SUPREME COURT OF NOVA SCOTIA

Citation: *Ucore Rare Metals Inc. v. IBC Advanced Technologies Inc., 2020 NSSC 232*

Date: 20200901
Docket: Hfx No. 483216
Registry: Halifax

Between:

Ucore Rare Metals Inc.

Plaintiff

v.

IBC Advanced Technologies, Inc. and Stephen R. Izatt

Defendants

LIBRARY HEADING

Judge: The Honourable Justice Scott C. Norton

Heard: August 19, 2020

Decision: September 1, 2020

Subject: Contempt of court; amendment of pleadings

Summary: Plaintiff sought an Order finding the Defendants in contempt of court and a separate Order permitting further amendments to the Amended Statement of Claim. Both motions were opposed by the Defendants.

The parties had a lengthy and complex litigation history that involved a number of motions and actions arising as a result of a dispute over an option agreement regarding technology for separating rare earth elements in a mining operation.

Issues: (1) Whether the Defendants were in contempt of an interlocutory injunction order by exercising their right to bring a motion for summary judgement in relation to a parallel proceeding in Utah.

(2) Whether the Plaintiff's request to amend pleadings to add all

selling shareholders as Defendants should be granted.

Result: (1) The Court held that the terms of the interlocutory injunction did not clearly and equivocally enjoin the Defendants from filing a summary judgment motion in Utah in the parallel proceeding. Therefore, the Defendants were not found to be in contempt of court and were entitled to costs of the application.

(2) The Court found that the Plaintiff's motion to add the selling shareholders to the action was not made in bad faith and further held that all of the signatories to the option agreement should be before the court. Therefore, the motion to add all of the selling shareholders as Defendants to the action was granted with costs to the Plaintiff.

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Counsel: Caitlin Regan and Stewart Hayne for the Plaintiff
Michelle C. Awad, Q.C. and Jeff Aucoin for the Defendants

By the Court:

[1] By Notice of Motion filed July 20, 2020 the Plaintiff, Ucore Rare Metals Inc. ("Ucore"), seeks an Order finding the Defendants, IBC Advanced Technologies, Inc. ("IBC") and Steven R. Izatt, in contempt of court ("Contempt Motion") and a separate Order permitting further amendments to the Amended Statement of Claim ("Amendment Motion"). Both motions are opposed by the Defendants. The motions were scheduled for hearing before me as appointed Case Management Judge.

[2] The contempt motion alleges that the Defendants have acted in contravention of the Order of this Court filed December 18, 2019 granting the Plaintiffs an interlocutory injunction ("Interlocutory Injunction"). The Amendment Motion seeks to add, as parties, individual shareholders of IBC who are signatories to an option agreement dated March 14, 2015 ("Option Agreement") that is at the heart of the dispute in this litigation.

[3] The parties filed extensive affidavit evidence and briefs. I have carefully reviewed all of the evidence filed and considered the briefs, authorities and oral submissions of counsel.

[4] I advised counsel at the hearing that based upon my review of the authorities, I had determined that it was appropriate to deal with the Contempt Motion in a bifurcated process with submissions and evidence on penalty to follow if liability for contempt was established. Justice Cromwell stated the following in *Carey v. Laiken*, 2015 SCC 17:

> 18…[A]s a general rule, proceedings are bifurcated into a liability phase — where the case on liability proceeds and a defence is offered — and, if liability is established, a penalty phase. In contempt proceedings, liability and penalty are discrete issues.

[5] Recent jurisprudence from this Province has followed this process. For example, in *Terris v. Meisner*, 2019 NSSC 252, Justice Rosinski stated the following:

> 28. Generally speaking, contempt proceedings should be bifurcated into a liability phase – where the case on liability proceeds and a defence (if any) is offered- and, if liability is established, a penalty phase.
> …
>
> 39. I find Tracey Meisner guilty of contempt beyond a reasonable doubt.
>
> 40. The matter of penalty, and costs, will be dealt with on a subsequent occasion.

[6] Similarly, in *Keinick v. Bruno*, 2012 NSSC 218, Justice Forgeron stated:

> 2. On March 29, 2012, Maureen Bruno was found in contempt of the parenting provisions of the court order as reported in *Keinick v. Bruno* 2012 NSSC 140. The court adjourned so that evidence and submissions could be produced to aid the court in its penalty disposition. Both parties filed submissions and affidavits. Neither party wished to present oral evidence, nor cross examine on the affidavits.

[7] See also: *Sleigh v. McLean*, 2017 NSSC 28, *Mason v. Lavers*, 2011 NSSC 63 and *Pittson v. Murnaghan*, 2011 NSSC 402.

[8] For the reasons that follow, I dismiss the contempt motion and allow the motion for further amendment of the Amended Statement of Claim. I will deal with each motion separately.

I. CONTEMPT MOTION

Background

[9] Ucore is a publicly-traded exploration and development-phase corporation focused on developing and commercializing technology for separating rare earth elements ("REEs") mined from its Bokan Mountain resource in Alaska, USA.

[10] IBC possessed a unique separation technology which the parties believed could be adapted to REEs: molecular recognition technology ("MRT").

[11] Ucore and IBC signed an agreement for certain work in April, 2014 (the "Research Agreement"). A year later, on March 14, 2015, they executed the Option Agreement, granting Ucore an option to purchase IBC and, in the result, MRT (the "Option Agreement").

[12] Over time, the relationship between the parties soured. Mr. Izatt no longer wanted to sell IBC to Ucore. On November 26, 2018, IBC issued a press release claiming that the Option Agreement had been terminated. In response, Ucore filed this proceeding as an application in court seeking defamation damages on December 11, 2018 on the basis that the press release was not true. The application in court was converted by Order dated April 18, 2019, whereby the Amended Notice of Application in Court became the Amended Statement of Claim.

[13] Before responding to this lawsuit, on January 4, 2019, IBC commenced its own action in the Utah State Court against Ucore and certain of its officers. It alleged misappropriation of trade secrets; trademark infringement, unfair competition; defamation; false light; tortious interference with economic relations; and unjust enrichment. It did not seek to have the Option Agreement declared either void or unenforceable. (Ucore successfully moved to have this action dismissed for want of jurisdiction on May 23, 2019. That dismissal was confirmed by written decision on September 23, 2019).

