SUPREME COURT OF NOVA SCOTIA

Citation: *Colbourne Chrysler Dodge Ram Limited v. MacDonald*, 2023 NSSC 309

Date: 20230925
Docket: No. 509902
Registry: Sydney

Between:

Colbourne Chrysler Dodge Ram Limited

Plaintiff

v.

Jim MacDonald, Chris MacDonald, Mark MacDonald, Ron MacDonald, The Estate of Winifred MacDonald, Jim MacDonald Family Trust, Chris MacDonald Family Trust, Mark MacDonald Family Trust, Ron MacDonald Family Trust, MacDonald Auto Holdings Limited

Defendants

v.

Rodney Colbourne, Steve MacDougall, and Matt Denny

Third Parties

Judge: The Honourable Justice John A. Keith

Heard: July 31, 2023, in Halifax, Nova Scotia

Counsel: Tony Mozvik, K.C. and David Irvine, for the Plaintiff
(Responding Party in this motion)
Christopher Conohan, for the Defendants
(Moving Party in this motion)

By the Court:

ISSUE AND BRIEF CONCLUSION

[1] The Defendants filed a motion to stay this action on the basis that all the claims and defences in issue should be subsumed within an arbitration proceeding previously commenced by the Defendants. In support of its motion for a stay, the Defendants filed the Affidavit of Jim MacDonald on May 11, 2022 (the "**MacDonald Affidavit**"). The MacDonald Affidavit address the allegations made by the Plaintiff in this action.

[2] The Plaintiff opposes the stay motion; and it filed the Affidavit of Brad Jacobs sworn August 25, 2022 (the "**Jacobs Affidavit**") and the Affidavit of John Gillis sworn August 25, 2022 (the "**Gillis Affidavit**"). The Jacobs Affidavit and the Gillis Affidavit include a more detailed response to the MacDonald Affidavit including the allegations made by the Plaintiff in this action.

[3] In this preliminary motion, the Defendants seek to strike both the Jacobs Affidavit and the Gillis Affidavit, in their entirety. Respectfully, the submissions made in support of that request did not include any caselaw or meaningful analysis. Their evidentiary objections were largely reduced to single word labels such as "hearsay" or "opinion" or "irrelevant", with no further explanation.

[4] The Jacobs Affidavit and Gillis Affidavit clearly contain inadmissible evidence. However, the Defendants' response was also problematic. Receiving an affidavit from an opposing party is neither an open-ended invitation to identify every possible evidentiary issue regardless of significance; nor is it a call to arms, requiring an instinctive attack on every aspect of the opposing party's affidavits. Litigants must maintain perspective and bring a reasonable degree of judgment to bear, having regard to the promise in *Civil Procedure Rule* 1.01 for "the just, speedy and inexpensive determination of every proceeding."

[5] This case demanded a more circumspect and surgical approach to the impugned affidavit evidence. By way of summary:

1. Jacobs Affidavit:
    a. Paragraph 3: The second, final sentence shall be struck;
    b. Paragraph 8: The final sentence shall be struck; and

c. Paragraphs 12 – 14: These paragraphs shall be struck.

2. Gillis Affidavit:

a. Paragraph 5: The second, final sentence is struck;

b. Paragraph 6: This paragraph is struck in its entirety; and

c. Paragraphs 7 – 9: These paragraphs shall be struck.

[6] Finally, I would caution that certain remaining paragraphs were not struck solely because they are narrative in nature and provide relevant factual context. They should **not** be relied upon for the truth of their contents or argued to be available for that purpose.

BACKGROUND

[7] By share purchase agreement dated December 14, 2018 (the "**Share Purchase Agreement**"), 3314852 Nova Scotia Limited ("**3314852**") agreed to buy all issued and outstanding shares in various companies that operated car dealerships in or around Sydney, Nova Scotia. The shares in question were owned by the named Defendants and defined in the Share Purchase Agreement as the "**Vendors**", or Defendants in this action.[1]

[8] I understand that in May, 2019, 3314852 amalgamated with Scotia Chrysler 2010 Limited to form the Plaintiff company, Colbourne Chrysler Dodge Jeep Ram Limited ("**Colbourne Chrysler**"). The specific details of the corporate amalgamation are unclear but, for ease of reference, describe 3314852 and its successor Colbourne Chrysler as the "**Purchaser**", or Plaintiff in this action.

[9] Under the terms of the Share Purchase Agreement, part of the purchase price ($1,000,000) was paid by a 3-year vendor take back promissory note ("**VTB Note**"). The VTB Note was personally guaranteed by the Purchaser-Plaintiff's directing minds: Rodney Colbourne, Steve MacDougall, and Matt Denny (the "**Guarantors**").

[10] The Defendants-Vendors allege that the Purchaser failed to make the payments due under the VTB Note. By letter dated January 12, 2021, the Defendants-Vendors served a Notice of Arbitration to compel payment. The Notice

[1] I use the term Vendors throughout this decision even though, on August 30, 2022, the parties filed a Consent Order dismissing the action against the following two Defendants: Ron MacDonald and Ron MacDonald Family Trust. Although these two Defendants were among the original Vendors, they are no longer parties to this action.

was issued under Section 9.01 of the Share Purchase Agreement which states, *inter alia*:

> If the parties are unable to agree on any matter intended to be governed by this Agreement then, upon written notice to the other, either party may demand that the matter be submitted to arbitration….. The arbitration shall be carried out in accordance with the terms and conditions contained in the *Commercial Arbitration Act* as amended from time to time."
>
> (the "**Vendors' Arbitration**")

[11] About 9 months later, on October 21, 2021, the Purchaser filed the within action against the Vendors (Syd No. 509902, the "**Action**").

