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REGISTRAR / REGISTRAIRE

CT-2024-012

OTTAWA, ONT.

131

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.

Respondent

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CT-2024-012

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

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INDEX

TAB	JURISPRUDENCE
1.	Rogers - Reasons for Order and Order partially granting Rogers Communications Inc.'s refusals motion
2.	ENMAX PPA Management Inc v Balancing Pool, 2017 ABQB 605
3.	Cambie Surgeries Corporation v British Columbia (Attorney General), 2017 BCSC 861
4.	Glaxo Group Ltd. v. Novopharm Ltd., 1998 CanLII 8730 (FCA)

TAB 1

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2025 Comp Trib 23

File No.: CT-2024-012

Registry Document No.: 101

IN THE MATTER OF the *Competition Act*, RSC, 1985, c C-34 as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
(respondent)



Date of hearing by videoconference: November 7, 2025

Before: Madam Justice Jocelyne Gagné

Date of Reasons for Order and Order: 12 December 2025

ORDER AND REASONS PARTIALLY GRANTING ROGERS' REFUSALS MOTION

I. OVERVIEW

[1] Rogers Communications Inc. brings this motion for an order compelling the Commissioner of Competition to answer a series of questions refused and/or partly answered at the examination for discovery of the Commissioner's representative, Ms. Kathleen Phillipowsky, held on September 3, 4, and 5, 2025, as set out in the chart of refusals attached hereto as Schedule "A" [the Refusals Motion].

[2] Out of the 94 questions posed to Ms. Phillipowsky that were refused, Rogers seeks to compel answers to 59 questions, organized into three categories:

- (a) questions related to the facts and conclusions reached regarding the Commissioner's assessments in 2020 and 2021 of unlimited data representations, his investigation commenced in March 2022, and his inquiry commenced in April 2023; this category is divided into two sub-categories:
 - i. Assessment Questions (21 questions);
 - ii. Investigation and Inquiry Questions (24 questions);
- (b) questions related to the alleged breach of the deemed undertaking rule and a confidentiality order in the Rogers-Shaw litigation by the Commissioner (5 questions); and
- (c) questions related to other factual allegations pleaded by the Commissioner in his Notice of Application and Reply (9 questions).

[3] At the time the parties filed their Motion Record, the Tribunal had not yet issued its decision in respect of Rogers' motion to amend its response. However, the Tribunal issued its order on the proposed amendments to Rogers' response [the Response Amendment Order] prior to the hearing of the Refusals Motion. During the hearing of the Refusals Motion, Rogers argued that despite the fact it was *not* granted leave to amend its response to plead (i) a defense of estoppel and waiver, (ii) an alleged breach of the deemed undertaking rule by the Commissioner, and (iii) some additional facts pertaining to the remedies sought in the Notice of Application, this Refusals Motion should nevertheless be granted. According to Rogers, all categories of questions are relevant to the issues in dispute, not precluded by the Tribunal's production order dated August 11, 2025 (the Production Order, which required the Commissioner to produce third-party records, but declined to compel the Commissioner to produce certain records relating to his investigation of unlimited plan representations), and not protected by any privilege.

II. THE NOTICE OF APPLICATION

[4] On December 23, 2024, the Commissioner filed a Notice of Application pursuant to section 74.1 of the *Competition Act* (RSC, 1985, c C-34 as amended), alleging that Rogers has previously engaged in and continues to engage in reviewable conduct contrary to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the Act.

[5] According to the Commissioner, Rogers misleads consumers by offering data plans that are said to be unlimited, but that, in fact, have limits [the Infinite plans]. The Commissioner argues

that by advertising limited data plans as if they were unlimited, Rogers has made and continues to make representations to the Canadian public that are false or misleading in a material respect for the purpose of promoting the supply or use of wireless telecommunication services and related products, and its business interests more generally.

[6] The Commissioner seeks various forms of relief, including “a declaration that [Rogers] has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and subsections, 74.011(1) and 74.011(2) of the Act”; “an order prohibiting Rogers from engaging in the reviewable conduct or substantially similar reviewable conduct in Canada for a period of ten years from the date of such order”; “an order requiring Rogers to pay such an administrative monetary penalty as the Tribunal deems appropriate”, and “an order requiring Rogers to pay an amount, not exceeding the total amounts paid to Rogers for the products in respect of which the reviewable conduct was engaged in, to be distributed among those persons to whom the products were sold, in an amount and manner to be assessed by the Tribunal.”

III. PROCEDURAL BACKGROUND

[7] Rogers filed its Response to the Commissioner’s Application on February 6, 2025, denying any false and misleading representations relating to its Infinite plans. The Commissioner filed a Reply to Rogers’ Response on February 20, 2025.

[8] On July 7, 2025, Rogers brought a motion to compel further documentary production from the Commissioner. A videoconference hearing was held on July 14, 2025.

[9] On August 11, 2025, the Tribunal issued the Production Order.

[10] Examinations on discovery took place on August 27-29, 2025, and September 3-5, 2025. The parties exchanged answers to undertakings and further productions from September 19 to October 3, 2025.

[11] Rogers’ motion to amend its response was heard by videoconference on October 17, 2025. The Response Amendment Order was issued on November 5, 2025 (with a revised version issued on November 7 to fix non-material errors); among other things, it allowed Rogers to amend its response to file a constitutional challenge in respect of the administrative monetary penalty regime found in subparagraph 74.1(1)(c)(ii) of the Act.

[12] Examinations on the answers to undertakings and additional documents produced by the Commissioner were also scheduled to take place on December 1, 2, 4 and 5, 2025.

[13] The hearing on the merits is scheduled to commence on March 30, 2026.

IV. ISSUE TO BE DETERMINED

[14] The sole issue raised by the present motion is whether the Commissioner should be compelled to answer the questions listed in Schedule “A”.

V. ANALYSIS

[15] Rule 34(1) of the *Competition Tribunal Rules*, SOR/2008-141 provides that, if a question arises as to the practice or procedure to be followed in proceedings before the Tribunal that is not provided therein, the *Federal Court Rules*, SOR/98-106 [the FC Rules] may be applied. The Tribunal will therefore refer to the FC Rules in respect of this Refusals Motion.

[16] Rule 240 of the FC Rules provides that a person being examined for discovery must answer, to the best of the person's knowledge, information, and belief, any question that is relevant to the unadmitted facts in the pleadings.

[17] In *Canada v Lehigh Cement Limited*, 2011 FCA 120, the Federal Court of Appeal articulated the test as follows:

[34] ... a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute.

[18] The principle in *Lehigh Cement* is a flexible standard. Doubts as to relevance are to be resolved in favour of disclosure (*The Commissioner of Competition v Live Nation Entertainment, Inc*, 2019 Comp Trib 3 at para 8). Refusals motions are guided by the key objective of achieving a level of disclosure sufficient to allow each side to proceed fairly, efficiently, and effectively towards a hearing, with sufficient knowledge of the case each party must meet (*Live Nation* at para 6; *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2022 Comp Trib 3 at para 6).

A. **Category #1: Questions related to the Commissioner's Assessment, Investigation and Inquiry**

[19] Rogers seeks to compel the Commissioner to answer questions related to the underlying facts and conclusions reached in respect of (i) the assessments in 2020 and 2021 into telecommunications carriers' "unlimited" plan representations, and (ii) his investigation and inquiry into Rogers specifically.

[20] Rogers first argued in its written materials that these questions were relevant to the defenses of estoppel and waiver. To the extent that these defences were denied – which they ultimately were by virtue of the Response Amendment Orders – Rogers also asserted that these questions remain relevant to:

- (a) The Commissioner's allegations and discovery evidence regarding the general impression created by and impact of the representations at issue (qq. 230, 231, 232, 330-331, 340, 342, 345, 400, 401 from September 3, 2025; and qq. 66-67, 68, 194, 195, 196-197, 201-204, 205, 222, 235-236, 237, 238, 239, 243, 319 from September 5, 2025);

- (b) The Tribunal’s exercise of its discretion on remedies and the aggravating factors alleged by the Commissioner (qq. 230, 231, 232, 248, 275, 274-279, 322, 330-331, 332-333, 334, 335, 338, 340, 342, 345, 383, 385-386, 390, 392, 398, 400, 401 from September 3, 2025; and qq. 65, 66-67, 68, 69-70, 141, 142, 143, 144, 149-150, 192, 193, 194, 195, 196-197, 201-204, 205, 222, 235-236, 237, 238, 239, 243 from September 5, 2025); and
- (c) Whether costs should be awarded against the Commissioner, in the event Rogers is successful at trial (qq. 230, 231, 232, 248, 275, 274-279, 322, 330-331, 332-333, 334, 335, 338, 340, 342, 345, 383, 385-386, 390, 392, 398, 400, 401 from September 3, 2025; and qq. 65, 66-67, 68, 69-70, 141, 142, 143, 144, 149-150, 192, 193, 194, 195, 196-197, 201-204, 205, 222, 235-236, 237, 238, 239, 243 from September 5, 2025).

[21] The Commissioner’s position is that by using the word “unlimited” in relation to Rogers’ Infinite plans, consumers understand this to mean that it is offering unlimited high-speed data. This meaning is plain on the words and, accordingly, those representations are false or misleading on their face.

[22] I agree with Rogers that both the general impression of Rogers’ representations and whether they were material to consumers’ purchasing decisions must be tied to the relevant facts. While there is a “certain legal dimension” to the issue, the question is fundamentally what the relevant consumer understands the representations to mean (*Live Nation* at para 26). Similarly, whether a representation is “material” depends on whether it could affect the relevant consumer’s purchasing decision (*Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5 at para 418). These are the factual questions on which Ms. Phillipowsky gave evidence for the Commissioner.

[23] I also agree with Rogers that it is entitled to test and challenge the Commissioner’s evidence on the issue of general impression and materiality. Amongst the questions identified above, I am allowing those which, in my view, are directed to these issues (noting that some are refused due to their formulation).

[24] However, I disagree with Rogers that whether the Commissioner or any Bureau officer has previously found its representations questionable or problematic under the deceptive marketing practices provisions of the Act is likely to have an impact on the remedy or costs the Tribunal may impose or grant, should it find in favour of the Commissioner. The Tribunal’s decision will be based on the evidence gathered during the investigation and presented at trial, not on anybody’s past assessment of this evidence.

B. Category 2: Questions related to the Commissioner’s Alleged Breach of the Deemed Undertaking Rule

[25] Considering the terms of the Response Amendment Order, which denied leave to Rogers to amend its response and plead a breach of the deemed undertaking rule, the 5 questions in this category are refused.

C. Category 3: Questions related to other Factual Allegations Made by the Commissioner

[26] Rogers seeks to compel the Commissioner to answer questions allegedly related to specific factual allegations pleaded in his Notice of Application. These questions concern throttled speeds, identifying the representations challenged by the Commissioner, and representations made by Comwave Networks Inc. referred to in the Deceptive Marketing Digest Volume 3.

[27] In his Notice of Application, the Commissioner pleads:

[36] Many operations that could be done quickly before the throttling, become difficult or virtually impossible after data is throttled. This fundamentally impacts the functionality of any application that requires high-speed data, such as streaming, video calling or cloud gaming. For example, Rogers indicates that downloading an HD movie takes 1 to 4 minutes at 1 Gbps to 250 Mbps respectively, but this will take over a day to download at 512 kbps. Contrary to the general impression conveyed by Rogers' representations, once throttled, consumers can no longer do all that they want to do with their data.

[28] In my view, what is relevant to this allegation is the measurement of difficulty (or the outright impossibility) the Commissioner used in its assessment, not hypothetical questions as to what the Commissioner's opinion would be in different scenarios. In other words, what is relevant are the facts before the Tribunal, not an assessment of factual scenarios not before the Tribunal. I am therefore allowing what is, in my view, relevant.

[29] Based on the following allegation, Rogers wants the Commissioner to identify each of the representations made and alleged to be false or misleading:

[8] Specifically, Rogers has made, and continues to make, representations to the public that convey the materially false or misleading general impression that Rogers Infinite Unlimited Plans offer unlimited and infinite data, allowing consumers to use as much data as they want, free from data limits...

[18] Rogers made the impugned representations through various channels, including television, radio, social media, online banner advertisements, in billboards, in malls, in live events, and even on public transit wraps...

[30] The Commissioner states this was open on a motion for particulars, not on discovery. I would say if anything, it is the contrary.

[31] However, I agree with the Commissioner that being asked to identify all specific representations at issue and the general impression each of them conveyed is excessive. Compelling the Commissioner to undertake an individualized review of the over 20,000 records containing representations produced by Rogers would be disproportionate, unduly burdensome, and unnecessary to determine the issues.

[32] The Notice of Application already sets out the facts necessary to assess whether a representation is false or misleading. The Commissioner's case does not depend on the precise

wording of each representation, but on the use of the term “infinite” or “unlimited”, the display of the Rogers infinity loop, or anything else that conveys that the data provided is “unlimited”. Those are the features that the Tribunal will need to assess and determine whether they are false or misleading. In my view, the Notice of Application offers sufficient examples of historic and ongoing representations to allow the Tribunal to make this assessment. These questions are therefore refused.

VI. CONCLUSION

[33] For the above reasons, Rogers’ Refusals Motion is granted in part, the specific of which being set in the attached Schedule “A”. Costs will be in the cause.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[34] Rogers’ Refusals Motion is granted in part.

[35] The Commissioner is compelled to answer the questions refused and/or partially answered at the examination for discovery of Ms. Kathleen Phillipowsky, held September 3, 4, and 5, 2025, which are marked “**Allowed**” in the chart of refusals attached hereto as Schedule “A”.

[36] As success on this motion is divided, costs shall be in the cause.

DATED at Ottawa, this 12 of December 2025.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) Jocelyne Gagné

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CT-2024-012

**SCHEDULE “A”
THE COMPETITION TRIBUNAL**

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to s. 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.

Respondent

SCHEDULE “A” CHART OF REFUSALS

Category #1: Assessment, investigation, and inquiry questions

(a) *Assessment Questions*

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné’s decision
September 3, 2025				
1.	91 – 92	383	To advise if the preliminary assessment resulted in a recommendation to start an investigation.	Allowed

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
2.	92	385 – 386	To advise who the individuals conducting the preliminary assessment reported to.	Refused
3.	93	390	To advise who Ms. Phillipowsky believes was the person to whom the individuals conducting the preliminary assessment reported to.	Refused
4.	94	392	To advise if the person to whom the people conducting the preliminary assessment reported to was different than the person who instructed Ms. Phillipowsky to commence an investigation.	Refused
5.	96 – 97	398	To advise if whether somebody conducting a preliminary assessment writes a recommendation as to whether or not to open an investigation.	Allowed
6.	96	400	To advise if the preliminary assessment is closed.	Allowed
7.	96 – 97	401	To confirm that the preliminary assessment was not ongoing in that period of time between September 2020 and September 2021.	Allowed
September 5, 2025				
8.	485	192	To advise whether the Competition Bureau took any steps at or around the time Mr. McPhail sent his email to Mr. Boswell or the introduction of Rogers Infinite wireless plans.	Refused
9.	485	193	To provide a copy of any communication initiating the steps the Bureau took, if it took any at or around the time of Mr. McPhail's email or the launch of Rogers Infinite wireless plans.	Refused
10.	485	194	To advise whether it is the case that when a preliminary assessment is closed, as it was in this case, that there is some communication closing it.	Refused

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
11.	486	195	To advise whether there is a formal or informal communication that brings an assessment to a close.	Allowed
12.	486-487	196 – 197	To advise whether when this preliminary assessment ended or any preliminary assessment ends, whether there is a report by the individuals conducting the preliminary assessment to their superior advising them that they are closing the assessment or asking that they close the assessment.	Allowed
13.	488-489	201 – 204	To confirm that there was a recommendation that was made in 2020, and the recommendation that was made was to wrap up the preliminary assessment.	Allowed
14.	489	205	To provide a copy of the 2020 recommendation.	Allowed
15.	494	222	To advise if the Commissioner agrees that had Rogers sought an advisory opinion, it would have been advised by the Commissioner at the time that the conduct was not reviewable.	Refused
16.	496	235 - 236	To advise how Ms. Sonley first raised this issue of the marketing of unlimited wireless data plans.	Refused
17.	497	237	To advise why Ms. Sonley was raising the issue of the marketing of unlimited wireless data plans.	Refused
18.	497	238	To advise to whom Ms. Sonley raised the issue of the marketing of unlimited wireless data plans.	Refused
19.	497	239	To advise what steps, if any, were taken in relation to Ms. Sonley raising the issue of the marketing of unlimited wireless data plans.	Refused
20.	497-498	243	To advise whether the notes taken by Ms. Assad of the conference call where Ms. Sonley raised the issue of the marketing of unlimited wireless data plans bear on the allegations pleaded by the Commissioner in the Notice of Application.	Refused

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
21.	524-525	319	To provide the recollection of each of the participants of the telephone call, provided those individuals are still at the Bureau (RFLB00041_000000014).	Refused

