SUPREME COURT OF YUKON

Citation: *Kiselbach v DeFilippi*, 2024 YKSC 7

Date: 20240314
S.C. No. 17-A0041
Registry: Whitehorse

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BETWEEN:

CRAIG KISELBACH and C.S.H. OUTFITTING LTD.

PLAINTIFFS

AND

RICHARD R.E. DEFILIPPI, RICHARD R.E. DEFILIPPI LAW CORPORATION, AND BOUGHTON LAW CORPORATION

DEFENDANTS

Before Justice E.M. Campbell

Counsel for the Plaintiffs — J.J. McIntyre

Counsel for the Defendants — Michael Armstrong, KC

REASONS FOR DECISION

OVERVIEW

[1] This is an action in professional negligence brought by the plaintiff, Craig Kiselbach ("Kiselbach"), and his corporation, C.S.H. Outfitting Ltd. ("C.S.H."), against their former lawyer, Richard R.E. DeFilippi ("DeFilippi"), his professional corporation, Richard R.E. DeFilippi Law Corporation, and Boughton Law Corporation ("Boughton Law").

[2] In April 2016, Kiselbach retained the services of Boughton Law to assist in resolving his dispute with Aaron Florian ("Florian"), his former business partner and sole

shareholder of 45325 Yukon Inc. doing business as Yukon Stone Outfitters ("Yukon Stone"), regarding Kiselbach's contractor fees, bonuses, and financial interests in Yukon Stone, and, more specifically, in Yukon Outfitting Concession Area No. 15 ("Concession 15").

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[3] The plaintiffs assert that DeFilippi was aware that Kiselbach wanted to settle his dispute with Florian in order to move on with his new business. Nonetheless, DeFilippi failed to advise Kiselbach in a timely manner that Florian had attempted to accept Kiselbach's terms for settlement of September 1, 2016, and failed to advise Kiselbach at all that he had the option of waiving any late acceptance on the part of Florian. The plaintiffs assert that Kiselbach would have settled that matter, in early September 2016, had he known he could do so. The plaintiffs assert that, as a result of DeFilippi's negligence, they suffered damages in that they incurred unnecessary legal fees and had to settle their legal dispute with Yukon Stone and Florian for much less than what they could have settled for in September 2016.

[4] The defendants deny any wrongdoing. They assert this is a case of settler's remorse. The defendant, Boughton Law, also filed a counterclaim seeking payment of unpaid legal fees, associated disbursements, and applicable taxes for the work DeFilippi and others at Boughton Law performed on Kiselbach's file while they represented him.

[5] The defendants acknowledge they owed a duty of care to their client, Kiselbach, and his corporation, C.S.H. Therefore, the issues with respect to the professional negligence claim are whether DeFilippi breached the standard of care he owed to the

plaintiffs; whether the plaintiffs suffered a loss or damages; and whether that loss or those damages were caused in fact and in law by DeFilippi's alleged breach.

[6] I find that, while the legal services provided by DeFilippi to Kiselbach were not without fault, they did not result in loss or damages to Kiselbach and/or the corporate plaintiff. Therefore, the plaintiffs' claim in professional negligence must be dismissed. The emails between Kiselbach and Terry Kennedy ("Kennedy"), Kiselbach's advisor, and/or DeFilippi, as well as text messages exchanged between Florian and Kiselbach, at the relevant time, reveal that Kiselbach was aware of Florian's late acceptance of his offer to settle; that Kiselbach knew he could accept it, but chose not to because, at the time, he believed he was in a good position to obtain a higher amount.

[7] As for the counterclaim, when Kiselbach formally retained Boughton Law on April 26, 2016, he agreed in writing to pay Boughton Law's fees and associated disbursements as well as the applicable taxes for the provisions of their legal services within 30 days of receiving their bill. Since the plaintiffs' claim in professional negligence has been dismissed, there is no reason not to compel Kiselbach to pay Boughton Law's last invoices, since the only reason invoked by Kiselbach for refusing to pay is that any legal work performed by Boughton Law after September 2, 2016, was unnecessary and the result of DeFilippi's negligence.

