SUPREME COURT OF NOVA SCOTIA
Citation: *Superport Marine Services Limited v. Balodis Incorporated*, 2021 NSSC 237

Date: 20210803
Docket: Pictou, No. 496972
Registry: Halifax

Between:

Pic No. 496972

SUPERPORT MARINE SERVICES LIMITED

Applicant

v.

BALODIS INCORPORATED

Respondent

And

Pic No. 498617

THE SOVEREIGN GENERAL INSURANCE COMPAY

Applicant

v.

SUPERPORT MARINE SERVICES LIMITED

Respondent

DECISION ON MOTIONS OF PARTIES BY CORRESPONDENCE

Judge:	The Honourable Justice Scott C. Norton
Heard:	By Correspondence July 9, 19, and 22, 2021, in Pictou, Nova Scotia

Decision: August 3, 2021

Counsel: Richard Norman, for Superport Marine Services Limited
Wayne Francis, for Balodis and Sovereign General Insurance Company

By the Court:

Introduction

[1] This decision responds to motions by correspondence to address objections to affidavit evidence filed by the parties in the two underlying Applications in Court, scheduled to be heard together commencing September 13, 2021. The motions were heard by correspondence by agreement of the parties.

[2] The underlying dispute relates to reciprocal claims arising from an agreement to carry armour stone and other materials from Pictou to Pictou Island, Nova Scotia. Superport Marine Services Limited ("SPM") provided a barge and other vessels to transport the materials. The barge capsized allegedly causing damages to SPM and to the Respondent Balodis Incorporated ("Balodis") and The Sovereign General Insurance Company ("Sovereign") as insurer of Balodis (referred to jointly herein as Balodis).

[3] The Balodis motion is for an order striking certain paragraphs or parts thereof from the affidavits of SPM witnesses on the bases that:

(a) The passage sought to be struck contains inadmissible hearsay or opinion evidence;

(b) The passage contains improper rebuttal evidence.

[4] The SPM motion seeks:

(a) Leave to file a supplementary affidavit;

(b) Leave to amend/correct several affidavits;

(c) Striking certain paragraphs or parts thereof from the Balodis' affidavits on the basis that they contain impermissible hearsay or opinion.

Law

[5] *Civil Procedure Rule* 39.02 addresses the contents of affidavits:

5.17 Rules of evidence on an application

> The rules of evidence, including the rules about hearsay, apply on the hearing of an application and to affidavits filed for the hearing except a judge may, in an *ex parte* application, accept hearsay presented by affidavit prepared in accordance with Rule 39 - Affidavit.
>
> **39.02 Affidavit is to provide evidence**
>
> (1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.
>
> (2) An affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.
>
> …
>
> **39.04 Striking part or all of affidavit**
>
> (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[6] In *King v. Gary Shaw Alter Ego Trust*, 2020 NSSC 288, I reviewed the applicable law in a similar motion to strike, at paras 9 to 14:

> [9] The leading decision in this province on the appropriate contents of affidavits is *Waverly (Village) v. Nova Scotia (Municipal Affairs)*, 1993 NSSC 71. Therein, Justice Davison made the following observation and set out in summary form the guidelines for admissible affidavit evidence (I note here that his

reference to “application” was to a Chambers Application in the former Rules, now a Motion in Chambers in our present Rules):

> 14 Too often affidavits are submitted before the court which consist of rambling narratives. Some are opinions and inadmissible as evidence to determine the issues before the court. In my respectful view the type of affidavits which are being attacked in this proceeding are all too common in proceedings before our court and it would appear the concerns I express are shared by judges in other provinces…
>
> 20 It would [be] helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
>
> > 1.Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
> >
> > 2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application [a motion under the present Rules]. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
> >
> > 3. Affidavits used in applications [motions] may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".
> >
> > 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.
> >
> > 5. The affidavit must state that the affiant believes the information received from the source.

[10] In Sopinka, *The Law of Evidence in Canada*, 5th ed. (Toronto: Lexis Nexis, 2018), the authors introduce the law of evidence as follows (p. 12):

> The law of evidence controls the presentation of facts before the court and is made up of common law principles, statutory provisions and constitutional principles. Its purpose is to facilitate the introduction of all logically relevant facts without sacrificing any fundamental policy of the law which may be of more importance than the ascertainment of the truth.

[11] There is a discretion for a judge to exclude evidence that meets the test of relevancy if the judge considers that the probative value is outweighed by its prejudicial effect. This discretion is most often considered in the context of criminal trials before juries. It has also been used to limit certain evidence in civil

cases, again primarily before juries. The discretion has been recognized as broad: *R v. B. (C.R.)*, [1990] 1 S.C.R. 717.

Hearsay

[12] Hearsay is one of the most common objections made to the introduction of evidence. It has been defined by the Supreme Court of Canada as follows:

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered as proof of their truth or as proof of assertions implicit therein. [*R. v. Bradshaw* 2017 SCC 35, at para. 1 and 20]

[13] Sopinka says:

> The usual hearsay circumstance covered by the rule is where the witness testifies as to what someone else, who is not before the court, said. However, the modern interpretation of hearsay also encompasses prior out-of-court statements made by the very witness who is testifying in court when such earlier statements of the witness are tendered to prove the truth of their contents. [*Supra*, at p. 249]

[14] The defining features of the rule are that the purpose of adducing the evidence is to prove the truth of its contents and the absence of the contemporaneous opportunity to cross-examine the declarant. It is the inability to test the reliability of the evidence by cross-examination of the declarant that makes the admission of such evidence unfair and inadmissible. The rule recognizes the difficulty of the trier of fact assessing the probative value, if any, to be given to a statement made by a person who has not been seen or heard and who has not been subject to cross-examination. [*R. v. Khelawon* [2006] 2 S.C.R. 787]

[7] These same evidentiary issues were considered in *Canadian National Railway Company v. Halifax (Regional Municipality)*, 2012 NSSC 300 ("*CNR*"). With regard to the hearsay objection, Leblanc J. stated, at paras 5-8:

> **Hearsay**
>
> [5] **Rule** 5.13 governs the use of hearsay evidence on applications. Rule 5.13 provides that the "rules of evidence, including the rules about hearsay, apply on the hearing of an application and to affidavits filed for the hearing except a judge may, in an ex parte application, accept hearsay presented by affidavit prepared in accordance with **Rule** 39 - Affidavit." This rule, says HRM, indicates that hearsay is not permitted on an application unless a common law hearsay exception applies. I am satisfied that this would include the principled approach to

admitting hearsay on the basis of necessity and reliability, as described in **R. v. Khelawon**, 2006 SCC 57, and decisions preceding it.

[6] The "essential defining features" of hearsay are . . . "(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant." (**Khelawon** at para. 35) It must be emphasized that it is "only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises." (**Khelawon** at para. 36) Further, Charron J. said for the court in **Khelawon**, (paras. 37-38) that while an out-of-court statement by a witness who testifies will be hearsay if adduced for the truth of its contents:

> When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. . . .

[7] Charron, J. went on to discuss the challenges of recognizing hearsay, at paras. 56-58:

> The first matter to determine before embarking on a hearsay admissibility inquiry, of course, is whether the proposed evidence is hearsay. This may seem to be a rather obvious matter, but it is an important first step. Misguided objections to the admissibility of an out-of-court statement based on a misunderstanding of what constitutes hearsay are not uncommon. As discussed earlier, not all out-of-court statements will constitute hearsay. Recall the defining features of hearsay. An out-of-court statement will be hearsay when: (1) it is adduced to prove the truth of its contents and (2) there is no opportunity for a contemporaneous cross-examination of the declarant.
>
> Putting one's mind to the defining features of hearsay at the outset serves to better focus the admissibility inquiry. As we have seen, the first identifying feature of hearsay calls for an inquiry into the purpose for which it is adduced. Only when the evidence is being tendered for its truth will it constitute hearsay. The fact that the out-of-court statement is adduced for its truth should be considered in the context of the issues in the case so that the court may better assess the potential impact of introducing the evidence in its hearsay form.