(b) *Investigation and Inquiry Questions*

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
September 3, 2025				
1.	50	230	To advise if Ms. Phillipowsky was satisfied that the Notice of Application reflected the facts upon which your recommendation was based.	Allowed
2.	51	231	To advise if the Notice of Application is consistent with the facts that formed part of the recommendation to commence this litigation.	Allowed
3.	51	232	To advise if there are facts set out in the Notice of Application that are different than those in the recommendation.	Allowed
4.	56	248	To advise when the Commissioner says that litigation became a real possibility such that he is entitled to claim litigation privilege.	Allowed
5.	63-64	275	To advise when the culmination was to recommend that an application be filed.	Refused
6.	65	274 – 279	To advise when the iterative process of recommendations (to pursue an application) began.	Refused
7.	77	322	To advise if there is a distinction between the Commissioner conducting an inquiry and conducting an investigation.	Allowed

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
8.	79	330 – 331	To advise what steps the Commissioner has taken or what facts the Commissioner has learned since filling the Notice of Application in December 2024.	Refused
9.	80	332 – 333	To advise what non-privileged steps the Commissioner has taken in furtherance of an investigation into Rogers' promotion of unlimited wireless plans.	Allowed
10.	80	334	To advise if the Commissioner's examination of a DIG representative, pursuant to Section 11, was part of the investigation.	Allowed
11.	80	335	To advise if the Commissioner's examination of a DIG representative, pursuant to Section 11, was part of the litigation.	Refused
12.	81	338	To advise if the Commissioner's position is that the facts discovered as part of the investigation are privileged.	Allowed
13.	81	340	To advise if there are any facts that the Commissioner has learned through its investigation subsequent to December 2024 that are relevant to the issues in this litigation.	Refused
14.	82	342	To advise if any of the facts supporting the allegations in the Notice of Application were gathered after the application was initiated and to identify which facts those are.	Refused
15.	83	345	To advise what the Commissioner learned from DIG that relates to the allegations in the Notice of Application.	Allowed
September 5, 2025				
16.	444	65	To advise if Ms. Phillipowsky made a recommendation to commence an inquiry.	Allowed

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
17.	444	66 – 67	If there was a recommendation to go on inquiry, to provide information as to whom the recommendation was made, the form of the recommendation, the basis of the recommendation, excluding any legal advice that may have been provided as part of the recommendation, and the documents that underpinned that recommendation.	Refused
18.	444-445	68	To produce a copy of the recommendation itself.	Refused
19.	445	69 – 70	To advise what documents, other than representations in the marketplace, Ms. Phillipowsky gathered as part of her investigation between March 2022 and April 2023.	Allowed
20.	467	141	To review the document, “Cosmos”, at Row 137 (item 135) of the Commissioner’s Schedule B and confirm that the document contains legal advice.	Allowed
21.	468	142	To advise whether it was Ms. Phillipowsky who was seeking the legal advice in the document referred to in the Commissioner’s schedule B productions at item 135 (row 137).	Refused
22.	468	143	To advise why Ms. Phillipowsky was seeking legal advice in the document referred to in the Commissioner’s schedule B productions at item 135 (row 137).	Refused
23.	468	144	To produce a redacted copy of the document at Row 137 (item 135) of the Commissioner’s Schedule B, if the document contains information that is not privileged.	Allowed
24.	470	149 – 150	To advise whether Ms. Cybulsky was on the Project Cosmos team at the time (October 13, 2022).	Allowed

Category #2: Deemed Undertaking Questions

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
September 5, 2025				
1.	447	79	To advise who was on the Rogers-Shaw team.	Refused
2.	448	82 – 83	To advise who provided Ms. Phillipowsky with access to the documents produced by the parties in the Rogers-Shaw litigation.	Refused
3.	449-450	86	To confirm whether, as Ms. Phillipowsky was conducting her investigation, she looked at certain documents that came from the Rogers-Shaw productions.	Refused
4.	454	94	To advise what process, procedures, or safeguards the Bureau had in place to ensure that documents produced in the context of the Rogers-Shaw litigation were not shared with members of Ms. Phillipowsky's investigative team.	Refused
5.	454-455	95	To advise whether Ms. Phillipowsky reviewed documents or was provided with copies of documents that were produced by the parties as part of the Rogers-Shaw litigation.	Refused

Category #3: Other Refusals

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
September 4, 2025				
1.	264	1096 – 1097	To advise if it is acceptable to market a plan as "unlimited data" if the speed of the data is fixed throughout.	Refused
2.	266	1108	To advise at what speed the Commissioner says there is not an impact on functionality.	Refused
3.	279	1164	To advise if it does not matter whether Rogers throttled at 256 kbps, 512 kbps, or 4G. And to advise if these speeds are a material restriction as explained in Deceptive Marketing Practices Digest, Volume III.	Allowed
4.	282	1175	To advise what throttling speed has a significant influence on the unlimited plan.	Refused
5.	282	1179	To produce the representations made by Comwave (pg. 16 of The Deceptive Marketing Practices, Vol 3).	Allowed
6.	355-356	1503	To advise what measurement of difficulty or virtual impossibility the Commissioner says applies to para. 36 of the Notice of Application.	Allowed
7.	356	1505	To advise what the amount of time is at which it becomes difficult or virtually impossible for a social media site, website, range of websites, streaming, cloud gaming, and/or any other application which the Commissioner alleges there is a difference in time between the max speed and the throttle speed.	Refused
September 5, 2025				

REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
8.	519-520	302	To identify each of the representations made by Rogers that the Commissioner alleges in this application were false and misleading and in what way (para. 46(f) of Notice of Application).	Refused
9.	527	329	To advise what the Commissioner says is the general impression created by the representation and the facts or sources of information relevant to the alleged general impression for each of the representations the Commissioner alleges in this proceeding are false or misleading.	Refused

TAB 2

Court of Queen's Bench of Alberta

Citation: ENMAX PPA Management Inc v Balancing Pool, 2017 ABQB 605

Date: 20171011
Docket: 1601 01689
Registry: Calgary

Between:

ENMAX PPA Management Inc.

Applicant

- and -

Balancing Pool

Respondent

**Memorandum of Decision
of the
Honourable Mr. Justice P.R. Jeffrey**

Introduction

[1] ENMAX PPA Management Inc sent a notice to the Balancing Pool on December 11, 2015, terminating the Battle River Power Purchase Arrangement (the “**BR PPA**”) effective 12:01 am, January 1, 2016.

[2] The Balancing Pool responded saying the termination, if later determined to be valid, cannot take effect until the Balancing Pool is legally able to take over ENMAX’s role as “buyer” under the BR PPA. On January 27, 2016, the Balancing Pool concluded the termination to be valid. On July 13, 2016, it assumed ENMAX’s role as buyer under the BR PPA.

[3] ENMAX applies for a declaration that the effective date of termination is January 1, 2016. The Balancing Pool says the termination takes effect on July 13, 2016. For the reasons that follow, I find that the effective date of termination of the BR PPA is January 1, 2016 at 12:01 am.

Background

[4] A power purchase arrangement (“**PPA**”) is a standardized set of contract-like terms promulgated under the *Power Purchase Arrangements Determination Regulation*, Alta Reg 175/2000 and continued by section 96(1) of the *Electric Utilities Act*, SA 2003, c E-5.1 (“**EUA**”). Such arrangements enable parties wanting to market electricity within the province to acquire the right to specified electricity production until year-end 2020. Auctions of electricity production under PPAs to such parties facilitated the transition from the regulated pricing of electricity in the hands of a few suppliers, towards more market-based (or deregulated) pricing of electricity in the hands of many suppliers. The Alberta legislators wanted the ultimate price paid for electricity to be determined by a market that would be “fair, efficient, and openly competitive” (or “**FEOC**”).

[5] The BR PPA entitles ENMAX (the “**Buyer**”) to electrical power from the Battle River Generating Station until December 31, 2020, and obliges it to pay the unit’s owner throughout that term. The Battle River Generating Station consists of five generating units; only the power generated by Unit 5 (“**BR5**”) is the subject of the BR PPA and this termination date issue. It is a coal-fired thermal electricity generating facility located in Forestburg, Alberta, that is operated by ATCO Power Canada Ltd (“**ATCO**” or the “**Owner**”).

[6] The Balancing Pool is a statutory body established under section 75 of the *EUA*. It facilitated the transition from regulated pricing of the commodity towards a market-based pricing of the commodity within a FEOC market by, among other things, conducting auctions of PPAs. It backstops the market against the risk of an extraordinary event such as *force majeure* in relation to PPAs. It has an ongoing duty to sell generation assets when it can receive fair market value for them: *EUA*, s 85(1)(d). It has a duty to act commercially in respect of power under PPAs that did not sell by auction or that reverts to the Balancing Pool by expiry or termination of a PPA: *EUA*, s 85(1)(b); it is to manage its accounts so that no profit or loss results: *EUA*, s 85(1)(j). It has a duty to manage generation assets in a manner consistent with the eligibility requirements for a person to hold a PPA: *EUA*, s 85(1)(c). Its costs are recovered for it from all system users via the Independent System Operator’s (“**ISO**”) tariff: *EUA*, ss 82 and 85(1)(h).

[7] The Balancing Pool is not a party to the BR PPA, but has a significant interest in it. For example, the sixth recital to the BR PPA states:

By operation of the Act and in accordance with the terms and conditions of this Arrangement the Owner and the Buyer are entitled to receive payment from the Balancing Pool in certain circumstances and are required to involve the Balancing Pool in making certain determinations.

Also, in certain circumstances including those in play here, by operation of law the Balancing Pool may be deemed a party to a PPA in place of the initial buyer.

[8] Under the BR PPA, the Buyer is required to keep the Owner whole for any net changes to its cash flows resulting from any “Change in Law”, as that is defined in the BR PPA. It further provides that if any such Change in Law could reasonably be expected to render continued performance of the BR PPA unprofitable to the Buyer, or more unprofitable to the Buyer, “then the Buyer may terminate this [BR PPA]”. Section 4.3(j) of the PPA states:

Notwithstanding any of the foregoing, to the extent that a Change in Law, after giving effect thereto and to this Section 4.3, could reasonably be expected to render continued performance by the Parties to this Arrangement for the balance of the Effective term unprofitable to the Buyer in respect of a Unit, having taken account of any compensation entitlement under Section 4.3(i) or any amount due from the Balancing Pool, then the Buyer may terminate this Arrangement and shall not be liable for, nor entitled to any Termination Payment.

[9] That is what happened here. In December 2015 the Province of Alberta amended the *Specified Gas Emitters Regulation*, Alta Reg 139/2007, and the *Climate Change and Emissions Management Act*, SA 2003, c C-16.7. Those amendments increased ATCO’s costs of running BR5, which would be borne by ENMAX under the BR PPA. The increase would commence on January 1, 2016.

[10] ENMAX determined that these amendments constituted a Change in Law under the BR PPA and reasonably expected that as a consequence, the continued performance of its obligations as Buyer under the BR PPA would be rendered unprofitable, or more unprofitable, for the remainder of the term of the BR PPA.

[11] On December 11, 2015, ENMAX issued a notice to ATCO and the Balancing Pool, that it was terminating the BR PPA effective January 1, 2016 at 12:01 am.

[12] The Balancing Pool replied on January 13, 2016, stating that it was:

... continuing our investigation, assessment and verification, under *the Balancing Pool Regulation* (AR 158/2003), in respect of the claimed extraordinary event stipulated in your letter.

and that:

... termination of the PPA cannot be effective until all requirements of law have been satisfied to allow Balancing Pool to hold the PPA in the capacity of buyer as required by, and in the manner stipulated in, Section 96(3) of the *Electric Utilities Act*.

[13] Section 96(3) of the *EUA* provides:

A power purchase arrangement, other than a power purchase arrangement held by the Balancing Pool, that is terminated other than under section 15.2 of the power purchase arrangement

- (a) is deemed to have been sold to the Balancing Pool, and
- (b) is to be held by the Balancing Pool in the capacity of a buyer for all purposes of this Act, the regulations and the power purchase arrangement.

[14] The Balancing Pool completed its investigation and reported the results to ENMAX by follow-up letter of January 27, 2016, stating that:

Balancing Pool has verified the occurrence of the extraordinary event and, correspondingly, confirms your entitlement to terminate the Battle River PPA pursuant to Article 4.3(j) thereof.

and that:

... We wish to also confirm to you that our position with respect to the effective termination of the Battle River PPA as set out in our letter to you of January 13, 2016 remains unchanged.

[15] All electricity capable of being generated by a generating unit in each hour must be offered into the Power Pool: *Fair, Efficient and Open Competition Regulation*, Alta Reg 159/2009, (“**FEOC Regulation**”) at s 2(f) and the Rules of the Alberta Electric Systems Operator (the “**ISO Rules**”), Part 200 Markets, Division 203 Energy Market, Section 203.1 “Offers and Bids”.

[16] Since 2006, the Balancing Pool has not maintained operations and staff for a 24-hour, real time generation offer desk. In order to meet its obligations as a Buyer under a different PPA, the Balancing Pool contracted with Capital Power Generation Services Inc. (“**Capital Power**”) to provide the Balancing Pool with energy management services through Capital Power’s Energy Management Operations Centre. Capital Power provides 24-hour real time desk service to the Balancing Pool for generation offer, operational information, ancillary services, dispatch down service and energy restatements.

[17] Section 3 of the *FEOC Regulation* restricts market participants from sharing non-public records relating to past, current, or future price/quantity offers. However, subsection 3(3) permits market participants to obtain an order from the Alberta Utilities Commission (the “**AUC**”) which permits the sharing of such records. Pursuant to subsection 3(3), the Balancing Pool must apply to the AUC for an order of sharing of records to enable Capital Power to act as the Balancing Pool’s agent to provide dispatch services. With respect to the BR PPA, the Balancing Pool applied for this order on March 7, 2016. The AUC granted the application and issued an interim order on June 28, 2016. The Balancing Pool officially took over offer control of BR5 from ENMAX on July 13, 2016. By “offer control”, the parties refer to the determination of offer quantity and price pairings of all the electric energy the Buyer under the BR PPA is entitled to control, 24-hours per day, and providing the necessary inter-face between ATCO as operator of BR5 and the system controller (“**Offer Control**”).

[18] Commencing January 1, 2016, counsel informed me, the Balancing Pool made the Buyer’s payments to ATCO and ENMAX continued to exercise Offer Control until July 13, 2016. The parties fulfilled these obligations in the interim, it appears, without prejudice to their respective positions on this application. Both parties acted pragmatically to minimize any collateral impacts while they resolved this issue.

Positions of the Parties

[19] ENMAX says all of the following compel the conclusion that the effective date of termination is, in this case, January 1, 2016: the “clear and unambiguous wording” of Section 4.3(j) of the BR PPA; the intent for Section 4.3(j) according to the “independent assessment

team” (or “**IAT**”); the related statutory provisions including but not limited to section 96(3) of the *EUA*; and the importance of such a right to a party like ENMAX to manage its risks.

[20] The Balancing Pool says the BR PPA is not clear and unambiguous but is in fact silent on the effective date of a termination under Section 4.3(j). It says that ENMAX seeks to impermissibly read-in a unilateral term to the legislation. It says ENMAX’s interpretation is unsupported in light of the entirety of the BR PPA and the legislative scheme.

[21] Further, the Balancing Pool says if the ENMAX interpretation prevails, “the date on which the Balancing Pool was legally *required* to act as Buyer would predate the date on which it was legally *able* to act as Buyer” (emphasis by the Balancing Pool). It says that the ENMAX interpretation would entitle it to terminate the BR PPA prior to the Balancing Pool being able to (i) investigate and verify the claimed termination for a Change in Law, (ii) apply for the requisite order under subsection 3(3) of the *FEOC Regulation*, and (iii) satisfy its other legal obligations relating to Offer Control.

[22] This Court’s jurisdiction to hear and decide this application was not in issue; both parties say this Court has jurisdiction. Both also say that it is open to the Court to declare any date as the effective date of termination, and that I am not limited to concluding it must be one of the two dates they commend as correct.

Threshold Issue on Admissibility of Affidavit Evidence

[23] The parties initially proceeded by way of an Agreed Statement of Facts. ENMAX then filed two further affidavits (the “**Disputed Affidavits**”). The Balancing Pool brought a cross application to strike the Disputed Affidavits, or most of them, on the basis of being (1) hearsay; (2) not relevant; (3) inadmissible opinion; and/or (4) prejudicial.

[24] For the most part, I agree. Upon review of the first Disputed Affidavit I consider only paragraphs 5 to 7 (which describe the work of the IAT and excerpt portions of its work product), and paragraphs 31 to 33, 36 and 37 (which may suggest inexcusable delay by the Balancing Pool in becoming able to take over ENMAX’s role as Buyer under the BR PPA) to be admissible on this application, and therefore also paragraphs 1 and 2 that identify the affiant. The IAT information is relevant and informs the statutory interpretive question (as described more fully below at paragraphs 31 to 42). The evidence of possible delay by the Balancing Pool is relevant to the Balancing Pool’s position on the effective date of termination of the BR PPA and its probative value to that approach exceeds any prejudicial effect.

[25] Upon review of the second Disputed Affidavit, only paragraphs 7 and 8 are admissible on this application, and therefore also paragraph 1 identifying the affiant. Paragraphs 7 and 8 also are relevant to the Balancing Pool’s approach to determining the effective date of termination of the BR PPA.

