevin Graham's counterclaim which rely on a purported agreement between BIL and Kevin Graham for compensation for his work building a manufacturing facility in China, must be struck pursuant to Rule 7-9(b) to (e) for the following reasons:

1) There is no evidence of a binding contract between the parties.

2) Kevin Graham expressly agreed to the rejection of his proposal.

3) Kevin Graham has not sought a remedy in his pleadings against BCII and BYML, who are the separate legal entities involved in the manufacturing facility in China.

4) The date for amending the pleadings to include BCII and BYML is past the limitation period.

5) There is juristic justification for unjust enrichment between the parties for this claim.

[70] Kevin Graham argues that the portion of his counterclaim related to the agreement he had with BIL should not be struck because the Memorandum of

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Understanding between the parties was an enforceable contract. Further, even if the Memorandum of Understanding is not enforceable, his claim for restitutionary *quantum meruit* relief is a valid basis for relief where an employee has performed work beyond the scope of their pre-existing employment contract, as Kevin Graham has done here. Further, the counterclaim does not contain any allegations that are scandalous, frivolous, vexatious, an abuse of court, immaterial, redundant or unnecessarily lengthy, or would prejudice or delay the fair hearing of these proceedings.

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[71] Rule 7-9(2)(b) through (e) states as follows:

> **7-9**(2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> …
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding; or
>
> (e) is otherwise an abuse of process of the Court.

[72] Given that BIL has requested that a portion of Kevin Graham's counterclaim be struck pursuant to those iterations of Rule 7-9(2), I will review the various judicial pronouncements that are applicable to each iteration of the Rule.

[73] The review of the legal principles regarding an application to strike pursuant to Rule 7-9(2)(b) begins with the seminal decision of *Sagon v Royal Bank*, 105 Sask R 133 (CA) [*Sagon*], where the court stated as follows:

> 18 Striking out an entire claim on the ground that it is frivolous, vexatious or an abuse of process of the court is based on an entirely different footing. Instead of considering merely the adequacy of the pleadings to support a reasonable cause of action, it may involve an assessment of the merits of the claim, and the motives of the plaintiff in bringing it. Evidence other than the pleadings is admissible. Success on such an application will normally result in dismissal of the action, with the result that the rule of *res judicata* will likely apply to any subsequent efforts to bring new actions based on the same facts. Odgers on *Pleadings and Practice*, 20th Ed. says at pp. 153-154:

> "If, in all the circumstances of the case, it is obvious that the claim or defence is devoid of all merit or cannot possibly succeed, an order may be made. But it is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. Its exercise would not be justified merely because the story told in the pleadings is highly improbable, and one which it is difficult to believe could be proved." (footnotes omitted)
>
> [Emphasis added]

[74] The decision of *Siemens v Baker*, 2019 SKQB 99, [2019] 5 CTC 129, provided the following guidance with respect to the meaning of the words "scandalous" and "vexatious" in the context of a Rule 7-9(2)(b) application:

> 23 Although these terms are often used interchangeably, it is helpful to differentiate among them. A pleading will qualify as "scandalous" if it levels degrading charges or baseless allegations of misconduct or bad faith against an opposite party. See: *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119 at para 45, 418 Sask R 96 [*Paulsen*] and the authorities cited there. Courts in British Columbia, for example, have described a scandalous pleading as "one that is so irrelevant that it will involve the parties in useless expense and prejudice the [pursuit] of the action by involving them in a dispute apart from the issues". See: *Turpel-Lafond v British Columbia*, 2019 BCSC 51 at para 23, 429 DLR (4th) 131 [*Turpel-Lafond*] quoting from *Woolsey v Dawson Creek (City)*, 2011 BCSC 751 at para 28.
>
> 24 A pleading will qualify as "vexatious" if it was commenced for an ulterior motive (other than to enforce a true legal claim) or maliciously for the purposes of delay or simply to annoy the defendants. See: *Paulsen*, at para 46. Put another way, it is vexatious if it does not assist in establishing a plaintiff's cause of action or fails to advance a claim known in law. See: *Turpel-Lafond*, at para 23.
>
> [Emphasis added]

[75] Improper motives are part of the definition of scandalous and vexatious claims because "bad faith" is required for a scandalous claim, and an "ulterior motive" is required for a vexatious claim. However, there appears to be some question about the extent to which the court may consider the motives behind the claim or defence that the applicant wishes to be struck because it is "frivolous." While *Sagon* makes it clear that the motive behind a claim or defence can be a consideration in determining whether a

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claim or defence is "frivolous", there does not appear to be any definitive statement within that decision stating that evidence of a motive, or any specific type of motive, must be present for a claim or defence to be struck on this basis. However, subsequent cases have come to different conclusions.

[76] In *Chisum Log Homes & Lumber Ltd. v Investment Saskatchewan Inc.*, 2007 SKQB 368, [2008] 2 WWR 320 [*Chisum*], the court provided the following definition of the word "frivolous" in the context of a former Rule 173(c) application. This type of application was the equivalent to a Rule 7-9(2)(b) application prior to the changing of the Rules in 2013. The court stated as follows:

> 133 Nothing in the pleadings supports a conclusion that the plaintiffs initiated the within action for anything other than *bona fide* reasons. Chisum claims it contracted and paid for something it did not receive and as a result suffered damages. While not well drafted, the statement of claim is not scandalous (i.e. it does not improperly cast ISI or CIC in a derogatory light), frivolous (i.e. groundless and pursued for the purpose of delay or embarrassment), or vexatious (i.e. instituted maliciously and without cause). Nor can the Court find the claim amounts to an abuse of process (i.e. that its purpose was vexatious or oppressive). (See: *O'Hara v. Chapman Estate and Macvicar* (1987), 46 D.L.R. (4th) 504 (Sask. C.A.) and *Sagon v. Royal Bank*, *supra* at para. 19).
>
> [Emphasis added]

[77] While the court in *Chisum* equates a "frivolous" application to a claim or defence that is both groundless and pursued for the purpose of delay or embarrassment, it appears to rely on American case law and not on a specific Canadian definition. I note that *The Law Dictionary, online*: <www.thelawdictionary.org> (22 August 2024), defines "frivolous" as follows:

> An answer or plea is called "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the plaintiff. Ervin v. Lowery, 64 N. C. 321; Strong v. Sproul, 53 N. Y. 499; Gray v. Gidiere, 4 Strob. (S. C.)442; Peacock v. Williams (C. C.) 110 Fed. 910. A frivolous demurrer has been defined to lie one which is so clearly untenable, or its insufficiency so manifest upon a bare inspection of the pleadings, that its character may be

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> determined without argument or research. Cottrill v. Cramer, 40 Wis. 558.Synonyms. The terms "frivolous" and "sham," as applied to pleadings, do not mean the same thing. A sham plea is good on its face, but false in fact; it may, to all appearances, constitute a perfect defense, but is a pretence because false and because not pleaded in good faith. A frivolous plea may be perfectly true in its allegations, but yet is liable to be stricken out because totally insufficient in substance. Andreas v. Bandler(Sup.) 56 X. Y. Supp. 614; Brown v. Jenison, 1 Code R. N. S. (N. Y.) 157.

[78] In *Currie v Halton (Region) Police Services Board* (2003), 233 DLR (4th) 657 (Ont CA), the court provided the following concise definition of "frivolous" from *Black's Law Dictionary*, 7th ed that does not refer to a motive to embarrass:

> 14 Black's Law Dictionary defines "frivolous" as: "Lacking a legal basis or legal merit; not serious; not reasonably purposeful".

[79] In *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119, 418 Sask R 96 [*Paulsen*], the same judge as in the *Chisum* decision reiterated the importance of motive in determining such actions as follows:

> 42 While a court may consider affidavit evidence when determining applications to strike on the basis the pleadings are scandalous, vexatious, frivolous or an abuse of process, the Court should be careful not to delve into the merits except to the extent necessary to determine the plaintiff's motives in bringing the action and whether a basis for the action is lacking. It is not for a court on a Rule 173 (c) and/or (e) application to weigh the evidence or determine legitimate issues to be tried. (See: *Marciano v Landa*, 2005 SKQB 58, [2005] S.J. No. 72 (QL) at para. 47; *Bank of Montreal v. Schmidt* (1989), 75 Sask. R. 157, [1989] S.J. No. 299 (Sask. C.A.)).

[80] The court in *Paulsen* then gave the following definition of "frivolous":

> 47 An action is "frivolous" if it is groundless and lacks substance (See: *Chernoff v. Chernoff*, [1988] S.J. No. 458 (Sask. Q.B.); *Bank of Montreal v. Giesbrecht*, [2005 SKQB 18], at para. 13 and *C & J Hauling Ltd. v. Mistik Management Ltd.*, [2010 SKQB 60], at para. 15).

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[81] In *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98 [*Harpold*], the court said the following with regard to the proper legal considerations in determining whether a claim is "frivolous":

> 63 Determining whether a claim is frivolous, by necessity, involves an assessment of its merits and the motivation of the claimant. Evidence beyond the pleadings may be considered: *Merchant* [2017 SKCA 62] at paras 56-57 and *Sagon* at para 18. An action is frivolous if it is groundless and lacks substance: see *Hope v Pylypow*, 2015 SKCA 26, 384 DLR (4th) 255, or *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119, 418 Sask R 96.

[82] However, in the decision of *Yashcheshen v Janssen Inc.*, 2022 SKCA 140 [*Yashcheshen*], the court made the following comment:

> 20 In the *QB Decision* [2020 SKQB 188], the Chambers judge set out the principles that underpin Rule 7-9(2)(b) by quoting from *Siemens v Baker*, 2019 SKQB 99 at paras 23-25, [2019] 5 CTC 129 [*Siemens*], which states that a pleading is *frivolous* where it is "plain and obvious" or "beyond reasonable doubt" that the claims it advances are "groundless and cannot succeed" (see also *Harpold v Saskatchewan (Corrections and Policing*), 2020 SKCA 98 at para 63); whereas *Siemens* describes *vexatious* pleadings as those that have been "commenced for an ulterior motive (other than to enforce a true legal claim) or maliciously for the purpose of delay or simply to annoy the defendants" (at para 24); the difference being that a plaintiff's motives are relevant to the determination that a pleading is vexatious (*Gabrysh v Milenkovic*, 2009 SKQB 302 at para 20, 339 Sask R 251; see also *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119 at para 46, 418 Sask R 96).
>
> 21 It is clear that the Chambers judge relied on and applied the indicia of a frivolous pleading from *Siemens* but erroneously characterised Ms. Yashcheshen's statement of claim as a vexatious pleading (see *Hope v Pylypow*, 2015 SKCA 26 at para 32, 457 Sask R 55). Notwithstanding this misdescription, we find no error in the Chambers judge's determination that it was plain and obvious that Ms. Yashcheshen's action could not succeed because it was statute-barred.

[83] This excerpt from *Yashcheshen* would seem to suggest that a plaintiff's motives are only relevant to determine whether a claim is vexatious, not frivolous, despite the statement in *Harpold* that the motivation must be part of an assessment of a

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frivolous claim.

[84] I also acknowledge the comments of this court in the decision of *Iron v Bateman's Jewelery*, 2024 SKKB 59, where the court found that a motive to inflict "gratuitous embarrassment" is a "near essential" element of a frivolous claim as follows:

> 45 Moreover, the definition of "frivolous", as articulated in *Chisum* and the authorities that have adopted it, suggests that the Court must have some regard for the motives of the party that filed the impugned pleading. A motive to inflict gratuitous embarrassment, readily discernible from the surrounding evidence or reasonably inferred from the actual pleading, is a near essential element in finding a claim to be frivolous. In the present case, there is no evidence in the supporting affidavit material to suggest any improper motive on the part of the plaintiff. Further, despite the shortcomings in the drafting of the plaintiff's claim, I cannot infer any improper motive from its wording.

[85] With respect, I would not go so far as to label "gratuitous embarrassment" as a "near essential" element of a frivolous claim. There is no doubt that the motive behind bringing a claim or proffering a defence is an essential consideration in assessing whether an application to strike is frivolous. However, I would not characterize it as an essential requirement or element. While I would agree that if proof of improper motivation exists, this would almost certainly demonstrate a frivolous claim, it would seem to be an overly heavy burden to require a demonstration of an improper or ulterior motive of any kind by itself in addition to a legally groundless claim in order for an applicant to strike a claim pursuant to Rule 7-9(2)(b).

[86] I find that in the interests and fairness of the litigation process and having regard to the foundational rules and the law cited in *Sagon*, the applicant should have the ability, on the provision of affidavit evidence in addition to the pleadings, to demonstrate that a claim or defence is groundless without reference to motivation. It is efficient and just to weed out claims or defences in this manner. As an example, I note Justice Allbright's decision in *Painchaud v 101183985 Saskatchewan Ltd.*, 2016 SKQB

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139. The court concluded in paragraphs 23-28 that the plaintiff's claim is partially devoid of merit under Rule 7-9(2)(b) and "frivolous" based on one of the defendants' provision of uncontroverted affidavit evidence demonstrating, without any consideration of motivation, that the plaintiff had no claim against this particular defendant.

[87] Therefore, I find that a frivolous claim or defence is one where it is plain and obvious or beyond a reasonable doubt that the claim or defence is groundless and without purpose or merit. An improper motive in bringing such a claim or defence shall be assessed in such an application and will likely render such a claim or defence frivolous if an improper motive is found to exist, but it is not essential that such an improper motive exists for a claim or defence to be found to be frivolous.

