Court of King's Bench of Alberta

Citation: Astolfi v Stone Creek Resorts Inc., 2025 ABKB 139

Date: 20250307
Docket: 1801 05350
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2025 ABKB 139 (CanLII)

Between:

Jon Astolfi

Plaintiff/Applicant

\- and -

Stone Creek Resorts Inc.

Defendant/Respondent

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

I. Introduction

[1] In this case managed action, the Plaintiff/Applicant (**Astolfi**) applies (**Application**), under rule 10.52 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*), for a declaration that the Defendant/Respondent, Stone Creek Resorts Inc (**Stone Creek**) is in civil contempt for non-compliance with a November 16, 2022 order (**Mason Order**) of Applications Judge Mason (**Mason AJ**). He also seeks confirmation of Stone Creek's obligations under the Mason Order and/or under rule 5.14 and costs.

[2] Some of the email records disclosed and produced by Stone Creek in this action in 2018 appear to have been corrupted in some fashion because they had date or time stamp errors in certain emails (**Date/Time Issue**). The Mason Order directed Astolfi to write to Stone Creek's legal counsel, Bennett Jones LLP (**Bennett Jones**) to identify which Stone Creek produced records Astolfi sought to be produced in "original electronic format" (**Identified Records**) and directed Stone Creek to provide a memory stick to Astolfi with a copy of the electronic Identified Records "in the form they exist in the Defendant's data base".

[3] Astolfi argues that Stone Creek intentionally failed to comply with the Mason Order. Stone Creek opposes the Application on the basis that it complied with and is not in contempt of the

Mason Order, that Astolfi now has the Identified Records, a way to review the Identified Records without the Date/Time Issue and, in any event, has since been provided the corrected date/time information for the Identified Records. Stone Creek asserts, in any event, that the specific date/time information on the Identified Records is not relevant and material to the issues in the action. Stone Creek seeks a significant solicitor-client costs award against Astolfi.

[4] For the reasons set out below, the Application is dismissed.

II. Procedural Background

[5] Some history is in ***Astolfi v Stone Creek Resorts Inc***, 2023 ABKB 416 at paras 5-28.

[6] Initial pleadings and affidavits of records in this action were exchanged in 2018. Later, among other things, Astolfi questioned Stone Creek's corporate representative (**Turcotte**).

[7] On October 17, 2022, Astolfi filed an application (**October 2022 Application**) for an order under rule 5.14 to inspect certain Stone Creek produced records *in specie*, compelling Stone Creek to amend its affidavit of records under rule 5.11(1)(a), and compelling Stone Creek to answer undertakings under rule 5.30(b). One of the issues Astolfi raised was the Date/Time Issue.

[8] On November 16, 2022, Mason AJ granted the Mason Order. It did not specifically address the relief sought regarding the affidavit of records or undertaking responses. There appears to be a dispute between the parties about whether these other matters were decided by Mason AJ or not. I have not been asked to, and need not make, any findings about that in this Application. The parties neither appealed the Mason Order nor applied to clarify its terms.

[9] On November 20, 2022, Astolfi wrote to Stone Creek's counsel providing his list of Identified Records, which included about 60 emails and some email attachments.

[10] On December 28 or 29, 2022, Bennett Jones delivered to Astolfi a USB thumb drive (**USB**) with electronic records on it (**USB Records**).

[11] On March 2, 2023, Astolfi filed the Application. On March 20, 2023, the Court adjourned the Application pending questioning of Astolfi on his affidavit (which occurred on April 12, 2023).

[12] On July 18, 2023, the Court adjourned the matter to August 9, 2023, for a procedural hearing about the Application.

[13] On August 8, 2023, I was appointed case management justice for this action. On October 16, 2023, we had our first case management meeting.

[14] On October 23, 2023, I provided a procedural direction for the Application. The Application was later scheduled for January 15, 2024.

[15] On November 24, 2023, I directed Astolfi to immediately advise as to "what he asserts (if anything) is corrupted in the electronic documents he has received thus far from Stone Creek (if he is able to do so)". Shortly thereafter, Astolfi provided Bennett Jones a list of records with his "asserted corruptness categorization", almost all of which related to the Date/Time Issue.

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[16] On December 6, 2023, I provided new procedural directions and the Application was rescheduled for February 22, 2024.

[17] In January 2024, after Turcotte was questioned on his affidavit in response to the Application in December 2023, Stone Creek late-filed an affidavit of Amara Depalme (**Depalme**). Astolfi then sought an adjournment of the Application so he could consider Depalme's evidence.

[18] On February 6, 2024, I adjourned the Application and directed Astolfi to advise whether he intended to proceed with the Application by February 21, 2024. He did that.

[19] On March 19, 2024, I provided new procedural directions. On June 4, 2024, I directed the scheduling of the Application and set deadlines for briefs. The Application was scheduled for a half-day special application hearing (**Hearing**) on February 5, 2025.

[20] On December 23, 2024, Astolfi applied to compel answers to undertakings and to answer refused questions in relation to the Application. On January 13, 2025, by way of Endorsement, I granted part of Astolfi's application and dismissed the rest. A copy of my Endorsement is attached as Schedule A to these Reasons.

[21] The Hearing proceeded on February 5, 2025. I reserved my decision.

III. The Record

[22] The significant record on this Application is comprised of:

(a) an October 17, 2022 Astolfi affidavit;

(b) a November 14, 2022 Astolfi affidavit;

(c) a March 2, 2023 Astolfi affidavit;

(d) a March 17, 2023 transcript of proceedings from the scheduled questioning of Astolfi;

(e) an April 12, 2023 transcript of questioning of Astolfi on his March 2, 2023 affidavit, together with marked exhibits and undertaking responses;

(f) a December 5, 2023 Turcotte affidavit;

(g) a December 5, 2023 Astolfi affidavit;

(h) a December 19, 2023 transcript of questioning of Turcotte on his December 5, 2023 affidavit, together with marked exhibits;

(i) a January 3, 2024 Astolfi affidavit;

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(j) a January 23, 2024 transcript of questioning of Astolfi on his December 5, 2023 affidavit, together with marked exhibits;[1]

(k) a January 31, 2024 Depalme affidavit;

(l) an April 2, 2024 Astolfi affidavit;

(m) an April 23, 2024 transcript of questioning of Astolfi on his April 2, 2024 affidavit;[2]

(n) a June 5, 2024 Depalme affidavit;

(o) a September 4, 2024 transcript of questioning of Depalme on her January 31 and June 5, 2024 affidavits, together with undertaking responses answered or directed to be answered;

(p) a December 9, 2024 transcript of questioning of Depalme on her undertakings given at her September 4, 2024 questioning, together with marked exhibits and answered or directed to be answered undertakings; and

(q) a January 21, 2025 Astolfi affidavit.

IV. Issues

[23] The issues in this application are:

(a) should the Court declare Stone Creek in contempt of the Mason Order pursuant to rule 10.52?

(b) should the Court reconfirm or enforce the Mason Order, or grant a new order?

V. Analysis

A. Should the Court Declare Stone Creek in Contempt of the Mason Order Pursuant to Rule 10.52?

1. Legal Framework for Civil Contempt under Rule 10.52

[24] Civil contempt has two goals: securing compliance with court orders and protecting the integrity of the administration of justice by upholding the Court's authority and respect for the law: ***Carey v Laiken***, 2015 SCC 17 at para 40; ***Reddy v Saroya***, 2024 ABKB 478 at para 41; ***ID v DB***,

[1] Exhibit 2 to this questioning was a printed hard copy binder of the USB Records, a copy of the contents of which were before me in the Hearing. However, it is not clear that Exhibit 2 has been filed with the Court – Stone Creek is directed to confirm with the Clerk's office whether the hard copy of this exhibit has been filed and, if not, to ensure it is filed.