[14] On February 14, 2019, Ucore triggered the purchase process under the Option Agreement. In response, IBC purported to terminate the Option Agreement on February 19, 2019.

[15] The same day as it purported to terminate the Option Agreement, IBC commenced a second lawsuit in Utah State Court against Ucore and certain of its officers that alleged breach of contract; breach of the implied covenant of good faith and fair dealing; negligent misrepresentation; fraudulent concealment or fraudulent nondisclosure; breach of fiduciary duty; unjust enrichment; and fraudulent inducement ("Contract Action"). The Contract Action did not seek to have the Option Agreement declared either void or unenforceable. Ucore removed the Contract Action to the Federal Court, District of Utah, on April 3, 2019.

[16] As a result of IBC's purported termination of the Option Agreement on February 19, 2019, Ucore immediately sought, from this court, an interim injunction and to amend the pleadings to include, *inter alia*, breach of the Option Agreement. IBC consented to the interim injunction issued February 27, 2019, and later indicated that it did not oppose the amendments to the pleadings.

[17] On April 10, 2019, Ucore brought a Motion to dismiss or stay the Defendants' Contract Action based on "international abstention" principles concerning jurisdiction.

[18] A few weeks later, IBC indicated for the first time that it was contesting Nova Scotia's jurisdiction over the amended claims. At the conclusion of its

motion on April 23, 2019, Justice Chipman determined (2019 NSSC 132) that the Nova Scotia Courts have jurisdiction over Ucore's claims relating to breach of the Option Agreement ("Jurisdiction Decision").

[19] In early April 2019, Ucore amended its pleading in the Nova Scotia proceeding to add claims relating to the Option Agreement.

[20] In the interim, IBC appealed the Jurisdiction Decision and the deadline to file its defence and counterclaims was suspended. However, on October 9, 2019, the Nova Scotia Court of Appeal confirmed Nova Scotia's jurisdiction. (2019 NSCA 80)

[21] The Court of Appeal denied IBC's request for an emergency motion for a stay of proceedings pending an application for leave to appeal to the Supreme Court of Canada on October 11, 2019. The Supreme Court of Canada denied IBC's motion for an emergency stay of proceedings on October 18, 2019 and dismissed the application for Leave to Appeal on April 16, 2020.

[22] IBC filed its Statement of Defence in this proceeding on October 21, 2019.

[23] On October 25, 2019, the Utah Federal Court denied Ucore's Motion to stay or dismiss the Contract Action. Accordingly, the Utah Federal Court continues to maintain jurisdiction over the Contract Action. The Utah Federal Court expressly

recognized that as a result of its ruling, there will be parallel proceedings in Utah and Nova Scotia. Ucore did not appeal the October 25, 2019 decision dismissing its jurisdiction Motion and the decision is now final.

[24] On December 4, 2019, Justice Warner granted the Interlocutory Injunction. The wording of the Order approved by Justice Warner and filed December 18, 2019 is as follows:

> 1. Pending further Court Order or the hearing of this Action on the merits an interlocutory injunction, the Defendants shall be enjoined from:
>
> a. Taking any further steps to issue additional notices to terminate the March 14, 2015 Option Agreement, as amended, or taking steps in reliance upon (or further to) the February 19, 2019 Notice of Termination; and
>
> b. Taking any steps, or conducting any business, or transacting with any third parties in such a manner as to prevent or preclude (or effectively prevent or preclude) the Plaintiff from fully or effectively exercising its asserted and disputed rights under the March 14, 2015 Option Agreement, as amended;
>
> 2. Nothing in this Order prohibits the Defendant, IBC Advanced Technologies Inc., (IBC), from carrying on and marketing its business in the ordinary course of business, so long as such is in compliance with the terms of the Option Agreement and more specifically, IBC is permitted to carry on business in the Rare Metals, Tailings Remediation and Catalytic Converter Recycling Sectors and section 3 and 9 of Schedule E to the April 29, 2019 Research Projects, Pilot Plant, Separation Plan and Prospective Joint Operating Enterprise Agreement, as amended, do not prohibit or limit IBC's activities in any way.
>
> 3. Pending further Court Order or the hearing of this Action on the merits, the Plaintiff shall similarly be enjoined from enforcing its asserted and disputed rights under the Option Agreement, and any such rights shall be suspended on the understanding that the Plaintiff's rights under the Option Agreement shall be preserved during such time as this injunction remains in place.
>
> …

[25] The Supreme Court of Canada dismissed IBC's application for leave to appeal the issue of jurisdiction on April 16, 2020.

[26] IBC filed a motion for summary judgment in Utah on March 6, 2020. IBC sought to have the Utah Federal Court declare that the Option Agreement is void and/or unenforceable, or has otherwise been validly terminated and is no longer of any force or effect.

[27] As soon as Ucore learned of IBC's summary judgment motion, it sought to schedule this motion for contempt. However, due to the Court's essential services model in response to COVID-19, the motion could not proceed at that time.

[28] Ucore opposed the summary judgment motion, and the parties filed their respective materials.

[29] There are now three separate actions in Utah Federal Court concerning substantially the same issues, parties, and allegations of fact which are conveniently described as the "Contract Action", the "Schrider Action"[1] and the "Shareholder Action"[2].

[1] On October 18, 2019, IBC filed the Schrider Action, alleging that Schrider wrongfully misappropriated IBC's trade secrets through breach of the terms of a non-disclosure agreement with IBC, and through conspiracy with Ucore's then President and CEO, Jim McKenzie. The Complaint in the Schrider matter [Weinberg Affidavit, para. 6(b), 15 and Exhibit "3"] alleges that Schrider led IBC to believe he was a good faith agent of Ucore and would work with

[30] The parties confirmed in oral submissions that the Utah Federal Court has recently issued an order to consolidate the three Utah cases meaning that the Utah Court will deal at once with all issues which have been joined in the Utah proceedings.

[31] The end result of the decisions from the Utah and Nova Scotia Courts is parallel litigation involving Ucore, IBC and Izatt. The consolidated Utah proceeding will involve additional issues and parties as compared to the Nova Scotia action.

[32] The parties advised the court at the hearing of this motion that the Utah Federal Court has recently dismissed the motion for partial summary judgment, without prejudice, meaning that it is open to IBC and Izatt to refile. Ucore says that they are still entitled to a finding of contempt against IBC and Izatt but the fact that the motion for summary judgment has been dismissed will mean that no continuing penalty will be sought at the penalty stage.

