Court of King's Bench of Alberta

Citation: H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd., 2024 ABKB 424

Date: 20240715
Docket: 2101 03737
Registry: Calgary

Between:

H2 Canmore Apartments LP, Hokanson Capital Inc. and 2158318 Alberta Ltd.

Plaintiffs

- and -

Cormode & Dickson Construction Edmonton Ltd., Berend Pieter Elzen also known as Ben Elzen, Michael R. Deacon, Martin Bohm, Bruce Miller, Frank Haas, Beck Vale Architects & Planners Inc., Greg Beck, SNC-Lavalin Inc., Sebastian Roman, Wanhong Zhang, TWS Engineering Ltd., Marshall Price, PDN Construction Ltd., Amen Construction Ltd., Design 19 Painter Ltd., Walker Plant J.V. Ltd., H Group Inc., Reza Aghazadeh and McCool Construction YYC Inc.

Defendants

Reasons for Decision
of the
Honourable Justice M.A. Marion

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I. Introduction

[1] This case-managed action (**Action**) involves the construction of an apartment building (**Project**) in Canmore, Alberta.

[2] In this application (**Application**), the plaintiffs, H2 Canmore Apartments LP (**H2**), Hokanson Capital Inc (**HCI**) and 2158318 Alberta Ltd (collectively, **Plaintiffs** or **Owner**[1]) seek:

(a) further and better record production by Cormode & Dickson Construction Edmonton Ltd (**Cormode**) and the "**Cormode Personnel**" (Berend Pieter Elzen also known as Ben Elzen (**Elzen**)), Michael R. Deacon (**Deacon**), Martin Bohm (**Bohm**) and Bruce Miller (**Miller**))(all collectively the "**Cormode Defendants**"), together with a requirement to show cause as to why they are not in contempt if they fail to do so;

(b) penalties for providing late, incomplete and improper disclosure, in an amount to be spoken to at a future hearing; and

(c) an order under rule 5.4(6) of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*) appointing Elzen, or an additional or substitute, corporate representative of Cormode, instead of Rodney Capstick (**Capstick**).

[3] For the reasons set out below:

(a) the Plaintiffs and the Cormode Defendants are directed to consult and attempt to agree to an email discovery plan, including the sharing of future costs incurred, for producing relevant and material emails for the requested Cormode custodians, failing which the parties will each propose an email discovery plan and I will impose one. The Cormode Defendants shall provide a further and better affidavit of records within 90 days of these Reasons, or such other date as agreed by all parties to the Action;

(b) Elzen and Deacon are ordered to take steps to identify, disclose and produce relevant and material text messages;

(c) Cormode is ordered to produce the Requested Policies (as defined herein) of insurance;

(d) the Court imposes a rule 10.49 penalty of $7,500 against Cormode;

(e) the Plaintiffs and Cormode Defendants shall have the opportunity, within 30 days of this decision, to make written submissions not exceeding five pages (excluding attachments) as to whether a rule 10.49 penalty should also be imposed against the Plaintiffs; and

(f) the Plaintiffs' application to replace or substitute Cormode's corporate representative is dismissed.

[1] The Plaintiffs are referred to collectively as Owner for ease of reference only.

II. Background

[4] On March 15, 2021, the Plaintiffs commenced this Action against the Cormode Defendants and others involved in the Project for one or more of: breach of contract, negligence, negligent misrepresentation, deceit, conspiracy, and breach of fiduciary duty relating to Project construction. The Plaintiffs claim delay and increased Project costs, and seek $9 million in damages, plus punitive damages, an accounting and disgorgement of profits, interest, and costs, together with other relief.

[5] On January 7, 2022, Master Prowse (as he was then called) ordered this Action and ten other related actions to proceed together and that all interlocutory applications were to be filed in the Action (and shall be deemed to have been filed in the related actions). In a separate order, Master Prowse granted a consent litigation plan order providing, among other things, that the Cormode Defendants would complete and serve their affidavits of records by February 26, 2022.

[6] On April 22, 2022 and May 13, 2022, the Cormode Defendants served identical initial affidavits of records (**Cormode AORs**) disclosing over 21,000 producible records.

[7] On May 16, 2022, the Plaintiffs' counsel (**McLennan Ross**) wrote to the Defendants' counsel (**Brownlee**) raising several concerns with the Cormode AORs, including missing emails and texts. McLennan Ross requested, among other things, complete email records and text messages for 11 custodians related to the Project for various date ranges spanning November 2016 to June 2020, in original digital format.

[8] On July 4, 2022, Brownlee responded that the Cormode Defendants would work to meet feasible requests but did not agree to "re-do the record production by now seeking native files (after our clients collected them in PDF format)". Brownlee pointed out that its paralegals had spent 125 hours on a rush basis to complete the production, including removing thousands of duplicates and irrelevant records, the *Rules* did not mandate native record production or metadata, and that the Plaintiffs failed to raise the format of production before the Cormode Defendants completed their production. Notwithstanding that position, Brownlee requested the Cormode Defendants to produce additional text messages and emails in native format, but noted that three custodians shared one email box (Faustino, Grettum and Miller), one custodian's email address was infected (Burnside), one custodian had no relevant emails (Capstick), and Elzen could find no additional emails.

[9] On July 6, 2022, McLennan Ross advised that records must be produced with sufficient detail to enable a party requiring the disclosure to understand generally what the documents contain, where they originated, when they originated, and the number of documents with that group, citing ***Cdn Eng v Banque Nationale (1995)***, 1995 CanLII 18106 aff'd ***Banque Nationale de Paris (Canada) v Canadian Engineering and Surveys (Yukon) Ltd***, 1996 ABCA 385 at para 4 [***Banque Nationale***]. McLennan Ross noted that "with the benefit of hindsight, it may have been advantageous to agree to a protocol prior to document production...".

[10] On July 11, 2022, McLennan Ross and Brownlee consulted and Brownlee agreed the Cormode Defendants would produce a supplemental affidavit of records. McLennan Ross clarified its request to now include complete records disclosure (not limited to emails and text messages)

for 14 custodians. McLennan Ross acknowledged that the request required the Cormode Defendants' disclosure to be "substantially re-done". McLennan Ross outlined specific concerns about missing texts and emails (including numerous examples of emails produced by other parties involving Cormode Defendants that were not produced by the Cormode Defendants, some custodians for which there were very few emails, and a significant drop in disclosed records during the important time frame of September 2019 to March 2020).

[11] Counsel continued to have communications about records production through fall 2022. On November 23, 2022, Brownlee advised that its team had coded 42,000 records, but weeding out irrelevant records might take 42 person-days. It also provided an update on the Cormode Defendants' status in collecting requested financial records and project management software (**SiteDocs**) records. Brownlee suggested a without prejudice "brainstorming session" between counsel and their paralegals to find production solutions. It is unclear from the record whether the brainstorming session occurred.

[12] On January 23, 2023, Applications Judge Farrington granted a Consent Order directing Cormode to serve a supplemental affidavit of records by February 6, 2023. The Consent Order does not provide a protocol for that production and there is no documented agreement between the parties in evidence about the types of records it would include.

[13] On January 30, 2023, Cormode served its supplemental affidavit of records (**Second AOR**) listing 36,633 records and, on February 23, 2023, Cormode served a second supplemental affidavit of records (**Third AOR**) listing 5,613 records.

[14] On February 9, 2023, I was appointed Case Management Justice over the Action and the related actions.

[15] On July 22, 2023, at the initial case management meeting, McLennan Ross advised that it was questioning Cormode's corporate representative, Capstick, on Cormode's affidavits of records, that the Plaintiffs did not believe that Cormode had properly disclosed everything it was obliged to disclose, and that the Plaintiffs may have to make a disclosure application.

[16] On July 27, 2023, Capstick was questioned on the three Cormode affidavits of records. He responded to undertaking requests in several iterations in November and December 2023, and February 2024, by which Cormode produced significant additional records (including misfiled SiteDocs records containing daily reports, records related to elevator shaft work, lien and lien bond records, and additional email records of 2 of the 14 requested custodians (Grettum and Neis).

[17] On October 4, 2023, the Plaintiffs confirmed they were bringing an application for further and better production. A draft application was provided in December 2023, and it was filed on February 8, 2024, after Capstick's undertakings were provided and a date scheduled for the Application.

[18] On April 24, 2024, I heard the Application. By that time, some of the Plaintiffs' requests for further production had been satisfied or abandoned. For example, in November 2023, McLennan Ross was given access to Cormode's SiteDocs and, in January 2024, McLennan Ross was given access to Cormode's SharePoint records. The Plaintiffs no longer seek the original

Project data (as it appears hopeless) or individuals to provide specific devices such as laptops or cellphones to Brownlee for review (except in relation to text messages).

III. The Record

[19] The record before me on the Application includes the:

(a) July 27, 2023 transcript of the questioning of Capstick on the first Cormode AOR, the Second AOR and the Third AOR;

(b) November 17, 2023 (filed February 8, 2024) affidavit of Jordan Hokanson and the April 9, 2024 transcript of questioning on that affidavit;

(c) December 11, 2023 and January 18, 2024 (both filed February 8, 2024) affidavits of Charlene Stewart, and the March 21, 2024 transcript of questioning on those affidavits; and

(d) February 14, 2024 affidavit (filed February 16, 2024) of Deacon and the March 21, 2024 transcript of questioning on that affidavit. The Deacon affidavit includes Capstick's iterative undertaking responses.

IV. Issues

[20] The issues in this Application are:

(a) Should the Cormode Defendants be compelled to produce further and better affidavits of records and, if so, on what basis?

(b) Should the Court impose penalties?

(c) Should the Court appoint a substitute or additional corporate representative for Cormode?

V. Analysis

A. Records Discovery Principles

[21] Record production is a key aspect of pretrial discovery: ***CNOOC Petroleum North America ULC v ITP SA***, 2024 ABCA 139 [***CNOOC v ITP***] at para 14; ***Kent v Martin***, 2018 ABCA 202 at para 32. It is usually the first step in the discovery process, allows parties to understand the case they have to meet, and to prepare for oral discovery. Material deficiencies and missteps in record production should be avoided because they increase costs, cause delay, and are inconsistent with the purpose of the *Rules* (rule 1.2) and, in particular, Part 5 of the *Rules* (rule 5.1). The culture shift to create an environment promoting timely and affordable access to the civil justice system should inform the overall approach to civil justice issues, including records production: ***Canadian Natural Resources Limited v ShawCor Ltd***, 2014 ABCA 289 at paras 5, 30 [***ShawCor***].

[22] This Application engages several records disclosure and production principles embodied in the common law and the *Rules*. These overlapping principles can be considered as key aspects of the records discovery life-cycle: (1) planning and consultation; (2) preservation; (3) scope of the ongoing positive duty to disclose and produce; (4) useable form of disclosure; (5) disclosure requests and proportionality; and (6) sanctions. Other principles that often arise in discovery disputes, such as the protection of privilege, privacy and confidentiality, or recovery of deleted or backed-up records, are not at issue in this Application.