[2] The undertaking responses arising from this transcript where before me in the Hearing but do not appear to have been filed with the transcript – Stone Creek is directed to confirm with the Clerk's office whether they have been filed and, if not, to ensure they are filed.

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2022 ABKB 831 at para 91; ***Recycling Worx Solutions Inc v Hunter***, 2018 ABQB 395 at paras 123 and 129; ***Storage Capital (2) LP v 1288314 Alberta Ltd***, 2018 ABQB 292 at para 31.

[25] At common law, civil contempt requires proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor had notice: ***Carey*** at paras 32-36, 38; ***JLZ v CMZ***, 2021 ABCA 200 at para 34; ***Demb v Valhalla Group Ltd***, 2016 ABCA 172 [***Valhalla Group CA***] at para 42.

[26] The relevant portions of rule 10.52 provide:

> (3) A judge may declare a person to be in civil contempt of Court if
>
> (a) the person, without reasonable excuse,
>
> (i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge, [...]

[27] Rule 10.52(3) codifies the requirement for civil contempt in similar words, but makes express the requirement that the breach of an order must be without reasonable excuse: ***TC v MH***, 2024 ABKB 447 at para 83; ***Uhryn v Uhryn***, 2024 ABKB 407 at para 29; ***Martineau v Henry Espina***, 2023 ABKB 664 at para 12; ***Ripley v Ripley***, 2022 ABQB 295 at para 48; ***MYW v DTW***, 2024 ABKB 231 at paras 17-18; ***Holden (Village) v Sen***, 2019 ABQB 472 at para 15. Courts are required to look at reasonable excuse as an aspect of the test for finding contempt, including under rule 10.52: ***Envacon Inc v 829693 Alberta Ltd***, 2018 ABCA 313 at para 36.

[28] The Court of Appeal has applied the three elements of civil contempt from ***Carey*** to rule 10.52(3)(a)(i), as follows: (i) the order must state clearly and unequivocally what should be done (or not done); (ii) the alleged contemnor must have actual notice of the order; and (iii) the alleged contemnor must have intentionally failed to do the act compelled by the order: ***Envacon*** at para 8; ***Balanko v Konkolus***, 2024 ABCA 363 at para 5; ***Alston v Foothills No 31 (District of)***, 2022 ABCA 408 [***Alston CA***] at para 7; ***Koch v Koch***, 2017 ABCA 310 at para 14. See also ***ID*** at para 93; ***Martineau*** at para 13; ***Kelana Holdings Ltd v 393510 Alberta Ltd***, 2023 ABKB 486 at para 83; ***Demb v Taylor***, 2017 ABQB 257 at para 13 [***Demb***]; ***Questor Technology Inc v Stagg***, 2024 ABKB 377 at para 34; ***Carnwell v Carnwell***, 2024 ABKB 318 at para 31; ***Kamal v Brandon***, 2021 ABQB 819 at para 27.

[29] The applicant bears the persuasive burden throughout (including with respect to proving an absence of a reasonable excuse), on the "beyond a reasonable doubt" standard due to civil contempt's quasi-criminal nature: ***Carey*** at paras 32, 42; ***Law Society of Alberta v Beaver***, 2021 ABCA 163 at para 25; ***Envacon*** at paras 42, 48-49; ***DC v NBC***, 2024 ABKB 444 at para 54; ***Holden (Village)*** at paras 17, 19; ***Norris v Norris***, 2024 ABKB 21 at para 279; ***Potts v Marschlik***, 2023 ABKB 362 at para 143; ***Questor Technology*** at para 69.

[30] A reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence: ***R v Lifchus***, 1997 CanLII 319 at para 30; ***Questor Technology*** at para 62; ***Recycling Worx*** at para 58. Reasonable doubt does not require proof to an

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absolute certainty: ***R v Villaroman***, 2016 SCC 33 at para 28. On the other hand, reasonable doubt is not "any" doubt, "imaginary" doubt, or "frivolous" doubt: ***Villaroman*** at para 28; ***R v Eide***, 2019 ABQB 83, aff'd 2021 ABCA 70, at paras 4, 61. Ultimately, reasonable doubt is a significant hurdle and falls much closer to absolute certainty than to proof on a balance of probabilities: ***R v Starr***, 2000 SCC 40 at para 242; ***Alston v the Municipal District of Foothills No 31***, 2021 ABQB 951, aff'd ***Alston CA*** [***Alston QB***] at para 10.

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[31] If an applicant seeks to prove civil contempt beyond a reasonable doubt based on circumstantial evidence and inferences, the circumstantial evidence, assessed considering human experience, should be such that it excludes any other reasonable alternative: ***Villaroman*** at para 41. However, alternative inferences must be reasonable, not just possible, and the applicant is not required to show that guilt is the only possible or conceivable inference: ***Villaroman*** at para 42; ***R v Vernelus***, 2022 SCC 53 at para 5; ***R v Cardinal, Joey,*** 2024 ABCA 200 at para 6; ***Morasse v Nadeau-Dubois***, 2016 SCC 44 at para 105; ***Questor Technology*** at paras 64-66.

[32] A finding of civil contempt is a final disposition, so should not be based on hearsay evidence (subject to valid hearsay exceptions): ***Kulyk v Wigmore***, 1987 ABCA 127 (CanLII) at para 3; ***Tornqvist v Shenner***, 2022 ABCA 133 at para 28; ***Questor Technology*** at para 60; ***Fitzpatrick v Fitzpatrick***, 2022 ABKB 862 at para 32; ***Porter v Anytime Custom Mechanical Ltd***, 2016 ABQB 322 at para 21; ***Recycling Worx*** at para 62. The supporting evidence must conform to the trial rules of admissibility: ***Questor Technology*** at para 60, citing ***Northwest Clean Air Company Inc v Harbour Stainless Ltd***, 2009 BCSC 1496 at para 4.

[33] Civil contempt is largely concerned with ensuring compliance. It is generally seen "primarily as coercive rather than punitive", and a remedy of last resort to be used "cautiously and with great restraint": ***Carey*** at paras 30, 31, 36; ***Koch*** at para 14; ***Morasse*** at para 21; ***JLZ*** at para 43; ***Lymer v Jonsson***, 2018 ABCA 36 at para 36; ***Ripley*** at para 49.

[34] Even where the necessary elements of contempt are established, the Court has discretion to refuse to declare a party in contempt (including due to its serious consequences): ***Carey*** at paras 36-37; ***Martineau*** at para 17; ***DC*** at para 71; ***Norris*** at paras 276-277; ***Questor Technology*** at para 70; ***Laurin v Paterson***, 2011 ABQB 521 at para 81; ***Broda v Broda***, 2004 ABCA 73 at para 12; ***Alston QB*** at para 14; ***Kamal*** at para 35; ***Recycling Worx*** at paras 57(d) and (e).

2. Does the Mason Order State Clearly and Unequivocally What Stone Creek was To do?

[35] As noted, the Mason Order must state clearly and unequivocally what should and should not be done: ***Carey*** at para 33. The requirement of clarity ensures that a party will not be found in contempt where an order is unclear: ***Carey*** at para 33; ***Pro Swing Inc v Elta Golf Inc***, 2006 SCC 52 at para 24; ***Alberta Health Services v Pawlowski***, 2022 ABCA 254 at para 48 [***Pawlowski***].