IBC (on behalf of Ucore) to further the business objectives which the two companies intended to achieve by way of the agreements which are the bases for the Contract Action. In the Answer, Affirmative Defenses, and Jury Demand filed by Schrider, he admits that jurisdiction and venue are properly in the Utah Court [Weinberg Affidavit, Exhibit "4", para. 12ff]. The Schrider Action will proceed in Utah.

[2] The Shareholder Action was commenced on behalf of eight Plaintiffs on January 6, 2020 (the "Shareholders"). The Shareholders allege various wrongdoing by Ucore, including wrongdoing relating to the Option Agreement and to other agreements which are the subject-matter of the Contract Action. [Weinberg Affidavit, para.6(c), 19 and 20 and Exhibit "6"]. The Shareholders seek declaratory relief concerning the Option Agreement; specifically they ask that the Utah Court declare that it was terminated, void, or unenforceable based on Ucore's breaches, Ucore's fraudulent inducement of the Shareholders to enter the Option Agreement, and Ucore's other wrongdoing.

.

Issue

[33] The issue for determination on this Motion is whether IBC and Izatt are in contempt of the Interlocutory Injunction Order by exercising their right to bring a motion for summary judgment in relation to the Utah proceeding?

The Law

[34] The parties agree on the applicable legal principles.

[35] Civil Procedure Rule 89.04 permits a party to bring a motion for contempt of court:

> **Motion or application by person other than judge**
>
> 89.04 (1) A party, the prothonotary, a person appointed by the court to perform an act on behalf of the court, the Attorney General of Nova Scotia, or another interested person may do either of the following:
>
> (a) make a motion for a contempt order in a proceeding to which the conduct alleged to be contemptuous relates;
>
> (b) start an application for a contempt order, if the conduct alleged to be contemptuous does not relate to a proceeding.

[36] The law of contempt was summarized by the Supreme Court of Canada decision in *Carey v Laiken*, 2015 SCC 17:

> 30 Contempt of court "rest[s] on the power of the court to uphold its dignity and process ... . The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. It is well-established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order".
>
> 31 The common law has developed to recognize two forms of contempt of court: criminal contempt and civil contempt. The distinction, which the parties to this

> appeal accept, rests on the element of public defiance accompanying criminal contempt. With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive". However, one purpose of sentencing for civil contempt is punishment for breaching a court order. Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct.
>
> …
>
> 33 The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
>
> 34 The second element is that the party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine.
>
> 35 Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily. [authorities omitted]

[37] See also *Mutual Transportation Services Inc v Saarloos*, 2016 NSSC 164.

[38] The burden of proving civil contempt lies with the moving party, in this case Ucore, which must prove each element of contempt beyond a reasonable doubt. The heightened criminal standard applies to ensure that the potential penal consequences of a contempt finding are only imposed in appropriate cases.

[39] What is meant by “beyond a reasonable doubt”? The burden has been canvassed in many decisions, perhaps most notably in *R. v. Lifchus*, [1997] 3 SCR 320, wherein Justice Cory stated the following:

> 39. Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> > The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
> >
> > What does the expression "beyond a reasonable doubt" mean?
> >
> > The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
> >
> > A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
> >
> > Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
> >
> > On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
> >
> > In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[40] The jurisprudence also establishes that two overarching principles should guide Courts in applying the test for contempt.

[41] First, according to the Supreme Court of Canada in *Carey*, given that contempt is such an extraordinary remedy, the Court's power should be exercised only as a last resort. Similarly, the court in *Blackman v. CIBC Wood Gundy Financial Services Inc*., 2009 NSSC 416, held (citing T.*G. Industries Limited v. Williams*, 2001 NSCA 105) that the contempt power should be exercised

"…cautiously and with great restraint…". In *Skipper Fisheries Ltd. v. Thorbourne*, 1997 NSCA 16, Justice Hallett held for the Majority of the Nova Scotia Court of Appeal that "[t]he jurisdiction of the Court to make a finding of contempt should be exercised with scrupulous care and only when the contempt is clear".

[42] Second, as the Supreme Court of Canada noted in *Carey* (at para 37), Judges have inherent discretion to decline to impose a contempt finding where the offending party has acted in good faith in taking reasonable steps to comply with the Order, and/or where it would work an injustice in the circumstances of the case.

The Parties' Positions

The Plaintiff

[43] The Plaintiff says:

- that the summary judgment motion filed by IBC and Izatt in Utah Federal Court relies on IBC's purported termination of the Option Agreement and seeks to declare the Option Agreement void or unenforceable. Ucore says it will be unable to enforce its rights under the Option Agreement if IBC is successful in its motion.

- In short, the Interlocutory Inunction Order is clear about what IBC cannot do, and it has taken legal steps in a foreign jurisdiction to do precisely that.

- As to the second step of the civil contempt test, IBC was keenly aware of the Interlocutory Injunction Order: it appeared at and vigorously contested the motion, and its counsel was served with the issued Order.

- As to the third step of the test, there can be no doubt that IBC has intentionally committed the act which allegedly constitutes its contempt: IBC and Mr. Izatt are the moving parties on the summary judgment motion.

- In sum, the Interlocutory Injunction Order prohibits IBC from taking any steps to rely on its notice of termination, or from taking any steps that would prevent Ucore from potentially enforcing the Option Agreement, unless and until the Nova Scotia Supreme Court issues a further order. Yet, the Defendants chose to file the summary judgment motion in any event, seeking relief entirely precluded by the Interlocutory Injunction and ignoring this Court's authority. IBC

should not be permitted to "circumvent the order and make a mockery of it and of the administration of justice", and should be held in contempt.

The Defendants

[44] The Defendants say:

- that with respect to the first element of the 3-part test, Ucore cannot prove beyond a reasonable doubt that the Interlocutory Injunction Order clearly and unequivocally enjoins it from bringing the Partial Summary Judgment Motion in Utah.

- With respect to the second element of the 3-part test, IBC and Izatt confirm that they had actual knowledge of the Interlocutory Injunction Order so that element of the contempt is present. As for the third element, and subject to the arguments concerning the first element, IBC and Izatt confirm that the Utah Partial Summary Judgment Motion was filed on their instructions.