[12] In this Action, the Plaintiff-Purchaser alleges that extended warranty work was being unnecessarily performed on automobiles by the Defendants-Vendors to boost the car dealership profits artificially and fraudulently. In turn, it is alleged, the illegally inflated profits drove an increased purchase price under the Share Purchase Agreement. The Plaintiff-Purchaser alleges that the Defendants-Vendors breached an express or implied contractual obligation by deliberately misleading the Plaintiff as to the true value of the shares in the companies that ran the car dealerships. The Plaintiff further alleges the torts of fraud, deceit, and negligent misrepresentation.

[13] On February 4, 2022 the Defendants filed a Notice of Defence together with a Counterclaim. On April 28, 2022, certain Vendors also filed a Third Party Claim seeking to enforce the personal guarantees held as security for the VTB Note.

[14] As part of their defence to this Action and among other things, the Defendants-Vendors observe that the Purchaser only commenced this Action after receiving notice of the Defendants-Vendors' arbitration initiated under Section 9.01 of the Share Purchase Agreement. The Defendants contend that the claims being advanced by the Plaintiff in this Action simply re-state what would otherwise be the Purchaser's position in the pre-existing arbitration proceeding. They insist that all related claims (including the claims made in this Action) must be determined through the arbitration – and not split between the Vendors' Arbitration and the Action.

[15] On May 11, 2022, the Defendants filed a Notice of Application in Chambers seeking an order staying the Action under the terms of the Share Purchase Agreement and Nova Scotia's *Commercial Arbitration Act*. In support of that, the Defendants rely upon the MacDonald Affidavit.

[16] Respectfully, the matter should have been filed as an interlocutory motion – not an application. An application is an entirely separate and discrete proceeding, which this is not. At the same time, for some unknown reason, the Notice of Application was filed using the same Court File Number as this Action. In any event, I agreed that the matter would proceed as an interlocutory motion in the Action (the "**Stay Motion**").

[17] On September 1, 2022, the Plaintiff filed the following two affidavits in response to the Stay Motion: the Jacobs Affidavit and the Gillis Affidavit.

[18] On December 23, 2022, the Defendants filed written submissions objecting to the admissibility of evidence contained in the Jacobs Affidavit and the Gillis Affidavit.

[19] The parties agreed that I would determine the Defendants' objections to the Jacobs Affidavit and Gillis Affidavit in writing.

LAW

[20] The jurisdiction for striking inadmissible evidence from an affidavit is codified in Rule 39.04(1) which states that: "A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit."

[21] Rule 39.04(2) and (3) provide further direction regarding a judge's jurisdiction:

> (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.

[22] As the Jacobs Affidavit and Gillis Affidavit were filed as part of an interlocutory motion, Rule 22.15 "Evidence on a Motion" is germane. Rule 22.15(1) states:

> (1) The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.

[23] Both the Defendants and the Plaintiff rely on *Waverley (Village Commissioners)* v. *Nova Scotia (Minister of Municipal Affairs)*, 1993 NSSC 71 ("***Waverley***"), a seminal decision released more than 30 years ago and still a fixture in the law regarding objections to the admissibility of affidavit evidence. All parties quote the following paragraphs from *Waverley* which is so cemented in the applicable jurisprudence as to have become virtually axiomatic:

> 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. 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 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.

[24] There are several additional comments to be made in this case regarding the law and practise for striking affidavit evidence.

PRELIMINARY COMMENTS ON MOTIONS TO STRIKE AFFIDAVIT EVIDENCE

[25] Obviously, litigants should not file affidavits containing inadmissible evidence. Moreover, a properly functioning adversarial system requires opposing parties to identify and confront inadmissible evidence. Thus, the *Civil Procedure Rules* properly provide a mechanism for parties to challenge inadmissible affidavit evidence.

[26] That said, broad, indiscriminate attacks on affidavit evidence:

1. Weaken the adversarial system by undercutting the goals of efficiency and economy in civil litigation; and

2. May prematurely distort the facts before the impugned facts can be better understood in their proper legal context.

Efficiency, Practicality and Economy

[27] As indicated, receiving an affidavit from an opposing party should not be seen as an open-ended invitation to identify every possible evidentiary concern without regard to its importance or the resulting impact in terms of cost and delay.

[28] Judges will scrutinize the evidence and are capable of allocating the evidentiary weight it deserves, if any. It is not necessary to challenge every bit of information no matter how minimal its potential evidentiary value might be.

[29] As importantly, focussing on material (not trivial) issues better achieves the promise of Nova Scotia's Rule 1.01 for "the just, speedy and inexpensive determination of every proceeding." Focussing on material issues also better aligns with the Supreme Court of Canada's warning in *Hyrniak* v. *Mauldin*, 2014 SCC 7 at para. 2, that:

> … a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[30] Saunders, J. (as he then was) similarly spoke to the need for pragmatism and economy in *Balders Estate* v. *Halifax (County) Registrar of Probate*, 176 N.S.R. (2d) 262 (NSSC) (leave to appeal refused (1999 NSCA 119)) when he observed at para. 33 that:

> … one should not apply too narrow, too rigid an approach to the principles so carefully drawn by Justice Davison in ***Waverley***. This is not to say that such requirements are to be waived or ignored in certain circumstances; clearly they are not. However, they ought be applied in the manner obviously intended by Justice Davison; that is which respects and protects the very object of the Civil Procedure Rules, namely: ... to secure the just, speedy and inexpensive determination of every proceeding (C.P.R. 1.03 [now 1.01]).