[36] Put another way, the order must be sufficiently clear and unambiguous: ***Pawlowski*** at para 51; ***DC*** at para 49; ***BDM v MMM***, 2020 ABQB 288 at para 97. The alleged contemnor is entitled to the most favourable interpretation: ***DC*** at para 49; ***Fitzpatrick*** at para 31; ***Alberta Health Services v Johnston***, 2021 ABQB 508 at para 51; ***BDM*** at para 97; ***Porter v Anytime Custom Mechanical Ltd***, 2016 ABQB 322 at para 20; ***Richter v Chemerinski***, 2014 ABQB 322 at para

27, citing ***Workers' Compensation Board of British Columbia v Moore***, 2011 BCCA 407 at para 6 and ***Gurtins v Goyert***, 2008 BCCA 196 at para 14; ***Capital Estate Planning Corporation v Lynch***, 2004 ABQB 727 at para 24.

[37] An order may be found to be unclear if it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: ***Carey*** at para 33; ***Pawlowski*** at para 48; ***Culligan Ltd v Fettes***, 2010 SKCA 151 at para 21. Further, breach of alleged implied terms or an alleged unexpressed "spirit" of an order will not normally be sufficient to find contempt: ***DC*** at para 50; ***Martineau*** at para 76; ***Fitzpatrick*** at para 31; ***BDM*** at paras 99-100; ***Richter*** at para 29; ***1199918 Alberta Ltd v TRL Holdings Inc***, 2011 ABQB 506 at para 58; ***Gurtins*** at para 16.

[38] The interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made: ***Pawlowski*** at para 51, citing ***Yu v Jordan***, 2012 BCCA 367 at para 53; ***Davis v Davis***, 2023 ABKB 652 at para 59; ***Twinn v Trustee Act***, 2022 ABQB 107 at para 111, rev'd on other grounds 2022 ABCA 368; ***Hartson v Park Paving Ltd***, 2021 ABQB 742 at para 31. Rather, a court order should be interpreted as a holistic document, by reading the language of the order as a whole, in the context of the pleadings, the arguments made by the parties, the factual and legal context or circumstances in which the order was granted, and the intention of the court granting the order: ***Lay v Lay***, 2024 ABCA 26 at para 10; ***Kantor v Kantor***, 2023 ABCA 237 at para 23; ***Weinrich Contracting Ltd v Wiebe***, 2022 ABCA 176 at para 25; ***Pawlowski*** at para 51.

[39] However, when an order is granted *ex parte*, its clarity must be determined on the face of the order and without reference to matters unknown to the person subject to the order (such as discussions occurring at the time the order was granted): ***Pawlowski*** at para 48; ***DC*** at para 49; ***Gurtins*** at para 15; ***Richter*** at para 27.

[40] The Mason Order was granted on notice and with the involvement of both parties. I find that the context to the Mason Order included:

(a) by early 2022, the parties disputed how and when this action should move forward, each alleging deficiencies in, among other things, records production or undertakings;

(b) in March 2022, one of the issues Astolfi re-raised was the previously flagged Date/Time Issue, which was noted in 2018 or 2019 and manifested during questioning. In April 2022, Astolfi noted "you will find a substantial number of them are falsely claiming to have taken place within seconds of each other, which grossly distorts the accuracy of events";

(c) Stone Creek did not immediately respond to the Date/Time Issue, and Astolfi followed up again more than once in April and May 2022;

(d) by October 6, 2022, the Date/Time Issue had not been materially addressed by Stone Creek, so Astolfi put Stone Creek on notice that he would apply under rule 5.11 for relief; and

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(e) on October 17, 2022, Astolfi filed the October 2022 Application. He filed two affidavits, both of which detailed his desire for an order allowing him to inspect Stone Creek's allegedly "erroneous records" (which included a reference to the Date/Time Issue). In an October 24, 2022 conversation, Stone Creek's counsel at Bennett Jones (**Counsel**) asserted to Astolfi that Stone Creek's records were "complete" and that Astolfi was not going be permitted to examine Stone Creek's records absent a court order.

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[41] The October 2022 Application was adjourned and then heard on November 16, 2022. The Mason Order provides (emphasis added):

- by November 21, 2022 [Astolfi] will provide written correspondence to counsel for [Stone Creek] outlining and identifying each record from [Stone Creek's] Affidavit of Records by production number which [Astolfi] **seeks to have produced in its original electronic format**. To be clear, since [Astolfi] is self-represented, this is not an Order for further production but is **an Order for the production of currently produced records in another form**;

- by December 31, 2022, [Stone Creek] shall provide a memory stick to [Astolfi] which contains a copy of the subject electronic records in question **in the form they exist in [Stone Creek's] data base**.

[42] A transcript of the attendance before Mason AJ exists but was not in evidence before me. I explained the legal framework applicable to the Court's interpretation of orders and gave Astolfi the opportunity to seek leave to adduce the transcript as evidence. He chose not to. The parties agreed I should proceed without the transcript.

[43] On November 20, 2022, Astolfi wrote to Bennett Jones and provided his list of Identified Records. This was done before he had been provided the entered Mason Order (which was filed on December 2, 2022), and so it is some evidence of his understanding based on the attendance before Mason, before a dispute about compliance with the Mason Order arose. While not governing, post-order evidence may be relevant to interpreting an order in some circumstances.

[44] Astolfi's letter sought the Identified Records "***in specie*** **including its actual electronic form, as follows...using the most native (authored) file format of the record**, including but not limited to EML, DOCX, PDF, DWG..." (emphasis added).

[45] Astolfi also deposed that Mason AJ articulated that the requested records were to be "live from the [Defendant's] computer system" and that Bennett Jones stated at the Hearing the Court's direction was to "recreate what we have already produced".[3] Astolfi was not specifically questioned on this evidence.

[46] On December 14, 2022, Counsel emailed Turcotte and asked him how he was "doing on collecting the electronic version of your [affidavit of records]". Again, this is some evidence of Stone Creek's understanding of the Mason Order before a dispute about compliance arose.

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[3] Astolfi March 2, 2023 affidavit at paras 15-16.

[47] In my view, read in context, the Mason Order was plain and unambiguous. It required Stone Creek to produce the Identified Records from the Stone Creek affidavit of records in original electronic format (i.e. in original digital format, which is often referred to as "native" format: ***H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd***, 2024 ABKB 424 at para 37(i)), as they existed in Stone Creek's "data base".

[48] I find that the reference the Identified Records being in Stone Creek's "data base" was a reference to the Identified Records from Stone Creek's affidavit of records, but as they then existed electronically in Stone Creek's systems. This appears to align with both sides' understanding of the Mason Order before the issue of non-compliance arose.

[49] In my view, the Mason Order was a pragmatic and proportionate response to the problem presented, which aligned with rule 5.14 and related jurisprudence: ***H2 Canmore*** at paras 48-63.

[50] It is also important to note what the Mason Order did not require. I find that the Mason Order did not require Stone Creek to go search for and produce new emails, to take steps to investigate or correct any errors or corruption that may have existed in the original electronic format records, to explain to Astolfi exactly what it did to comply, or to take steps to unarchive any archived electronic records it may have had in its possession on back-up tapes or otherwise.[4] This was a simple order requiring production of original electronic format records from Stone Creek's affidavit of records as they were then in its possession in its current systems.

