CANADA / JUDGMENT

McMahon v. Harper

2017 BCSC 2328

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2017 BCSC 2328 McMahon v. Harper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McMahon v. Harper,

2017 BCSC 2328

Date: 20171215

Docket: M150213

Registry: Victoria

Between:

Kenneth Blair McMahon

Plaintiff

And

Joe Patrick Harper

Defendant

Before: The Honourable Madam Justice Gray

Reasons for Judgment on Applications Alleging Abuse of Process and Waiver of Privilege

Counsel for the Plaintiff:

S.M. Kelliher

D.C. Redman

Counsel for the Defendant:

R.C. Brun, QC

Place and Dates of Hearing:

Victoria, B.C.

July 4 and 5, 2017

Place and Date of Judgment:

Victoria, B.C.

December 15, 2017

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I. INTRODUCTION

[1] The parties have brought cross-applications. They all relate to the failure of the plaintiff's first list of documents dated March 11, 2014 ("Plaintiff's First LOD") to disclose 16 pages of documents ("Delayed Production Documents"). Those documents were listed in the plaintiff's second list of documents dated about two and one-half years later, on October 14, 2016 ("Plaintiff's Second LOD").

[2] This case is a personal injury claim. Mr. McMahon alleges that he was injured on April 7, 2013, when he was rear-ended in what I will term the "Accident". Mr. McMahon's claim for damages includes a claim for past and future wage loss. The defendant has denied liability, and says that Mr. McMahon did not sustain any injuries in the Accident.

[3] At the time of the Accident, Mr. McMahon was 55 years old, and he is now 60 years old. He is a retired military corporal, who served in the Canadian Armed Forces from 1977 to 1996, which is about 19 years. He held a variety of jobs in the following 17 years.

[4] At the time of the Accident, Mr. McMahon was living in Courtenay, B.C. and working at the Comox Valley Regional District ("CVRD") in a part-time union position. His job title was Facility Maintenance Worker, and his duties included performing ice maintenance duties such as driving a Zamboni ice resurfacing machine.

[5] Unfortunately, the relationship between trial counsel has become very acrimonious.

[6] Mr. McMahon's claim was set for an 18-day jury trial commencing April 3, 2017. On March 23, 2017, being about ten days before the scheduled trial date, defence counsel, Mr. Hargreaves, served Subpoenas on several people who then or previously worked at a law firm I will refer to as "Acheson Sweeney", counsel for the plaintiff. The firm's name has changed over the material period but it is not necessary to review the various names. One of the subpoenas ("Foley Subpoena") was served on Ms. Foley, who was legal counsel for Mr. McMahon, and had been his counsel for about three years.

[7] On March 28, 2017, being the Tuesday prior to the scheduled commencement of the trial on Monday, April 3, 2017, the trial was adjourned generally.

[8] Mr. McMahon seeks several orders, including the following:

a) cross-examination of Mr. Hargreaves;

b) setting aside the defendant's notice to admit dated March 6, 2017 ("NTA");

c) setting aside the Foley Subpoena;

d) removing Mr. Hargreaves as counsel of record for the defendant and prohibiting him from providing any further assistance or advice to the defendant or his solicitors with respect to this proceeding; and

e) special costs.

[9] Mr. McMahon seeks that relief on the basis that Mr. Hargreaves's conduct has been an abuse of process. I refer to Mr. Hargreaves's law firm as "Jones Emery" for convenience, although the proper name is longer.

[10] The defendant is opposed to the court granting any of the orders sought by Mr. McMahon. The defendant also seeks several orders, including the following:

a) a declaration that the First McMahon NOA (defined below) is a nullity owing to its length;

b) striking out portions of the affidavits filed on behalf of the plaintiff;

c) requiring Mr. McMahon to swear an affidavit verifying the Plaintiff's Second LOD;

d) in the alternative that the court admits into evidence the affidavits of Ms. Foley, Mr. Dudding, and Mr. McMahon, an order that the defendant be permitted to cross-examine them on their affidavits;

e) an order that Mr. McMahon has waived solicitor-and-client privilege over all his communications with Acheson Sweeney and over all communications among members of Acheson Sweeney relating to the omission of the Delayed Production Documents from the Plaintiff's First LOD; and

f) an order that Acheson Sweeney pay the costs of the cross-applications personally.

[11] The cross-applications proceeded to a hearing lasting about two days, on the basis of five affidavits, one from each of Ms. Foley, Mr. Dudding, Mr. Sweeney, Mr. McMahon and Mr. Hargreaves. Mr. Kelliher, who is not a member of Acheson Sweeney, represented the plaintiff on the cross-applications. Mr. Brun, Q.C., who is not a member of Jones Emery, represented the defendant. I am grateful to counsel for their very thorough submissions.

[12] The cross-applications raise a tangle of legal issues, including the proper form of notices of application and affidavits, cross-examinations, abuse of process, waiver of solicitor-client privilege, agency, and spoliation.

II. ISSUES

[13] The cross-applications raise the following questions:

a) Is the First McMahon NOA (as defined below) a nullity owing to its length?

b) Are the following affidavits inadmissible in whole or in part on the cross-applications?

i) Affidavit #1 of Ms. Foley;

ii) Affidavit #1 of Patrick Dudding; and

iii) Affidavit #1 of Mr. McMahon.

c) Should the court order cross-examination of any deponents on their affidavits?

d) Should the court order that Mr. McMahon swear an affidavit verifying the Plaintiff's Second LOD?

e) Has Mr. McMahon waived legal advice privilege over all his communications with, and over all communications within, Acheson Sweeney regarding the Delayed Production Documents and the Plaintiff's First LOD?

f) Should the court set aside the Foley Subpoena because the defence has not established that Ms. Foley likely has material evidence?

g) Was any of the following conduct of Mr. Hargreaves an abuse of process:

i) serving the NTA;

ii) issuing and serving the Foley Subpoena;

iii) sending the Email Offer.

h) If any of the defendant's impugned conduct was an abuse of process, what is the appropriate remedy?

i) What is the appropriate order for costs?

III. FACTS

[14] In early April 2013, Mr. McMahon was working part-time for CVRD in a job which included cleaning duties and driving a Zamboni to resurface ice. He had been so employed for a period of about four and one-half years, including periods of seasonal layoff. His work history included about nineteen years in the Royal Canadian Air Force as an aero engine technician. For about eleven years after that, he held various jobs as a technician or working in construction, landscaping, or cleaning. His educational history included completion of numerous courses related to work as an aero engine technician.

[15] As stated, Mr. McMahon alleges that he was injured in the Accident on April 7, 2013. He has not returned to the paid workforce since the Accident, although he volunteers.

[16] In July 2013, Acheson Sweeney received a two-page cover letter dated July 19, 2013 from CVRD, with 50 pages of attachments, being a total of 52 pages. Sixteen of those pages are the Delayed Production Documents, and I will refer to the other 36 pages as the "Timely Production Documents". The cover letter is one of the Timely Production Documents, and it states "[a] complete copy of Mr. McMahon's employment file is enclosed."

[17] Ms. Acheson, Q.C., then of Acheson Sweeney's Courtenay office, commenced this lawsuit on Mr. McMahon's behalf on November 27, 2013. As stated, Mr. McMahon claims damages, including damages for lost earning capacity.

[18] Jones Emery sent Acheson Sweeney the defendant's response to civil claim and defendant's list of documents with its letter dated January 15, 2014. The letter also requested Mr. McMahon's list of documents, and provided a list of the documents the defence specifically requested from Mr. McMahon. The letter requested medical documents, tax returns, and employment insurance records, but did not specifically request any records from CVRD.

[19] As set out below, the Plaintiff's First LOD is dated March 11, 2014, but it is unsigned and does not appear to have been sent to Jones Emery at that time.

[20] Jones Emery repeated the request for Mr. McMahon's list of documents and the specified documents. In a letter dated April 11, 2014, Jones Emery asked for the documents by May 30, 2014, failing which it intended to seek instructions to apply for an order for production of documents.

[21] Ms. Foley first became involved in Mr. McMahon's file in the spring of 2014, when her firm took over a satellite office in Courtenay. She visited Courtenay from time to time until Mr. McMahon's file was eventually physically moved to the Victoria, B.C. office. Ms. Foley deposed that Ms. Acheson and Ms. Baxter worked on the file in the Courtenay office. Ms. Baxter had been called to the bar in August 2011, less than three years earlier. Ms. Foley was called to the bar in May 1998, and so had been practicing for about 16 years at the time she took over Mr. McMahon's file.

[22] On May 1, 2014, Ms. Sykes, a paralegal at Acheson Sweeney, sent an email to Ms. McKenna, a legal assistant at Jones Emery. The email included the following:

McMahon is one of the files I just took over from the Courtenay office. Please give me some time to review the file -- I can then look at all outstanding requests.

[23] As stated, the Plaintiff's First LOD was dated March 11, 2014. The copy in evidence has a line for Ms. Acheson's signature, but it has not been signed. The evidence on the cross-applications did not include a copy of a cover letter sending the Plaintiff's First LOD to Jones Emery. Mr. Hargreaves has deposed that he cannot tell from a review of the Jones Emery file when Jones Emery received the Plaintiff's First LOD.

[24] The Plaintiff's First LOD listed documents under four of five listed headings. Under the heading "B Income Loss", item 6 had this entry: "[CVRD] - Employment records covering the period Nov 27/08 to Apr 8/13 (36 pages)". These 36 pages are what I refer to as the Timely Production Documents.

[25] Among the Timely Production Documents was the CVRD cover letter referring to enclosing a complete copy of Mr. McMahon's employment file. The Timely Production Documents also included a CVRD job description dated July 22, 2013 for Mr. McMahon's position as Facility

Maintenance Worker. The date of this document is about 3 ½ months after the Accident, and after the April 8, 2013 date listed in item 6 of the First Plaintiff's LOD. The copy in the Timely Production Documents has a place for signature by an employee, but the copy is unsigned. Under the heading "Required Licenses, Certificates and Association Memberships (required for acceptance into the job)" are six bullet points, one of which is "5th Class Power Engineer Certificate with Refrigeration Endorsement". I refer to that qualification as the "Certificate".

[26] Jones Emery received a letter dated May 26, 2014 from Acheson Sweeney which enclosed documents described in thirty line items. Some of those line items refer to document numbers which correspond to the Plaintiff's First LOD. Other line items do not refer to a number from the Plaintiff's First LOD.

[27] It appears likely that Jones Emery received the Plaintiff's First LOD in May 2014, although it is puzzling that none of the affidavits filed on the cross-applications included a copy of a cover letter or a signed copy of the Plaintiff's First LOD.

[28] By consent ordered entered July 14, 2014, the court file was transferred from the Courtenay Court Registry to the Victoria Court Registry for all purposes.

[29] Ms. Baxter left Acheson Sweeney's Courtenay office at some point in 2014, but continued to work for Acheson Sweeney until January 16, 2015.

[30] Mr. Hargreaves assumed conduct of the defence in the summer of 2015.

[31] The Notice of Trial dated and filed October 2, 2015 scheduled the trial for not more than 18 days commencing April 3, 2017 in Victoria.

[32] The defence Notice Requiring Trial by Jury was dated October 8, 2015 and filed October 21, 2015.

[33] At some point, the Examination for Discovery of Mr. McMahon was scheduled to proceed on October 27 and 28, 2016. Ms. Foley deposed as follows:

18. It is routine in this circumstance [of an upcoming examination for discovery] for the Plaintiff to prepare an updated List of Documents in preparation. At that time it came to my attention from my paralegal that there were a number of pages of the employment file (16) that had not been included in the [Plaintiff's First LOD] provided in the spring of 2014. When I learned that these pages were not included in the original file, I immediately provided an updated List of Documents, dated October 14, 2016, [Plaintiff's Second LOD], clearly indicating an amendment of the employment file on the List of Documents, in accordance with Rule 7-1(9).

19. From my initial review of the 16 pages I did not place any particular significance on the materials. Leading up to the Discovery I was aware that Mr. Hargreaves had requested the 16 pages and I assumed they had been produced to him via our standard office procedures. There was no mention of the materials by Mr. Hargreaves either before or during the discovery of October 26 & 27.

[34] The Plaintiff's Second LOD was dated October 14, 2016 and signed by Ms. Foley. It listed at least 1,150 more pages of documents than the Plaintiff's First LOD. The entry regarding the CVRD employment records had been altered to change the number of pages from 36 to 52, therefore including the sixteen pages of the Delayed Production Documents, and to change the date on which the document was listed to the date of the Plaintiff's Second LOD.

[35] The Delayed Production Documents include the following:

a) a letter dated January 29, 2011 from CVRD to Mr. McMahon, referring to a second incident in which Mr. McMahon allegedly drove the Zamboni badly and struck gates, and stating that Mr. McMahon needs to make every attempt to avoid hitting the boards;

b) a letter dated February 3, 2012 from CVRD to Mr. McMahon, referring to a further incident on January 23, 2012 of Mr. McMahon allegedly hitting gates with the Zamboni, and stating that the letter was a written warning that immediate improvement in his work performance is required, and further incidents will result in disciplinary action;

c) a letter dated July 4, 2012 from CVRD to Mr. McMahon, stating that Mr. McMahon will not be eligible to apply for a full-time position unless he obtains a Certificate by December 3, 2012, and that unless he obtains a Certificate by June 30, 2013, he will receive a layoff notice (from his existing part-time position). Mr. McMahon appears to have signed the letter on July 4, 2012;

d) a handwritten letter from Mr. McMahon dated October 20, 2012 and addressed "[T]o whom it may concern", but apparently sent to CVRD, which states as follows:

With the understanding that I could challenge the 5th class eng exam, I proceeded to make enquiries as to a time and place to write the exam. After a few phone calls to the safety authority of B.C. I ended up talking to the head examiner. I explain (sic - explained) my situation to him when he informed me, I could not challenge the exam because I had not taken a formal course. So I intend to take the BCIT course to qualify to write the 5th class exam;

e) an email dated December 22, 2012 addressed "to whom it may concern" from Mr. McMahon and apparently sent to CVRD employees, which states as follows:

After having tried to challenge the BC safety exam for 5th class power eng. exam I was told I could not because I needed a formal course, so I applied for the BCIT course and now in the process of doing the course so I can write for my ticket. Therefore I request a 6 month extension to the letter dated July 4, 2012. Thank you for your consideration;

f) a letter dated January 17, 2013 from CVRD to Mr. McMahon which was also apparently signed by him. It included the following:

The employer has received your written request dated December 22, 2012, for an extension to the above deadline. The employer has provided you financial assistance to obtain your certification and there is a record of reimbursing you for a course you registered for in February 2010. In reviewing your request, the employer looked at the amount of time and support you had been given between February 2010 and December 31, 2012 (34 months), which is more than sufficient time to achieve certification and yet you have failed to do so. It is in the employer's view that another extension is difficult to justify.