[26] All the remaining portions of the Disputed Affidavits are irrelevant to the question of law before the Court or are otherwise inadmissible. I therefore grant the Balancing Pool application to strike those remaining portions and referenced attachments. The weight of the admitted portions of the Disputed Affidavits is a separate matter. It has been assessed in the context of the Court’s deliberations on the main issue.

[27] ENMAX characterizes some of the remaining portions of the Disputed Affidavits as admissions by the Balancing Pool against its interest and therefore admissible hearsay. ENMAX

says the Balancing Pool has made numerous statements and admissions that acknowledge and admit that it became the default Buyer of the BR PPA effective January 1, 2016. ENMAX says these are an exception to the inadmissibility of hearsay and relies on *R v Waite*, 2014 SCC 17 at para 3, where the Supreme Court of Canada states: “[t]he general rule is that out-of-court statements by a party may be adduced as evidence of their truth by an opposite party”.

[28] In my view, the statements ENMAX refers to here do not fall into that category. They also do not constitute *factual* admissions by the Balancing Pool against its interest. In *Augustine v Inco Ltd.*, 2006 CanLII 21783, the Ontario Superior Court of Justice said, at paras 10-13 (emphases added):

An admission is a statement made by one party against his or her own interest. Such a statement is admissible as an exception to the hearsay rule. Documents that contain admissions of a party are admissible as some evidence to prove the facts admitted against that party.

The party who made the admission may not rely upon this exception to the hearsay rule. However, the party who made the admission is not precluded from introducing that admission as some evidence of the facts stated, based on some other exception to the hearsay rule.

A statement may only be accepted as evidence under this exception as evidence of the facts stated; it may not be accepted for the truth of opinions, diagnoses, impressions, summaries or recommendations.

The foregoing is not to be confused with a formal admission, such as an admission made in a pleading or in response to a request to admit. The party making an admission against interest may lead other evidence to contradict the facts stated.

[29] Out of court statements against a declarant’s interest that are admissible are statements of fact, not statements of legal opinion on statutory interpretation. The ‘admission against interest’ evidence that ENMAX seeks to rely upon is opinion evidence, about a question of law from a non-lawyer, which purports to answer the ultimate question before the Court and, as stated earlier, is irrelevant to the test used to interpret statutes. That evidence is not admissible.

Effective Date of Termination

[30] The right of ENMAX to terminate the BR PPA for a Change in Law is contained in Section 4.3(j). Both parties acknowledge that it is silent as to the date any such termination would be effective.

[31] ENMAX suggests the BR PPA should be interpreted as a contract. The Tax Court of Canada referred to a PPA as a “contract-like instrument”: *Alberta Power (20000) Ltd v R*, 2009 TCC 412 at para 4. The Alberta Court of Appeal described PPAs as “long-term contracts”: *ATCO Electric Ltd v Alberta (Energy and Utilities Board)*, 2004 ABCA 215 at para 17. This Court held that “PPAs are not contracts, but are ‘a form of regulation’”: *TransAlta Generation Partnership v Balancing Pool*, 2012 ABQB 2 at para 9.

[32] I consider the characterization of PPAs by the AUC to be correct, that they are not strictly commercial contracts but are “a component of a comprehensive statutory scheme enacted to

ensure the fair, efficient and openly competitive operation of the electricity market in Alberta”: *MSA v TransAlta, Nathan Kaiser, and Scott Connelly*, AUC Decision 3110-D01-2015 at para 289. In that case it had been argued that the AUC did not have jurisdiction to review or interpret PPAs because they were commercial contracts. The AUC disagreed, basing its conclusion on how the IAT characterized PPAs in its report to the Alberta Energy and Utilities Board in 1999 (the “**IAT Report**”)¹. The purpose of the IAT Report was to provide the IAT’s determination of the form of the PPAs for the specified generating units and its determination of the parameter values to be included in each of the PPAs for those units. The AUC relied on the following excerpt from the IAT Report:

The IAT has elected to proceed on the basis that the PPAs will not be agreements. It is proposed that the PPAs be specifically authorized and implemented in accordance with the legislation and the regulations which will specify that a particular arrangement attached by reference will operate as between the named Owner and successful bidder at the PPA auction(s)...

As a general rule, the IAT has drafted the PPAs to be as close to a contractual form as possible recognizing the limitations involved. There are recitals but they do not record any agreement as between the parties. Certain other clauses to contracts have been left out and, finally, there is no provision for the document to be executed since it will be in effect by virtue of the legislation and the regulations: *MSA v TransAlta* at para 289 citing the IAT Report at page 2. (emphases added)

[33] Decisions of the AUC regarding its governing statutes and regulations attract a high degree of curial deference: *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 28 at para 26. Though the deference spoken of in that case meant deference to decisions of the AUC applying its governing statutes that are under appeal, the deference is no less appropriate here regarding its characterization of the nature of a PPA for purposes of their interpretation.

[34] In any event of deferring to the AUC’s conclusion, its conclusion that PPAs should be understood and implemented in accordance with their legislative and regulatory context is correct at law. First, their wording is made final by legislative act. Second, all the essential elements to the creation of a contract are not present.

[35] Third, they are not stand-alone documents. It is *necessary* to consider other statutory provisions to understand the complete terms that govern the relationship between PPA parties and to understand the intent behind their words.

[36] Fourth, the wording of PPAs make it clear they operate in conjunction with the broader regulatory regime contemplated by the *EUA*. For example, half of all their recitals commence with: “By operation of the Act [meaning the *EUA*] and in accordance with the terms and conditions of this Arrangement...” In this way their own wording necessitates reference to legislative enactments. Further, the electrical power becoming subject to a PPA required prior

¹ Alberta, Independent Assessment Team, *Independent Assessment Team Report To The Alberta Energy And Utilities Board on Implementing Deregulation of Electric Generation In Alberta* (Calgary: AEUB, 1999).

determination by the IAT and prior approval by a regulator – originally by the Alberta Energy Utilities Board (“AEUB”) and now by the AUC.

[37] Fifth, despite it wanting the Court to interpret the BR PPA as a contract, ENMAX has implicitly acknowledged that the legal effect of the BR PPA is not dictated by its words alone. By their Agreed Statement of Facts the parties recognized that the wording of Section 4.3(j) in the BR PPA has been revised by, or at least clarified by, the AEUB. They state:

On August 1, 2000, Section 4.3(j) was amended by way of Errata issued by the AEUB, which clarified that under Section 4.3(j):

... the Buyer shall be entitled to terminate the PPA and shall not be liable for, nor entitled to any Termination Payment if a Change in Law renders the PPA unprofitable, or more unprofitable.

These “or more unprofitable” words are not in the BR PPA, but ENMAX has proceeded in recognition that they apply as if they were in the BR PPA.

[38] Accordingly, I am to consider both the text of the arrangement within the legislative scheme as a whole. The PPA’s legislative scheme includes the *EUA*, the *Balancing Pool Regulation*, the *Power Purchase Arrangements Determination Regulation*, the *Power Purchase Arrangement*, the *FEOC Regulation*, and the ISO Rules.

[39] The leading case on statutory interpretation is *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at 41, where the Supreme Court of Canada adopted Driedger’s modern approach:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

[40] I agree with the Balancing Pool that the *Interpretation Act*, RSA 2000, c I-8, therefore also applies here, such that the BR PPA and its authorizing statutory regime must be interpreted in a fair, large, and liberal way that “best ensures the attainment of its objects”: *Interpretation Act*, s 10.

[41] The Alberta Court of Appeal in *Balancing Pool v TransAlta Corporation*, 2013 ABCA 409 at para 34, found that “[t]he purpose of the *EUA* is the development and promotion of an efficient market for electricity based on fair and open competition.”

[42] When interpreting regulations, materials such as policy papers and cost-benefit assessments or impact analyses prepared by or relied on by the government in the course of the regulation-making process are admissible extrinsic aids: Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 261. In *Schaeffer v Woods*, the Supreme Court of Canada expressly relied on a report that formed the basis of a regulation as direct evidence of the regulation’s intended scope: *Schaeffer v Woods*, 2013 SCC 71 at paras 53-60. In this case the legislators relied on the associated AEUB decisions and the IAT Report therefore they also offer insight to the Court as to the legislator’s intention.

[43] For the reasons that follow, the only interpretation of the effective date of a section 4.3(j) that is consistent with the PPA as a whole within its legislative context, and the purposes and object of that legislative context, is: the termination date selected by the Buyer that is on or after the date that the Change in Law could reasonably be expected to render continued performance of the PPA unprofitable or more unprofitable. In this case, that date is January 1, 2016, at 12:01 a.m.

[44] First, the operative phrase in Section 4.3(j), underlined in the following: “to the extent that a Change in Law ... could reasonably be expected to render ... this Arrangement ... unprofitable to the Buyer... then the Buyer may terminate this Arrangement”, without more, suggests the right to terminate is effective immediately. It does not say “then the Buyer may provide notice of termination”, “then the Buyer may terminate effective no less than [X] days thereafter”, “then the Buyer may place affected parties on notice the Arrangement will terminate after [future event(s)]” or any other such wording suggesting a delay before the termination could take effect. The Balancing Pool says ENMAX’s interpretation impermissibly reads-in a unilateral term (“immediately”) to the legislation but I find the word implicit by the absence of any specified period of time before the termination may take effect. Further, it is actually the Balancing Pool’s interpretation that reads-in words not there. In effect it says other legal requirements and practical realities import into Section 4.3(j) by operation of law words like “but not effective until after the Balancing Pool is legally able to act and physically capable of acting as Buyer under the Arrangement”.

[45] While the phrasing actually used in Section 4.3(j) is not “clear and unambiguous” proof, as ENMAX urges, that such terminations can take immediate effect if the Buyer chooses, it is nevertheless the more reasonable inference and is a relevant consideration. It militates in favour of the effective date being whatever date the Buyer chooses, on or after the Change in Law takes effect.

[46] This interpretation is reinforced by reference to the other BR PPA sections contemplating termination:

- Section 14.6 permits termination for an event of force majeure that exceeds or will exceed 6 months in duration or that will extend past December 31, 2020. Like Section 4.3(j) the provision is silent on the effective date of any such termination, stating: “... then the Buyer may terminate this Arrangement ...”.
- Section 15.2 allows the Owner to terminate “for destruction” on 60 days’ notice.
- Section 15.3 allows a Buyer to terminate on 30 days’ notice if the BR5 unit is destroyed.
- Section 17.3 allows either party to “immediately terminate” if the other party substantially defaults, is bankrupt, insolvent, in receivership, dissolved, liquidated, or even into proceedings headed that way. The right to terminate immediately for substantial default only comes after giving 60 days’ notice to allow the party opposite to remedy the substantial default. The right to terminate immediately for all these 17.3 scenarios requires prior payment of a Termination Payment, determined in accordance with “Schedule L” to the BR PPA.

- Section 17.4 allows the Buyer to “immediately terminate” at any time upon prior payment to the Balancing Pool in accordance with Schedule L.

I infer from these other termination provisions that the drafters turned their minds to the effective dates of terminations and to the cost consequences of early terminations. They chose to not insert any period of prior notice, or any payment precondition, before a Section 4.3(j) termination would take effect.

[47] The Balancing Pool says that an immediate right was expressly mentioned in Sections 17.3 and 17.4, but not in Section 4.3(j), and therefore the drafters must have intended the right in Section 4.3(j) to not be immediate. With respect, first, that compares Section 4.3(j) only with Sections 17.3 and 17.4, in disregard to the other rights of termination in the BR PPA. Second, the Section 17.4 right of a Buyer to terminate is unilateral and immediate. The Balancing Pool accepts this, that this ground for termination takes effect immediately. But if it occurs when the Balancing Pool is, as it was between January 1 and July 13, 2016, without capacity to exercise Offer Control 24/7 it would, under its reasoning, nevertheless be forced to operate illegally. If the Balancing Pool was consistent in its approach, it would not juxtapose a Section 4.3(j) termination to a Section 17.4 “immediate” termination. Instead it would say they both are modified by the subsequent enactments and choices of the Balancing Pool to not operate its own Offer Control processes. Third, the “immediate” wording in Sections 17.3 and 17.4 is accompanied by an express period of time to remedy a substantial default, in respect of that possible triggering event, and a payment penalty in respect of all the possible triggering events due to the terminating party upon its election to terminate immediately. So the contrast suggested by the Balancing Pool fails. In my view, the better interpretation is that the absence of an effective date of a Section 4.3(j) termination that expressly is later than the notice of termination implies that the termination takes effect upon notice.

[48] Second, the other wording of Section 4.3(j) militates strongly in favour of ENMAX’s interpretation. The end wording (underlined) states: “... then the Buyer may terminate this Arrangement and shall not be liable for, nor entitled to any Termination Payment.” This reveals the drafters’ intent to not have a Buyer bear any cost consequence from a Change in Law. The Buyer will not bear any cost consequence for a Change in Law termination only if the termination takes immediate effect. Under the Balancing Pool’s interpretation, the Buyer continues to bear cost responsibility and probable unprofitable operation until *after* the Balancing Pool verifies the Buyer’s claim under Section 4.3(j), the Balancing Pool self-perceives it has the legal ability to take over the Buyer’s role and the Balancing Pool self-perceives it can actually do so in fact. In my view this is inconsistent with the apparent intention of Section 4.3(j).

[49] Third, the Balancing Pool’s interpretation renders the legislated interim payment scheme between notice of the termination and verification of its validity superfluous, in the circumstance where the claim is ultimately verified. Section 2 of the *Balancing Pool Regulation* states:

2(1) The Balancing Pool must carry out the following powers and duties in accordance with the Act, the regulations and any arrangement:

...

- (g) on receipt of notice in respect of an extraordinary event from a party to an arrangement or otherwise,
 - (i) conduct any investigation the Balancing Pool determines appropriate, and
- ...
- (h) when clause (g) applies,
 - (i) agree with the parties to the arrangement that the extraordinary event has occurred and that there is a need for a payment to be made to or by the Balancing Pool, or
 - (ii) assess and verify the occurrence of the extraordinary event and the need for any payment to be made by or to a party under the provisions of the arrangement, and participate in any dispute resolution proceedings under an arrangement pursuant to subsection (2);
- (i) on receipt of notice under clause (g), begin making payments as set out in an arrangement until all matters arising pursuant to clauses (g) and (h) are agreed to or resolved;
- ...
- (2) Notwithstanding the provisions of an arrangement, and subject to section 2.1, if
 - (a) a party to the arrangement disputes a determination by the Balancing pool under subsection (1)(h)(ii), or
 - (b) the Balancing Pool disputes that an extraordinary event has occurred or that a payment to or by the Balancing Pool should be made under the provisions of the arrangement,

the dispute must be resolved by the dispute resolution process set out in the arrangement.

The termination by ENMAX in this case satisfies the definition of an “extraordinary event” in this regulation.

[50] The scheme established here for extraordinary events like the Change in Law driven termination is, therefore, to immediately relieve ENMAX of its obligation as Buyer to make payments to the Owner in the interim, while the Balancing Pool conducts the mandatory investigation, but at the same time ensure the Owner continues to receive its capacity payments. The Balancing Pool is the backstop. Upon completion of the assessment, one of two things will occur. Either the Balancing Pool will verify the legitimacy of the claim of an extraordinary event or it will dispute the claim’s validity. If the claim is not verified, the dispute must be resolved in accordance with the Section 19 dispute resolution provisions of the PPA. At issue there would be the validity of the disputed claim and the cost responsibility for the interim period, the Balancing Pool being entitled to reimbursement of the amounts it paid to the Owner in the interim if it prevailed through the dispute resolution process. If on the other hand the Balancing Pool verifies the claim, like it did with the BR PPA, no reimbursement would be necessary and the parties

would carry on with the Balancing Pool fulfilling the Buyer's role under the PPA and meeting all its responsibilities until it could sell the PPA at fair market value.

[51] If the Balancing Pool's interpretation is correct, however, even though the Balancing Pool has paid the Owner as required by a PPA and the claimed extraordinary event has been verified, the Balancing Pool could claim reimbursement of the payments to the Owner that predated the effective date of the termination. This undermines the interim mechanism.

[52] If the Balancing Pool's interpretation is correct, section 2(1)(i) of the *Balancing Pool Regulation* would be far more likely to read that the Balancing Pool's obligation is to make payments due under the arrangement "once" all matters arising are agreed to or resolved, not "until" they are agreed to or resolved, as it currently reads. It would require the Buyer, not the Balancing Pool, to continue to make such payments "until the effective date of the termination" or "until the Balancing Pool is legally able to fulfill the Buyer's responsibilities" under the arrangement or, at the very least, "until the extraordinary event is verified". It does not. The ENMAX interpretation of the effective date of termination is the one consistent with the broader legislative scheme.

[53] Fourth, section 96(3) of the *EUA* has similar effect. On its own, in isolation, the wording of section 96(3) is equally consistent with both parties' interpretations of Section 4.3(j). Both parties say the deemed sale and the obligation on the Balancing Pool take effect on termination, just ENMAX says that time is in accordance with the notice of the termination and the Balancing Pool says it is upon the effective date of the termination, after it can legally and actually fulfill the obligations.