[88] With respect to an application to strike a pleading pursuant to Rule 7-9(2)(c), the court in *May v Saskatchewan Power Corp.*, 2024 SKKB 4 [*May*], provided the following overview of the legal principles guiding the enforcement of the Rule:

> 31 Pleadings serve an important purpose in litigation. They are the vehicle by which parties embroiled in a legal dispute convey to each other the nature of their claims: *Chisum Log Homes & Lumber Ltd. v Investment Saskatchewan Inc.*, 2007 SKQB 368 at para 15, [2008] 2 WWR 320. A pleading must describe the actionable conduct including what the defendant did and why the plaintiff says the conduct is actionable: *Country Plaza Motors Ltd. v Indian Head (Town)*, 2005 SKQB 442 at para 8, 272 Sask R 198.
>
> 32 Rule 13-8 of *The King's Bench Rules* requires that a pleading contain a summary of the material facts, and not evidence, on which a party relies. A plaintiff's claim must allow the defendant to know the case it has to meet so that it may "respond with an intelligible statement of defence": *Hill v Wiess (Estate)*, 2010 SKQB 193 at para 15.
>
> 33 In *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98, the court explained that Rule 13-8 reflects the jurisprudence about the function of pleadings, which include:
>
> a) Clearly defining the questions in issue;

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> b) Giving notice to the opposing party of the case asserted against them so they may appropriately direct their evidence; and
>
> c) Establishing a record of the questions in issue to prevent future litigation.
>
> 34 Pleadings "should not be prolix, garrulous, argumentative or replete with opinions, speculation or descriptions of evidence": *Mallard v Killoran*, 2005 SKQB 203 at para 26 [*Mallard*]. Passages of a claim may be struck if they describe activity of the defendant that constitutes evidence or contains speculative opinion which have "no place in a pleading": *Mallard* at para 31.
>
> 35 I am mindful that pleadings may survive an application to strike even if they contravene the requirements of Rule 13-8. In *Reisinger v J.C. Akin Architect Ltd.*, 2017 SKCA 11, 411 DLR (4th) 687, the defendants appealed the chambers judge's ruling to not strike the plaintiff's 20-page claim that was a rambling and unfocussed narrative and included evidence, argument and opinion which strayed far from the requirements of Rule 13-8. Among other things, they argued the claim should be struck pursuant to Rule 7-9(2)(c) because it was redundant and unnecessary lengthy. The court noted the chambers judge focused on the "core concept" that the purpose of the claim was to inform the party opposite of the material facts so that they had a fair opportunity to know the case they were required to meet (para. 8). In the result, the court allowed the appeal in part and struck portions of the claim, but not because it was immaterial, redundant, or unnecessarily lengthy contrary to Rule 7-9(2)(c). The court struck portions for failing to disclose a cause of action. It allowed the "undoubtedly prolix" (para. 47) and "copious specific and detailed allegations of fact" (para. 48) to remain because they potentially bore on the claims that were advanced (para. 54).

[89] In *May*, the court noted the multitude of factors that a court must assess under an application pursuant to Rule 7-9(2)(c). Generally, it appears the court will focus on determining whether the party opposite can understand the case to meet. While portions of the claim may be struck as offending Rule 13-8, the court will generally allow amendments to ensure that the claimant or defendant has an opportunity to remedy the offending portions of the claim (see also *Yashcheshen v Canada (Attorney General)*, 2024 SKKB 63 at paras 100 to 108).

[90] With respect to an application to strike a pleading pursuant to Rule 7-9(2)(d), the court in *Bell v Xtreme Mining & Demolition Inc.*, 2014 SKQB 177,

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448 Sask R 255 [*Xtreme*], made the following observations:

> 39 In considering the applicants' amended notice of application, I observed that in the catalogue of impugned pleadings, the consistent theme is that the specific pleadings in question are immaterial and on a secondary basis that some plead evidentiary matters or a combination of both. This chronicle reflects the wording of Rule 7-9(2) where the Rule references a pleading or pleadings that is or are immaterial, redundant or unnecessarily lengthy or such as "may prejudice or delay the fair trial or hearing of the proceeding". This Rule is to be considered in conjunction with Rule 13-8(1) which provides in part that every pleading must "contain only a statement in summary form of the material facts on which the party pleading relies for the party's claim or defence, but not the evidence by which the facts are to be proved".

[91] The *Xtreme* decision essentially delineates that the considerations involved in a Rule 7-9(2)(c) application are practically identical to those in Rule 7-9(2)(d), which I outlined in the paragraph above. Logorrheic pleadings will likely be struck, but courts will give the respondents a chance to correct their pleadings if it is practical and just to do so unless there is proof of a motive to delay proceedings.

[92] In relation to an application to strike pursuant to Rule 7-9(2)(e), the court in *GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38, 29 CLR (5th) 294 [*GHC*], stated as follows:

> 25 Striking a claim under Rule 7-9(2)(e) is not a remedy to be lightly granted. A claim should be struck under that subrule only "where it is 'plain and obvious' that allowing an action to proceed would amount to an abuse of process" (*Nelson v Teva Canada Limited*, 2021 SKCA 171 at para 4 [*Nelson*]; see also *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959), or where "it is obvious the claim is devoid of all merit or cannot possibly succeed" (*Sagon v Royal Bank of Canada (1992)*, 105 Sask R 133 at para 18 (CA) [*Sagon*]; *Mann Family Trust (Trustee of) v Hawkins*, 2011 SKCA 146 at para 20, 385 Sask R 59 [*Mann*]). In a case where the expiry of a limitation period is at issue, this standard will be met where, at the time of issuing the claim, "the plaintiff had knowledge of all the facts that would cause the plaintiff's claim to be statute barred" (*Walker* [2020 SKCA 127] at para 25). Conversely, where there is an arguable issue as to whether the claim is statute barred, it is an error in principle for a Chambers judge to strike the claim under Rule 7-9(2)(e) (*Nelson* at paras 17-18; see also *CPC Networks Corp. v McDougall Gauley LLP*, 2021 SKCA 127 at para

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> 92).
>
> 26 A judge faced with an application to strike a pleading under Rule 7-9(2)(e) is entitled to consider affidavit evidence to assess the merits of the claim or defence (*Sagon* at para 18). However, the requirement to apply the "plain and obvious" standard at this stage means that it is not appropriate for the judge to weigh the evidence or determine legitimate triable issues (*Paulsen v Saskatchewan Ministry of Environment*), 2013 SKQB 119 at para 42, 418 Sask R 96). Where only one side has filed affidavit evidence on a material point in a strike application, the facts stated in that affidavit are generally to be taken as true (*Mann* at para 21; *Robin Hood Management Ltd. v Gelmich*, 2014 SKQB 347 at paras 41-42, 459 Sask R 183; *Landry v Rural Municipality of Edenwold No. 158*, 2020 SKQB 218 at para 20). Where both sides have filed affidavit evidence, a strike application is not the appropriate place to resolve conflicts in the evidence or make credibility findings. The presence of conflicting evidence on a material point means it is not plain and obvious that the claim is devoid of all merit and, where that is so, an application to strike the claim cannot succeed (*Mann* at paras 31-33; *Bank of Montreal v Schmidt et al.* (1989), 75 Sask R 157 at paras 9-10 (CA); *Shinkaruk v Neufeld Building Movers Ltd*., 2014 SKQB 12 at para 25, 432 Sask R 255; *Marciano v Landa*, 2005 SKQB 58 at para 47, 1 BLR (4th) 281).

(See also *Onion Lake Cree Nation v Stick*, 2018 SKCA 20 at paras 52-54, [2018] 5 WWR 111 [*Onion Lake*] and *Canadian Pacific Railway Company v Kelly Panteluk Construction Ltd.*, 2020 SKCA 123 at para 59, 17 CLR (5th) 138 [*CPRC*]).

[93] Essentially, pleadings that impugn the integrity of the adjudicative functioning of the court would bring the administration of justice into disrepute or would result in unacceptable unfairness to BIL, which would be found to be an abuse of process and struck.

[94] I should also be cognizant that, if possible, even if the claim offends one of the Rules in Rule 7-9(2) and the offending party has not applied to amend, I may permit the offending party to amend their pleading so that it can become compliant. As noted by the court in *Wilson v Saskatchewan Water Security Agency*, 2023 SKCA 16, 478 DLR (4th) 170 [*Wilson*]:

> 19 However, the Chambers judge did not refer to another principle

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> that was engaged in this case. As Ryan-Froslie J.A. recently reiterated in *Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 49, [2022] 8 WWR 60, "where feasible a plaintiff should be given an opportunity to amend their pleadings to correct deficiencies before those pleadings are struck" (at para 43). Rule 7-9(1)(b) speaks to this authority, providing that where one or more of the conditions specified in Rule 7-9(2) exist, the court may order the pleading or other document to be amended.
>
> 20 The court may permit amendments to cure a defective pleading even if the pleader has not applied to amend: *Taheri v Buhr*, 2021 SKCA 9 at para 80, 456 DLR (4th) 306; *Thirsk v Saskatchewan (Public Guardian and Trustee)*, 2017 SKQB 66 at para 11 [*Thirsk*]. Indeed, as a rule, an order permitting such an amendment *should* be made if it is apparent that it would correct the defect. ...

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[95] I will now consider the various arguments made by BIL that a portion of Kevin Graham's counterclaim ought to be struck. In doing so, as stated in the *Paulsen* decision, the court should not be expected to delve into an unnecessarily complex examination in assessing whether the claim or defence should be stricken under an iteration of Rule 7-9(2). Given the foundational rules and the need for efficiency and cost-effective justice within the system, the use of an application under this Rule should not be used as a means of circumventing summary judgment proceedings or obtaining an advance ruling about the wisdom of a particular defence or claim. Rule 7-1 is much better suited for endeavours related to determining points of law.

[96] Therefore, my analysis will focus on determining whether there are "plain and obvious" portions of the counterclaim which should be struck.

[97] While BIL took a "kitchen sink" approach in that they relied on most of the subrules under Rule 7-9(2), I find that a more focused inquiry will be beneficial in justly and efficiently examining whether a basis for the counterclaim exists. Therefore, in the following three paragraphs, I will eliminate any consideration of subrules I find to be irrelevant.

[98] Firstly, neither Rule 7-9 (2)(c) nor (d) was seriously argued by BIL as they made no submissions that Kevin Graham's counterclaim was immaterial, redundant, or unnecessarily lengthy or would delay the fair trial or hearing of these proceedings. As Kevin Graham's counterclaim is 18 paragraphs long and the impugned paragraphs only amount to 8 paragraphs, I do not find that any of the paragraphs go beyond the material facts necessary to support the counterclaim. Therefore, I find that neither Rule was breached in this instance. In fact, the only delay in this matter arises from the decision of BIL to amend its Claim after the chambers' argument, not from the conduct of Kevin Graham.

[99] Secondly, I find that Rule 7-9(2)(e) was not engaged either. While the doctrine of abuse of process is flexible and can encompass many different aspects of behaviour, I do not find anything in the way the counterclaim is framed that would impugn the integrity of the adjudicative functioning of the court, would bring the administration of justice into disrepute, or that would result in unacceptable unfairness to BIL. While the doctrine of abuse of process is sometimes used interchangeably with an allegation that a claim is frivolous in applications to strike, I find that determining a claim to be an abuse of process requires an element of stark unfairness contrary to equitable principles over and above the "plain and obvious" standard. In the case at bar, there is nothing obviously inequitable about making an allegation that Kevin Graham is entitled to compensation from BIL for starting a business on behalf of BIL in China over and above his regular employment duties. Therefore, Rule 7-9(2)(e) was not breached in this instance.

[100] Thirdly, with respect to Rule 7-9(2)(b), I find that there is no evidence to find that the counterclaim was scandalous or vexatious. Given there was no evidence of some ulterior motive or malicious intent in commencing this counterclaim, there is no basis to find it to be vexatious. Further, given there were no degrading charges levelled against BIL or baseless allegations of misconduct or bad faith, there is no basis

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to find the allegations in this counterclaim to be scandalous.

[101] The sole remaining basis to consider whether the counterclaim should be struck is that it is frivolous, contrary to Rule 7-9(2)(b). While I must assess whether there is any evidence of improper motive in pursuing this counterclaim, it is clear that there is no evidence of any ulterior motive of any kind. Therefore, I will only be assessing whether it is plain and obvious that the counterclaim is groundless.

[102] Many of the arguments proffered by BIL in favour of striking Kevin Graham's counterclaim involve a consideration of the law of contracts as it relates to the exchange of emails and so-called "Memorandums of Understanding". At trial, Kevin Graham will no doubt argue that these emails and memorandums establish a binding contract with BIL. In determining whether there is some evidence that may establish a binding contract between the parties, I will review some of the foundational contractual legal requirements.

[103] The recent decision of the Saskatchewan Court of Appeal in *Neigum v Van Seggelen*, 2022 SKCA 108, 474 DLR (4th) 673, provides a concise restatement of the legal requirements that must exist for contract formation as follows:

> [54] … In order for a contract to exist there must be a consensus *ad idem*, or a meeting of the minds, with regard to *all* of the essential terms. This requirement will not be met where "a material term is not resolved, and is left vague and imprecise, without the tools to refine it" (*Tether* [2008 SKCA 126, 56 RFL (6th) 250] at para 62). Put another way, a contract is only formed where it would be clear to an objective reasonable bystander that (i) the parties intended to contract, (ii) the parties reached an agreement on all essential terms, and (iii) the essential terms are sufficiently certain (see: *Jans Estate v Jans*, 2020 SKCA 61 at para 34, 59 ETR (4th) 53 [*Jans Estate*]; *Carruthers v Carruthers*, 2021 SKCA 52 (Sask. C.A.) at para 66, 56 RFL (8th) 110; and *Matic v Waldner*, 2016 MBCA 60 at para 57, 330 Man R (2d) 107 (leave to appeal to SCC refused, 2017 CanLII 1341)).

[104] In terms of the specific considerations that must guide this Court in performing contractual analysis, the Court of Appeal in *Boutin v Boutin*, 2023 SKCA

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41, [2023] 9 WWR 623, provided a helpful overview at paras. 32 to 37.

[105] The decision of *Martel v Mohr*, 2011 SKQB 161, [2011] 9 WWR 150 [*Mohr*], is instructive in detailing the relative importance of the subsequent conduct of the parties in considering the existence of a contractual relationship regarding agreements to agree. The court states as follows:

> [39] *Bawitko Investments Ltd. v. Kernels Popcorn Ltd*. (1991), 79 D.L.R. (4th) 97, [1991] O.J. No. 495 (Ont. C.A.), is a leading Canadian decision on agreements to agree. It aptly sets out the issues at p. 104:
>
> > ... when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent upon the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. ...
>
> [40] As *Bawitko* states, there are three separate principles contained within the basic notion that an "agreement to agree" is unenforceable. The first proposition is that there is no enforceable contract where essential terms of the agreement have not been agreed to, but have been left to the parties for future agreement. The second proposition is that there is no enforceable contract where the provisions of what has been agreed to are insufficiently certain. The third proposition is there is no enforceable contract where the parties intend that a preliminary agreement is not to create binding contractual relations until a subsequent formal document is executed. In examining all of the situations, the parties' subsequent conduct is an important factor. Conduct takes on great importance in assessing whether an arrangement goes beyond an unenforceable agreement to become a binding contract. It is clear that the courts have a strong inclination to find a binding contract if the parties acted as if they thought [1998] 1 All E.R. 98, they had one. Subsequent conduct reinforcing a conclusion that there was a binding contract has been relied upon by many courts including decisions in *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253 (S.C.C.); *Canada Square Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (Ont. C.A.) and *Imperial Oil Ltd. v. Young* (1998), 167 Nfld. & P.E.I.R. 280, 21 R.P.R. (3d) 65.