In reference to the letter dated July 4, 2012, you shall remain a part-time facility maintenance worker and your work hours will reflect that. For you to retain this position, you are required to obtain your certification by June 30, 2013. ; and

g) a letter dated July 9, 2013 from CVRD to Mr. McMahon, which includes the following:

you stated that your doctor has indicated to you that due to your motor vehicle accident on April 7, 2013, you have suffered a severe concussion that is impacting your cognitive abilities and your ability to concentrate while reading; therefore, you have not been able to study towards obtaining your [Certificate] to meet the deadline of June 30, 2013.

In consideration of your situation as per the above, the Employer has decided to suspend your above deadline to obtain certification, until after you have safely returned to work. Upon your return, the Employer shall discuss with you at that point about how to proceed towards obtaining your certification. This decision is made by the Employer on a without prejudice and non-precedent setting basis.

[36] The job description in the Timely Production Documents had disclosed that a Certificate was required for Mr. McMahon's position as of a few months following the Accident. The Delayed Production Documents disclosed, in addition, that Mr. McMahon was required to obtain a Certificate by June 30, 2013, being about ten weeks after the Accident, in order to retain his part-time position. The Delayed Production Documents also show that Mr. McMahon requested an extension of that deadline, but CVRD refused that request, and that CVRD paid for a course Mr. McMahon registered for in February 2010.

[37] The evidence is not clear about how the Delayed Production Documents were omitted from the Plaintiff's First LOD.

[38] Mr. Sweeney's affidavit includes the following:

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d. I recall I told [Mr. Hargreaves] that what I thought might hypothetically have happened was that the 16 pages had been separated out because Ms. Baxter was likely unsure of their significance (because of inexperience) when the records were received in August 2013, that she wished to have the pages reviewed by Ms. Acheson before they were released. The pages had been placed in a plastic sleeve within the file and appeared to have been overlooked until Ms. Foley discovered in October 2016 that the separated pages had not been listed.

[39] While not entirely clear, this passage suggests that someone told Mr. Sweeney that the 16 pages were in a separate plastic sleeve within the file when somebody first saw them. I assume that Ms. Foley told Mr. Sweeney that, when she first found the 16 pages, which are the Delayed Production Documents, they were in a separate plastic sleeve in the file.

[40] Jones Emery requested various documents, including the Delayed Production Documents, on October 20, 2016. Ms. Foley's assistant at Acheson Sweeney was out of the office due to a medical emergency from October 21-31, 2016, and the documents were not provided to Jones Emery until on or shortly after October 31, 2016.

[41] In the meantime, Mr. Hargreaves conducted an examination for discovery of Mr. McMahon on October 27 and 28, 2016 ("First McMahon XFD"), in Courtenay, B.C. Mr. Hargreaves had not reviewed the Delayed Production Documents prior to the First McMahon XFD, but Ms. Foley did not know that.

[42] At the First McMahon XFD, Mr. McMahon testified that, prior to the Accident, he had applied for a regular full-time position, that he was required to get his class five power engineering (being a Certificate), and that he had started a course from the British Columbia Institute of Technology ("BCIT") to obtain that qualification. Mr. McMahon testified that his work on aircraft "transferred over", and he basically had the qualifications he needed, and was just "getting it on paper". He testified that it was simply a different application of the hydraulics, fuel, oils, and generator information from the aircraft application.

[43] Mr. McMahon testified at the First McMahon XFD that he had not submitted any exams to BCIT at the time of the Accident. He testified that he believed he enrolled in the program around November of 2012, and the program was supposed to take two years, and he thought he was on track for two years.

[44] Mr. McMahon also testified at the First McMahon XFD that he did not know if he still had any of the records or paperwork or course work that he did. Mr. Hargreaves asked him to provide it, and to seek it from BCIT if he could not find it.

[45] Mr. Hargreaves asked Mr. McMahon whether he was "taking the course just to stay current with [his] existing job, or [was he] taking the course so that [he] could compete for a better job?" Mr. McMahon answered, "I was taking the course to have the qualification for the job requirement, but also to compete for a permanent full time."

[46] Although Jones Emery received the documents including the Delayed Production Documents in early November 2016, owing to an error in the office of Jones Emery, the "expanded employment file" (including the Delayed Production Documents) was labelled as "duplicate".

[47] Ms. Acheson retired at the end of December 2016.

[48] On January 11, 2017, Ms. Foley filed a trial brief on behalf of Mr. McMahon. She estimated three days for the plaintiff's direct examinations, cross-examinations, and submissions.

[49] The Delayed Production Documents did not come to Mr. Hargreaves's attention until about February 2, 2017, about three months after Jones Emery received them. Presumably, the reason that the Delayed Production Documents did not come to Mr. Hargreaves's attention for about three months after his office received them was because someone in his office had erroneously marked them "duplicate" and he assumed that he had reviewed them previously.

[50] On February 2, 2017, the day the Delayed Production Documents came to his attention, Mr. Hargreaves sent an email asking Ms. Foley to confirm that Acheson Sweeney had not received the Delayed Production Documents in 2013.

[51] Around the time the Delayed Production Documents came to his attention, in early February 2017, Mr. Hargreaves contacted the personnel department of CVRD and inquired whether the CVRD had sent employment file material to Acheson Sweeney on one occasion or on more than one occasion.

[52] Mr. Hargreaves received a response from CVRD by email dated February 6, 2017, which suggests that the CVRD sent Mr. McMahon's employment file material to Ms. Acheson only once, by letter dated July 19, 2013.

[53] Ms. Foley responded to Mr. Hargreaves's request for confirmation that Acheson Sweeney had not received the Delayed Production Documents in 2013 by letter dated February 6, 2017 ("Apology"), which included the following:

Thank you for your email of 02 February 2016. I have now had the opportunity to review the file with regard to the issue raised therein.

It is clear that a portion of Mr. McMahon's employment file was not listed until the fall of 2016. I do not know how this happened, as I was not on this file at the time, and the lawyer who had carriage of the file during the relevant period is no longer with our firm.

the complete file was listed on 14 October 2016. .. you were not provided with the records until after [the First McMahon XFD]. As such, I agree that you are entitled to further examination of Mr. McMahon on issues relating to the employment file.

I did not realize that you had not received the requested documents prior to the discovery, and for that I apologize. In hindsight, if I had that information at the time I would have discussed with you whether you would have wanted to adjourn the discovery.

[54] Mr. Hargreaves responded to the Apology with a lengthy email dated February 6, 2017. It includes the following:

This is not a case of a photocopying error. This is a case of an intentional withholding of relevant documents, in a manner calculated to cause serious harm to the defence.

Somebody had to count the pages of the edited file. This is not a case of an employment file being listed, with no page count, and then a story later that there must have been an innocent error in copying it. Somebody, with a 50+ page file in hand, counted out the 36 innocuous pages and created List (sic - the list of documents) (and provided a copy of the listed document (sic - documents)) with the intention of actively misleading the defence.

A reference to an unidentified lawyer no longer with the firm is, in my view, an inadequate explanation, all the more so when the emails in the file suggest that you had become the responsible lawyer before the List was prepared, and were the responsible lawyer thereafter.

[55] Mr. Hargreaves wrote a further email to Ms. Foley dated February 8, 2017. It includes the following:

I cannot overstate my concern about the employment file issue. Somebody in your office appears to have made an utterly incomprehensible, indefensible decision to intentionally conceal documents of potentially enormous effect on the claim, and this situation remained uncorrected for some two and a half years.

I had considered a report to the Law Society; not a complaint about you in particular but a complaint about your firm's treatment of the initial disclosure. However, I have decided not to do so. I mention it only to stress just how seriously I take this.

I accept that despite the fact that your paralegal wrote, May 1st 2014, that she would be doing the List, suggesting that the List was done after you became the handling lawyer, it is likely that the List was in draft form already and that you played no role in the decision to mislead opposing counsel in this egregious fashion.

What troubles me about your behaviour is that you appear to have recognized the deceit practiced on my firm and my client by the original lawyer but chose not to tell me about it. I cannot imagine being in your position and not picking up the phone to explain what had happened, to apologize profusely, and to immediately send over the missing documents.

Your claim that you did not know that the documents had not been given to me as of the discovery is very hard to accept. You listened to my questioning of your client. Did you feel no surprise that I did not ask him about the letter, signed by him, notifying him that he was losing his job as of June 30, 2013, absent getting his certificate?

In short, I am on a personal level disappointed that a fellow counsel could act as you have done.

On a professional level, I am advising my client to seek special costs of my further discovery of your client, necessitated by your firm's actions in this matter.

[56] An email dated February 9, 2017 from Mr. Hargreaves to Ms. Foley included the following:

We further anticipate seeking special costs of any resulting application given that the relevance of this information should have been apparent to your firm, and to you, from early 2014 given the references to this subject in that part of the employment file apparently intentionally concealed by your office until October last year. We add to this the requests made in October and seemingly ignored since then, and I suggest that your client has a significant exposure here.

[57] Mr. Hargreaves's trial brief on behalf of the defence is dated February 9, 2017, although it was not filed until March 8, 2017. Master Bouck made an order, by consent, that the defendant had leave to file that trial brief at the February 9, 2017 trial management conference, so I assume it was before the court that day.

[58] Mr. Hargreaves's trial brief sets out an estimate of 14.75 hours, being less than four days, for the defendant's direct evidence, cross-examinations, and submissions. The defence trial brief did not list as witnesses to be called either Ms. Foley or anyone else who worked at the time or previously for Acheson Sweeney.

[59] Together with the three days estimated by Ms. Foley, the total trial time estimated in the two trial briefs together was less than seven days, although the trial had been scheduled for 18 days or less.

[60] On February 9, 2017, Mr. Dudding on behalf of Mr. McMahon, and Mr. Hargreaves on behalf of the defendant, attended a trial management conference before Master Bouck ("TMC"). Mr. Hargreaves referred to the fact that the timing of the disclosure of the Delayed Production Documents would necessitate a further examination for discovery of Mr. McMahon. Mr. Hargreaves did not mention an intention to subpoena Ms. Foley or anyone else associated with Acheson Sweeney, and he did not mention other issues which would have compromised the trial date.

[61] While the letter itself is not in evidence, it appears that by letter dated February 17, 2017 to BCIT, Acheson Sweeney requested Mr. McMahon's application to BCIT, test and assessment results and any other information BCIT may have on file regarding Mr. McMahon.

[62] BCIT's letter dated February 22, 2017 to Acheson Sweeney included the following:

To the best of our knowledge, other than the student's official transcript which you have already received, BCIT has no other educational records pertaining to your client.

Mr. McMahon was enrolled in the POWR 1210 - 5th Class course which is an online course that students have up to 52 weeks to complete. The full course description is available on the BCIT website at . Mr. McMahon's withdrawal from this course was processed on December 10, 2013.

Please note that in accordance with BCIT's records retention schedule, the minimum retention period for student information related to the management and administration of BCIT programs and courses including routine information required to contact students, track their progress, correspond and issue information related to their enrollment and attending BCIT is one year, after which these records may be destroyed.

[63] This letter implies that BCIT might have destroyed information regarding Mr. McMahon after one year. If the year commenced on December 10, 2013, the date BCIT processed his withdrawal from the course, the information might have been destroyed on December 10, 2014. That is a date after the Plaintiff's First LOD dated March 11, 2014, and before the Plaintiff's Second LOD dated October 14, 2016.

[64] Mr. Hargreaves conducted a further examination for discovery of Mr. McMahon on March 6, 2017 ("Second McMahon XFD"), and Mr. Dudding attended on behalf of Mr. McMahon. The Second McMahon XFD proceeded in Victoria, B.C., as requested by Mr. Hargreaves.

[65] At the Second McMahon XFD, Mr. Hargreaves asked Mr. McMahon questions relating to the Delayed Production Documents. Mr. Hargreaves asked Mr. McMahon to locate the credit card statement including a record of his payment to BCIT to enroll in the course. Mr. McMahon testified that he first got information from BCIT about the course materials "I believe just before Christmas 2012." He testified that students registered online, and had to go online to get the tests from BCIT, but BCIT sent three or four books of study materials. Mr. Hargreaves asked "what happened to the books?" Mr. McMahon answered "I have no idea. They might have been thrown out."

[66] Mr. McMahon testified at the Second McMahon XFD that his study habit is to go through the whole course so that he understands each part, whether it is boiler systems, pressure systems, hydraulics, or air conditioning, so that he can put everything together in his mind, and then he goes and writes the tests.

[67] Mr. McMahon testified that he "did" the study material, but did not "do" any of the tests. He testified that he believed he got through three of the books. He testified that he could not recall whether he was making marks or putting highlighting in the books, or whether he was making notes on paper or anything like that. He testified that his wife must have thrown them out after the Accident, but he had no idea how soon after the Accident.

[68] Mr. McMahon testified that he had not seen his employment file or reviewed it in preparation for the Second McMahon XFD. Mr. Hargreaves asked him if he reviewed it in preparation for the First McMahon XFD, but Mr. McMahon did not answer that question on the advice of Mr. Dudding, who took the position that the Second McMahon XFD was limited to questions arising from the Delayed Production Documents.

[69] Mr. McMahon testified that he had not seen the Plaintiff's First LOD before Mr. Hargreaves showed it to him at the Second McMahon XFD.

[70] Mr. McMahon testified at the Second McMahon XFD that, in his December 22, 2012 email, he requested a six-month extension of the period to obtain his Certificate as a "backup" or "buffer" or "comfort zone" for himself, to make sure he could finish the course on time. He testified that he was not worried that he might not be able to complete the course and take the exam by June 30, 2013.

[71] Among the things Mr. Hargreaves said to Mr. Dudding during the Second McMahon XFD was the following:

Sir, when you withhold important documents that call into question your client's continued employment, you have no right to object to my exploring issues relating to your client's expectation of continued employment. If you want to make objections like that, then comply with your ethical obligations as counsel and disclose the documents in a timely fashion.

If you want to object to this line of questioning, I can assure you I'm going to be in chambers where I'm going to assure you that the judge or master is going to be aware of what your office did with these documents by way of disclosure. If you want that to become known in judicial circles, by all means persist with these objections.

Now, you may be very sensitive to the problems that will arise should this issue with the list of documents become wider known

[72] Mr. Hargreaves's affidavit includes the following:

58. By March 6, 2017, I had researched the topic of spoliation of evidence and had satisfied myself that it might be open to the Defendant to argue at trial that there had been spoliation of evidence. In particular, I had developed an argument to the effect that the loss or destruction of the BCIT study materials and the unavailability of BCIT information with respect to anything that Mr. McMahon may have submitted to that institution could give rise to an adverse inference against Mr. McMahon based on the doctrine of spoliation.