ISSUES

[8] For the plaintiffs to succeed in their professional negligence action, they must demonstrate, on a balance of probabilities, that: the defendants owed them a duty of care; the defendants' conduct breached the standard of care; the plaintiffs suffered a

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loss or damages; and the loss or damages were caused, in fact and in law, by the defendants' breach (see *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para. 3).

[9] The defendants acknowledge that DeFilippi, a lawyer at Boughton Law, owed a duty of care to his client, Kiselbach, and C.S.H., his corporation.

[10] Therefore, to decide whether DeFilippi engaged his and the corporate defendants' liability in professional negligence, I must determine whether DeFilippi's conduct fell below the standard of a reasonably competent lawyer when advising Kiselbach, and C.S.H., about the settlement of their dispute with Florian and Yukon Stone (see *Central Trust Co v Rafuse*, [1986] 2 SCR 147 ("*Central Trust*") at 210). If I conclude that he did, I must then determine whether the breach of the standard of care caused, in fact and in law, financial loss or damages to the plaintiffs, and if so, the amount of damages.

[11] With respect to the counterclaim, I must determine whether Kiselbach has the obligation to pay Boughton Law's invoices for their professional services pursuant to the retainer agreement.

EVIDENCE AT TRIAL

[12] The trial proceeded over a two-week period. Two witnesses testified at trial: the plaintiff, Kiselbach, and the defendant, DeFilippi. The majority of their testimonies consisted of comments and explanations on the multiple emails and other documents exchanged or prepared between February 2016 and April 2017.

[13] Five volumes of documents were filed by consent. The parties agreed I could consider all the documents included in those volumes to decide this matter even if they did not specifically reference them at trial.

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[14] In addition, excerpts of the examinations for discovery of DeFilippi and Philip Barton (“Barton’’), a lawyer with Boughton Law, were read-in by the plaintiffs.

Facts not in Dispute

[15] Kiselbach, the individual plaintiff, is an outfitter and a businessman. C.S.H. is the company through which Kiselbach provided his professional services to Yukon Stone. Kiselbach is a Canadian citizen and a resident of British Columbia.

[16] The defendant, DeFilippi, is a lawyer. Richard R.E. DeFilippi Law Corporation is his professional corporation. At all relevant times, DeFilippi was practicing law with Boughton Law, a law firm located in Vancouver, British Columbia.

[17] The events that led Kiselbach to retain Boughton Law, the timeline, and amounts of the settlement offers exchanged by Kiselbach and Florian, as well as the timeline of the legal proceedings that opposed them are not in dispute.

Business relationship between Kiselbach, Yukon Stone, and Florian

[18] Florian is an American citizen. At all relevant times, he was a U.S. resident. Florian was the sole shareholder of Yukon Stone, a Yukon corporation. Prior to 2012, Yukon Stone “acquired” Concession 15. From then on, Yukon Stone operated an outfitting business on Concession 15. At all relevant times, Yukon legislation (s. 50 of the *Wildlife Act,* RSY 2002, c 229 (“*Wildlife Act*”)) provided that only a Canadian citizen or permanent resident ordinarily resident in Canada could hold a concession (outfitter). It also provided that a person who holds a Yukon concession is entitled to operate the concession through a corporation of which they are a director (s. 38 of the *Wildlife Act*). In 2012, Yukon Stone “offered” the position of outfitter for Concession 15 to Kiselbach. Kiselbach qualified as an outfitter whereas Florian did not. Kiselbach accepted the offer.

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Kiselbach applied for, obtained, and held the concession in his name, purportedly subject to a trust declaration by which he agreed to hold Concession 15 in trust for Yukon Stone, and to surrender Concession 15 upon Yukon Stone's request. He also became a director of Yukon Stone. Kiselbach obtained a permit for him and Yukon Stone to operate the outfitting business. Kiselbach's responsibilities involved not only the management of guided hunting trips in the area covered by Concession 15, but the overall planning and management of marketing and booking; attendance at trade shows; and relations with government agencies, First Nations, and the Yukon Outfitters Association.