1. Discovery Planning and Consultation

[23] Courts have long-encouraged parties in disputes involving significant electronic records to meet early and often to attempt to reach agreement about how potentially relevant and material electronic records can and will be identified, preserved, gathered, compiled or processed, organized for review, reviewed, disclosed, and then produced in litigation.

[24] The benefit of up-front and ongoing planning and consultation efforts is clear. It maximizes the potential for relevant, material, proportionate, efficient, and useful records disclosure and production. It also minimizes the risk of increased cost and delays caused by wasteful, inefficient, unhelpful, and incomplete processes.

[25] These are not new ideas. 20 years ago, the Sedona Conference published *The (2004) Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 5 SEDONA CONF. J. 151 (2004) [*Sedona Principles*] to grapple with electronic discovery. A key recommendation was that parties "should confer early in discovery regarding the preservation and production of electronic data and documents ... and seek to agree on the scope of each party's rights and responsibilities": *Sedona Principles* at 162.

[26] In 2006, a working group was formed to create a Canadian version of the *Sedona Principles*. The Canadian principles were published in 2008 and recommended that "counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information": The Sedona Conference Working Group Series, *The Sedona Canada Principles Addressing Electronic Discovery*, First Edition, SEDONA CONF. J. (2008) at 19 [*Sedona Canada Principles*]. Later, Ontario amended its rules of civil procedure to require a formal discovery plan, created with reference to the Sedona Canada Principles: see e.g. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 29.1.03(4).

[27] The *Sedona Canada Principles* are now in their third edition and have been cited or adopted by numerous Canadian courts: The Sedona Conference, *The Sedona Canada Principles Addressing Electronic Discovery, Third Edition*, 23 SEDONA CONF. J. 161 (2022), 2022 CanLIIDocs 1167 [*Sedona Canada 2022*]; Anatoliy Vlasov, *Judicial Treatment of the Sedona Canada Principles in Canadian Courts*, 2020 CanLIIDocs 2615. Aspects of the *Sedona Canada Principles* have been favourably referenced or adopted by Alberta courts in deciding records discovery issues: ***Innovative Health Group Inc v Calgary Health Region***, 2008 ABCA 219 at para 26, leave to appeal to SCC refused, 2008 CanLII 63473; ***Dow Chemical Canada Inc v Nova Chemicals Corporation***, 2015 ABQB 2 [***Dow Chemical***] at para 50; ***Demb v Valhalla Group Ltd***, 2015 ABQB 618 at para 83 [***Demb 2015***], rev'd on other grounds 2016 ABCA 172; ***PM&C***

Specialist Contractors Inc v Horton CBI Limited, 2018 ABQB 842 at para 11; ***MBH v CKI***, 2023 ABKB 284 at para 40.

[28] Principle 4 of *Sedona Canada 2022* provides that "[c]ounsel and parties should cooperate in developing a joint discovery plan to address all aspects of discovery and should continue to cooperate throughout the discovery process...". The purpose of discovery planning is explained at 215-217 (footnotes omitted):

> The purpose of discovery planning is to identify and resolve discovery-related issues in a timely fashion and to make access to justice more feasible and affordable. The process is not intended to create side litigation. Cooperation includes collaboration in developing and implementing a discovery plan to address the various steps in the discovery process. These will include some or all of the following steps: the identification, preservation, collection, and processing of documents; the review and production of documents; the determination of how privileged documents are to be handled or other grounds to withhold evidence; costs; and the development of protocols.
>
> While the original *Principles* primarily discussed the "meet-and-confer" process, the Canadian collaborative experience has developed more significantly around the principle of ongoing cooperation and the development of a discovery plan. The idea of cooperation between counsel and parties extends well beyond the confines of a meeting, or series of meetings, to transparent sharing of information in an effort to keep discovery costs proportionate and timelines reasonable.
>
> A successful discovery plan will ensure that the parties emerge with a realistic understanding of what lies ahead in the discovery process. To address the increasing volumes of [electronically stored information] and the high costs of litigation, these *Principles* strongly encourage a collaborative approach to eDiscovery, reflecting recent judicial opinions and attitudes in Canada and other countries. "Common sense and proportionality" have been described as the driving factors of discovery planning.

[29] Principle 8 of Sedona *Canada 2022* similarly provides that the parties should "agree as early as possible in the litigation process on the scope, format, and organization of information to be exchanged."

[30] In 2019, the Uniform Law Conference of Canada (**ULCC**) proposed Uniform Electronic Documents Rules which further extolled discovery planning and consultation. In its associated report, the ULCC noted that "proper planning is the most effective way of minimizing cost and disputes with Electronic Documents", that planning "does not increase cost or complexity" but rather "reduces costs, and if there are disputes regarding the scope of production, they should be dealt with early to avoid the extraordinary expenses of having to "re-do" any aspect of the discovery process": Uniform Law Conference of Canada, *Electronic Document Rules Report of the Working Group*, January, 2019 at para 9 [ULCC Report].[2]

[2] https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Electronic-Document-Rules-Act_2.pdf

[31] Neither the *Sedona Canada Principles* nor the proposed Electronic Documents Rules in the ULCC Report are expressly referenced or incorporated in the *Rules*. However, in my view, the need for discovery planning and consultation is firmly embedded in this Court's jurisprudence, practice and the *Rules*.

[32] This Court has confirmed that there is a fundamental assumption of cooperation, communication and common sense when it comes to record production matters: ***Innovative*** at paras 25-26; ***Dow Chemical*** at para 50; ***Demb 2015*** at para 50; ***MBH*** at para 40; ***Starratt v Chandran***, 2023 ABKB 609 at para 32; ***Bard v Canadian Natural Resources***, 2016 ABQB 267 at para 106; ***Shell Canada Limited v Superior Plus Inc***, 2007 ABQB 739 at paras 30-32.

[33] Civil Practice Note No. 4, *Guidelines for Use of Technology in any Civil Litigation Matter* (March 1, 2011), s 2.3 [Practice Note No. 4][3], encourages parties to adopt it where there are a substantial portion of electronic records, more than 1,000 records, or more than 3,000 pages. Parties should consider ways in which the use of technology might lead to more efficient conduct of the litigation, including in records discovery: Practice Note No. 4, s 2.5.3. Practice Note No. 4 provides that the parties should consider at an early stage of the proceeding whether they have "conferred with the other parties regarding any issues about the collection, preservation and production" of discoverable records, and where possible, agree on "the scope of each party's rights and responsibilities", and whether they have given notice of any problems reasonably anticipated: Practice Note No. 4, s 6.1. Practice Note No. 4's purpose is to "encourage parties to consider these technical issues early in the litigation process to avoid duplication of effort later": ***Bard*** at para 107; ***Innovative*** at para 25. Practice Note No. 4 provides helpful recommendations (and requirements when adopted by parties or court-ordered) but, in my view, it does not abrogate parties' positive obligations under the *Rules*: Practice Note No. 4, s 2.1.

[34] Rule 1.2(1) provides that the purpose of the *Rules* is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective manner. Rule 5.1 provides that the purpose of Part 5 (Disclosure of Information) of the *Rules* is to obtain evidence, to narrow and define issues, to encourage early disclosure of facts and records, to facilitate the evaluation of the parties' positions and resolution, and to discourage conduct that delays proceedings or unnecessarily increases costs. Rule 1.2(3) provides that parties have a joint obligation to, among other things, "facilitate the quickest means of resolving the claim at the least expense". Rule 4.1 provides that the parties are "responsible for managing their dispute and for planning its resolution in a timely and cost-effective way". Rule 4.3(2) requires parties to consider whether a case is a standard case or a complex case and, if it is a complex case, it is expected that the parties will "agree on a protocol for the organization and production of records": rule 4.5(1)(b)(ii).

[35] Long-gone should be the days when parties in disputes involving a significant number of electronic records quietly retreat to their respective corners without joint planning or consultation and then serve their affidavit of records. As this case illustrates, that is a recipe for disproportionate delay and expense, inefficiencies, missteps, missed expectations, and missed opportunities. It appears a modern and more blunt statement from this Court may be of assistance.

[3] Practice Note No. 4 was formerly the Court's Civil Practice No. 14.

[36] Therefore: in order to comply with their joint obligations under the above-noted *Rules*, parties in matters involving a material number of electronic records are obligated to engage in discovery planning and consultation early in litigation. This should occur on an ongoing basis, to identify and attempt to reach consensus or agreement on a discovery plan and protocol that addresses identification, preservation, scope, gathering, compilation or processing, review, disclosure, and production of electronic records.

[37] Non-exhaustively, parties should consider jointly planning and consulting about:

(a) specific records production issues they foresee;

(b) specific records (or types or categories of records) they expect to be included or excluded by both sides;

(c) specific custodians of records or other non-custodian specific repositories of electronic records (for example, records in electronic file folders or electronic document management systems) they expect to be included or excluded;

(d) proposed search terms and other technology-enabled record gathering, narrowing and culling methodologies;

(e) procedures and expectations for removal of duplicate or clearly irrelevant records;

(f) how the parties expect potentially privileged records to be handled (including, potentially, agreed procedures for clawing back inadvertently disclosed privileged records);

(g) redaction and confidentiality procedures;

(h) record review procedures, including the possibility of jointly hosted databases which allow access by both parties for review;

(i) production format protocols, including file types, provision of "original digital records" (or what has historically been referred to as "native" format, including in Practice Note No. 4) or some other format, record information fields and records bundling;

(j) the use of e-discovery professionals, including the possibility of jointly retained e-discovery professionals or neutral-party data hosting; and

(k) expected timelines for the production and review of documents.

[38] Discovery planning requires work early in litigation that will save time and expense later even if agreements are not reached. Cooperation, communication and common sense should prevail. The appropriate scope and details of the plan will depend on the circumstances. Although not currently binding under our *Rules*, parties would be well-advised to consider the guidance in Principles 4 and 8 of the *Sedona Canada 2022* and proposed rule 6 (Discovery Planning), and associated commentary, of the ULCC Report.

[39] If agreements cannot be reached, then disagreement cannot be used to delay the process. Parties must abide by their positive duties to preserve, disclose, and produce records under the *Rules* (discussed below) or may seek court assistance where appropriate. However, I agree with the sentiment of Master MacLeod (as he then was) in ***Kaymar Rehabilitation v Champlain CCAC***, 2013 ONSC 1754 (Master) at para 38, that a "well-crafted [discovery] plan should minimize the need for court intervention and utilize adversarial adjudication as a last resort".

2. Preservation of Relevant and Material Records

[40] Principle 3 of *Sedona Canada 2022* provides, at 190, that as "soon as litigation or investigation is anticipated, parties must consider their obligation to take reasonable and good-faith steps to preserve potentially relevant electronically stored information".