59. My research persuaded me that such an inference would only be available if the Court accepted that the loss of the evidence had been brought about intentionally.

[73] On March 7, 2017, the day following the Second McMahon XFD, Mr. Hargreaves issued the NTA. It asks Mr. McMahon to admit, among other things, that "[c]ounsel acting on behalf of Mr. McMahon made a conscious decision, in the preparation of the [Plaintiff's First LOD], to conceal 16 pages from the employment file." The NTA also sought admissions that the pages were concealed because they reflected poorly on Mr. McMahon's employment with the CVRD, and that the Delayed Production Documents were intentionally withheld from disclosure.

[74] On the same day as he issued the NTA, Mr. Hargreaves filed the defendant's trial certificate. It states that Mr. Hargreaves estimates that the trial will last eighteen days, and that he will be ready to proceed on the scheduled trial date of April 3, 2017. It is not clear to me why Mr. Hargreaves estimated eighteen days, when the total time estimated in the two trial briefs was only about seven days.

[75] Also on March 7, 2017, Mr. Hargreaves sent an email to Ms. Foley which is marked "without prejudice" and which apparently made a settlement offer ("Offer Email"). The terms offered were not in evidence on the cross-applications. The portions of the Offer Email which are in evidence on the cross-applications are the following:

I fully intend to explore with the jury the inferences that arise from:

a) Concealment of the relevant portion of your client's employment file until October of last year.

b) Destruction by your client of the physical evidence that would show what, if any, efforts he had made to complete the BCIT course, which destruction occurred after he was aware that he might not return to work, after he had retained your firm (and thus presumably been given advice about the need to retain/produce document (sic - documents)), and during the period of concealment of the relevant portions of the employment file.

I venture to suggest that juries typically strongly dislike claimants perceived by the jury to be trying to game the system. I venture to suggest that your client may well be perceived in that fashion, regardless of whether he was personally behaving in such a manner or had merely retained counsel who chose to do so.

I hasten to add that I do not believe that you personally had anything to do with the original concealment of the employment records, but I do not see that as assisting either you or your client.

Please note that my view that the records were intentionally concealed is based on inferences I have drawn, coupled with your apparent inability to proffer any innocent explanation. As I told Mr. Dudding yesterday, I would be pleased to learn of a plausible innocent explanation, since the alternative is conduct that strikes at the very heart of our system of civil justice, by undermining the ability of counsel, and parties, to rely upon the honest performance of duties by counsel. I do not, for a moment, think that you or Mr. Dudding behaved in that fashion, but (absent explanation) it seems to me clear that someone (then) in your firm did so.

You may protest that your client is innocent in this regard and that he is not responsible for the concealment of the records, and did not consciously intend to destroy evidence. However, any attempt to exculpate him must presumably include testimony by you that it was a lawyer or paralegal in your firm who concealed the records, and that your firm did not explain to your client the obligations imposed by the Rules in terms of document disclosure. I note that not only did your office conceal parts of the employment file, but also failed to list, as required by Rule 7-1(a) the BCIT study material. Had that been disclosed it would have led to questions as to why

he was taking the course, and that in turn, assuming honest answers, might have led to earlier disclosure of the concealed employment records and the fact that your client was at risk of losing his employment.

In addition, a close review of the employment file suggests to me that the pages were deliberately numbered in a non-chronological fashion so as to enable the description of a 36 page document. Had the pages been numbered chronologically, your office would either have had to disclose more of the file or the numbering in the documents as provided to us would have revealed gaps (as I read the file, based on the perhaps mistaken assumption that the file was transmitted to your office in a chronologically organized condition).

As soon as you attempt to deflect responsibility from your client you will, in my view, have waived privilege. I caution you that the privilege is not yours to waive so I assume that should this happen, then you have obtained informed consent from your client to waive privilege. That will lead to my seeking leave to cross examine your client on all communications with your office up until the full employment file was disclosed, and I will likely want to call you to the stand as well. I am not prepared to allow you to 'testify' to the jury other than from the witness stand. It will be for the Court to rule on that, but I want you to understand my position.

With all of that in mind, I suggest to you that your client faces a very high likelihood that the jury will conclude, on a balance of probabilities, that your client was going to be unemployed as of June 30th, 2013.

His record of employment in the years before being hired by the CVRD shows that he often struggled to find any employment at all, and that such employment as he did find was sometimes at minimum wage.

His aerospace qualifications were, by 2013, many years out of date, and he had not used those skills for some 7 years, and even then for short periods of time.

Thus we see his claims for both past and future income loss as being problematic.

I await your response.

[76] Ms. Foley responded with a without prejudice letter dated March 8, 2017. Again, only some of the letter was in evidence. The portions in evidence included the following:

Ken's [Mr. McMahon's] immediate supervisor, Les Hokanson, was the manager of recreational operations at the time of the [Accident]. Les knew Ken to be an excellent employee with a strong work ethic. Ken was in no risk of losing his job, apart from the need to obtain his 5th Class certificate. On that point, Les will say that CVRD would not fire an employee who was making "honest efforts" towards obtaining the certificate, for instance, employees who failed the written examination would be provided with opportunities to re-write.

In sum, assuming the court rejects Ken's testimony that, absent the [Accident], he would have obtained the 5th Class certificate before 30 June 2013, the evidence will nevertheless show that he likely would have retained his position at CVRD since he was a valued employee making "honest

efforts" toward obtaining the certificate. Even if the court declines to accept the evidence of Ken's direct superior on that point, the evidence of the senior manager will prove it is more likely than not that Ken could have obtained alternate employment at CVRD. The defence position fails to appropriately account for the evidence of CVRD management, which contradicts the notion that Ken would have been unemployed as of 30 June 2013.

The defence position also attaches seemingly considerable weight on the timing of disclosure of portions of [Mr. McMahon's] CVRD employment file. This is collateral and irrelevant to the issues to be decided by the jury. If raised in the manner suggested without the judge's agreement it will more than likely result in a mistrial.

[77] Mr. Hargreaves responded later that day with another email marked "without prejudice". This email includes the following:

I have your letter of this date.

I find parts of the letter to be inconsistent with my understanding of the likely evidence at trial.

As to the evidence, I have the advantage of having spoken directly with both Hokanson and Hwang, who are on my list of witnesses, and not yours, and who I may or may not call, depending on the state of evidence at the close of your case.

I will invite the Court, at the end of the trial, to instruct the jury as to the law relating to document disclosure, which is indeed a matter of law.

The Rules, of course, impose the obligation to comply upon the party, not the lawyer. Thus I will be able to demonstrate that your client concealed the existence of producible documents in breach of his statutory duty.

Any attempt by you to divert blame elsewhere may well result in that mistrial about which you are so concerned, but if the mistrial arises from your conduct in objecting to my questions and especially if it arises from an effort by you to make an unknown former lawyer responsible, then I shall seek special costs thrown away, to be paid by your firm.

Any attempt by your client to divert blame, on the basis that he was unaware of his legal obligation or unaware that his lawyer had breached that obligation, puts your client's state of mind in issue and that, in my view, amounts to a waiver of privilege.

Should that arise, I shall seek disclosure of the original file, including all notes and communications with your client up until the file was finally disclosed. I may also need to subpoena one or more present or former members or employees of your firm.

Frankly, I have great difficulty imagining that the responsible lawyer in your office, reading the complete employment file, didn't immediately contact or instruct staff to contact the client to find out whether he was taking steps to keep his job. An enquiry into that topic, enabled by waiver of privilege, will almost surely end unhappily for your firm, your client or, in all likelihood, both.

I also respectfully suggest that your client, either as a victim of poor (to be charitable) legal representation (before you assumed carriage of the file) or by active participation in the decision making, finds himself facing a potentially catastrophic outcome should the jury decide that they can't believe a word he says.

I know you had nothing to do with the decisions made in 2013 or early 2014, but that cannot and shall not affect how I deal with the arguments that those decisions have handed me now.

On rereading this before sending it, I can see that my reference to Ms. Acheson could be construed as implying that she was directly involved in the concealment of part of the employment file and/or the loss/failure to list the BCIT materials. I have known Ms. Acheson for many years, and I would have grave difficulty accepting that this would have happened by her direction. However, the buck stops someplace and she wrote to the CVRD, the CVRD sent the file to her, and the List of Documents was prepared in her name. While I do not believe that she would act in a deceitful fashion, someone to whom she, apparently, delegated her obligations seems to have done so.

In short, I have no ethical concerns about either you or Ms. Acheson but I have very significant concerns about unidentified (perhaps now former) members or employees of your firm and I owe it to my clients to advance these arguments vigorously.

[78] Also on March 8, 2017, as stated, Mr. Hargreaves filed the trial brief dated February 9, 2017 on behalf of the defence.

[79] Mr. McMahon's response to the NTA is dated March 15, 2017. Mr. McMahon refused to make most of the admissions sought, stating that they were irrelevant and an abuse of process.

[80] Also on March 15, 2017, Mr. Hargreaves wrote to Ms. Foley as follows:

It is my view that in light of your response to the [NTA], it is inevitable that you will be found to be in conflict such that neither you nor any member of your firm may act as counsel. It is my view that such would likely have been the case in any event, but your refusal to make the requested admissions makes it, in my view, unavoidable.

[81] Ms. Foley responded to Mr. Hargreaves that day, asking that if he intended to seek any rulings from the trial judge, he provide her with an application setting out the relief sought and the basis so that she could have an opportunity to prepare.

[82] On March 22, 2017, Acheson Sweeney decided that Mr. Sean Sweeney would take over conduct of the trial and Ms. Foley would no longer act as counsel for Mr. McMahon.

[83] On March 23, 2017, Mr. Hargreaves issued and served the Foley Subpoena. It states that Ms. Foley is to attend on a date "to be determined", rather than specifying on which of the 18 days scheduled for trial Mr. Hargreaves anticipated calling Ms. Foley as a witness.

[84] Mr. Hargreaves's affidavit does not set out what material evidence he anticipated Ms. Foley could provide at trial. He referred to arguing that an adverse inference should be drawn on the basis of spoliation, and to arguing that solicitor-client privilege would be waived, and continued as follows:

67. A ruling that solicitor-client privilege had been waived in that regard would have been of no avail if the only witness I could ask questions about (sic - of) were Mr. McMahon because I would be seeking evidence as to the state of mind of his agents.

68. Accordingly, I issued and served Subpoenas upon Sherry Baxter, the associate I understood to have day-to-day carriage of the file as of March 2014, Ms. Sykes, the former paralegal employed by Ms. Foley who delivered to our office the List of Documents and the abbreviated employment file, and Ms. Foley. Ms. Foley was the responsible lawyer for the file, as best as I understood matters, as of the time that the truncated file was sent to us and was the lawyer of record at the time that the full employment file was sent to us.

69. I understood that taking these steps would be perceived as unusual and indeed I have never undertaken steps similar to this on any other file. Accordingly, I was at pains to attempt to explain to Ms. Foley not only what it was that I was planning to do but why it was that I felt that I had to do so in the interest of my client.

[85] Also on March 23, 2017, Mr. Hargreaves wrote a lengthy email to Mr. Sweeney, including the following:

6. We infer that the file was transferred internally from Acheson/Baxter to Foley in or around April 2014. Gail Sykes, styling herself as 'paralegal to NATALIE FOLEY' advised late April or early May that she would be getting to the List very soon. In the event, the List later came over dated as of March 11, 2014 and prepared for the signature of (but not signed by) Acheson.

7. We infer that Sykes had been unaware that the List had been drafted before the file was transferred and we infer that someone other than Sykes/Foley was responsible for the creation of the List. We do not know this to be the case and we will not be speculating before the jury on this issue. However, for your purposes I want to let you know that at no time have I harboured any strong suspicion that either Foley or Sykes were involved in the decision to withhold the 16 pages (you will observe that I am inferring that a decision was made to that effect: I find it inconceivable that this was mere inadvertence).

9. I infer that someone in your firm made a conscious decision to deceive the defence with respect to the contents of the employment file. I have no knowledge of who that person was. I know that the List was prepared for the signature of Acheson. I know that it was likely prepared by or under the direction of Baxter. I obviously have no knowledge as to whether any lawyer was aware of the concealment of documents but I do not think that it is open to your office to point the finger at some unidentified employee, while avoiding the responsibilities that rest with counsel. In my opinion some explanation is required, and I

have pointed out to Foley the difficulties that arise, in my view, should your client attempt to blame your firm for his failure (make no mistake: this is his failure it is his List and the Rules impose obligations on him, not on some clerical employee of your office). Moreover, I am not going to consent to any effort by counsel to 'accept' the blame, especially as I very much doubt that you would have any personal knowledge of the truth of whatever explanation you gave. I mean no disrespect to you in so stating: I see no indication that you have had any previous involvement with the file so I cannot imagine how you would have personal knowledge of what went on in early 2014. I also see no way that any apology or acceptance of blame, absent a personal appearance at trial, in the witness stand, of the person or persons responsible can be an adequate explanation of, or remedy for, the prejudice caused to the defence, as elaborated upon below.

13. It matters not, as far as I am concerned, whether the concealment was with the knowledge of the client or an adventure embarked upon by someone within your firm without seeking client approval. Your firm were and remain his agent. The deceit (or negligence if negligence be the explanation) of the agent is visited upon the principal if it arose within the scope of the agency, as it did here.

We intend to confront your client with the Lists and with the employment files that were disclosed at different times.

We face a practical problem with this, in that I expect your client to disclaim any knowledge of his Lists, or knowing the contents of the employment file or of what was disclosed.

This leaves me with no alternative that I can see to placing Ms. Foley under subpoena. While she, I assume, is innocent of any involvement in the original disclosure problems, it is apparent that she became aware of them at some time, since it was she who partially disclosed them in October 2016 and she who got a letter from BCIT in February 2017, before your client was questioned by me about the BCIT course, advising that there were no records available by which we could challenge his evidence.

I have tried to avoid this by delivery of a Notice to Admit

I cannot be certain that having the requested admissions would obviate the need to call Foley or others from your firm, past or present, but I drafted the Notice to Admit in order to reduce and, I hope, eliminate the need to do so.

You will note that this email is not written without prejudice. ...

[86] On March 28, 2017, the trial scheduled to commence on April 3, 2017 was adjourned generally to permit Mr. McMahon's applications to proceed before trial.

[87] The evidence included Mr. McMahon's evidence to the effect that he was very concerned when he was told that Mr. Sweeney would represent him rather than Ms. Foley, and that he was very concerned that Mr. Sweeney would not be able to represent him at trial and that he might have to find and pay another lawyer.