3. Did Stone Creek Have Actual Knowledge of the Mason Order?

[51] As noted, Astolfi must prove beyond a reasonable doubt that Stone Creek had actual knowledge of the Mason Order: ***Carey*** at para 34; ***Pintea v Johns***, 2017 SCC 23 at paras 1-2. Actual knowledge may be inferred based on the circumstances (including, potentially, that a solicitor was informed) or through the application of the wilful blindness doctrine: ***Carey*** at para 34; ***Koch*** at para 14; ***DC*** at para 51; ***Recycling Worx*** at para 59, citing ***Bhatnager v Canada (Minister of Employment and Immigration)***, 1990 CanLII 120 (SCC), [1990] 2 SCR 217 at 226; ***Storage Capital*** at para 24.

[52] There is no dispute that Stone Creek, and Turcotte specifically, had actual knowledge of the Mason Order. Bennett Jones drafted the form of order. Turcotte did not deny knowing about it and deposed about his efforts to comply with it. In the circumstances, it can reasonably be inferred, and I find, that Astolfi has established beyond a reasonable doubt that Stone Creek had actual knowledge of the Mason Order.

4. Did Stone Creek Intentionally Fail to Comply with the Mason Order?

[53] This element of civil contempt is the core issue in this case.

a. Legal Framework

[54] To prove an alleged contemnor's intent does not require proof that they actually intended to breach the order (although that would suffice: ***DC*** at para 52). Contumacious intent (a desire to

[4] This latter point is informed by the contextual evidence that what was being discussed were "live" records.

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wilfully disobey the court or to interfere with the administration of justice) is not an essential element of civil contempt; it is not the intent to disobey the order that constitutes contempt, but the disobedience itself: ***Carey*** at para 38; ***Envacon*** at paras 35-36; ***Recycling Worx*** at para 57(b); ***Norris*** at para 274. All that is required to prove the *mens rea* of contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice: ***Carey*** at para 38; ***Bhatnager*** at 224-25; ***DC*** at para 52; ***Valhalla Group CA*** at para 42; ***Norris*** at para 274.

[55] However, as noted, courts are required to look at reasonable excuse as an aspect of the test for finding contempt, which may also go to the *actus reus* of civil contempt: ***Envacon*** at paras 36-37; ***Vavrek v Vavrek***, 2019 ABCA 325 at para 11.

[56] Courts have long held that a person to whom an order applies is required to make "all reasonable efforts to comply" or "sufficient degree of diligence to perform, or to have the act performed": ***Envacon*** at paras 19 and 41, citing ***Ouellet v BM***, 2010 ABCA 240 at para 34 and ***Michel v Lafrentz***, 1998 ABCA 231 at para 21; ***Reddy*** at para 274; ***067876 BC Ltd v Bennett Jones LLP***, 2022 ABQB 599 at para 29; ***CMZ v JLO***, 2024 ABKB 688 at para 31; ***Norris*** at para 275. Where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, or where an alleged contemnor "tries diligently to obey an order but fails", they might avoid a contempt finding: ***Carey*** at para 37; ***Envacon*** at para 38; ***DC*** at para 71; ***Questor Technology*** at para 68.

[57] In many cases, the moving party's burden of proof will be met by proving non-compliance with the order because, absent persuasive evidence to the contrary, the court would be entitled to infer "no reasonable excuse": ***Envacon*** at para 45; ***DC*** at para 55. While the burden does not shift to the alleged contemnor to prove a reasonable excuse, as a practical, common-sense matter, the alleged contemnor may be compelled to put forward countervailing evidence either to provide a reasonable excuse or to prove that they did what was required of the order: ***Envacon*** at paras 48-49; ***DC*** at para 55; ***Martineau*** at para 15.

b. Factual Findings

[58] Based on the admissible and undisputed evidentiary record, I make the following findings:

(a) in 2018, Stone Creek produced records to Bennett Jones for Stone Creek's affidavit of records. The production included original digital format records and hard copy records. Bennett Jones used software (called "Eclipse") to organize Stone Creek's records into a database of records (**Eclipse Database**). Stone Creek's original digital format records were uploaded into the Eclipse Database. At some point before records were produced to Astolfi and/or his counsel in 2018, Bennett Jones created "image" files (in PDF format) for the produced records from the original digital format records. Therefore, as of the time the Stone Creek affidavit of records was provided, the Eclipse Database included both Stone Creek's original digital format records as well as imaged records (including likely in both formats for the Identified Records at issue in this Application);

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(b) at least some of the Identified Records had the Date/Time Issue, which was brought to the attention of Bennett Jones and Stone Creek early in the litigation but was never materially addressed by them prior to the October 2022 Application;

(c) the Mason Order required Stone Creek to go back to its systems to locate original electronic versions of the Identified Records and to produce them electronically on a memory stick (or USB);

(d) in November and December 2022, Turcotte was personally engaged in locating the Identified Records in Stone Creek's systems. He was aware of and read the Mason Order, and was the person that worked to respond to the Mason Order;

(e) on December 14, 2022, Counsel followed up to see how Turcotte was doing on "collecting the electronic version" of Stone Creek's affidavit of records. Counsel was unavailable over the holiday season and instructed his legal assistant (**Marshall**) to "send Astolfi the electronic info when it comes in from [Turcotte]". Marshall was also away over the holiday season and advised Turcotte to send the materials to another Bennett Jones legal assistant (**Robertson**);

(f) between December 14, 2022 and December 22, 2022, Turcotte personally went through Stone Creek email records on two Stone Creek computers (his and the one previously used by Astolfi) to search for digital copies of the Identified Records;

(g) Stone Creek's email system had changed since 2018. Turcotte reviewed original format emails on the computers, but was not able to find or access all the Identified Records in their original electronic format. The specific reason for that is unclear. Turcotte did not consult an IT professional to assist him, nor did he attempt to unarchive any archived emails;

(h) on December 22, 2022, Turcotte emailed Robertson to advise her he had "now completed the information for this file. It is about 200MB", and asked how to get it to Robertson. That day, on Bennett Jones' instruction, Turcotte uploaded electronic records to Bennett Jones through a file sharing application (**Hubshare**);

(i) on December 23, 2022, Robertson shared a Hubshare link with Astolfi for him to access Stone Creek electronic records. Astolfi was able, with some difficulty, to access at least some of these records, but they related to Turcotte's undertaking responses from questioning and did not include the Identified Records. Astolfi reminded Robertson of the December 31, 2022 deadline under the Mason Order and re-attached his list of Identified Records;

(j) on December 28, 2022, Robertson emailed Astolfi and advised that she had "attached the requested native files" from the affidavit of records to a USB which she would courier to him by the end of the next day. Astolfi received the USB on December 29, 2022;

(k) on December 29, 2022, Astolfi reviewed the USB Records and advised Bennett Jones that the USB Records were not the required *in specie* Identified Records. He

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stated that "upon a cursory review of the contents, it appears the issue has not been resolved" because the USB Records continued to have the Date/Time Issue;

(l) on December 29, 2022, Robertson advised Astolfi, among other things, that Bennett Jones had spoken to its document production team and that the USB included "the native documents we have in our system". On December 30, 2022, Robertson advised Astolfi that the "documents sent to you yesterday were the native files that were obtained from your old computer when drafting the Affidavit of Records";

(m) on December 30, 2022, Astolfi suggested to Robertson that Stone Creek obtain advice from appropriate IT support experts. Robertson advised that Counsel would respond to Astolfi upon Counsel's return to the office;

(n) on January 10, 2023, Astolfi followed up with Bennett Jones seeking an update on Stone Creek's compliance with the Mason Order. He stated that "the records your office submitted on December 29, 2022 still contain erroneous information and can not be from the original source as required";

(o) on January 11, 2023, Counsel advised Astolfi, among other things, that "[w]e have provided you with the electronic form of records of the Affidavit of Records to the extent that they exist at this time" and that "our client advises that it has complied with the [Mason Order] to the extent possible given the state of the records"; and

(p) on March 2, 2023, Astolfi filed the Application.

c. Did Stone Creek Fail to Comply with the Mason Order due to an Intentional Act or Omission?