[54] But read in conjunction with the *Balancing Pool Regulation*, in particular the portion just discussed above, the ENMAX interpretation of Section 4.3(j) is the more likely. The Balancing Pool interpretation would result in it bearing the interim payment obligations to the Owner from the date of notice of termination under the *Balancing Pool Regulation*, but not receiving any interim revenue for dispatched offers resulting from the Buyer's exercise of Offer Control until, in this case, months after the notice of termination, on the effective date of the termination under its interpretation of section 96(3) of the *EUA*. I consider that inconsistent approach by the legislators improbable. Far more plausible is that the drafters intended both to commence at the same time, on an interim basis until the claimed extraordinary event was verified or disputed, because they intended the effective date of a 4.3(j) termination to be immediate upon its notice.

[55] Fifth, I agree with ENMAX that the commentary in the IAT Report, recommending the Balancing Pool assume a buyer's role immediately upon a termination, informs what became the legislators' intention:

The IAT, however, agrees with the Owners that the Balancing Pool should have a "PPA backstop" role in risk mitigation under certain events (the specifics of which are discussed later in the report). The IAT has had to make assumptions about the role of the Balancing Pool. This section outlines the role that the IAT believes the Balancing Pool should take in performing this PPA backstop role.

In this section the term "termination" means that the Buyer exits from the PPA. The IAT proposes that, under these circumstances, the PPA should immediately be taken over by the Balancing Pool.

Balancing Pool Role in relation to the PPA

Termination

Where the PPA is terminated (i.e. the Buyer exits from the arrangement under the terms allowed in the PPA) it is assumed that the Balancing Pool is required, without delay, to take over the role of the Buyer. It is expected that the Balancing Pool will then have a number of options: IAT Report at page 15. [emphasis added]

And elsewhere in the IAT Report:

Post-Termination Role of Balancing Pool

The IAT's view has consistently been that the PPA determined by the IAT governs the relationship between the Owner and the Buyer (and includes, in some specific circumstances, the Balancing Pool in this relationship). Once the Buyer exits ("termination of the PPA" in the language of the PPA) the Balancing Pool steps in to take over many of the rights and obligations of the Buyer: IAT Report at pages 17-18. [emphasis added]

[56] Sixth, the ENMAX interpretation is more consistent with the purposes and objects of the legislation in two respects. A Change in Law termination taking effect immediately is more consistent with the intended role of PPAs in the transition towards a FEOC market and is more consistent with the Balancing Pool's statutory role as the backstop for extraordinary events. I will explain each of those in turn.

[57] PPAs were the means by which the legislators sought to introduce competition into the market for electrical power, by attracting additional competitors into that market, without confiscating the asset value of the very small group of incumbent power generators holding significant market power. The legislators needed to attract many different private commercial interests to become market participants by buying the PPAs. The more market participants that became interested in buying PPAs the better, for it would drive up their price at the PPA auctions. A greater number of market participants succeeding in acquiring PPAs would reduce the market power of any single holder of PPA rights, facilitating the transition to a FEOC market. To accomplish this, among other things, the legislators had the IAT undertake a two year industry consultation process to recommend PPA content and, further, the legislators relied on the industry expertise at the AEUB to review and approve the PPAs. From that process it appears the legislators endeavoured to provide as much certainty as possible to potential PPA buyers and relieve them of non-market related risks. They looked to such potential buyers to take on market risk, business risk, capital risk, regulatory risk, long term price risk and commercial counterparty risk, among other risks, but took steps to protect them from governmental risk – via the Change in Law provisions. Having been one of the few jurisdictions in North America to attempt the transition to market based commodity pricing of electricity, the legislators, and the AEUB by its Errata, appear to have understood the apprehension among the pool of potential investors in PPAs around government losing its resolve and reverting to price regulation, or making some equally adverse decision to the interests of a PPA buyer. The legislators chose to address that concern, expressly raised by industry during the IAT consultation, by including the Change in Law provisions. The interpretation of the Balancing Pool on the effective date of a Change in

Law driven termination undermines that intended allocation of risk and intended protection to PPA buyers.

[58] The interpretation of the Balancing Pool is also inconsistent with its statutory role as the backstop for extraordinary events. The Balancing Pool interprets the PPA and its statutory regime in a way that will keep itself whole in such events, rather than it keeping affected market participants whole, for the transition to a FEOC market.

[59] The Balancing Pool previously ceased maintaining its capability to immediately step in as PPA buyer. The Balancing Pool says that the AUC approved its having done so. The Balancing Pool relies on a decision of the AUC regarding the Balancing Pool's sharing of information with another market participant (Capital Power) so the latter could exercise Offer Control on behalf of the Balancing Pool in respect of electrical power from BR5: Decision 21406-D01-2016. The AUC focused in that application on the *FEOC Regulation* and ensuring that "no confidential information will be shared between the Balancing Pool, [Capital Power], and ATCO for the purposes of price-fixing, price-manipulation or any other conduct prescribed by the [*FEOC Regulation*": at para 24.

[60] The AUC ruled on whether the information sharing was reasonably necessary in the circumstances, not on whether the Balancing Pool was satisfying *all* its statutory obligations by contracting out its Offer Control responsibilities for generation assets reverting to it upon termination. That Decision concludes that the information sharing is reasonably necessary in the circumstances. It is not an approval of all the decisions that resulted in the Balancing Pool not being able to immediately backstop for BR5. Its decision cannot be taken, as the Balancing Pool intimates, as approval to reduce its statutory obligation to be poised and ready as a backstop against the risk of extraordinary event.

[61] The AUC decision implies that the approach taken by the Balancing Pool was consistent with its obligation to "manage generation assets in a commercial manner and exercise its powers and carry out its duties in a manner that is responsible and efficient": at para 30. But that is only one of the Balancing Pool's obligations. The AUC Decision is not a determination that the Balancing Pool could, in carrying out those duties, shift the cost consequences of doing so on to a PPA buyer that is terminating. That is a separate question that was not before the AUC but that is entailed by the question of law brought to this Court.

[62] Seventh, and finally, the Balancing Pool's interpretation makes the effective date of the Change in Law termination variable depending on its earlier actions and decisions, rather than being commercially certain as the legislators intended and as described above. I strongly doubt this was the legislative intent originally or that it was a legislatively intended collateral consequence subsequently, as legal requirements affecting all market participants, including potentially the Balancing Pool, were added.

[63] The Balancing Pool says that if the ENMAX interpretation prevails, "the date on which the Balancing Pool was legally *required* to act as Buyer would predate the date on which it was legally *able* to act as Buyer" (emphasis by the Balancing Pool). It says that the ENMAX interpretation would entitle it to terminate the BR PPA prior to the Balancing Pool being able to (i) investigate and verify the claimed termination for a Change in Law, (ii) apply for the requisite order under subsection 3(3) of the *FEOC Regulation*, and (iii) satisfy its other legal obligations

relating to offer control. The Balancing Pool says that “satisfaction of these prerequisites is dependent on factors beyond the control of the parties”.

[64] While it is true that the ISO Rules and the discretion of the regulator under the *FEOC Regulation* are outside the parties’ control, I am not persuaded that the Balancing Pool ending up in this position was beyond its control. The Balancing Pool only ran up against its prerequisites (ii) and (iii) above because of its earlier actions and choices in how to discharge its responsibilities. As these prerequisites became a possibility, the Balancing Pool had opportunity to adjust to them in advance of any immediate termination of a PPA (not just for a Change in Law termination), and remain positioned to fulfill its risk backstopping role. It also might be able to arrange with the terminating Buyer or the Owner to act as its interim agent until it could assume Offer Control, potentially avoiding the effect of a delay to comply with section 3(3) of the *FEOC Regulation*. It is not reasonable to suggest that PPA Buyers should bear the avoidable consequence of the Balancing Pool’s choices.

Conclusion

[65] Therefore I find that the Balancing Pool interpretation undermines the attainment of the statute’s objects, whereas the ENMAX interpretation fulfills them. I find the effective date of a Section 4.3(j) PPA termination to be the date the Buyer indicates in its notice of termination, that is on or after the Change in Law takes effect.

[66] For these reasons, the effective date of termination of the BR PPA is January 1, 2016 at 12:01 am. The parties may speak to costs if they are unable to agree.

Heard on the 7th day of September, 2017.

Dated at the City of Calgary, Alberta this 11th day of October, 2017.

P.R. Jeffrey
J.C.Q.B.A.

Appearances:

Dalton W McGrath, QC,
Michael O'Brien
for the Applicant

Roger Smith
Lara Mason
for the Respondent

TAB 3

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*,
2017 BCSC 861

Date: 20170524
Docket: S090663
Registry: Vancouver

Between:

**Cambie Surgeries Corporation, Chris Chiavatti, Mandy Martens,
Krystiana Corrado, Walid Khalfallah by his litigation guardian
Debbie Waitkus, and Specialist Referral Clinic (Vancouver) Inc.**

Plaintiffs

And

Attorney General of British Columbia

Defendant

And

**Dr. Duncan Etches, Dr. Robert Woollard, Glyn Townson, Thomas McGregor,
British Columbia Friends of Medicare Society, Canadian Doctors for Medicare,
Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison,
and the British Columbia Anesthesiologists' Society**

Intervenors

And

The Attorney General of Canada

Pursuant to the *Constitutional Question Act*

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

(Exhibits for Identification, Documents in Possession)

Counsel for Plaintiffs:	Robert W. Grant, QC
Counsel for Defendant:	Jacqueline D. Hughes Peter T. Duncan
Counsel for The Attorney General of Canada:	Kenneth A. Manning
Counsel for Intervenors Schooff, Lang, Hamer and Allison:	Craig D. Bavis
Counsel for Intervenors Drs. Etches, Woollard, Townson and McGregor, British Columbia Friends of Medicare Society, and Canadian Doctors for Medicare:	Joseph J.M. Arvay, QC
Dr. Roland Orfaly, Agent for Intervenor British Columbia Anesthesiologists' Society:	In Person
Place and Date of Hearing:	Vancouver, B.C. March 14, 15, 16, 2017
Place and Date of Judgment:	Vancouver, B.C. May 24, 2017

Table of Contents	Paragraph Range
A. INTRODUCTION	[1] - [6]
B. BACKGROUND	[7] - [13]
C. ANALYSIS	[14] - [188]
(a) Relevance	[21] - [23]
(b) List of Documents	[24] - [32]
(c) The Document Agreement	[33] - [47]
(d) Documents in Possession Doctrine	[48] - [61]
(e) Hearsay	[62] - [90]
(i) Traditional Exceptions to Hearsay Rule	[71] - [85]
(ii) Principled Approach to Hearsay	[86] - [90]
(f) The Documents at Issue: Lettered Exhibits for Identification	[91] - [171]
(i) Exhibit YY	[94] - [115]
(ii) Exhibit AAA	[116] - [156]
i. Exhibit AAA: First Document (November 9, 2016)	[120] - [140]
ii. Exhibit AAA: Second Document (November 4, 2016)	[141] - [143]
iii. Exhibit AAA: Third Document (October 4, 2016)	[144] - [147]
iv. Exhibit AAA: Fourth Document (October 4, 2016)	[148] - [156]
(iii) Exhibit DDD	[157] - [164]
(iv) Exhibit EEE	[165] - [171]
(g) Documents at Issue: Documents in Numbered Exhibits	[172] - [188]
(i) Exhibit 251	[173] - [182]
(ii) Exhibit 252	[183] - [186]
(iii) Exhibit 253	[187] - [188]
D. SUMMARY	[189] - [194]

A. INTRODUCTION

[1] This litigation is about wait times for health care in British Columbia and whether, given those wait times, four sections of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 (the “MPA”), are contrary to ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the “Charter”). Further, if there is a violation, can the challenged provisions be saved under s. 1 of the Charter?

[2] The subject application here relates to a dispute between the parties about the application of relevance, the documents in possession doctrine and hearsay to documents listed on the list of documents of the defendant British Columbia (“British Columbia”). The plaintiffs say that all documents on that list can be entered at least for the purpose of proving that British Columbia knew of the contents of the documents. In addition, a large number of these documents can also be entered for their prima facie truth, according to the plaintiffs.

[3] The documents at issue are primarily complaints by patients and others about wait times for medical care, emails written by employees of the Ministry Health (represented by the Attorney General of British Columbia) discussing those complaints and possible responses, draft responses and, in some cases, the actual responses that were sent to the complainants.

[4] During the course of argument, British Columbia consented to entering copies of the actual responses for their prima facie truth. However, it opposes the admission of the other documents. Canada adopts the position of British Columbia.

[5] The documents considered in this judgment are small in number and relate only to documents which were put before Sharon Stewart when she was cross-examined as an adverse witness by counsel for the plaintiffs on February 23, 2017. The plaintiffs submit that these documents are representative of a much larger group, numbering in excess of 900. On the other hand, after reviewing a list of documents prepared by the plaintiffs and which they intend on tendering in a similar fashion, British Columbia claims that the “Stewart documents” examined here are not representative.

[6] I have not seen the plaintiffs' large document list or the documents themselves and I cannot comment on them, including their relevance to this litigation. While the following decision applies directly only to the "Stewart documents" the expectation is that it will also provide direction to the parties for the larger group of documents.

B. BACKGROUND

[7] More than 80 days of trial have passed in this litigation and a large number of future days are planned. Some 66,000 documents have been disclosed, primarily by British Columbia.

[8] At this point in the trial the calling of evidence has been adjourned while a number of evidentiary and procedural disputes between the parties are to be decided, including this one. The plaintiffs have not completed their evidence and evidence from British Columbia may commence in fall or early winter 2017 at the earliest. Evidence from Canada and the intervenors will also be heard some time in the future.

[9] The plaintiffs filed the current application following evidence from an employee of the Ministry of Health they called as an adverse witness under sub-Rules 12-5(19) - (26), Ms. Stewart. Over the course of a day, she was asked a number of questions about complaints received from the public, doctors and Members of the Legislative Assembly ("MLA" or "MLAs") about wait times for medical care and the process of preparing responses to those complaints and inquiries.

[10] The witness was shown six packages of documents. She could only identify all of the documents in a small number of packages and these packages were entered as numbered exhibits. In other packages, she could only identify some of the documents and these packages were given numbered exhibits but the documents that the witness could not identify were given no weight. For most of the packages, she could not identify any documents and these were marked only as exhibits for identification.

[11] The plaintiffs now seek to have entered into evidence for their prima facie truth (as numbered exhibits) the packages of documents that are currently for identification only and the parts of the numbered exhibits that were given no weight.

[12] During the course of argument two documents that had been in dispute before were admitted by consent for their prima facie truth. These are two letters from the Ministry of Health to two individuals who had written complaining about waiting for medical care and who had raised issues about seeking services from a private facility.

[13] The letters offered the Ministry's explanations for the waits, suggested options and alternate programs and stated that medical treatment at a private facility could only be paid for privately (i.e. not with public funds from the Medical Services Plan ("MSP") of the Ministry). The letters are undated and signed by an executive director within the Ministry of Health. The recipients of the letters are not parties or witnesses in this trial and there is no evidence from them, including whether they approve or know about the admission of these documents. There is an agreement between the parties that any personal information that is admitted from non-parties (and in some cases patient/plaintiffs) will be subject to a sealing order.

C. ANALYSIS

[14] As above, the plaintiffs seek to admit documents on the list of documents of British Columbia that were authored by employees or agents of British Columbia as evidence for their prima facie truth. As well, they seek to enter as evidence documents from patients, relatives of patients, doctors and MLAs who have raised issues about wait time for medical care with the Ministry of Health. However, the plaintiffs say this second group of documents would only be entered as evidence that the Ministry knew about the complaints and not for the truth of their contents.

[15] As already mentioned, two letters from the Ministry of Health to two complainants have, in the meantime, been admitted by agreement. Otherwise, British Columbia points to the documents in this case numbering in excess of 66,000

and it objects to what it describes as an omnibus approach to the admissibility of these documents.

[16] What remains in dispute are a number of email strings with internal drafts of responses from the Ministry that the plaintiffs say should be admitted for their truth. The actual letters from patients and doctors are also in dispute and the plaintiffs say these are admissible to prove that the Ministry of Health knew about the complaints, not the truth of their contents.

[17] The broad legal elements of the plaintiffs' submission are:

- (a) A document listed on the list of documents by British Columbia is evidence that British Columbia has possession of the document (actually or constructively) for the purposes of admissibility under the documents in possession doctrine.
- (b) The document is also authentic as a result of the terms of a document agreement between the parties.
- (c) At this point the document is admissible under the documents in possession doctrine as being in the knowledge of British Columbia "and for circumstantial evidence of anything flowing from that knowledge," according to the submission of the plaintiffs.
- (d) Finally, a document may be used for the prima facie truth of its contents in two circumstances: if it can be shown or inferred that British Columbia has in any way recognized, adopted or acted on the document or its contents or any of the statements in the document fall within the traditional or principled exceptions to the hearsay rule.

[18] The plaintiffs acknowledge that other evidence may counter any documents entered as they propose. If there is a dispute after the close of evidence, that can be argued in final argument and decided in the final judgment in this litigation. In addition, if the documents at issue here are admitted for their prima facie truth, the

plaintiffs accept that British Columbia and Canada as well as the plaintiffs can use them. For example, some of the letters from the Ministry of Health already admitted for their prima facie truth contain information about complaints about wait times. However, they also include explanations from the Ministry about those wait times that British Columbia may rely on in final argument.