[19] Kiselbach's remuneration, as a contractor, consisted of an annual base fee and bonuses. It also included limited equity participation in Yukon Stone over time. Pursuant to a services agreement, payment for Kiselbach's services as outfitter was to be made to his company C.S.H. Kiselbach managed Concession 15, as its outfitter, from 2012 to 2015 inclusively.

[20] In February 2016, Kiselbach, considering all the efforts he had put into building Yukon Stone's outfitting business, and the fact that, in his mind, it had become "turn-key" under his management, determined that it was either time to become a majority partner in Yukon Stone or move on. His decision was also motivated by his concerns that, in his view, Florian was not maintaining the company's record in good order and was not holding up to his part of their agreement. As a result, Kiselbach made an unsolicited offer to purchase 90% of Yukon Stone for $2.5 million. Florian refused the offer, adding he would not entertain an offer at $4 million but would consider an offer at

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$6 million. At or around that time, Kiselbach started to look for “acquiring the rights” to another outfitting concession.

[21] In February 2016, Kiselbach contacted a number of lawyers, including DeFilippi at Boughton Law, to obtain legal representation regarding the value of his financial interests in Yukon Stone (and Concession 15) and to enter into negotiations with Florian to settle his fees, bonuses, and financial interests in Yukon Stone with a view to end their business relationship. However, he did not retain Boughton Law at that time.

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The Terminus Deal

[22] In February 2016, Kiselbach retained the legal services of Nicholas Weigelt (“Weigelt”), a British Columbia lawyer, to represent him with respect to the acquisition of Terminus Holdings Ltd (“Terminus”) and Kechika Valley Air Ltd (“Kechika”) (combined the “Terminus Deal”), which included hunting and guiding operations in British Columbia.

[23] On March 9, 2016, Kiselbach entered into an agreement in principle to acquire Terminus and Kechika for $2.65 million and $850,000 respectively. The agreement included the payment of a deposit of $200,000. The closing date for the acquisition was set at October 31, 2016. Kiselbach paid the two deposits.

[24] Kiselbach was not in a position to close the deal on October 31, 2016 due to paperwork issues. Nonetheless, he later acquired Terminus and Kechika, but had to pay an additional $200,000 to do so.

Early negotiations with Florian

[25] In or shortly after February 2016, Florian became aware that Kiselbach had sent a document to, at least, one of Yukon Stone’s clients seeking financial assistance

through the purchase of future hunting trips to acquire Terminus (and Kechika). Florian took the position that, in doing so, Kiselbach was in breach of his fiduciary duties to Yukon Stone.

[26] On April 25, 2016, Florian purported to terminate Kiselbach and asked him to surrender Concession 15. Florian told Kiselbach he had to resign effective May 15, 2016, whereas Kiselbach had offered to resign at the end of the hunting season, on October 31, 2016. Florian offered Kiselbach $90,000 over three years, as a final payment for Kiselbach's financial interests in Yukon Stone, which consisted of shares that Kiselbach was supposed to have accumulated since 2012 but that had not been issued to him. Kiselbach refused.

Kiselbach retains Boughton Law and early negotiations with Florian

[27] On April 26, 2016, Kiselbach formally retained Boughton Law to act as his lawyers in his dispute with Florian and Yukon Stone. The retainer identified DeFilippi, a member of Boughton Law's commercial litigation group, as the principal lawyer on Kiselbach's file. The retainer specifically stated that other lawyers, under the supervision of DeFilippi, may work on the file. The document also set out the general fee arrangements between Kiselbach and Boughton Law. Kiselbach made the $5,000 retainer deposit he had negotiated down from $8,000 with DeFilippi.

[28] In early May 2016, as the matter was not at the litigation stage, DeFilippi suggested one of Boughton Law's corporate lawyers, Barton, take the leading role for the purpose of negotiating a settlement with Florian.