- Nowhere in Ucore's 10 Affidavits, 6 briefs, lengthy oral submissions and exchanges with Justice Warner, or the form of Order Ucore

> proposed is there any mention of enjoining IBC's and Izatt's rights as litigants in Utah. Ucore has repeatedly represented to the court that the relief sought in the Interlocutory Injunction was the same relief it secured by way of the Interim Injunction when it clearly represented to the court that it was not seeking to restrain IBC in respect of its rights as a litigant in Utah.

Analysis

[45] IBC and Izatt have conceded that the second and third elements of the test have been satisfied. The court's inquiry, therefore, must focus on the first element: whether the order alleged to have been breached stated clearly and unequivocally what should and should not be done.

[46] The meaning of "clear and unequivocal" has been widely considered in the case law.

[47] For example, Justice Blair, writing for the majority in *Bell ExpressVu Limited Partnership v. Corkery*, 2009 ONCA 85 (Authorities, tab 5), held that "…[i]n relation to the first of these elements, it must be clear to a party exactly what must be done to be in compliance with the terms of an order" .

[48] In *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, Justice Jackson elaborated on the meaning of the phrase "clear and unambiguous" as follows:

> 20. In Baumung, the Court referred to numerous authorities to illustrate the statement that "in order to ground a contempt finding, a court order must be clear or, to put the point in another way, that an ambiguity in an order should be resolved to the benefit of the alleged contemnor" (at para. 27). Similarly, in *Sonoco Ltd. v. International Brotherhood of Pulp, Sulphite & Paper Mill Workers, Local 433* (1970), 13 D.L.R. (3d) 617 (B.C. C.A.) at p. 621, the British Columbia Court of Appeal wrote: "persons enjoined ought to be able to tell from the order what they may not do without having to decide whether they are acting lawfully or not." Further, the very clarity of the court order must be proven beyond a reasonable doubt before a finding of contempt will be sustained (see: *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217 (S.C.C.) at p. 224).

[49] For convenience, I repeat the provisions of the order in issue:

> 1. Pending further Court Order or the hearing of this Action on the merits an interlocutory injunction, the Defendants shall be enjoined from:
>
> > a. Taking any further steps to issue additional notices to terminate the March 14, 2015 Option Agreement, as amended, or taking steps in reliance upon (or further to) the February 19, 2019 Notice of Termination; and
> >
> > b. Taking any steps, or conducting any business, or transacting with any third parties in such a manner as to prevent or preclude (or effectively prevent or preclude) the Plaintiff from fully or effectively exercising its asserted and disputed rights under the March 14, 2015 Option Agreement, as amended;

[50] Simply put, there is nothing in the plain wording of the Interlocutory Injunction Order which enjoins IBC's ability to pursue its right to take steps in the ongoing litigation in Utah.

[51] Dealing first with clause "1 a." of the Order, the argument made by Ucore is that the summary judgment motion relies on the Notice of Termination of the

Option Agreement and is therefore in contravention of the Order. I agree with the Defendants' submission that the entirety of the Utah litigation is premised on the Option Agreement being void or terminated. If the Plaintiffs believed the intent of the Order had been as submitted by the Plaintiffs, they could have raised their objections to any further step taken in the Utah proceedings. They did not. I do not accept that clause "1 a." of the Order clearly and unequivocally enjoins the Utah litigation in any way.

[52] Turning to clause "1 b." of the Order, the Plaintiff says that the provisions of the order preserve the Option Agreement until the Nova Scotia Court decided the action before it. However, that is not what the plain words of the order provide. The plain language enjoins the Defendants from taking "any steps… as to prevent or preclude (or effectively prevent or preclude) the Plaintiff from fully or effectively exercising its asserted and disputed rights under the March 14, 2015 Option Agreement, as amended". [Emphasis added]

[53] What then are those asserted rights? On the face of the Order it is not clear.

[54] However, examining the plain language of the impugned Order is not the end of the inquiry. The court must examine the complete record to determine if the

impugned term or clause has sufficient clarity such that its breach attracts the quasi-criminal sanctions associated with contempt.

[55] In *Aloe-Gunnell v Aloe et al*, 2015 ONSC 191, the principal authority relied on by Ucore, the court had issued a final order in Canadian proceedings and the alleged contemnor had thereafter commenced proceedings in the State of New York for substantially the same relief. The Canadian court had expressly retained exclusive jurisdiction over all residual dealings with the matter and found that the foreign proceeding was in breach of the Canadian order. The *Aloe* situation is completely different from the matter before this Court. As will be made clear below, Justice Warner's Interlocutory Injunction Order enjoined two areas of activity (the sale of IBC's shares and the sale of IBC's technology and material assets). Justice Warner was not asked and did not reserve any exclusive or other authority in the way Justice Koke did in the *Aloe* case.

[56] In its reasons, the court in *Aloe* stated the following legal principle (para. 26):

> Thus, it is clear that the Ontario Court of Appeal has reaffirmed the contextualized approach for interpreting the clarity of given terms of Orders as per the first prong of the test for contempt. It is not enough for parties or the Court to take a literal interpretation of a given clause in isolation of the factual record. Instead, the Courts must look at the entire record to determine whether or not the impugned term or clause has sufficient clarity such that its breach attracts the quasi-criminal sanctions associated with contempt.

[57] Accordingly, it is important to examine the factual record.

[58] The contents of the transcripts of the two injunction hearings before the court, placed in evidence before me, establish that the injunction was not intended to prohibit the Defendants' exercise of their rights as litigants in Utah.

[59] During the hearing of the motion for the Interim Injunction before me on February 27, 2019, the scope and meaning of the disputed language in the proposed Order was thoroughly canvassed. In particular, IBC and Izatt advocated that the Order should include language that made it clear that the injunction did not restrict IBC from pursuing litigation in another jurisdiction. Ucore's Counsel submitted that such language was not necessary and there was an insufficient record on which the court could decide that issue. The following exchange is relevant to Ucore's current suggestion that the identical clause 1(b) enjoins IBC and Izatt from bringing the Utah Summary Judgment Motion (Transcript of February 27, 2019 Hearing, pages 9-14):

> (Keith): Paragraph 2, I think, My Lord is the heart of the matter or the heart of the dispute...And, there's two issues here, My Lord…And, the second is asking the Court,
>
> > "To indicate that nothing in this Order will preclude the other side form initiating or carrying on litigation in any other jurisdiction."
>
> ...
>
> The other point 'on carrying litigation in any jurisdiction,' My Lord, as I've said in my submissions earlier on, there have been two Claims launched in Utah by