[31] The *Civil Procedure Rules* clearly permit motions to strike affidavit evidence; however, they should not be interpreted as promoting a forensic dissection of every conceivable evidentiary issue, regardless of its importance. To find otherwise would

encourage litigants to spend inordinate amounts of time nitpicking and, in doing so, subvert the move towards more efficient and cost-effective proceedings.

[32] Obviously, this does not mean that litigants may file affidavits littered with inadmissible evidence. Rather, the point is simply that litigants should bring a reasonable degree of judgment to bear before approaching every perceived evidentiary problem as a call to arms.

Prematurely Distorting the Factual and Legal Context

[33] "Relevant" information is that which, as a matter of logic and human experience, tends to prove or disprove a fact in issue. (*Sipekne'katik* v. *Mi'kmaw Family and Children's Services Nova Scotia,* 2023 NSCA 44 at para. 31 and *Murphy* v. *Lawton's Drug Stores Ltd.*, 2010 NSSC 289 at para. 20). Facts "in issue" obviously do not include any random fact which a party may wish to prove. Facts "in issue" are ***legally*** significant and may be further sub-categorized as including:

1. Material facts: Material facts are those core, essential facts which ground a cause of action or defence. In *R.* v. *Candir*, 2009 ONCA 915 (leave to appeal to SCC dismissed), the Ontario Court of Appeal wrote: "Evidence is material if what it is offered to prove is in issue [at the proceedings] according to the governing substantive and procedural law and the allegations contained in the indictment [or the civil pleadings]" (at para. 49). In *2420188 Nova Scotia Ltd.* V. *Hiltz*, 2011 NSCA 74, the Nova Scotia Court of Appeal wrote that a "material fact" is one which is essential to a cause of action or defence (at para. 27). Similarly, in the subsequent decision of *Coady* v. *Burton*, 2013 NSCA 95, the Court of Appeal wrote that a material fact is an "important factual matter that anchors the cause of action or defence" (at para. 42); and
2. Secondary or collateral facts: Secondary facts are those which make a material or core fact more or less probable based on reason, logic, and human experience. Secondary facts are not relevant if, for example, their connection to a core, material fact is imagined, or based upon sheer, unfounded speculation, or premised on some absurd misrepresentation of reality.

[34] Assessing whether a fact is legally relevant requires a clear understanding of the substantive law applicable to the underlying claim or defence.

[35] If the fact and legal arguments underpinning a claim or defence are not fully developed, it may not be reasonably possible to safely predict the implications of striking affidavit evidence. Worse, prematurely striking evidence may improperly or prematurely skew the contest in favour of one side. This risk is particularly acute where a party seeks to strike affidavit evidence at an early stage in the proceeding - before the facts and ultimate legal arguments are fully developed.

[36] The Rules allow a party to seek an order striking affidavit evidence at any stage of the proceeding. And there will obviously be circumstances where inadmissible affidavit evidence must be struck immediately. However, in an adversarial system, the parties are required to muster and prove relevant evidence in support of their respective claims and defences. The Court provides oversight, protects the integrity of the process, and ensures compliance with the rules of evidence, among other things.

[37] Where a party brings interlocutory proceedings in advance of the ultimate trial (or hearing) to attack affidavit evidence, that moving party must present legal arguments which are sufficiently developed to assess relevance in its proper factual and legal context - or risk having their concerns dismissed as premature, unproven, or indeterminate at that stage in the process.

HEARSAY AND OPINION

[38] In addition to relevance, the Defendants allege that the Jacobs Affidavit and the Gillis Affidavit contain inadmissible hearsay and opinion evidence.

[39] The concerns around the inadmissibility of hearsay and opinion evidence are somewhat different from those which arise around relevance. As indicated, information is relevant (and admissible) where it tends to prove a fact in issue. The inquiry is tethered to the facts and law which apply to the specific case at bar. The concerns around hearsay and opinion are more general in nature and driven largely by the nature of this type of evidence.

Hearsay

[40] An out-of-court statement is hearsay when offered for its truth and the opposing party is denied the opportunity to conduct a contemporaneous cross-examination of the person making the statement. While hearsay evidence may be relevant, it is presumptively inadmissible because of its inherently unreliable nature. Absent cross-examination, there is an unacceptable risk that the person to whom the

out of court statement is attributed may be mistaken, or under a misapprehension, or biased, or lying. (See *R.* v. *Bradshaw*, 2017 SCC 35 at para. 105). That said, exceptions are admitted where certain specific circumstances are sufficient to allay the various risks and potential prejudices which undercut the reliability of hearsay evidence. In *R.* v. *MacKinnon*, 2022 ONCA 811, the Ontario Court of Appeal provided the following three-step framework for assessing if/when hearsay evidence meets the test for "threshold reliability" [2] and, is therefore, admissible:

> 62 To summarize, the focus at the admissibility stage is on threshold, not ultimate reliability. The *Starr/Mapara* framework for determining the admissibility of hearsay evidence may be further developed as follows:
>
> > i. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The onus is on the party tendering the evidence to show that it meets the requirements of a traditional exception or the principled approach.
> >
> > ii. Evidence that falls under a traditional exception to the hearsay rule is presumptively admissible as traditional exceptions embody circumstantial guarantees of trustworthiness. (In the case of a spontaneous utterance exception, the inherent reliability stems from the requirement that the statement was made contemporaneously with a startling event that dominates the mind.)
> >
> > > a. In "rare cases" however, evidence falling within an existing traditional exception may be excluded because there are "special features" such that the hearsay statement does not meet the requirements of the principled approach in the particular circumstances of the case. The onus rests on the party resisting admission.
> > >
> > > b. In the context of the spontaneous utterance exception, the basis for asserting a "rare cases" exception includes circumstances of gross intoxication, highly impaired vision, and exceptionally difficult viewing conditions, which are sufficiently grave that the trial judge cannot exclude the possibility of error or inaccuracy on a balance of probabilities. However, the "rare cases" exception does not include weaknesses that go to the ultimate reliability of the evidence or reliability concerns that are inherent in the traditional exception.