[8] Second, by putting one's mind, at the outset, to the second defining feature of hearsay – the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci, J. in **R. v.**

Starr, [2000] 2 S.C.R. 144 identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer, C.J. in U. (F.J.) expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested" (para. 22).

[8] With respect to the opinion objections, Leblanc J. commented as follows:

Opinion Evidence

[11] In addition to extrinsic evidence concerns, this case raises issues of opinion evidence. Charron, J. (as she then was) summarized the law on opinion evidence in **R. v. Collins** (2001), 160 C.C.C. (3d) 85, at para. 17:

> In the law of evidence, an opinion means an "inference from observed fact": see R. v. Abbey (1982), 68 C.C.C. (2d) 394 at 409. As stated in Abbey, as a general rule, witnesses testify only as to observed facts and it is then up to the trier of fact to draw inferences from those facts. A lay witness will be permitted to give an opinion only with respect to matters that do not require special knowledge and in circumstances where it is virtually impossible to separate the facts from the inferences based on those facts. A witness testifying that "a person was drunk" is a common example of an opinion that can be provided by a lay witness. See R. v. Graat (1982), 2 C.C.C. (3d) 365 (S.C.C.) for a review of the law on non-expert opinion. Otherwise, opinion evidence will only be received with respect to matters calling for special knowledge beyond that of the trier of fact. In those cases, an expert in the field may be permitted to provide the judge and jury with an opinion, that is "a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate" (Abbey at 409). The law as to expert opinion evidence was authoritatively restated in Mohan, supra. Before expert opinion evidence can be admitted, the evidence: (a) must be relevant to an issue in the case; (b) it must be necessary to assist the trier of fact; (c) it must not be subject to any other exclusionary rule; and (d) it must be given by a properly qualified expert.

[12] Paciocco and Stuesser, in *The Law of Evidence in Canada*, 6th ed. (Irwin Law, 2011) the authors summarize the law governing lay opinion evidence at 183:

> *Lay witnesses may present their relevant observations in the form of opinions where*
>
> · *they are in a better position than the trier of fact to form the conclusion;*
>
> · *the conclusion is one that persons of ordinary experience are able to make;*

· *the witness, although not expert, has the experiential capacity to make the conclusion; and*

· *the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions.*

Issues

[9] The issues raised by the parties are addressed in the following order:

1. Leave to file a supplemental affidavit
2. Leave to amend/correct the SPM affidavits
3. The Objections to the SPM affidavits
4. The Objections to the Balodis affidavits

Analysis

Leave to file a supplemental affidavit

[10] Civil Procedure Rule 5.15 states:

5.15 No supplementary affidavits

(1) A party to an application may only file an affidavit within the deadlines under this Rule or set by a judge giving directions, unless a judge hearing the application permits an affidavit to be filed later.

(2) On a motion to allow a later affidavit, the judge must consider all of the following:

(a) the prejudice that would be caused to the party who offers the affidavit, if the application proceeds without that affidavit;

(b) the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice of an adjournment if that would be a result;

(c) if an adjournment would result, the public interest in making the best use of court facilities, judges' time, and the time of court staff.

(3) A judge who allows a late affidavit may order the party filing the affidavit to indemnify each other party for expenses resulting from the filing, including expenses resulting from any adjournment.

[11] SPM is seeking permission to file a supplemental affidavit from Les MacIntyre, SPM's directing mind. SPM's pre-hearing brief articulates their submission:

> Affidavits from all parties were filed by October and November 2020. Discovery examinations were conducted in December 2020 and January 2021. There were further documentary request [sic] from Balodis throughout the period following the filing of affidavits.
>
> In Mr. MacInytre's primary affidavit sworn on October 30, 2020, he referred to damages lost as a result of delays to the work on site and capsizing of SPM barge (which is at the centre of this litigation). He said in that affidavit:
>
> > 50. The Balodis job was projected to end around Labour Day but went on until the week of Christmas 2019. The marine equipment used on the job constituted our whole tug and barge fleet which was tied up waiting for dredging to commence and the barge to be repaired.
> >
> > 51. This equipment - two tugs and three barges were not available for fall work as a result. Attached as Exhibit "H" are true copies of sections from SPM's audited financial statements (Tug and Barge Services) for the previous three years which shows an average income for the period Sept. 15th through Dec. 20th, which has a historical seasonal average of $474,448 for the period. We had to forego work of this work in 2019 as a result of the Balodis entanglement.
>
> The affidavit did not describe what portion of the revenue was profit or what SPM's standard profit margin was on this kind of work.
>
> The purpose of the supplemental affidavit is to provide particulars of the profit margin which SPM asserts would have been obtained on the lost revenue referred to in the paragraphs quote above.
>
> Following the filing of Mr. MacIntyre's October 30, 2020 affidavit and prior to discoveries, Balodis sought further evidence in relation to this claim for lost profit including additional financial records. Many of these were provided by letter to Mr. Francis dated December 9, 2020.
>
> During Mr. MacIntyre's discovery examination, he was questioned extensively about the lost profit claim including the profit margin. An excerpt of that portion of the transcript is attached with the affidavit of Ms. Kehoe at Exhibit "D". It is being provided to prove what Balodis knew about the claim and when – not to prove the actual claim for profit itself.
>
> Following the completion of the discoveries and the adjournment of the original hearing dates to September 2021, the unsworn supplemental affidavit of Mr. MacIntyre was provided to Balodis on March 1, 2021 with an inquiry as to

whether Balodis would consent to the filing of the affidavit. Balodis indicated they would not consent.

A sworn copy of the affidavit was provided to Balodis on March 30, 2021 . There were no changes between the sworn and unsworn copies.

There were various outstanding issues between the parties, including objections to affidavits, and the question of whether the proceeding should be converted to an action (SPM contemplated that if the motion to convert was successful, the supplemental affidavit issue would be resolved). For that reason, SPM held off immediately making a motion seeking leave to file a supplemental affidavit.

Following the conclusion of the conversion motion, the Court directed that the supplemental affidavit issue and objections to affidavits should be dealt with by correspondence.

The supplemental affidavit relates to the Applicant's claim for lost profit. It provides information requested by Balodis following the filing of Mr. MacIntyre's original affidavit. It particularizes evidence provided by him at his discovery examination. There were a significant amount of documentary requests made by Balodis following the filing of the affidavits that caused SPM to refine its evidence in relation to its lost profit claim.

The supplemental affidavit does not relate to a new claim which SPM is attempting to add at this stage in the proceeding. It provides better particulars of a claim already asserted and not completely expressed. It also relates to a claim which Balodis has explored in detail through requests for further production and a discovery examination of Mr. MacIntyre in which the issue was fully canvassed by Balodis.

In the event that Balodis believes further discovery on the supplemental affidavit is required, SPM will consent to that. If Balodis believes it should be permitted to file a rebuttal affidavit to the supplemental affidavit, SPM will consent to that.

Balodis has been aware of the evidence in the supplemental affidavit since December (during the discoveries) or March 1 at the latest (at the time the supplemental affidavit was first provided). There is no known prejudice to Balodis; if there was, SPM would be prepared to agree to a reasonable solution to remedy that prejudice. There is no request on the part of Balodis to adjourn the hearing as a result of this supplemental affidavit. Balodis has already discovered Mr. MacIntyre on the substance of the supplemental affidavit.

[12] In response, Balodis says that the Court must examine the conduct of SPM during the litigation process to properly weigh the relevant prejudice. The prejudice to SPM if the supplementary affidavit is not permitted is minimal because SPM had ample opportunity to tender whatever evidence it wishes to rely on earlier in the process. SPM has provided no explanation as to why it did not produce this information in its earlier affidavits in the context of advancing a claim

that, from the outset, SPM knew or ought to have known would involve a calculation of loss of profit. It was SPM that chose the Application in Court process. They knew or should have known that they would have to produce their proof by affidavit evidence in a short time period and, in the affidavit filed in support of the Application in Court, confirmed that disclosure could be completed within a month or less. Balodis argues that the Supplementary Affidavit is an attempt to improve SPM's case following discovery of the SPM witnesses on the issue of profit margin.