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[106] The following excerpts from *Ziola v Petrie*, 2021 SKCA 97, [2021] 10 WWR 123 [*Ziola*], are also helpful in framing the discussion as there are nuanced considerations in determining whether a contract, if it exists, was accepted. The court stated as follows:

> [45] The law is clear that an acceptance of an offer must be clear, unambiguous and absolute: *Harvey v Perry*, [1953] 1 SCR 233 at 237 [*Harvey*]. In *Harvey*, the Supreme Court of Canada held that even though a contract could have been found had the negotiations stopped at an earlier stage, the actions of the parties in continuing to negotiate and settle the terms of the contract indicated that, at least from the point of view of one of the parties, there had never been a completed agreement.
>
> [46] The highly contextualized nature of an inquiry as to whether a contract was entered into at all is illustrated by comparing *Pelley v Morguard Trust Co*., (1989), 78 Nfld & PEIR 238 (NLSC), (stating that an offer is "agreeable" does not constitute acceptance (at para 19)) with *Gateway Industries Ltd. v MacMillan Bathurst Inc.*, (1990), 66 Man R (2d) 210 (QB), reversed in part (1991), 76 Man R (2d) 304 (CA), leave to appeal to SCC refused, [1992] 2 SCR vii (acknowledging that an offer that is "agreeable" does constitute acceptance).

[107] Many other decisions offer further refinements on the particularities and nuances of contract formation. While the above excerpts are by no means an exhaustive review of the law, they provide a helpful overview of the multi-faceted considerations involved in contractual interpretation.

[108] From the decisions cited above, the following apposite legal principles to the case at bar emerge:

1) The meeting of the minds necessary for contract formation requires that it be clear to an objective observer that, at the time the contract was made, the parties intended to contract, the parties reached an agreement on all the essential terms, and the essential terms were sufficiently certain.

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2) While a contract is presumed to mean what its text says it means, the surrounding circumstances in which the contract was formed should be taken into account to demonstrate the meaning of the written agreement.

3) While the law states that an acceptance of an offer must be clear, unambiguous and absolute, this is a highly contextualized inquiry.

4) While an "agreement to agree" is generally unenforceable, subsequent conduct is an important factor to consider in assessing whether there is a binding arrangement between the parties. The courts have a strong inclination to find a binding arrangement if the parties act as though such an arrangement exists.

[109] These principles illustrate that assessing evidence to determine the existence of a contract is a complex and contextual inquiry that allows for a fair degree of interpretation.

[110] In applying these principles to the case at bar, my task is not to make a final determination as to whether a contract between BIL and Kevin Graham existed, but whether it is plain or obvious or beyond reasonable doubt, this aspect of the counterclaim is groundless and cannot succeed. As noted in the case law, evidence other than pleadings should be considered, and I should not strike a claim simply because the allegation is highly improbable or difficult to prove. A novel claim should not be rejected either. Further, the onus is on BIL to justify their application.

[111] Regarding BIL's assertion that there was no evidence of a contract between BIL and Kevin Graham relating to his work in China, I find that, to the contrary, there is some evidence that would suggest contract formation.

[112] The third Memorandum of Understanding referred to in the affidavit of Kevin Graham that he received on December 18, 2018, states as follows:

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December 18, 2018

Memorandum of Understanding (R3)

Participants: Bourgault Industries Ltd., Kevin Graham (KG) and Jun (Joey) Han (JH)

I am working on completing the memo to Nancy Hopkins, our corporate lawyer, and to Dave Boyko, our tax accountant and advisor from MNP, so that they could assist us in properly structuring the shareholdings in the company, Bourgault CHN Investments Inc. (BCII). In reflecting on what we are going to need going forward in terms of documentation that addresses how we are going to operate Bourgault (Yantai) Machinery Manufacturing Co., Ltd. (BYMML) in order to properly address corporate governance issues, we will need a formal agreement that stipulates and articulates the responsibilities of the stakeholders in the company, which in this case would include Bourgault Industries Ltd. (BIL) plus Jun and you.

Although the parties always goes into an agreement such as the one that is contemplated here with the best of intentions, in order to protect the interest of both parties and their survivors should the worst happen, we will want to develop an agreement that describes that "what if" scenarios should unexpected events change the situation for any of the parties named in the agreement. The agreement will have to clearly define what each party is responsible for delivering as well as the remedies to address any deficiencies that materialize as well as describe how earnings from operations will be paid out. One of the purposes of this document is to lay out in plain language what BIL's understanding is for your and Jun's information and consideration. Naturally if there is anything in this document that you disagree with, the expectation is that you or Jun would make us aware of your position so that the matter could be properly addressed.

My understanding of yours and Jun's proposal is that BIL would make 100% of the investment in BCII, which in turn would invest BYMML. Thus BYMML would be a wholly owned subsidiary of BCII and managed by you and Jun. You and Jun would be responsible for all aspects of the operations in China, with Jun being on the ground in China most of the time. Jun would be BYMML's representative in China on all business and legal matters. KG would function as the Supervisor, effectively acting as the Board of Directors of BYMML and JH would function as the Executive Director and General Manager as defined by the Articles of Association (AOA). What this means is that KG would meet with Jun to discuss the annual business plan that he develops and provide approval, similar to our earlier meetings. JH then would execute the plan as the Executive Director/General Manager.

The Management Services agreement would be consistent with the

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AOA of BYMML as both the Supervisor and Executive Director are appointed by BCII for an initial three year term, and then is automatically renewed unless changed by BCII; however, it would also address performance issues related to illness, injury or incapacitation for other reasons. The agreement would likely further stipulate that if certain operational parameters were not being met that BIL could buy out either your or Jun's shares using the net book value of the shares.

Thus, so that we have a basis of understanding, here is what I think that we I believe that we have agreed to:

1) You (Kevin Graham) (KG) and Jun Han (JH) will be responsible for leading and managing Bourgault (Yantai) Machinery Manufacturing Co., Ltd. (BYMML), which will be located in Yantai, Shandong, China.

2) Bourgault (Yantai) Machinery Manufacturing Co., Ltd. (BYMML) will be a wholly owned subsidiary of Bourgault CHN Investments Inc. (BCII), the common shares other than those issued to you and Jun would be owned by Bourgault Industries Ltd. (BIL)

3) KG and JH will have sole responsibility for setting up, and operating BYMML on a go forward basis.

4) KG will hold the position of Supervisor and JH will hold the position of Executive Director/General Manager. The responsibilities of these positions are defined in the AOA of BYMML.

5) JH will represent BYMML on all business and legal matters in China.

6) For their efforts in setting up and then managing BYMML as it goes forward, the net tax operating profits that are calculated using generally accepted accounting practices and based on local taxation policies would be allocated 75% to BCII and 25% to KG and JH.

7) The 25% profits that are allocated to KG and JH would be divided 15/25 x 100 = 60% to JH and 10/25 x 100 = 40% to KG.

8) BIL would make a $1.5 million dollar investment in BCII and receive a total of 75000 voting, participating common shares in BCII, KG and JH would not make any initial investment in BCII but would have the option to purchase voting participating shares at any point based on the book value of the equity in the company.

9) BIL could make further investments in BCII at any time and would receive voting participating shares based on book value, which would increase its equity stake in the company.

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> 10) The profits that are allocated to KG and JH would not be paid out to them; rather they would be turned over to BIL in exchange for voting, participating common shares in BCII based on the book value of the shares at the time. This format would be followed until KG and JH had acquired 25% of the voting, participating common shares of BCII. Once the shareholdings by KG and JH have reached 25%, from the profits of BYMMI, KG and JH would receive either before tax profits or after tax dividends that they could use at their discretion.

[113] In reviewing the matter from an objective perspective, it could appear that this detailed memorandum of understanding between the parties contained all the essential terms of an agreement as compensation, the scope of the parties' duties and responsibilities appears to be clearly delineated and nothing in this document seems left for future agreement.

[114] Further, the emails between Gerard Bourgault and Kevin Graham on November 29, 2018, December 2, 2018, and December 18, 2018, in relation to the various Memorandums of Understanding [MOU] read as though there is an acceptance of an agreement between the parties. I note that Gerard Bourgault, on behalf of BIL, uses the words "plain English understanding of what we have agreed to" when referring to the first MOU. Kevin Graham uses the words "this captures the spirit of our agreement" when referring to the second MOU. I find that these words could mean that there was a clear acceptance of the terms of the agreement in accordance with the legal criteria in *Ziola*.

[115] However, of primary importance is the fact that Kevin Graham went to China to establish and commence operations at the new manufacturing facility. As the decision in *Mohr* makes clear, the parties' subsequent conduct after the purported agreement is important. I find that it is a common sense proposition that an individual working in St. Brieux, Saskatchewan, at a middle management job does not go to China for lengthy periods of time or devote countless hours after work hours to supervise another individual for their employer out of the goodness of their heart. From a rational

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viewpoint, it could reasonably appear that this employee, especially someone with Kevin Graham's experience, would be spending hours away from his family and residence on a firm expectation of compensation as a result of an agreement with his employer.

[116] It is also reasonable to assume that BIL would have also sanctioned this extensive time away from his regular employment duties in furtherance of the objectives of the purported agreement.

[117] However, BIL argues that emails between Gerard Bourgault and Kevin Graham that occurred between April 5, 2021, and April 7, 2021, where Gerard Bourgault advised Kevin Graham of some conflict of interest issues in the terms of the MOU and proposed some alternatives, demonstrate that there was never any *consensus ad idem* that would constitute a binding contract.

[118] On the other hand, Kevin Graham argues that the totality of the email chain, which they submit begins January 4, 2021, with an email from Gerard Bourgault to Nancy Hopkins K.C., which was cc'd to Kevin Graham, could reasonably be seen as BIL attempting to renegotiate or repudiate the accepted terms of a valid contract, an attempt that failed, according to Kevin Graham's evidence.

[119] While BIL relies on Kevin Graham's emailed statement on April 7, 2021, "Gotcha now, we are now on the same page," in response to Gerard Bourgault's implied rejection of the terms of the prior memorandum of understanding as evidence of the acceptance of that rejection, I find that this evidence is quite equivocal. In that regard, I note the discussion in *South West Terminal Ltd. v Achter Land & Cattle Ltd*., 2023 SKKB 116, [2023] 10 WWR 717, regarding the potential meanings of a thumbs-up emoji. It is clear that words or symbols that are capable of more than one interpretation require a complete contextual analysis before a court can make a final determination on meaning. I find that Kevin Graham's statement has more than one possible meaning.

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Let me explain.

[120] Given the conflicting affidavit evidence, I am in no position to find that Kevin Graham's "gotcha" statement can only mean that he agrees with Gerard Bourgault's rejection of any prior agreement. I find that there is a reasonable possibility that Kevin Graham implies that he understands BIL's position without concurring that their initial agreement is repudiated. It does not appear on its face that this statement is a tacit acknowledgment that any prior agreement (if such agreement exists) is null and void. This statement may reasonably mean that Kevin Graham is taking a wait-and-see approach to determine if the parties can come up with a new agreement after the identification of the conflict before declaring the old one null and void.

[121] Given the contextual analysis is open to interpretation, I find that it is not plain and obvious that Kevin Graham's counterclaim cannot succeed on the basis that no agreement could exist.

[122] BIL's other central argument for striking the counterclaim is that it advances claims involving the entities BCII and BYML, who have not been made parties to the lawsuit, and it is past the limitation period to issue a claim against them or amend a claim so as to include them as parties.

[123] Based on my review of the evidence of Kevin Graham and an examination of the MOU, it appears that the compensation being provided was through a share structure that BIL managed. The discussions regarding the purported agreement were between Gerard Bourgault, as a representative for BIL, and Kevin Graham. The MOU outlined the parties as being Kevin Graham, BIL and Mr. Han. The entities of BCII and BYML were not named as parties. It is also noteworthy that the discussions in April 2021, whether they were seen as terminating the agreement, demonstrating Kevin Graham's opposition to termination or demonstrating the lack of acceptance of an agreement, involved members of BIL, not BCII or BYML. As noted in the MOU,

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there is some evidence that BIL owned and controlled the creation of these separate entities.

[124] Therefore, in the context of the factual matrix regarding the creation of this purported agreement, there appears to be some legal justification for the counterclaim to focus solely on BIL so that BIL would be legally responsible for providing a remedy to Kevin Graham. As BIL appears to exercise a significant degree of control over BCII and BYML, according to some of the evidence, they may have a legal obligation should there be a breach of contract. In other words, there is no irrefutable evidence that the counterclaim will fail as a result of not involving BCII and BYML. As well, no case law was cited by BIL suggesting it was necessary, in this context, to proceed in that fashion.

[125] That said, it may be that these entities need to be involved in the counterclaim depending on whether further evidence is brought forward regarding the share structure and the compensation terms discussed orally and in writing between Kevin Graham and BIL. However, at this stage of the proceedings, because of the present state of the evidence, I do not find it essential that these entities must be included in the proceedings for Kevin Graham's counterclaim to proceed.

[126] That said, even if I determined that BCII and BYML needed to be included in the proceedings, there are available procedures that may assist Kevin Graham in that endeavour. While BIL cites ss. 5 and 6 of *The Limitations Act*, SS 2004, c L-16.1, as barring any further claims against the non-parties, they did not cite s. 20 of *The Limitations Act*, which states as follows:

> **Amendment of pleadings in certain cases**
> **20** Notwithstanding the expiry of a limitation period after the commencement of a proceeding, a judge may allow an amendment to the pleadings that asserts a new claim or adds or substitutes parties if:
>
> (a) the claim asserted by the amendment, or by or against the new party, arises out of the same transaction or occurrence as the

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> original claim; and
>
> (b) the judge is satisfied that no party will suffer actual prejudice as a result of the amendment.