[59] In questioning, Astolfi admitted that the USB Records were an electronic form of the Identified Records. Therefore, the only issue is whether the USB Records were the original format electronic copies of the Identified Records from Stone Creek's database. Astolfi asserts they were not. Stone Creek asserts the USB Records included whatever electronic records were accessible in Stone Creek's systems.

[60] Evidence about the core issue of the USB Records' source was problematic: it included inadmissible hearsay and opinion, speculation, and bare assertions or conclusions, as discussed further below.

i. Turcotte's Evidence

[61] Turcotte provided evidence about what he did, and what he provided Bennett Jones, but he was unable to give evidence about what Robertson did to compile the USB Records. He could only testify about his belief of what was then provided to Astolfi, which he believed was a combination of records he had located in November or December 2022 and other records Bennett Jones already had (presumably in the Eclipse Database).

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ii. Astolfi's Evidence

[62] Astolfi asserts that the USB Records had the same Date/Time Issue as the Identified Records. He provided direct evidence of this phenomenon with examples of the emails. The issue was evident in the version of the USB Records he reviewed on his phone while being questioned on January 23, 2024. I find that at least some of the USB Records Astolfi was provided had the Date/Time Issue, at the very least when Astolfi viewed them. However, the provision of records with the Date/Time Issue does not necessarily mean that Astolfi has proven that Stone Creek failed to comply with the Mason Order, or that the USB Records were not obtained from Stone Creek's database. Again: the Mason Order did not require Stone Creek to fix records.

[63] Astolfi needs to prove that the USB Records did not originate from Stone Creek's then current systems. To do so, Astolfi deposed that the USB Records were a "regurgitation" of digital versions of the same erroneous records Stone Creek had previously submitted and which contain "the very same scrambled information" as those records produced in Stone Creek's 2018 affidavit of records. Astolfi deposed that he understands this would be "highly improbable to reproduce years later". Similar statements are found elsewhere in his evidence and argument. Astolfi argued that the USB Records were from the Eclipse Database, not Stone Creek's 2022 systems.

[64] Astolfi's understanding, belief or opinion about the source of the USB Records is not admissible evidence and, even if admissible, I give it little-to-no weight.

[65] Opinion evidence is presumptively inadmissible, subject to a few exceptions, including expert opinion evidence and lay opinion evidence: ***Kon Construction Ltd v Terranova Developments Ltd***, 2015 ABCA 249 at para 21.

[66] Astolfi is not an e-discovery, electronic records, or email systems expert. He does not qualify as a "litigant with expertise" as contemplated by the Court of Appeal in ***Kon Construction*** at para 35, and as I summarized in ***ATCO Energy Solutions Ltd v Energy Dynamics Ltd***, 2024 ABKB 162 at paras 240-243.

[67] Further, Astolfi's opinion does not meet the requirements for admissibility as lay opinion evidence from ***R v Graat***, 1982 CanLII 33 (SCC), [1982] 2 SCR 819, as summarized in ***ATCO Energy*** at para 244:

> [244] As recently explained…by Justice Feasby in [***O'Kane v Lillqvist-O'Kane***, 2021 ABQB 925] at para 10 (footnotes omitted):
>
>> [10] Following ***Graat***, leading texts have distilled four criteria for admitting lay evidence under the compendious statement of facts exception that have, in turn, been accepted by courts. Lay opinion evidence may only be accepted if:
>>
>> (1) the lay witness is in a better position than the trier of fact to form the conclusion;
>>
>> (2) the conclusion is one that persons of ordinary experience are able to make;

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> (3) the witness, although not expert, has the experiential capacity to make the conclusion; and
>
> (4) the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions.

[68] Astolfi's opinion about the nature of the USB Records fails (1), (2) and (4) from ***Graat***. Therefore, Astolfi's conclusory opinions about the nature or source of the USB Records are not admissible. However, his observations about what he was provided and his experience with them is admissible factual evidence.

[69] I note that Astolfi also provided hearsay evidence of a discussion he had with Robertson after the filing of his Application, when she was no longer employed by Bennett Jones. This is inadmissible hearsay evidence that does not meet the principled exception to hearsay, because it fails both the necessity and threshold reliability requirements (as per ***R v Charles***, 2024 SCC 29 at paras 43-47; ***R v Bradshaw***, 2017 SCC 35 at para 1; ***R v Denovan***, 2024 ABCA 246 at para 24). I have not given that evidence any weight.

iii. Counsel's Assertions

[70] On January 11, 2023, Counsel advised Astolfi that "we have provided you with the electronic form of the records of the Affidavit of Records to the extent that they exist at this time". This did not identify nature or source of the USB Records.

[71] At other times, Counsel interjected in Astolfi's questioning of Turcotte and Depalme to make statements about the nature and source of the USB Records. For example:

- Turcotte Questioning at pp 64-65: "Mr. Astolfi, for the record, we have provided you with two sets of electronic documents, the materials that were provided by Mr. Turcotte by way of Hubshare. You were given exactly the same access as Bennett Jones had. We also provided you with an electronic copy of everything that we had in the Bennett Jones database. You have received both..."

- Depalme Questioning at p 164: "In fact, we say that we've produced them pursuant to the Order. So, Mr. Astolfi, you've assumed a fact not in evidence...In December 2022, we were ordered to produce electronic records in native form. We say we have done that. You have them."

- Depalme Questioning at p 171: "We produced the records in that regard, Mr. Astolfi. It's Exhibit A to the Affidavit of Ms. Depalme sworn on June 5th 2024. If [sic] confirms precisely what occurred, and that is that Mr. Turcotte undertook a review of his records and sent the records that he found to the attention of Ms. Robertson, who in turn loaded them to a zip file and sent them to you...we have provided you with the records".

[72] Counsel's assertions are problematic, for several reasons.

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[73] First, absent consent (which was not provided by Astolfi) counsel cannot be a witness and advocate in the same proceeding on an important issue: ***Holden v Holden***, 2022 ABCA 341 at para 50 (footnote 37); ***RT v Alberta***, 2020 ABQB 655 at para 32; ***RM v JS***, 2013 ABCA 441 at para 28. Accordingly, counsel should not purport to give evidence in a cross-examination on an affidavit of a witness: ***Canalta Concrete Contractors v Camrose***, 1985 CanLII 1169 (ABQB) at paras 66, 71-72, and 74-75.

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[74] Second, Counsel did not swear an affidavit and was not sworn to give truthful evidence at the cross-examination. In any event, the record is clear he was not personally involved in the creation of the USB.