[13] As to the prejudice to Balodis, it says that the record shows its repeated and ongoing request for proper disclosure regarding SPM's claims. That discovery examination was conducted on the basis of the material disclosed and SPM now seeks to provide new evidence with no explanation as to why it was not previously provided. Balodis identified the following prejudice in their response brief at page 5:

> • Case-Splitting: SPM included evidence regarding its lost profit claim in Mr. MacIntyre's primary affidavit. Now, after Balodis having completed its discovery examination, SPM wants to tender additional evidence – all of which was available to SPM when it filed its primary affidavit.
>
> It is a fundamental principle that the Respondents must be aware of the case they have to meet. Allowing SPM's motion would encourage Applicants to withhold available evidence until late in a proceeding, learning of a Respondents strategy and leaving limited time for response.
>
> • Additional Discovery examination: There are legal fees and disbursements (such as court reporter and transcript) associated with this activity. Scheduling of such a discovery on short notice, in Summer, may be a challenge. A follow up discovery will likely lead to a request for further financial records. To date, SPM has shown an unwillingness to disclose requested financial records (see below)
>
> • Motion for production: Mr. MacIntyre has attached a 'profitability analysis' as Exhibit B to the supplemental affidavit. There is no explanation as to the origin of data for the analysis. Balodis has repeatedly asked for SPM's audited financial statements to allow the lost profit claim to be fully assessed. SPM has refused to disclose that information (see exhibit N of my July 9 affidavit).
>
> To date, given the lack of evidence from SPM on this issue, Balodis has opted to not incur the expense of motion to produce further financial records. However, the admission of this information may require Balodis to file such a motion.
>
> • Expert Evidence: Given the very limited financial evidence tendered by SPM, Balodis has chosen to not obtain an expert accountant report on the damages claim. If this additional evidence is admitted, it may be necessary to

> obtain an expert report in response. Obtaining such a report close to trial will be costly and could pose some logistical challenges. In addition, if Balodis tenders such a report, would SPM want a rebuttal report? There would not appear to be enough time to do so.
>
> • Case Assessment/Settlement: The Respondents made ongoing assessments on strategy, risk exposure and settlement options throughout the litigation. Those assessments were based on its knowledge of the evidence against it that had been properly tendered with the Court. Admitting new, and potentially significant, evidence at this stage of the proceeding may alter the assessment of the case. The Respondents may have sought new evidence or explored different approaches if the evidence had been filed last year. Those opportunities cannot be re-visited at this late stage of the proceeding.
>
> The stage of the case is important. The Application was nearing the eve of trial in late January when it was adjourned. New evidence was not suggested at that time. All other litigation steps are now completed. SPM could have made this motion at any time after Balodis objected on March 3. Instead, SPM chose to focus on other procedural issues, including a motion to convert to an action.

[14] Balodis says that it does not want an adjournment at this time but if the Supplementary Affidavit is permitted then it may have to seek adjournment to allow for further discovery and the potential retention of an expert.

[15] In its reply brief, SPM asserts that the prejudice Balodis asserts is all conjecture and that it is telling that Balodis does not state that any of the possible further litigation steps identified will in fact be required. SPM will accommodate a further discovery of the affiant MacIntyre if that is requested by Balodis. As to the attached Exhibit "B", SPM says that the affiant is the directing mind of SPM and can speak to the financial performance of the business and that, in any event, the document would be admissible as a business record pursuant to the *Evidence Act*, R.S.N.S., c. 154.

[16] The Court notes in respect of this last point that the affidavit does not provide the necessary foundation for a court to determine this to be a business record.

[17] Having considered the submissions of both of the parties, I will not permit the filing of the Supplementary Affidavit. SPM has provided no explanation as to why that information was not produced in its affidavits and information produced prior to discovery. There is no suggestion that this information was not available at that time. SPM chose the Application in Court process and knew or should have

known that the measure of damages would include consideration of the profit margin of its operations. In addition to offering opinion evidence, the attached Exhibit "B", "Profitability Analysis", was prepared by a third party who is not on the list of witnesses and did not file an affidavit. This document is hearsay and opinion. A profit margin valuation is not a conclusion that a person of ordinary experience is able to make. I would have struck that attachment to the affidavit in any event. I observe that Balodis has pushed for full disclosure from SPM from the outset of this case.

[18] In summary, I find the balance of prejudice favours Balodis and accordingly the motion for leave to file the Supplementary Affidavit is dismissed.

Leave to amend/correct several affidavits

[19] In anticipation of some of Balodis' objections to SPM's affidavits, pursuant to *Rule* 5.15, SPM seeks leave to either amend or correct the affidavits of Les MacIntyre, Steve MacNamara, and Greg Fitzpatrick sworn and filed in October 2020 as well as the responding affidavits of Les MacIntyre, Steve MacNamara, and Greg Fitzpatrick sworn and filed in November 2020.

[20] The proposed amendment or correction would be to add a paragraph to each of these primary affidavits which would say:

> I have knowledge of the facts and matters to which I hereinafter depose, except where the same are stated on information and belief, in which case I verily believe them to be true.

[21] The purpose of this amendment/correction is to address Balodis' objection that some paragraphs in these affidavits do not state that the affiant verily believes the source of the information. This ignores the requirements of *Rule* 5.17 and *Rule* 39 that states:

> **39.02 Affidavit is to provide evidence**
>
> (1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.
>
> (2) An affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.

[22] Hearsay is not permitted on an Application in Court and accordingly a statement of source and belief is of no assistance to SPM.

[23] Further, the proposed amendment or correction seeks to operate as a blanket statement of information and belief. That is not a desirable approach. The source of the information remains unknown. It is that specific source in each instance that is key to determining the hearsay objection. The identity of the source is necessary to consider the issues of necessity and reliability under the principled exception to the hearsay rule. Whether the Balodis objections are properly taken are best determined on an analysis of each statement objected to and SPM's response as considered below.

[24] The motion for leave to amend/correct the affidavits is dismissed.

Objections to SPM affidavits

[25] Attached to the brief filed by Balodis is its Notice of Objection to Admissibility that contains all of its objections and the bases therefore. As previously noted, the objections fall into two categories: (i) inadmissible hearsay; and (ii) improper rebuttal evidence. For the Court's assistance, a "strike-through" copy of each affidavit was attached to the brief showing the portions to which objection was taken.

Hearsay

[26] Balodis says that, as a result of the SPM affiants not being present at the work site, they have resorted to impermissible hearsay to attempt to prove facts not within the direct knowledge of the affiants. The affiants have not identified the source of the information, nor their belief in its truth (hence the motion of SPM to amend/correct ruled on above). Balodis says that while they have the opportunity to cross-examine the affiants, improper affidavit evidence should not be admitted simply on the basis that it can be challenged by cross-examination. They say that this is particularly so in a case such as this one where the time for cross-examination of affiants is limited. Balodis says it should not have to spend its limited time for cross-examination on inadmissible evidence.

[27] In response, SPM says while Mr. MacIntyre may not have been frequently present on the job site in Pictou, it does not follow that he therefore lacked any knowledge of events at the site. His comments are based on his personal knowledge. Balodis has not established that the impugned portions of his affidavits

can only be hearsay and cannot derive from his personal knowledge or experience. As directing mind of SPM, he had knowledge of its plans and intentions, and this informed the evidence he provided in his affidavits. It is open to Balodis to test during cross-examination whether certain of his personal observations may not be reliable based on a lack of presence at the site (denied by SPM), but that on its own does not render his evidence inadmissible at this stage.

[28] SPM asserts that Mr. MacNamara was not discovered by Balodis and therefore Balodis does not know if his visits to the site were limited to the times referred to in his affidavits or not. His affidavits do not provide an exhaustive explanation of each of his appearances at the site. His evidence is presumed to be from his personal knowledge unless shown otherwise. If Balodis wishes to try to show otherwise during cross-examination, it may do so. His evidence should not be found to be inadmissible at this stage.

[29] SPM further asserts that Mr. Fitzpatrick's evidence is also presumed to be coming from his personal knowledge. To the extent that Balodis can show that he lacked personal knowledge of the events he is speaking of, they can raise this during cross-examination. As Master of the Strait Raven, Mr. Fitzpatrick was the point-man for SPM on the job site and was aware of SPM's plans and intentions and sought to carry them out through the project. In some portions of his affidavit he appears to speak for his crew, presumably based on his personal observations of their activities and his constant contact and instructions to them. Again, the question Balodis is raising is whether his observations are reliable or not, and that is an issue to be tested during cross-examination and not on this motion.