[127] The court in *Qaisar v SGI Canada*, 2019 SKQB 68 at paras 76-80, outlined the legal considerations for amendments to pleadings when a limitation period had expired, including adding a party to a claim. The court notes that s. 20 of *The Limitations Act* grants courts the discretion to allow amendments as follows:

> 76 As it clearly states, s. 20 permits *amendments* to pleadings. In *Cameco Corp. v Insurance Co. of State of Pennsylvania*, 2008 SKCA 54, [2008] 6 WWR 626 [*Cameco*], Richards J.A (as he then was) said that the notion of an amendment carries with it the idea that the proposed changes to the original pleadings must not be so dramatic as to effectively create a wholly new proceeding.
>
> 77 A "new claim", within the meaning of s. 20 means a cause of action not pled in the original claim. Adding a new type of damages, such as aggravated or punitive damages, not originally claimed, amounts to asserting a new claim, and brings s. 20 of *The Limitations Act* into play: *Brown v Standard Life Assurance Co.*, 2006 SKQB 247, 282 Sask R 297.
>
> 78 As set out in ss. 20(a), in order to open the door to a post-limitation period amendment, the new claim must arise "out of the same transaction or occurrence as the original claim".
>
> 79 The requirement that the newly asserted cause of action in an amended claim "arise out of the same transaction or occurrence" has generally been given a broad interpretation by the courts. The term does not limit the claim to the exact occurrence relied on in the original claim, it merely requires there to be some temporal and factual relationship between the occurrences: *Duke v Vervaeck*, 2000 SKQB 414, [2001] 5 WWR 380; *Kidd v Flad*, 2007 SKQB 372. "Same transaction or occurrence" has been equated with the phrase "same precipitating event" in *Bourgault*. In *Stomp Pork Farm Ltd. v Lombard General Insurance Co. of Canada*, 2008 SKQB 405, [2009] 4 WWR 483 [*Stomp Pork*], Justice Ottenbreit (as he then was) described "same transaction or occurrence" as a precipitating event that allows a court to step back and take a view of what is reasonable in the circumstances. Section 20(a) allows for situations where an event happens which results in varying injury, loss or damage as a result of varying acts or omissions, resulting in varying claims which may, or should be, tried together.
>
> 80 The second pre-condition to permitting a post-limitation period

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> amendment which adds a new claim is that the judge must be satisfied that no party will suffer actual prejudice as a result of the amendment. "Actual prejudice" means prejudice associated with the delay itself which affects the ability of the opposing party to respond to the amended claim: *Cameco*; *Stomp Pork*; *Pollock v Sasktech Inspection Ltd.*, 2013 SKQB 409, 432 Sask R 227.
>
> [Emphasis in original]

[128] While it cannot be certain whether prejudice would be an issue in this matter, the case law and legislation would seem to support an attempt by Kevin Graham to add BYML and BCII should he believe it to be necessary. From the evidence so far presented, these two companies are closely linked to BIL and the factual matrix of the counterclaim. It is also difficult to discern what actual prejudice may result by adding them as parties past the limitation period given their intertwined relationship with BIL's manufacturing venture in China.

[129] Therefore, I find that there is a possibility they could be legally added if necessary. As noted previously, I am to dismiss impossible claims, not claims that may present with a degree of legal difficulty. Given that I find that BCII and BYML could be added in the future, BIL's argument that their lack of inclusion militates in favour of striking Kevin Graham's counterclaim carries little weight.

[130] The last argument presented by BIL on this application involved the assertion that there is a lack of unjust enrichment on Kevin Graham's part and, therefore, there can be no formation of a constructive trust with respect to the assets of BYML and BCII. Essentially, BIL argues that as Kevin Graham's work in China was part of his employment contract with BIL, there is a juristic justification for the alleged enrichment and, therefore, according to law, no basis for the counterclaim's claim for remedies as a result of the unjust enrichment.

[131] Kevin Graham frames this allegation as a claim for restitutionary *quantum meruit* and unjust enrichment as an alternative argument in his counterclaim

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should the court not find there to be a valid and enforceable contract. Both concepts have similar underlying equitable principles.

[132] Given that restitutionary *quantum meruit* is not a familiar term, I will provide the court's explanation in *CH2M Hill Energy Canada, Ltd. v Consumers' Co-operative Refineries Ltd.*, 2010 SKCA 75, 320 DLR (4th) 755. Restitutionary *quantum meruit* is defined by contrasting the concept with contractual *quantum meruit* as follows:

> 22 Herauf J. then turned to the question of whether the claim might succeed on the basis of "contractual *quantum meruit*". His conclusion is summarized in these passages from the judgment.
>
> > 47 The distinction between *restitutionary quantum meruit* and contractual *quantum meruit* was set out in *J.P. Metal Masters Inc. v. David Mitchell Co*. (1999), 44 C.L.R. (2d) 98 (B.C.S.C.) at para. 61:
> >
> > > 61 ... *Quantum meruit* derives from the doctrine of equity, and is based upon the notion that absent a valid juristic reason, no party who benefits from the labour and material of another should be able to do so without providing consideration for such services. Under these circumstances, the law implies a promise or obligation to pay a reasonable amount for labour and material supplied, even in the absence of a formal contract. For a claim of *quantum meruit* to succeed, the work for which payment is claimed must be outside a specific contract. If the work done is contemplated by a contract then the law of contract applies. Thus, the first issue to be determined is whether the work for which payment is claimed falls within the existing contract.
> >
> > 48 Immanuel Goldsmith and Thomas G. Heintzman, *Goldsmith on Canadian Building Contracts*, (4th Ed.), (looseleaf; (2008 -- Rel. 1) July 2008) at pp. 4-22-4-23 as follows:
> >
> > > ... It follows from the fact that payment on a *quantum meruit* basis can arise only as a result of an implied contract, that the doctrine can have no application whatever in circumstances where a contract exists covering payment for the particular work in question. A contractor, will, therefore, be able to recover payment on a *quantum meruit* basis only if he has performed work for an owner in respect of which there never was any agreement with regard to payment, or if the work has been performed in pursuance of a contract which has

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> been abandoned by the owner, or changed so fundamentally that the payment provisions in the contract no longer have any application to the work actually performed. ...

[133] Restitutionary *quantum meruit* applies in situations where there is no binding contract where one party benefits from the labour and material of another and equity demands that party not receive that benefit without proper consideration. In the case at bar, Kevin Graham claims that BIL should not unjustly benefit from his work regarding the Chinese manufacturing facility without him receiving just compensation for his time and effort.

[134] Unjust enrichment, which also forms part of the basis for Kevin Graham's counterclaim, is similar in effect. The concept was outlined by the Supreme Court in *Moore v Sweet*, 2018 SCC 52, [2018] 3 SCR 303 [*Moore*], as follows:

> 35 Broadly speaking, the doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit. Where this is found to be the case, the defendant will be obliged to restore that benefit to the plaintiff. As recognized by McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788, "At the heart of the doctrine of unjust enrichment ... lies the notion of restoration of a benefit which justice does not permit one to retain."
>
> 36 Historically, restitution was available to plaintiffs whose cases fit into certain recognized "categories of recovery" — including where a plaintiff conferred a benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a failed or ineffective transaction, or at the defendant's request (*Peel (Regional Municipality)*, at p. 789; *Kerr*, at para. 31). Although these discrete categories exist independently of one another, they are each premised on the existence of some injustice in permitting the defendant to retain the benefit that he or she received at the plaintiff's expense.
>
> 37 In the latter half of the 20th century, courts began to recognize the common principles underlying these discrete categories and, on this basis, developed "a framework that can explain all obligations arising from unjust enrichment" (L. Smith, "Demystifying Juristic Reasons" (2007), 45 Can. Bus. L.J. 281, at p. 281; see also *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, and *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423, per Laskin J., dissenting). Under this principled

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> framework, a plaintiff will succeed on the cause of action in unjust enrichment if he or she can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason (*Becker v. Pettkus*, [1980] 2 S.C.R. 834, at p. 848; *Garland*, at para. 30; *Kerr*, at paras. 30-45). While the principled unjust enrichment framework and the categories coexist (*Kerr*, at paras. 31-32), the parties in this case made submissions only under the principled unjust enrichment framework. These reasons proceed on this basis.

[135] The court in *O.O.E. v A.O.E.*, 2019 SKQB 48, provides the following guidance with respect to the relationship and interplay between constructive trusts and unjust enrichment:

> 37 The courts in Saskatchewan have had numerous opportunities to apply the principles of unjust enrichment and constructive trust in domestic relationships and other types of relationships. In *Gordon v. Nielson*, 2018 SKQB 207, Justice Wilkinson set out the requirements for a constructive trust in the following terms:
>
> > 111 A trust creates an equitable obligation to deal with property under one's control for the benefit of others. Trusts can come into existence intentionally or by operation of law. ... constructive trusts arise by operation of law and do not need to be in writing. Constructive trusts are predominantly concerned with alleviating circumstances of unjust enrichment. ...
> >
> > ...
> >
> > 119 In order for a claim in constructive trust to succeed, there must be (1) an enrichment, (2) a corresponding deprivation, and (3) the absence of any juristic reason for the enrichment (such as a contract or disposition of law). These are the constituent elements of a constructive trust claim as outlined in *Becker v Pettkus* ...
>
> 38 A constructive trust can arise in situations where the parties are not cohabiting domestic partners. In *May v. Saskatchewan*, 2010 SKQB 310, [2011] 1 WWR 530, Justice Zarzeczny, in a completely different context, commented as follows on the relationship between unjust enrichment and constructive trust:
>
> > 106 In a claim for unjust enrichment, a three-fold test is applied: the facts must display an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment. A constructive trust exists where the criteria for unjust enrichment is met ... .

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[136] I find that there are two reasons why BIL's argument in favour of striking the alternative claims for unjust enrichment and restitutionary *quantum meruit* counterclaim must fail in these circumstances, whether the claim arises as a result of unjust enrichment and a resultant constructive trust or restitutionary *quantum meruit*.

[137] Firstly, there is some evidence that Kevin Graham's work in China was not part of his employment contract with BIL. While BIL argues that the work done by Kevin Graham in China was in the performance of his employment with BIL and, therefore, he was not unjustly enriched as there was a juristic justification for the enrichment, this does not accord with all the evidence presently before the court. The evidence of Kevin Graham indicates that his duties as materials leader at BIL were limited to procuring materials and components. Supervising Mr. Han and establishing a manufacturing facility in China could reasonably be seen as above and beyond his specified duties. The evidence regarding his compensation and the emails from Gerard Bourgault demonstrate that additional compensation of some fashion was contemplated for Kevin Graham.

[138] I find there is a rational, equitable basis to believe that BIL was unjustly enriched as a result of Kevin Graham's work regarding the Chinese manufacturing facility, with Kevin Graham being deprived of compensation for his time and effort.

[139] Secondly, even if there is some basis to question whether Kevin Graham's employment contract could prohibit a recovery based on unjust enrichment or restitutionary *quantum meruit* principles, the decision by the British Columbia Court of Appeal in *Birch v GWR Resources Inc.*, 2017 BCCA 184, 99 BCLR (5th) 308, demonstrates that an employment relationship does not automatically preclude recovery on an unjust enrichment/*quantum meruit* claim. The court stated as follows:

> 17 When uncertainty undermined the contractual claim founded upon that representation, the question that remained was whether the subsequent employment of Mr. Birch (on terms that did not provide

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> for a commission) precluded a *quantum meruit* claim.
>
> 18 GWR then says:
>
> > The learned chambers judge erred on the evidence at paragraph 80 of the Reasons for Judgment when he found that GWR had paid nothing to Mr. Birch for bringing in the MacQuarie investment.
> >
> > Mr. Birch was not paid nothing. He received a salary and stock options as Investment Relations Consultant. GWR maintains that the duties of Investment Relations Consultant included his part in bringing in the MacQuarie investment.
> >
> > The investor relations work under Mr. Birch's employment contract included bringing in the MacQuarie investment.
>
> 19 The judge was clearly aware Mr. Birch was paid to be an investment relations consultant and that his compensation as such was not tied to success. The judge found the work he was paid for as an employee did not encompass the attempt to attract funds for private placement in the Lac La Hache project, for which he had been promised a reward by Mr. Eisler. GWR "maintains" otherwise but, I am not convinced the judge made an error or was under any misapprehension in this regard.

[140] I find that Kevin Graham's alternative arguments in his counterclaim for restitutionary *quantum meruit* or unjust enrichment and a resultant constructive trust have a chance of success. Therefore, there is no basis to strike out this portion of the counterclaim.

[141] BIL's application to strike portions of the counterclaim must be dismissed in its entirety because I have found that all portions of Kevin Graham's counterclaim are not obviously devoid of merit.

Buffalo AG, Jodi Graham and David Graham's Application to Strike

[142] Pursuant to Rule 7-9(2)(a), 7-9(2)(b) and 7-9(2)(e), Buffalo AG applies to dismiss any reference to them in BIL's Amended Claim due to BIL not having any reasonable cause of action and/or BIL's allegations against them being scandalous, frivolous and/or vexatious, and/or constituting an abuse of process. In that regard, they

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assert that BIL has no reasonable case for an accounting and disgorgement of profits remedy, no reasonable case for a constructive trust remedy, no reasonable case for civil conspiracy, no reasonable case for general and special damages and no case for a permanent injunction. As a result of the lack of evidence noted in the affidavits so far provided, the fact that no legal basis exists for these causes of action to be pled, and the fact that BTT has brought a Federal Court of Canada action seeking the same general relief as BIL against the Buffalo AG defendants, they submit that the Amended Claim should be struck against them.

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[143] In opposition, BIL submits that all its causes of action and remedies related to loss, damage, or injury that have affected BIL's business reputation are valid and reasonable causes of action. In accordance with *The King's Bench Rules* and the case law, BIL states that they have only asserted the essential facts related to these pleadings and not the evidence. Therefore, given the allegation in their Amended Claim that all the defendants engaged in a common purpose to gain from the wrongful use of confidential information taken by Kevin Graham in breach of his employment contract and duty of fidelity and good faith, they are entitled to all the remedies pled as they are all associated, necessary and valid causes of action. Further, they argue there is no evidence of any abuse of process or any frivolous, vexatious or scandalous claims.