[2] In *R.* v. *Kelawon*, 2006 SCC 57, Charron, J. emphasized the important distinction between "threshold reliability" and "ultimate reliability" (at para. 3). In very basic terms, "threshold reliability" speaks only to the standards that must be met at law for evidence to be admissible for consideration by the trier of fact. "Ultimate reliability" refers to the admissible evidence relied upon by the trier of fact and its relative weight when deciding the legal issues in dispute.

> iii. Hearsay evidence that does not fall under a traditional exception may still be admitted under the principled approach if sufficient indicia of necessity and threshold reliability are established on a *voir dire* on a balance of probabilities. This is established by satisfying the following criteria:
>
> > a. Threshold reliability (or reliability for the purpose of admission into evidence only) may be established through procedural reliability, substantive reliability, or both.
> >
> > b. To establish procedural reliability, there must be adequate substitutes for testing the evidence and negating the hearsay dangers arising from a lack of oath, presence, and cross-examination. Procedural reliability is concerned with whether there is a satisfactory basis to rationally evaluate the statement.
> >
> > c. To establish substantive reliability, the circumstances surrounding the statement itself must provide sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy. This is a functional inquiry. Substantive reliability is concerned with whether there is a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness or accuracy. Where hearsay evidence has sufficient features of substantive reliability, there is no need to consider any extrinsic evidence that corroborates or conflicts with the statement. Courts should be wary not to turn the principled approach into a "rigid pigeon-holing analysis": *Khelawon*, at paras. 44-45.
> >
> > d. If substantive reliability is still lacking after examining the circumstances surrounding the statement, trial judges can rely on corroborative evidence to establish substantive reliability only if the corroborative evidence meets the criteria set out by the Supreme Court in *Bradshaw*.
> >
> > e. The process set out in *Bradshaw* is as follows: (i) identify the material aspects of the hearsay statement tendered for its truth, (ii) identify the hearsay dangers raised, (iii) consider alternative, even speculative, explanations for the statement, and (iv) determine whether 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.

[41] Paragraph 20 of Davison, J's decision in *Waverley* also touches upon several more technical requirements which must be met when presenting hearsay evidence in an affidavit. To repeat:

> 3. Affidavits used in applications 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.

[42] That said, compliance with these technical requirements does not automatically render hearsay information admissible. The phrase "I am advised by [source of hearsay information] and do verily believe…." is not a spell that magically validates hearsay evidence or renders inadmissible hearsay impervious to challenge.

[43] Finally, hearsay evidence may also be found in documents authored by persons who are not called as witnesses and tested under cross-examination. In *Mi'kmaw Family and Children's Services* v. *Sipekne'katik*, 2022 NSSC 313 ("***Mi'kmaw Family and Children's Services***"), Chipman, J. provides the following helpful summary of the law around documentary hearsay[3]:

> [14] The law regarding documentary hearsay was set out by Justice Rosinski in *Gibson* v. *Party Unknown*, 2014 NSSC 220, at para. 25:
>
> > 25 I recognize that under the rules of evidence, hearsay may also come from documentation. Such documentation may be admissible as an exception to the hearsay rule, if it meets the test for the *Ares v. Venner*, [1970] S.C.R. 608, criteria (the common law exception) or under s. 23 of the *Evidence Act* RSNS 1989 c. 154, records made in the usual and ordinary course of business; or if it can be characterized as "necessary" and "reliable: — *R. v. Khelawon*, [2006] 2 S.C.R. 787; and its probative value significantly outweighs its prejudicial effect on the fair trial process.
>
> [15] The common law business records exception to the hearsay rule was set out by the Alberta Court of Appeal in *R. v. Monkhouse*, 1987 ABCA 227, and adopted by the Nova Scotia Court of Appeal in *R. v. Wilcox*, 2001 NSCA, at para. 49:
>
> > 49 Is Exhibit 24 admissible under the common law business records exception to the hearsay rule? All respondents accept *R. v. Monkhouse*, [1988] 1 W.W.R. 725 (Alta. C.A.) as an accurate statement of the requirements for such admissibility. The following passage from the

[3] Chipman, J. also rendered a decision regarding certain undertakings. The decision was appealed by only on the undertaking issue. The Nova Scotia Court of Appeal dismissed the appeal at 2023 NSCA 44.

judgment of Laycraft, C.J.A., for the Court at p.732 sets out the applicable principles:

In his useful book, *Documentary Evidence in Canada* (Carswell Co., 1984), Mr. J.D. Ewart summarizes the common law rule after the decision in *Ares v. Venner* as follows at p. 54:

> ... the modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after Ares does reflect a more modern, realistic approach for the common law to take towards business duty records.

To this summary, I would respectfully make one modification. The "original entry" need not have been made personally by a recorder with knowledge of the thing recorded. On the authority of Omand, Ashdown, and Moxley, it is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records. ...