[30] Mr. MacIntyre, Mr. MacNamara, and Mr. Fitzpatrick all occupy managerial positions within SPM. In their respective capacities, they have personal knowledge of tasks they have set to the employees under their supervision and whether the employees followed through. Messrs. MacIntyre, MacNamara, and Fitzpatrick also have personal knowledge of SPM operational practices and SPM equipment which are described in various portions of their respective Affidavits.

[31] SPM asserts that even if some of the paragraphs and averments objected to by Balodis are hearsay, they are nonetheless admissible under the principled approach. Necessity and reliability form the basis of the principled approach (the recent restatement of which in *R v. McMorris*, 2020 ONCA 844, at paras. 18 to 34, was explicitly adopted by this Court in *Layes v. Layes*, 2021 NSSC 176 at para. 85. Lauwers J.A., writing for the Court in *McMorris* stated:

18 The appellant argues that the trial judge should have granted the defence application but that he correctly dismissed the Crown application.

(1) *The Governing Principles*

19 Bent's statements to Graham were plainly hearsay statements and were therefore presumptively inadmissible: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 (S.C.C.), at para. 3. Fish J. explained the dangers that render hearsay presumptively inadmissible in *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520 (S.C.C.), at para. 32:

> First, the declarant may have misperceived the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been wrongly remembered; third, the declarant may have narrated the relevant facts in an unintentionally misleading manner; and finally, the declarant may have knowingly made a false assertion. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination. [Emphasis in original.]

20 Trial judges may nevertheless admit hearsay evidence under one of the traditional exceptions to the hearsay rule or under the principled exception developed by the Supreme Court in *R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.), and *Khelawon*. Karakatsanis J. traced the evolution of the principled exception in *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865 (S.C.C.), at paras. 19-24.

21 The principled exception is intended to enhance the truth-seeking function of a trial and accurate fact-finding. Hearsay evidence is admissible under the principled exception if it "meets the twin threshold requirements of necessity and reliability": *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720 (S.C.C.), at para. 21. By the nature of these requirements, this must be "a flexible case-by-case examination": *Youvarajah*, at para. 21.

(a) Necessity

22 Necessity can be established when a witness dies, recants, or, as here, refuses to testify: *Bradshaw*, at para. 25; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.), at pp. 796-99. It is common ground that Bent's refusal to testify satisfied the necessity requirement in this case. The issue was whether Bent's statements met the threshold reliability test.

(b) Threshold Reliability

23 The trial judge's task is to determine threshold reliability on a balance of probabilities. Ultimate reliability is a matter for the trier of fact, in this case the jury.

24 Although it has been said that some form of cross-examination of the hearsay declarant is usually required, such as preliminary inquiry testimony or cross-examination of a recanting witness at trial, the whole point of the principled

exception to the hearsay rule is that exceptions are acceptable in certain circumstances.

25 The methodology for trial judges to follow in determining threshold reliability, was prescribed in *Bradshaw*, at paras. 26-28, and 30-32. I re-state the methodology in brief.

26 Threshold reliability is established by showing that cross-examination of the declarant is unnecessary because there are: (1) adequate substitutes for testing truth and accuracy (procedural reliability); or (2) sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability); or (3) a combination of elements of both procedural and substantive reliability (which plays no role in this case).

27 The trial judge must specify the statement's particular hearsay dangers regarding the declarant's perception, memory, narration, or sincerity, and must evaluate whether and how the dangers specific to the case can be overcome because the truth of the statement cannot be tested by the declarant's cross-examination.

(i) Procedural Reliability

28 Procedural reliability is established by showing that there are adequate substitutes for testing the hearsay evidence to permit the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement. Substitutes might be a video or audio recording of the declarant's statement, the presence of an oath, or a warning to the declarant about the consequences of lying.

(ii) Substantive Reliability

29 Substantive reliability is established by showing that the hearsay statement is inherently trustworthy because of the circumstances in which the declarant made it and evidence, if any, that corroborates it.

30 The standard for substantive reliability is high, but what is commonly referred to as the "circumstantial guarantee of trustworthiness" does not require absolute certainty. The trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process," for example, when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken," so that the statement is so reliable that it is "unlikely to change under cross-examination," or when the only likely explanation is that the statement is true: *Bradshaw*, at para. 31.

(iii) The Role of Corroborative Evidence

31 A trial judge may rely on corroborative evidence to find that a hearsay statement shows sufficient substantive reliability to justify a finding of threshold reliability: *Bradshaw*, at para. 4. Karakatsanis J. set out the methodology and the principles for the use of corroborative evidence in the substantive reliability analysis in *Bradshaw*, at para. 57:

> 1. identify the material aspects of the hearsay statement that are tendered for their truth;
>
> 2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
>
> 3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
>
> 4. determine whether, given the circumstances of the case, the corroborative evidence led at the voir dire rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

32 Commentators have expressed concern that a degree of uncertainty might have been injected into the test by Karakatsanis J.'s use of the words "alternative, even speculative, explanations for the statement," at paras. 48 and 57 of *R. v. Bradshaw*: See Hamish Stewart, "*The Future of the Principled Approach to Hearsay*" (2018) 23 Can. Crim. L. Rev. 183 (S.C.C.) ; Chris D.L. Hunt and Micah Rankin, "*R. v. Bradshaw: The Principled Approach to Hearsay Revisited*" (2018) 22 Int'l J. Evidence & Proof 68.

33 I do not share this concern. In my view Karakatsanis J. was describing the trial judge's anticipated reasoning process, not its culmination. The trial judge is required to consider "alternative, even speculative, explanations for the statement" while thinking through the reliability analysis. But speculative explanations must survive scrutiny under the lens of para. 49 in order to warrant a role in the determination of threshold reliability:

> While the declarant's truthfulness or accuracy must be more likely than any of the alternative explanations, this is not sufficient. Rather, the fact that the threshold reliability analysis takes place on a balance of probabilities means that, based on the circumstances and any evidence led on <u>voir dire, the trial judge must be able to rule out any plausible alternative explanations on a balance of probabilities.</u>
>
> [Emphasis added.]

34 Any speculative explanation, in short, must be plausible on a balance of probabilities and any speculative explanation that does not survive such scrutiny is to be rejected. Any explanation left over becomes the plausible candidate for assessment at step four; "the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement." In other words, not just any speculative explanation or fanciful idea suffices to abort the threshold reliability analysis — only those that are, on reflection, reasonably plausible. I take this to have been the intention of Karakatsanis J. in *Bradshaw*. This court's decision in *R. v. Nurse*, 2019 ONCA 260 (Ont. C.A.), takes that approach at paras. 105 ff, and so demonstrates that the test can be met, despite Professor Stewart's concern that the *Bradshaw* test sets "a

> standard that is almost impossible to meet": Stewart, at p. 193. See also the comment by Lisa Dufraimont on *Nurse* to the same effect: 54 C.R. (7th). And see *R. v. Tsega*, 2019 ONCA 111 (Ont. C.A.), leave to appeal refused, [2019] S.C.C.A. No. 106 (S.C.C.), at para. 26, per Hourigan J.A.

[32] SPM asserts, without authority, that necessity and reliability in this context are informed not only by *Rules* 39.02 and 39.04 but must also take into account the *Rules'* overarching purpose set out in *Rule* 1.01:

> These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[33] SPM concludes its argument by stating that the evidence given by Les MacIntyre, Steve MacNamara and Greg Fitzpatrick meets the requirements for necessity as it would be impractical, costly and disproportionate to obtain affidavits from each and every SPM employee and crew member rather than permitting their supervisors and managers to provide evidence about the project operations. SPM says Balodis employed the same rationale in limiting its evidence to that of Brandon Balodis and Cory Williams. The principal issue is reliability and that can be tested by cross-examination. The probative value of the evidence outweighs any prejudice. Striking these parts of the affidavits would impoverish the fact-finding process contrary to the objects of the *Rules* and hamper achieving a just result in these proceedings.