[144] While I have previously reviewed case law relating to Rule 7-9(2)(b) to (e) with respect to BIL's application, Rule 7-9(2)(a) had not thus far been engaged in this application. Rule 7-9(2)(a) states as follows:

> 7-9(2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> (a) discloses no reasonable claim or defence, as the case may be;
>
> …

[145] The legal principles governing Rule 7-9(2)(a) were recently concisely summarized in the decision of *Standing Buffalo Dakota First Nation v Maurice Law*

Barristers and Solicitors (Ron S. Maurice Professional Corporation), 2024 SKCA 14 at para 24, [2024] 9 WWR 221. It must be "plain and obvious" that the claim or defence in question has "no reasonable chance of success". No evidence aside from the pleadings may be considered. The applicant seeking to strike bears the onus, and all the factual allegations in the pleadings must be assumed to be true.

[146] While I do not wish to conflate Buffalo AG's application under Rule 7-9(2)(a) with their application under Rule 7-9(2)(b) as there are different governing legal guidelines, I will primarily analyze the issues using the considerations previously outlined in only assessing whether the claim is frivolous for two primary reasons. Firstly, given the volume of affidavit evidence, it would be redundant to analyze claims both under Rule 7-9(2)(a) without considering the affidavit evidence and then largely perform the same analysis under Rule 7-9(2)(b). Secondly, as with BIL's application of the same nature, there is no evidence establishing a motive that would render the claim scandalous or vexatious as those terms are defined.

[147] I will also point out that, in my assessment of whether the claims are frivolous, I have not found any evidence of improper motive in bringing the actions. This conclusion was reached for the reasons indicated in my later analysis under Rule 7-9(2)(e) in relation to the BIL's application for a permanent injunction.

The Tort of Civil Conspiracy

[148] I will begin my analysis by determining whether BIL's cause of action in civil conspiracy against Buffalo AG is frivolous based on the facts and pleadings alleged in the Amended Claim.

[149] The following paragraphs in the Amended Claim pertain to the civil conspiracy allegations:

> 39. The Plaintiff says that the Defendants conspired together to

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> financially gain from the Confidential Information belonging to Bourgault Tillage Tools Ltd. and as the case is has in fact done so.
>
> 40. The unlawful and collective conduct of the Defendants was done with the express knowledge of each and all that the use of the confidential knowledge would cause (or they were each negligent and careless and wilfully blind) injury to the Plaintiff's business reputation and resulting loss and damages to the Plaintiff directly and indirectly in its business relationship with Bourgault Tillage Tools Ltd. (now and in the future).
>
> 41. The Plaintiff says that it is at risk of being vicariously liable (whether by legal action or in its continuing business relationship with Bourgault Tillage Tools Ltd. for the misconduct of the Defendant Kevin Graham insofar as the use and mis-use by him and his co conspirators as alleged of the Confidential Information of Bourgault Tillage Tools Ltd. and resulting loss and damages of Bourgault Tillage Tools Ltd. arising therefrom.
>
> 42. Further and in the alternative, the Plaintiff says that that conspiracy between the Defendants and their use of the confidential information belonging to Bourgault Tillage Tools Ltd. caused reputational risk and damage to the Plaintiff in its business as an honourable and trustworthy entity amongst its peers and others with whom it did, now does or wishes to do business with in the future.
>
> 43. The Plaintiff says the Defendants, individually and collectively and whether intentionally and as part of an unlawful conspiracy as herein alleged, or wilfully blind to the consequences, knew or ought to have known that injury to the Plaintiff was likely to result.

[150] The recent decision of *Aecon Mining Construction Services v K+S Potash Canada GP*, 2024 SKCA 48 [*Aecon*], provided a helpful summary of the elements of the tort of conspiracy as follows:

> [19] The elements of an action for conspiracy are (a) an agreement between two or more parties, (b) made with the predominant purpose of injuring the plaintiff or aimed at the plaintiff in circumstances where injury to the plaintiff may result, (c) through the commission of unlawful acts or the use of unlawful means, (d) that results in the plaintiff actually suffering harm: see *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at paras 72, 74 and 80, [2013] 3 SCR 477 [*Pro-Sys*]; *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 985-986 [*Hunt*]; *Canada Cement LaFarge Ltd. v B.C. Lightweight Aggregate Ltd.*, [1983] 1 SCR 452 at 471-472 [*LaFarge*]; *Reisinger v J.C. Akin Architect Ltd*., 2017 SKCA 11 at paras 21-22, 411 DLR (4th) 687 [*Reisinger*]; *Bank of Montreal v Tortora*, 2010 BCCA 139 at para 47, 3 BCLR (5th) 39 [*Tortora*]; *Golden Capital Securities*

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Limited v Holmes, 2004 BCCA 565 at para 58, [2005] 1 WWR 631 [*Golden Capital*]; and *Agribrands Purina Canada Inc. v Kasamekas*, 2011 ONCA 460 at paras 27-28, 334 DLR (4th) 714 [*Purina*].

20 A conspiracy transpires "not merely in the intention of two or more, but in the agreement of two or more 'to do an unlawful act, or to do a lawful act by unlawful means'" (*Pro-Sys* at para 72, quoting *R v Mulcahy* (1868), LR 3 HL 306 at 317). There are two types of actionable civil conspiracies in Canada: predominant purpose conspiracy (also called conspiracy to injure) and unlawful means conspiracy (on this, see *Pro-Sys* at para 73, *LaFarge* at 471-472, *Hunt* at 986, and *Reisinger* at para 22).

21 The Supreme Court summarized the elements of each of the two types in *Pro-Sys*:

> [74] Predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant's conduct. Where lawful means are used, if their object is to injure the plaintiff, the lawful acts become unlawful (*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 471-72).
>
> ...
>
> [80] The second type of conspiracy, called "unlawful means conspiracy", requires no predominant purpose but requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant should know that injury to the plaintiff is likely to result, and that the injury to the plaintiff does in fact occur (*Cement LaFarge*, at pp. 471-72).

22 Unlawful means conspiracy "requires no predominant purpose" (at para 80). Where unlawful means are established, it must be shown that the defendants' actions targeted the plaintiff and the defendants "knew, or in the circumstances should have known, that injury to [the plaintiff] was likely in the sense that it was clearly expected" (*Golden Capital* at para 58). The unlawful conduct element of conspiracy was described in *Purina* as follows:

> [38] What is required, therefore, to meet the "unlawful conduct" element of the conspiracy tort is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort.

…

24 In cases asserting unlawful means conspiracy, the purpose of the

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> defendants' actions becomes *superfluous* upon establishing the unlawful nature of the conduct: see *LaFarge* at 471 and *Southam Company Ltd. v Gouthro*, [1948] 3 DLR 178 (BCSC) at 185. However, the conduct must still be directed towards the plaintiff, whether alone or with others, and "known by the defendants to be likely to result in damage to the plaintiff" (*LaFarge* at 470): similarly, see the discussion on injury in the headnote.

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[151] In the case at bar, it seems clear that BIL is asserting that an "unlawful means" conspiracy occurred because BIL's pleadings, while alleging that the defendants' conduct was undertaken with the knowledge that it would injure BIL, did not state that the defendants' "predominant purpose" was injury and damage to BIL. Therefore, to paraphrase the court in *Aecon* in para. 25, the following elements must be pled in order to establish such a conspiracy:

1) An agreement between Kevin Graham, Buffalo AG, Jodi Graham and David Graham;

2) The agreement was to engage in an unlawful act or use unlawful means directed towards BIL, alone or with others;

3) Kevin Graham, Buffalo AG, Jodi Graham and David Graham knew that these actions would — or could be clearly expected to — cause injury to BIL;

4) BIL suffered actual damage through the participation of Kevin Graham, Buffalo AG, Jodi Graham and David Graham in the unlawful conduct.

[152] The dispute between the parties exists with respect to whether the element requiring an agreement to engage in an unlawful act or use unlawful means was appropriately pled in relation to Kevin Graham, Buffalo AG, Jodi Graham, and David Graham and whether BIL suffered actual damage.

[153] With respect to the element regarding unlawful means, these defendants argue they owed no duties of confidentiality in relation to BTT's confidential

information as they were not employees of BIL, so a civil cause of action in conspiracy could not result. Therefore, they posit that there is no evidence that would implicate them in an unlawful act.

[154] Given that this is an application to strike and novel claims are not to be stricken at this stage, I will only determine whether the essential elements have been appropriately pled. Therefore, I must start with the premise that BIL's assertion in their Amended Claim that all the defendants conspired together to "financially gain from confidential information" belonging to BTT is true. From this allegation, I can infer that the Buffalo AG defendants knew that the confidential information they allegedly obtained was a result of Kevin Graham's unlawful act in breaching his employment contract.

[155] In an application to strike pursuant to Rule 7-9(2)(b), I am able to review the parties' affidavit evidence in determining whether the legal standard to strike a claim is met. However, in doing so, I recognize that conspiracy claims usually do not involve direct evidence. As stated by the court in *Canadian Community Reading Plan Inc. v Quality Service Programs Inc*. (2001), 141 OAC 289 (CanLII) (Ont CA):

> 27 This evidence can be put no higher than that it potentially gives rise to an inference that both QSP and Maclean Hunter engaged in, to use the motions judge's description, "a scheme to unduly lessen competition". However, in a conspiracy case evidence by way of inference is often crucial. As expressed by Rinfret J. in *R. v. Paradis* (1933), [1934] S.C.R. 165, at 168:
>
> > Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. Ordinarily the evidence must proceed by steps. The actual agreement must be gathered from "several isolated doings" ... having possibly little or no value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.

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> Although *Paradis* was a case dealing with a criminal conspiracy, in my view Rinfret J.'s observations about the role played by inferences is equally apposite in a civil conspiracy context.

[156] The question remains whether the Buffalo AG defendants would be liable under the tort of conspiracy due to their participation in facilitating Kevin Graham's unlawful act despite there being no evidence that such an act would be unlawful for the Buffalo AG defendants to have committed solely as against BIL as they owed no duty of confidentiality to BIL. The issue involves an examination of the concept of parties and aiding and abetting within the tort of conspiracy.

[157] In *Agribrands Purina Canada Inc. v Kasamekas*, 2011 ONCA 460, 334 DLR (4th) 714 [*Agribrands*], the court stated as follows with respect to the requirement for "unlawful conduct":

> 28 What, then, are the requirements for unlawful conduct for the purposes of this tort? Most obviously, it must be unlawful conduct by each conspirator: see *Bank of Montreal v. Tortora* (2010), 3 B.C.L.R. (5th) 39 (B.C. C.A.). There is no basis for finding an individual liable for unlawful conduct conspiracy if his or her conduct is lawful, or alternatively, if he or she is the only one of those acting in concert to act unlawfully. The tort is designed to catch unlawful conduct done in concert, not to turn lawful conduct into tortious conduct. The trial judge applied this requirement, and found that each of the appellants had committed an unlawful act.

[158] *Agribrands* would appear to state that individuals who commit lawful acts, even when committed in conjunction with an individual who commits an unlawful act, are not liable under the tort of conspiracy. However, the court in *Canadian National Railway Company v Holmes*, 2022 ONSC 1682, 28 BLR (6th) 163 [*Holmes*], noted the following nuance:

> 188 In *Agribrands,* the Court of Appeal held that "to constitute unlawful conduct for the purposes of the tort of intentional interference, the conduct must be actionable" in the sense that it is wrong in law. The court went on to hold that the conduct need not be actionable in the sense that a full cause of action must exist for it. If that were the requirement, it would mean that criminal conduct could

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> never form the basis of a civil conspiracy because criminal conduct is not actionable at the suit of a civil plaintiff. Thus, while Flynn was not a fiduciary of CN, if she engaged in other, independent, unlawful conduct as part of an overall scheme that helped Holmes breach his fiduciary duties to CN, she is liable for conspiracy.
>
> 189 In my view, there are two intertwined categories of behaviour by Flynn that were actionable in the sense that they were wrong in law: (1) falling short of the standard of care expected of an officer or director of a corporation and (2) engaging in deceit.
>
> 190 As noted, Flynn consistently signed corporate documents without knowing what she was signing. She did that as part of a broader pattern of conduct that was aimed at aiding and abetting Holmes' breach of fiduciary duty to CN.
>
> 191 The documents she signed misrepresented the state of affairs. Those documents indicated that she had been present at meetings with Helmer or Fussee when that was not the case.
>
> 192 Flynn seeks to avoid liability by claiming that she did not know what she was signing. That is of no avail.
>
> 193 Ignorance does not excuse officers and directors from their responsibilities to those who may be injured by corporate conduct where they failed to exercise reasonable diligence. As Thorburn J. (as she then was) noted when she dismissed the defendant'' motion for summary judgment against CN at an earlier stage of this proceeding:
>
> > Directors cannot plead ignorance to shield themselves from their responsibilities as directors and officers of the corporation or to those who may be injured by the corporation's conduct. An officer or director of a corporation may be liable for wrongdoing where there are findings of fraud, deceit or dishonesty. Courts have not excused directors from liability for wrongdoing where the director failed to exercise reasonable due diligence in circumstances where further inquiry is warranted.

[159] *Holmes* would appear to stand for the proposition that directors and officers of a corporation may be liable in civil conspiracy for their actions when they fail to exercise reasonable due diligence when further inquiry is warranted in certain situations. In the case at bar, it may be that David Graham and Jodi Graham, as officers and directors, are liable in tort as a result of aiding and abetting Kevin Graham's breach of employment contract. Given that questioning has not yet occurred, I find it would be

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premature to dismiss this aspect of BIL's claim as there exists a possibility that liability may attach depending on the documents uncovered in discovery and the responses to questions during questioning.

[160] The law with respect to civil conspiracy is complex and fluid. There are nuances that result in some uncertainties in the application of the law depending on the factual situation that is presented to the court. The "aiding and abetting" concept as it relates to civil conspiracy is mentioned in class action lawsuits where there is an alleged breach of the *Competition Act*, RSC 1985, c C-34. (See, for example, *Coburn and Watson's Metropolitan Home v Bank of America Corp*., 2016 BCSC 2021 at paras 48-55.) The law as it pertains to conspiracies is evolving, and I would not wish to foreclose a novel attempt to expand the definition of what could constitute "unlawful" conduct if there is a legal basis for doing so. I am also cognizant that the Buffalo AG defendants bear the onus in their application to strike.