[88] The evidence did not disclose what efforts, if any, either Acheson Sweeney or Jones Emery made to obtain evidence from either Ms. Baxter or Ms. Sykes about the Plaintiff's First LOD and its omission of the Delayed Production Documents.

[89] These cross-applications were initiated by Mr. McMahon's notice of application dated April 28, 2017 ("First McMahon NOA"), which is 22 pages long and seeks relief including removal of Mr. Hargreaves as counsel. The First McMahon NOA refers to the inherent power of the court to control abuse of process, and cites numerous cases. The defendant's application response to the First McMahon NOA application ("Defence First NOR") is dated April 28, 2017, and is 10 pages long.

[90] The defendant's notice of application is dated May 16, 2017 ("Defendant's NOA"), and seeks a number of orders, including cross-examination of Mr. McMahon, Ms. Foley, and Mr. Dudding, and an order that Mr. McMahon has waived solicitor-client privilege. The Defendant's NOA is 10 pages long. Mr. McMahon's response to the Defendant's NOA ("McMahon NOR") is 10 pages long.

[91] Mr. McMahon's second notice of application dated May 26, 2017 ("Second McMahon NOA") seeks an order permitting cross-examination of Mr. Hargreaves on his affidavit. The Second McMahon NOA is 11 pages long. The defendant's amended application response to the Second McMahon NOA ("Defence Second NOR") is dated June 7, 2017 and is two pages long. However, it incorporates by reference ten pages of the Defence First NOR, and eight pages of the Defendant's NOA. As a result, the Defence Second NOR is effectively 20 pages long.

[92] Mr. Kelliher's written argument on Mr. McMahon's behalf, filed June 28, 2017, is 28 pages long. Mr. Brun's written argument, filed June 29, 2017, is 20 pages long.

IV. ANALYSIS

A. Is the First McMahon NOA a nullity owing to its length?

[93] The object of the Supreme Court Civil Rules [Rules], as set out in Rule 1-3, is to secure the just, speedy and inexpensive determination of every proceeding on its merits. Rule 1-3(2) is as follows:

Proportionality

(2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

(a) the amount involved in the proceeding,

(b) the importance of the issues in dispute, and

(c) the complexity of the proceeding.

[94] Rule 8-1(4) provides that "the notice of application, other than any draft order attached to it under paragraph (a), must not exceed 10 pages in length." That Rule also provides that the notice of application must "(c) set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the orders sought should be granted". Rule 8-1(10) imposes a similar 10-page limit on application responses.

[95] Rule 22-7(1) is as follows:

Non-compliance with rules

(1) Unless the court otherwise orders, a failure to comply with these Supreme Court Civil Rules must be treated as an irregularity and does not nullify

(a) a proceeding,

(b) a step taken in the proceeding, or

(c) any document or order made in the proceeding.

[96] Rule 22-7(2) includes the following:

if there has been a failure to comply with these Supreme Court Civil Rules, the court may

(e) make any other order it considers will further the object of these Supreme Court Civil Rules.

[97] As stated, three of the documents relating to the cross-applications exceed the 10-page limit in the Rules. They are the 22-page First McMahon NOA, the 11-page Second McMahon NOA, and the Defence Second NOR, which is effectively 20 pages long.

[98] The defendant relied on the Rules and on the decision in Dupre v. Patterson, 2013 BCSC 1561. Paragraph 56 is as follows:

[56] If counsel are coming to court with inadequate material that clearly fails to comply with the Rules, and counting on being heard, they are misguided. Judges and masters are entitled to expect that counsel will prepare application materials (including affidavits) that comply with the Rules, and do no less than this. Counsel who come to court with application materials that do not comply risk having their applications at least adjourned, with potential cost consequences, until proper materials are filed.

[99] There is a good reason for a page length limit for a notice of application. It encourages brevity, and enables the court and the opposition to understand the application and the basis for it without undue investment of time.

[100] In this case, the parties' arguments are relatively complex, and the hearing of the application occupied two court days. The written arguments were largely based on the notices of application and the application responses, and expanded on them.

[101] The First McMahon NOA provided adequate notice to the defendant and the court of the relief Mr. McMahon sought and the basis for it.

[102] It might have been better if the First McMahon NOA had complied with the ten-page limit, and Mr. McMahon's argument had been expanded in his written argument. Similarly, it might have been better if the Defence Second NOR had complied with the ten-page limit.

[103] However, in all the circumstances, I am not persuaded that the length of the First McMahon NOA has caused any prejudice to the defendant, or that the court should insist on strict compliance with the page limits in this case. The cross-applications raised complex issues, as demonstrated by the length of the hearing and of these reasons for judgment.

[104] In any event, as set out in Rule 22-7(1), the failure to comply with the Rules regarding the First McMahon NOA must be treated as an irregularity, and not a nullity, unless the court orders otherwise. The usual remedy for such an irregularity would address any prejudice to the application respondent, by adjourning the matter if necessary and potentially making appropriate orders concerning costs. It is difficult to conceive of a case in which the court would consider a notice of application to be a nullity only because of its length.

[105] I dismiss the defendant's application for a declaration that the First McMahon NOA is a nullity based on its length.

B. Are the following affidavits inadmissible in whole or in part on the cross-applications: Affidavit #1 of Ms. Foley, Affidavit #1 of Patrick Dudding, and Affidavit #1 of Mr. McMahon?

[106] I refer to the affidavits of Ms. Foley and Messrs. Dudding and McMahon together as the "Challenged Plaintiff's Affidavits" and to those three deponents together as the "Challenged Plaintiff's Deponents". The defendant did not challenge the admissibility of Mr. Sweeney's affidavit.

[107] The defendant argued that the Challenged Plaintiff's Affidavits included inadmissible passages, including expressions of emotion, hearsay, opinion evidence, assumptions, commentary, speculation, and argument.

[108] The court has the jurisdiction to strike portions of affidavits which contain passages which are inadmissible. See Chamberlain v. School District #36 (Surrey), [1998] B.C.J. No. 2923 (S.C.), at para 15, as follows:

[15] The court has power to strike inadmissible evidence from affidavits: Evans Forest Products Ltd. v. The Chief Forester of British Columbia (6 April 1995), Vancouver A943891 (B.C.S.C.). In practical terms, when there is no time between the application to strike inadmissible evidence and the hearing of the lis, this means portions of filed affidavits are given no weight by the court.

[109] The mischief of including inadmissible "evidence" in affidavits is that it requires the opposing party to determine how to respond, lengthens the time required for the court and the parties to review and consider affidavits, and risks the decision-maker falling into legal error by relying on inadmissible material. The chambers hearing process is poorly suited to making rulings on admissibility of passages in affidavits. As a result, usually the court simply chooses not to give any weight to the inadmissible passages, without any formal order regarding the inadmissible passages.

[110] Unfortunately, here the Challenged Plaintiff's Affidavits include passages which are in reality speculation or argument, and are inadmissible. In the circumstances of this case, it is appropriate to clarify that the following passages from the Challenged Plaintiff's Affidavits are inadmissible, because they consist of either speculation or argument or inadmissible opinion, rather than evidence of what the witness observed or did:

a) Ms. Foley's affidavit:

i) para. 12: "which I believe have culminated in an interference with the administration of justice";

ii) para. 15 in its entirety, including Exhibit A;

iii) para. 23, "it was clear to me that he was suggesting that there had been some nefarious activity on the part of members of my firm";

iv) para. 31, after referring to the result that Ms. Foley might not be able to act for Mr. McMahon at trial, the words "I felt that was precisely Mr. Hargreaves's intention and I had a number of sleepless nights attempting to separate out the baseless allegations and manufactured arguments generated by Mr. Hargreaves from the real risk assessment in the case and what proper advice to provide my client.";

v) para. 32, the words "for something that had caused no prejudice";

vi) para. 33 in its entirety;

vii) para. 38 in its entirety;

viii) para. 41, the words "clearly intended to undermine my relationship with my client and convince my client to accept his settlement proposal";

ix) para. 47, the words "[T]he correspondence, communications and use of powers as an officer of the court by Mr. Hargreaves in this matter have been of the nature of a personal attack on myself and my firm" and "[T]he allegations and approach of Mr. Hargreaves made it impossible for me to effectively represent my client and put the evidence, facts and issues that merit consideration before the court for a proper and timely determination of Mr. McMahon's claim, thereby denying him access to justice"; and

b) Mr. Dudding's affidavit:

i) para. 20 in its entirety;

ii) para. 25, the words " I nevertheless understood him to be using the threat of bringing that issue to the attention of the court as a means for him to gain an advantage for his client in the litigation. It also appeared to me that Mr. Hargreaves wished to signal to my client that I had acted in an unethical way and that I had withheld documents, in a way that had compromised the plaintiff's claim"; and

iii) para. 26, the words "I interpreted these things as signifying intense anger and aggression."

[111] In addition, the following passages of Ms. Foley's affidavit are inadmissible for the reasons discussed below:

a) para. 16 and Exhibit B are inadmissible because the facts are irrelevant. They deal with another file involving both Mr. Hargreaves and Acheson Sweeney; and

b) para. 17 is inadmissible because it is a statement of alleged fact rather than evidence. This paragraph refers to the inadmissible statement in para. 16, and says "[A]t no time has Mr. Hargreaves denied making the above statement to Mr. Sweeney, or the truth of the contents of that statement". If Ms. Foley meant to say, "Mr. Hargreaves has not told me that he denied making the statement", or if she meant to say, "Mr. Sweeney informs me and I believe that Mr. Hargreaves has not told Mr. Sweeney that he denies making that statement", her affidavit should have said so. However, it is expressed as a statement of fact which it is unclear how Ms. Foley could know, and it is inadmissible.

[112] The defence argued that a number of other passages from the Challenged Plaintiff's Affidavits were inadmissible. Many of the challenged passages provided evidence relating to how angry Mr. Hargreaves appeared to be when he was discussing issues related to the Delayed Production Documents. Mr. Hargreaves denies some of the facts alleged.

[113] These passages could potentially relate to the question of whether Mr. Hargreaves intended to abuse the process of the court. As discussed below, it is not necessary for me to determine whether, as a matter of law, Mr. Hargreaves intended to abuse the process of the court. In this case, I found the evidence of how angry Mr. Hargreaves appeared to be at various times did not help me determine whether Mr. Hargreaves's conduct demonstrated that he intended to abuse the court process, or that he was simply taking an aggressive position on behalf of his client. Similarly, the fact that there has been a history of unhappy

dealings between Mr. Hargreaves and members of Acheson Sweeney did not help me determine what were Mr. Hargreaves's intentions in this case, even if that is relevant.

[114] The defendant argued that the court should strike passages which included hearsay. Ordinarily, hearsay is admissible if the application does not seek a "final order", as set out in Rule 22-2(13). In addition, there are circumstances where the court can provide leave for statements as to the information and belief of the deponent.

[115] The balance of the Challenged Plaintiff's Affidavits, including all of Mr. McMahon's affidavit, are admissible on the cross-applications.

[116] Mr. McMahon's counsel argued that numerous paragraphs of Mr. Hargreaves's affidavit were inadmissible as hearsay, speculation, commentary, argument, and opinion evidence. Mr. McMahon did not seek an order formally striking the paragraphs, instead asking the court "to take the deficiencies in Mr. Hargreaves's evidence into account when considering the weight to be given to his testimony".

[117] Much of Mr. Hargreaves's affidavit appears to be directed to the question of his personal belief in the merits of his arguments regarding spoliation and waiver of solicitor-client privilege. As discussed below, I do not find the question of Mr. Hargreaves's personal belief to be determinative of whether Mr. Hargreaves's conduct amounts to an abuse of process. However, it appears to me that this question was raised by Mr. McMahon's argument and it was acceptable for Mr. Hargreaves to respond to it.

[118] Mr. McMahon's counsel objected to portions of Mr. Hargreaves's affidavit which summarized evidence Mr. McMahon gave on examination for discovery. That evidence is admissible. It is not offered for the truth of the contents, but for the fact that Mr. McMahon gave the testimony, so it is not hearsay. However, where the excerpts from the transcript were attached, they provided better evidence of Mr. McMahon's testimony than Mr. Hargreaves's summary.

[119] There are passages in Mr. Hargreaves's affidavit which were speculation and must be ignored. That includes the following:

a) para. 35, "That (having notice that Mr. McMahon was at risk of losing his employment as of June 30, 2013 due to a lack of a required trade designation) in turn would have led the Defendant to explore with the Plaintiff, in a then-timely fashion, what efforts he had been making to obtain the trade designation";

b) para. 36, "That in turn would inevitably have led to disclosure of his enrollment at BCIT and would have permitted and undoubtedly lead (sic - led) to the defence obtaining from BCIT all such records as were then in existence with respect to efforts made by the Plaintiff to complete the course"; and

c) para. 46, "[w]ere I aware at that time of the Plaintiff's June 30, 2013, deadline to obtain the certification or be terminated from his employment, I would have raised the issue of the completion of his course occurring well after that date".

C. Should the court order cross-examination of any deponents on their affidavits?

1. Cross-examination of Challenged Plaintiff's Deponents

[120] I will first deal with the defendant's application for cross-examination of the Challenged Plaintiff's Deponents.

[121] The defendant's written argument states that the court should order cross-examination of the Challenged Plaintiff's Deponents "so as to get to the bottom of the failure to make proper disclosure".

[122] Mr. McMahon's position is that any cross-examination of those deponents should be limited to the following issues:

a) the state of mind of Ms. Foley and Mr. Dudding regarding the effect of Mr. Hargreaves's conduct on them;

b) the credibility of the evidence of Messrs. Dudding and Hargreaves concerning what was said between them prior to the TMC of February 9, 2017; and

c) the credibility of what was said between Messrs. Dudding and Hargreaves during the Second McMahon XFD.

[123] Rule 22-1(4) is as follows:

Evidence on an application

(4) On a chambers proceeding, evidence must be given by affidavit, but the court may

(a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,

(b) order the examination of a party or witness, either before the court or before another person as the court directs,

(c) give directions required for the discovery, inspection or production of a document or copy of that document,

(d) order an inquiry, assessment or accounting under Rule 18-1, and

(e) receive other forms of evidence.

[124] Cross-examination often will be permitted where the evidence to be elicited is relevant to facts that are at issue on the application. See Dakota Ridge Builders Ltd. v. Niemela, 2015 BCSC 581, including para. 8, as follows:

[8] In exercising my discretion on whether to order cross-examination, it is relevant to consider whether cross-examination is necessary, whether it is relevant to the issues on the application and whether it is likely to produce any evidence that will support the side of the party seeking cross-examination: see Tiessen v. Insurance Corp. of British Columbia, 2008 BCSC 1822, and Kvaerner U.S. Inc. v. AMEC E & C Services Limited, 2004 BCSC 730.