[75] Third, Counsel interrupted the flow of Astolfi's questioning of Stone Creek's witnesses with statements that were not otherwise in evidence. Counsel for a party being examined should not interfere with a cross-examination unless clearly necessary to resolve ambiguity or to prevent injustice, and should not do so in a way that suggests to the witness what the desirable answer might be: ***Kendall v Sun Life Assurance Company of Canada***, 2010 BCSC 1556 at para 12; ***570 Dunsmuir Holdings Ltd v Eggleton***, 2021 BCSC 1244 at paras 9-10; ***Shukla v Fenton***, 2021 ONSC 1340 at para 11. In my view, this is particularly important when dealing with a self-represented litigant who may be unaware of questioning protocols and practices.

[76] There was no affidavit from Robertson, or anyone else at Bennett Jones involved in the creation of the USB in December 2022, to explain what was actually done to create the USB Records or the source of the USB Records. As noted above, Turcotte could not speak to what was done by Bennett Jones, only what he believed was done.

[77] However, in Robertson's December 30, 2022 email to Astolfi she confirmed that the USB Records were from Bennett Jones' system and were "obtained from your old computer when drafting the Affidavit of Records", which clearly suggests the USB Records came from the Eclipse Database as created in 2018 and not from Turcotte's 2022 search of Stone Creek's computers.

[78] Counsel's factual assertions were not evidence, and I gave them no weight.

iv. Depalme's Evidence

[79] Depalme deposed about her belief that Stone Creek, to the extent it was able to do so, provided electronic records from its computer systems in 2022.[5] She advised of her belief that Stone Creek has "provide[d] proper native files to the Plaintiff".[6] She was more concrete in her evidence in questioning on her affidavit to the effect that the USB Records came from Stone Creek's systems in 2022.[7]

[80] Depalme's evidence is also problematic in some respects.

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[5] Depalme January 31, 2024 affidavit at para 6.
[6] Depalme January 31, 2024 affidavit at para 10.
[7] Transcript of Depalme questioning at p 20, 22, 52, 56, 213.

[81] First, Depalme was not employed by Bennett Jones at the time the USB was created and provided to Astolfi and was not involved in that process at all. In questioning, she acknowledged she could not actually say how the USB was created: “I don’t know what steps [Robertson] took”.[8]

[82] Second, Depalme based her conclusions, at least in part, on the “instruction”[9] and advice of Counsel. As noted above, Counsel was not directly involved in the creation of the USB and the basis for his instructions and advice to Depalme is not in evidence.

[83] Third, Depalme also relied on the “record” from the Bennett Jones files and her review of the USB Records themselves. She was able to locate Bennett Jones’ copy of the USB and the USB Records. She viewed them using a Microsoft Explorer preview pane and did not see any Date/Time Issues when viewed this way. She confirmed the “rest of the document was accurate”. This was permissible evidence.

[84] However, Depalme did not compare the 2022 USB Records to the 2018 original digital records (native) version of the Identified Records in the Eclipse Database because she did not have access to the latter. She was only able to and did compare the 2022 USB Records to the 2018 imaged (PDF) versions of the Identified Records. She identified the Date/Time Issue in the 2018 imaged (PDF) versions from the Eclipse Database, but was not able to give reliable evidence (other than speculation or based on her internet research) about why the problem existed in the first place.

[85] Fourth, while Depalme arguably may have had sufficient expertise to give an opinion about the nature of the USB Records based on her previous litigation support and e-discovery experience, she could only do so as a “witness with expertise”. In ***ATCO Energy***, I summarized the three categories of witness with expertise from ***Kon Construction***, at para 240:

> [240] In ***Kon Construction Ltd v Terranova Developments Ltd***, 2015 ABCA 249 at para 35 [***Kon Construction***], the Court of Appeal noted that there are at least three categories of “witnesses with expertise”:
>
> (a) Independent experts who are retained to provide opinions about issues in the litigation, but were not otherwise involved in the underlying events. This is the category of expert witness contemplated by [***White Burgess Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23] and [***R v Mohan***, 1994 CanLII 80 (SCC)].
>
> (b) Witnesses with expertise who were involved in the events underlying the litigation, but are not themselves litigants. An example is the family physician in a personal injury case who is called upon to testify about his or her observations of the plaintiff, and the treatment provided.

[8] Transcript of Depalme questioning at p 214.
[9] Transcript of Depalme questioning at p 18.

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> (c) Litigants (including the officers and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation. ...

[86] Depalme does not fall under (a), (b) or (c). She is not an independent expert. She was not involved in the provision of the USB Records to Astolfi in December 2022. She is not a litigant. Her opinion also fails the lay opinion criteria set out in ***Graat*** for the same reason as Astolfi. Only her personal observations, including about Bennett Jones' systems, are admissible and given weight.

[87] For the reasons above, I gave Depalme's opinion or belief about the nature or source of the USB Records no weight.

v. Conclusion

[88] As noted, I gave the evidence or assertions of Turcotte, Astolfi, Counsel and Depalme no weight on the question of the nature and source of the USB Records.

[89] The best evidence of the source of the USB Records is found in Robertson's December 29 and 30, 2022 emails to Astolfi at the time the USB Records were compiled and sent to him. These emails are admissible based on the admissions exception to hearsay because they were written by Robertson for Bennett Jones on behalf of Stone Creek (as set out in David M Paciocco et al, *The Law of Evidence*, 8th ed (Toronto, ON: Irwin Law Inc, 2020) at 191-193), or under the business records exception to hearsay (as set out in ***ATCO Energy*** at para 177).

[90] Based on Robertson's emails, I find that the USB Records were not records that Turcotte had gathered in 2022 from Stone Creek's systems, but were original digital format versions of the Identified Records from the Bennett Jones Eclipse Database and Stone Creek's affidavit of records, as compiled in 2018. This conclusion is supported by the fact that Turcotte's evidence was that he could not find all the Identified Records in Stone Creek's system in 2022, yet the USB Records were a complete set of a version of the Identified Records. Further, the USB Records' file names were named by the Identified Records' production numbers, which is consistent with them being from the Eclipse Database.[10] Stone Creek did not provide evidence about how the USB Records were named or created.

[91] In any event, even if it is assumed that the USB Records were the version of the Identified Records Turcotte had located on Stone Creek's computers in 2022, Turcotte's undisputed evidence is that he was not able to find all the Identified Records on Stone Creek's systems. Therefore, it follows that at least some of the USB Records could not have come from Stone Creek's systems as required by the Mason Order.

[92] Accordingly, I find that Astolfi has proven beyond a reasonable doubt that all, or at least some of, the USB Records were not from Stone Creek's database or systems in 2022. Therefore, there was non-compliance, or at least partial non-compliance, with the Mason Order.

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[10] April 12, 2023 transcript of Astolfi questioning, Exhibit 5.

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[93] I further find that Stone Creek's non-compliance was the result of an intentional act on Stone Creek's behalf: the provision of the USB to Astolfi. But that does not end the matter.

d. Did Stone Creek Fail to Comply with the Mason Order "Without Reasonable Excuse"?

[94] I am satisfied on the record before me that Stone Creek used a sufficient degree of diligence to locate the Identified Records in its systems.

[95] Turcotte reviewed the Mason Order. Both he and Counsel clearly understood that Stone Creek was required to go to its systems and produce the electronic version of the Identified Records as they then existed in Stone Creek's systems. Turcotte used Astolfi's list of Identified Records and spent time going through relevant Stone Creek computers to find the emails. He could not find them all but provided records to Bennett Jones.

[96] Again, it was not required by the Mason Order, and not reasonable for Astolfi to expect or me to require in this context, that Stone Creek engage third party professionals or go through unarchiving processes to comply with the Mason Order.