IBC. I do not believe they have been defended yet. I don't really know with any detail, the status of those, other than I do know they've been launched. We have this proceeding here, My Lord. We've gone some distance down the road with respect to this proceeding, but regardless, whatever the parties right are on these jurisdictional disputes, this is not the time or the place in our submission for the Court to enter into that fray. The parties' rights are what they are in terms of jurisdiction. I don't think it would be appropriate for the Court in any event to issue an Order that would essentially encourage or invite a multiplicity of proceedings in any jurisdiction or to suggest that that would be appropriate. And, our position is very –or introduce language into the Order, My Lord, that might have unintended consequences that have nothing to do with this Motion or the parties' legal rights. So, our point is very simple, My Lord, the Court should not enter into that debate at this stage. If there's going to be a debate over jurisdiction that can happen in the future…

(Norton J.): So, just on that point, if the Order is silent on the point, there's nothing enjoining either party from bringing an Action anywhere else they feel that they're entitled to bring it.

(Keith): Or defending an Action, My Lord. We're not trying to say that IBC can or can't do anything. I mean, the rights are there and whether or not those rights are going to be recognized ultimately or there's going to be a jurisdictional challenge, that's for another time in our submission.

(Norton J.): Okay.

(Keith): So, if that was Mr. Moir's concern, I can put that on the record.

(Norton J.): All right, Mr. Moir?

…

(Moir): Well, I'm grateful that it's on the record, but I'd rather that the Order was clear about it. The Order that were drafted the way that Mr. Keith is suggesting…would be an Order of this Court enjoining IBC from taking a step in either of its proceedings that have been already been filed in Utah. They may need to take steps in that litigation. I don't know exactly how it works in Utah and I'm not fully informed as to what the nature of those Claims are, other than I've read the Claims.

(Norton J.): What is about the Order that would stop your client from taking steps in litigation in Utah?

(Moir): Because, the litigation in Utah involves whether or not the Option Agreement is enforceable. IBC takes the position in the ongoing litigation in Utah, that the Option Agreement was not enforceable or that the Notice of Termination was valid. Either of those things, taking any step in a proceeding that alleges that, My Lord, would be a step in a manner as to prevent or preclude Ucore from effectively exercising its asserted rights under the Option

> Agreement…if the net is going to be cast that wide, then my submission is there needs to be a specific exception from steps taken in litigation.
>
> (Norton J.): Mr. Keith?
>
> (Keith): A couple of points, My Lord. **First of all, I don't see this as being an Injunction that's enforceable in terms of taking legal proceedings in a Utah court.** Secondly, My Lord, this is an Inunction dealing with rights under the Option Agreement. That's what the parties are doing. So, for this Court to say 'but it's okay, we're going to have an Interlocutory Injunction on that issue, but it's okay if you want to take another step in Utah.' Not that, that issues should be resolved right now, My Lord, but I'd be concerned about what that means in terms of this multiplicity of proceedings. **If the parties want to take other steps, My Lord, they can take other steps and let the chips fall where they may. But I don't think the Court should enter into that fray right now on an interim basis, certainly**. [Emphasis Added]

[60] I ruled on the language of paragraph 2 of the Interim Injunction Order, stating the following (Aucoin Affidavit, Exhibit "4", 22-23):

> … IBC proposes that the Order include reference to 'initiating or carrying on litigation in any jurisdiction' in numbered Paragraph 2 of the Order. IBC is concerned that the wording of the Order without this language would prevent them from taking a step in the existing litigation. Ucore submits that (1) jurisdictional issues are not before the Court, (2) there is not record upon which the Court can determine these issues; and (3) it would be potentially problematic if the Court weighed into this issue. Ucore in its submission says that any such issue should be argued on a properly filed Motion with a record on that issue. I do not believe that the Court, should, in the absence of a proper Motion before it, make an Order regarding the ongoing litigation between the parties. Accordingly, I will not agree to add the proposed language offered by IBC.

[61] As a result, paragraphs 1 and 2 of the issued February 27, 2019 Interim Injunction Order provide as follows:

> 1. Pending the hearing of an interlocutory injunction, the Defendants shall be enjoined from:
>
> a. taking any further steps to issue additional notices to terminate the Option Agreement or taking steps in reliance upon (or further to) the Notice of Termination;

> b. taking any steps, or conducting any business, or transacting with any third parties in such a manner as to prevent or preclude (or effectively prevent or preclude) the Plaintiff from fully or effectively exercising its asserted an disputed rights under the Option Agreement.
>
> 2. Nothing in this Order prohibits IBC from carrying on and marketing its business in the ordinary course of business so long as such is in compliance with the terms of the Option Agreement.

[62] The Interim Injunction Order remained in place until Ucore's Interlocutory Injunction Motion was heard by Justice Warner on December 4, 2019. The language of operative paragraphs 1 and 2 of the draft Interlocutory Injunction Order filed by Ucore was identical to the language of the Interim Injunction Order.

[63] Ucore's clear representation to the Court was that the language of the Interim Injunction was not "an Injunction that's enforceable in terms of taking legal proceedings in a Utah court".

[64] Before Justice Warner, Ucore was clear that the language sought for the Interlocutory Injunction was largely the same as the Interim Injunction. There was no suggestion of an intent to prohibit the Defendants in any way from exercising their full rights in the Utah litigation. Nevertheless, Justice Warner was alive to the possibility of a dispute such as is presently before the court and so made pointed inquiry of Ucore's counsel as to what specifically they were looking to enjoin (Transcript of December 4, 2019 Interlocutory Injunction Hearing, pages 110-113):

Warner J.: So, the Injunction that you've asked for had two particular elements to it. Maybe your first Brief is a good place to start. Not taking any further steps to issue additional notices to terminate or steps in reliance upon it. That's the number one request?

Regan: Correct.

Warner J.: …Request number two, take any steps or conduct any business or transact with any third party so as to prevent or preclude the ability of Ucore to exercise the Option Agreement. And, you're going to have to be fairly clear about what rights in the Option Agreement you're talking about because other than your last Brief…it's not clear to me what rights you think Ucore has over the operations of IBC. And, it wasn't clear to me exactly what you intended by that second part...The Agreement says it's not to prevent IBC from conducting its business in the ordinary course, that is extremely vague and I didn't know what you thought you could do or how many times someone would show up here or in Utah to say that by them licensing MRT to Techninko or Tech, it's call now I think is a breach of our rights. And it wasn't clear to me what exactly it was that you were actually seeking.