[161] Therefore, in my analysis, there exists the possibility that liability may attach to the Buffalo AG defendants. However, the very general wording that has been pled by BIL does not specify the nature of the "unlawful conduct" allegedly used by the Buffalo AG defendants. I note the following comments of the court in *Tran v University of Western Ontario*, 2015 ONCA 295 [*Tran*] with respect to the requirements of such allegations:

> 20 I also agree with the motion judge that the appellant failed to plead the essential elements of both the claims of conspiracy and intimidation.
>
> 21 In *Normart* [*Normart Management Ltd. v West Hill redevelopment Co. Ltd.*, 1998 CanLII 2447 (ON CA)], at p. 104, this court held that a statement of claim alleging conspiracy should:
>
> > [D]escribe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged

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> to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.
>
> 22 If read generously, some facts supporting these elements may be identified in the statement of claim. However, an agreement to conspire, its objects and the overt acts of each of the individual respondents have not all been pled.

[162] While the alleged unlawful conduct of Kevin Graham is contextually clear, the alleged unlawful conduct of the Buffalo AG defendants is vague and uncertain. It does not "set forth" with "clarity and precision" the "overt acts" by each of the conspirators. Given that an unlawful means conspiracy tort committed by the Buffalo AG defendants can be pled by BIL in certain limited circumstances, more specificity is required in order for BIL to continue to claim this tort so that the Buffalo AG defendants are able to properly mount a defence.

[163] I will order that BIL shall amend their Amended Claim to provide the necessary particulars identified in *Tran* within 30 days, failing which the paragraphs relating to the tort of civil conspiracy will be struck as it relates to the Buffalo AG defendants. It may be that if BIL amends its pleadings, Buffalo AG may renew its application to strike because it will have the specificity necessary to identify what BIL is attempting to claim. It may also be that BIL believes that they have a "predominant purpose" conspiracy claim. If so, the requirements identified above apply equally to such allegations.

[164] If BIL makes an amendment and the Buffalo AG defendants believe that reconsideration of the validity of this cause of action is required or the amendment is deficient, any party is given leave to contact the local registrar and convene a telephone conference call to determine a date when the issue, upon serving a notice of application, can be re-argued before me.

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[165] With respect to the element of actual damage, Buffalo AG submits that general reputational damages are not available for the tort of conspiracy. They proffer the decision of *Guccione v Bell*, 1998 ABQB 613, 229 AR 365 [*Guccione*], in that regard.

[166] However, *Guccione* mainly dealt with the concept of merger in that a plaintiff, in claiming reputational loss, should make a claim in defamation rather than also trying to add the tort of conspiracy to claim essentially the same damages. The court approved of the following statement:

> 17 He goes on to answer the issue this way, p. 195-96:
>
> In my judgment, if the plaintiffs want to claim damages for injury to reputation or injury to feelings, they must do so in an action for defamation - not in this very different form of action. Injury to reputation and to feelings is, with very limited exceptions, a field of its own and the established principles in that field are not to be side-stepped by alleging a different cause of action. Justification - truth - is an absolute defence to an action for defamation, and it would, in my judgment, be lamentable if a plaintiff could recover damages against defendants who had combined to tell the truth about the plaintiff and so had destroyed his unwarranted reputation. But that would be the consequence if damages for injury to reputation and injury to feelings could be claimed in a 'lawful means' conspiracy action. To tell the truth would be wrongful.
>
> I see no difference in this regard between general reputation and commercial or business reputation. ...

[167] However, the concept of merger was extensively discussed in the decision of *Jevco Insurance Co. v Pacific Assessment Centre Inc.*, 2015 ONSC 7751 at paras 20 to 41, 128 OR (3d) 518) [*Jevco*], where the court found that different courts have come to different conclusions in its application. The court then found as follows:

> 43 I also agree with the motion judge's finding that the pleading of special damages is sufficient at this stage. Conspiracy and fraud claims are by their nature secretive and hidden from the plaintiff. It is often impossible for the plaintiff to know the full extent of its damages at the pleadings stage. However, where the conspiracy claim itself is not redundant, and where damages flowing from the conspiracy are

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> alleged, that is sufficient to sustain the cause of action at this stage. Further, I agree with the motion judge's analysis at paragraphs 12-13 in *Robinson v. Medtronic Inc.* [2010 ONSC 1739] as to how the pleading of special damages should be handled (see paragraph 23 above).

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[168] In these circumstances, BIL has pled that it has suffered damages for loss of its business reputation and its business relationship with BTT and I must presume this is an accurate statement. I find that *Jevco* stands for the proposition that the statement of law proffered in *Guccione* is not absolute, so overlapping claims involving conspiracy and other torts are not necessarily mutually exclusive and can be properly pled.

[169] In the end result, I am not able to say that it is plain and obvious that this allegation in BIL's claim regarding civil conspiracy is frivolous. There are too many variabilities at this point in the proceedings to make absolute pronouncements about the state of BIL's claim. Given that conspiracies are usually committed behind closed doors, I am providing BIL with some latitude in that regard despite the generic nature of some of the allegations in their Amended Claim at this stage prior to questionings.

[170] Before I leave this topic, I note that as part of its pleadings related to the tort of civil conspiracy, BIL has stated that it is "at risk" of being vicariously liable for the misconduct of Kevin Graham for the misuse by all the defendants of the confidential information and resulting loss and damage to BTT. So far, there is no evidence of any legal action taken by BTT against BIL for any of the alleged wrongdoings that were pled in the Amended Claim, and the two-year limitation period has elapsed.

[171] While there could be a valid action for breach of a fiduciary duty without any resulting loss, the same cannot be said in an action for negligence. The Supreme Court in *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19, [2020] 2 SCR 420 [*Babstock*], put it as follows:

> 33 It is therefore important to consider what it is that makes a defendant's negligent conduct wrongful. As this Court has maintained, "[a] defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff" (*Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 16). There is no right to be free from the *prospect* of damage; there is only a right not to *suffer* damage that results from exposure to unreasonable risk (E. J. Weinrib, *The Idea of Private Law* (rev. ed. 2012), at pp. 153 and 157-58; R. Stevens, *Torts and Rights* (2007), at pp. 44-45 and 99). In other words, negligence "in the air" — the mere creation of risk — is not wrongful conduct. Granting disgorgement for negligence without proof of damage would result in a remedy "arising out of legal nothingness" (Weber, at p. 424). It would be a radical and uncharted development, "[giving] birth to a new tort over night" (Barton, Hines and Therien, at p. 147).

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[172] Given that there was no request to strike this paragraph from the Amended Claim, I will leave it in as a narrative statement of fact. It also appears to be worded to impugn the actions of Kevin Graham rather than any of the other defendants, so it is of less consequence to the Buffalo AG defendants.

[173] However, the allegations in paragraph 42 of the Amended Claim that the defendants' conspiracy to use BTT's confidential information caused "reputational risk and damage" to BIL in its business as an "honourable and trustworthy entity among its peers" is deficient. As noted by the Supreme Court in *Babstock*, risk is not "wrongful conduct". Therefore, I will strike the words "risk and" from the Amended Claim.

The Tort of Unjust Enrichment and Constructive Trusts

[174] As part of its pleadings, BIL has alleged that all the defendants were unlawfully enriched by the unlawful act of using BTT's confidential information. I previously reviewed the case law pertaining to this tort and remedy in paragraphs 134 and 135. The essential elements of a constructive trust are:

1) An enrichment;

2) A corresponding deprivation; and

3) The absence of any juristic reason for the enrichment.

[175] The Buffalo AG defendants take issue with BIL's allegation in the Amended Claim that "There is a direct causal relationship between the said alleged enrichment and deprivation," given that the deprivation suffered by BIL is stated to be its "business reputation". They argue that the Buffalo AG defendants could not have taken BIL's business reputation.

[176] In the *Moore* decision, the court stated the following with respect to the relationship that must exist in a claim for unjust enrichment as it pertains to a tangible benefit that passed to one party and was deprived by the other:

> 41. …To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value — a "tangible benefit" — passed from the latter to the former (*Kerr* [*Kerr v Baranow*, 2011 SCC 10, [2011] 1 SCR 269], at para. 38; *Garland* [*Garland v Consumers' Gas Co*., 2004 SCC 25, [2004] 1 SCR 629], at para. 31; *Peel (Regional Municipality [Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762]), at p. 790; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 15). This Court has described the enrichment and detriment elements as being "the same thing from different perspectives" (*PIPSC v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 ("*PIPSC"*), at para. 151) and thus as being "essentially two sides of the same coin" (*Peter*, at p. 1012).

[177] The close relationship required between the object of enrichment and deprivation was further explained in the decision *of Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71, [2012] 3 SCR 660 [*PIPSC*], as follows:

> 151 Following this Court's decision in *Peter v. Beblow* [[1993] 1 SCR 980], the enrichment must correspond with a deprivation from the plaintiff. While the test for unjust enrichment is typically articulated as having three elements, it is important to recognize that the enrichment and detriment elements are the same thing from different perspectives. As Dickson C.J. suggested in *Sorochan v.*

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> *Sorochan*, [1986] 2 S.C.R. 38, cited by Cory J. in his concurring reasons in *Peter v. Beblow*, at p. 1012, the enrichment and the detriment are "essentially two sides of the same coin".
>
> 152 The "straightforward economic approach", as described in *Pacific National* [2004 SCC 75, [2004] 3 SCR 575], to enrichment and detriment, is properly understood to connote a transfer of wealth from the plaintiff to the defendant (para. 20). As the purpose of the doctrine is to reverse unjust transfers, it must first be determined whether wealth has moved from the plaintiff to the defendant.
>
> 153 Accordingly, the first inquiry is not whether the government was somehow enriched or benefitted by amortizing or removing the surpluses in the Superannuation Accounts. Rather, the question is whether the government was enriched at the appellants' expense. Even if it could be shown that the government benefited in some way by reducing the stated financial obligations of Canada, it would not assist the appellants unless the gain corresponded to the appellants' loss.

[178] I find that the case law directs that the object of enrichment obtained by the Buffalo AG defendants must be the business reputation of BIL because BIL has pled that it was their business reputation that they were deprived of. While I must accept BIL's pleadings as true, simply pleading that there is a "direct causal relationship" between enrichment and deprivation is inadequate because the Buffalo AG defendants must specifically gain the business reputation lost by BIL in some fashion. The business reputation must be an integral part of both the loss and the gain. This has not been pled, and there is no evidence to support such a relationship.

[179] While there may be an allegation that BIL's loss of reputation is directly related to the presumed financial gain as a result of the profits which resulted from the Buffalo AG defendants manufacturing the Buffalo AG Tip, Buffalo AG's gain does not correspond to BIL's loss as outlined in *PIPSC*. BTT might be able to claim that the manufacture and profits from the Buffalo AG Tip by the Buffalo AG Defendants directly corresponded to a loss of profits that resulted in less sales of the BTT Tip. However, BIL cannot. Those aspects of their claim against the Buffalo AG defendants must be struck.

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[180] Given the interrelationship between the remedy of a constructive trust and the tort of unjust enrichment, I will strike the request for a constructive trust in the Amended Claim against the Buffalo AG defendants that is alleged in paragraphs 44 and 47 in addition to the allegation of unjust enrichment.

Accounting and Disgorgement of Profits

[181] BIL claims that it is entitled to an accounting from all the defendants for the monies received by their unlawful actions and an order disgorging all the profits of Buffalo AG in favour of BIL.

[182] The Supreme Court's recent decision in *Babstock* has clarified the law so that disgorgement is no longer capable of being an independent cause of action. However, the court also stated that disgorgement could be a remedy for negligence in "certain circumstances" and noted that the law "remains unsettled" (see *Babstock* at para 36).

[183] In the case at bar, BIL has pled that it is entitled to such a remedy from all defendants without an explanation as to why it is lawfully entitled to such a remedy. If BIL had some plain and obvious statutory right to such a remedy, it may be adequate for the pleadings to remain as they are here without explanation. However, in the factual scenario present in this case, it appears to be doubtful that BIL would be entitled to such a remedy. Given that BTT's Federal Court action against the Buffalo AG defendants requests an accounting of profits for an alleged trademark infringement, it would appear that BTT would more likely be entitled to disgorgement should a breach be proven as there is a statutory basis for such a remedy under s. 57(1)(b) of the *Patent Act*, RSC 1985, c P-4, s. 15.1 of the *Industrial Design Act*, RSC 1985, c I-9 and s. 53.2(1) of the *Trademarks Act*, RSC 1985, c T-13. BIL's claim for loss of business reputation does not seem tailor-made for a disgorgement remedy.

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[184] Because the pleadings in this action and the concurrent Federal Court action are framed differently, there is a live issue of whether the Buffalo AG defendants are expected to disgorge profits to BTT and BIL should both actions be successful.

[185] The following comment in *Babstock* is apposite given this unresolved complexity:

> 34 The difficulty is not just normative, although it is at least that. The practical difficulty associated with recognizing an action in negligence without proof of damage becomes apparent in considering how such a claim would operate. As the Court of Appeal recognized, a claim for disgorgement available to any plaintiff placed within the ambit of risk generated by the defendant would entitle *any one* plaintiff to *the full gain* realized by the defendant. No answer is given as to why any particular plaintiff is entitled to recover the whole of the defendant's gain. Yet, corrective justice, the basis for recovery in tort, demands *just that*: an explanation as to why *the plaintiff* is *the* party entitled to a remedy (*Clements* [[2012] 2 SCR 181], at para. 7; Weinrib (2000), at pp. 1-7). Tort law does not treat plaintiffs "merely as a convenient conduit of social consequences" but rather as "someone to whom damages are owed to correct the wrong suffered" (Weinrib (2000), at p. 6). A cause of action that promotes a race to recover by awarding a windfall to the first plaintiff who arrives at the courthouse steps undermines this foundational principle of tort law.
>
> [Italics in original] [Emphasis added]

[186] I find that there must be an explanation as to why BIL is entitled to such a remedy against each specific defendant and whether this remedy is requested on an alternative basis so that I may properly determine whether this remedy has a chance of success. It is not enough to toss out requests for remedies in pleadings and hope that something sticks. An explanation is required.