[29] On May 9, 2016, Florian formally requested that Kiselbach surrender Concession 15 and the Operating Certificate he purportedly held in trust for Yukon

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Stone in favour of another qualifying individual (outfitter) selected by Florian by no later than May 11, 2016. Following his counsel's advice, Kiselbach refused to do so.

[30] On May 17, 2016, Barton sent an offer to Florian to settle the dispute for $345,000 plus an undetermined amount for annual bonus adjustments for 2012 to 2015 inclusively. Kiselbach reviewed and approved the offer before it was sent.

[31] On May 27, 2016, Florian responded with an offer of $161,535 based on a valuation of Yukon Stone at $2.5 to $2.7 million. In his letter, Florian asserted that Kiselbach had breached his fiduciary duties to Yukon Stone. Kiselbach rejected the offer.

[32] On May 31, 2016, Barton responded to Florian with an offer to settle for $409,750 based on a net-debt value of $4.4 millions attributed to Yukon Stone. Kiselbach reviewed and approved the offer prior to it being sent. Florian did not respond to the second settlement offer.

[33] In May of 2016, as the sole shareholder of Yukon Stone, Florian appointed his wife as the third director of Yukon Stone (Florian and Kiselbach being the other two). At a June 1, 2016 board meeting, Florian and his wife passed a Resolution requesting and directing that Kiselbach surrender and transfer Concession 15 to a qualified individual of their choice, as per the Trust Declaration.

[34] On June 2, 2016, Florian wrote to Kiselbach to inform him of the Resolution and to request that he surrender and transfer the outfitting concession to a qualified outfitter of Florian's choice, failing which Yukon Stone was prepared to commence legal proceedings to compel him to do so. Kiselbach, on his counsel's advice, refused to oblige. On or around that time, anticipating that legal proceedings would be required to

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motivate Florian to retain counsel and to generate a reasonable settlement, legal counsel started to prepare to commence legal proceedings, with Kiselbach's authorization.

Legal proceedings in the Yukon

[35] On June 7, 2016, Yukon Stone filed a petition (SC No 16-A0039) in the Supreme Court of Yukon seeking an order enjoining Kiselbach to comply with the terms of the Trust Declaration and to surrender and transfer Concession 15 to another individual, as per Yukon Stone's Resolution. It also sought costs of the legal proceedings. Yukon Stone's counsel unilaterally set the matter for a hearing on July 19, 2016.

[36] Kiselbach agreed to Boughton Law defending the petition on his behalf, in part by challenging the legality of the Trust Declaration. Kiselbach also agreed to Boughton Law bringing an application for an interim injunction restraining Florian and Yukon Stone from interfering with Kiselbach operating Concession 15 until the end of the 2016 hunting season.

[37] DeFilippi was away from June 23 to July 18, 2016. It was decided that Lino Bussoli ("Bussoli"), a lawyer with Boughton Law and a member of the Law Society of Yukon, would argue the case for Kiselbach. Barton remained available to assist.

[38] On June 21, 2016, DeFilippi sent an email to Barton, Kiselbach, and Bussoli asking them to think about a proposal they could make to Florian's lawyer to settle the dispute.

[39] On June 25, 2016, Kiselbach sent an email to his lawyers with two options regarding an offer that could be made to Florian. "Option 1": they could agree on a

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company to do an appraisal of the value of the concession. “Option 2”: he was ready to settle for $242,375 by June 28.

[40] Bussoli spoke with Kiselbach about his proposal. On June 28, 2016, Barton emailed Kiselbach a draft counter-offer he wanted to send to Florian’s lawyer. In that email, Barton reiterated the reasonableness of the May 31 counter-offer of $409,750 and warned that Florian’s proposed operational plans were putting Yukon Stone at risk to contravene the *Wildlife Act* and Federal legislation in order to put pressure on Florian, as requested by Kiselbach. Kiselbach agreed with that proposal, which was sent to Florian’s lawyer on June 28, 2016.