[34] With respect, SPM has mistakenly advanced the object of the *Rules* as satisfying the evidentiary requirement of necessity as part of the principled exception. No authority was provided to support this argument. The following passage from Paciocco and Stuesser, *The Law of Evidence*, 7th ed., (Toronto: Irwin Law Inc., 2015), at p.131, instructs on the requirement in *R v. Khan*, [1990] 2 S.C.R. 531 for there to be "reasonable necessity",:

> "Reasonable necessity" requires that "reasonable efforts" be undertaken to obtain the direct evidence of the witness . The requirement of necessity is there in part to protect the integrity of the trial process. Without a requirement of necessity the introduction of out-of-court statements could replace the calling of witnesses, which would deprive the opposing party of the opportunity to test the evidence through cross examination, even where effective cross examination is entirely possible.
>
> …
>
> As a general proposition, therefore, where a witness is physically available, and there is no evidence that he or she should suffer trauma in testifying, then the

> witness should be called. There is a spectrum of trauma. Proof of severe trauma is not required. On the other hand, it is not enough that a witness is unwilling to testify. Fear or disinclination without more does not constitute necessity.
>
> [Authorities omitted]

[35] I conclude that if the statement objected to is determined to be hearsay, it is not admissible under the principled exception.

[36] I pause here to note that it was SPM's choice to proceed with this matter as an Application in Court. This case is instructive as to the restrictions within that chosen manner of litigation that require careful consideration by a party at the time of choosing to proceed by Application or Action. In addition, at the time of the Motion for Directions, SPM could have identified the need for such witnesses to testify without filing affidavits. Balodis would then have had the option to examine them on discovery and could have cross-examined them at the hearing. Obviously, affidavits could have been obtained from them. There is no suggestion that they are unavailable, unable, or unwilling to testify. There was no agreement between the parties that such hearsay evidence would be admitted to reduce the expense of litigation or shorten the time necessary for the hearing.

[37] As to the merits of the specific objections based on hearsay, I have in the attached Appendix "A" reviewed each of the statements objected to and made a ruling as to its admissibility. In many cases there is insufficient evidence to determine whether the statement is or is not within the personal knowledge of the affiant. That can be explored on cross-examination. Ultimately, it is for the Court to decide the case based upon admissible evidence.

Rebuttal

[38] Balodis says that the parties are each advancing claims and counterclaims. As Sovereign had to commence a separate Application (now joined), SPM is listed as both an Applicant and a Respondent. At the Motion for Date and Directions, a standard, three step affidavit timeline was established, calling for Applicant affidavits, Respondent Affidavits and rebuttals. The affidavit evidence filed on this motion discloses SPM experienced issues with production of documents in the Fall of 2020. Despite the delayed production, SPM wanted to proceed with the scheduled hearing dates (then March 2021) within a very tight timeline. In an effort to accommodate that goal, the parties agreed, without court approval, to limit the affidavits to a two-step process: initial affidavits dealing with both claims and defences based on the pleadings and the documents exchanged by October 30,

2020; rebuttal affidavits by November 16, 2020. The agreement is outlined in an email between counsel dated October 13, 2020.

[39] Balodis argues that the parties agreed that the rebuttal affidavits would be confined to new matters raised by the primary affidavits and, despite this agreement, SPM included fairly extensive evidence in its rebuttal affidavits that was within its knowledge at the time of the primary affidavits and obviously material based on the pleadings. In doing so, SPM gained an unfair advantage. First, it did not put its best foot forward with complete evidence regarding the issues in dispute. Second, by withholding information until the rebuttal affidavit phase, it was able to provide that evidence without an opportunity for Balodis to respond.

[40] Balodis says that rebuttal evidence has limited scope. Applicants are required to put their best foot forward in their primary affidavits and should not be allowed to "split" their evidence as this is unfair to the respondent who has no further right to reply.

[41] In response, SPM acknowledges that at the Motion for Directions the Court had set deadlines for affidavits, responding affidavits and reply affidavits. The parties agreed to streamline the process and that "reply" affidavits were unnecessary, however, SPM says that there was no agreement between counsel to limit what evidence could be included in the responding affidavits. There was no agreement that the responding affidavits would be limited to rebuttal evidence in respect of new issues raised in the primary affidavits.

[42] As to the merits, SPM says that in any event the statements objected to are admissible rebuttal evidence. SPM says that the statements do not offend the rule against case splitting or introducing new evidence, they only address issues newly-raised or expanded by Balodis.

[43] SPM referred the Court to the following passage from *960222 Ontario Inc. v. Sterling Rentals Corp*., 2020 ONSC 657 addressing the principles of case splitting, at para 28:

> 28 In the recent case of *Johnson v. North American Palladium Ltd*., 2018 ONSC 4496 (Ont. S.C.J.) Perrell, J. reviewed the principles concerning the rule against case-splitting in the context of the delivery of reply affidavit material at paras. 12-15, and 45-53. In doing so he referenced the relevant authorities including the case of *Lockridge v. Ontario (Director, Ministry of the Environment),* 2013 ONSC 6935 (Ont. Div. Ct.).

29 The relevant principles which may be derived from *Johnson* include the following:

(a) the law against case-splitting regulates the delivery of a reply affidavit as well as the argument at the hearing of the motion or the application;

(b) where the parties or the Court set a timetable for the exchange of affidavits for a motion or application, the reply evidence should generally be limited to proper reply, that is, with evidence that complies with the rule against case-splitting;

(c) the rule against case-splitting restricts reply evidence to matters raised by the defendant and does not permit the plaintiff to deliver new evidence;

(d) the rationale for the rule against case splitting is that the defendant is entitled to know and to respond to the case being made against him or her and therefore the plaintiff should not split his or her case and take the opponent by surprise and without an opportunity to respond;

(e) reply evidence is admissible only when the defendant has raised a new matter that could not have been reasonably anticipated by the plaintiff or where the reply evidence is in response to an issue enlarged by the opponent in a manner that could not have been reasonably foreseen;

(f) the standard for permissible reply evidence is less strict on a motion than the standard applied at trial. When the reply evidence for a motion is introduced before the cross-examination and the hearing on the merits, a less rigorous standard applies;

(g) the court has a discretion on a motion to admit the improper reply evidence and to allow the opponent to respond with a sur-reply affidavit;

(h) ultimately the question is a balancing exercise with the goal of ensuring that each party has a fair opportunity to present its case and to respond to the case put forward by the other party;

(i) where the parties have agreed to a timetable for delivery of materials on a motion, they are taken to have agreed to the rules that govern reply evidence;

(j) the plaintiff should not be permitted to set a "litigation trap" in making the defendant respond to a case they thought they had to meet and then, by means of new reply evidence, make them respond to a different case;

(k) reply evidence should not be used to correct deficiencies in the plaintiff's case in-chief;

(l) each case of determining whether to permit a reply affidavit that may amount to case-splitting must be decided in accordance with its own circumstances and exigencies. In some cases, it will be appropriate to admit the reply evidence and to allow a sur-reply or to impose terms.

[44] SPM argues that there has been no surprise and no prejudice to Balodis. Balodis has had the November 2020 affidavits for many months and had full opportunity to examine all of the SPM affiants on their evidence at discovery held in December 2020. Balodis has never raised an objection that the affidavits provided SPM with an unfair advantage as it now asserts, nor did it make any request to file rebuttal affidavit evidence. SPM asserts that Balodis has not identified any further evidence that it would have led in reply and has not explained how it would be prejudiced if the impugned statements are admitted into evidence.

[45] The evidence before the Court on this motion is not sufficient to prove that there was an agreement between counsel as alleged by Balodis. The email dated October 13, 2020 between counsel confirms the deadlines for filing primary and rebuttal affidavits but is silent as to any restriction on what can be included in the rebuttal affidavits. SPM counsel have filed affidavits stating that they did not understand there to be any restriction on the content of the rebuttal affidavits. Counsel for Balodis clearly thought otherwise. I am unable to find that there was agreement to this term restricting the scope of the rebuttal affidavits.