[125] In short, this court should order cross-examination of the Challenged Plaintiff's Deponents only if the cross-examination will likely assist in resolving the cross-applications before the court.

[126] The applications before the court do not depend on how exactly the Delayed Production Documents were omitted from the Plaintiff's First LOD. Mr. McMahon's applications turn on whether Mr. Hargreaves or Jones Emery have abused the court process. As part of that analysis, there are issues relating to Mr. McMahon's alleged waiver of solicitor-client privilege and relating to an alleged defence argument regarding spoliation. However, further evidence concerning how the omission of the Delayed Production Documents from the Plaintiff's First LOD occurred is not required to resolve the cross-applications.

[127] In addition, the evidence does not show that cross-examination of the Challenged Plaintiff's Deponents would resolve the question of how the omission occurred. There is no evidence showing that any of the Challenged Plaintiff's Deponents were directly involved in the preparation or service of the Plaintiff's First LOD, and they have already provided evidence about their knowledge and involvement.

[128] As a result, I dismiss the defendant's application for cross-examination of the Challenged Plaintiff's Deponents.

2. Cross-examination of Mr. Hargreaves

[129] I turn next to Mr. McMahon's application to cross-examine Mr. Hargreaves.

[130] Mr. McMahon alleges that Mr. Hargreaves has abused the court process. Is Mr. Hargreaves's subjective intention relevant to that determination? If a lawyer does something which would be an abuse of process if the lawyer intended to abuse the process, but the lawyer did not intend to abuse the process, will the conduct escape characterization as an abuse of process? If a lawyer intends to abuse the process, but does something which would not otherwise be an abuse of process, does the lawyer's intention create an abuse of process?

[131] The authorities do not answer those questions clearly.

[132] In Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, Madam Justice Arbour, for the majority, found as follows in respect to the doctrine of abuse of process:

[37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute" (Canam Enterprises Inc. v. Coles (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (CanLII))). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

[Emphasis added.]

[133] In MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235 [MacDonald Estate], a case dealing with the removal of counsel due to a conflict of interest, Justice Sopinka, for the majority, held that courts have inherent jurisdiction to remove counsel of record where appropriate. The jurisdiction flows from the fact that: "lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction" (at p. 1245).

[134] In Everingham v. Ontario, [1992] O.J. No. 304 (ON SC) [Everingham], the Ontario Divisional Court found that the courts may remove counsel of record when the interests of justice requires, whether for a conflict of interest or otherwise, as follows:

It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise. This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached.

[135] At issue in Everingham was a private meeting between a Crown lawyer and a mental patient (who the Crown was scheduled to cross-examine the following day), without the presence of the patient's lawyer, while the Crown lawyer was taking a tour of the mental hospital. The Divisional Court found that the removal order must stand, stating that:

The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the public. This is particularly so when the rights are at stake of powerless and vulnerable litigants like detained mental patients. The appearance of unfairness, oppression and deprivation of counsel is not, as noted above, cured by an eventual finding that a court prefers the evidence of the solicitor to the evidence of a detained mental patient. The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice. The sine qua non of the justice system is that there be an unqualified perception of its fairness in the eyes of the public.

[Emphasis added, citations omitted.]

[136] In 781332 Ontario Inc. v. Mortgage Insurance Co. of Canada, [1991] O.J. No. 1592 (ON SC), Justice Hoilett found that the power to intervene and remove counsel of record is not limited to conflict of interest situations. In removing counsel of record, the Court held as follows:

This court needs not impute motive, nor does it need to find impropriety. But it must be concerned with appearances which might reflect adversely on the integrity of the administration of justice. Mindful of that paramount consideration, therefore, I am of the opinion that the litigant's right to be represented by counsel of his/her choice must yield to the paramount public interest in preserving the integrity of the system, as well as its appearance.

[137] In Quebec (Criminal and Penal Prosecutions) v. Jodoin, 2017 SCC 26 [Jodoin], the Court upheld an award that a lawyer pay costs personally for engaging in an abuse of process. The abuse of process consisted of filing motions alleging bias by a judge for the improper purpose of adjourning a hearing. It is not clear from the decision of the Supreme Court of Canada whether the lawyer provided testimony about his intentions, or the court inferred it from his conduct.

[138] The Court referred to conduct that would give rise to the inference that the lawyer had an improper purpose. The lawyer's conduct consisted of filing motions alleging that one judge was biased, and after learning that the cases had been reassigned to a second judge, filing another set of motions (on the same day as the first set) alleging that the second judge was biased.

[139] It appears that the Court inferred from this conduct that the lawyer had an improper purpose. This is described in para. 42 of Jodoin, as follows:

[42] As the judge noted, the respondent's conduct in the cases in question was particularly reprehensible. Its purpose was unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. His subsequent conduct was consistent with this finding. It is quite odd, if not unprecedented, for a lawyer to file, on the same day and in the same cases, two series of motions for writs of prohibition against two different judges on the same ground of bias. The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

[140] As discussed in Jodoin, courts cannot award costs against a lawyer personally without observing procedural safeguards, and the lawyer should be given prior notice of the allegations against him or her and the possible consequences. As set out in Jodoin at para. 36, "[i]deally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits."

[141] Here, Mr. McMahon has sought special costs from the defendant, but has not sought costs against Mr. Hargreaves or Jones Emery personally. As a result, Mr. Hargreaves's personal intentions are of little or no importance.

[142] Ordinarily, the question for the court considering abuse of process is a question of the impact of the impugned conduct in the conduct of the case and on the reputation of the administration of justice. This depends primarily on an objective analysis of the conduct, rather than a subjective analysis of the lawyer's intention. A lawyer may commit an abuse of process unintentionally, and a lawyer who seeks to abuse the process may fail to do so.

[143] I conclude that in rare cases, the lawyer's subjective intentions may be relevant. This may be particularly so in a case in which the lawyer is being asked to pay costs personally. In such cases, the court may choose to draw inferences from the lawyer's conduct, rather than relying on testimony from the lawyer.

[144] In this case, I am not convinced that cross-examination of Mr. Hargreaves is necessary to resolve the applications.

[145] Essentially, Mr. Hargreaves's evidence is that he acted in good faith and in pursuit of his client's interests, and not in order to abuse the process. His evidence is that he was pursuing arguments related to spoliation and waiver of privilege, as discussed below. In this case, an objective analysis of his conduct is sufficient to resolve the applications. Cross-examination of Mr. Hargreaves would lead to further delay and expense, and is not consistent with the purpose of the Rules.

[146] I dismiss Mr. McMahon's application to cross-examine Mr. Hargreaves on his affidavit.

D. Should the court order that Mr. McMahon swear an affidavit verifying the Plaintiff's Second LOD?

[147] The defence seeks an order that Mr. McMahon must swear an affidavit verifying the Plaintiff's Second LOD. Mr. McMahon is opposed.

[148] Rule 7-1(8) is as follows:

Affidavit verifying list of documents

(8) The court may order a party of record to serve an affidavit verifying a list of documents.

[149] In Gardner v. Viridis Energy Inc., 2012 BCSC 1816, Justice Pearlman discussed the circumstances in which it may be appropriate to order an affidavit verifying a list of documents, as follows (at para. 52):

[52] Rule 7-1(8) permits a court to order that a party provide an affidavit verifying its list of documents when in the absence of any adequate explanation, relevant documents have been omitted from a list of documents. Such an order may also be made where a party has shown a "dilatory and casual attitude to production of documents" leading to an inference that "either deliberately or by wilful indifference relevant documents may be hidden". Rule 7-1(8) should not be rigidly applied in a case involving very large numbers of documents. There must be evidence showing relevant documents have been omitted or that the disclosure has been inadequate: Copithorne v. Benoit, 2010 BCSC 130 (CanLII) at paras. 11-14.

[Emphasis added.]

[150] In Copithorne v. Benoit, 2010 BCSC 130, Justice Schultes found that an order for an affidavit verifying a list of documents may be appropriate where significant documents have been omitted or where it is reasonable to suspect that relevant documents may be hidden (at paras. 11 and 12):

[11] Rule 26(3) of the Rules of Court provides that a court may order that a party provide an affidavit verifying a list of documents. A useful authority on this issue is the decision of Mr. Justice Legg (as he then was) in Foundation Co. of Canada Ltd. v. Burnaby (District), [1978] B.C.J. No. 557 (S.C.) at para. 7:

When some documents which are significant to the defence or claim of one party, have, for whatever reason, been omitted from any list delivered under Rule 26(1), in the absence of any adequate explanation or reason for such omission, an order directing the delinquent party to deliver an affidavit verifying the list of discovered documents ought, in my view, to be made.

[12] In addition to responding to the omission of significant documents, such an order may also be necessary when a party has shown a "dilatory and casual attitude to production of documents" giving the other party "reasonable cause to suspect that either deliberately or by wilful indifference relevant documents may be hidden from them." Such an order tells the dilatory party in effect "no more missing documents." Those principles are drawn from Synergy Management Group Ltd. v. Walker Systems Corp., [1992] B.C.J. No. 2109 (S.C.).

[151] As stated, the object of the Rules, as set out in Rule 1-3, is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

[152] The case law raises the question of whether Mr. McMahon, either deliberately or by wilful indifference, hid relevant documents. Mr. McMahon's evidence is that he did not see the Plaintiff's First LOD until Mr. Hargreaves showed it to him at the Second McMahon XFD.

[153] The defence relies on inferences it asks the court to draw from the facts. The defence argued that the circumstances suggest that there was deliberate concealment of the Delayed Production Documents. The defence argues that the suggestion in the evidence, that Ms. Foley may have found the Delayed Production Documents separated into a plastic folder, strongly suggests that someone at Acheson Sweeney deliberately chose to conceal those documents.

[154] As stated by Goldie, J.A. in Souter v. 375561 BC Ltd., [1995] BCJ No. 2265 (BCCA) [Souter], at para. 49:

Late and incomplete delivery of documents is a common experience and there are a variety of reasons which have nothing to do with fraud for such late delivery.

[155] It is very unlikely that Acheson Sweeney deliberately concealed the Delayed Production Documents, for the following reasons:

a) It is unlikely that lawyers would deliberately conceal documents to advance a single case, because it would risk their professional reputation and invite disciplinary proceedings;

b) If someone at Acheson Sweeney had intended to deliberately conceal the Delayed Production Documents, one would expect them to discard the documents, rather than leave them in the file;

c) It is unlikely that someone would deliberately conceal documents which would continue to exist in the CVRD files, and which could be discovered by Jones Emery through conversations with someone at CVRD. In this case, Mr. Hargreaves spoke to CVRD employees, as set out in Mr. Hargreaves's March 8, 2017 email;

d) The job description in the Timely Production Documents reveal that a Certificate was required for Mr. McMahon's position. The additional information in the Delayed Production Documents is that CVRD had set a deadline of June 30, 2013, and had declined to extend the deadline. If someone intended to conceal documents showing that Mr. McMahon needed to obtain a Certificate, they would likely have concealed the job description as well;

e) Ms. Foley is not likely to have deliberately concealed the documents, because she listed them in the Plaintiff's Second LOD, and because she admitted in the Apology that Acheson Sweeney should have listed the Delayed Production Documents earlier;

f) There are other inferences than fraud to be drawn from the possible existence of the Delayed Production Documents in a separate plastic folder. Two that come to mind are these:

i) The Plaintiff's First LOD may have been a draft which remained unsigned because it was never properly finalized, and someone such as Ms. Baxter may have intended to discuss the Delayed Production Documents with a senior lawyer before finalizing the Plaintiff's First LOD. This is consistent with the following facts:

1) the evidence on the cross-applications did not include a cover letter sending the Plaintiff's First LOD to Jones Emery;

2) the Plaintiff's First LOD was unsigned;

3) Acheson Sweeney's May 26, 2014 letter to Jones Emery enclosed many documents which are apparently not referred to in the Plaintiff's First LOD, suggesting that there would be a more comprehensive list of documents at some point including all the documents; and

4) around the time of the date typed on the Plaintiff's First LOD, Acheson Sweeney was moving the file from Ms. Acheson and Ms. Baxter in the Courtenay office to Ms. Foley and Ms. Sykes in the Victoria office;

ii) Although the collective agreement governing Mr. McMahon was not in evidence, collective agreements can contain "sunset clauses" which require employers to remove letters of reprimand and the like from the employee's record within a specific period of time: see for example the clause discussed in Carillion Services v. Canadian Union of Public Employees, Local 942, 2011 CanLII 10605 (ON L.A.). The Delayed Production Documents relate to employment discipline matters. As a result, it may be that Acheson Sweeney received the documents from the CVRD with the disciplinary documentation in a separate plastic folder, and that this led someone to keep the documents separate, which led to the failure to include the disciplinary Delayed Production Documents with the balance of the CVRD employment file.

[156] I am troubled that Mr. Hargreaves's correspondence, beginning in early February 2017, asserts that there was intentional concealment of the Delayed Production Documents, because there is simply no evidence supporting that inference. One would hope that lawyers would understand that mistakes can happen innocently. For example, here, someone at Jones Emery incorrectly labelled the CVRD documents, including the Delayed Production Documents, as "Duplicate", apparently resulting in a three-month delay before Mr. Hargreaves reviewed the Delayed Production Documents.

[157] The defence has failed to establish that Mr. McMahon, either deliberately or by wilful indifference, hid relevant documents or concealed them temporarily. The Delayed Production Documents have now been produced and there is no reason to think any other documents have been omitted from the Plaintiff's Second LOD.

[158] In addition, here, the Second McMahon XFD occurred after the production of the Plaintiff's Second LOD. The defendant was able to question Mr. McMahon about his production of documents during that examination for discovery. Ordering Mr. McMahon to provide an affidavit verifying the Plaintiff's Second LOD would simply increase the procedure and the related expense in this case, contrary to the object of the Rules.

[159] I dismiss the defence application for an order that Mr. McMahon provide an affidavit verifying the Plaintiff's Second LOD.

E. Has Mr. McMahon waived legal advice privilege over all his communications with, and over all communications within, Acheson Sweeney regarding the Delayed Production Documents and the Plaintiff's First LOD?

[160] The defendant argues that, if Mr. McMahon's evidence was that he did not know anything about the preparation of the Plaintiff's First LOD, the intent of his lawyers, being his agents, would be imputed to Mr. McMahon, and would thereby waive solicitor-client privilege. Mr. McMahon's position is that there has not been any waiver of solicitor-client privilege.

[161] The defendant's application response includes the following:

11. The Plaintiff filed an affidavit in support of the application wherein he addresses issues related to the subject matter of the application. This constitutes a waiver of solicitor/ privilege that might relate to communications between the Plaintiff and the Plaintiff Firm: Weir-Jones v. Taylor, 2013 BCSC 1633 ("Weir-Jones").