[16] Section 23 of the *Nova Scotia Evidence Act*, RSNS 1989, c. 154, also deals with the admissibility of business records:

Business records

23 (1) In this Section,

(a) "business" includes every kind of business, profession, occupation, calling, operation of institutions, and any and every kind of regular organized activity, whether carried on for profit or not;

(b) "record" includes any information that is recorded or stored by means of any device.

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

(3) Evidence to the effect that the records of a business do not contain any record of an alleged act, condition or event shall be competent to prove the non-occurrence of the act or event or the non-existence of the condition in that business if the judge finds that it was the regular course of that business to make such records of all such acts, conditions or events at the time or within reasonable time thereafter and to retain them.

> (4) The circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to this Section, but such circumstances do not affect its admissibility.
>
> (5) Nothing in this Section affects the admissibility of any evidence that would be admissible apart from this Section or makes admissible any writing or record that is privileged.

Opinion Evidence

[44] Generally speaking, opinion evidence is inadmissible. Two particular problems associated with expert opinion relate to the fact-finder's ability to properly assess the reliability of evidence which is beyond (not within) the expertise of an ordinary person and associated, potentially prejudicial effects on the fact-finding process. In *R.* v. *Mohan*, 1994 SCC 80, Sopinka, J. describes these problems at para. 23:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. As La Forest J. stated in R. c. Béland, [1987] 2 S.C.R. 398, at p. 434, with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science.

[45] To this, in *White Burgess Langille Inman* v. *Abbott and Haliburton Co*, 2015 SCC 23, Cromwell, J. added the following additional potential dangers associated with expert opinion evidence at para. 18:

> There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at para. 90, leave to appeal refused, [2010] 2 S.C.R. v (note) (S.C.C.). The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J. (J.-L.)*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D. (D.)*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D. (D.)*, at para.

> 55); the risk of admitting "junk science" (*J. (J.-L.)*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 (S.C.C.), at para. 76.

[46] Despite this problem associated with the unique nature of expert opinion, and somewhat paradoxically, it is precisely because an expert possesses unique and relevant knowledge outside an ordinary person's experience that the trier of fact requires their opinion. As a result, the dangers identified by Cromwell, J. (e.g. that experts might improperly leverage their credentials or misuse arcane language as a method of persuasion) are necessary risks that are managed by applying a legal test through which judges may scrutinize and filter expert opinion based on accepted procedural and substantive standards.

[47] In *Layes* v. *Bowes*, 2020 NSSC 345, Smith, Ann J. usefully distilled the law surrounding the following two-step test applied in an interlocutory motion[4]:

> [50] In *R. v. Abbey*, 2009 ONCA 624 (Ont. C.A.), the Court of Appeal outlined a two-step process for determining the admissibility of expert evidence:
>
> > I suggest a two-step process for determining admissibility. First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence... Second the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.
> >
> > (para. 76)
>
> [51] The Supreme Court of Canada in *White Burgess* followed the *Abbey* approach with minor variations:
>
> > At the first step, the proponent of the evidence must establish the threshold requirements of admissibility ... Relevance at this threshold stage refers to logical relevance ... Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement.
> >
> > (para. 23)

[4] Additional procedural and substantive requirements arise under *Civil Procedure Rule* 55 where expert opinion evidence is to be presented at the trial of an action or hearing of an application.

[52] Cromwell J. in *White Burgess* confirmed that a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to the expert's duty to the court (para. 34).

[53] Cromwell J. explained that the expert's opinion must be impartial, independent and unbiased:

> ... in the sense that it reflects an objective assessment of the question at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-9. These concepts of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.
>
> (para. 32)

[54] The requirement that an expert be fair, objective and non-partisan is a duty owed to the court. The appropriate threshold for admissibility flows from this duty: *White Burgess* at para. 46.

[55] If a witness is unable to or unwilling to fulfill this duty owed to the court, they do not qualify to perform the role of an expert and should be excluded: *White Burgess* at para. 46, quoting from Prof. Paciocco (as he then was) in "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L. R.* 135, at p. 152 (para. 46).

[56] Cromwell J. in *White Burgess* stated that the expert witness must, therefore, be aware of this primary duty to the court and be able and willing to carry it out (para. 46).

[57] Cromwell J. observed that imposing this additional threshold requirement is not intended to, and should not result in, trials becoming longer or more complex. He also observed that he would not go so far as to hold that the expert's independence and impartiality should be presumed, absent challenge:

> My view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.
>
> (para. 47)

[58] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is

> unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence: *White Burgess* at para.48.
>
> (at paragraphs 50 – 58)

[48] In dismissing a subsequent appeal, the Nova Scotia Court of Appeal reproduced these paragraphs and endorsed them as a correct articulation of the law. (2021 NSCA 50 at paras. 11 – 12; leave to appeal to the Supreme Court of Canada refused on February 17, 2022, 2022 CarswellNS 105)

[49] The law also recognizes certain limited exceptions where the opinions being expressed lie within a person's ordinary experience. An ordinary layperson may express an opinion such as, for example, another person seemed angry or whether objects such as clothing appeared tattered and worn. Referring again to *Mi'kmaw Family and Children's Services*, Chipman, J. reviews the law around ordinary opinions expressed by affiants who are not qualified as experts (at paras. 12 – 13).

APPLICATION OF THE LAW

Objections Based on Relevance

[50] The Defendants argue that virtually every paragraph in the Gillis Affidavit and Jacobs Affidavit should be struck as "irrelevant". Of the 14 paragraphs in the Jacobs Affidavit, the Defendants state that paragraphs 2 – 11 and 13 – 14 are irrelevant.