[46] In the Notice of Objection, Balodis has identified the paragraphs or portions thereof they say contain improper rebuttal evidence. I have reviewed the impugned passages in the context of the summary of the law provided in *Sterling Rentals*. In the factual context of this case, I find that Balodis had more than adequate time to respond to the impugned evidence, particularly when the trial dates were adjourned from March 2021 to September 2021. There is no surprise or unfairness caused to Balodis by admitting this evidence.

[47] Accordingly, the impugned statements identified by Balodis in the Notice of Objection as improper rebuttal will be admitted into evidence and the motion to strike them is dismissed.

<u>Objections to Balodis affidavits</u>

[48] SPM objects to a number of paragraphs or portions thereof in the affidavits of Brandon Balodis and Cory Williams. These were identified in a Notice of Objection signed June 3, 2021. This was dated and delivered after the April 9, 2021 deadline that the parties had agreed to exchange their objections. SPM notes that it was nonetheless filed before the Finish Date in accordance with *Rule* 5.16(5). The Court also notes that it was very soon after SPM's motion to convert

was denied on May 31, 2021. SPM makes the further assertion that in any event the Court retains authority to exclude inadmissible evidence to preserve the integrity of the fact finding process.

[49] As to the merits, SPM says that the identified passages are inadmissible as they contain lay opinion that does not meet the test as discussed by Leblanc J. in *CNR*, above.

[50] In response, Balodis says that the April 9, 2021 deadline was chosen by SPM and agreed to by the parties after the amendments to *Rule* 5 requiring a Finish Date. No Finish Date was set by the Court. That lack of date should not give SPM *carte blanche* to file objections when it chooses. The written agreement of the parties should govern.

[51] As to the merits, Balodis says that the objections on the basis that the statements are opinion are primarily focused on the use of the words "responsible" or "mitigate". In the full context of the lengthy affidavits of Mr. Balodis and Mr. Williams, the evidence is largely statements of fact based on the context of their personal involvement in the projects and personal observations.

[52] The litigation process works best when counsel manage the litigation themselves in an efficient and cost effective way. Agreements made between counsel should have some meaning and a degree of reasonableness must govern when a deadline is missed. However, when it comes to issues of admissible evidence, the Court has an overarching obligation to act as gatekeeper and see that disputes are resolved based on admissible evidence. Accordingly, I will accept the late objection filed by SPM and consider the objections made to the Balodis affidavits.

[53] As to the merits, I have in the attached Appendix "B" reviewed each of the statements objected to and made a ruling as to its admissibility.

Conclusion

[54] In summary I find:

1. Leave to admit the supplementary affidavit of Les MacIntyre is denied;
2. Leave to amend/correct the SPM affidavits is denied;

3. The motion to strike passages of the SPM affidavits as improper rebuttal is dismissed;

4. The motion to strike passages of the SPM affidavits as improper hearsay is allowed in part as indicated on Appendix "A" to this Decision;

5. The motion to strike passages of the Balodis affidavits as improper opinion is dismissed as indicated on Appendix "B" to this Decision.

[55] The parties should prepare "strike-through" copies of the affidavits to conform with my admissibility rulings to be entered as exhibits at the hearing.

[56] As to costs, Balodis was substantially successful on both motions. I award Balodis costs in the amount of $1,000 inclusive of disbursements payable at the conclusion of the proceeding.

Norton, J.

Appendix "A"

LES MacINTYRE AFFIDAVIT

Item	Paragraph	Paragraph Portion to be Struck	Basis for exclusion	Ruling
1.	30.	We were not able to use the SPM 85 as much as anticipated for rock haulage due to its low freeboard when fully laden. The low freeboard prevented the Strait Raven from tying up alongside it. Handling it outside the harbour was an issue as the small tug Wikit could not safely work in the sea and tide.	Hearsay. The affiant fails to identify the source of this information.	Admitted – no evidence not within knowledge of affiant
2.	32	...and said, "I have bad news. The barge is tipped 45 degrees, the barge is gone and most of the rock is gone."	Hearsay. Mr. Forgeron was an employee of SPM, yet he has not provided an affidavit. The affiant fails to indicate his belief in the truth of the information.	Struck

3.	38	It was obvious by this time that Balodis did not want to discuss things with us.	Hearsay. The affiant fails to identify the source of this information.	Admitted – no evidence not within knowledge of affiant
4.	39	On or around October 1 to 14, 2019, divers were unable to refloat the barge. SPM crews went to Pictou daily to work on refloating the barge.	Hearsay. The affiant fails to identify the source of this information.	Admitted – no evidence not within knowledge of affiant
5.	45	Entire paragraph.	Hearsay. The affiant fails to identify the source of this information.	Admitted – Fitzgerald will be available for cross

REBUTTAL AFFIDAVIT OF LES McINTYRE

Item	Paragraph	Affidavit Portion to be Struck	Basis for exclusion	Ruling
1.	4	They have significant experience of this nature.	Hearsay. The Affiant fails to identify the source of this information.	Admitted – no evidence not within knowledge of affiant
2.	4	The Strait Raven towed the BI barge with an excavator on it at the start of the project. I later learned that barge was used by BI for the dredging work	Hearsay. The Affiants fails to identify the source of this information	Admitted – no evidence not within knowledge of affiant

		on the Pictou project.		
3.	5.	We maintain it to a high standard to enable us to secure work with high margins such as transporting oil rig and industrial modules, use as a geotech drill platform, and the carriage of ship's stores and freight. Unlike comparable barges, we have a policy of coating the interior of the tanks every 5 years and replacing shell plating if it shows signs of pitting or damage. For this job, I had our yard crew repair all tanks and hatches (as required) and ensure the gaskets and dogs were in good shape.	Not proper for a rebuttal affidavit. The condition of the SPM 125 was in issue from the outset based on the pleadings.	Admitted
4.	7	Entire paragraph	Not proper for a rebuttal affidavit. The condition of the SPM 125 was in issue from the outset based on the pleadings.	Admitted
5.	8	Entire paragraph	Not proper for a rebuttal affidavit. The	Admitted

			condition of the SPM 125 was in issue from the outset based on the pleadings.	
6.	9	Entire paragraph	Not proper for a rebuttal affidavit. The condition of the SPM 125 was in issue from the outset based on the pleadings.	Admitted
7.	10	On this job, there was extra freeboard available.	Hearsay. The affiant was not present in Pictou during the project to see the loaded 125 barge. He fails to provide the source of this information.	Admitted – no evidence not within knowledge of affiant
8.	11	Entire paragraph	Hearsay. The Affiant fails to identify the source of this information.	Admitted – no evidence not within knowledge of affiant
9.	12	Entire paragraph	This is not proper rebuttal evidence. It is commentary/ argument that could have been set out in the affiant's original affidavit.	Admitted
10.	13	Entire paragraph	This is not proper rebuttal evidence. It is commentary/argument that could have been set out in the affiant's original affidavit.	Admitted
11.	14	Entire paragraph	This is not proper rebuttal evidence. It is commentary/argument	Admitted

			that could have been set out in the affiant's original affidavit.	
12.	16	Entire paragraph	This is not proper rebuttal evidence. It is commentary/ argument that could have been set out in the affiant's original affidavit.	Admitted
13.	22	Entire paragraph	This is not proper rebuttal evidence. Mr. Balodis does not make the alleged claim this at paragraph 31.	Admitted
14.	23.	"...but told him in his office during one of our meetings that such a survey would cost around $15,000. I mentioned on numerous occasions that the SPM 125 Barge would require 8' of water depth to give us room to maneuver when we visited the Aecon wharf with Mr. Balodis and Mr. MacDougall. I specifically mentioned that they would have to watch the wharf	This is not proper rebuttal evidence. It is commentary/argument that could have been set out in the affiant's original affidavit.	Admitted