[41] On July 6, Kiselbach sent an email to Bussoli stating, among other things, that he wanted to have Kennedy, an acquaintance, as part of his team. In his email, Kiselbach described Kennedy as someone with intimate knowledge of the *Wildlife Act*.

[42] Bussoli obtained Florian lawyer’s consent to convert the July 19 hearing into a case management conference to take place on July 18. On that date, Bussoli attended the case management conference by phone. The presiding judge agreed the applications (the petition and Kiselbach’s application to have the petition proceed as an action) could not be heard on July 19. However, he directed the applications be heard on August 24 and 25, 2016, even if Bussoli was not available on those dates due to another hearing. Bussoli reported in writing on the result of the case management conference to Kiselbach and DeFilippi. Bussoli also wrote he would discuss the matter with DeFilippi to determine his availability for the hearing.

[43] In mid-July, Kiselbach traveled to the Yukon for Yukon Stone hunting’s season.

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[44] On July 29, DeFilippi informed Kiselbach he would be assuming conduct of this matter, as per Kiselbach's request. Kennedy also became a part of the litigation team with DeFilippi and Kiselbach.

[45] On August 4, Kiselbach and Kennedy met with DeFilippi and Barton at Boughton Law's office in Vancouver to discuss the case.

[46] On August 22, 2016, DeFilippi left a voicemail for Kiselbach indicating Florian's lawyer had reached out to him as he wanted to meet and see if they could settle the matter. He said he would be sending Florian's lawyer an email that Kiselbach would also receive. He added that he would see Kiselbach the next day in Whitehorse.

[47] Later that day, DeFilippi sent via email, a without prejudice proposal to Florian's lawyer, in which he stated he would be prepared to recommend to Kiselbach a settlement on his economic claims against Yukon Stone for $500,000 if Florian wanted to resolve the matter prior to the hearing of the applications. DeFilippi did not consult Kiselbach prior to sending that letter. DeFilippi subsequently forwarded a copy of that email to Kiselbach and to Kennedy.

[48] On August 24, 2016, at the hearing, it was agreed by counsel that Florian's petition would be converted to an action. The interim injunction was heard by Gower J. on August 24 and 25, 2016. The matter was reserved for a decision to be given orally on September 2, 2016, at 2:00 p.m. DeFilippi was scheduled to attend the decision by phone.

[49] On August 31, 2016, Florian sent a settlement proposal directly to Kiselbach. In his without prejudice email, Florian set out three scenarios to resolve their dispute, one

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of which was an offer to settle for $237,000. Kiselbach forwarded Florian's email to Kennedy and DeFilippi.

[50] On September 1, 2016, at 11:44 a.m., DeFilippi sent, via email, a proposal for settlement of the plaintiffs' claims for $550,000 to Kiselbach and Kennedy for their review. At 12:17 p.m., Kiselbach communicated his approval to DeFilippi. At 12:23 p.m., DeFilippi sent, via email, to Florian's lawyer a without prejudice offer to settle, which terms included settling all economic claims against Yukon Stone for $550,000. The settlement offer was stated to be open for acceptance by return email on or before September 2, 2016, up to one minute before Gower J. began his judgment.

[51] Shortly after DeFilippi sent his email to Florian's lawyer, Kiselbach wrote to DeFilippi not to send the offer yet. After exchanges of emails and discussions with DeFilippi and Kennedy, Kiselbach decided to maintain the settlement offer at $550,000.

[52] On September 2, 2016, at 12:58 p.m., Gower J. released his decision in writing[1] on the injunction application to counsel for the parties by email.

[53] DeFilippi sent an email to Kiselbach and Kennedy at 1:01 p.m. advising: "We won. Report to follow".

[54] On September 2, at 1:53 p.m. Florian's lawyer, on behalf of Yukon Stone, sent an email to DeFilippi purporting to accept the settlement offer. DeFilippi rejected the acceptance of the settlement offer by email on the basis that such acceptance was too late.