[19] I will consider the following legal issues:

- (a) Relevance;
- (b) The list of documents of British Columbia as it might relate to the documents in possession doctrine;
- (c) The document agreement between the parties as it might relate to the issue of the authenticity of documents;
- (d) The documents in possession doctrine; and
- (e) Exceptions to the rule against hearsay evidence.

[20] I will then consider the specific documents at issue in this application, whether each document is admissible in the context of the legal issues and, if a document is admissible, for what purpose it is admissible. Beyond determining the admissibility of the “Stewart documents”, the objective is also to provide general directions to the parties so that they can consider whether any of the large number of the other documents in dispute are admissible.

(a) Relevance

[21] In a previous judgment Mr. Justice Goepel (as he then was) usefully summarized the law of relevance (*Beazley v. Suzuki Motor Corp.*, 2010 BCSC 681):

[15] To be admissible, evidence must be relevant to the facts in issue and not subject to exclusion under any other rule of law or policy. Evidence is relevant “where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would appear to be in the absence of that evidence” (D.M.

Paciocco & L. Stuesser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 19).

[16] In a civil case, the facts in issue are established by the pleadings. Evidence unrelated to the issues as disclosed in the pleadings is not admissible.

[17] Not all relevant evidence is admissible. The court must also balance the cost to the trial the [sic] process of admitting the evidence. The judge's task was described by Sopinka J. in *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20-21:

Relevance is a matter to be decided by a judge as question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same.

[18] While the above passage was written in the context of the admissibility of expert evidence, the same principles must be considered in determining the admissibility of any form of evidence.

[22] To the above, I would add that relevance is a pre-condition of admissibility and determined separately from issues such as possession, authenticity and admissibility under one of the exceptions to hearsay. That is, if information in a document is not relevant, it is not necessary to determine those issues.

[23] By way of applying relevance to the documents in possession doctrine (discussed below) I note the following from a text on the latter issue (J. D. Ewart *et al*, *Documentary Evidence in Canada* (Toronto: Carswell, 1984), at pg. 233):

... the issue of relevance should be firmly pressed by those who seek to exclude documents which appear to fall within the broad ambit of this rule [possession of documents doctrine]. One common error in dealing with this doctrine is to assume admissible every document found in a party's possession which contains any material relevant to the issue at hand. But if

the party's mere knowledge of the contents has no relevance unless they are true, and if there is no evidence, whether by adoption of the document or independently, that the contents are true, then mere possession should not make the documents admissible.

(Footnotes omitted)

(b) List of Documents

[24] The plaintiffs rely on the list of documents of British Columbia for their submission that the documents at issue were in the possession of British Columbia. Possession is a critical element in the documents in possession doctrine, as discussed below.

[25] The Rules of Court set out the requirements for the discovery and inspection of documents, including the requirement for a list of documents. This is found in sub-Rule 7-1:

Rule 7-1 — Discovery and Inspection of Documents

List of documents

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

Documents to be enumerated

(2) Subject to subrules (6) and (7), each party's list of documents must include a brief description of each listed document.

...

[26] I first of all note that, under sub-Rule 7-1(1)(ii), a party is required to list documents that are not necessarily in that party's possession but which it intends to rely on at trial. This category could include documents in the possession of another party or even in the possession of a non-party and they are obviously *not* in the possession of the party preparing the list. For this reason, I am unable to find that

this sub-Rule establishes that a party has possession of all documents on its list of documents. As it happens this is not of significance in the subject application.

[27] More generally, I take the general purpose of sub-Rule 7-1 to be that a party is required to list documents that come under sub-Rule 7-1(a) that could be relevant. Whether they are admissible in court is a different and subsequent matter, determined by the rules of evidence. Documents listed on a party's list of documents are frequently challenged and some of those challenges result in the document not being admissible for a number of reasons. As noted above in *Beazley*, not all relevant evidence is admissible (at para. 17). For these reasons, I do not agree with the plaintiffs that this sub-Rule creates a level of proof for the purposes of admissibility of documents in court.

[28] In my view, whether a document is in the possession of a party for the purposes of admitting that document in evidence is a question of fact to be determined by considering the circumstances of the document (assuming it is relevant).

[29] For the purposes of the documents in possession doctrine, the Ewart text described the issue of possession of a corporation's documents as follows (Ewart, at pg. 243):

It would therefore seem to be beyond dispute that, in the absence of a special statutory provision, a corporation will not be found to have been in possession of documents found on corporate premises unless knowledge of their existence is brought home to responsible officials of the company. This could be done by showing the knowledge of the Board, or of an officer or employee acting in the course of his or her employment. Although, as is the case with individuals, this knowledge, and hence possession, can be inferred from the circumstances of the individual case, the standard clearly cannot be met by inferences from the mere finding of a document on corporate premises as part of the corporate records.

(Footnotes omitted)

[30] While there are legal differences between a government department and a corporation, I adopt that statement for the purposes of determining knowledge of documents as an aspect of the possession of documents doctrine as it might apply to the Ministry of Health in the subject application.

[31] Applying this to the subject matter, the statements at issue in the “Stewart documents” arose in the context of a well-established mechanism within the Ministry set up for the purpose of receiving and responding to complaints and inquiries from the public and elected officials. The client relations department within the Ministry handles both the tracking of such communications and drafts the responses that are then sent to the complainants. The responses must be approved and signed by higher ranking officials who possess the authority to publish official statements on behalf of the Ministry. For these reasons I find that all of the “Stewart documents” were in the possession of the Ministry of Health.

[32] It should be noted, however, that the packages of documents also contain internal emails exchanged between Ministry employees as part of the process of drafting responses to complaint letters. It is not always clear who is the author of these internal exchanges or whether the person making the statement had the requisite expertise, knowledge or authority to make them, as I discuss below. However, at this point, and for the purposes of deciding the issue of possession, I find that given the context of the communications and the way in which they were processed and handled by the Ministry they were in the Ministry’s possession at the relevant time.

(c) The Document Agreement

[33] On August 23, 2016 the plaintiffs, British Columbia, Canada and the intervenors signed a document agreement. Such agreements are often used in litigation in this court but they are not included or otherwise regulated by the Rules of Court.

[34] The plaintiffs submit that a number of provisions in the document agreement support their position that the documents at issue are authentic. According to British Columbia, the agreement does not assist the plaintiffs on this point. In light of the above conclusion that the documents/statements in issue are authentic, it is not strictly necessary to consider this issue. However, it is part of the submission of the plaintiffs and I will consider it.

[35] As general context for the agreement, I note ss. 1, 6 and 7 of the document agreement:

1. In this Agreement the word “Document”;
 - (a) in its singular or plural form, has the meaning set out in Rule 1-1 of the British Columbia *Supreme Court Civil Rules*; but
 - (b) is limited to documents that have been disclosed or produced by a party in compliance with the provisions of the *Supreme Court Civil Rules*; and
 - (c) does not include any other documents or evidence tendered at the Trial;
- ...
6. Nothing in this Agreement shall limit or restrict the rights of any party to tender evidence or prove Documents in any manner that might otherwise be permitted if this Agreement had not been made.
7. Nothing in this Agreement shall prevent any party from:
 - (a) objecting to the admissibility of a Document that is not included in the Common Book of Documents; or
 - (b) seeking further directions from the Court, to resolve questions of proof of Documents at the Trial.

[36] I take s. 1(b) to include documents listed by a party (i.e. British Columbia) on its list of documents as required under the Rules. Documents tendered at trial are an exception and, in any event, that is not an issue here. Then s. 6 opens up a broad right to tender evidence or prove documents “in any manner that might otherwise be permitted if this Agreement had not been made.”

[37] Section 7 is most significant to the subject application by the plaintiffs. It permits any party to object to documents not included in the “Common Book of Documents”. The definition of the Common Book of Documents appears to be that it “contain[s] most if not all, of the documentary evidence that will be tendered at Trial”. This is in the preamble to the agreement so it is not clear what legal significance it has. As well, the use of “most” leaves open what will be in the book and can be fairly described as a statement of intent rather than a conclusive definition.

[38] Overall, whether in anticipation of evidence that might arise at trial or for other reasons, the document agreement leaves open the prospect of documents being

entered into evidence that are not in the Common Book. It follows that the documents subject to this agreement are not a closed group and can be added to in the future. Put another way, the agreement does not define a specific and closed group of documents.

[39] Similarly, s. 7 also permits any party to seek further directions from the court to resolve questions of proof of documents at trial. This indicates that the fact that a document is in the book of documents does not resolve questions of proof. That is, the Book of Documents is not the final word on what documents are or will be admissible at trial. Nor does it decide that all of the documents in the Book are admissible since any party can seek further directions from the court “to resolve questions of proof” (s. 7(b)). This is also demonstrated in s. 3 of the agreement, discussed below.

[40] The plaintiffs also rely on most of s. 2 of the agreement. I set out all of that provision here:

2. The following provisions apply to all Documents, whether or not they have been included in the Common Book of Documents:
 - (a) A paper or electronic copy of a Document is prima facie proof of the true copy of the original document;
 - (b) A date appearing on a Document is prima facie proof of the date it was written, executed, modified or made effective;
 - (c) Where, by its content or nature, it is apparent that a Document was intended to be delivered to a person, it will be presumed to have been so delivered in the normal course of business, whether by post, fax, email or physical delivery;
 - (d) Where, by its contents or nature, it appears that a Document was written, created or authorized by or under the instructions of a person, it will be presumed that it was so written, created or authorized by that person;
 - (e) Where, by its content or nature, it appears that a Document was received on a particular date or at a particular time, it will be presumed that it was so received;
 - (f) Where a Document, by its content or nature, appears to have been made and kept in the usual and ordinary course of business, it will be presumed to be a business document admissible pursuant to section 42 of the BC Evidence Act; and

- (g) Any party, including the party that tenders or files a Document, may dispute the authenticity, date of creation, delivery, receipt or authorship, or truth of the Document, or contradict it in any way, or lead other evidence, including another Document, tending to contradict the content of the Document.

[41] The meanings of the sub-sections of s. 2 are self-evident and they confirm that a copy is prima facie proof of the original document and so on. However, s. 2(g) leaves open the possibility of a dispute about a document on many of the very issues that purport to be resolved by the preceding sub-sections. For example, s. 2(f) creates a presumption in favour of the business document exception to hearsay but s. 2(g) opens up a challenge to a document on a number of grounds including truth. Similarly, while sub-sections 2(a)-(f) establish an assumption of authenticity of documents and the truthfulness of its identifying features therein (such as dates and authorship), sub-section 2(g) provides that any party may dispute the authenticity of a document or the accuracy of the information therein.

[42] This internal contradiction in the document agreement does not assist the plaintiffs because it is counter to their submission that the agreement answers any questions of authenticity of documents covered by the agreement.

[43] For its part, British Columbia relies on parts of s. 3 of the agreement and I set out all of that provision:

3. In addition to the provisions in paragraph 2, the following provisions apply to every Document included in the Common Book of Documents:
 - (a) the Document is admitted into evidence at Trial as an exhibit;
 - (b) the inclusion of a Document in the Common Book of Documents does not constitute an admission of any facts contained in the Document by any party;
 - (c) any party may make submissions regarding the relevance, accuracy, proper use and weight of any document in the Common Book of Documents;
 - (d) no statement or other record of opinion of any kind or form contained in a Document is admissible as evidence of the truth of the opinion unless, by law or the rules of evidence and procedure, it is admissible as such and all legal and other

- conditions to and requirements for its admissibility as such have been met;
- (e) any medical or mental health related diagnosis recorded in a Document is admissible as evidence that the diagnosis was made;
 - (f) any medical or mental health related treatment or therapy recorded in a Document as having been prescribed or recommended is admissible as evidence that the treatment or therapy was prescribed or recommended; and
 - (g) For greater certainty, the purpose of the Common Book of Documents is to facilitate the tendering and admission of documentary evidence at the Trial. The rules of evidence and law permitting their admission for various purposes continues to apply to all of the Documents in the Common Book of Documents, and nothing in this Agreement should be interpreted as derogating from the full extent of their admissibility at law.

[44] Section 3 further weakens the overall effect of the Document Agreement. While a document in the Book of Documents can be entered at trial as an exhibit, its inclusion in the Common Book is not an admission of any facts contained in the document. Further, any party may make submissions about the relevance, accuracy, proper use and weight of any document in the book and no statement or opinion in any document is evidence of its truth.

[45] Overall, the plaintiffs rely on the Document Agreement as an important part of their submission that the documents in question here are authentic and therefore admissible under the documents in possession doctrine. There are certainly provisions that do that (in s. 2 for example) but there are other provisions that at the same time allow a party to dispute authenticity of a document.

[46] I accept that creating a Document Agreement may assist counsel in organizing documents for an efficient trial. However, while the inconsistencies within the agreement noted above may be in anticipation of further evidence developing at trial, they do not assist the plaintiffs here in establishing conclusive authenticity for the documents at issue in this application.

[47] As for whether a relevant document is authentic or not for the purposes of its admissibility, as with determining who possesses it, this is a question of fact to be determined by considering its circumstances.

(d) Documents in Possession Doctrine

[48] The documents in possession doctrine has been described as one of the most frequently used methods of admitting documents into evidence (Ewart, at pg. 232).

[49] It has been defined in another leading text as follows (*Phipson on Evidence*, 13th ed. (1982), paras. 21-09):

Documents which are, or have been, in the possession of a party will, ... generally be admissible against him as *original (circumstantial) evidence* to show his knowledge of their contents, his connection with or complicity in, the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as *admissions (i.e. exceptions to the hearsay rule)* to prove the *truth* of their contents if he has in any way *recognised, adopted or acted* upon them.

(Footnotes omitted)

[50] The Ewart text cited identified three elements of the doctrine in a discussion of an older judgment (pg. 247, citing the *1794 Treason Trials* (1794), 25 How. St. Trials 1):

This passage contains within it three of the most basic principles of the doctrine under discussion. First, there is no *a priori* restriction on the types of documents admissible under this exception, whether by reference to their source, veracity, or antiquity. Second, the documents are admissible only if relevant. Finally, admissibility and weight are two quite different things; whatever *prima facie* evidentiary value mere possession may give rise to is always subject to being explained away, or to being given minimal weight.

(Footnotes omitted)

[51] Judging from the Ewart text the doctrine may be used more frequently in criminal than civil proceedings and, indeed, it appears to have special application to trials involving combined investigations. In a criminal trial a document is typically tendered through a police officer who seized the document in a lawful search and seizure. The fact that, for example, a score sheet in a marijuana grow operation is

found in the premises of the operation is circumstantial evidence for the limited purpose of establishing that the occupant had knowledge of drug trafficking. One piece of circumstantial evidence is not sufficient, however, to convict an accused. Moreover, possession of the document alone may only establish knowledge of its contents by the accused but not the truth of its contents, i.e. that the transactions actually took place or that the accused was involved. Nevertheless, this piece of circumstantial evidence may eventually be used by the finder of fact with other evidence to draw a negative inference against the accused.

[52] In contrast, in the civil proceedings here, the plaintiffs seek to admit documents not through a witness who can provide evidence on the circumstances in which the document was found, but by the mere fact that they were in the possession of British Columbia. The documents in possession doctrine appears to permit admission of documents in that way in a civil trial, as demonstrated in the *Beazley* case mentioned above. However, as will be seen, the documents are generally admitted for a limited purpose of establishing that the party in possession of the document had knowledge of the document rather than as circumstantial evidence of the truth of their contents. As reflected in the submission of the plaintiffs, something more than possession is required to have the documents admitted for their truth.

[53] A further difficulty arises in civil proceedings, or at least these proceedings, because virtually all of the statements at issue include opinions and often double hearsay. There is also the quantity of documents at issue. As already mentioned earlier, the documents which the plaintiffs seek to enter in this manner potentially number more than 900. Moreover, counsel for the plaintiffs have advised the Court that even that is not a final number and more documents may be added in the future.

[54] In addition, there are considerable difficulties related to the specific circumstances of this case. The plaintiffs do not seek to tender the documents, or at least most of them. Instead they seek to enter certain portions of the documents as evidence for the truth of their contents while other portions of the same document

will go only to prove that the defendant had knowledge of the complaint. Other portions of the same document will not be entered into evidence at all. Parsing specific statements from documents that otherwise contain irrelevant or otherwise inadmissible information does not only raise issues in terms of efficiency and manageability of this trial but, more importantly, it raises concerns regarding the potential prejudicial effects of these documents.

[55] Thus, while the documents in possession doctrine is applicable here, I note that there are several concerns related to civil litigation in general, and the nature of this trial in particular, which warrant special care in determining the way in which documents in the possession of a party may be entered into evidence absent an agreement between the parties or *viva voce* testimony.

[56] The possession of documents doctrine was also discussed in *Ault v. Canada (Attorney General)*, [2007] O.J. No. 4924 (S.C.), a case involving negligent misrepresentation. The plaintiffs place considerable reliance on this judgment and submit that it supports their submission in the subject application.