…

Regan: The language in that Order was negotiated with IBC's Counsel on the Interlocutory...

Warner J.: I don't care what it was ordered then. Now, I'm sitting with nine months later and an Action and Interlocutory Injunction that based on the history of this file is probably going to be – not going to be resolved next month. Okay?

Regan: And, I say that only, My Lord, to indicate that at the time I believe the parties understood the rights that they were trying to protect.

Warner, J.: But the Order wasn't clear on that. Okay.

...

Warner, J: And, I'm seeking when I read all of the materials I see where is this going and how many more times are these parties going to be back in Court under Contempt or Enforcement Applications under this document. And I appreciate they're only Court Orders and people do what they do but that Interim Order might have been difficult to enforce and would have created probably more litigation than the litigation of the rights itself is what I'm thinking as a practical matter. So, I wanted some from you- I wanted better wording. I appreciate what you say or I want some clarity with regards to what those two sentences mean.

[underlining added]

[65] Counsel for Ucore specified the actions which it sought to enjoin in the following exchange: (, pages 129-130):

> Regan: Yes, My Lord. So, the three things that we've identified in our Brief that IBC -– major ones that IBC is prevented from doing under the Option Agreement, are selling itself to someone else.
>
> Warner J.: Right.
>
> Regan: Selling its technology and material assets to someone else or competing with Ucore in the REE space.

[66] The exchange below is when Justice Warner summarized Ucore's position to Ucore's Counsel, who confirmed that His Lordship had correctly set out the requested scope of the Interlocutory Injunction (page 137):

> Warner J.: Okay. And, in terms of protecting Ucore in relation solely to the Option Agreement which is the right to ensure that the shares are available to buy in accordance with the Agreement. The right to ensure that the assets are [sic] dissipated. And, you say the restriction on IBC to market the technology that it developed as a result of the services it provided under the Research Agreement to Ucore which Ucore terminated is –- are three rights and that the loss of any of those three rights would constitute irreparable harm to Ucore.
>
> Regan: Correct.

[67] Justice Warner gave an oral decision at the conclusion of the Interlocutory Injunction Hearing (later released in writing at 2019 NSSC 396). He ruled against Ucore in relation to the third category of activity which Ucore sought to enjoin (page 155):

> Warner J.: … I understand the ability to preserve the right to buy the shares of Ucore and make sure that their material assets are still in place which would include the MRT technology. Okay? It's still in place.
>
> Regan: Correct.
>
> Warner J.: I understand those two. But, the third point, that by incorporating the Co-operating Agreement that saying that MRT can't license their technology

> other than to…Bokan…to my mind is not something that Ucore has a right to do independently. They only had a right to do it if they incorporated the Newco under the Research Agreement.
>
> …
>
> Warner J.: Okay. And, now that I know the Research Agreement is not done it makes it much easier for me because Ucore has no rights to the technology under the Option Agreement unless they buy the shares. They have no rights to the technology under the Research Agreement because it's been terminated. And I'm looking at a go forward Interlocutory Injunction, not a past one…

[68] Justice Warner's ruling denying Ucore's attempt to enjoin IBC's business activities was as follows (page 305):

> …the balance of convenience strongly favours an Interlocutory Injunction with regards to enjoining IBC from taking any further steps to issue additional notices or terminate the Option Agreement or taking steps in reliance upon or further to the Notice of Termination and taking steps or conducting any business or transacting with any third party in such a manner as to prevent or preclude or to effectively prevent or preclude Ucore from fully and effectively exercising the Option Agreement and until it's determined by the Court that it includes some kind of a restriction on target sectors at a trial, I'm not prepared to include that as part of the enjoined activity.
>
> …I'm prepared to grant an Interlocutory Injunction that uses the words, requested by the Plaintiff with the exception that there has to be added a clause that particularly says, nevertheless the Injunction does not refrain the Defendant doing what Paragraph 3 in the Amended Co-operating Agreement said he covenanted not to do.

[69] In his oral decision, Justice Warner noted the importance of restraint when it comes to interlocutory injunctions. For example, he held as follows, quoting from Justice Sharpe's text Injunctions and Specific Performance looseleaf edition, (Toronto, Canada Law Book, November 2016) (page 280):

> As a general principle,
>
> > "A remedy should be fair to the party against whom the Order is made and should not impose substantial hardships that are not required to secure the right being protected."
>
> The discretion to award Injunctions cannot be reduced to a simple balance of burden and benefit.
>
> Supervision of Injunctions involves problems of definition more so than most Court Orders. Just as Sharpe writes,
>
> > "That Courts should avoid vague and ambiguous language which fails to give the Defendant proper guidance or which in effect postpones determination of what actually constitutes a violation of the Plaintiff's right."
>
> The terms of the Injunction should not be wider than is required to protect the Plaintiff's rights…

[70] The relief which Ucore is seeking is a recognized type of injunction known as an anti-suit injunction. However, Ucore has never requested that relief and has never made submissions on the applicable test or placed an evidentiary record before the court is support of such a claim (as they argued was necessary at the Interim Injunction Hearing).

[71] The key principles from the leading Supreme Court of Canada case dealing with such injunctions are relevant. *In Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, Justice Sopinka stated (after reviewing Canadian jurisprudence) as follows at para. 54:

> No consistent approach appears to emerge from these cases other than recognition of the principle that great caution should be exercised when invoking the power to enjoin foreign litigation.

[72] The *Amchem* case also set out the test which Canadian courts should apply when a party requests an anti-suit injunction. The Supreme Court's summary of the effect of the anti-suit injunction test is relevant to the Motion before the court. Justice Sopinka stated the following at para. 61:

> The result of the application of these principles is that when a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to the forum non conveniens, that decision will be respected and a Canadian court will not purport to make the decision for the foreign court. The policy of our courts with respect to comity demands no less. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with our rules of private international law and an injustice results to a litigant or "would-be" litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.

[73] There is no suggestion, and no basis for suggestion, that the Utah Court has not shown comity toward Nova Scotia.