		depth at Aecon. At that time, both Mr. Balodis and Mr. MacDougall stated that that was fine."		
15.	27	"...an experienced tug captain who had worked for Atlantic Towing and McKeil Marine Ltd.	Hearsay. The affiant does not provide the name of the captain, the source of the tug captain's experience, or any information to support his alleged credentials. The captain has not provided any affidavit in this matter.	Admitted – no evidence not within knowledge of affiant
16.	27	I am aware that the captain had some concerns regarding the weather conditions on those days.	Hearsay. The affiant does not provide the source of that information.	Admitted – no evidence not within knowledge of affiant
17.	27	I remember that there was some wind and swell for a few days during that period.	Hearsay. The affiant was not present in Pictou at that time. He does not provide the source of that information.	Admitted – no evidence not within knowledge of affiant
18.	28	SPM employees were not allowed to be at the Aecon facility or in the vicinity of the barges when BI was loading.	Hearsay. The affiant does not provide the source of that information.	Admitted – no evidence not within knowledge of affiant
19.	28	It would not have been safe for our personnel to be on	Hearsay. The affiant was not present during the barge	Admitted – no evidence not within

		the barge while B1 was loading.	loading process. He does not provide the source of that information.	knowledge of affiant
20.	29	Entire paragraph	Hearsay. The affiant was not present during the barge loading process. He does not provide the source of that information.	Admitted – no evidence not within knowledge of affiant
21.	30	Entire paragraph.	Hearsay. The affiant does not provide the source of that information.	Admitted – no evidence not within knowledge of affiant
22.	31	When hauling rock like this, you are constantly looking in the tanks to make sure that there are no punctures. The SPM crew was constantly looking for the ingress of water.	Hearsay. The affiant never travelled on the barge during the project. He does not provide the source of that information.	Admitted – no evidence not within knowledge of affiant
23.	32	The crack was probably caused by the excavator bucket or a piece of armor rock hitting the comer while discharging.	Opinion and/or hearsay. The affiant was rarely present during the project. He does not provide the source of this information and provides no basis upon which to provide an opinion as to the cause of the damage.	Struck - opinion or speculation with no foundation.

24.	32	The crack could not be repaired on location but was not a concern as it would only weep a small amount of water over time. It would require a half-hour of pumping using a small pump. Such pumping is not unusual in the barge industry and was known to BI's employees who pumped the SPM 125 as required	Hearsay. The affiant was rarely present during the project. He does not provide the source of this information.	Admitted – no evidence not within knowledge of affiant
25.	33	Far more significant damage to the SPM 125 was done by the teeth of the BI excavator and was repaired without incident. SPM sent workers to Pictou multiple times to make repairs to the SPM 125 where the excavator or rocks had damaged it.	Hearsay. The affiant was rarely present during the project. He does not provide the source of any of this information.	Admitted – no evidence not within knowledge of affiant
26.	33	There was initially a cover on the teeth, but it disappeared after day 1 of the project	Hearsay. The affiant was not present at this time. He does not provide the source of this information.	Admitted – no evidence not within knowledge of affiant

		without explanation. On one occasion, repairs were done on site by the operator of the Wikit, Willy McGee. On other occasions, our crew would do the repairs at a third-party wharf because Aecon we were not allowed at that site.		
27.	34	SPM does maintain a watch person on the Strait Raven, 24 hours a day, in order to monitor SPM's other equipment for this project. The Strait Raven and the additional equipment are not at the BI loading site or inside the Aecon wharf. The SPM 125 was docked at the BI loading sit some 75-120 meters away. The SPM watch person could not have accessed the Aecon facility nor maintained an	Hearsay. The affiant was rarely present on site during the project. He does not provide the source of this information.	Admitted – no evidence not within knowledge of affiant

		effective watch on the barge, much less respond in case of an emergency.		
28.	36	Entire paragraph.	This is not proper rebuttal evidence. The affiant does not provide a date of this event. It appears to be a repeat description of the event at paragraphs 37 and 38 of his original affidavit.	Admitted
29.	37	Entire paragraph	This is not proper rebuttal evidence.	Admitted
30.	38	".. .it was in the same shape as when it initially arrived in Pictou."	Hearsay. The affiant was not present in Pictou when the SPM arrived on either occasion. He does not provide the source of this information	Admitted – no evidence not within knowledge of affiant

STEPHEN MCNAMARA AFFIDAVIT

Item	**Paragraph**	**Paragraph portion to be Struck**	**Basis for exclusion**	**Ruling**
1.	21	Underwater portions of the inspections were performed by SPM's diver, Dwayne Sampson.	Hearsay. Mr. Sampson is not an affiant in this case. There are no records regarding the work he conducted. The	Admitted – no evidence not within knowledge of affiant

			affiant cannot speak to the extent or the results of Mr. Sampson's inspections.	
2.	22	After the vessels leave the SPM dockyard, they are inspected regularly by the crew who report necessary minor repairs through work orders. Often, necessary repairs are identified and performed before a work order is received.	Hearsay. The affiant was not present on these vessels during the dates in issue. He cannot speak to what inspections or repairs were done. He fails to identify the source of this information.	Admitted – no evidence not within knowledge of affiant
3.	24	Entire paragraph	Hearsay. The affiant does not indicate he was present for this passing of information or even when the event occurred. He fails to	Admitted – Les MacIntyre and Greg Fitzpatrick will be available for cross-examination

			identify the source of the other information. The affiant did not attend at Pictou Island.	
4.	25	Entire paragraph	Hearsay. The affiant fails to identify when this communication occurred or the source of the Balodis information.	Admitted – no evidence not within knowledge of affiant. Les MacIntyre will be available for cross-examination
5.	27	The lugs and d-rings to which chains or cables might have been attached to would have been buried beneath the gravel on the barge. Due to the manner in which Balodis loaded rock and gravel onto the barge, there was nothing to secure the excavator to.	Hearsay. There is no evidence the affiant was present at any time during this project to view the barge loaded with gravel. He fails to provide the source of this information.	Admitted – no evidence not within knowledge of affiant

6.	28	SPM personnel were not allowed to be on the barge or the loading site during loading...The excavator was placed midship on an 8" to 10" gravel base on the barge at this location by Balodis' crew	Hearsay. There is no evidence the affiant was present at any time to view the manner in which Balodis loaded the barge. He fails to provide the source of this information.	Admitted – no evidence not within knowledge of affiant
7.	29	When not in use, the remaining SPM vessels were docked at the wharf outside of Aecon's gated loading area, approximately a few hundred metres from the Balodis ramp.	Hearsay. The affiant was rarely present on site during this project to view the location of the SPM vessels. He fails to provide the source of this information.	Admitted – no evidence not within knowledge of affiant
8.	30	Entire paragraph	Hearsay. The affiant was rarely present	Admitted – no evidence not within

			on site during this project to determine the location of SPM employees. He fails to provide the source of this information.	knowledge of affiant
9.	31	On September 29, 2019, I was informed that the 125 Barge had tipped over while loaded and tied to the ramp at Pictou Shipyard and that both the rocks and the excavator had fallen into the water.	Hearsay. The affiant fails to identify the source of this information.	Admitted – not for proof of contents but as narrative
10.	35	There was no communication between Balodis and SPM.	Hearsay. The affiant fails to provide the source of this information. He was not always present in Pictou during this time frame and cannot speak to what may have been communicated between employees	Admitted – no evidence not within knowledge of affiant

			of the companies. He provides no evidence of any efforts by him to poll SPM employees on this subject.	