[57] In *Ault* the plaintiffs were former civil servants who alleged that problems with their pension plan should have been disclosed before they resigned their employment and the plan should have been transferred to their new employer, pursuant to a transfer agreement. A dispute arose between the parties about the admissibility of certain documents contained in a joint book of documents. The documents at issue included information bulletins, memoranda between public servants, emails, facsimiles, notes and letters. They related to what happened in terms of events, discussions, deliberations and decisions related to the plaintiffs and others (at para. 9). There is no reference to a document agreement in the judgment.

[58] The plaintiffs in *Ault* argued that the documents were admissible for their truth even though they contained hearsay. This was based on necessity and reliability under the principled approach to the exceptions to hearsay (discussed below). In contrast, the defendants argued that the documents might be admissible for the limited purpose of proving certain statements were made or information was sent or

received. However, because they were hearsay and there were issues related to necessity, they were not admissible for their truth. In the end, some documents were admitted for their truth and others were not admitted.

[59] As a first step in its reasoning, the court found that all of the documents were relevant (at para. 10). The court then noted that all but one document was authored by a government employee and were in the possession of the defendant at some time and were therefore admissible under the documents in possession doctrine (at para. 11).

[60] On this basis the documents at issue in *Ault* (except for one document) were admissible for a *limited purpose*, to prove that (at para. 12):

... the statements were made to and/or the defendant, that information was provided to and/or by the defendant, what specific information was provided to whom at what time and the state of mind, beliefs or understanding of the defendant (through its agents) at a particular point in time.

[61] I adopt this approach and find that the documents in possession doctrine applies to the documents at issue in the subject application for the purposes of their admission but for limited purposes. Those purposes will depend on the nature of each document. This doctrine does not establish the truth of a document unless the contents have been recognized, adopted or acted upon by, in this case, British Columbia, or, as below, they are admissible under one of the exceptions to the rule against hearsay.

(e) Hearsay

[62] In the subject application, as above, the plaintiffs rely on the fact that British Columbia had possession of the documents in order to invoke the documents in possession doctrine. The next step in their submission relies on the document agreement between the parties to establish that the documents are authentic. I have discussed those issues above.

[63] The plaintiffs further submit that all the “Stewart documents” pursuant to the documents in possession doctrine are admissible for the purposes of establishing that the defendant knew about the complaints.

[64] As a next step in their submission, the plaintiffs say that specific parts of the “Stewart documents” are also admissible for their prima facie truth because British Columbia adopted or acted upon them by processing them and responding to them.

[65] The documents at issue here are hearsay since they are out of court statements made by people who will not be witnesses in this trial. The plaintiffs submit that they are nevertheless admissible for the truth of their contents under the documents in possession doctrine once the defendant acted upon them. Alternatively, the plaintiffs submit that these portions of the documents are also admissible under one of the traditional exceptions to the hearsay rule or under the principled approach to hearsay.

[66] The defendant British Columbia, on the other hand, submits that even if the doctrine applies, portions of the documents which are hearsay are admissible only if one of the exceptions under the principled approach applies. British Columbia says that none of the exceptions apply in this case and therefore none of the statements in the documents are admissible.

[67] In *Ault*, Aitken J. usefully summarized the general principles of hearsay evidence including the traditional exceptions to the hearsay rule and the principled approach (citing *R. v. Mapara*, 2005 SCC 23, at para. 15):

- (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
- (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
- (c) In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

- (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.

[68] The reason for the careful consideration of hearsay evidence is that, by definition, there is no opportunity to test the reliability of the original statement made outside of court (*Ault*, at paras. 15, 16; citing *R. v. Khelawon*, [2006] 2 S.C.R. 787. (at paras. 2, 3)).

[69] A document tendered by itself in court is hearsay. This is so even if "... the author of the document subsequently testifies, unless the author as witness repeats what was said in the document or adopts it as his or her own evidence in court" (*Ault*, at paras. 17). In addition, before a document can be admitted in court for its truth, the party tendering the document (the plaintiffs here) has the onus to establish that the contents of the documents meet the criteria of necessity and reliability or one of the traditional exceptions applies. As in *Ault*, I conclude that even where a party had possession of a document and acted upon it, for a hearsay statement to be admissible to prove the truth of its contents it must meet the criteria of necessity and reliability or one of the traditional exceptions.

[70] The plaintiffs here rely on both the traditional exceptions and the principled approach in order to admit documents admissible through the documents in possession doctrine for the truth of their contents.

(i) *Traditional Exceptions to Hearsay Rule*

[71] The traditional exceptions to the hearsay rule relied on by the plaintiffs are declarations made in the course of a business duty, business records and admissions against a party.

[72] The exception for declarations made in the course of a business duty was described as follows in *Ault*:

[24] At common law, "statements made by a deceased person under a duty to another person to do an act and record it in the ordinary practice of the declarant's business or calling are admissible in evidence, provided they were made contemporaneously with the facts stated and without motive or interest to misrepresent the facts." This exception to the hearsay rule was

broadened in *Ares v. Venner*, 1970 CanLII 5 (SCC), [1970] S.C.R. 608, where the Court held that nurses' notes were admissible without the necessity of the original makers of the notes being called as witnesses. The nurses in that case were in fact in the courtroom and available to be called as witnesses.

[73] In *Ault*, a number of documents were prepared by public servants with a duty to advise the Crown, serve the public and keep records of events. They were identified by their exhibit numbers and admitted "at least to the extent that they reflect the personal observation or knowledge of the facts recorded" (at para. 25). In the alternative, they were admissible under the principled exception to the hearsay rule.

[74] The documents at issue in the narrative of the *Ault* judgment were primarily identified by their exhibit numbers. The particulars of the documents are not known except for this general list (para. 8):

1. Information Bulletins prepared by public servants for the public
2. Information Bulletins prepared by public servants for public servants
3. Memoranda between public servants
4. E-mails facsimiles, notes between public servants
5. Letters from public servants to one of the Third Parties
6. Letters between the RCMP and public servants

[75] It is not clear from the judgment which numbered exhibits are included in which of the above categories. In terms of understanding the documents at issue in *Ault* I also note that the broad purpose for the documents was "to prove the structure in place within the federal government to oversee and administer" the plaintiffs' pensions (at para. 49).

[76] Considering the very general information provided in the judgment about the documents at issue, the purpose of the documents was to provide context for the substantive issue in *Ault*, whether the defendant should have done something differently with the plaintiffs' pensions. The context appears to have been the organizational structure of the defendant at the material times. As I read the judgment, the documents were not directly relevant to the substantive issues in that

trial but to provide context as to the organizational structure and mode of operation. As will be seen, in the subject application the plaintiffs seek the admissibility of the documents at issue for the purpose of proving the substantive issues between the parties.

[77] With respect to the business records exception, the plaintiffs rely on the document agreement between the parties. As discussed above, the document agreement here is of limited use to the plaintiffs. In *Ault*, the issue of business records was not fully argued and evidence was not adduced with respect to the business records exception to hearsay under federal and provincial legislation (i.e. *Evidence Act*). No determination was made on this issue.

[78] Alternatively the plaintiffs rely here on s. 42 of the *Evidence Act*, RSBC 1996, c. 124 which provides that:

Admissibility of business records

42(1) In this section:

"**business**" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

"**document**" includes any device by means of which information is recorded or stored;

"**statement**" includes any representation of fact, whether made in words or otherwise.

- (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
 - (a) the document was made or kept in the usual and ordinary course of business, and
 - (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.
- (3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.
- (4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.

- (5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

[79] The documents at issue here clearly meet the requirement under sub-section 42(2)(a) because the complaint letters were kept in the “usual and ordinary course of business” at the Ministry. However, the documents do not meet the requirement under sub-section 42(2)(b) because it was not ordinary or usual to record the statements of facts within the documents at the time the event occurred or within a reasonable time thereafter. The processing of the complaint letters could only take place once a letter is received which in some cases may happen many months after the event it describes took place. In some cases certain statements in the documents are provided without dates so it is impossible to determine the timeline of the events and subsequent communications. For these reasons I find that s. 42 of the *Evidence Act* is not applicable here.

[80] The plaintiffs rely also on the “party statement” exception to the hearsay rule. The cases describe this exception as the “Admissions of a Party” (*Ault*, at para. 27). The following is a summary from *Ault* describing this exception:

[27] Out-of-court statements made by a party to the proceedings have been regarded as admissible at the instance of an opposing party as an exception to the hearsay rule. An admission may consist of a written statement made directly by or on behalf of a party and tendered as evidence at trial by the opposing party. “Statements made by a representative of a party in his or her capacity as such may be binding as admissions against the party.” [Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, 2nd ed. (Butterworths: Toronto, 1999, para 6.323)]. This is of particular relevance in this case where the Crown is a party and the documents in question were authored by agents or employees of the Crown. For the admissibility of an agent’s statements against his or her employer, there must be proof of the agency or employment and proof that the admission of the agent to a third party was made within the scope of his or her authority during the subsistence of the agency or employment relationship. ...

[81] The justification for requiring proof of agency and proof that the admission of the agent or employee was made within the scope of his/her agency or employment (rather than requiring that the statement actually be authorized by the principal or

employer) is the proposition that the agent/employee is well informed. “Accordingly, the predominant view now favours broader admissibility by agents if the statement concerned a matter within the scope of the declarant’s employment and was made before that relationship was terminated” (*Ault*, at para. 27; citing Strong, John William (ed.) *McCormick on Evidence*, 4th ed. (St. Paul: West Publishing, 1992) at 158; *The Law of Evidence in Canada*, at para. 6.326; and *Caron v. Allport*, [1995] O.J. No. 4220 (Gen. Div.), at paras. 22-23).

[82] It follows from this that a statement made by one employee to a second employee within the Ministry of Health is admissible as against the Ministry so long as it is made within the scope of the first employee’s employment. However, where a statement is based on hearsay or “unqualified opinion”, the party whose admission it is must adopt the hearsay statement or otherwise indicate it is true (*Ault*, at paras. 28-29, citing *Morrison-Knudsen Co. v. B.C. Hydro & Power Authority* (1973), 36 D.L.R. (3d) 95 (B.C.S.C.); *R. v. Streu*, [1989] 1 S.C.R. 1521). In *Streu* the Supreme Court of Canada described the point as follows (at page 1530):

...once it is established that the admission was in fact made, there is no reason in principle for treating it any differently than the same statement would be treated had it been made in the witness box. In the latter case, if a party indicates a belief in or acceptance of a hearsay statement, that is some evidence of the truth of its contents. The weight to be given to that evidence is for the trier of fact. On the other hand, if the party simply reports a hearsay statement without either adopting it or indicating a belief in the truth of its contents, the statement is not admissible as proof of the truth of the contents.

[83] I note that it is not every out-of-court statement by a party that is admissible under the admission of a party exception. Hearsay or opinion evidence of an employee or agent is not admissible under this exception unless the principal adopts the statement or it can otherwise be demonstrated that the principal believed in its truth. The requirement is also for relevant evidence in the sense described in *Beazley*: evidence is relevant “where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would appear to be in the absence of that evidence” (*Beazley*, at para. 15, citing D.M. Paciocco & L. Stuesser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 19). In a civil context, the requirement is broader than what would be

an admission against interest in a criminal context such as a confession. The proper term is admission of a party exception, not “party statement” as used by the plaintiffs.

[84] As will be seen, there are issues of hearsay, opinion and agency as well as relevance, with respect to the documents at issue in the subject application.

[85] In *Ault*, some documents were admitted under the admissions of a party exception to hearsay. They were “prepared by a public servant as part of his or her functions as a public servant and within the scope of his or her authority and which were conveyed to a third party”. Again, the documents were identified by exhibit numbers and they were not described in detail so it is not possible to know what types of documents were admitted. However, what is clear from the judgment is that they were tendered to establish the organizational structure of the defendant at the material times.

(ii) Principled Approach to Hearsay

[86] With respect to the principled approach to hearsay, in a previous judgment in this litigation (2016 BCSC 2377), I discussed this as follows:

[6] The Supreme Court of Canada has discussed the principled approach to the admissibility of hearsay in the context of criminal law (*R. v. Khelawon*, 2006 SCC 57 at para. 49):

The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society’s interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the

circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.

[7] In another criminal case, a statement by a peace officer about what he heard when he answered the cell phone of an accused (a “drug purchase call”) was ruled inadmissible. The Court again discussed reliability and necessity as follows (*R. v. Baldree*, 2013 SCC 35):

[72] ... the number of callers could also inform necessity. The Crown cannot be expected, where there are numerous declarants, to locate and convince most or all to testify at trial, even in the unlikely event that they have supplied their addresses — as in this case. And it is important to remember that the criteria of necessity and reliability work in tandem: if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed: see *Khelawon*, at para. 86, citing *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, and *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764.

...

[109] At bottom, the point is that the necessity criterion is not meant to stifle the admission of relevant evidence. Rather, it is ‘founded on society’s interest in getting at the truth’ (*Khelawon*, at para. 49). Necessity should be viewed as a servant of truth, not its master. For that reason, in cases such as this one - where the prospects of locating, identifying, and receiving accurate information from a forthcoming and cooperative caller is remote - if the evidence is reliable, it should be admitted because its reception into evidence will be necessary in order to get closer to the truth. If the evidence is not reliable it should be excluded. Either way, in my view, the focus should be reliability.

[87] In another previous judgment in this litigation I noted that some latitude should be given to the admissibility of legislative facts in constitutional litigation. However, the general rules of evidence, including hearsay, still apply, including the well-established requirements of reliability and necessity (2016 BCSC 1390, at paras. 34-41).

[88] In *Ault*, some documents were admitted under the principled exception to the hearsay rule. With respect to reliability, the court concluded that:

[38] The purpose for which the documents were prepared, the level of seniority of those preparing the documents, and the fact that the documents

were prepared during the course of the declarants' duties and responsibilities as public servants provide circumstantial guarantees of trustworthiness to such an extent that the statements in the documents can be considered highly reliable. Contemporary cross-examination of the declarant would likely have added little to the determination of reliability of the evidence.

[89] With respect to necessity under the principled approach, the court in *Ault* made similar findings about the documents in question; “[t]he documents themselves provide the best evidence of the matters in question”, it was more efficient to admit the documents rather than calling numerous witnesses and it was open to the defendant to call any of the authors to provide clarification or explanation (at paras. 45, 46).

[90] With respect to whether the probative value of the documents outweighs any prejudicial effect, the former was considered “very high”. Further, “[i]t is hard to identify any prejudicial effect of admitting the documents” (at paras. 49, 50).

(f) The Documents at Issue: Lettered Exhibits for Identification

[91] With the above in mind, I will now review the documents that the plaintiffs seek to have admitted. Again, all are listed on the list of documents of British Columbia. The position of the plaintiffs is that the ones authored by an employee or agent of British Columbia are admissible for their prima facie truth, including internal communications between Ministry employees. Others such as letters of complaint from patients and doctors are admissible to prove that British Columbia had knowledge of the complaints.

[92] There are two groups of packages of documents. The first are packages that were entered only for identification during the cross-examination of an employee of the Ministry of Health, Ms. Stewart. The second group includes packages in which some documents, or portions of them, were admitted and others were not.

[93] In the first category, there are four exhibits entered for identification thus far, two of which are packages of documents and two are single documents.

(i) Exhibit YY

[94] This is a ten-page package including a letter or email from a patient, a letter from his physician, three email strings (including an email from the same doctor) and a letter from the Ministry of Health responding to the patient's letter and copied to the doctor. Some of the emails include communications between Ministry employees as part of the process of drafting a response to the patient and possibly his physician. The Ministry's final response letter to the patient is now, by consent, a numbered exhibit entered for its prima facie truth and, therefore, is no longer an issue. These documents were and are in the possession of British Columbia and they are authentic.

[95] The plaintiffs say the email strings should also be entered for their prima facie truth. With respect to the communications from the patient and his doctor, the plaintiffs accept they cannot be entered for their truth but they claim they are admissible as prima facie proof that the Ministry had knowledge of the complaint.

[96] I will first consider the relevance of these documents. I note the statement in the Ewart text that particular attention should be applied to the relevance of documents that may be considered under the documents in possession doctrine (at para. 13).

[97] As a starting point, in a previous judgment in this litigation I recorded that British Columbia admitted "... that there have been a number of complaints about wait lists and requests for reimbursement of costs paid to private clinics" (2016 BCSC 2377, at para. 5). British Columbia repeats that admission in the subject application.

[98] That previous judgment has further application here since it considered the plaintiffs application to admit for their truth 45 pages of letters and emails from patients, their relatives and others. As in the current application, the plaintiffs relied on the principled approach to hearsay and said the documents were admissible based on necessity and reliability. I found that there were problems with necessity since there was no evidence the people writing the letters were unavailable and

problems with reliability since some of the documents were without names and virtually all of them involved hearsay, often double hearsay. I denied the plaintiffs previous application to admit the documents at issue.

[99] In the current application, counsel for the plaintiffs advises that the individuals named in the complaint letters are different from the ones in the previous application. He also points out that this time the plaintiffs are seeking admissibility only to establish that the Ministry knew about the complaints and not, as in the previous application, for proving the truth of the contents in the letters.