[187] Given the comments made in the *Wilson* decision, I will give leave to BIL to amend their claim to provide a valid legal basis for their disgorgement claim against each specific defendant in paragraph 45 of the Amended Claim. Should no amendment be made within 30 days of the date of the issuance of this decision, then this portion of BIL's claim will be struck. If BIL makes an amendment and the Buffalo AG defendants

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believe that reconsideration of the validity of this cause of action is required, any party is given leave to contact the local registrar and convene a telephone conference call to determine a date when the issue, upon serving a notice of application, can be re-argued before me.

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No Reasonable Case for General and Special Damages

[188] The Buffalo AG defendants argue that BIL's claim for general and special damages resulting from the reputational damage they allegedly caused is trivial to non-existent. They point to the fact that, at this point in the litigation, BIL has not provided any evidence of a damaged relationship or reputation.

[189] BIL asserts that it is not required to prove its claim for damages regarding injury to its reputation at this point in the proceedings.

[190] There is no question that a corporation can be awarded damages when it has suffered a loss of its reputation (see *Thomas Management Limited v Alberta (Minister of Environmental Protection)*, 2006 ABCA 303 at para 18, 276 DLR (4th) 430). In relation to quantifying the amount of damages, the court in *Fettes v Culligan Canada Ltd.*, 2009 SKCA 144, [2010] 6 WWR 420 [*Fettes*], has recognized the inherent difficulty of such a task in a similar case as follows:

> 33 In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at p. 341, the Supreme Court of Canada defined irreparable harm:
>
> > "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra* [[1975] A.C. 396]); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel*

Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). [. added]

> WaterGroup argues that harm should be presumed in cases involving breaches of fiduciary duty or negative covenants; that is, a breach is *prima facie* evidence of irreparable harm.
>
> 34 Having found that there is no basis to question the findings of Ball J. up to this point, we must take it there is a strong *prima facie* case that Mr. Fettes had a contract with a negative covenant, the covenant is reasonable, and he is in breach of that covenant. Further, there is a strong *prima facie* case that the Appellants owed a fiduciary duty to WaterGroup and that the Appellants are in breach of this fiduciary duty. Given the nature of the confidential information, which Ball J. found they hold, and the fact they formerly represented the upper echelon of WaterGroup's management and sales personnel, it was open to Ball J. to infer that WaterGroup's share of the market will be affected by their activities.
>
> 35 Courts have found potential loss of market share can constitute irreparable harm (see: *Scantron Corp. v. Bruce* (1996), 136 D.L.R. (4th) 64 (Ont. Gen. Div.) at para. 29; *Eversoft Fibre & Foam Ltd. v. James*, [2001] O.J. No. 3741 at para. 11, 2001 CarswellOnt 4234 (Ont. Sup. Ct. J.)). Additionally, courts have recognized the difficulty a plaintiff faces when quantifying losses caused by a defendant former employee possessing and using confidential information in a competing business. (See: e.g. *Messa Computing Inc. v. Phipps*, [1997] O.J. No. 4255 (QL), 1997 CarswellOnt 5596 (Ont. Gen. Div.)), where the Court noted at para. 32: "Messa has no way of knowing the extent to which Phipps might be using successfully any confidential information from Messa to effectively compete with Messa; and therefore Messa cannot easily quantify damages in this action.")
>
> 36 Given that the allegation is as to the use of confidential information by former employees, the nature of losses falls with the definition of "irreparable harm" as set out in *RJR-MacDonald* and the subsequent authority.

[191] *Fettes* stands for the proposition that unquantifiable harm should be presumed in cases where there are allegations against former employees who use confidential information. This obviously would apply to Kevin Graham's alleged actions. With respect to the Buffalo AG defendants, given the allegations involved in the tort of conspiracy, their participation in aiding and abetting Kevin Graham's unlawful act could lead to the same unquantifiable harm.

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[192] Therefore, BIL's lack of specific evidence relating to provable damages quantifiable in monetary terms at this point in the proceedings prior to discovery is not yet of concern, given the specific allegations of loss of business reputation.

[193] I find that there exists a reasonable cause of action related to this remedy.

Request for Permanent Injunction and Abuse of Process

[194] The Buffalo AG defendants submit that BIL is seeking intellectual property remedies to restrain the production of the Buffalo AG Tip on behalf of BTT, which is not involved in this litigation and has commenced its own separate action. They argue that given the existence of both lawsuits seeking similar remedies, this request for a permanent injunction constitutes an abuse of process.

[195] To scrutinize this argument, it will be necessary to review the request for an injunction in BIL's Amended Claim.

[196] In the Amended Claim, BIL requests the following orders:

1) Kevin Graham be restrained from further disclosing BTT's confidential information to anyone;

2) Kevin Graham be restrained from using BIL's confidential information to anyone;

3) All defendants be restrained from using the confidential information of BTT and BIL for any purpose;

4) All defendants be restrained from selling or otherwise disposing of the Buffalo AG Tip until further order of this court;

5) All defendants be ordered to deliver to BIL all confidential information belonging to BIL or BTT;

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6) All defendants be ordered to deliver to an independent third-party computer consultant all electronic storage devices to confirm that all confidential information of BIL and BTT has been permanently deleted.

[197] From my review, I find that all the elements required for injunctive relief outlined in *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120, 341 DLR (4th) 407, have been appropriately pled and are not in dispute.

[198] The issue is whether the existence of BTT's Federal Court action, in addition to the present lawsuit, constitutes an abuse of process, given the argument that BIL is requesting duplicative remedies on behalf of BTT in their Amended Claim. In relation to abuse of process, as outlined in the decisions of *GHC*, *Onion Lake*, and *CPRC*, the ultimate question for me to determine is whether this request for injunctive relief brings the administration of justice into disrepute or results in "unacceptable unfairness" to the defendants.

[199] There can be no doubt that there are some concerning aspects to the claims made by BIL in their pleadings and other material filed. As noted by the court in a fiat dated August 18, 2021, regarding a previous application in this matter:

> [52] Rather mysteriously, Bourgault Industries has commenced this action and has sought injunctive relief because it may be vicariously liable for Kevin Graham's alleged wrongdoing if Bourgault Tillage Tools were to advance a claim against Bourgault Industries that it had been harmed by Mr. Graham's conduct. At para. 35 of his affidavit, Mr. Glanville states, [Bourgault Industries] … is concerned that it is at risk of being vicariously liable for the misconduct of … Kevin Graham …" Bourgault Tillage Tool is not a party to this action and has not submitted affidavit evidence to the court. Indeed, if the entirety of this action is premised on a potential claim by a third party, a claim that has apparently not materialized to date, one wonders about the legitimacy of the action, the merits of the injunctive relief application, and the request to cross-examine.

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[200] Since that date, there has been no evidence of any action taken by BTT against BIL.

[201] That said, I do not find that the relief requested by BIL in these circumstances would bring the administration of justice into disrepute or result in unacceptable unfairness to the Buffalo AG defendants because the remedies sought are reasonable requests designed to restrain and minimize the impact of the alleged breaches and damage caused by the defendants. Let me explain.

[202] BIL alleges the Buffalo AG defendants used BTT's confidential information gathered by Kevin Graham when he worked with BIL, contrary to his contract of employment so that Buffalo AG could market the Buffalo AG Tip, a product that competed directly with a product made by BTT, the BTT Tip. As a result, they allege the loss of their business reputation occasioned by this unlawful use of confidential information by the defendants.

[203] Logically, I find it reasonable for BIL to want to stop all the defendants from using this confidential information any further to minimize the damage to their business reputation that presumably results from an employee breaching his employment contract. Further, they would want to demonstrate the measures that BIL has put in place to prevent and mitigate the loss of confidential information of another company with whom it has a relationship. While BTT may have the same goal in their Federal Court action in restraining the use of their confidential information, there is no evidence or inference that could be drawn that BIL's actions in commencing an action against these defendants are part of a calculated effort to harass these defendants through litigation. BTT alleges that the defendants improperly used their design. BIL contends that the defendants' improper use of confidential information caused loss.

[204] On their face, I find it reasonable for both BTT and BIL to take measures to attempt to stop the flow of confidential information from all sources.

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[205] Therefore, I find there is nothing untoward in the duplicitous requests by both BIL in their Amended Claim and BTT in their Federal Court claim to request similar injunctive relief. While there are concerning aspects to the Amended Claim as a result of the way the Amended Claim is framed, they do not yet rise to the level of an abuse of process. It may be that upon further discovery, a document or some testimony may be unearthed that will provide a party with a basis for an abuse of process claim against another party. However, as stated, there is nothing unfair in the nature of these proceedings yet.

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Kevin Graham's Amended Application for Production

[206] In Kevin Graham's amended application, he requests the following documents from BIL pursuant to Rule 5-12 of *The King's Bench Rules* in relation to the damage that occurred to BIL's business relationship with BTT and BIL's business reputation as a result of Kevin Graham's alleged conduct:

> i. any documents related to the product supply arrangement between Bourgault and Bourgault Tillage Tools Ltd. ["BTT"] from the years 2018 to present;
>
> ii. each purchase order made by Bourgault to BTT for the supply of products from the years 2018 to present;
>
> iii. any documents related to work outsourced from Bourgault to BTT from the years 2018 to present;
>
> iv. copies of any other written agreements and summaries of any other oral agreements, entered into, amended, terminated, rescinded, repudiated and/or otherwise cancelled, as between Bourgault and BTT from the years 2018 to present;
>
> v. copies of any other documents related to the damages that occurred to Bourgault's business relationship with BTT and/or Bourgault's business reputation as a result of Kevin's alleged disclosure of confidential information belonging to BTT to Jodi Graham and David Graham, and the Defendants' alleged subsequent use of BTT's confidential information to manufacture, distribute and sell a product similar to the "BTT Tip", as alleged in Bourgault's Amended Statement of Claim;

> [the "BTT Business Relationship/Business Reputation Documents"]

[207] Kevin Graham also requested the following documents from BIL related to the shares he was entitled to receive in BCII pursuant to the agreement with BIL as a result of his work in China:

> i. Financial Statements of BCII, and Bourgault Yantai Manufacturing Ltd. ["BYML"] from 2018 to present; and
>
> ii. The corporate books and records, including the minute books of BCII, and BYML [the "BCII Shares Documents"].

[208] The dispute between the parties relates to whether these documents are relevant and, therefore, disclosable.

[209] As noted in *Bell*, the test to determine relevance is that a document is "*relevant* to any matter *at issue in an action*" so that "relevance will generally be determined with reference to the elements of the causes of action and the defences asserted in the pleadings" (para. 39). Given that Kevin Graham is requesting the disclosure, he bears the onus of persuading the court of any document's relevance.

[210] The court in *Bell* stated as follows with respect to the factors that a court must consider in determining relevance:

> 43 In an application under Rule 5-12, where the relevance of a requested document is clear, and there is no proper basis to withhold it, such as a valid claim of privilege, the court should order disclosure. Likewise, where a document is clearly irrelevant, the court should not order its disclosure. However, where the relevance of a document is uncertain or marginal, "proportionality considerations such as litigation efficiency and cost control may be the deciding factor" (*S.B.R.* [2018 SKQB 177] at para 31). In *Clarke Transport* [2013 SKQB 394], Scherman J., whose reasoning I accept as an apt description of the proper approach, described the contours of the proportionality analysis in this context as follows:
>
> > [23] Materiality and relevance are concepts that do not have rigid boundaries. The debate about whether a broad or narrow relevance

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> test should be applied demonstrates that the concept of relevance can be applied narrowly and rigidly or broadly and with some flexibility. While delineating the boundaries of whether or not a matter is material can often be done with greater precision that delineating what is relevant, nonetheless materiality is not always clear cut. A matter may fall outside the mark of clear materiality but remain debatable.
>
> [24] Where materiality or whether a matter is in issue and relevance fall into ranges where the matter is debatable, the decision whether a question or production demand is proper may need to address the proportionality considerations that flow from the principles outlined in the foundational rules.
>
> [25] If a matter is of only debatable, potential or marginal materiality or relevance then it is appropriate for the court, in making its decision and exercising its discretion, to do a cost/benefit analysis taking into account the considerations outlined in the foundational rules. Where the materiality or relevance is uncertain, the cost imposed in time, expense or burden is significant or the benefit limited or unknown then proportionality considerations may well be the deciding factors.
>
> 44 However, this does not mean that a judge faced with an application for disclosure under Rule 5-12 must engage in a proportionality analysis in every case. The proportionality analysis is only required where the party seeking disclosure can establish that a document or documents have some *potential relevance* but falls short of establishing clear relevance. If the party has not established any potential relevance, no proportionality analysis is required.

Business Reputation Documents

[211] Kevin Graham argues that the documents regarding certain aspects of the business relationship between BIL and BTT are logically relevant to the material fact of whether BIL suffered any damage to its business relationship with BTT or business reputation as they would tend to prove or disprove the health of BIL's business relationship with BTT by showing whether BIL did more, less or the same amount of business with BTT after the occurrence of the alleged conduct than the amount of business that occurred before the alleged conduct.

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[212] BIL submits that there is no lawful purpose in disclosing these documents as BIL has not claimed that it has experienced any quantifiable economic loss, so it would not be appropriate for it to produce documents that are not relevant to a material issue. BIL argues that its claim for general damages does not rely on quantifiable financial records to prove injury to its business reputation and, therefore, disclosure of such material would be irrelevant and disproportionate.

[213] According to *Bell*, I must resolve two primary issues in determining whether to order the disclosure of documents:

1) Has the party seeking disclosure of the document established that it is clearly relevant or only potentially relevant?

2) If the document is only potentially relevant, then I must weigh proportionality and perform a cost/benefit analysis, taking into account the considerations outlined in the foundational rules in making my decision whether to order disclosure.

[214] Before examining the nature of the specific documents requested, I will address the argument proffered by BIL that any financial documents are irrelevant because it has only pled that unquantifiable non-economic general damages occurred to its business reputation and business relationship with BTT as a result of the tortious conduct of the defendants. While BIL is able to pursue its claim in any fashion it deems advisable, that does not mean that it also has exclusive control over a defendant's ability to defend itself against such a claim because relevance refers to matters which may prove and disprove a claim. BIL cannot dictate to the defendants how they may wish to pursue their defence. Let me explain.