[55] At a case management conference held later that day, Florian's lawyer indicated to the Court that the settlement offer had been accepted. DeFilippi advised the Court it

[1] *45325 Yukon Inc v Kiselbach*, 2016 YKSC 46

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was his position that the without prejudice offer had expired. The presiding judge ordered that, if Yukon Stone wanted to enforce settlement, it would have to bring an application to that effect by the end of day on September 13.

[56] At 3:09 p.m., DeFilippi reported to Kiselbach and Kennedy by email that he had just gotten out of the case management conference; that he had to leave early; and that a report would follow. Kiselbach, who was driving back to Whitehorse from Yukon Stone's main camp that day, tried to contact DeFilippi by telephone during the afternoon of September 2, but was unsuccessful.

[57] At 8:52 p.m., Kiselbach received an email from Barton congratulating him on a settlement at $550,000. On September 3, 2016, in follow-up emails between them, Barton advised that he must have made a mistake and would speak to DeFilippi upon his return to the office on Tuesday, September 6.

[58] On September 3, 2016, Florian told Kiselbach by text messages that he had tried to accept the settlement offer but DeFilippi had turned it down for technical reasons.

[59] On September 5, 2016, Kiselbach sent an email to DeFilippi.

[60] On September 6, 2016, DeFilippi reported by email to Kiselbach and Kennedy on, among other things, Florian's late acceptance of the settlement offer and on the September 13 deadline ordered by the Court for Florian to file an application to enforce settlement.

[61] On September 7, 2016, Florian texted Kiselbach that his acceptance of Kiselbach's offer stood, and he was still prepared to settle the case.

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[62] Florian's counsel did not file an application to enforce settlement on or before September 13. The matter did not settle on or before that date. The court proceedings continued.

[63] On or about September 16, 2016, DeFilippi was informed that Florian and Yukon Stone had retained new counsel. On or about September 19, Florian's new counsel forwarded a draft statement of claim to DeFilippi, which included claims against Kiselbach and C.S.H. based, in part, on breach of fiduciary duties owed by Kiselbach and C.S.H. to Yukon Stone, which included the Terminus Deal.

[64] On September 20, 2016, DeFilippi informed Kiselbach he was withdrawing as his counsel. Kiselbach asked him to continue. DeFilippi agreed on the condition that Kennedy no longer be part of the team.

[65] On September 29, 2016, Kiselbach asked DeFilippi to put forward a proposal at $550,000 plus legal fees incurred since the injunction. DeFilippi suggested an all-inclusive offer of $700,000. Kiselbach approved a settlement offer at $650,000 all inclusive. The offer was sent to Florian's counsel on October 4, 2016. Florian did not respond to that offer.

[66] On December 19, 2016, DeFilippi informed Kiselbach he could no longer continue and withdrew as his counsel.

[67] Kiselbach retained new counsel. He decided not to pursue the application challenging the validity of the Trust Declaration. At a mediation session on March 7, 2017, Kiselbach settled his claim against Yukon Stone for $250,000, payable over five years.

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Kiselbach's Evidence

[68] Kiselbach testified it is either Florian's $90,000 offer or Florian's demand that Kiselbach relinquish Concession 15 that triggered his decision to retain counsel. Kiselbach recalled that his negotiations with Florian were friendly up to the point where he found out Kiselbach had sent a letter to a client to help him raise money by buying hunts in the Terminus area. Kiselbach noted it was the client who had approached him not the opposite. After that, his departure became an issue he and Florian could no longer talk about.

[69] Kiselbach testified that, from the start, he was concerned with the costs of retaining counsel and the costs associated with litigation in relation to his dispute with Florian. He stated more than once during his testimony that costs were a big concern for him. He did not make a lot of money at the time nor did his family have a lot of money. In addition, he was in the process of buying a different outfitting area. He just wanted to get this done and move on. However, as time passed, he was getting further down into litigation than what he was hoping initially.