12. A party is said to have waived privilege in instances in which a party states that a mistake arose by the reason of negligence or inadvertence by counsel: Weir-Jones, at para. 53; Souter v. 375561 BC Ltd., [1995] BCJ No. 2265 (BCCA); Camosun College v. Levelton Engineering Ltd., 2014 BCSC 1190, at para. 19.

13. The above principle should apply to waiver of privilege in the present case. Here, the Plaintiff swore an affidavit in which he stated, among other things, that he felt that his counsel "was interfering" with Mr. Hargreaves, was given the impression his counsel was "trying to hide documents," and was worried that it was possible his counsel had "hidden documents" or "done something wrong".

[162] The term "solicitor-client privilege" is a broad term, often used to describe three quite different things: confidential communications between solicitor and client (legal advice privilege), lawyer's brief privilege, and litigation privilege. Here, the privilege in question is legal advice privilege.

[163] Legal advice privilege extends over confidential communications made for the purposes of giving or receiving legal advice. It is the "highest privilege" recognized by the courts because it is based on the fact that communications between lawyers and their clients is essential to the effective operation of the adversarial justice system.

[164] Legal advice privilege is a rule of evidence, a fundamental civil and legal right, and a principle of fundamental justice in Canadian law: see Canada (National Revenue) v. Thompson, 2016 SCC 21.

[165] The Supreme Court of Canada has consistently reaffirmed the principle that the protection of confidentiality provided by legal advice privilege must be as close as possible to absolute to ensure public confidence: Blank v. Canada (Minister of Justice), 2006 SCC 39 at para 24.

[166] The privilege holder or the holder's agent may waive privilege expressly or by implication. The party asserting that the privilege has been waived bears the burden to establish waiver: Kamengo Systems Inc. v. Seabulk Systems Inc., [1998] B.C.J. No. 3003 (BC SC) at para 15, citing McLachlin J. (as she then was) in S. & K. Processors Ltd. v. Campbell Avenue Merring Producers Ltd., [1983] B.C.J. No. 1499 (BC SC).

[167] As a result, the defendant would bear the burden of establishing that Mr. McMahon waived solicitor-client privilege over his communications with Ms. Foley or anyone else at Acheson Sweeney.

[168] If a party to a lawsuit puts the legal advice at issue, the party may be held to have waived the privilege by implication: Reid v. British Columbia (Egg Marketing Board), 2006 BCSC 346, at paras. 23-28.

[169] The defendant argues that Mr. McMahon put at issue his communications with Ms. Foley, and thereby waived legal advice privilege.

[170] However, it is the defendant, not Mr. McMahon, who has sought to put those communications at issue. The defendant seeks to do so by raising the issue of spoliation.

[171] The defendant relied on a series of cases where clients had waived legal advice privilege. They are distinguishable because in each of them it was the privilege-holder who sought to rely on the communications at issue, as follows:

a) In Weir-Jones, the client was applying for an order extending the time for filing a jury notice. The client was required to establish the reason for his failure to file the notice in the period required by the Rules. As a result, by bringing the application to extend the time, the client waived privilege over the reason for the failure;

b) In Souter, the question of waiver of privilege arose in two ways. First, the client blamed mistakes in prior affidavits on his solicitors. Second, the defendant alleged that the plaintiff and his son had fraudulently concocted a fake promissory note, and the defendant sought to examine the plaintiff's lawyer on that issue. On the first issue, the court held that by relying on evidence which blamed the affidavit mistakes on his lawyer, the plaintiff thereby put in issue the state of his instructions to his lawyers, and waived privilege. Here, Mr. McMahon does not rely on the state of his instructions to his lawyers. On the second issue, Mr. Justice Goldie did not accept that privilege had been waived. The defendant could not waive the plaintiff's privilege by making allegations about a fraudulent promissory note, just as the defendant here cannot waive Mr. McMahon's privilege by making allegations about intentional concealment of documents; and

c) In Camosun College, the plaintiff pled and relied on the postponement provisions of the Limitation Act, asserting that he did not have certain legal knowledge. The court held that he had put his state of mind regarding that in issue and by doing so had waived privilege. The plaintiff also blamed his counsel for making an admission without instructions and for providing deficient legal advice concerning joinder of issues, and privilege was waived on that issue.

[172] Here, Mr. McMahon does not rely on the late disclosure of the Delayed Production Documents as a basis for any of his applications or for the relief he seeks at trial. His applications rely on the alleged abuses of the court process. Further, the position of Mr. McMahon and Acheson Sweeney are in harmony, not in conflict, in responding that the defendant has not established a deliberate concealment of documents.

[173] As a result, I dismiss the defence application for an order that Mr. McMahon has waived solicitor-client privilege.

F. Should the court set aside the Foley Subpoena because the defence has not established Ms. Foley likely has material evidence?

[174] Mr. McMahon argued that the Foley Subpoena was issued as an abuse of process and should therefore be set aside. Mr. McMahon's position is that any evidence from Ms. Foley about the Delayed Discovery Documents would be inadmissible on the basis that it would be evidence relating to a collateral issue and, in addition, is privileged.

[175] The defence position is that Ms. Foley's evidence would be admissible, in aid of the defendant's argument that the jury should draw an adverse inference on the basis of spoliation, and that the privilege is waived.

[176] If Ms. Foley likely has material evidence, the Foley Subpoena would not likely be an abuse of process. As a result, I begin with an analysis of whether the defence has established that Ms. Foley likely has material evidence.

[177] The issuance of a subpoena is a serious step. It puts citizens to the inconvenience, and often the expense and lost income, of attending at court. When the person under subpoena is trial counsel, the issuance of a subpoena may require counsel to withdraw, as occurred here. That is a serious matter because it has the effect of interfering with the lawyer-client relationship and the client's choice of legal counsel.

[178] The onus is on the party who issued the subpoena to establish that the proposed witness likely has material evidence: see Wexler v. Bhullar, 2006 BCSC 1466 [Wexler], at para. 41, aff'd in 2007 BCCA 273.

[179] At para. 36 of the reasons for judgment of the British Columbia Supreme Court in Wexler, Justice Ehrcke wrote as follows:

[36] Where a party in a proceeding subpoenas counsel for the opposite party to give evidence and the subpoena is challenged, the court must carefully scrutinize the circumstances to determine whether that person's evidence is truly necessary to the proceeding or whether the opposing party has issued the subpoena for the improper and collateral purpose of disrupting the proceeding and causing prejudice to the opposing side. In such a case, the court may set aside the subpoena as an abuse of process. Thus, in Williams v. Stephenson, 2005 BCSC 450, Goepel J. held at paras. 56 - 57:

If a subpoena is challenged, the onus is on the party proposing to call a witness to establish that the witness is likely to give material evidence on an issue before the court: Re Stupp et al. and The Queen (1982), 70 C.C.C. (2d) 107 (Ont. H.C.J.) at 121. This is particularly so when the proposed witness is counsel for the opposing party. If Mr. Zworski is called as a witness he obviously cannot continue as counsel. A party should not be deprived of his or her choice of counsel without good cause: MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235. If it was otherwise, a party could disrupt at random the orderly course of a civil action and cause severe prejudice to the other side by merely issuing a subpoena to their counsel and forcing them to retain new representation.

As set out in Ms. Shergill's correspondence of October 4, 2004, she subpoenaed Mr. Zworski to give evidence about actions which occurred in August 2002 and thereafter. Any complaints the plaintiffs have against Crown counsel, the VPD and the VPD Property Office concerning events that took place in August 2002 and thereafter are independent of the matters complained of in the statement of claim and do not relate to the torts alleged in the present lawsuit. The statement of claim is limited to events that took place between 1998 and 2001. There is no suggestion that Mr. Zworski has any knowledge of those events or can give evidence material to an issue before the court. There is absolutely no basis for the subpoena. It is an abuse of process.

[180] I begin by discussing the potential spoliation argument.

[181] The defendant argued that the loss or destruction of Mr. McMahon's BCIT study materials and the unavailability of information from BCIT with respect to what Mr. McMahon may have submitted to BCIT could give rise to an adverse inference against Mr. McMahon. The defendant argued that such an adverse inference would only be available if the trier of fact accepted that the loss of the evidence had been brought about intentionally.

[182] The defendant also argued that the state of mind of Mr. McMahon, or his agents if he disavowed any personal knowledge, would be relevant to the issue of spoliation of evidence.

[183] As I understand it, the defence would seek to argue that the jury should infer that Mr. McMahon deliberately concealed the Delayed Production Documents for about two and one half years so that during that period of concealment BCIT and his wife would destroy documents which would have shown that he was unlikely to pass the test for a Certificate at all, or in time for the deadline of June 30, 2013 imposed by CVRD.

[184] The concept of spoliation of evidence was discussed by the Court of Appeal in Holland v. Marshall, 2008 BCCA 468, at paras. 55, 59, 70, and 71, as follows:

[55] Justice Brooke stated his understanding of the law of spoliation based on four case authorities to which he was referred by counsel for the respondents. The following is a summary of what was stated:

1. A rebuttable evidentiary presumption arises where evidence of spoliation exists; the doctrine of spoliation is an evidentiary rule raising a presumption and not an independent tort giving rise to a cause of action (St. Louis v. Canada (1896), 25 S.C.R. 649).

2. In an appropriate case, destruction of documents carries a procedural but not substantive remedy, an action for damages cannot be sustained solely on the ground that documents have been destroyed (Endean v. Canadian Red Cross Society (1998), 48 B.C.L.R. (3d) 90 (C.A.)).

3. Spoliation requires four elements in evidence: a) the evidence has been destroyed; b) the evidence destroyed was relevant to an issue in the lawsuit; c) legal proceedings were pending; and d) the destruction of documents was an intentional act indicative of fraud, or an intention to suppress the truth (Dyk v. Protec Automotive Repairs (1997), 41 B.C.L.R. (3d) 197 (S.C.)).

4. There is no common law duty of care to preserve property which may possibly be required for evidentiary purposes; such an obligation can only be imposed by court order granted pursuant to the Rules of Court (Dawes v. Jajcaj, 1999 BCCA 237, 66 B.C.L.R. (3d) 31, aff'g (1995), 15 B.C.L.R. (3d) 240, leave to appeal ref'd [1999] S.C.C.A.. No. 347).

[59] In a legal context, the term spoliation refers to the destruction, mutilation, alteration or concealment of evidence. The harm to the trial process that spoliation can cause is well-recognized. The more difficult problem is finding an appropriate remedy for spoliation. The sanctions or remedies available to litigants who suffer due to spoliation include procedural remedies, evidentiary presumptions, contempt proceedings and costs orders. Preventive measures may also be taken through preservation orders.

[70] Spoliation has been described as "a form of cheating" which "threatens to undermine the integrity of civil trial process" (Charles Nesson, "Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action" (1991) 13 Cardozo L. Rev. 793 at 793). Some proponents of an independent cause of action take the view that the act of destroying evidence, especially intentionally, ought to be actionable in tort simply as a matter of policy (Virginia Nesbitt, "A Thoughtless Act of a Single Day: Should Tennessee Recognize Spoliation of Evidence as an Independent Tort?" (2007) U. Mem. L. Rev. 555 at 582. See also Nesson; Steffen Nolte, "The Spoliation Tort: an Approach to Underlying Principles" (1995) 26 St. Mary's L.J. 351 at 401-402). As well, some commentators have pointed to product liability and medical malpractice as examples of cases where the destruction of evidence is particularly devastating to a plaintiff's claim (Richard Sommers & Andreas Seibert, "Intentional

Destruction of Evidence: Why Procedural Remedies are Insufficient" (1999) 78 Can. Bar Rev. 38 at 39).

[71] A strong argument against recognition of an independent tort for spoliation is its inherently speculative nature with respect to injury, causation and damages. As a prerequisite to the claim, the evidence must not exist, as such the fact of harm and amount of damages is uncertain. While courts frequently deal with uncertainty in the quantity of damages, the uncertainty of any causation of harm is more of a problem. The fact-finder must guess how probative the absent piece of evidence might have been: by definition, the tort attempts to place a value on evidence that no longer exists, and whose exact content is unknown (Judge, at 454). As stated in Petrik v. Monarch Printing Co., 501 N.E. 2d 1312 at 1320 (Ill. App. Ct. 1986) and quoted in Cedars-Sinai:

[I]t is impossible to know what the destroyed evidence would have shown It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying lawsuit. Given that the plaintiff has lost the lawsuit without the spoliated evidence, it does not follow that he would have won it with the evidence.

[185] The law of spoliation was summarized in McDougall v. Black & Decker Canada Inc., 2008 ABCA 353, at para. 29, as follows:

[29] In conclusion, therefore, I would summarize the Canadian law of spoliation in the following way:

1. Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.

2. The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case.

3. Outside this general framework other remedies may be available - even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs.

4. The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort, nor that there is a duty to preserve evidence for purposes of the law of negligence, although these issues, in most jurisdictions, remain open.

5. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.

6. Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. But generally this is accomplished through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.

[186] The trial judge would not be entitled to instruct the jury that they may draw an adverse inference without a threshold examination of the strength of such an argument. In Buksh v. Miles, 2008 BCCA 318, the Court of Appeal ordered a new trial because a trial judge instructed a jury about drawing an adverse inference. The Court of Appeal concluded that the judge should not have done so without first determining that a reasonable juror could draw the inference sought. At para. 31, Madam Justice Saunders, on behalf of the Court, wrote as follows:

It seems to me that the tactic of asking for an adverse inference is much over-used in today's legal environment, and requires, at the least, a threshold examination by the trial judge before such an instruction is given to the jury.

[187] There are many difficulties with the defendant's argument that a jury could consider whether an adverse inference should be drawn against Mr. McMahon on the basis of spoliation. I discuss some of them below.

[188] First, there is no evidence that Mr. McMahon lost or destroyed evidence, or that Acheson Sweeney lost or destroyed evidence. There is only evidence that Mr. McMahon's wife may have destroyed workbooks, and that BCIT may have destroyed records in the ordinary course.

[189] Second, it is not clear that any material evidence has been destroyed. Mr. McMahon testified that he does not remember making markings on the workbooks. Even if he did, it is unlikely that a jury or even an expert could tell, by reviewing a workbook on, for example, hydraulics, whether Mr. McMahon would likely have passed the tests. Mr. McMahon's evidence is that he did not take any tests, so the evidence does not support the assertion that BCIT may have had evidence that Mr. McMahon took exams. If Mr. McMahon did not take any tests, it is difficult to see what relevant BCIT records may have been destroyed.

[190] Third, there is no evidence that Mr. McMahon knew about BCIT's record retention policy, or that BCIT routinely destroys documents when the minimum period has passed. The evidence does not support the argument that the Delayed Production Documents were withheld for the period calculated to lead to document destruction.