[51] However, the parties have yet to file written submissions on the ultimate issue regarding a stay of proceedings and the arguments on relevance in the motion are narrow and offers only a glimpse into the facts that may or may not be relevant to the motion for a stay. For example:

1. Counsel for the moving party takes the broad position the impugned affidavit evidence generally is "not relevant because the affidavits pertain to the substance of [the Plaintiff's] claims in the action not the procedural determinations of whether the matter properly belongs in arbitration" (Defendants' written submissions, p. 2). No further law is cited in support of the statement that the motion for a stay involves only "procedural determinations";

2. The Defendants' counsel concludes with the similarly broad submission that the Jacobs Affidavit and Gillis Affidavit must be entirely struck because they are "not salvageable, for the most part because they do not speak to the existence of the [Share Purchase] agreement, the clauses about arbitration, or what facts the Respondent Colbourne Auto Group feels negate the requirement to deal with representations and warranties through the arbitration process." (Defendant's written submissions, p. 4);
3. To further complicate matters, there is a certain disconnect or "double standard" between the evidence presented by the Defendants/Vendors in their own affidavit but then condemn as irrelevant in the Plaintiff's affidavits. In particular, the Vendors rely upon the Affidavit of Jim MacDonald sworn February 2, 2022. In it, Mr. MacDonald testifies that, for example:

> "I came to believe that the Purchaser may have been attempting to contrive a way to renegotiate the amount of their debt to us, I presumed this was due to poor sales which I perceived the Purchasers were experiencing and the downturn in the industry during the covid crisis." (at para. 29);

4. The Plaintiff/Purchaser subsequently threatened to start an action "unless [the Defendants] were willing to discuss matters which [Mr. MacDonald] took as a suggestion …that we should renegotiate the amount of [the Plaintiff/Purchaser's] debt" (at para. 33);
5. "…the [Purchaser has] made allegations relating to the use of warranties and the profitability of the service department at the Chrysler store. These are patently untrue claims." (at para. 35); and
6. A report prepared for the Purchaser's by the MNP accounting firm reviewing the alleged improper warranty work is, in Mr. MacDonald's view, "flawed" and tainted by "bias" (at para. 36).

[52] Despite having raised these issues, the Defendants/Vendors object on the basis of relevance when the Plaintiff/Purchaser subsequently filed the Gillis Affidavit and Jacobs Affidavit both sworn August 25, 2022 providing a detailed response. If the Defendants'/Vendors' request is granted, their view of relevance would be applied to the Plaintiff/Purchaser's affidavits but not their own. And the only evidence on the issues initially raised by the Defendants/Vendors would be limited to their own version of events.

[53] I recognize that the Plaintiff/Purchaser had the opportunity and procedural right to attack the admissibility of the Defendants/Vendors' affidavit evidence. To date, they have not done so. However, again, the important point is that these all-encompassing evidentiary objections are unfolding before the parties file formal legal submissions and more clearly connect the evidence to their legal arguments on the stay application.

[54] I refer to the concerns expressed in paragraphs 19 – 28 above. In my view, the arguments raised by the Defendants to strike on the basis of relevance are premature, at best. Based on the limited information and submissions before me, the affidavit evidence is sufficiently relevant. In all events, it would be unsafe at this stage to declare these paragraphs irrelevant and effectively eliminate all of the Plaintiff's Affidavit.

[55] I turn now to the Defendants remaining objections: hearsay and opinion.

OBJECTIONS BASED ON INADMISSIBLE HEARSAY AND OPINION EVIDENCE

[56] The remaining arguments made in support of striking the Jacobs Affidavit and Gillis Affidavit are effectively limited to invoking one-word labels such as "opinion" or "hearsay" without elaboration, caselaw or meaningful analysis. Regardless, as indicated above, I address the specific impugned paragraphs below in the context of the applicable law.

Jacobs' Affidavit

[57] Paragraph 2 refers to a statement by Rodney Colbourne that the employment of a former service manager named Chad Burke was terminated "for improprieties". Mr. Burke's Record of Employment is attached as Schedule "A".

[58] Mr. Colbourne's statement is not offered for the truth of its contents. It is not intended to prove that there were, in fact, "improprieties". Rather, the statement provides context for the dispute and begins the narrative for explaining the Plaintiff's actions.

[59] Mr. Burke's Record of Employment is clearly a business record which is an accepted exception to the hearsay rule.

[60] Paragraphs 3 – 8 refer to various investigations completed by the Plaintiff regarding suspected improprieties allegedly occurring at the direction of the former

owners (the Defendants). These paragraphs provide the factual backdrop and narrative to explain the Plaintiff's-Purchaser's ultimate decision to engage legal and accounting experts to formally address their suspicions. Thus, Mr. Jacobs begins paragraph 9 by referring back to these investigations as the circumstances which prompted further action. He states:

> Given all of this, we decided to engage legal counsel and financial auditing services. We engaged the Breton Law Group locally and MNP; more specifically Corey Bloom from Montreal, who is a Partner that specializes in investigative and forensic services. Ms. Bloom was tasked to review our situation and provide an Expert's Report.

[61] I make no determination as to the significance or weight, if any, that ultimately attaches to the decision to engage experts and/or obtain an expert report. And I note that if an expert report was completed, a copy was not filed with this motion.