[41] The *Rules* do not expressly reference the preservation of relevant and material records, but there is a "well-established obligation to preserve and produce records" in litigation: ***Trillium Power Wind Corporation v Ontario***, 2023 ONCA 412 at para 22, leave to appeal to SCC refused, 2024 CanLII 17608. This obligation is consistent with (or a corollary of) at least the following:

(a) the fundamental purpose of Part 5 of the *Rules* and the *Rules* generally: rule 5.1; rule 1.2;

(b) the Court's power to grant remedies to preserve evidence under the *Rules* and through *Anton Piller* orders: rule 6.25(1)(a); ***Celanese Canada Inc v Murray Demolition Corp***, 2006 SCC 36 at paras 35-36; ***Secure 2013 Group Inc v Tiger Calcium Services Inc***, 2017 ABCA 316 at paras 56-59; ***Questor Technology Inc v Stagg***, 2022 ABQB 578 at paras 66-70; and

(c) the Court's inherent power to control its process and grant procedural or evidentiary remedies (including presumptions or adverse inferences), including for spoliation: ***Trillium*** at para 24; ***McDougall v Black and Decker Canada Inc***, 2008 ABCA 353 at paras 15-29; ***Grummett v Warholik***, 2023 ABKB 208 at para 120.

[42] Put simply: parties must take reasonable steps to identify and preserve relevant and material records, and this should be part of the discovery planning and consultation.

3. Scope of the Ongoing Positive Duty to Disclose and Produce

[43] The *Rules* mandate a system of "self-discovery" of records: ***Demb v Valhalla Group Ltd***, 2017 ABCA 340 at para 4 [***Demb CA***]. The system imposes a positive obligation to make initial and ongoing disclosure of relevant and material records, relying on the good faith of parties and their counsel: ***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2023 ABCA 97 at para 25 [***CNOOC v 801 Seventh***]. As explained most recently by the Court of Appeal in ***CNOOC v ITP*** at para 14:

> [14] Record production is an important component of pretrial discovery. Each party to the action is required to serve an affidavit of records listing all the relevant and material records under its control. The system hinges on the integrity and diligence of the litigants in ensuring full disclosure is made, as well as the duty of

> counsel to advise clients of their disclosure obligations: [***CNOOC v 801 Seventh***] at paras. 24-26; [***Demb CA***] at para. 4; ***ENMAX Energy Corp v TransAlta Generation Partnership***, 2022 ABCA 206 at para. 139.

[44] The Court of Appeal's numerous references to integrity, diligence and good faith in recent decisions are not made idly, yet it appears that some litigants or counsel persist in ignoring them.

[45] Integrity, diligence, and good faith are critical for the fair and just resolution of disputes in a timely and cost-effective way. Parties are intended and required to take the process and their obligations seriously and to employ appropriate effort and resources to ensure that they meet their obligations. This is reflected in the fact that a party (either personally or through a corporate representative) must positively swear an affidavit of records in Form 26 that discloses "all records" that are relevant and material to the issues in the action, that lists records that are under the party's control (or which were previously under the party's control), and to confirm that the party does not have and never had "any other" relevant and material records under its control: rule 5.6. The seriousness is embodied in the prohibitions on use of undisclosed records and sanctions for failing to comply: rules 5.12, 5.16 and 10.49; ***ATCO Energy Solutions Ltd v Energy Dynamics Ltd***, 2024 ABKB 162 at paras 45-49. These duties are ongoing: rule 5.10.

[46] I recently summarized the scope of the disclosure duty in ***Goold v Allen***, 2023 ABKB 66 at paras 12-16:

> [12] Disclosure obligations are not limitless. They are not designed to allow every stone, or every potential, possible, speculative or theoretical stone, to be turned over. Rules 5.5, 5.6 and 5.10 set the limits. They require parties to civil actions to disclose in an affidavit of records, and if available to produce for inspection, records that are "relevant and material to the issues in the action" and which are or have been under a party's control: rule 5.6(b).
>
> [13] Rule 5.2 outlines when a record is relevant material:
>
> > When something is relevant and material
> >
> > 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
> >
> > (a) to significantly help determine one or more of the issues raised in the pleadings, or
> >
> > (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.
> >
> > (2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

> [14] Courts are not to be overly strict in assessing relevance and materiality: ***The Canada Trust Co (McDiarmaid Estate) v Alberta (Infrastructure)***, 2022 ABCA 247 at para 28 [Canada Trust Co], citing ***Weatherill (Estate of) v Weatherill***, 2003 ABQB 69.
>
> [15] Relevance must be determined with respect to the issues set out in the pleadings: ***Canada Trust Co*** at para 29; ***Dow Chemical Canada ULC v Nova Chemicals Corp***, 2014 ABCA 244, at para 17.
>
> [16] Materiality, on the other hand, while also dependent on the issues, is more a matter of proof: ***Canada Trust Co*** at 29; ***Weatherill*** at para 16. Courts must consider whether the records could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or to ascertain evidence that could do so: rule 5.2; ***Canada Trust Co*** at para 30; ***Weatherill*** at paras 15-17. Whether a record is material depends on whether it can help, directly or indirectly, prove a fact in issue: ***Tolton v Tolton***, 2020 ABCA 218 at para 24; ***Dow Chemical Canada ULC v Nova Chemicals Corporation***, 2014 ABCA 244 [***Dow Chemical Canada***] at para 17. At the interlocutory stage, courts should not measure the proposed line of argument too finely – if a party can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient because the purpose of the rule is to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry: ***Canada Trust Co*** at para 29, citing ***Weatherill***. However, the proposed discovery should not be unrealistic, speculative, or without any air of reality: [***Dow Chemical Canada***] at para 21.

[47] It is now well-established that a party may use technology to discharge its disclosure and production obligations. Courts don't encourage printing thousands of pages of paper or manual review of entire email boxes. However, if the parties do not have an agreement or court order ratifying a discovery process, it is up to each litigant to engage appropriate procedures to ensure they are complying with their positive disclosure and production obligations.

4. Useable Disclosure

[48] As noted above, *Sedona Canada 2022* provides that the parties should agree as early as possible in the litigation on the information to be exchanged and its format and organization. Where possible, and where relevant, material, and proportionate, electronic records should be searchable, in original digital format, and should include metadata: *Sedona Canada 2022* at 265-267; ***Questor Technology*** at paras 114-115 and 121; ***Spar Aerospace Limited v Aerowerks Engineering Inc***, 2007 ABQB 543 aff'd 2008 ABCA 47; ***Bard*** at paras 96-115.

[49] The point is that, unless disproportionate, meaningful disclosure in a useable format is required: ULCC Report at paras 9-13; ***Bard*** at paras 107-115; ***Spar*** at para 71; ***Banque Nationale*** at para 4. Producing records in an unusable format undermines procedural fairness and just results, does not help to narrow the issues in dispute, and threatens the ability of litigants and courts to understand the evidence: ***Bard*** at para 115.

[50] Further, enough information should be proportionally provided so that the party receiving the disclosure can understand what it contains or why the party objects to produce it: rules 5.7 and 5.8; ***Banque Nationale*** at para 4; ***Starratt*** at paras 17-32; ***ShawCor*** at para 9; ***Demb 2015*** at paras 66-74.

[51] This is an area where practicality, pragmatism, common sense and reasonable collaboration are important: ***Starratt*** at para 32; ***Bard*** at para 107; ***Dow Chemical*** at paras 50-51.

5. Disclosure Requests, Proportionality and Cost-Sharing

[52] Initial disclosure will rarely be perfect. Perfection is not expected or required and "a party is not at fault just because pre-trial disclosure processes result in the augmentation of the set of documents referred to in an Affidavit of Records": ***GO Community Centre v Clark Builders and Stantec Consulting Ltd***, 2020 ABQB 203 at para 193. The reality is that it is impossible for parties or counsel to anticipate every possible relevant and material record that might arise in litigation. Missed records are often revealed in other records produced, or through the oral questioning process: ***CNOOC v 801 Seventh*** at para 26.

[53] As noted above, courts are not overly restrictive to disclosure requests at the interlocutory stage, but a party seeking further and better disclosure will have to be able to explain or prove that the records they seek likely exist, are relevant and material, and that the request is not a fishing expedition based on unrealistic or speculative premises.

[54] Another important potential limit on the duty to disclose is proportionality. Principle 2 in *Sedona Canada 2022* provides, at 180:

> In any proceeding, steps taken in the discovery process should be proportionate, taking into account: (i) the nature and scope of the litigation; (ii) the importance and complexity of the issues and interests at stake and the amounts in controversy; (iii) the relevance of the available [electronic stored information]; (iv) the importance of the [electronic stored information] to the court's adjudication in a given case; and (v) the costs, burden, and delay that the discovery of the [electronic stored information] may impose on the parties.

[55] Embedded in (v) is whether the requested records are "reasonably accessible": ***Bard*** at paras 99, 120; ***Spar*** at para 57; *Sedona Canada 2022*, at 232, 242 (Principles 5 and 6).

[56] Alberta courts have embraced proportionality in records production matters to "ensure the procedures adopted are proportionate to the issues" and to avoid "endless and unlimited pretrial discovery": ***CNOOC v 801 Seventh*** at paras 20-21; ***Innovative*** at paras 23-25; ***Spar*** at para 57; ***Dow Chemical*** at para 48; ***MBH*** at para 40; ***Starratt*** at para 32; ***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2021 ABQB 81 at paras 17 and 55.

[57] However, proportionality is not to be used as a shield to avoid proper discovery or the denial of justice: *Sedona Canada 2022*; ***Dow Chemical*** at para 50.

[58] Proportionality is squarely inculcated in the *Rules* both generally and specifically as a limit on discovery (including records production): rules 1.2(4) and 5.3. Rule 5.3 provides:

Modification or waiver of this Part

5.3(1) The Court may modify or waive any right or power under a rule in this Part or make any order warranted in the circumstances if

(a) a person acts or threatens to act in a manner that is vexatious, evasive, abusive, oppressive, improper or tediously lengthy, or

(b) the expense, delay, danger or difficulty in complying with a rule would be grossly disproportionate to the likely benefit.

[59] Rule 5.3 provides the Court with significant discretion to tailor discovery: ***Rifco Inc (Re)***, 2020 ABQB 366 at para 54.

[60] In addition to making a procedural order, the Court may, among other things, make a costs award or require an advance payment against costs payable, or "make any other order respecting the action or an application or proceeding the Court considers necessary in the circumstances": rule 5.3(2). For example, while the costs to disclose and produce records is typically borne by the producing party, rule 5.3 permits the Court to consider an interim "cost transfer" or "cost shifting", whereby the requesting party is required to bear some or all of the costs of providing the requested disclosure: ***1218388 Alberta Ltd v Reifel Cooke Group Limited***, 2019 ABQB 76 at para 56; *Sedona Canada 2022*, at 324-327 (Principle 12 and commentary); Practice Note No. 4 , s 6.1.4.2; ***Innovative*** at para 27.