[215] In reviewing the cause of actions and defences asserted in the pleadings, Kevin Graham is denying that BIL had any losses to its business reputation or business relationship with BTT. While BIL may rely on loss being inferred as a result of the

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tortious conduct of the defendants which has some support in the case law, I find it reasonable to attempt to defend such a claim by proving that BIL has not suffered any financial loss, generally or with respect to its business relationship with BTT. It may be that a court may award damages to BIL without proof of any financial or market share loss. However, presenting evidence that BIL has not suffered any or a minimal loss of market share with BTT despite the alleged tortious conduct is surely evidence that may establish that either reduced damages or no damages at all would be an appropriate remedy in the circumstances. This is a logical inference that may disprove a fact in issue.

[216] Therefore, documents that may establish the pecuniary value of the business relationship before and after the alleged tort are clearly relevant.

[217] The next step involves scrutinizing the requested documents to determine whether their disclosure establishes the pecuniary value of BIL's business relationship with BTT.

[218] Kevin Graham is requesting extensive records, including every purchase order made by BIL to BTT from 2018 onwards. Given that BTT and BIL discovered the alleged breach of information in April 2021, it may be that requesting information dating back to 2018 may be overly broad. However, allowing for the financial oddities that occurred as a result of the onset of COVID-19 in March 2020 thereafter, which a court may see as having some effect on the numbers for a number of years between the companies, I find that information dating back to January 1, 2018, is appropriate, necessary and relevant.

[219] However, I find that the documents requested at this stage of the proceedings by the Buffalo AG defendants are overly broad so that many irrelevant documents will be unnecessarily and disproportionately disclosed without purpose. Kevin Graham requires documents which outline the monthly orders that BIL makes

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with BTT to determine whether there was a difference in the amount and quantum of business transactions between BIL and BTT in the period before April 2021 and after. At this point in the litigation, I find there is no basis in relevance for Kevin Graham to request a forensic accounting of each purchase order made in order to determine the validity of the numbers, as no discrepancies have yet been established. No doubt, there are financial documents that summarize the monthly business between the two companies without the need for BIL to produce massive amounts of separate purchase orders.

[220] To be clear, it is not the purchase orders that are relevant. It is the monthly sales and the consequent comparisons with the sales from other points in time which will potentially establish whether there was a difference in sales before and after April 2021. While documents related to work between BIL and BTT from 2018 onwards may be potentially relevant, I find it is not proportional that BIL be charged with a quest for every scrap of paper documenting every product sold between the two companies.

[221] To that end, given my findings, I will structure an order so that Kevin Graham will have the benefit of the relevant financial information that will assist him in asking Mr. Glanville and potentially other members of BIL appropriate questions during questioning related to the amount and quantum of sales. In that regard, I will order that BIL, in addition to providing all documents to the defendants that relate to the damage caused by the defendants to BIL's business reputation and business relationship with BTT, also provide to the defendants:

1) Any and all documents related to the product supply arrangement between BIL and BTT from the years 2018 to the present. For greater clarity, this includes contracts, agreements, and summaries of oral agreements that detail the financial arrangements between the companies for the purchase and supply of products. This also includes contracts, agreements, and summaries of oral agreements that may have been

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rescinded, repudiated, terminated or amended. This does not include individual purchase orders or day-to-day billing information between the two companies.

2) Specific financial information relating only to the monthly billings received from BTT from 2018 to the present. For greater clarity, this information could come from a redacted financial or accounting document and need only contain information about the number of products sold monthly along with the amount paid.

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[222] It may be that after questioning Mr. Glanville, further information may be required or requested. However, given that the parties are still in the early stages of litigation, I find that the proceedings should not be unduly delayed by lengthy document searches and protracted interim litigation because we do not yet have the contextual background that a representative of BIL may provide.

[223] I should also point out that I made this order in regard to BIL's concerns expressed by Mr. Glanville in his affidavit and Mr. Ready during the chambers' argument regarding the potential negative impact of detailing private financial information. This concern was not lost on me as I crafted the disclosure order so to ensure that unnecessary, confidential and irrelevant financial information was not unnecessarily disclosed. However, when a party commences a lawsuit, it must do so on the understanding that fairness requires that all parties operate on a level informational playing field. A party cannot pick and choose what it may wish to disclose, as the nature of the claim will dictate what is relevant. For justice to occur, there must be transparency, which will generally trump confidentiality.

[224] I do not find that there is any further clearly relevant proportional documentation for BIL to provide at this juncture on this issue.

Documents Related to BYML and BCII

[225] Before I can determine whether these requested documents are relevant, I must first address BIL's argument that BYML and BCII are non-parties to the action and that I cannot order BIL to disclose documents pertaining to other companies. There is no doubt that BCII and BYML are separate corporate entities, although the scant evidence that I do have points to BYML being owned by BCII, which is a wholly owned subsidiary of BIL.

[226] In essence, Kevin Graham asks that I "pierce the corporate veil" and order that BIL produce financial records that belong to separate but closely related companies.

[227] However, I find that I cannot pierce the corporate veil in these particular circumstances because the evidence so far proffered does not meet the required legal test to do so, and Kevin Graham has other reasonable options.

[228] The legal principles outlining the principles of corporations and the circumstances when one may pierce the corporate veil were stated in *AgMotion Trading Canada, Inc. v McDermit*, 2018 SKQB 100 [*AgMotion*], as follows:

> 21 As a starting point, it is appropriate to acknowledge the longstanding general principle that a corporation is a separate legal entity. Two of the most fundamental characteristics of a business corporation is its separate legal personality and limited liability. It can sue and be sued. Directors, shareholders, officers, employees and agents, generally speaking, cannot be held liable for the actions of a company because the corporation is a distinct entity. See *Salomon v Salomon & Co.*, [1897] AC 22 (UK HL) and *Kosmopoulos v Constitution Insurance Co. of Canada*, [1987] 1 SCR 2 (QL) [*Kosmopoulos*].
>
> 22 However, it is also recognized that there are circumstances where the courts are empowered to "pierce the corporate veil", although, as commented on by Wilson J. in *Kosmopoulos*, the cases concerning corporate veil piercing follow "no consistent principle" (para. 12).

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> 23 The jurisprudence is replete with examples of situations where courts have exercised their discretion to pierce the corporate veil. It is unnecessary in the context of this case to analyze the various disparate decisions and attempt to formulate comprehensive rules, guidelines or principles as to when corporate veils ought to be pierced. Here, AgMotion relies on the reasoning in *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.* (1996), 28 OR (3d) 423 (Ont Gen Div) [*Transamerica*], as the basis for its argument to pierce the corporate veil. Accordingly, it is appropriate, in the context of this case, to focus on this discreet ground to determine whether AgMotion has established its claim to pierce the corporate veil in accordance with the principles developed in *Transamerica* by Sharpe J. He set forth a two-part test at pages 433-34:
>
> > ... the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently: ...
> >
> > The second element relates to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights"? ...

[229] Here, it is clear that both BYML and BCII are separate legal entities. While I found that these entities were not required to be added as parties in relation to BIL's application to strike Kevin Graham's counterclaim, the circumstances are different with regard to this disclosure application. I had found some evidence that could establish a contract between BIL and Kevin Graham in relation to BIL compensating Kevin Graham with shares in BYML and BCII so that these entities were not parties to the agreement but part of the consideration between the parties. In that matter, it was BIL's responsibility to arrange compensation for Kevin Graham.

[230] However, in relation to this application, there is very little evidence establishing the corporate parameters between BIL, BYML, and BCII. The principles stated in *AgMotion* clearly outline that aspects of fraud and "complete domination" need to be established in order to pierce the corporate veil.

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[231] In this matter, I find there is no evidence from which I could infer such conduct. It may be that BIL controls BYML and BCII to some extent. It may also be that those companies have a very close relationship. However, even if some sort of corporate domination was established, there is no evidence of any type of fraud or other malice regarding the establishment of the companies in the first place. In fact, it appears they were mainly incorporated to deal with the new manufacturing arm of BIL in China, which was a perfectly legitimate purpose.

[232] However, even if I were able to pierce the veil on that basis, I would not find it in the interests of justice to do so for two reasons.

[233] Firstly, I would be reticent to make any order that affects the interests of BYML and BCII without giving either corporation notice that their rights may be at issue. Notice is one of the fundamental tenets of a transparent justice system, and equity demands that they be allowed to make representations at a hearing where disclosure of their financial statements, books and records since 2018 are contemplated.

[234] Secondly, I would not make an order when Kevin Graham could easily use Rule 5-15(1) of *The King's Bench Rules* to request that a determination of relevance be made with respect to the requested records. This rule will permit notice to be given to BCII and BYML, and further affidavit evidence could be filed by the parties if they so desire.

[235] Therefore, I decline to make any order regarding Kevin Graham's request to obtain documents from BYML and BCII from BIL and dismiss the application.

Costs and Costs Thrown Away

Costs Thrown Away

[236] Kevin Graham is asking for costs thrown away because BIL amended its

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Claim after the April 9, 2024, chambers argument. He argues that he incurred costs of $6,786.05 in responding to BIL's Amended Claim and amending their February 13, 2024, application with a revamped application dated May 10, 2024.

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[237] BIL states that there is no compelling reason for any party to obtain costs thrown away. They argue that it was not necessary for Kevin Graham to amend his application as his substantive position that he is entitled to certain financial documents remained the same.

[238] The court in *Richardson Pioneer Limited v Stadnyk*, 2023 SKKB 265, recently discussed the discretionary nature of "costs thrown away" as follows:

> 42 Some guidance on this issue is obtained from Ontario jurisprudence, however. For example, the oft-cited authority, *Graziano v Ciccone*, 2017 ONSC 362 at para 8 [*Graziano*], holds that an award of costs thrown away is not a punitive measure. Rather, it is intended to compensate a party for its efforts in dealing with an application to set aside a default judgment. Typically, such a costs award is intended to indemnify a party fully for monies already expended. See: *Graziano* at para 9. To similar effect, see: *Nelson v Chadwick*, 2019 ONSC 4544 at para 27.
>
> 43 In *Oz Merchandising Inc. v Canadian Professional Soccer League Inc*., 2016 ONSC 4272 [*Oz Merchandising*], Hackland J. stated at para. 5 in part:
>
> > ...The term 'costs thrown away' normally connotes complete indemnification although, the court has a residual discretion to order otherwise. The complete indemnification does not flow from any misconduct on the defendants' part as both parties seem to suggest in their written submission, rather it simply means costs unnecessarily and uselessly incurred by the defendants' actions ie. costs that were thrown away. The plaintiffs are entitled to be reimbursed for such expenditures on a full indemnity basis.

[239] In determining whether Kevin Graham "unnecessarily and uselessly" incurred costs as a result of BIL indicating they were amending their Claim during the Chambers argument and then subsequently amended their Claim thereafter, I am reminded that a moving target is more difficult to identify than a stationary target.

Although BIL argues that Kevin Graham did not have to amend their application in response to their amendment, I find that the amendments proffered by BIL in relation to the elimination of their claim for economic loss were substantial and changed the context of the arguments which required Kevin Graham to complete extra work that would not have been required had the application not been amended. While lawyers are adaptable and able to pivot when new arguments are introduced or the factual frame of reference is altered, these adaptations and alterations come at a cost. Although BIL states that Kevin Graham did not need to change anything in his argument and application in response to BIL changing their argument and application, and even assuming that no change was necessary, a reasonably competent lawyer would still have to expend a considerable amount of time and energy ensuring and confirming that no further analysis was actually required.

[240] This costs money.

[241] Lawyers may put in as much effort as they feel is required to provide the court with submissions regarding an argument. Some put in a lot of effort. Some put in less effort. Those who put in less effort may do so at their peril, as there is a risk that their client's argument and response may not be as complete, which may weaken their client's position. To her credit, Ms. Holtslander provided the court with an additional 21-page brief in response to BIL's amendments, along with an amended application. While I did not find her application entirely successful, I am able to say that I found her additional submissions helpful and not duplicative. Had BIL framed their application in the amended fashion in the first place, much time, effort, and delay would have been spared.

[242] That said, I do not wish to be seen as inequitably punishing a party who corrects errors in their application so that matters can be justly adjudicated. It is a benefit to the court that parties are able to put their best foot forward and alter their applications

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at the earliest available opportunity to ensure competent and compelling documentation is presented.

[243] However, it was curious that no amendments to BIL's Claim appeared to be contemplated after receipt of the application, affidavits and briefs of law by Kevin Graham. In fact, it was only upon some questions being directed from the court that BIL appeared to have a change of heart with respect to their argument in relation to Kevin Graham's request for specific documents from BIL. Whether BIL amended their Claim because it believed that the court was considering certain issues in a particular fashion or for some other reason is of no moment. What was problematic in the amendment was the timing because it came after much effort had already been expended in completing documentation. This created uncertainty as it took some time for the amendments to crystallize in an amended document that would provide Kevin Graham with some certainty in preparing a response.

[244] In the end, I find that Kevin Graham is entitled to costs thrown away, but complete indemnification is not justified. When considering all the factors I noted above, I find it appropriate to award Kevin Graham $2,000 in costs thrown away, payable by BIL within 30 days. I will take into account that while Kevin Graham's application was amended, many of his original arguments with respect to relevance were able to be made, albeit in a different context. In these circumstances, a precise mathematical formula based on billings is problematic because neither application was entirely useless or unnecessary, and no doubt the contributions of the earlier application assisted, to some extent, in the submissions of the later application. Therefore, I believe that the $2,000 awarded represents the appropriate discretionary costs award.

Costs

[245] In terms of costs overall, I have found some mixed degrees of success. BIL's application for documents was adjourned *sine die*. BIL's application for the

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cross-examination of Kevin Graham was dismissed. I dismissed BIL's application to strike portions of Kevin Graham's counterclaim in its entirety. I dismissed parts of Buffalo AG's application to strike BIL's Amended Claim and granted others. I also dismissed parts of Kevin Graham's application for documents and allowed others.

[246] Overall, Kevin Graham had a greater degree of success than BIL, while the degree of success between BIL and the Buffalo AG defendants was roughly similar.

[247] Costs for Buffalo AG's application against BIL will be in the cause. In relation to costs, as between the applications pertaining to Kevin Graham and BIL, I find that BIL shall pay $2,000.00 in costs to Kevin Graham over and above the costs thrown away. I have not included any of my considerations for costs thrown away in my determination against BIL for costs.

J.
J.P. MORRALL

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