REBUTTAL AFFIDAVIT OF STEPHEN MCNAMARA

Item	Paragraph	Paragraph portion to be struck	Basis for exclusion	Ruling
1.	6	Entire paragraph	Improper information for rebuttal affidavit. The affiant has misquoted paragraph 40 and 41 of Mr. Balodis' 10 affidavit. It does not claim the survey was provided to SPM in June of 2019.	Admitted
6.	9	It otherwise returned to Aecon wharf in the same	Hearsay. The affiant was	Admitted – no evidence

		condition in which it had arrived in July 2019.	not present at the Aecon wharf when the SPM arrived on either occasion. He fails to cite the source of his information.	not within knowledge of affiant

AFFIDAVIT OF GREG FITZPATRICK

Item	Paragraph	Paragraph portion to be struck	Basis for exclusion	Ruling
1.	23	We were told that for safety reasons, Aecon did not permit SPM's employees to remain at the location of the Balodis ramp as this area is unlit at night	Hearsay. The affiant fails to identify the source of this information.	Admitted – no evidence not within knowledge of affiant
2.	23	Similarly, SPM employees were not permitted on site during loading.	Hearsay. The affiant does not identify the source of this restriction.	Admitted – no evidence not within knowledge of affiant

REBUTTAL AFFIDAVIT OF GREG FITZPATRICK

Item	Paragraph	Affidavit Portion to be struck	Basis for exclusion	Ruling
1.	5	Entire paragraph	Not proper rebuttal evidence. This	Admitted

			evidence should have been part of original affidavit. Furthermore, it is hearsay. The affiant does not indicate his belief in the truth of Mr. Williams' statement. The affiant provides virtually no information regarding the date or circumstances to allow the evidence to be tested.	
2.	7	Entire paragraph	Not proper rebuttal evidence. This evidence should have been part of original affidavit as	Admitted

			the manner of loading of the barge during the project was clearly in issue based on the pleadings.	
4.	8	Entire paragraph	Not proper rebuttal evidence. This evidence should have been part of original affidavit as the manner of loading of the barge during the project was clearly in issue based on the pleadings.	Admitted
5.	9	Entire paragraph	Not proper rebuttal evidence. This evidence should have been part of original affidavit as	Admitted

			the manner of loading of the barge during the project was clearly in issue based on the pleadings.	

AFFIDAVIT OF CLAUDE COLEMAN

Item	Paragraph	Affidavit Portion to be Struck	Basis for exclusion	Ruling
1.	8	…which I understand made hourly rounds inside the yard.	Hearsay. The affiant fails to identify the source of this information.	Admitted – no evidence not within knowledge of affiant

Appendix "B"

Brandon Balodis Affidavit

- *Item 17 (Paragraph 55)*

Objected portion: "The decking covering was not complete and what was installed was done poorly."

Basis for objection: A conclusion unsubstantiated by factual observation.

Balodis position: As noted earlier in paragraph 55, Mr. Balodis attended at the wharf after the barge arrived and observed its condition. His comments were his own personal observations made on what he saw that day. After the loss, the barge was no longer in the same condition as it was at the start of the project. The ultimate decision regarding the barge's condition will be for the Court, after it hears from all parties. SPM will have an opportunity to cross examine Mr. Balodis on his factual observations, including references to his notes and photographs taken on the date in question (at Exhibit G and H of his affidavit).

RULING: Admitted – personal observation.

- *Item 22 (Paragraph 63)*

Objected portion: "BI relied fully on SPM for direction and guidance regarding loading…"

Basis for objection: A conclusion unsubstantiated by factual observation and an attempt to offer legal opinion.

Balodis position: Mr. Balodis is the President and controlling mind of Balodis Inc. His comment is a statement of fact, setting out his company's actions during the project. It is not a legal opinion. The factual accuracy of that comment can be tested on cross-examination. The legal impact of any reliance will be for the Court to determine.

RULING: Admitted – statement of fact.

- *Item 25 (Paragraph 70)*

Objected portion: “BI relied on SPM to provide safe and reliable barges for the Project.”

Basis for objection: A conclusion unsubstantiated by factual observation and an attempt to offer legal opinion.

Balodis position: We repeat our comments from the above item. This is a statement of fact, setting out his company’s reliance during the project. It is not a legal opinion.

RULING: Admitted – statement of fact.

- *Item 26 (Paragraph 71)*

Objected portion: SPM knew it was fully responsible for monitoring and securing its own vessels and barges during the Project, including the SPM 125.

Basis for objection: legal opinion.

Balodis position: This is not provided as a legal opinion. What SPM knew about ‘monitoring and securing its own vessels and barges during the Project’ will be a factual issue at trial. This comment by Mr. Balodis is based on his communications with SPM and, as referenced later in same paragraph, the fact SPM had a watch person aboard its vessel.

RULING: Admitted – statement of fact.

- *Item 29 (Paragraph 74)*

Objected portion: “It was my understanding that, in those circumstances, SPM watchmen - situated on the nearby ‘Strait Raven’ – were responsible for overseeing the loaded barges and taking action to address any issue that might arise.”

Basis for objection: A conclusion unsubstantiated by factual observation and an attempt to offer legal opinion.

Balodis position: This is not a legal opinion. Mr. Balodis is merely providing his understanding based on his observations and communications with SPM.

RULING: Admitted – statement of fact as to his understanding.

- *Item 33 (Paragraph 98)*

Objected portion: "This is not accurate and SPM should not be entitled to full payment under the Contract."

Basis for objection: Legal opinion.

Balodis position: This comment is not a legal opinion. Upon reviewing the entire paragraph, it is clear Mr. Balodis was merely responding to the SPM allegation that its "…vessels, barges and crew were ready, willing and able to do the dredging work on Pictou Island…".

RULING: Admitted – statement of fact as to Balodis position.

- *Item 34 (Paragraph 99)*

Objected portion: "I viewed the incident as avoidable and caused by SPM's negligence."

Basis for objection: Legal opinion.

Balodis position: This comment is not a legal opinion. Upon reviewing the entire paragraph, it is clear Mr. Balodis was simply explaining why he was upset and frustrated. The decision on whether SPM was negligent will be for ruling by the Court.

RULING: Admitted – statement of fact as to his personal view but of questionable relevance.

Cory Williams Affidavit

- *Item 1 (Paragraph 34)*

Objected portion: “They were not caused by BI.”

Basis for objection: A conclusion without factual foundation.

Balodis position: The word ‘they’ in this paragraph refers solely to certain holes in the barge. Mr. Williams’ affidavit explains that he worked on and around the barge throughout the entire project. He also states the holes were present from the start of the project. His conclusion is based on his factual observations. It can be tested on cross-examination.

RULING: Admitted – personal observation.

- *Item 2 (Paragraph 42)*

Objected portion: “I did not consider this to be BI’s responsibility…”

Basis for objection: Legal opinion.

Balodis position: This statement is not a legal opinion. It is a statement of fact from Mr. Williams’ regarding his own belief regarding pumping of water from the barge.

RULING: Admitted – statement of fact as to his perspective of job responsibility.

- *Item 5 (Paragraph 48)*

Objected portion: “However, as SPM was responsible for the safety and security of the SPM 125…”

Basis for objection: Legal opinion.

Balodis position: This statement is not a legal opinion. It is Mr. Williams own belief as to which party was to generally take care of the barge in question.

RULING: Admitted – statement of fact of personal view but of questionable relevance.

- *Item 7 (Paragraph 48)*

Objected portion: "…I trusted the SPM employees would advise BI if the SPM 125 was unsafe or unstable."

Basis for objection: Legal opinion

Balodis position: This statement is not a legal opinion. It is a statement of fact from Mr. Williams' regarding his own belief.

RULING: Admitted – statement of fact of personal perspective.

- *Item 9 (Paragraph 63)*

Objected portion: "I did not consider pumping of the SPM 125 tanks part of my job. I considered this work to be SPM's responsibility."

Basis for objection: Legal opinion

Balodis position: This statement is not a legal opinion. It is a statement of fact regarding his own belief on the date of loss.

RULING: Admitted – statement of fact of personal view of job responsibility.

- *Item 11 (Paragraph 77)*

Objected portion: "…mitigate the losses associated with the incident."

Basis for objection: Legal opinion.

Balodis position: This statement is not a legal opinion, it is merely a comment on his own activities on the dates in questions. Ultimately, whether Balodis properly mitigated its losses will be an issue for determination by the Court.

RULING: Admitted – mitigate is not an exclusively legal term.

- *Item 12 (Paragraph 78)*

Objected portion: "…continuing to try and mitigate losses."

Basis for objection: Legal opinion.

Balodis position: We repeat our comments from the above item.

RULING: Admitted - for the same reason as item 11.

- *Item 13 (Paragraph 81)*

Objected portion: "It was clear that significant repairs had been conducted by SPM after the tipping."

Basis for objection: A conclusion unsubstantiated by factual observation

Balodis position: SPM takes with the issue of the adjective 'significant' to describe the volume of barge repairs conducted after the loss. Mr. Williams' comment is a statement of fact based on his observations. The extent of repairs actually conducted will be a factual determination by the Court at the end of the hearing.

RULING: Admitted – statement of personal observation.