[61] The potential for transferring costs to the requesting party was expressly considered by the Alberta Law Reform Institute in its consultation work and recommendations leading up to the 2010 enactment of the *Rules*: Alberta Law Reform Institute, "Alberta Rules of Court Project, Document Discovery and Examination for Discovery Consultation Memorandum No. 12.2", (2002) at para 71 [ALRI Consultation Memorandum 12.2]: "The issue of who bears the responsibility for costs of additional searches is in the court's discretion and thus may be apportioned based on the particular circumstances of the action."

[62] Borrowing, in part, from the helpful commentary in *Sedona Canada 2022* and the ULCC Report (Part 8), the authorities cited therein, other decisions of this Court, and application by analogy of some of the principles set out in rule 10.33(2), non-exhaustive factors to consider in determining whether to require the requesting party to pay all or some of the costs of providing the requested production may include:

(a) whether parties engaged in, or attempted to engage in, joint discovery planning and consultation to find creative or cost-efficient solutions both generally and specific to the request;

(b) whether the parties failed to propose or refused to agree to reasonable solutions to the request;

(c) whether the parties failed to follow discovery principles in the *Rules* or common law;

(d) whether the parties' conduct has increased the burden or cost to implement the request;

(e) the specificity or scope of the request;

(f) the importance and materiality of the requested records;

(g) the necessity of the requested records and whether they are available from other sources;

(h) the accessibility of the requested records;

(i) the availability of technology to reduce costs to one or both of the parties;

(j) the burden and costs associated with identifying, collecting, compiling/processing and reviewing the requested records;

(k) the producing party's ability to bear the burden and costs of responding to the request;

(l) the relative cost of disclosure and production compared to the amount or importance of the issues in dispute in the litigation;

(m) any agreements of the parties respecting records production; and

(n) whether any penalties are imposed against the parties.

6. Sanctions for Deficient Records Disclosure and Production

[63] Another control in the self-discovery system is the potential for "the usual sanctions" for failing to comply with discovery obligations (over and above a costs award): ***CNOOC v 801 Seventh*** at para 26. The *Rules* provide courts with several tools to sanction non-compliance: rule 5.12 (breach of rules 5.5 or 5.10, or an order under rule 5.11), rule 1.5(6), rule 10.49 (non-compliance with the *Rules*), and rule 10.52 (contempt of court). There may also be costs consequences associated with non-compliance: ***Go Community Centre*** at paras 193-198.

[64] I now turn to assess this aspect of the Application in light of these principles.

B. Should the Cormode Defendants Be Compelled to Serve Further and Better Affidavits of Records and, if so, On What Basis?

[65] The discovery process in this action was problematic from the start. It appears the parties failed to consider and formally designate the Action as a complex case, as they were required to do: rules 4.1 to 4.3. Formal designation as a complex case would have required them to agree on a production protocol: rule 4.5(1)(b)(ii). They failed to consider or follow Practice Note No. 4 until after the Cormode AORs were served. In fact, they failed to engage in any initial pre-discovery planning or consultation, notwithstanding the presence of experienced counsel, numerous parties, and a reasonably complex construction Project that was obviously going to involve thousands of

electronic records, numerous custodians, and other record repositories (including Project files and financial and accounting records). In those circumstances, all parties bear some responsibility for the inefficiencies and delay caused by discovery that missed the mark.

[66] Shortly after the Cormode AORs were served, the Plaintiffs properly advised the Cormode Defendants of numerous concerns with the production. For the remainder of 2022, the parties consulted, as should have occurred prior to the Cormode AORs. Counsel on both sides were engaged and attempted to find solutions despite their respective frustrations. The Cormode Defendants agreed to do more discovery work, within defined limits, and the parties agreed on a deadline for the Second AOR. Unfortunately, the parties did not take the extra step of clarifying the scope or format of the Second AOR (or the Third AOR). Both sides appear to have decided to see if the supplemental disclosure sufficiently addressed the concerns.

[67] Because there was no agreement or court order defining their discovery obligations, it was up to the Cormode Defendants to discharge their obligations to preserve, identify, gather, review, disclose and produce relevant and material records in accordance with the *Rules*. For the reasons set out below, I am satisfied that the Plaintiffs have established that the Cormode Defendants failed to do so.

[68] Cormode's corporate representative, Capstick, largely delegated the discovery process to Deacon but provided him no written instructions. Although Deacon appears to have been the one of the Cormode Personnel with the most information technology experience, he did not have e-discovery experience. It is unclear how Deacon formulated his discovery plan. It was *ad hoc* and not formally documented. Neither he nor Capstick could fully explain what was done.

[69] The Cormode Defendants' discovery initially produced over 21,000 records, and the number is now over at least 65,000 records. A large number of produced records is not always a proxy for fulfilling discovery obligations, and in some cases can be evidence of the opposite.

[70] In my view, significant time was likely wasted in this Action due to the Cormode Defendants' records discovery. Cormode candidly admitted in argument that they should have done it better the first time. Problems included:

(a) failure to take active steps to identify and preserve potentially relevant and material records. For example, the discovery delegate Deacon deposed that he was never advised not to delete records. Capstick testified that people were told not to take anything off their system, but there is nothing in writing to determine the contents of his advice or who received that direction. Insufficient steps were taken to preserve information from laptops and cell phones used on the Project, some of which are no longer available. No steps were taken to preserve and ensure accessibility of accounting information in August 2021 when Cormode changed accounting software. There is an unexplained gap in daily reports and Project meeting minutes, and missing timesheets;

(b) failure to initially take sufficient steps to identify or gather paper records;

(c) failure to sufficiently identify and attempt to gather Project files, including from SiteDocs, and from Cormode's financial accounting system;

(d) failure to identify some custodians, including Cormode employees and consultants or contractors, who worked on the Project and who likely had relevant and material records;

(e) inconsistently applied or insufficient processes for gathering emails from the custodians for which records were gathered;

(f) some custodian-initiated screening or organization of records prior to their provision to Deacon or to counsel, without any apparent process in place to educate on the issues in the Action or what might be relevant and material;

(g) use of insufficiently or undocumented, and inconsistently applied, search terms to further screen the set of emails to be provided to counsel;

(h) production of over 16,000 emails in PDF format rather than in original digital format, thereby removing metadata and making the records less searchable or useable;

(i) incomplete or insufficient record descriptions and coding issues; and

(j) production of numerous irrelevant and duplicate records.

[71] The Plaintiffs have established, on a balance of probabilities, that the Cormode Defendants' disclosure and production did not comply with their obligations under, or the purpose of, the *Rules*, including rules 5.1 and 5.6. The Plaintiffs have established that thousands of relevant and material records were initially missed, including as evidenced by the Second AOR. As noted earlier, some of the issues have been resolved in the Second AOR or the Third AOR, or are no longer being pursued at this point. Some of the issues may be addressed at trial in other ways if missing records cannot be located.

[72] Below I address the matters the Plaintiffs continue to pursue.

1. Emails

[73] The Plaintiffs have established, on a balance of probabilities, that Cormode's production failed, and continues to fail, to disclose and produce a significant number of relevant and material emails. The Plaintiffs have shown numerous examples where relevant and material emails involving the Cormode Personnel have been produced by other parties but not the Cormode Defendants. They have shown examples where emails produced by other parties include Deacon's search terms but were not disclosed or produced by Cormode. Deacon acknowledged in cross-examination that his search terms were not designed to identify internal Cormode emails.

[74] For one custodian (Grettum), after the Cormode AORs were served, Deacon personally performed a 2 ½ week-long manual review of the custodian's inbox and this resulted in over 1500 additional emails being produced that were not previously produced. This was not done for any other custodians who likely had relevant and material records.

[75] There are only 300 emails involving Elzen in Cormode's entire updated disclosure, even though Elzen appears to have taken over the project management role for over six months and was involved in the initial contract negotiations. Capstick, through undertakings, has advised that Elzen has "recently searched his emails and did not find any overlooked emails", although the particulars of Elzen's search was not explained. Deacon offered to search Elzen's emails using search terms provided by the Plaintiffs. I find the argument or evidence that there are no missed Elzen emails to be unpersuasive and that it is likely relevant and material Elzen emails exist and have not been disclosed or produced.

[76] Cormode's suggestion that emails may have been deleted is not persuasive. It is more likely Deacon's *ad hoc* search methodology just did not work properly or was not consistently applied. I find that undisclosed relevant and material emails likely still exist.

[77] Cormode has refused to redo its email gathering and review process. It argues proportionality and, while it acknowledges some of the issues with its production, it partially points the finger at the Plaintiffs for not consulting or advising about its expectations before Cormode engaged in its lengthy discovery process. Cormode's position is that it should not have to redo its email discovery. Cormode provided no other proposed solutions to the problem.

[78] I agree, to an extent, with both sides. Cormode has failed to discharge its obligations to produce relevant and material emails, and something needs to be done about it. However, the Plaintiffs' request that Cormode be forced to conduct a sequential manual review of every sent and received email of the Cormode Personnel and three other custodians over a multi-year period would result in an archaic make-work project rather than a reasonable and proportionate solution to the problem. The Plaintiffs have not satisfied me that using search terms or other technology-assisted processes are not feasible or realistic.

[79] I have also considered proportionality factors:

(a) Nature and Scope of the Litigation. The claim is pleaded broadly and involves many different claims and factual issues as referenced and explained in ***H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd***, 2024 ABKB 423 [***H2 Canmore – Summary Dismissal***]. There are several related actions and over twenty parties;

(b) The Importance and Complexity of the Issues. The claim involves damages approaching $10 million together with other monetary relief. With respect, however, this Action is financially modest in the context of commercial construction litigation;

(c) Relevance of the Available Emails. As noted above, numerous emails that have likely been missed are relevant to the issues in the Action. The Plaintiffs argue that, in effect, the construction of the entire Project is at issue and all Project emails will be relevant;

(d) Importance of the Available Emails. It is difficult to assess the importance of the missing emails, which is a factor against a cumbersome additional discovery process. For those that were sent to other parties in the litigation, it seems likely

that they have been captured in the production by other parties, so re-producing those same emails is not important at this point. The likely more important emails are Project meeting minutes attached to emails, and internal emails that have likely been missed and would not be captured in the production of other parties. The latter are particularly important given the conspiracy, deceit and bad faith claims. However, courts must also be wary of the production growing to "nightmarish proportions" by which "huge amounts of resources can be consumed in an effort to uncover every document which may contain an evidentiary nugget bearing on these questions": ***Kaymar*** at para 26; ***Koolatron v Synergex***, 2017 ONSC 4245 at para 59; and

(e) Cost, Burden and Delay. The cost, burden and delay caused by the Plaintiffs' suggested manual review of all emails will be significant and likely disproportionate. However, the cost and burden of gathering the requested emails and preparing them for searches and then more targeted review is likely more proportionate.