[100] Nonetheless, there are close parallels. In the previous judgment, I found support for my conclusion in the judgment in *Beazley*. That case involved allegations of problems with a vehicle, a “J1 Tracker”. The plaintiffs there applied to admit complaints about the vehicles from non-party individuals. I reproduce the part of *Beazley* where Justice Goepel found that the complaints were inadmissible:

F. Complaints

[40] The plaintiffs have included 17 complaint-related documents in Exhibit 13. The defendants submit that the complaint-related documents are not relevant, are inadmissible hearsay and do not meet the test for admissible similar fact evidence.

[41] The plaintiffs submit that the complaint documents are not being admitted for the truth but as evidence that the defendants were on notice of J1 Tracker rollover accidents and failed to take steps to modify or correct the vehicle.

[42] There can be many causes to a motor vehicle accident. Evidence concerning individual accidents are of limited value in determining whether or not the subject vehicle was properly designed and potentially involve an inordinate amount of time which is not commensurate with their value. The complaint-related documents found at Tabs 275, 286, 292, 293, 298, 302, 303, 304, 308, 311, 319, 325, 337, 346, 347 and 366 are inadmissible and shall be removed from Exhibit 13.

[101] In the subject case, the plaintiffs rely on *Beazley* and they say that the discussion of the documents in possession doctrine in that judgment supports the admission of complaints from the public here. It is true that in *Beazley* a number of documents were admitted based on the documents in possession doctrine (although not for their truth). However, as above, complaints from non-parties were not

admitted. It is clear that the reason for excluding them was relevance as can be seen from the paraphrasing of the analysis in *Mohan*, including the reference to “commensurate with their value” (at para. 42).

[102] Overall, as a matter of relevance, I can find little to distinguish the circumstances of the subject application from *Beazley*. The plaintiffs in both cases sought or seek to admit complaints from non-parties about, in the one case, wait times for medical care and, in the other case, complaints about the performance of a vehicle. There can be no question that medical care is more important than vehicle safety but the rules of evidence for each are essentially the same. Furthermore, unlike in *Ault* where the documents appear to have been tendered for the limited purpose of providing general context to the litigation, in *Beazley* and the subject application the complaint letters relate directly to the central issues of the litigation.

[103] In addition, there are a number of practical difficulties admitting non-party complaints. For example, they typically include opinions about medical issues and the health care system (without being certified in court as experts) as well as hearsay, sometimes double hearsay. For example, at times the authors of the complaint letters make statements about what they were told by physicians and other third parties. As well, to fully understand the complaints it would be necessary to know the medical history of each complainant and have that history examined in open court. That is the situation with the plaintiffs in this case who have had to disclose their medical records and can be cross-examined about the decisions they made concerning their medical care, sometimes very private decisions.

[104] In addition, British Columbia admits there have been complaints about wait times for medical care so there is nothing to be gained by admitting these numerous documents for the limited purpose of establishing that point. The plaintiffs say they are entitled to particularize that admission by entering individual cases but, in my view, that is unnecessary and not an effective use of the court’s time. It bears repeating that this is not a royal commission or a constitutional reference.

[105] It is also of some significance that the complainants named in the letters the plaintiffs seek to have admitted here did not provide any evidence of their own. There is no indication they support the use of their letters in this litigation or that they even know about that use. A sealing order is a partial answer to this concern but such an order demonstrates the privacy issues at play and it also demonstrates some limitations on how the documents can be used.

[106] The plaintiffs say the information in the letters at issue is well known by the public and not controversial. However, that view is not accepted by the other parties in this litigation. Furthermore, if that were true then the defendant's admission that complaints have been received should suffice and it is not necessary to "individualize" that assertion as the plaintiffs claim. The measurement of wait times and their causes are highly controversial in this trial and admissible evidence is required to prove or disprove those issues. Put another way, they must be decided on the direct evidence of the parties, bearing in mind there may be admissible evidence about systemic issues relevant to the individual circumstances of the plaintiffs. Simply admitting single documents creates more questions than answers.

[107] The result is that letters from non-party individuals complaining about delays in medical care are not admissible for any purpose.

[108] I turn next to the email strings in Exhibit YY that the plaintiffs seek to have admitted for their truth. As matter of relevance I note, first of all, the following emails that were circulated internally among Ministry staff:

As a first step after receiving a complaint, "Hi [name and deleted] - can I get this for rush reply direct MO approval please. Thanks..."

Emails about who would work on development of "some new messaging for surgical wait time complaints ... I think it makes sense for us to at least get started on the new language now..."

... We would be happy to work with your team to review the standard messaging to letters like these..."

[109] I can find no relevance in this and other email chatter between employees of the Ministry.

[110] Next, there is the letter and email from the patient's doctor. The plaintiffs have advised that they will be calling this person as a witness and, therefore, it is not necessary to consider the admission of these documents except through the usual means of his evidence.

[111] There is an email between Ministry staff about the doctor's letter which, among other things, says the letter will be shared with other staff and includes a comment of one employee that: "I take his comments about the 'solutions' we provide to patients. I wish we had something better to tell people but, in any case, we probably need to rethink our response to surgical wait time complaints". It is not known from the email what "solutions" are being referred to in the doctor's 2.5 page letter by the Ministry employee, although the doctor's letter ends with his "3-step solution free of charge" opinion and then provides eight points for consideration. Again, British Columbia does not dispute there are wait lists and that patients wait longer than they should. As for the general wish to offer something better, the evidence is that all parties want to offer something better. And it is not clear that the information was considered or otherwise managed by officials with the Ministry who had authority over these issues. The mere fact that an employee reproduces a statement made in a complaint letter or comments on it does not on its own constitute an "adoption" or "acting upon" the initial complaint letter. As stated above, something more is required to establish that British Columbia had acted upon that information, namely that the comment was made with authority or had been adopted by someone with the requisite authority in the Ministry.

[112] In addition, I am unable to find that a reference between staff about changes to complaint responses is relevant to the constitutional issues in this litigation. There is no evidence these changes were made or that they had any bearing on the rights of the plaintiffs. Moreover, it seems to me that there could well be violations of s. 7

and s. 15 of the Charter (or not) regardless of how complaints are generally managed.

[113] In summary, in light of the admission of British Columbia that there are delays for medical care (with the reasons being a controversial issue in this litigation) it is not necessary to admit this information for the limited purpose that the Ministry had knowledge of it. While these documents provide context for the documents admitted for their truth, to admit them would be the equivalent of admitting all of the information the Ministry possesses. Furthermore, the complaint letter itself adds very little once the final Ministry response to the complainant is admissible. Clearly where there is a response there is also an underlying complaint and that alone suffices to establish that the Ministry had knowledge of the complaint.

[114] Therefore, admitting the non-party letters is unnecessary and risks creating an overwhelming record of information requiring detailed examination of the medical care of non-party patients. The impact on the trial process including the additional time and evidence of admitting those complaints would not be commensurate with their value.

[115] As a matter of relevance, none of the documents in Exhibit YY are admissible. It is not necessary to consider the issues of the documents in possession doctrine or hearsay.

(ii) Exhibit AAA

[116] This is a four-page document. Each page is a “Request for Information/Patient Complaint” form for four named individuals who apparently raised concerns with the Ministry of Health. Two are from November 2016 and two are from October 2016.

[117] Each form has a number of boxes to be filled out including priority, dates requested and due, program area, name of complainant, patient name (sometimes a family member or someone else complains on behalf of a patient), “Details of Concern Received” and information required. The form is apparently part of the

process of replying to complaints from patients and draft language is recorded on the forms. These documents are subject to a sealing order for privacy reasons.

[118] The documents were and are in the possession of British Columbia and they are authentic. There is no evidence of final versions of the responses from the Ministry or that a final version was sent to the patient. In addition, there are no references to the sources of the information recorded.

[119] A discussion of the documents and statements at issue follows.

i. Exhibit AAA: First Document (November 9, 2016)

[120] Turning to the first specific document, the plaintiffs emphasize the following comments by the Ministry on one form (November 9, 2016) and they seek their admissibility for their truth or for the purposes of establishing that British Columbia had knowledge of the contents.

[121] The plaintiffs seek admission for knowledge on the part of British Columbia about wait times for ultrasound testing as follows: "approximately nine months for routine cases, with 5,8000 [sic, see below] requisitions currently waiting to be given appointment time". This is relevant but also hearsay.

[122] As a matter to be considered under the documents in possession doctrine, it is not clear how an employee identified as "Patient and Client Relations, Performance and Issue Management" with the Ministry of Health would have this knowledge in the course of her employment. Nor is there any indication that this information was "brought home" to responsible officials of the Ministry (Ewart, pg. 243). Mere possession of a document by the Ministry in the sense that the document was on its premises and even in its files may not, without more, afford grounds for an inference that its contents had come to the knowledge of the officials of the Ministry who had authority to deal with the matters discussed in the document (Ewart, pg. 243). As well, unlike *Ault*, these are controversial issues and there is considerable potential prejudice to admitting this statement by itself without proper evidence about the sources of the statements.

[123] Here, as in *Ault*, the email in question was prepared by a public servant with a duty to advise the Crown, serve the public and keep records of events. On this basis, under the documents in possession doctrine, I accept that the email is admissible for the limited purpose of proving that some employees in Patient and Client Relations of the Ministry of Health had knowledge of the wait for ultrasound testing at Island Health Authority in November 2016; more specifically, they were told this information by some unidentified source. As below, the number is 18,000 (not “5,8000”). It is not admissible for its truth under this doctrine and the principled approach to hearsay is discussed below.

[124] Turning to hearsay, a document tendered by itself as here is hearsay and hearsay is presumptively inadmissible (*Ault*, at paras. 15, 17). Is the statement here admissible under one of the exceptions to the rule against hearsay (in the course of a business duty, business record or the admission of a party exceptions) or under the principled approach to hearsay?

[125] In *Ault* some documents were admitted under the course of business duty exception, “at least to the extent that they reflect[ed] the personal observation or knowledge of the facts recorded”. Alternatively, they were admissible under the principled approach to hearsay (at para. 25). As discussed above, the details of those documents are not explained but they appear to have been relevant as part of the contextual background to the substantive issues in that trial. As well, the prejudicial effect was considered very low (at paras. 49, 50). In the subject application the causes and benchmarks for wait times for medical care are highly controversial and go to the heart of the case. With regards to the business records exception the plaintiffs rely on the document agreement with British Columbia and I have found above that it is of limited use. There is also an issue with respect to s. 42(2)(b) of the *Evidence Act*. In *Ault* the business records issue was not fully argued, no determination was made on it and no documents were admitted on this basis.

[126] Turning to the admission of a party exception, the evidence in the email at issue here is relevant. And, as discussed in *Ault*, statements made by a representative of a party may be binding as against the interest of the party. Further, before a statement by an agent of a party (such as the Crown) is admissible against the party “there must be proof of the agency or employment and proof that the admission of the agent or employee was made within the scope of his or her authority” (at para. 27). Those elements of the party admissions exception do not appear to be obstacles for the plaintiffs.

[127] However, where a statement is based on hearsay or “unqualified opinion,” the party whose admission it is must adopt the hearsay statement or otherwise indicate it is true (*Ault*, at para. 28-29). Similarly, if a party simply reports a hearsay statement without either adopting it or indicating a belief in the truth of its contents, the statement is not admissible for the truth of its contents (*Streu*, page 1530). This is a problem for the plaintiffs because the email in dispute here is a report containing opinion that has not been adopted by British Columbia. Moreover, it is not obvious or explained how a person described as “Patient and Client Relations” in the Ministry of Health would know the details of wait times for ultrasounds in Island Health Authority. For this reason, the statement at issue may also be hearsay but that is not clear.

[128] With respect to the principled approach to the rule against hearsay, the problems discussed above under the documents in possession doctrine raise issues of reliability. In terms of necessity, it may be the case, as submitted by the plaintiffs, that admitting the documents without a witness is efficient but the value of the documents by themselves is problematic. Again, these are controversial matters. Nor do I agree that the necessity aspect of the principled approach means that a statement can be admitted for its truth when there is no evidence that the declarant is unavailable or otherwise unable to testify. Here, there is no evidence as to why the person making the statement is not called as a witness, adverse (as the plaintiffs have done already) or otherwise. It is true that the necessity element in the

principled approach to hearsay can be relaxed when reliability is sufficiently established (*Baldree*, at para. 72) but, as above, there are issues of reliability here.

[129] Nor is it sufficient to simply admit the documents and leave any problems with them for determination of weight. Some examination of relevant evidence in open court is required in order to test contested evidence; it is not at all satisfactory to leave the critical examination of important issues in this litigation to argument by counsel. Similarly, admitting the documents with the opportunity for British Columbia to provide other evidence to counter the documents is problematic because it shifts a good measure of the onus of proof from the plaintiffs to British Columbia. The undoubted practical problems in presenting the evidence necessary to support the plaintiffs claim are for them to resolve.

[130] That there is a shortage of sonographers is broadly relevant to wait times for diagnostic imaging. It is a statement of fact rather than an opinion but it has not been adopted by an authorized official in the Ministry.

[131] Therefore, the statement about wait times for ultrasounds is admissible only for the limited purpose of establishing that some employees in the Patient and Client Relations of the Ministry of Health had knowledge of the wait for ultrasound testing at Island Health Authority in November 2016; more specifically, they were told this information by some unidentified source. It is not admissible for its truth. As below, the number is 18,000 (not “5,8000”).

[132] Next, the plaintiffs seek to establish that British Columbia knew that the problem and “solution” lies with the staffing shortage of sonographers (the technicians who conduct ultrasounds). Further, this was “a challenge for all”, including a number of organizations, and “innovative solutions” were being worked on to expand BC training program capacity. This is clearly opinion that has not been accepted at an authoritative level of the Ministry. It is not admissible for any purpose.

[133] As above neither the traditional exceptions to the rule against hearsay nor the exceptions under the principled approach apply to this statement. Therefore, under

the documents in possession doctrine the statement is admissible only for the limited purpose of proving that a staff member of the Ministry of Health had knowledge of a shortage of sonographers at Island Health Authority in November 2016; more specifically, they were told this information by some unidentified source.

[134] I would add to this that whether there are solutions and who might be involved in those solutions are not issues that are relevant to this litigation. In other words, why there is a problem hiring sonographers or the opinions of non-parties on how that problem can be solved are not relevant to any of the constitutional issues in this litigation and they are inadmissible.

[135] The plaintiffs seek the admission for its truth the following: “Island Health [one of the health authorities in British Columbia] sets wait time benchmarks by scan priority level. Island Health currently meets the benchmark for STAT [urgent] CT scans but exceeds the benchmark for a lower priority level scans”.

[136] For the reasons given above, this statement is admissible for the limited purpose that some employees in Patient and Client Relations with the Ministry had this knowledge about Island Health Authority in November 2016; more specifically, they were told this information by some unidentified source. It is not admissible for the truth of the information.

[137] The plaintiffs seek the admission of the following for its truth:

Island Health recently installed 3 new state of the art CT scanners, which required extended downtime while the scanners were being installed. This has impacted our ability to perform the desired volume of CT scans this year. This is compounded by the fact that many of our other CT scanners are nearing replacement age and have experienced higher than normal maintenance downtimes. Additionally we are experiencing a high turnover of CT technologists, who generally require additional training once hired, which has impacted CT capacity.

[138] As above, this statement is also admissible for the limited purpose of proving that the information was known to staff in Patient and Client Relations about Island Health Authority in November 2016; more specifically, they were told this information by some unidentified source. It is not admissible for its truth.

[139] The plaintiffs seek the admission of the following for its truth: in answer to the question “[i]s the ultrasound messaging above still correct?” the following is given: “[t]he waitlist is still long, but we have been successful in hiring 9 new sonographers which should begin to alleviate the issue. (Note: the number in the body of the paragraph should be 18,000 not 58,000)”.

[140] For the reasons given above, this is admissible for the limited purpose of showing that the information was known to staff in Patient and Client Relations about Island Health Authority in November 2016; more specifically, they were told this information by some unidentified source. It is not admissible for its truth.

ii. Exhibit AAA: Second Document (November 4, 2016)

[141] This document related to a request for information from a MLA about a patient waiting for back surgery at Royal Columbian Hospital.

[142] There is opinion and double hearsay information about the patient’s concerns and situation in the background section. As above, this is not admissible for any purpose.

[143] The plaintiffs seek admissions for its truth a lengthy section that includes information about the date the booking for the surgery was received by the hospital, the urgency rating, the benchmark, when the surgery decision was made and resources available to the patient. For the reasons given above, this is admissible for the limited purpose that a Patient Care Quality Officer with the Ministry of Health (the person who wrote the document) had knowledge of the information in the document in November 2016; more specifically this person was told this information by some unidentified source.

iii. Exhibit AAA: Third Document (October 4, 2016)

[144] This document relates to wait times for a hip replacement in Prince George.

[145] The plaintiffs seek the admission for knowledge on the part of British Columbia the details of a complaint from a non-party patient. As above, this is not admissible for any purpose.

[146] The plaintiffs seek admission for its truth the following: “[name of doctor]’s total joint waitlist has been 12 – 14 months so this patient does fit into that timeline – the patient can probably expect a call in the next few weeks.” The patient is recorded as saying that a hip replacement was booked in September 2015 in Prince George but there had not yet been a surgery date scheduled.