[70] After he retained Boughton Law, Kiselbach hoped his counsel would come up with a plan to bring Florian to the table to resolve their dispute in a timely manner because his ultimate goal was to resign and leave Yukon Stone in a good state to allow him and his family to move on with his new business.

Early negotiations

[71] The first offer that Barton sent to Florian on May 17, 2016, was based on Kiselbach's contractor fees for 2016, bonuses due, and Yukon Stone shares he was entitled to. They estimated the value of Yukon Stone at $6 million for the purpose of

making the offer, which is the value that Florian had put forward when he refused Kiselbach's unsolicited purchase offer in February 2016. However, Kiselbach testified he did not believe that Yukon Stone's value was that high.

[72] Kiselbach thought that Florian's counter-offer of $161,535 was good to see because it was the first time Florian had moved at all. Kiselbach was interested in that offer but wanted to know how much he owed to Boughton Law first. Also, Kiselbach thought that Florian's valuation of the company at $2.5 to $2.7 million (as a basis for his counter-offer) was low. Kiselbach also thought he was entitled to the value of four Yukon Stone's shares not three, as proposed by Florian.

[73] Kiselbach saw and approved the offer to settle for $409,750 that Barton sent to Florian on May 31, 2016. He added that the first proposal Barton submitted to him was higher. Kiselbach approved a lower number because he wanted to show Florian he was prepared to meet him somewhere. Kiselbach reiterated that he entertained the possibility of accepting Florian's offer at $161,535, but DeFilippi and Barton felt that Florian was finally moving. Therefore, the goal of the May 31 offer was to get Florian to go up another $100,000. If Florian had come back with an offer $100,000 higher than the previous one, Kiselbach would have accepted it because it would have covered his legal costs and would have represented what he thought was a fair value for his shares. Kiselbach added that DeFilippi and Barton were frustrated with Florian because he was communicating directly with Kiselbach. They kept directing Florian to communicate through them and to retain a lawyer.

[74] Kiselbach was worried about the issue of fiduciary duty that Florian had raised early in their dispute. Kiselbach was still worried about it in May 2016 and had put the

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deposit on the Terminus Deal on hold. However, DeFilippi and Barton reassured him that it was not an issue and that he could go ahead with the purchase. DeFilippi seemed confident, at the time, that the dispute was going to be over soon. As a result, Kiselbach decided to release the deposit money to the Terminus/Kechika owners. The current owners had agreed to finance part of the purchase price. In cross-examination, Kiselbach agreed he entered into the letter of intent to purchase Terminus after being warned by Florian that he was in breach of his duties as a director of Yukon Stone.

[75] Kiselbach testified that Florian was of the view that Kiselbach was breaching his fiduciary duties by contacting hunters to back him up on the acquisition of Terminus. Florian was also of the view that Kiselbach was under a duty to bring more concessions to him as Florian wanted to expand his business.

[76] In cross-examination, Kiselbach agreed he retained DeFilippi to negotiate a buy-out from Yukon Stone and there was nothing in the retainer that referred to the issue of fiduciary duty. Kiselbach told DeFilippi about his concerns regarding this issue but did not recall if he received advice from DeFilippi in that regard. He did not recall DeFilippi warning him in May about his fiduciary duties and his desire to start a new business quickly. Kiselbach agreed that Weigelt advised him to create a paper trail on that issue. Weigelt did not advise him not to purchase Terminus. He acknowledged that DeFilippi told him it would be preferable if the same law firm handled the Yukon Stone and Terminus matters. However, Kiselbach felt Weigelt had more experience with respect to the acquisition of outfitting concessions. Kiselbach did not instruct Weigelt not to disclose their communications to DeFilippi. I note that, at his examination for discovery, Barton acknowledged discussing the issue of fiduciary duty with Kiselbach.

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[77] Kiselbach testified that he asked about costs. He recalled Bussoli saying that litigation could be costly. However, Kiselbach reflected on the costs and decided to proceed with litigation.