[191] Fourth, the allegedly missing evidence, of Mr. McMahon's workbooks and possibly something BCIT once had, is evidence which, in the context, would have only slight significance. Mr. McMahon had a working life lasting over 35 years before the Accident and was in a part-time position at the time of the Accident. The allegedly missing information relates only to his continued part-time employment with CVRD and the possibility that he

might have obtained a full-time position with CVRD. It would be relevant to Mr. McMahon's past and future lost earning capacity, which considers far more than just his work at the time of the Accident.

[192] Fifth, there is no evidence that anyone intentionally omitted the Delayed Production Documents from the Plaintiff's First LOD.

[193] Sixth, Mr. Hargreaves's argument was that, if he could establish that someone at Acheson Sweeney deliberately omitted the documents, Mr. McMahon would be considered the principal and pursuant to laws of agency, he would be held to have deliberately omitted the documents. While Mr. Hargreaves is correct that an agent-principal relationship exists between barristers and their clients, his argument fails regarding the scope of the agency. The scope of a law firm's agency would be to act in the ordinary way, not to breach the Rules and professional obligations. See Wigmore v. Canadian Surety Co., [1996] 9 W.W.R. 406 (SK CA); GHL Fridman, Canadian Agency Law, 1st ed (Markham, Ont: LexisNexis Canada, 2009) at 188.

[194] The defendant argued that if someone, presumably Ms. Foley, found the Delayed Production Documents segregated and in a plastic sleeve, it must have been the result of an intentional decision to withhold the documents. As discussed above, that is not an appropriate inference. There are several reasons why the documents may have been separated in the Acheson Sweeney file, as discussed earlier.

[195] The issue of the admissibility of evidence related to the defendant's proposed spoliation argument and the propriety of an instruction regarding an adverse inference would ordinarily be decided by a trial judge. In this case, I would have expected counsel to advise the trial judge about the alleged concealment and the intended spoliation argument, to enable the judge to rule on whether evidence relevant to that would be admissible at trial.

[196] However, in order to decide these cross-applications, it is appropriate for me to consider whether the defendant has established that he would have been entitled at trial to argue that an adverse inference should be drawn against Mr. McMahon relating to the Delayed Production Documents.

[197] I conclude that it would be theoretically possible to argue that, if Mr. McMahon intentionally concealed the Delayed Production Documents in the hope that other relevant documentation would be destroyed, and that the delayed production of them resulted in the destruction of relevant evidence, that the trier of fact could draw an adverse inference against Mr. McMahon. As a result, I conclude that the spoliation issue is not a "collateral issue".

[198] However, the evidence does not support the spoliation argument. There is no evidence that Mr. McMahon intentionally concealed the Delayed Production Documents, or for that matter, that Acheson Sweeney did so. As discussed above, the inference that the omission was the result of oversight is overwhelming. Further, there is no evidence that Mr. McMahon destroyed any evidence or that he instructed anyone to do so.

[199] It appears that, in addition to arguing that the court should infer intentional concealment of the Delayed Production Documents, the defence seeks to "fish" for evidence supporting intentional concealment, through issuing the subpoenas, including the Foley Subpoena.

[200] Counsel should not issue a Subpoena "to fish" for material evidence. A subpoena is proper only if counsel can establish that the proposed witness is likely to provide material evidence.

[201] In context, it would be disproportionate to permit the jury to consider making an adverse inference on the basis of spoliation related to the Delayed Production Documents. The Timely Production Documents included a job description, dated after the Accident, which stated that the Certificate was required for Mr. McMahon's position. At the First McMahon XFD, Mr. McMahon testified that he was taking the BCIT course "to have the qualification for the job requirement, but also to compete for a permanent full time" position. Had the defence chosen to question Mr. McMahon about this further at the First McMahon XFD, the deadline CVRD had imposed on Mr. McMahon to obtain the Certificate may have been revealed. The only additional information related to the Certificate provided by the Delayed Production Documents was the fact that CVRD had imposed a time limit of June 30, 2013 for obtaining the Certificate, a date about ten weeks after the Accident, and had declined Mr. McMahon's request for an extension of the deadline.

[202] The Delayed Production Documents are only relevant to the issue of whether Mr. McMahon would have retained his job with CVRD if the Accident had not occurred. Mr. McMahon is a man who had a work history spanning over thirty years. Even if, had the Accident not occurred, he would have lost the CVRD job, he could have a claim for the loss in his earning capacity resulting from his injuries.

[203] It would be disproportionate in this case to permit the defence to pursue the "spoliation" argument, even if there were evidence to support it. It would cause a jury to focus unduly on a minor part of determining the impact of the Accident on Mr. McMahon's earning capacity. In my view, the trial judge should not admit evidence relating to it or instruct the jury about taking an adverse inference on the basis of spoliation.

[204] In short, while the evidence about the Delayed Production Documents would not be "collateral", because it theoretically could relate to a spoliation argument, the evidence does not support that argument. Even if the defendant were able to find evidence showing that there was intentional concealment of the Delayed Production Documents and that material evidence was destroyed by or at the instruction of Mr. McMahon, it would be inappropriate to permit that argument to be pursued in this case because it would be

disproportionate in light of the importance to the issue of lost earning capacity to the claim of a man of McMahon's age and experience.

[205] I return then to the question of whether the defence has established that Ms. Foley is likely to give material evidence.

[206] There is no evidence that Ms. Foley provided the Plaintiff's First LOD to Jones Emery, or that she intentionally concealed the Delayed Production Documents. Indeed, she listed them in the Plaintiff's Second LOD. Mr. Hargreaves stated in numerous places in his correspondence, including his March 7, 2017 email, that he did not believe that she personally had anything to do with the "concealment" of the employment records.

[207] Mr. Hargreaves's affidavit does not set out the material evidence he anticipated Ms. Foley would provide. In paragraph 68 of his Affidavit, quoted above, he simply states that "Ms. Foley was the responsible lawyer for the file, as best as I understood matters, as of the time that the truncated file was sent to us and was the lawyer of record at the time that the full employment file was sent to us."

[208] That is insufficient to establish that Ms. Foley had any material evidence to provide at trial. It would not assist the jury to resolve the issues to learn when Ms. Foley was responsible for the file. Being "responsible" for a file is a different matter from having relevant, material evidence. Even if the defence were permitted to pursue the spoliation argument, the evidence does not demonstrate that Ms. Foley had any evidence material to that argument.

[209] The Foley Subpoena must be set aside because the defence has failed to establish that Ms. Foley likely has material evidence.

G. Was the following conduct of Mr. Hargreaves an abuse of process: Serving the NTA; Issuing and serving the Foley Subpoena; and Sending the Email Offer?

[210] Mr. McMahon alleges that Mr. Hargreaves delivered the NTA and served the Foley Subpoena for purposes irrelevant to the trier of fact, and for the sole purpose of disrupting the proceedings and causing wrongful prejudice, and that Mr. Hargreaves has made it clear that he intends to persist in this conduct. Mr. McMahon alleges that Mr. Hargreaves issued the Foley Subpoena to require Ms. Foley to cease acting as counsel of record, and to undermine the relationship between Ms. Foley and Mr. McMahon.

[211] Mr. McMahon alleges that by issuing the Foley Subpoena, Mr. Hargreaves put Acheson Sweeney in the untenable position that they would be expected to cross-examine Ms. Foley, and that it was inevitable that Ms. Foley would be required to cease acting as counsel for Mr. McMahon, and that perhaps Acheson Sweeney will be required to cease acting for Mr. McMahon altogether.

[212] Mr. McMahon alleges that the Apology adequately and completely addressed any potential risk of prejudice to the defendant from the delayed disclosure of the Delayed Production Documents.

[213] In contrast, the defence position is that the defendant would have been entitled to rely on the doctrine of spoliation as a basis for asking the court to instruct the jury that it can draw an adverse inference. The defence position is that it issued the NTA and the Foley Subpoena properly, in pursuit of the spoliation argument.

[214] Mr. McMahon also argued that, because the Foley Subpoena fails to specify the date on which Ms. Foley was to testify, it is plain that Mr. Hargreaves did not intend to actually call Ms. Foley to testify, and that the issuance of the Foley Subpoena was an abuse of process.

1. NTA

[215] The NTA sought admissions which, if made, would have supported part of the spoliation argument. The spoliation argument is not collateral, but it would not be permitted at trial because it would be disproportionate to do so, and it is not supported by the evidence.

[216] The NTA is unusual because it sought admissions of wrongful conduct. The purpose of notices to admit is to encourage the admission of undisputed facts, to shorten trials and thereby reduce expenses. It is unusual to use a notice to admit to seek admissions of contentious facts.

[217] Does it bring the administration of justice into disrepute when a lawyer sends a notice to admit seeking admission of wrongful conduct, where there is no factual basis for the allegation?

[218] Mr. McMahon could, and did, decline to make the admissions sought, on the basis that they were irrelevant. It is a relatively simple matter for a party to deny admissions sought by an NTA.

[219] The allegations in the NTA are distasteful. While it is close to the line, in my view, the NTA was not an abuse of process, because the allegations could be easily denied.

[220] While there could be a case in which the admissions sought in an NTA were such as to put the administration of justice into disrepute, in my view, the NTA here was not so egregious.

2. Foley Subpoena

[221] As stated, the Foley Subpoena must be set aside because the defence has not established that Ms. Foley would likely have material evidence. Was the issuance of the Foley Subpoena an abuse of process? Was it manifestly unfair to Mr. McMahon, or would it in some other way bring the administration of justice into disrepute? Did Mr. Hargreaves issue the Foley Subpoena for the improper and collateral purpose of disrupting the proceeding and causing prejudice to Mr. McMahon?

[222] I am not prepared to draw the inference that the absence of specifying the date for Ms. Foley's evidence demonstrates that the Foley Subpoena was sent in an abuse of process. Mr. Hargreaves may have failed to specify a date for Ms. Foley's testimony out of inadvertence, or because he intended to advise Ms. Foley later about the specific date for her testimony, and expected that as an officer of the court she would attend when required.

[223] In considering whether the issuance of the Foley Subpoena was an abuse of process, the timeline of what occurred is of assistance. The key events were as follows:

a) the First Plaintiff's LOD, which was dated March 11, 2014, was received by Jones Emery, unsigned, at a date which is unclear but was probably in May 2014. The First Plaintiff's LOD listed only 36 pages of CVRD documents, excluding the Delayed Production Documents, but including the job description dated after the Accident which set out that Mr. McMahon's position required a Certificate;

b) in October 2015, the trial was scheduled for 18 days commencing April 3, 2017, and a jury notice was filed;

c) the first dates scheduled for an examination for discovery of Mr. McMahon were October 27 and 28, 2016. In advance of that, Ms. Foley provided Jones Emery with the Plaintiff's Second LOD, which changed the number of CVRD documents from 36 pages to 52 pages, thereby including the Delayed Production Documents;

d) Jones Emery requested the Delayed Production Documents from Acheson Sweeney, but did not receive them prior to October 27, 2016. Ms. Foley did not know at the time of the First McMahon XFD that Mr. Hargreaves had not seen all the documents on the Second Plaintiff's LOD, and in fact Ms. Foley assumed that Mr. Hargreaves had received the Delayed Production Documents;

e) At the First McMahon XFD, Mr. McMahon testified that he was taking the BCIT course "to have the qualification for the job requirement, but also to compete for a permanent full time" position;

f) Jones Emery received the Delayed Production Documents on or shortly after October 31, 2016;

g) due to an error in the office of Jones Emery, the Delayed Disclosure Documents did not come to Mr. Hargreaves's attention until early February 2017, about three months after receipt;

h) at the Second McMahon XFD on March 6, 2017, the defendant was able to question Mr. McMahon about the Delayed Production Documents;

i) by March 6, 2017, Mr. Hargreaves had researched the topic of spoliation and was persuaded that an adverse inference would only be available if the court accepted that the loss of the evidence had been brought about intentionally. The NTA dated March 6, 2017 asked Mr. McMahon to admit that counsel consciously decided to conceal the Delayed Production Documents from the Plaintiff's First LOD;

j) in the March 7, 2017 Offer Email, Mr. Hargreaves set out his position that by "attempting to deflect responsibility" from Mr. McMahon, Acheson Sweeney will have waived privilege, and that this "will lead to my seeking leave to cross examine your client on all communications with your office up until the full employment file was disclosed, and I will likely want to call you to the stand as well";

k) Mr. McMahon's response to the NTA is dated March 15, 2017, and refused to make most of the admissions sought; and

l) the Foley Subpoena is dated March 23, 2017, a date eleven days before the scheduled trial date. The trial date was adjourned on March 28, 2017.

[224] Not every subpoena which is set aside for the failure of the issuer to establish that the proposed witness had material evidence would be an abuse of process. However, issuing a subpoena to opposing counsel is an unusual step, and immediately puts the lawyer who has been subpoenaed into an awkward position. Where time permits, the lawyer may seek to set the subpoena aside, a step which may require the involvement of counsel outside the subpoenaed lawyer's firm.

[225] Here, the Foley Subpoena was issued very close to the trial date. Here, issuing the Foley Subpoena, without being able to demonstrate that Ms. Foley has material evidence, and doing so very close to the trial date and about six months after the Plaintiff's Second LOD listing the Delayed Production Documents, amounts to an abuse of the court process. It was manifestly unfair to Mr. McMahon because it disrupted his relationship with his lawyer and led to the adjournment of the trial. A party should not be deprived of his or her chosen counsel without good cause, as discussed in MacDonald Estate. It would bring the administration of justice into disrepute if counsel could issue subpoenas in such circumstances without consequences.

3. Email Offer

[226] Was the Email Offer an abuse of process?

[227] Mr. McMahon argued that it is improper to include, in a settlement offer letter, assertions that a law firm has acted inappropriately either with or without the client's instructions, because that suggests that the amount of the offer is lower as a result of conduct of legal counsel. Mr. McMahon argued that by including such assertions in the Email Offer, Mr. Hargreaves effectively created a conflict between Mr. McMahon and Acheson Sweeney. Mr. McMahon argues that this demonstrates an intention to misuse the court procedure to "coerce" a settlement.

[228] The defence argued that the terms of the Offer Email simply set out what might occur.

[229] Again, the questions for the court in considering whether there has been an abuse of process are whether the Email Offer was manifestly unfair to Mr. McMahon, or would it in some other way bring the administration of justice into disrepute? And did Mr. Hargreaves sent the Offer Email for the improper and collateral purpose of disrupting the proceeding and causing prejudice to Mr. McMahon?