[147] This information is recorded by a “Patient and Client Relations Officer” (unlike a person identified only as “Patient and Client Relations” in the first form discussed above). The source of the information about the physician’s waitlist is not identified. It is of the same character as the information discussed above and is hearsay that has not been adopted by the defendant. It is admissible for the limited purpose of establishing that staff in Patient and Client Relations knew about an issue relating to wait times for hip replacement surgery for one surgeon in the Island Health Authority in November 2016; more specifically, they were told this information by some unidentified source. It is not admissible for its truth.

iv. Exhibit AAA: Fourth Document (October 4, 2016)

[148] On the fourth form in Exhibit AAA, a patient was recorded as being upset in October 2016 because his CT scan appointment was scheduled seven months in the future.

[149] The plaintiffs seek admission for proving knowledge on the part of British Columbia: that the patient is upset that his appointment for a CT scan is “7 months away” and that he “feels he requires his spine CT scan sooner”.

[150] This is in the category of non-party patient complaints discussed above with the added complication of it being double hearsay. Also, while the patient’s opinion about when a scan was required is relevant, for the purposes of admissibility it is also a medical issue that requires medical expertise. In light of the admission by

British Columbia that there are waits for medical care and the other reasons given above, it is not necessary for this statement to be admitted, more specifically, they were told this information by some unidentified source. It is not relevant and not admissible for any purpose.

[151] The plaintiffs seek admission for its truth the entire section titled “Information Required.” This includes statements such as:

The region is aware of our current situation with one diagnostic scanner working at full capacity. (LGH [Lions Gate Hospital] performs approximately 23 – 24 thousand annually) A second scanner in this case has been put forward to the region. One major hurdle is operating dollars for the second CT scanner as CT scans are not an MSP funded exam (fee for service – technical) we work from a global budget

[152] This information was recorded by another Patient and Client Relations Officer and, as with other information recorded on these forms, the source of the information is not given. In any event, it is uncontroversial that some CT scans are not funded by MSP. This statement is admissible for the limited purpose that staff in Patient and Client Relations of the Ministry had this knowledge about CT scans at Lions Gate Hospital in October 2016, obtained from some unidentified source. It is not admissible for its truth.

[153] The plaintiffs seek admission for its truth the following statement by an employee with the Ministry of Health: “I agree that a seven month wait may be long for this type of exam. Given our current volume of exam requests and following Ministry guidelines for performing these exams in clinical priority this type of exam is being slotted into the earliest available spot.”

[154] This statement is relevant but is clearly an opinion without any source given, in particular the first sentence. It also appears to be a personal opinion of a Patient and Client Relations Officer with no identifiable expertise in this area. There is no indication that this information was brought home to responsible officials of the Ministry. Mere possession of a document by the Ministry in the sense that the document was on its premises and even in its files may not, without more, afford grounds for an inference that its contents had come to the knowledge of the officials

of the Ministry who had authority to opine on the matters to which the document relates (Ewart, pg. 243).

[155] With respect to the exceptions to the rule against hearsay, the above analysis applies.

[156] This is admissible for the limited purpose that staff within Patient and Client Relations of the Ministry of Health knew about complaints of a “long” wait for a CT scan at Lions Gate Hospital in October 2016 and possessed general knowledge about priorities for CT scans; more specifically, they were told this information by some unidentified source. It is not admissible for its truth.

(iii) Exhibit DDD

[157] This is a two-page email string from April 2011 with essentially the same content as exhibit AAA but with headings “Background,” “Status” and “Response.” The purpose also appears to be the same, to prepare a draft response following a phone conversation with the husband of a patient with the Interior Health Authority. He is recorded as saying that his wife required spinal surgery but she had not yet received a surgery date.

[158] The husband is recorded as saying that the wait was two years. The plaintiffs say the background section is admissible for proving that British Columbia had knowledge of the concerns expressed. The source of this information is not stated. This information is of the same character as the information from non-party patients discussed above and it is not admissible for any purpose.

[159] The response section of the document is lengthy. It includes descriptions of inquiries made by the Ministry of Health and it records a conversation with the husband. A suggested response was to acknowledge, “waiting for his wife’s surgery can be stressful and difficult experience for her and her family. The Ministry does not manage or influence surgeons’ schedules, or limit the number of operations they may perform”. There is a description of how surgeries are prioritized and a summary

of another conversation the husband had with another agency with the Ministry of Health.

[160] The husband is recorded as saying that the surgeon advised him that his wife could have the required surgery “in a few weeks if she wished to pay \$12,000 to a private clinic where [name of surgeon] works”. The Ministry official explained that any such payment would be the family’s responsibility because it would not be considered “a provincial health insurance benefit”. The husband was advised to keep the general physician updated on the condition of the wife and discuss referral to a surgeon with a shorter wait list. The response section ended with, “[Name of husband] thanked me for the call and the information, but was clearly not pleased with his wife’s wait time or pain level”. He was not pleased because he had “paid medical premiums for years and his wife is not receiving the care she requires”.

[161] According to the plaintiffs, all of the status and response sections are admissible for the truth except for the reference to \$12,000 for the cost of private treatment, which is admissible only for showing knowledge on the part of British Columbia.

[162] To a considerable extent, the information in this document is of the same character as the information from non-party complainants discussed above. In addition, as with the documents discussed above, there is no source given for the information such as the length of the surgeon’s wait list or the description of how surgeries are prioritized.

[163] Nor is there any indication that these opinions were brought home to responsible officials of the Ministry. The fact that a document is found on the premises of party does not make it in the “possession” of the party or admissible in evidence (Ewart, at pg. 243). Finally, I am unable to find that the cost of private care for this procedure in April 2011 is relevant to the constitutional issues in this litigation. The above analysis of hearsay applies.

[164] This is admissible for the limited purpose that staff within Patient and Client Relations of the Ministry of Health had knowledge in April 2011 about the named surgeon's wait list and wait times; more specifically, they were told this information by some unidentified source. It is not admissible for its truth.

(iv) Exhibit EEE

[165] This is a two-page document apparently dated August 31, 2012 and it is about wait times for an MRI at Royal Columbian Hospital at that time.

[166] An introductory paragraph references "Minister request for bullets [name deleted] re: wait times for magnetic resonance imaging (MRI), reimbursement for costs of having the MRI done privately and will Medical Service Plan (MSP) cover the cost of the MRI if [name deleted] travels to another location (and absorbs the travel costs)". The document continues with headings and discussion of background, status and recommended response. There is no evidence that an actual response was sent to the complainant. These documents were and are in the possession of British Columbia, they are authentic and they are relevant.

[167] The plaintiffs say that the background section is admissible for the purpose of proving that British Columbia had knowledge of concerns about an "estimated (1 year)" for an MRI exam and that the person had been told the reason for the wait was budgetary cutbacks for MRIs. The status and recommended response are admissible for their prima facie truth, according to the plaintiffs.

[168] In the status section, there is information about numbers of MRIs in 2011-12 and average waits for MRIs at Royal Columbian Hospital. The section with the recommended draft response includes concerns for the patient's health situation and:

MRI exams are considered a provincial health insurance benefit only when performed at a public hospital or through a formal contract between a health authority and a private provider

...

If [name deleted] purchases an MRI exam through a private facility or broker, he assumes responsibility for payment, since the service would not be considered a benefit.

...

... [Royal Columbian Hospital] has maintained the same baseline budget for MRI exams for the past several years. There has been no change to this baseline.

[169] The background section of this document is of the same character as the non-party patient complaints discussed above. In light of the admission by British Columbia, that there is delay (with the causes of the delay very much in dispute) it is not necessary to admit this information because any admission would require a full and detailed examination of the issues raised and would not be commensurate with its value.

[170] As with other documents, no source is provided for detailed information about budgets and reasons for increases in examinations. The person writing the document is not specifically identified but it is likely the name of a person in a footer at the end of the document. There is no reference to this person's responsibilities or authority and no indication of her title. When MRIs are considered a provincial health insurance benefit at a public hospital and payable from public funds is not controversial and nor is the fact that a patient who seeks a private MRI is required to pay privately. The above analysis of hearsay applies.

[171] This document can only be admitted for the limited purpose that someone in the Ministry of Health had knowledge in August 2012 of the information in the status section; more specifically, they were told this information by some unidentified source. It is not admissible for its truth.

(g) Documents at Issue: Documents in Numbered Exhibits

[172] I move next to the second group of documents that have already been entered as exhibits but contain more than one document. The documents that were identified by the person called by the plaintiffs as an adverse witness, Ms. Stewart, were entered as numbered exhibits. But documents in a package she could not

identify were not entered as numbered exhibits. The plaintiffs now seek the admission of those documents.

(i) Exhibit 251

[173] This is an email string of about nine emails over six pages in June and July 2011, including an email from an MLA. Again, some emails were identified by an adverse witness subpoenaed by the plaintiffs and that is the basis of the package being a numbered exhibit. The emails in the package that could not be identified by this witness were given no weight. The plaintiffs now seek the admission of all of the excluded parts of the email string either for their truth or to prove that the Ministry had knowledge of the information in the emails.

[174] The email string begins with an email from a MLA dated June 29, 2011. This related to what was described as a wait of up to two years for a spinal cord stimulator implant and intrathecal pump for a patient's chronic back pain over several years. The patient lived in Kelowna or in that area. According to the MLA, the procedure could only be done in a Vancouver hospital and he inquired if it could be done in Kelowna. There are obvious issues of at least double hearsay.

[175] The MLA was meeting the patient the next day so an email within the Ministry of Health on the same day requested "general information only". The general information provided in the next email the following day was that the specialist physician makes the decision about placement of patients on wait lists, not the Ministry. "Due to the time restriction" nothing else could be confirmed "with any surety".

[176] Next, on June 30, 2011, program staff within the Ministry prepared what appears to be a draft response. This included information that the procedure could not be done in Kelowna, that physicians manage their own waitlists and that the Ministry and Health Authority were committed to supporting clients and physicians in achieving the best outcomes. A meeting apparently took place between the MLA and the patient and an assistant to the MLA then questioned whether having the procedure done in one central location for the province was working for the benefit of

the patient. A further draft response was prepared on July 11, 2011, approved by the executive director, “HA Division” of the Ministry.

[177] Subsequent emails were written, with the last one dated July 14, 2011. It considered questions from the assistant of the MLA and the plaintiffs seek the admission of this section of the email.

[178] The draft response from the Ministry is already admitted for its prima facie truth. It pointed out that a decision had not yet been made that the procedure was required, only that it be assessed to determine if it was a viable option. Further, the procedure was considered to be a last resort after all other feasible options had been explored and/or eliminated. If the procedure was considered a viable option and there was extensive wait time then out of province options could be considered. Information about that was provided.

[179] As typical of many email strings this one is lengthy. As above, email chatter is not relevant. There are difficulties with the plaintiffs’ submission inasmuch as they seek to break up paragraphs into one part that is admitted for its truth and the rest of the paragraph for knowledge on the part of the Ministry. Other parts are not to be admitted at all.

[180] With regards to the initial email from the MLA, about the procedure being available in only one location and it was not the patient’s home, it is of the same character as the non-party patient complaints discussed above. It is not admissible.

[181] Two emails dated July 11, 2011 and July 14, 2011 are admissible for the limited purpose that staff within the Ministry of Health had knowledge about the contents of the email and the contents were approved by the executive director “HA Division”; more specifically, they were told this information by some unidentified source. They are not admissible for their truth.

[182] As mentioned above, the section titled “RESPONSE” in the July 14 email has already been admitted into evidence for the truth of its contents. Likewise, the

sections entitled “Referral Process” and “Recommended Response” in the July 11 email is also already in evidence for its truth.

(ii) Exhibit 252

[183] This is a 12-page package of an email string in March 2015 regarding a patient’s complaints about wait times for hip surgery in Vernon.

[184] The last undated email is in the form of a letter from an executive director, responding to the patient on behalf of the Minister of Health. This was the person who previously testified as an adverse witness and this email has been admitted for its prima facie truth. Some other emails were identified by this witness and are also admitted for their prima facie truth.

[185] The other emails in the package could not be identified by the witness and they were given no weight. The plaintiffs now seek the admission of all of the excluded parts of the email string either for their truth or to prove that the Ministry had knowledge of the information in the emails.

[186] These are emails from the non-party patient. For the reasons set out above, they are not admissible and are to be given no weight. Similarly, a letter from the patient’s doctor is also inadmissible and to be given no weight. There are no draft responses in the package as in other packages. The remainder of the package is not admissible.

(iii) Exhibit 253

[187] This is a one-page string of two emails from January 2015. The specific situation is not clear but it apparently involved wait time for an urologist to do an unspecified implant. One email was written by the person called by the plaintiffs as an adverse witness and the other is a response. Both were admitted for their prima facie truth but the medical history of the patient was excluded.

[188] The parts of the email in question are private medical information about a patient who is not a party. This is not relevant and not admissible.

D. SUMMARY

[189] The plaintiffs received a number of documents from the defendant British Columbia that relate to complaints from patients, doctors, MLAs and others about wait times for medical care.

[190] Applying the documents in possession doctrine and the exceptions to the rule against hearsay, the plaintiffs say that the documents are admissible for either their prima facie truth or for the purpose of proving that British Columbia had knowledge of the information in the documents. There are also issues about relevance, hearsay and opinion evidence. All the documents are contained in packages, usually as part of email strings.

[191] The list of documents and the document agreement between the parties are of limited assistance to the plaintiffs' submission. Nonetheless, establishing the possession by British Columbia of the documents in issue and their authenticity of the documents in issue is not particularly controversial.

[192] The document in possession doctrine applies here to a number of specific documents. Some documents are admissible to prove that some staff members of the Ministry of Health had knowledge of certain facts at certain times; more specifically, they were told this information by some unidentified sources. A number of these contain hearsay and uncertified opinions. The traditional exceptions to the rule against hearsay and the principled approach to hearsay do not assist the plaintiffs.

[193] No documents at issue in this application are admissible for their truth.

[194] As above, the expectation is that the parties will apply this judgment to the more than 900 documents the plaintiffs seek to have admitted (for truth or knowledge). To ensure the efficient use of the court's time, all disputes about these documents will be resolved before the evidence continues (as well as any other disputes between the parties).

The Honourable Mr. Justice Steeves

TAB 4

Glaxo Group Ltd. v. Novopharm Ltd., 1998 CanLII 8730 (FCA)

Source: Federal Court of Appeal
Date: 1998-11-20
File number: A-408-98
Citation: Glaxo Group Ltd. v. Novopharm Ltd., 1998 CanLII 8730 (FCA), <<https://canlii.ca/t/1h535>>, retrieved on 2026-01-07

Date: 19981120

Docket: A-408-98

CORAM: STONE J.A.

McDONALD J.A.

SEXTON J.A.

BETWEEN:

GLAXO GROUP LIMITED and GLAXO WELLCOME INC.

Appellants

(Plaintiffs)

- and -

NOVOPHARM LIMITED

Respondent

(Defendant)

REASON FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, Friday, November 20, 1998)

STONE J.A.

[1] This appeal is from an order of the Trial Division of June 24, 1998 refusing to compel answers to all of the questions which are set forth in Schedule A to the appellants' Notice of Motion except Questions 506, 507 and 5566.

[2] The questions in dispute are grouped in two discrete categories: "Acquiescence and Laches" and "Anticipation". The three questions that were ordered to be answered fall into the first category.

[3] It is apparent from the pleadings that acquiescence and laches as well as anticipation are among the defences relied upon by the respondent. For a defence of acquiescence to be made out a defendant must be able to satisfy several elements or requisites among which are a mistaken belief as to that party's legal rights and the doing of some act on the faith of the mistaken belief: Canadian Superior Oil Ltd. v. Padden-Hughes Development Co. Ltd., 1970 CanLII 3 (SCC), [1970] S.C.R. 932, at page 938.

[4] In our view, the learned Motions Judge neglected these principles in the case at bar. The respondent's knowledge of its rights and of actions taken in asserting those alleged rights are surely relevant to this issue at the discovery stage. We are all of the view that the questions in the "Anticipation" category are relevant on the discovery and ought to be answered as well. It is well accepted that a fair amount of latitude is allowed on discovery provided a question is relevant to issues raised by the pleadings; whether such question is relevant and admissible at trial is a matter for the Trial Judge. See e.g. McKeen & Wilson Ltd. v. Gulf of Georgia Towing Co. Ltd., 1964 CanLII 460 (CA EXC), [1965] 2 Ex. C.R. 480, at page 482, and the cases there cited.

[5] It should remain open, of course, for the respondent to assert a claim of privilege in answering a particular question.

[6] The appeal will be allowed with costs and the amended order of the Trial Division of June 24, 1998 will be varied by striking out all of the first paragraph except the first and last sentence thereof and substituting the following:

A representative of the respondent shall re-attend on discovery within six weeks of the date of this order at the expense of the respondent at a time and place to be fixed by the appellants to answer all of the questions as set out in Schedule "A" to the appellants' Notice of Motion. The requirement to answer the said questions shall be subject to any claim of privilege that the respondent may assert in answering a particular question.

"A.J. STONE"

J.A.

CT -2024-012

THE COMPETITION TRIBUNAL

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.

Respondent

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