[62] In any event, the Defendants state that paragraphs 3 - 8 contain inadmissible opinion and that paragraphs 6 - 8 also contain inadmissible hearsay. Breaking these paragraphs down:

1. Paragraph 3: The first sentence simply confirms the decision to initiate an investigation. It is not objectionable. The second sentence states that Mr. Jacobs "found a number of irregularities including work that was being charged and not completed and other work which was being unnecessarily completed." This is not narrative. It is conclusory and constitutes inadmissible expert opinion. Mr. Jacobs does not provide the required assurances described in paragraph 47 above to ensure an understanding of, and compliance with, an expert's duty to the Court.
2. Paragraph 4: Mr. Jacobs describes a review of numerous Repair Orders.[5] Mr. Jacobs merely states that he perceived a pattern of common phrases repeatedly found through different Repair Orders. This is lay opinion. No particular expertise is required to observe that repeatedly using particular written phrases in a series of documents reveals a pattern. I make no determination as to the significance or weight, if any, that ultimately attaches to these statements and note, for example, the documents which support these statements (i.e. the ROs described in paragraph 4) were not attached to the Jacobs

[5] Mr. Jacobs uses the term "RO" to describe the repair orders but, unfortunately, does not provide a definition of "RO". However, it is clear from the Gillis Affidavit that "RO" is an acronym for "Repair Order".

Affidavit. In any event, this will be an issue for the judge hearing the Stay Motion.

3. Paragraph 5: Mr. Jacobs describes a review of numerous documents entitled "Service Contract Work Orders" and he states that "approximately 40 percent (458) of total Service Contract Work Orders were viewed as suspicious and possibly fraud." As indicated, this is narrative provided for factual context, not opinion. This statement does not provide evidence that the documents were, in fact, either suspicious or fraudulent. It confirms Mr. Jacobs' view, and it explains the Plaintiff's decision to engage legal and accounting experts. Beyond that, again, I make no determination as to the significance or weight, if any, that ultimately attaches to this statement and note, again, that the documents in question (i.e. the Service Contract Work Orders) were not attached to the Jacobs Affidavit.
4. Paragraphs 6 – 8: Mr. Jacobs describes a review of two documents entitled "Action Plan" and "Consultation Findings Report", copies of which were attached as Exhibit "B". They were prepared by a person named "Mac Hasnany" as part of a broader audit performed in 2018. In so far as the objections based on opinion are concerned, I am prepared to allow these documents to remain but not as opinion. They are limited to providing context to explain the Plaintiff's subsequent decision to engage an expert to more properly investigate its concerns around warranty work. To the extent these documents express any opinions regarding the merits of the Plaintiff's allegations, in my view, they should be ignored. I recognize that Mr. Hasnany offers certain observations in the form of opinions including, for example, "Over repairs done/extra parts (Left & Right) replace on vehicles without any specific details" (p. 3). Again, for emphasis, this document is not being admitted for its truth or as opinion evidence. It is context and narrative only to better explain the Plaintiff's subsequent actions.
5. That said, the Defendants' raise legitimate objections with respect to the final sentence of paragraph 8. It shall be struck. This sentence states:

   Specific anomalies in the Consultation Findings Reports included:

   (a) Suspension Knuckle

   (b) Control arms being replaced in pair

(c) Repair frequency at 169% of the Atlantic Canadian average

(d) Front sway bar

(e) High number of stabilizer links and sway bar bushings being replaced

(f) Repair frequency at 258% of the Atlantic Canada average

6. There are numerous problems with this statement. Mr. Jacobs has provided none of the assurances required to be qualified as an expert (see paragraph 47 above) – and the author of these statements, Mac Hasnany, has not sworn an affidavit. Moreover, the reports are riddled with acronyms such as "POPPS" and "SMG" that are undefined and, as such, their meaning is unclear. Mr. Jacobs' interpretation of certain items is also somewhat misleading. Mr. Hasnany does not describe these issues as "anomalies". Respectfully, that is Mr. Jacobs' "spin" or gloss. Moreover, the Jacobs Affidavit identifies subparagraphs (a) – (c) as separate, distinct "anomalies". However, these issues are actually found under a single heading: "Cap#2 – 0210 (Suspension) Knuckle: On POPPS report for more than 2 quarters". Moreover, the document states that "Your frequency is 169% compared to SMG". As indicated, the acronym "SMG" is undefined. Yet, without any background or explanation, Mr. Jacobs translates this statement to "Repair frequency at 169% of the Atlantic Canada average". Similarly, the Jacobs Affidavit identifies subparagraphs (d) – (f) as separate, distinct "anomalies". Yet, again, they are all found under the single heading "Cap #4 – 0220 (Suspension) Front Sway Bar: Climbing on the POPPS report". Mr. Hasnany's report also states that "Your frequency is 258% compared to the SMG". It does not say "258% of the Atlantic Canada average", as Mr. Jacobs attests. Even if this statement could satisfy the first step of the test for admitted expert opinion, any probative value is outweighed by its confusing and prejudicial impact.

7. Paragraphs 9 – 11 are challenged on the basis of relevance. I address the issue of relevance above. These paragraphs are not struck.

8. Paragraphs 12 - 14 recounts a discussion which Mr. Jacobs said he had with unidentified "Service Technicians" regarding alleged instructions given by Chad Burke to complete unnecessary work. The Defendants say that these paragraphs contain inadmissible opinion and hearsay.