[230] The Offer Email includes the following:

You may protest that your client is innocent in this regard and that he is not responsible for the concealment of the records, and did not consciously intend to destroy evidence. However, any attempt to exculpate him must presumably include testimony by you that it was a lawyer or paralegal in your firm who concealed the records As soon as you attempt to deflect responsibility from your client you will, in my view, have waived privilege. I caution you that the privilege is not yours to waive so I assume that should this happen, then you have obtained informed consent from your client to waive privilege. That will lead to my seeking leave to cross examine your client on all communications with your office up until the full employment file was disclosed, and I will likely want to call you to the stand as well. With all that in mind, I suggest to you that your client faces a very high likelihood that the jury will conclude, on a balance of probabilities, that your client was going to be unemployed as of June 30, 2013.

[231] I am not prepared to conclude that Mr. Hargreaves sent the Offer Email "for the purpose of disrupting the proceeding".

[232] However, it is troubling that the Offer Email sets out arguments based on alleged concealment by Acheson Sweeney, and then makes an offer to settle the claim "with all that in mind". This suggests that the amount the defendant was willing to offer was reduced because of the conduct of Acheson Sweeney.

[233] By suggesting that the amount of the offer was reduced because of the conduct of Acheson Sweeney, the Offer Email would be expected to disrupt the relationship between Mr. McMahon and Acheson Sweeney.

[234] As a result, the Offer Email was manifestly unfair to Mr. McMahon. It would bring the administration of justice into disrepute for a party to suggest that an offer would differ based not on the merits of the claim, but instead on which lawyers were representing the party and how they have conducted the claim. It would be expected to disrupt the solicitor-client relationship.

[235] The doctrine of abuse of process is focussed on the inherent power of the court to prevent the misuse of its procedure.

[236] Rule 9-7 governs offers to settle. Offers to settle are governed by that rule if, among other things, they contain the words that the party "reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

[237] Those words are not included in the portion of the Offer Email included in the evidence. As a result, I am not able to conclude that the Offer Email used the court process rather than the out-of-court process.

[238] It can be argued that the Offer Email "used the court process" because it was sent in the context of a pending court trial. It can be argued that the court should take jurisdiction over conduct of lawyers relating to court proceedings.

[239] In this case, it is not necessary for me to determine whether the court's jurisdiction to control abuse of its process can extend to settlement offers made in the context of litigation but which do not rely on the court process for making offers. That is because I have already concluded that the service of the Foley Subpoena was an abuse of process and the threat of calling Ms. Foley as a witness resulted in Ms. Foley ceasing to act as counsel. Nothing further resulted from the Offer Email.

H. If any of the defendant's impugned conduct was an abuse of process, what is the appropriate remedy?

[240] I have concluded that the Foley Subpoena was an abuse of process. What is the appropriate remedy?

[241] Mr. McMahon seeks the removal of Mr. Hargreaves as counsel for the defence, and an order that he cannot provide further assistance or advice to the defendant or his solicitors with respect to this proceeding.

[242] The defence is opposed to removing Mr. Hargreaves as counsel and advisor.

[243] Almost all the cases in which the court has prohibited a lawyer from acting are cases in which the lawyer was in a conflict of interest. The only way to remedy such a conflict was the removal of counsel.

[244] The result of the threat of, and ultimate service of, the Foley Subpoena has been the involvement of Mr. Sweeney in preparation to act as trial counsel, the cross-applications which are before me, and the delay in the trial of Mr. McMahon's claim. Removing Mr. Hargreaves as counsel and advisor would not remedy any of those things.

[245] The Court should interfere with a party's right to representation by counsel of their choice only in clear cases: Cewe Estate v. Mid-Wilson, 2009 BCSC 975, citing to Manville Canada Inc. v. Ladner Downs (1992), 63 B.C.L.R. (2d) 102 (S.C.), 88 D.L.R. (4th) 208 (B.C.S.C.), aff'd (1993), 76 B.C.L.R. (2d) 273 (C.A.), 100 D.L.R. (4th) 321 (B.C.C.A.).

[246] The court should not interfere with the defendant's choice of counsel unless that is necessary. Mr. Kelliher argued that it was necessary here, because Mr. Hargreaves has indicated an intention to pursue the spoliation argument at trial.

[247] In this case, it is not necessary to remove Mr. Hargreaves as counsel or advisor. Even if he were removed as counsel, his replacement would be able to make any arguments at trial which Mr. Hargreaves could make. In any event, I have concluded that the spoliation argument would not pass the threshold for presentation to the jury both because of the absence of required evidence and because of disproportionality.

[248] The order setting aside the Foley Subpoena should enable Ms. Foley to resume as Mr. McMahon's trial counsel, although that is not required. The other effects of the issuance of the Foley Subpoena as an abuse of process, other than delay, can be appropriately addressed in costs. Removing Mr. Hargreaves as counsel would not remedy the delay.

[249] I decline to remove Mr. Hargreaves as defence counsel.

I. What is the appropriate order for costs?

[250] The position of Mr. McMahon is that the defendant has made unfounded allegations of misconduct against Acheson Sweeney. Mr. McMahon seeks special costs on that basis.

[251] The defendant's position is that Mr. McMahon's solicitors, presumably meaning Acheson Sweeney, should personally pay costs in any event of the cause.

[252] The leading statement on the law in relation to special costs is that of Justice Lambert in Garcia v. Crestbrook Forest Industries Ltd., 1994 CanLII 2570 (BC CA), in which he held as follows (at para. 17):

17 Having regard to the terminology adopted by Madam Justice McLachlin in Young v. Young, to the terminology adopted by Mr. Justice Cumming in Fullerton v. Matsqui, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in Leung v. Leung in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in Leung v. Leung, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[Emphasis added.]

[253] In Taser International, Inc. v. British Columbia (Thomas Braidwood, Q.C. Study Commission), 2010 BCSC 623, the Court found that unfounded allegations of dishonesty can amount to reprehensible conduct, as follows (at para. 68):

[68] There is a long line of authority which establishes that unproven allegations of dishonesty can amount to reprehensible conduct. This is particularly so when the person who alleges the dishonesty is unable to demonstrate a reasonable basis for the allegation.

[254] In Startup v. Blake and MacIsaac & Co., 2001 BCSC 8, the Court awarded special costs against a plaintiff who leveled unfounded allegations of impropriety against a lawyer, as follows (at para. 112):

[112] It is important to note that Mr. Blake sits as a member of the B.C. Benefits Appeal Board which examines, among other things, fraudulent welfare claims. To suggest that Mr. Blake, in the course of counselling a client, would counsel "morally wrong" conduct is, in my view, conduct deserving of rebuke. A lawyer relies on his reputation for integrity. When that reputation is falsely assailed, the court's reproof should be felt.

[255] In Insurance Corp. of British Columbia v. Blue Mountain Collision Ltd. et al, 2002 BCSC 1643, Justice Macauley awarded special costs against a plaintiff (lay litigant) who, among other things, issued a subpoena in circumstances amounting to an abuse of process.

[256] I have dismissed several of the applications on both sides. I have also found that both sides included inadmissible passages in the affidavits filed on the cross-applications.

[257] However, I have ordered that the Foley Subpoena should be set aside, and I concluded that its issuance and service constituted an abuse of process. I was troubled by the Offer Email, but was not required to determine whether it was within the court's jurisdiction to control abuse in settlement offers which do not use the court process. I did not conclude the NTA was an abuse of process, but it was close to the line.

[258] This is a case in which the problems originated from the omission of the Delayed Production Documents from the Plaintiff's First LOD. The inference I draw from the evidence is that it occurred through some error in Acheson Sweeney's preparation of the Plaintiff's First LOD, but was not deliberate.

[259] A lawyer should make reasonable efforts to ensure that a list of documents includes all the documents required by Rule 7-1. An old decision from the House of Lords, Myers v. Elman, [1940] A.C. 282 [Myers], is often cited for the proposition that a lawyer may be required to investigate further if he or she has reasonable grounds for questioning his or her client's advice that all relevant documents were produced. The decision was summarized as follows in British Columbia Civil Trial Handbook, Continuing Legal Education Society of British Columbia, 4th edition September 2015, at para. 15.9:

In Myers v. Elman, [1940] A.C. 282 (H.L.), a solicitor's duty to correct a false affidavit was examined. The facts, involving a civil fraud committed by judgment-proof wrongdoers, were complex. The following proposition emerged: if, before trial, a solicitor discovers that the affidavit of his client purporting to disclose all relevant documents is untrue and that important documents have been omitted, the duty of counsel to the other party and to the court is to inform the solicitors of the omitted documents. If his or her client does not assent, the solicitor must cease to act.

An affidavit of documents is no longer required in British Columbia. A party can call for one if the list of documents is suspect [Rule 7-1(8)]. To await such an order may invite censure if the failure to disclose was apparent and continued delay was itself prejudicial.

[260] The issue for determination by the House of Lords in Myers was whether it was appropriate for the court to order that a solicitor pay costs personally. The House of Lords held that it was appropriate to make such an order. Several law lords gave speeches, including Lord Atkin, who said as follows:

From time immemorial judges have exercised over solicitors a disciplinary jurisdiction in cases of misconduct. If the Court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible and will be admonished or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case What is the duty of the solicitor? He is at the early stage of the proceedings engaged in putting before the court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter; but he need not go beyond taking reasonable steps to ascertain the truth.

[261] Lord Atkin considered that the court had a disciplinary jurisdiction to award costs against a solicitor arising by the solicitor's failure in his or her duty to the court itself, and he said as follows about the standard of misconduct:

By misconduct is meant something which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute; for example wilfully misleading the Court in 'the conduct of a case.'

[262] The law in England at the time of Myers did not permit pre-trial examinations for discovery, such as is available in British Columbia under Rule 7-2. Under the Rules, an opposing party can explore in examination for discovery what documents a party witness has or knows about, and so it is less significant now in B.C. than it was in Myers if a client's list of documents is incomplete.

[263] Even though examinations for discovery are available under the Rules, I accept that there is a duty on counsel in B.C. to make reasonable efforts to ensure that a list of documents is complete.

[264] In this case, the evidence does not support the inference that Mr. McMahon personally took any steps to omit the Delayed Production Documents from the Plaintiff's First LOD. The Delayed Production Documents were in fact obtained by Mr. McMahon's counsel from a third party, CVRD, and it is unclear why some of the CVRD file was not included in the Plaintiff's First LOD.

[265] In short, the omission of the Delayed Production Documents from the First Plaintiff's LOD is troubling. However, any prejudice to the defendant was remedied by the Second McMahon XFD. The spoliation argument is not borne out by the evidence, and would be disproportionate to leave with the jury, if the evidence supported it.

[266] It is the response by Mr. Hargreaves, and particularly the Foley Subpoena, which is the basis of most of the cross-applications. The issuance and service of the Foley Subpoena was an abuse of process and was reprehensible.

[267] Mr. McMahon's counsel argued that the spoliation argument was a "contrivance", apparently implying that Mr. Hargreaves believed there was no merit to it. That is a serious allegation, but I have concluded that the cross-applications can be decided without further examination of Mr. Hargreaves's subjective intentions. The defendant's abuse of process by serving the Foley Subpoena, with the easily-anticipated resulting change of counsel and trial adjournment, in the context of continued assertions of intentional concealment with no evidence supporting it, is far more reprehensible than the allegation that the spoliation argument was a contrivance. The issuance of the Foley Subpoena resulted in the disruption to Mr. McMahon's relationship with his legal counsel of three years.

[268] As a result, the defence should pay special costs of these cross-applications to Mr. McMahon. In addition, Mr. McMahon is entitled to recover, on a special costs basis, any costs thrown away arising from the issuance of the Foley Subpoena, such as the costs of instructing Mr. Sweeney in preparation for trial and the costs of instructing Mr. Kelliher on these cross-applications.

V. SUMMARY

[269] In summary, the order is as follows:

a) the following passages are struck from Ms. Foley's affidavit:

i) para. 12: "which I believe have culminated in an interference with the administration of justice";

ii) para. 15 in its entirety, including Exhibit A;

iii) para. 16 and Exhibit B;

iv) para. 17;

v) para. 31, the words "I felt that was precisely Mr. Hargreaves's intention and I had a number of sleepless nights attempting to separate out the baseless allegations and manufactured arguments generated by Mr. Hargreaves from the real risk assessment in the case and what proper advice to provide my client.";

vi) para. 32, the words "for something that had caused no prejudice";

vii) para. 33 in its entirety;

viii) para. 38 in its entirety;

ix) para. 41, the words "clearly intended to undermine my relationship with my client and convince my client to accept his settlement proposal";

x) para. 47, the words "[T]he correspondence, communications and use of powers as an officer of the court by Mr. Hargreaves in this matter have been of the nature of a personal attack on myself and my firm" and "[T]he allegations and approach of Mr. Hargreaves made it impossible for me to effectively represent my client and put the evidence, facts and issues that merit consideration before the court for a proper and timely determination of Mr. McMahon's claim, thereby denying him access to justice"; and

b) the following passages are struck from Mr. Dudding's affidavit:

i) para. 20 in its entirety;

ii) para. 25, the words " I nevertheless understood him to be using the threat of bringing that issue to the attention of the court as a means for him to gain an advantage for his client in the litigation. It also appeared to me that Mr. Hargreaves wished to signal to my client that I had acted in an unethical way and that I had withheld documents, in a way that had compromised the plaintiff's claim"; and

iii) para. 26, the words "I interpreted these things as signifying intense anger and aggression."

[270] I dismiss the following applications:

a) the defendant's application for a declaration that the First McMahon NOA is a nullity based on its length;

b) the defendant's application to strike out further passages from Ms. Foley's affidavit and Mr. Dudding's affidavit, and to strike out passages from Mr. McMahon's affidavit;

c) the defendant's application for cross-examination of Messrs. McMahon and Dudding and Ms. Foley on their affidavits;

d) Mr. McMahon's application to cross-examine Mr. Hargreaves on his affidavit;

e) the defence application for an order that Mr. McMahon provide an affidavit verifying the Plaintiff's Second LOD;

f) the defence application for an order that Mr. McMahon has waived solicitor-and-client privilege as regards all his communications with Acheson Sweeney and among members of Acheson Sweeney relating to the omission of the Delayed Production Documents from the Plaintiff's First LOD; and

g) Mr. McMahon's application for an order that Mr. Hargreaves be removed as counsel of record for the defendant and prohibited from providing any further assistance or advice to the defendant or his solicitors with respect to this proceeding.

[271] The Foley Subpoena is set aside. Mr. McMahon is entitled to receive special costs from the defence of the cross-applications, and of costs thrown away as a result of the Foley Subpoena, including any costs of instructing Mr. Sweeney to act at trial and of instructing Mr. Kelliher to act on these cross-applications.

"Gray J."

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