[80] I agree with Cormode's submission that the "time, effort, and money should be directed towards practically resolving this dispute...". During argument, under rule 1.4(2)(g), I raised several suggested potential avenues for the parties to explore to address the concerns about Cormode's email discovery. Both counsel were willing to explore other options, and I suggested they do so immediately. I asked them to advise me if they reached a solution. I have not heard from them. I do not know what efforts were made. It is unfortunate the parties have been unable to solve this problem without court intervention.

[81] I find that a proportionate process requires these parties to formally engage in the appropriate planning and consultation as they should have done from the get-go. I direct the parties to meaningfully consult and attempt to reach agreement on an email discovery plan for the emails for the individuals (the Cormode Personnel plus Faustino, Wallace and Evangelista) and date ranges requested by the Plaintiffs. The discovery plan shall include gathering, compiling and processing the entire sent and received set of emails of these individuals in original digital format so that search terms or other technology-based gathering, narrowing and culling methodologies can be employed. The parties are encouraged to reach agreement on search terms or other methodologies, handling of potential privilege claims, removal of duplicates and irrelevant records, and to employ an e-discovery professional to assist in identifying ways to target the key types of emails the Plaintiffs seek. The parties should consider *Sedona Principles 2022* and the matters referred to in paragraph [37] above. Identifying search terms or other narrowing or culling methodologies should involve legal counsel. Review of the narrowed or culled set of emails shall be conducted by lawyers, not the Cormode Defendants or their non-legal employees or contractors. The parties shall also attempt to agree on cost-sharing associated with implementing this process.

[82] If the parties are unable to agree to a discovery plan, then the parties shall, within 30 days of this decision, provide me their proposed discovery plans in writing, together with any supporting information or evidence, and I will choose the plan. If the parties agree more time is needed, they can jointly seek an extension of this deadline.

[83] I have considered who should bear the cost of this additional effort which undoubtedly will duplicate some of the previous efforts of both parties. I have considered the factors noted at para [62] above. Both sides failed to engage in joint discovery planning and consultation initially, and then failed to reach agreement on how to address the problems.

[84] The Cormode Defendants' response to initial concerns raised by McLennan Ross was not reasonable in some respects, but was quite cooperative in other respects. The Cormode Defendants failed to follow the *Rules* and well-established discovery principles, which has increased the burden and cost of complying with the Plaintiffs' email request, although the precise burden and cost is unknown and has not been reliably estimated by either party. Cormode's ability to bear the cost and burden of the request is limited as Cormode is no longer an active company.

[85] On the other hand, the Plaintiffs' request is not specific and is wide ranging, some of the records are likely available from other sources, and only an unknown number of the emails are likely important. There is likely technology available to address these issues, but the Plaintiffs have insisted on a manual approach that is out-of-step with modern discovery principles.

[86] As will be noted below, the Court levies a penalty against Cormode. However, I find the Plaintiff's have also failed to satisfy their obligations under the *Rules.* In accordance with the guidance provided by the Court of Appeal in ***Kotyk (Re)***, 2024 ABCA 233, I will allow these parties an opportunity to address whether the Plaintiffs should also be subjected to a penalty under rule 10.49.

[87] On balance, I find that it is appropriate that, initially, the Cormode Defendants should be responsible for more of the go-forward costs to implement the Plaintiffs' request, but the Plaintiffs should materially share those costs. Having both parties with "skin in the game" at this stage encourages resolution on a discovery plan and appropriately assigns initial responsibility for the additional cost and burden.

[88] Therefore, subject to a different agreement reached by the parties, I direct that reasonable out-of-pocket costs to gather, compile/ process and review the additional emails for relevance and materiality shall initially be shared and paid by both parties in agreed-upon percentages, or as determined by the Court if agreement cannot be reached. For clarity, initial cost sharing shall not include counsel's involvement in planning and consultation for the discovery plan. Any lawyers or consultants for whom costs may be recoverable shall separately track their time or costs for the implementation of the discovery plan. If necessary, I will decide the initial proportionate cost sharing if the parties cannot agree and I need to direct a discovery plan based on subsequent proposals as set out above.

[89] The final determination of the appropriate sharing of these costs will be determined at or after trial when the final costs of the requested process and utility of the emails sought, and the additional emails produced, can be put into proper context.

[90] In conclusion, pursuant to rules 5.3 and 5.11, Cormode, is directed to complete the further email disclosure pursuant to an agreed discovery plan or, failing agreement, a court-imposed plan, within the 90 days of these Reasons, or on such shorter or longer deadline as may be agreed by all parties to this Action included in a subsequent order. In the circumstances, the Plaintiffs' request

for a show-cause contempt process if Cormode fails to abide by the Court's order is not appropriate.

2. Text Messages

[91] The Cormode Defendants did not take reasonable steps to preserve or gather text messages from cell phones used by all the Cormode Defendants or their consultants. To date, only 28 unique text messages are included in the Cormode Production, and these appear to be from Miller's phone. In the passage of time, some of those cell phones now appear to be unavailable or not accessible, or custodians of the cell phones are not cooperating to provide text messages.

[92] The Plaintiffs have accepted that some text messages may no longer be available. They only seek in this application the cell phone devices used by Elzen and Deacon from October 2016 to December 2020.

[93] Capstick's undertaking response #35 does not adequately address the state of affairs with respect to Elzen and Deacon's text messages. It only says that Elzen does not have texts on his "current" phone. It does not address Deacon's texts at all. Deacon testified that Cormode upgraded phones from time to time and typically recycled useable old phones and donated them to charity. Capstick refused to undertake to provide available cell phones to Brownlee for review of text messages, on the basis that doing so was unreasonable.

[94] I disagree with the Cormode Defendants on this point. The Plaintiffs do not yet "have their answer". The text messages are likely relevant and material, and it is not disproportionate at this stage to take steps to confirm whether text messages exist on current or former phones or in some other electronic storage location.

[95] Cormode, Elzen and Deacon are ordered to provide any available current or former cell phones used by Elzen or Deacon, for the period October 2016 to December 2020, to Brownlee for review, are to take reasonable steps to confirm whether they are able to access any data for such devices (through SIM cards, local or online back-up), to provide such access to Brownlee for review, and produce any relevant and material text messages located through these processes in a supplemental affidavit of records. If the cell phones or data are unavailable, these Cormode Defendants shall detail and provide the precise steps taken to locate the cell phones or to access the data and explain why the phones or data is unavailable. This shall be completed within 30 days of these Reasons and Cormode, Elzen and Deacon shall bear the costs of compliance with this direction.

3. Insurance Policies

[96] As noted in ***H2 Canmore – Summary Dismissal***, the Plaintiffs claim that, effective November 9, 2018, Cormode entered into a Design-Build Contract (Contract) with HCI (later assigned to H2) to perform the design, construction and related services for the Project. The Owner terminated the Contract effective May 1, 2020.

[97] Clause GC 11.1 of the Contract obligated Cormode to "provide, maintain and pay" for certain insurance coverages, including "General Liability" insurance, automobile liability, "all risks" property insurance, boiler and machinery insurance, "Professional Liability" insurance,

"Umbrella" insurance, and wrap up liability insurance. Clause GC 11.1.2 obligated Cormode, if required, to provide the Owner with true copies of the policies together with copies of any amending endorsements applicable to the "Design Services" or "Work" (as defined in the Contract) upon placement, renewal, amendment or extension of all or any party of the insurance.

[98] The Plaintiffs advise that the "all risks" insurance and the wrap up liability insurance have been disclosed and provided because they were attached as part of Appendix J of the Contract. The Plaintiffs have requested disclosure of the General Liability, Umbrella and Professional Liability policies (**Requested Policies**). Cormode has refused.

[99] The Plaintiffs' position is that the Requested Policies are "relevant and material" because all of Cormode's Project-related records are relevant and material. The Plaintiffs argue that they "seek to confirm that insurance was provided by Cormode as required by the [Contract], and to assess the insurance limits, terms, endorsements and exclusions as relevant to the resolution of the action". The Plaintiffs seek disclosure subject to the condition that the policies and details of coverage are not disclosed to the trial judge or finder of fact.

[100] The Plaintiffs point to a "trend to increasing disclosure of insurance" in other Provinces, and in some respects in Alberta (for example in the context of motor vehicle accidents): Barbara A Billingsley, "Policies & Prejudice: The Mandatory Disclosure of Liability Insurance Policies & Policy Limits in Tort Litigation in Canada" (2014) 47:2 UBC L Rev 329, 2014 CanLIIDocs 33715 [Policies & Prejudice]; *Supreme Court Civil Rules*, BC Reg 168/2009, rule 7-1(3); *Rules of Civil Procedure*, RRO 1990, Reg 194, r 30.02(3); *Fair Practices Regulation*, Alta Reg 128/2001, s 5.1. The Plaintiffs say that this trend dilutes any general principle that insurance should not be disclosed because it is generally not relevant to issues of liability and quantum of damages in tort (for example, as that general concept is described in Policies & Prejudice at 331, 333-334).

[101] Cormode's position is that the Requested Policies are not relevant and material because "they cannot help the Plaintiffs prove either liability, or damages", and there is no authority to order their disclosure or production.

[102] With respect to the Plaintiffs' argument that there is a trend to increasing disclosure of insurance, they reference specific legislated or regulatory enactments creating a positive obligation to disclose insurance coverage details regardless of whether it otherwise meets the threshold for disclosure (i.e. even if it is not relevant and material to the issues in the litigation): See Paul J Bates, "Disclosure of Insurance Pursuant to Ontario's New Rules of Civil Procedure" (1985), 47 CPC 232 at 233. The Plaintiffs assert that this trend warrants judicial reconsideration of the policy basis for excluding liability insurance from discovery (even if that reconsideration is not necessary in this case).

[103] The issue of mandatory disclosure of insurance was expressly considered in ALRI Consultation Memorandum 12.2 and was not recommended to be included in the *Rules*, at paras 79-80 (emphasis added):

> [79] The Committee had concerns about imposing a general requirement to produce insurance policy information. As noted above, the only relevance that an insurance policy has to proceedings (where the policy itself is not in issue) is on a

> party's ability to satisfy a potential judgment and perhaps on a party's ability to cover the expense of proceeding with an action. As a general proposition these matters should not influence the disposition of an action, though it is recognized that practically speaking insurance coverage may factor into some settlements, particularly where a defendant has no other means and the claim exceeds the policy limits. The Committee was also concerned about the potential effects of a broad requirement to produce insurance policy information in all actions where such policies exist. **While there may be benefits in disclosing insurance information in motor vehicle accident actions, insurance policies exist for many other types of actions other than personal injury matters. At this time the effects of disclosing insurance information in other types of actions, particularly in those involving complex commercial insurance policies, are not known. The Committee proposes that there be no general requirement to disclose the contents nor the existence of insurance policies**.