9. Respectfully, the evidentiary issue is not opinion. The concern is hearsay.
10. Paragraphs 12 - 14 shall be struck. As indicated, the source of the information associated with this evidence is attributed to unidentified "Service Technicians" (paragraphs 12 – 13) and "Service Department people" (paragraph 14). There is no ability to assess the circumstances within which these statements were made or even who made these statements. The vague and prejudicial manner in which this evidence is presented is inherently unreliable and cannot be saved as narrative.

Gillis Affidavit

[63] Paragraphs 4 – 6 are challenged on the basis of inadmissible opinion. Breaking these paragraphs down:

1. Paragraph 4 contains no opinion evidence.
2. Paragraph 5 begins with the statement that Mr. Gillis noticed "a pattern of there being 5 – 6 appointments per day which led to 50+ hours of work." To the extent this constitutes opinion evidence, in my view, this is the type of observation that a lay person of ordinary experience may make. It is admissible.
3. The second and final sentence of paragraph 5, however, is inadmissible opinion. Mr. Gillis concludes that 50+ hours of work was "far above the industry average of approximately 1.9 hours per RO". Mr. Gillis provides none of the required assurances to provide this opinion to the Court (see paragraph 47 above). Moreover, there is no indication as to either Mr. Gillis' methodology or source for determining the "national average". This sentence is struck.
4. Paragraph 6 similarly states that Mr. Gillis proceeded to review repair orders (ROs) for a "one (1) year period and determined proper procedures were not being followed and warranty work was unnecessarily completed by previous owners." This is opinion evidence. Unlike the evidence in the Jacobs Affidavit which simply expressed a view that prompted a decision to engage legal and accounting experts, Mr. Gillis offers a definitive opinion.
5. There are numerous problems with this opinion evidence. As to the first step of the test, Mr. Gillis does not provide the required

> assurances to ensure compliance with an expert's obligation to be fair, objective and non-partisan. His position as Dealer Principal for the Plaintiff/Purchaser casts doubt upon his ability to fulfil that duty to the Court. Even if Mr. Gillis were able to satisfy this first step of the test, the unreliable and prejudicial nature of this opinion outweighs any probative value. I note, for example, Mr. Gillis does not indicate which "one (1) year period" was captured by his review. And he offers no insight into the actual scope of the alleged problems and, instead, broad conclusory statements which imply a widespread problem without offering any supporting data or meaningful analysis.

6. Paragraph 6 of the Gillis Affidavit is struck.

[64] The Defendants state that paragraphs 7 – 9 of the Gillis Affidavit contain inadmissible hearsay.

[65] In these paragraphs and by way of summary, Mr. Gillis states that a former Service Manager named Chad Burke initially told Mr. Gillis and Rodney Colbourne that he (Mr. Burke) "was directed by previous ownership to complete unnecessary work under the warranty to increase profitability" (paragraph 7). Mr. Gillis states that he instructed Mr. Burke to sign an affidavit "regarding unnecessary warranty work being completed to increase profitability". According to Mr. Gillis, Mr. Burke originally agreed but then refused to sign an affidavit (paragraph 8). Mr. Gillis says that he then dismissed [Mr. Burke] "as a result of his admission made regarding warranty work being unnecessarily done in our shop" (paragraph 9).

[66] The Plaintiff's submissions may be effectively distilled to the argument that the information is relevant; that Mr. Gillis confirms the source of the information (former employee Chad Burke); and Mr. Gillis attests to his belief in the information attributed to Mr. Burke.

[67] As to paragraph 7, the Plaintiff argues:

> This statement is not hearsay as it complies with *Waverley*, in that the source of the information is identified, as is the affiant's belief in the information conveyed. Furthermore, the statement is relevant to the conduct of the Defendant, upon which the proper forum for this dispute turns.

[68] As to paragraphs 8 – 9, the Plaintiff contends:

> The statements in these paragraphs are not hearsay as either the affiant has personal knowledge of the matters or clearly indicates the source of the information and his belief therein. The statements are relevant either as factual background in which the choice to bring an action in this court was made or as further indication of the Defendants conduct.

[69] Respectfully, Mr. Gillis does not have personal knowledge of the statements being attributed to Mr. Burke. And the evidence all flows from those statements. In addition, there is nothing in these statements that suggests the information received from Mr. Burke offers relevant narrative or context. In my view, these paragraphs are not linked to any aspect of the Defendants conduct or otherwise qualify as background narrative. In my view, their primary purpose is for the truth of their contents.

[70] As to the Plaintiff's reliance on *Waverley* and as indicated at paragraphs 41 - 42, it is true that an affiant must identify the source of hearsay information and attest to his belief in the hearsay information. However, hearsay concerns do not magically vanish simply because these technical requirements are met (see paragraph 42 above). The evidence must still be admissible at law and, more specifically, either fall within an accepted common exception or be deemed admissible under the principled approach.

[71] This hearsay evidence does not fall within any common law exception. Moreover, the statements being attributed to Mr. Burke do not meet the requirements of either procedural reliability or substantive reliability. The circumstances which surround Mr. Burke's alleged statement offer no adequate procedural substitute for ensuring reliability and, indeed, Mr. Gillis acknowledges that Mr. Burke actually refused to sign an affidavit confirming the statements now being attributed to him. Mr. Burke's refusal to sign an affidavit provides a rational basis for rejecting its substantive reliability (i.e. Mr. Burke refused to sign an affidavit because he did not accept the statements now being attributed to him). Finally, there is no corroborative evidence that would meet the criteria set out in *Bradshaw*. Ultimately, this hearsay evidence simply does not approach the standards of reliability required to be deemed admissible.

[72] In my view, these paragraphs are inadmissible and shall be struck.

Keith, J.