[74] Considering all of the circumstances I am not persuaded beyond a reasonable doubt that the wording of the Interlocutory Injunction clearly and unequivocally enjoined IBC and Izatt from filing the summary judgement motion in Utah. I dismiss the motion for contempt. In the circumstance I do not need to address the arguments on the court's discretion to decline to find contempt or the issue of comity.

[75] IBC and Izatt are entitled to costs. If the parties cannot agree on costs I direct that IBC and Izatt submit their position to me on costs in writing with any necessary affidavit evidence within 30 days of receipt of the decision. The Plaintiffs shall have 15 days to reply from the receipt of the Defendants submissions.

II. AMENDMENT

Background

[76] Ucore moves to join nine individuals as defendants to the Notice of Action and Statement of Claim. The nine individuals are shareholders of IBC who signed the Option Agreement. They are:

(a) Liisa Marianne Silander-Izatt (Mr. Izatt's spouse);

(b) Reed Izatt (Mr. Izatt's father);

(c) The Jerald S. Bradshaw Trust;

(d) IBC Advanced Technologies Inc. 401(K) Profit Sharing Trust; (of which Mr. Izatt is a trustee);

(e) Reed M. and Helen F. Izatt Foundation (of which Mr. Izatt's father is a trustee);

(f) Ronald L. Bruening;

(g) Neil E. Izatt (Mr. Izatt's brother);

(h) Paul J. Talbot; and

(i) Reed M. Izatt Voting Trust (of which Mr. Izatt's father is a trustee).

(collectively, the "Selling Shareholders")

[77] When IBC purported to terminate the Option Agreement on February 19, 2019, that letter was sent by IBC itself (arguably including Mr. Izatt). None of the Selling Shareholders was named in or copied on the letter. Ucore says it had no indication that they would not honour Ucore's prior attempt to trigger the option.

[78] In response to the purported termination, Ucore sought (among other things) to amend its pleadings. Ucore provided IBC with a complete draft of its proposed amended claims on March 6, 2019.

[79] On March 13, 2019, IBC responded to the proposed draft by writing to the Court and stating that Selling Shareholders "must be made parties in this proceeding", given that Ucore was seeking specific performance of the Option Agreement.

[80] IBC repeated that demand in a letter to the Court on March 28, 2019.

[81] At the same time, however, IBC was actively contesting the Nova Scotia courts' jurisdiction over the action, and the parties turned their attention towards this issue, which had the potential to see the end of the Nova Scotia proceedings entirely.

[82] The parties then turned their attention to the impending Interlocutory Injunction, which was heard on December 4, 2019.

[83] With its jurisdiction confirmed, and the previously-scheduled Interlocutory Injunction resolved, Ucore immediately set out to add the Selling Shareholders. On December 18, 2019 Ucore sent a letter to each such shareholder, advising that:

> On March 13, 2019, IBC and Steven R. Izatt argued that you, as a party to the Agreement, must be added as a defendant to the claims described in the Statement of Claim (a copy of the March 13, 2019, argument brief is attached as Schedule D). However, it is not clear to us whether you oppose Ucore in exercising the option to purchase your shares of IBC. Consequently, we have been instructed to approach you, and if necessary, add you as a defendant in the Statement of Claim, as amended.

[84] Ucore did not receive a response from any of the Selling Shareholders. Instead of responding, the Selling Shareholders commenced an action against Ucore in the Federal Court, District of Utah on January 6, 2020 (the "Shareholder Action")[3]. Neither IBC, nor Mr. Izatt, are parties to the Shareholder Action.

[85] The Shareholder Action seeks to have the Option Agreement declared validly terminated, void, or otherwise unenforceable.

[3] See footnote 2.

[86] However, the Selling Shareholders did not serve Ucore with their lawsuit for months. On March 19, 2020, the Nova Scotia Supreme Court entered into an essential services model in response to COVID-19.

[87] On April 7, 2020, the Selling Shareholders sought an *ex parte* order permitting substituted service on Ucore by email from the Utah Federal Court. The Federal Court issued the *ex parte* order on April 21, 2020.

[88] Also on April 21, 2020, the Selling Shareholders purported to serve Ucore's Utah counsel and its Nova Scotia registered agent, Mr. Stuttard, by email. Ucore is currently contesting the *ex parte* order for non-compliance with American and international law and seeking to have the Shareholder Action dismissed.

[89] The Nova Scotia Supreme Court re-opened to non-urgent matters on June 15, 2020 and, on July 6, 2020, Ucore requested IBC's permission to amend the Statement of Claim to include the Selling Shareholders. IBC has since refused.

[90] The Defendants do not agree that Ucore should be granted leave to make the requested amendments to its pleadings. The Defendants submit that Ucore's proposed amendments are merely tactical, advanced with a view to either hindering the ongoing litigation in Utah or strategically exacerbating the potential for inconsistent findings by the Utah and Nova Scotia Courts, or both.

The Law

Civil Procedure Rules

[91] The parties agree that the following Rules are relevant to this motion:

> **Judge joining party**
>
> 35.08(1) A judge may join a person as a party in a proceeding at any stage of the proceeding.
>
> How a party joins further parties
>
> 35.05 A party who starts a proceeding may join a further party by amending the originating document, or notice of claim against third party, as provided in Rule 83 - Amendment.
>
> **Amendment of notice in an action**
>
> 83.02 (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.
>
> (2) The amendment must be made no later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.
>
> **Amendment to add or remove party**
>
> 83.04 (1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).
>
> (2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:
>
> (a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;
>
> (b) the expiry precludes the claim;
>
> (c) the person protected by the limitation period is entitled to enforce it.
>
> (3) A notice may be amended to remove a party from a proceeding, but the removed party may make a motion for costs or other relief.
>
> **Amendment by judge**
>
> 83.11 (1) A judge may give permission to amend a court document at any time.
>
> (2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.

> (3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
>
> (a) the material facts supporting the cause are pleaded;
>
> (b) the amendment merely identifies, or better describes, the cause.

[92] None of the circumstances in Rule 83.04(2) or 83.11(2) and (3) apply.