[104] The *Rules* are consistent with the Committee's recommendation. There is no positive general obligation in Alberta to disclose insurance in litigation if the policy itself is not in issue or it does not otherwise meet the "relevant and material" test. While people may debate whether it may be time for this to be reconsidered, that is a policy-based decision better suited for the legislature or the Rules of Court Committee, not a single Justice of the Court: rule 1.6; *Judicature Act*, RSA 2000 c J-2 section 28.2; ***Glamorgan Landing Estates GP Inc v Calgary (City)***, 2024 ABCA 150 at para 102 (and footnotes 69-71).

[105] Therefore, I limit my consideration to whether the Requested Policies are properly producible in this case based on the legal framework in the existing *Rules* based on the scope of the duty to disclose as summarized above: ***Goold*** at paragraphs 12-16.

[106] In my view, the Plaintiffs have been unable to articulate, or point to aspects of the pleadings, by which the Requested Policies are relevant and material to the Plaintiffs' claim against Cormode. The Statement of Claim does not plead a breach of Cormode's obligation to obtain insurance or any damages the Plaintiffs suffered as a result of any such breach. The existence of the Requested Policies is not at issue in the claim against Cormode.

[107] However, I find that the Requested Policies are relevant and material to the Cormode Personnel's potential personal concurrent liability for Cormode's conduct. See ***H2 Canmore – Summary Dismissal***.

[108] In ***Hall v Stewart***, 2019 ABCA 98, the Court of Appeal addressed the interplay between concurrent personal liability for corporate acts and insurance coverage. At para 14, the Court noted that concurrent liability will often be of no practical importance because the corporation or its insurer will cover the loss, but the "issue does become of importance" where the corporation has insufficient insurance to pay the plaintiff's claim. The Court went on to state, at para 18, that the law on when personal liability will attach to corporate torts is not clear, and that a number of relevant factors have been identified by the courts. One of those factors is whether the damage was physical or economic, which "partly relates to accessibility to insurance, which is more common for physical damage": ***Hall*** at para 18.

[109] In setting aside the summary dismissal of a claim against a corporate director, the Court in ***Hall*** stated, at para 19 (emphasis added):

> [19] The competing policy objectives of tort law and corporate law must be reconciled in context. One important factor is the ready availability of insurance for property damage and personal injury. One obvious source of personal injury insurance is the workers' compensation system itself. However, even if a corporation does not elect to purchase director's insurance within the workers' compensation system, general commercial liability insurance coverage is widely available for personal injury and property damage. **In assessing whether a corporate representative should be exposed to personal liability for corporate torts, it must be acknowledged that the underlying risk can readily be managed and diverted through the purchase of appropriate insurance.** Balanced against this factor is the reality that mere employees (unlike directors like the respondent) have little control over corporate decisions to insure. Whether the respondent actually purchased commercial general liability insurance is not the point; the point is that such insurance was available to him, and if he did not purchase it he must have elected to assume the underlying risk himself. He could not, by his decision, seek to pass the risk of recovery of personal injury damages onto injured claimants like the appellants.

[110] I am aware of the Court of Appeal's warning that personal liability cannot be imposed on human agents of the corporation based only on the "circumstances of the case": ***Swanby v Tru-Square Homes Ltd***, 2023 ABCA 224 at para 41, leave to appeal to the SCC refused, 2024 CanLII 40769. However, at this interlocutory stage, it seems to me that there is a rational strategy in which the Requested Policies, including whether the Cormode Personnel took steps to ensure Cormode or the Cormode Personnel were covered under them, are relevant and material to determining whether the Cormode Personnel are personally liable. Disclosure and production of the Requested Policies is not abusive or excessive, and will not create unnecessarily expensive discovery.

[111] Cormode is ordered to produce the Requested Policies, together with copies of any amending endorsements, to the Plaintiffs, on the condition proposed by the Plaintiffs (that is, that they not be disclosed to the trial judge without further court order).

4. Conclusion re Further and Better Affidavit of Records

[112] The parties are directed to take the steps noted above.

C. Should the Court Impose Penalties?

[113] The Plaintiffs apply for penalties to be levied pursuant to rules 5.12 and 10.49 for the Cormode Defendants' breach of their disclosure and production obligations, in an amount to be spoken to at a later hearing. The formal Application also references rule 10.52 but does not seek any specific contempt relief so I find that there is no contempt application before me, and I do not consider a rule 10.52 sanction.

1. Is a Rule 5.12 Penalty Appropriate?

[114] Rule 5.12 provides:

> **Penalty for not serving affidavit of records**
>
> 5.12(1) In addition to any other order or sanction that may be imposed, the Court may impose a penalty of 2 times the amount set out in item 3(1) of the tariff in Division 2 of Schedule C, or any larger or smaller amount the Court may determine, on a party who, without sufficient cause,
>
> (a) does not serve an affidavit of records in accordance with rule 5.5 or within any modified period agreed on by the parties or set by the Court,
>
> (b) does not comply with rule 5.10, or
>
> (c) does not comply with an order under rule 5.11.
>
> (2) If there is more than one party adverse in interest to the party ordered to pay the penalty, the penalty must be paid to the parties in the proportions determined by the Court.
>
> (3) A penalty imposed under this rule applies irrespective of the final outcome of the action.

[115] A reasonable interpretation of rule 5.12 suggests that its purpose is to provide a monetary penalty, paid to the adverse party or parties, for failing to meet the time deadlines under rule 5.5, rule 5.10, or an order under rule 5.11. It is arguable that rule 5.12 could also apply to an on-time but deficient breach of discovery obligations. However, ensuring on-time delivery was the basis for the recommended rule: ALRI Consultation Memorandum 12.2 at xix, 12-14.

[116] Although never expressly stated to be applicable to missed deadlines (rather than deficient disclosure), that interpretation is also consistent with the practice and comments of this Court in respect of rule 5.12: ***Sun Life Assurance Company of*** Canada ***v Tom 2003-1 Limited Partnership #2***, 2010 ABQB 815 at para 26; ***Malton v Attia***, 2015 ABQB 430 at para 117; ***Dornan (Re)***, 2016 ABQB 259 at para 15; ***McDonald & Bychkowski Ltd (CMB Insurance Brokers) v Lougheed***, 2015 ABQB 792 at para 36; ***Peters v Keef***, 2019 ABQB 398 at para 31; ***Minshull v LED Sign Supply Inc***, 2019 ABQB 424 (Master) at paras 53-57; ***Song v Alberta***, 2019 ABQB 789 (Master) at para 6; ***Clearbakk Energy Services Inc v Sunshine Oilsands Ltd***, 2022 ABQB 506 at paras 12, 23. This was also the thrust of rule 5.12's predecessor, former rule 190 of the former *Alberta Rules of Court*, Alta Reg 390/1968 [*Former Rules*]; ***Johnston v Bryant***, 2003 ABCA 169 at para 15.

[117] I agree that the focus of rule 5.12 is on whether a party has met the deadline, however, I would not foreclose the possibility that a deficient affidavit of records, disclosure or compliance with a rule 5.10 order might also warrant a penalty under rule 5.12 where the timeline was facially met but the substance of requirement was not. This may be relevant where the Court is of the view

that a penalty should be paid to the adverse party or parties, rather than the Clerk of the Court as is contemplated by rule 10.49.

[118] Where rule 5.12 non-compliance is engaged in other aspects of an application, it may also be adequately addressed through a costs award rather than a penalty.

[119] "Sufficient cause" under rule 5.12 is a "hard test" with a "high bar", requiring "rare" and "extraordinary circumstances over which [a party] had no practical control": ***Sun Life Assurance*** at para 26; ***Wagner v Petryga Estate***, 2001 ABQB 690 at para 17. A party cannot complain where they are the architect of the delay or complications: ***Paraniuk v Pierce***, 2018 ABQB 1015 at para 130. On the other hand, courts should be wary about encouraging wasteful proceedings that become more about imposing penalties than focussing on the merits of the action: ***Archer v Ribbon Communications Canada ULC***, 2019 ABQB 481 at para 21. Where a penalty is warranted, it should be "readily identifiable on their facts": ***Archer*** at para 21. Ultimately, even where there is not sufficient cause for non-compliance, the Court retains permissive discretion to decide whether to levy a rule 5.12 sanction: ***Scott & Associates Engineering Ltd v Ghost Pine Windfarm, LP***, 2017 ABQB 626 at para 36, aff'd 2019 ABCA 2; ***Paraniuk*** at para 130.

[120] It is unclear from the evidence why the Cormode AORs were delivered about two months later than the requirement set out in the January 7, 2022 consent litigation plan. However, that delay is not the focus of the Application or the Plaintiffs' complaint. In the circumstances, I do not find it appropriate to levy a penalty under rule 5.12. The impugned conduct is better considered as a matter of costs or under the general rule non-compliance rules: rules 1.5(6) and 10.49.

2. Is a Penalty under Rules 1.5(6) and/or 10.49 Appropriate?

[121] Rule 1.5 allows a party to apply to the Court for relief if a person does not comply with a procedural requirement. Rule 1.5(6) provides the Court discretion to impose a penalty under rule 10.49 if it makes an order under rule 1.5. The Court also has discretion to order a rule 10.49 penalty even if it does not make an order under rule 1.5, or on its own motion: ***Baltimore v Baltimore***, 1997 CanLII 14731 (AB KB) at para 18.

[122] Rule 10.49 was added when the "new" *Rules* were enacted in 2010. Rule 599.1 of the *Former Rules* is its predecessor, so authorities interpreting and applying former rule 599.1 may be of some assistance in interpreting rule 10.49: ***Osborn v Gagne***, 2017 ABQB 438 at para 28.

[123] Rule 10.49 provides:

> **Penalty for contravening rules**
>
> 10.49(1) The Court may order a party, lawyer or other person to pay to the court clerk a penalty in an amount determined by the Court if
>
> (a) the party, lawyer or other person contravenes or fails to comply with these rules or a practice note or direction of the Court without adequate excuse, and

(b) the contravention or failure to comply, in the Court's opinion, has interfered with or may interfere with the proper or efficient administration of justice.

(2) The order applies despite

(a) a settlement of the action, or

(b) an agreement to the contrary by the parties.

[124] The public policy behind these rules is to ensure that court orders are obeyed which, in turn, upholds the policy of promoting the public interest in the fair and just resolution of claims in a timely and cost-effective way: rule 1.2; ***Osborn*** at para 35; ***336239 Alberta Ltd (Dave's Diesel Repair) v Mella***, 2016 ABQB 174 at para 35.

[125] Rule 10.49 differs from rule 5.12 because, if a penalty is levied, it is paid to the Clerk of the Court, not the other parties: rule 10.49(1); ***Makis v Alberta Health Services***, 2020 ABCA 168 at para 66; ***Carnwell v Carnwell***, 2024 ABKB 318 at para 26. It is also different than a penalty or sanction for contempt under rule 10.52 and, when read together with the fundamental rules, provides the Court with a helpful and "very flexible tool", and likely a more efficient and effective sanctioning process: rules 1.2-1.5; ***CJD v RIJ***, 2018 ABQB 287 at paras 62-66; rules 1.2-1.5; ***Meads v Meads***, 2012 ABQB 571 at paras 604-607.