[97] Further, there is no expert opinion evidence to suggest that there was another process that Stone Creek could have reasonably undertaken to locate the Identified Records. Astolfi's evidence about what others told him about what could or should have been done is inadmissible hearsay.

[98] It is unknown why 2018 original digital files from the Eclipse Database were loaded onto the USB instead of records Turcotte had provided in 2022. On the evidence, it appears to have been a decision made over the holiday season by a legal assistant, or others, to comply with the deadline in the Mason Order. The USB appears to have been created without Turcotte's involvement and was inconsistent with Turcotte's understanding and intention - he believed Robertson was going to include the records Turcotte had provided and supplement it with what Bennett Jones already had. It also appears the USB was not made with Counsel's involvement (as he was unavailable) and was inconsistent with Counsel's express instructions to Marshall.

[99] Astolfi was able to contact Robertson prior to the Application (when she was no longer employed by Bennett Jones), but did not avail himself of questioning her pursuant to rule 6.8 to provide evidence about why the USB was created in the format it was.

[100] Ultimately, I find Astolfi has not excluded a reasonable explanation for what happened, which may be the most likely explanation: that Robertson (or someone else at Bennett Jones) made a mistake or misinterpreted what was supposed to be done and erroneously loaded the USB with the wrong records. I cannot and need not make a finding about the USB's creation.

[101] Astolfi argues that Stone Creek did not exercise reasonable diligence because Stone Creek was able to produce two of the Identified Records in response to undertakings, that do not have the Date/Time Issue (or at least have a less serious Date/Time Issue). However, it is not known from which systems these two emails came, or what, if anything was done to them before being produced. Further, Astolfi had these records since late 2022 or 2023, and did not put them or Astolfi's theory to Turcotte in questioning. The rule in ***Browne v Dunn***, 1893 CanLII 65 (FOREP), 6 R 67 (UKHL) at 71 requires a cross-examiner to give notice to witnesses when the cross-

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examiner intends to challenge a part of the witness' evidence and to give the witness an opportunity to answer the challenge: see also ***R v SCDY***, 2020 ABCA 134 at para 70; ***R v Neilson***, 2019 ABCA 403 at para 41; ***R v Lyttle***, 2004 SCC 5 at para 64.

[102] In any event, even if Stone Creek could produce original electronic records from its system in 2022, that does not prove beyond a reasonable doubt that Stone Creek had no reasonable excuse for failing to do so. As noted earlier, an alleged contemnor "who tries diligently to obey an order but fails", might avoid a contempt finding: ***Carey*** at para 37; ***Envacon*** at para 38; ***DC*** at para 71; ***Questor Technology*** at para 68.

[103] Further, and in any event, to the extent that Stone Creek was unable to locate Identified Records in its systems in 2022 (some four years later) does not warrant contempt. The failure to provide something a party does not have is not necessarily contempt: ***Norris*** at paras 300-305.

[104] On balance, I find that Astolfi has not met the burden to establish the *actus reus* of contempt. Put another way, Astolfi has failed to establish beyond a reasonable doubt that Stone Creek's non-compliance was without reasonable excuse.

e. Conclusion re: Intentional Failure to Comply

[105] For the reasons given above, Astolfi has failed to establish this element of the test.

5. Should the Court Exercise its Discretion to Declare Stone Creek in Contempt?

[106] As noted above, the Court has a residual discretion to refuse to make a contempt declaration. Courts are called to exercise judicial restraint and use the remedy as a last resort. Some factors include: if it would cause injustice, would serve no purpose, or there are circumstances beyond the control of the alleged contemnor: ***Carey*** at paras 36-37; ***Recycling Worx*** at paras 57(d), (e), 125; ***Broda*** at para 12; ***Norris*** at para 325; ***Questor Technology*** at para 70; ***Laurin v Paterson***, 2011 ABQB 521 at para 81; ***Alston QB*** at para 14; ***Kamal*** at para 35; ***Potts*** at para 145.

[107] I have found that Astolfi has not established the elements of contempt beyond a reasonable doubt, so there is no need to consider the Court's residual discretion. However, if I am wrong in my conclusion above, I have considered whether I would exercise my discretion to declare Stone Creek in contempt in this matter had Astolfi established the elements of contempt beyond a reasonable doubt. The answer is no.

[108] As I will discuss in further detail below under the next issue, a contempt declaration would serve no purpose because Astolfi now has relevant and material records and information in useable format, he can materially correct the Date/Time Issue, and, in any event, the specific dates and precise times of the Identified Records emails have not been proven to be material. There is no practical purpose to a contempt declaration at this point. Continuing contempt proceedings will increase costs and further entrench the parties' mutual distrust but will not materially advance the matter to resolution of the real issues in dispute in the action.

[109] This case has some parallels to ***Lay***. In that case, there was an order for production, alleged non-compliance with that order, an unsuccessful application for contempt, and an unsuccessful

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appeal of that decision. The Court of Appeal stated, at para 15: "[i]t is unfortunate this proceeded by way of a contempt application as opposed to an application for further and more complete documentation". That comment applies here too.

[110] As noted, contempt is a remedy of last resort. Far too often this Court sees records production or discovery disputes, which should be resolvable through cooperation or expeditious applications to applications judges, balloon into expensive and time consuming contempt processes that add little to the underlying progress of the action. When confronted with unsatisfactory discovery, *litigants* should also consider contempt proceedings as a last resort to ensure compliance with court orders. This is consistent with the foundational rules (rule 1.2), parties' obligations for managing litigation (rules 4.1, 4.2), and the disclosure rules (rule 5.1). Contempt should not be the first response or a litigation tactic. Caution and diligence are required to ensure contempt processes do not inappropriately overwhelm, obfuscate or delay the resolution of the real issues in dispute.

[111] In this case, I find both parties bear some responsibility for this failed contempt application.

[112] Stone Creek could have responded earlier to cooperatively engage with and address Astolfi's complaint that the USB Records continued to have the Date/Time Issue. There is a fundamental assumption of cooperation, communication and common sense when it comes to record production matters: ***H2 Canmore*** at para 32; ***Innovative Health Group Inc v Calgary Health Region***, 2008 ABCA 219 at paras 25-26; ***Dow Chemical Canada Inc v Nova Chemicals Corporation***, 2015 ABQB 2 at para 50; ***Demb v Valhalla Group Ltd***, 2015 ABQB 618, rev'd on other grounds ***Valhalla Group CA*** [***Valhalla Group QB***] at para 50; ***MBH v CKI***, 2023 ABKB 284 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. Had Stone Creek adopted a cooperative instead of dismissive approach, it would likely have discovered, much earlier, that something was amiss with the USB Records (at least when Astolfi accessed them). Further, Stone Creek exacerbated matters when it inappropriately attempted to selectively redact information that Bennett Jones' staff, as of December 2023, were of the view that Stone Creek's 2018 original email PST file was corrupted.

[113] For Astolfi's part, had he focussed on getting what he needed under the Mason Order, rather than steadfastly pursuing contempt, he could have simply filed a follow-up application for clarification of the Mason Order, or for a further and better order for production or inspection. Had he done so, it is likely the Date/Time Issue would have been resolved much sooner. Astolfi was able to obtain the Mason Order within approximately one month of filing the October 2022 Application. By including contempt as part of the relief he sought, Astolfi ousted the application judges' ability to provide him relief: *Court of King's Bench Act*, RSA 2000, c C-31, section 9(3)(d).