[93] Amendments to add parties will usually be permitted. In *Altschuler v Bayswater Construction Limited*, 2019 NSSC 197, Justice Bodurtha summarized the law on amendments to add parties:

> 14 Justice Rosinski in *Oldford v. Canadian Broadcasting Corp*., 2011 NSSC 49 (N.S. S.C.), summarized the relevant law in relation to adding amendments:
>
> [4] Counsel agree on the proper legal test that the Court should use. The test is found in *Stacey v. Consolidated Fund Corp. or Canada Ltd*. (1986), 76 N.S.R. (2d) 182 (C.A.) per Clarke, C.J.N.S.:
>
> ...**the amendment should have been granted unless** it was shown to the Judge that the Applicant was acting in **bad faith** or that by allowing the amendment, the other party would suffer **serious prejudice** that could not be compensated by costs." [emphasis in original]
>
> …
>
> [8] The only reported cases which have considered this issue under the new Rules are *Canada Life Assurance v. Saywood* et al (2010), 288 N.S.R. (2d) 273 (NSSC) and M5 Marketing Communications v. Ross, 2011 NSCC 32, both decisions of McDougall, J.
>
> [9] As Justice McDougall concluded, I also do not believe the new Rules intended to alter, and I accept that they therefore have not altered, the appropriate legal test regarding when leave will be granted to amend court documents.
>
> 15 In *Canada Life Assurance Co. v. Saywood*, 2010 NSSC 87 (N.S. S.C.), McDougall J. summarized the law as follows:

> [7] Apparently there are no written decisions regarding the new Rule 83.02. There are, however, a number of cases pertaining to the predecessor Rule 15 (1972 Rules). In the case of *Global Petroleum Corp v. Point Tupper Terminals Co.* (1998), 170 N.S.R. (2d) 367, Bateman, J.A., at para. 15, stated:
>
> > [15] The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs. (*Baumhour et al. v. Williams* et al. (1977), 22 N.S.R. (2d) 564, 31 A.P.R. 564 (C.A.)) [emphasis added]
>
> [8] This same statement of the law was cited by the Honourable Justice Arthur J. LeBlanc in the case of *Shea v. Whalen* (2008), 250 N.S.R. (2d) 65 at para. 6.
>
> [9] In the case of *Garth v. Halifax (Regional Municipality)* (2006), 245 N.S.R. (2d) 108 Cromwell, J.A. (as he was then) stated the following at para 30:
>
> > [30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs: [emphasis added]
>
> [10] While these cases were all decided prior to the implementation of the new rule they continue to offer guidance despite these recent changes.

[94] In this case, the parties acknowledge that they have not yet exchanged disclosure, nor completed any discovery examinations. The Selling Shareholders will be aligned in interest with IBC, and even if their addition as defendants could possibly affect the scope of IBC's production or questions on discovery (which, Ucore suggests, it does not), those steps have not yet been taken. The proposed amendments also do not include any new or additional facts or theories of law related to IBC – they consist solely of adding the Selling Shareholders and limited additional facts setting out their involvement.

[95] The Selling Shareholders have contemplated litigation between themselves and Ucore on the question at issue in this proceeding already and are presumably engaged in preserving their evidence and preparing their disclosure in any event.

[96] The Defendants rely on a number of cases in which the court inferred that the amendments sought were in bad faith: *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385; *Radial Investments Ltd. v. Salvatore,* [2000] OJ No. 4108; *Foy v. Royal Bank,* [1995] OJ No. 1422; *National Bank Financial Ltd. v. Potter*, 2008 NSCA 92.

[97] It is plain to see upon reading each of these cases that the inference of bad faith turned on their specific facts, and in some cases, extreme facts. Here there is no attempt to add new causes of action or to increase substantially the value of the claim (*Furbacher*); no failure to provide any explanation for why the amendments are sought (*Furbacher*); no attempt to add substantial new critical facts (*Redial*); no attempt to add corporate directors, officers and employees as individuals with no valid basis (*Foy*); and, no attempt to withdraw factual allegations without explanation (*Potter*).

[98] The Defendants argue that the proposed amendments amount to bad faith which should be inferred based on the following:

- It has been more than a year since Ucore's first pleadings and even longer since the March 13, 2019 letter which is central to Ucore's submissions. There is no explanation for the delay in attempting to add seven of the Shareholders from the Utah Shareholder Action to this Nova Scotia proceeding. The Defendants submit that Ucore's delay in attempting to join the Shareholders to this proceeding must be viewed through the lens of the ongoing parallel litigation in Utah. It is striking that Ucore's efforts to join the Shareholders is being made after the Shareholders commenced the Shareholder Action in Utah, and after it elected not to oppose consolidation of all three Utah proceedings.
- The request for leave is also brought alongside Ucore's Contempt Motion which is a clear collateral attack on the Utah Court's October 25, 2019 decision in the Contract Action and its ongoing jurisdiction over that matter.
- Ucore seems to suggest that it was awaiting confirmation of this Honourable Court's jurisdiction over its amended claims against IBC and Izatt before joining the Shareholders.
- This Honourable Court should show comity toward the Utah Court, particularly in light of the comprehensive nature of the soon to be consolidated Utah proceedings, and deny Ucore's tactical attempt to place an additional few of the host of pending Utah issues before it.

[99] With respect, the chronology set forth above does not suggest to me that Ucore has unreasonably delayed its attempts to add the Selling Shareholders as defendants. I also see no issue with the two motions being brought together – it is simply a temporal issue. The two motions could have been brought and heard separately but to what avail? As to the jurisdiction issue, this is not IBC's concern. The individual Selling Shareholders as proposed defendants will be able to challenge the court's jurisdiction if they see fit. As to comity, the Nova Scotia and

Utah courts are aware of the parallel proceedings. The amendment proposed is not a challenge to comity but a step to see that the outcome of the Nova Scotia litigation is effective by including all signatories to the Option Agreement.

[100] In sum, I am not persuaded that the evidence leads inevitably to the inference that the motion to add the Selling Shareholders to the action is made in bad faith. I note the obvious irony that at the outset of this proceeding it was the Defendants who were advocating that the Selling Shareholders had to be added as parties. It makes obvious sense to me that when this court determines the issues before it relating to the Option Agreement, all of the signatories to the Option Agreement should be before the court.

[101] The motion for amendment is granted. The Plaintiff will provide the Court with a revised form of Order and Schedule naming all of the Selling Shareholders as defendants.

[102] Ucore is entitled to costs on the Amendment Motion. If the parties cannot agree, I direct that Ucore file with me its brief and any necessary affidavit evidence within 30 days from receipt of this decision. IBC and Izatt shall file their response brief and any affidavit evidence within 15 days of receipt of the Ucore submissions.

[103] Order accordingly.

Norton, J.