[126] Rule 10.49 requires three things: (1) contravention or failure to comply with the *Rules*, a practice note or a court direction; (2) without adequate excuse; and (3) the contravention or failure has, in the Court's opinion, interfered with or may interfere with the proper or efficient administration of justice. It does not require that the contravention or failure be intentional: ***Baxter v Darby***, 2009 ABQB 559 (Master) at para 12.

[127] The meaning of "without adequate excuse" has not been expressly considered by this Court. Although the wording is slightly different, I find that a similarly high bar set for "sufficient cause" under rule 5.12 is also reasonable for "without adequate excuse" under rule 10.49. Parties must establish, at a minimum, that, even with reasonable due diligence, they could not comply with the *Rules*, practice note or court direction due to something outside their control. Interpreting "adequate excuse" this way will not cause injustice or unfairness because the Court retains the discretion to not impose a penalty even in the absence of an adequate excuse: ***Morin v TransAlta Utilities Corporation***, 2017 ABQB 409 at para 49.

[128] With respect to the meaning of "interfered with or may interfere with the proper administration of justice", this is the same wording as under former rule 599.1. There must be evidence to support a finding of past or future interference: ***Estate of Montgomery***, 2019 ABQB 833 at para 45.

[129] Interfering with the proper or efficient administration of justice can include interfering with the judicial function, court operations, or actions administered by the Court, in particular in the form of wasted public resources or delay in the progress of court proceedings: ***Milfive Investments v Sefel***, 1998 ABCA 164 at para 3; ***Pollock v Liberty Technical Services Ltd***, 1997 CanLII 14782 (AB KB) at para 14; ***Morin*** at paras 50-51; ***Trang v Alberta (Edmonton Remand Centre)***, 2007

ABCA 267 at para 14, leave to appeal to SCC refused, 2008 CanLII 6439; ***Klushin v Tkachuk***, 2001 ABCA 231 at paras 14-17; ***CJD*** at para 70.

[130] Specifically, interfering with the proper or efficient administration of justice can include a failure to honour records discovery obligations: ***Weatherford Canada Partnership v Addie***, 2010 ABQB 477 [***Weatherford QB***] at para 53 aff'd 2010 ABCA 362 [***Weatherford CA***]; ***Goofers (Theroux) v Goofers***, 2002 ABQB 1094 at para 56.

[131] Non-exhaustive factors relevant to whether to impose a penalty under rule 10.49 (and the quantum of any penalty) include:

(a) any delay, inefficiencies or increased expenses caused by the contravention/failure: ***Weatherford QB*** at para 53; ***Pollock*** at para 14; ***Meads*** at para 604;

(b) the impact of the contravention/failure on the judicial function and court operations, including the waste of public resources: ***Milfive*** at para 3; ***Klushin*** at para 14; ***Trang*** at para 14; ***Pollock*** at para 14; ***AS v NLH***, 2006 ABQB 708 at paras 17-19; ***CJD*** at para 70;

(c) the reasonableness of the explanation for the contravention/failure, including whether the party reasonably attempted to avoid contravention, or to comply, or whether the contravention/failure was vexatious, intentional, careless or innocent: ***Weatherford CA*** at para 10; ***R v Ayyazi***, 2022 ABKB 836 at paras 60-63; ***Royal Bank of Canada v Anderson***, 2023 ABKB 661 at paras 21-23, 42; ***Morin*** at para 50-51; ***Baxter*** at para 12; ***Meads*** at para 607;

(d) the need to impose a penalty to secure compliance: ***Demb v Valhalla Group Ltd***, 2015 ABCA 29 [***Demb 2015 CA***] at para 40 (O'Ferrall, JA concurring in result); ***Ubah v Ubah***, 2024 ABKB 164 at para 35;

(e) the need for general or specific deterrence, including whether the contravention/failure represents an undesirable general litigation practice or a pattern of conduct of a specific party or counsel: ***Demb 2015 CA*** at para 40 (O'Ferrall, JA concurring in result); ***Milfive*** at para 3; ***Hunter v Preston***, 2001 ABCA 35 at para 21; ***McClelland v Harrison***, 2023 ABKB 638 at para 14; ***Morin*** at paras 50-51; ***Crouser-Reymon v Tawa Developments Inc***, 2010 ABQB 166 at paras 23-26;

(f) the need to punish, discipline or denounce: ***Lastiwka v TD Waterhouse Investor Services (Canada) Inc***, 2006 ABQB 567 at para 78; ***Wagner*** at para 19; and

(g) the financial means of the party being sanctioned. A penalty under rule 10.49 is not usually intended to impact the substance of the action or create a barrier to non-vexatious access to justice: ***Osborn*** at para 46; ***Meads*** at para 605.

[132] I agree with the sentiments of Stinson J in ***Apotex Inc v Eli Lilly and Company***, 2014 ONSC 3574 at para 4:

> [4] As stewards of the justice system, both judges and lawyers have a duty to ensure that disputes are resolved and claims are prosecuted in an efficient fashion, so that the limited resources of the court may be effectively shared among all who seek access to justice. [...]

[133] One way we can fulfil our stewardship role, while also protecting against waste of precious private and public resources, is to order rule 10.49 penalties, where appropriate, to promote rule-compliance and to deter and denounce wasteful conduct that causes delay, increases private and public costs, and reduces access to justice.

[134] I have considered the factors above and find that a rule 10.49 penalty is appropriately ordered against Cormode for failing to comply with the *Rules*.

[135] Capstick delegated Cormode's discovery process to Deacon, without sufficient guidance. In fact, while Deacon appears to have taken some good-faith discovery steps, Capstick displayed a *laissez-faire* and careless approach to Cormode's records discovery obligations under the *Rules* and his obligation to swear Cormode's affidavits of records. For the first Cormode AORs, Cormode, among other things:

(a) took minimal steps to ensure the preservation of records;

(b) failed to ensure Deacon had clear or appropriate instructions for identifying, gathering, culling and reviewing records;

(c) failed to ensure discovery processes were documented;

(d) failed to reasonably search for Project files or financial and accounting records;

(e) took minimal steps to ensure production of paper records; and

(f) failed to take steps to preserve laptops and cell phones that likely had relevant and material records on them.

[136] Capstick appears to have simply assumed Deacon or others gathered everything required, and generally did not appear to be aware of what exactly Cormode had produced or from where it was gathered. He did not provide any evidence to explain what, if anything, he did to ensure he could truthfully swear Cormode's affidavits of records (as he was required to do under rule 5.9(1)(b)).

[137] I also have concerns about what steps some of the Cormode Personnel took to ensure they could truthfully swear the Cormode AORs, but they were not questioned on their affidavit of records and no specific penalty relief was sought against them in the Application.

[138] Cormode's careless approach to records disclosure and production led to a breach of Cormode's discovery obligations, which has contributed to delay and increased expense. While perfection is not expected or required, litigants must use appropriate due diligence and take their discovery obligations seriously.

[139] In the Application, the Plaintiffs requested that the Court defer determining penalty quantum to a later hearing. That is not proportionate, or necessary, and will only further increase the parties' costs. Cormode had an opportunity to address the penalty request in the Application.

[140] I order a rule 10.49 penalty of $7,500 against Cormode. This amount is modest in the context of this litigation but hopefully will sufficiently put the parties and others on notice to deter a similar approach to records production in the future. As a gauge, it is also more than would be paid under rule 5.12 (which would be $4,050 in this case) which reflects the fact this was more serious than missing the deadline to provide an affidavit of records. The penalty shall be paid to the Clerk of the Court by August 16, 2024.

[141] I also have concerns regarding the Plaintiffs' lack of compliance with the *Rules* in respect of the Cormode discovery. Had these parties engaged in reasonable discovery planning and consultation, it is quite likely a significant portion of the Application would not have been required.

[142] The possibility of a rule 10.49 penalty against the Plaintiffs was not specifically addressed in the Application. The rule of *audi alteram partem* requires that a party be given adequate notice of the case against them, and provided a fair opportunity to respond: ***Kotyk (Re)*** at para 16. As I am raising the possibility of a penalty for the Plaintiffs under rule 10.49 on my own motion, I will give the Plaintiffs and the Cormode Defendants an opportunity to provide written submissions as whether a rule 10.49 penalty should be imposed on the Plaintiffs. Submissions should be no more than five pages (excluding attachments) and shall be provided to me within 30 days of this decision.

D. Should the Court Appoint a Substitute or Additional Corporate Representative for Cormode?

1. Legal Framework

[143] A corporation is a legal entity that can be a party to litigation, but it can only act through humans. This reality is contemplated by Part 5 questioning for discovery, which requires a human to be appointed as the "corporate representative" to give evidence on behalf of the corporation: rule 5.4(1). The evidence of the corporate representative is considered "evidence given by the corporation": rule 5.4(3).

[144] Absent a contrary court order, at first instance the corporation has the right and obligation to appoint the individual of its choice to be the corporate representative: rule 5.4(1); ***Apex Safety Apparel Inc v Kel-Tek Safety Apparel***, 2011 ABQB 406 at para 4; ***Geophysical Service Incorporated v Edison SPA***, 2024 ABKB 27 at Appendix B (Question at page 23).

[145] The Plaintiffs take issue with Cormode's appointment of Capstick as its corporate representative under rule 5.4(1). The Plaintiffs apply to have the Court replace Capstick with Elzen or Deacon as Cormode's corporate representative under rule 5.4(6).

[146] Rule 5.4(6) provides that the Court may intervene and appoint an additional or substitute corporate representative for a party that is a corporation if:

(a) an appointed corporate representative is not suitable, or

(b) an appointed corporate representative failed to inform himself or herself of relevant and material records and relevant and material information before being questioned.

[147] The policy behind judicial regulation of appointed corporate representatives is to ensure that the purposes of the discovery rules are not undermined: ***Cana Construction Co Ltd v Calgary Centre for Performing Arts***, 1986 ABCA 175 at para 5. In modern times, that includes the purposes set out in rules 1.2 and 5.1 as discussed earlier in these Reasons.

[148] In my view, the reference to "being questioned" in rule 5.4(6)(b) is a reference to the questioning for discovery of the corporate representative in rules 5.4(2)-(3) and rule 5.17(b)(ii), not the cross-examination on an affidavit of records as permitted under rule 5.11(2)(b). However, the evidence from the cross-examination on affidavit of records may be used as evidence of the suitability of the corporate representative under rule 5.4(6)(a). As Capstick has not yet been questioned for discovery under Division 1 of Part 5 of the *Rules*, the Plaintiffs must establish that Capstick is "not suitable" to be Cormode's corporate representative.

[149] The Court's power to override the corporation's choice of corporate representative based on unsuitability must be considered in the proper context.