[114] Even if Astolfi had established contempt for the reasons he has argued, I would have exercised my discretion not to declare Stone Creek in contempt. Instead, I would have considered whether there was a practical, proportionate need for any further steps based on current evidence.

6. Conclusion re: Contempt

[115] For the reasons set out above, Astolfi's contempt declaration application is dismissed.

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B. Should the Court Reconfirm and/or Enforce the Mason Order?

[116] Rule 5.14(1)(a) provides that a party is entitled to inspect a relevant and material record that is under the control of another party. Rule 5.14(1)(b) provides that a party is entitled to receive a copy of the record on making written request for the copy and paying reasonable copying expenses.

[117] As of the date of the Hearing, Astolfi appears to still experience the Date/Time Issue when he views the USB Records on his phone or on his computer. However:

(a) Astolfi has the hard copy of the USB Records[11] which Stone Creek asserts corrects the Date/Time Issue on the Identified Records. Depalme created this hard copy set from the Bennett Jones copy of the USB Records. Astolfi has not rebutted this evidence or provided any foundation to suggest the hard copy is not accurate;

(b) Astolfi can view the electronic USB Records using the Microsoft Preview pane, which removes the Date/Time Issue, although it is cumbersome to use; and

(c) Astolfi has been provided an updated schedule setting out the dates and times of the Identified Records, which was prepared by Depalme based on, at least, her review of the Identified Records and other produced records. Astolfi has not rebutted this evidence or provided any foundation to suggest it is not accurate.

[118] Astolfi asserts that he still requires the original electronic format of the Identified Records because he cannot verify the USB Records' accuracy and remains suspicious that the records continue to be incorrect. He suggests that an appropriate approach would be to allow him to attend with someone from Stone Creek to personally review the Identified Records on Stone Creek's computers. However, Astolfi does not provide details of his concerns other than by pointing to Stone Creek's approach to the Mason Order and this action more generally. He could not point to any actual inaccuracy in or problem with the content of the records and information he now has.

[119] I am satisfied that Astolfi now has the Identified Records in a "useable format" for the purposes of this action, as contemplated in ***H2 Canmore*** at paras 48-51. Normally this would require production in original digital (native) format with metadata: ***H2 Canmore*** at para 48, citing The Sedona Conference, *The Sedona Canada Principles Addressing Electronic Discovery, Third Edition,* 23 SEDONA CONF. J. 161 (2022), 2022 CanLIIDocs 1167 at 265-267; ***Questor Technology Inc v Stagg***, 2022 ABQB 578 [***Questor Technology 2022***] at paras 114-115; ***Bard*** at para 106; ***Spar Aerospace Limited v Aerowerks Engineering Inc***, 2007 ABQB 543, aff'd 2008 ABCA 47 at paras 7 and 56. But there are limits to this principle. Useable does not mean perfect useability at all costs. The Court will not require more work to be done to make records more useable without balancing it against other factors, including proportionality and common sense: ***H2 Canmore*** at paras 48-51.

[11] Astolfi January 23, 2024 questioning, Exhibit 2.

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[120] As I stated in ***H2 Canmore*** at para 48 (emphasis added): "[w]here **possible**, and where relevant, material, and **proportionate**, electronic records should be searchable, in original digital format, and should include metadata". What is required will depend on the circumstances.

[121] Accordingly, in my view, Astolfi's request to go further than what Stone Creek has now provided is subject to the lens of proportionality to avoid "endless and unlimited" pretrial discovery: rule 5.3; ***Rifco Inc (Re)***, 2020 ABQB 366 at para 54; ***H2 Canmore*** at para 56; ***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2023 ABCA 97 at paras 20-21; ***Innovative Health*** at paras 23-25; ***Spar Aerospace*** 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.

[122] In ***H2 Canmore*** at para 62, I summarized non-exhaustive factors to consider, which I find apply in these circumstances, namely:

(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;

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

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

[123] I have considered these factors. I am not satisfied that it is appropriate to require Stone Creek to, once again, go through its electronic records to locate and produce the Identified Records. Its systems have changed, and it has already done at least one manual search of relevant computers for emails. The Date/Time Issue, even if it continues to exist when viewing the USB Records on some platforms, is materially resolved or moot. Astolfi has the material *information* about the Identified Records and has not established the materiality of obtaining different or better electronic information about them. Accordingly, it is doubtful that the email Identified Records, in their original digital format as *currently* found in Stone Creek's systems, is relevant and material as contemplated by rule 5.14.

[124] In summary, Astolfi has not established any functional or pragmatic purpose to the requested order, other than to satisfy his suspicions that the USB Records "might" not be accurate. That, at best, is a fishing expedition that lacks a reliable factual foundation.

[125] On the other hand, another order will likely cause further delay and associated costs. Astolfi was not prepared to commit to sharing Stone Creek's costs to comply. Moreover, in my view, an order will provide fertile ground for more disputes about collaterals issues or facts. The parties' efforts will be better spent on the real issues in dispute and moving this matter to resolution or trial as expeditiously as possible.

[126] Astolfi's application for reconfirmation or enforcement of the Mason Order, a similar production order, or a new order under rule 5.14, is dismissed.

VI. Conclusion

[127] The Application is dismissed. Counsel for Stone Creek shall prepare the order arising from today and shall obtain Astolfi's consent to its form and content.

[128] Stone Creek shall update and swear a supplemental affidavit of records to reflect its corrected dates and times of the Identified Records, within two weeks of these Reasons (if it has not already done so).

[129] With respect to costs, rule 10.29 provides that, subject to the discretion of the Court under rule 10.31 (among other matters), a successful party is entitled to a costs award against the unsuccessful party. Rule 10.29 embodies the general rule that the successful party is presumptively (or *prima facie*) entitled to costs: ***McAllister v Calgary (City)***, 2021 ABCA 25 at para 21; ***JBRO Holdings Inc v Dynasty Power Inc***, 2022 ABCA 258 at para 16.

[130] While Stone Creek has been successful in opposing the Application, as I noted earlier, the matter could have been resolved sooner had Stone Creek meaningfully engaged with Astolfi's assertions about the Date/Time Issue earlier. Astolfi's complaints about Stone Creek's conduct in responding to the Application (including the redaction matter noted above) are relevant to costs.

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[131] Further, the Application was both backward looking (contempt) and forward looking (repeated or new production order under 5.14). Stone Creek's successful opposition to the forward looking portion of the Application was in part because Stone Creek eventually responded to the core Date/Time Issue raised by Astolfi, investigated it, and has now mitigated its effect. That did not occur until 2024, many months after the Application was filed. In that sense, Astolfi was at least partially successful in the forward looking portion of his Application.

[132] Mason AJ ordered that the costs of the application before her, and compliance with the Mason Order, "will be costs in the cause". That was not appealed. At least some of the Mason Order compliance costs may be wrapped up in the Application.

[133] In these circumstances, the parties are strongly encouraged to attempt to reach a resolution of the costs of the Application. If they cannot do so within one month of these Reasons, either party may contact my office and I will set a process for the determination of costs.

[134] The parties are directed to contact the court coordinator to schedule a case management conference in March or April 2025 for the purposes of putting a new litigation plan into place. The parties are directed to attempt to reach agreement on a litigation plan. If a litigation plan cannot be agreed, each party will provide me their proposed plan at least one week before the conference.

Heard on the 5th day of February 2025.
Dated at the City of Calgary, Alberta this 7th day of March, 2025.

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

Appearances:

Jon Astolfi
Self-Represented Litigant

Grant Stapon, KC
for the Defendant

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