[150] Since 1914, the practice of this Court (as endorsed by the Court of Appeal), has been that a corporation's choice of corporate representative will not be overturned lightly, but only in the "most exceptional cases": ***McDougall & Secord, Limited v Merchants Bank of Canada***, 1919 CanLII 627 (AB KB), 14 Alta LR 564 at 571; ***Damiani v Anderson***, 1977 ALTASCAD 86 at para 12; ***Cana Construction*** at para 5; ***Leeds v Alberta (Environment)***, 1989 ABCA 208 at para 29; ***Wesley First Nation (Stoney Nakoda First Nation) v Alberta***, 2013 ABQB 344 at para 113 aff'd 2015 ABCA 76; ***Apex Safety Apparel Inc v Kel-Tek Safety Apparel***, 2011 ABQB 406 at para 4; ***Martin v Northwest Territories Power Corporation***, 2000 NWTSC 17 at para 12.

[151] In my view, there are good reasons for this practice, including:

(a) the corporate representative role is critical and substantive. Their evidence has the serious consequence of being binding admissions of the corporation which can then be read-in against the corporation in interlocutory applications and trial: rule 5.31; ***Cana Construction*** at para 5; ***Damiani*** at para 5; ***Apex Safety*** at para 4; ***Kudzin v APM Construction Services Inc***, 2023 ABKB 425 at para 41. A corporation may consider a number of factors in deciding who is best suited to bind it in litigation, including knowledge of relevant and material records and information, authority or desirability to bind the corporation, availability to take on the role, internal resource allocation, oral testimony skills, ability or power to direct others in the corporation to assist in finding answers to questions, and knowledge of corporate management structure and decision-making, to name a few;

(b) at common law, courts generally do not interfere with corporate decision-making pursuant to the business judgment rule: ***JBRO Holdings Inc v Dynasty Power Inc***, 2022 ABCA 140 at para 46, citing ***Peoples Department Stores Inc (Trustee of) v Wise***, 2004 SCC 68, paras 64-65. In my view, the same principle applies (if

necessary by analogy) to its decision about who should bind the corporation and speak on its behalf in litigation: and

(c) courts do not generally manage parties' litigation strategies or dictate how or by whom they present their evidence. Imposing who will speak for and bind a corporate litigant is a significant step, and one that is not available against human litigants (who can also be inefficient, difficult or expensive to question). Courts should consider whether they are creating an unlevel playing field or advantage on substantive evidentiary matters in the name of procedural efficiency and, if so, whether doing so is reasonably justified balancing any competing considerations.

[152] The *Rules* do not define when a corporate representative is "unsuitable". Factors relevant to unsuitability, and the Court's exercise of discretion under rule 5.4(6), include:

(a) whether the choice of corporate representative was made unreasonably, dishonestly or not in good faith or *bona fide*: ***McDougall*** at 570; ***Apex Safety*** at para 5; ***Damiani*** at para 14; ***Leeds*** at para 29; ***Wesley First Nation (Stoney Nakoda First Nation)*** at para 113;

(b) whether it would be inefficient, difficult or expensive to question the corporate representative: ***Damiani*** at para 12; ***Apex Safety*** at paras 4-5; ***Austec Electronic Systems Ltd v Mark IV Industries Ltd***, 2000 ABQB 273 at paras 8-12. This may include the individual's personal knowledge (as someone with limited personal knowledge will likely have to give numerous undertakings), physical location, or other factors. In my view, proving inefficiency, difficulty and expense does not necessarily mean courts should intervene, but rather is one of several important considerations;

(c) whether the corporate representative is reasonably available and physically able to perform the important corporate representative function, namely to:

(i) inform themselves of relevant and material records and relevant and material information of the corporation as required by rule 5.4(2): ***CNOOC Petroleum North America ULC v ITP SA***, 2022 ABKB 683 at para 153. This duty requires, in my view, that the corporate representative must take reasonable steps in the circumstances to be fully informed and prepared for questioning, subject to proportionality considerations and the practical reality that no corporate representative is expected to be able to personally answer every proper question adverse parties might pose: rule 5.25(3); rule 5.30; ***Apex Safety*** at paras 7-9; ***Kent v Martin***, 2012 ABQB 467 at paras 9, 20; ***Wesley First Nation (Stone Nakoda First Nation)*** at para 112;

(ii) be questioned and give "appropriate evidence of the relevant and material records and relevant and material information": rules 5.4(2)(b)-(c), 5.17(b)(ii); ***Wesley First Nation (Stone Nakoda First Nation)*** at para 114;

(iii) marshal responses to undertakings, make appropriate inquiries, and provide answers to those questions within a "reasonable time": rule 5.30; ***GO Community Centre*** at para 192-194;

(iv) if written questions are used, to respond to written questions, to respond to follow-up written questions, or to respond to follow-up oral questions: rule 5.28; ***XS Technologies Inc v Veritas DGC Land Ltd***, 2016 ABCA 165 at para 20; ***CNOOC v 801 Seventh*** at para 28; and

(v) review the evidence of corporate witnesses and, under oath, acknowledge some or all of the evidence of the corporate witness and, if the corporate representative disbelieves or disagrees with some or all of the evidence of a corporate witness, to provide further evidence that is contrary to or inconsistent with the corporate witness's evidence: rule 5.29: ***XS Technologies*** at paras 21-23; ***AMEC Americas Limited v Attila Dogan Construction and Installation Co Inc***, 2015 ABQB 366 at para 32;

(d) whether inefficiencies or expense associated with the corporation's preferred representative can be addressed as a matter of costs; and

(e) whether another person is suitable to fulfil the corporate representative function. The "suitability" of the corporation's preferred representative must be considered in the context of whether there are other suitable proposed options.

[153] Factors relevant to the suitability of a proposed replacement or additional corporate representative include whether the proposed individual:

(a) is reasonably available and physically able to take on the role, more efficiently and at less expense than the appointed corporate representative;

(b) is in the control of the corporation: ***McDougall*** at 570-571; ***Giovanetto v Abacus Oil & Gas Ltd***, 1981 ABCA 331 at 3; ***Western Canadian Place Ltd v Con-Force Products Ltd***, 1998 ABQB 486 at para 5. It would be unusual for the "Court to choose, against the company's will, a person who has no existing relationship to it simply on the basis of his past office and past knowledge" (***Giovanetto*** at para 3), or to compel a corporation to accept an "unwilling non-employee" as its representative (***Western Canadian Place*** at para 7);

(c) is in a conflict of interest with the corporation, including (without limitation) if they are adverse to the corporation, or they have a reasonable potential to become adverse to the corporation, in the action or other litigation: ***McDougall*** at 570; ***The Pelican Oil & Gas Company v The Northern Alberta Natural Gas and Development Company***, 1918 CanLII 593 (AB CA), [1918] WWR 957 at 964; ***Martin*** at para 13, citing ***Gibson v Bagnall***, 1978 CanLII 1572 (ON SC); and

(d) is willing to take on the role: ***Western Canadian Place*** at para 7. In my view, it would be unusual for the Court to effectively order a mandatory injunction against an individual who has a reasonable basis for being unwilling to take on the role.

[154] Based on the above framework, I turn to the Plaintiff's Application.

2. Application of the Legal Framework

[155] Simply put, I am not satisfied that it is appropriate to grant the Plaintiffs' requested relief.

[156] Capstick's shortfalls in respect of records disclosure have been addressed earlier and, while relevant, they are not determinative of the question of whether he should remain Cormode's corporate representative.

[157] The issues in the Action are wide-ranging and the Plaintiffs have argued that information about the entire Project is relevant and material. There is no person that can address all matters and significant undertakings will likely be required regardless of who is the corporate representative. (The parties might consider reaching agreement on the use of written questions to increase efficiency).

[158] The Plaintiffs' main concern expressed in oral argument was anticipated future problems with having Capstick fulfil his duties under rule 5.29 with respect to acknowledging other corporate witness evidence (or providing further contrary or inconsistent evidence). Again, given the scope of the claim this will be a challenging role for any corporate representative, and it is likely the assistance of others will be required in any event. I am not satisfied it will make a significant difference if the representative is Capstick or someone else. In any event, this is a premature concern and can be addressed by case management application if problems arise at that point in the litigation. (A practical and efficient approach to rule 5.29 might involve the adverse party identifying those portions of the corporate witness transcripts that they seek to have the corporate representative acknowledge or otherwise respond to.)

[159] Further, and in any event, I am optimistic that, with the guidance of these Reasons about his role as corporate representative, guidance from Cormode's experienced counsel, and Capstick's awareness of the possibility of penalties under rule 10.49 (including, potentially, personal sanctions as an "other person" under rule 10.49), Capstick will ensure he properly performs his corporate representative function.

[160] Another factor is the lack of an identified suitable alternative to Capstick. Cormode is inactive and may only exist for the purposes of this litigation. It has limited ability to control or enlist others to be its corporate representative. Only Deacon, Elzen and Capstick currently work for Cormode.

[161] Deacon is 69 years-old and semi-retired. Elzen is 66 years-old and has not been involved in records production or attending questioning. Capstick has already attended over 30 days of questioning. It is not clear to me that it would be significantly more efficient for Deacon or Elzen to be Cormode's corporate representative, including for the reasons noted above. Further, Capstick and Cormode may enlist whomever they wish to assist Capstick in fulfilling his corporate representative duties, including Elzen and Deacon.

[162] While Elzen and Deacon have not outright refused to be corporate representative, the evidence is that they do not desire to take on the role. They both remain parties as defendants, and there is a prospect that, at some point, they may find themselves adverse to Cormode in respect of

the Project fallout. In my view, it would not be fair or appropriate that they be compelled to be Cormode's corporate representative. Capstick does not have the same limitation as he is not a party.

[163] On balance, the Plaintiffs have not persuaded me it is appropriate to compel a change to Cormode's corporate representative and that aspect of the Application is dismissed.

VI. Conclusion

[164] In conclusion, on the specific terms described in these Reasons, the Court makes the orders summarized above at paragraph [3] of these Reasons.

[165] If the parties cannot agree on costs of the Application within 30 days of this decision, then the following process shall apply:

(a) within four weeks of this decision, the Plaintiffs shall file and serve on the Cormode Defendants and submit to my office a written cost submission setting out their costs position;

(b) within six weeks of this decision, Cormode Defendants shall file and serve on the opposing party and submit to my office their response submission to the Plaintiffs' cost submission; and

(c) each party's costs submission shall provide: (a) their position with respect to the factors set out in rule 10.33; (b) any pre-decision formal offer or other settlement offer they wish considered; (c) a draft proposed bill of costs pursuant to Schedule C of the *Rules*; (d) a summary of their proposed reasonable and proper costs that the party incurred in respect of the action. These submissions will be a maximum of three pages in letter format, single spaced (excluding authorities, offers, or proposed bills of costs).

Heard on the 24th day of April, 2024.
Dated at the City of Calgary, Alberta this 15th day of July, 2024.

M.A. Marion
J.C.K.B.A.

Appearances:

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for the Plaintiffs/Applicants

Paul Beke
for the Cormode Defendants/Respondents