[78] Kiselbach had a discussion with Barton and DeFilippi around May 27 to discuss the possibility of litigation. Barton and DeFilippi thought the best way to deal with this matter was to start litigation to force Florian to get a lawyer instead of continuing to pursue negotiation with Florian alone, which would be a waste of money and legal fees. Kiselbach agreed that Florian was being very difficult and agreed with that strategy and authorized them to commence litigation. He acknowledged being told that commencing litigation did not mean there would be a trial because most matters settle before trial. DeFilippi knew he did not have experience in litigation.

[79] When Florian filed his petition on June 7, 2016, Kiselbach realized this matter was going to be a much bigger fight than what he wanted to get into. Costs continued to be a consideration for him.

[80] In cross-examination, Kiselbach testified that, in mid-June, he did not fully understand the legal argument on the Trust Declaration. He did not fully realize it was going to be a big fight with Florian. He acknowledged they talked about the steps of the court proceeding, but he did not think his lawyers told him it was going to be that long. At the time, Kiselbach was hoping the argument would put pressure on Florian to bring him to the table to discuss a reasonable settlement. He did not ask his lawyers not to advance the trust argument to return to the basics of his dispute. He agreed that the examples of sales of outfitting businesses he provided to his lawyers were to reinforce the $6 million figure as an appropriate valuation of Yukon Stone.

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[81] Kiselbach was informed that Bussoli was going to fill in while DeFilippi was away from June 23 to July 18, 2016. Kiselbach felt DeFilippi was leaving at a time he was hoping they could still resolve this matter. He also felt they had lost momentum. They were approaching the end of June and they had not yet responded to Florian’s petition. The hunting season was approaching, and he felt it was going to get complicated if he had to deal with Florian and the person Florian had identified as his replacement during the hunting season.

[82] On June 25, 2016, Kiselbach sent options to settle the case to his lawyers. One option was an offer to settle for $242,375. Kiselbach had discussed that offer with his wife and he wanted his lawyers to put it to Florian. His family situation was not good, and he really wanted out. Kiselbach and his wife wanted to move on to focus on their new business (Terminus). He also suggested they use Ernst and Young to do a valuation of Yukon Stone. In that email, he wrote to his counsel:

> Boys this may not be what you want or like but I want this over and it’s always been my hopes for this deal. If there is wording that may motivate more I am open or legal terms to add for protection please let me know. Would like to add a date for Tuesday June 28th for response from Aaron. If he doesn’t take this the gloves are off.

[83] However, his lawyers told him not to put his proposal forward because he would be negotiating against himself. Instead, on June 28, 2016, Barton sent an email to Florian’s lawyer informing him that they would file their documents in response to Florian’s petition shortly. Barton also reiterated the reasonableness of their last settlement offer at $409,750 considering a similar outfitting business in British Columbia was for sale for $7.5 million – Kiselbach provided that example to Barton. Only Kiselbach’s suggestion to use Ernst and Young for a valuation was put to Florian’s

lawyer, not the amount he was prepared to accept. Kiselbach acknowledged he approved the email and settlement offer. Neither Florian nor his lawyer responded to that offer. Kiselbach did not think his lawyers were interested in his approach of going lower. That is the reason why he did not revisit the issue mid-July.

[84] On June 28, 2016, Kiselbach received an invoice from Boughton Law in the amount of $23,805 for the legal services rendered to date. He was upset with the amount and thought something was wrong. He had a telephone conversation with Barton in that regard and, as a result, Barton agreed to give him a courtesy discount of $8,295, thereby reducing the invoice to $15,510, with a balance owing of approximately $11,000. Kiselbach testified that this amount was still a lot of money for him because it represented two months worth of work. He acknowledged his wife worked as well.

[85] In early July, Kiselbach asked Bussoli if he would be against setting up a without prejudice meeting with Florian because Kiselbach felt he and Kennedy could get him to settle. Kiselbach did not recall whether he received a response from Bussoli regarding this proposal.

[86] Kiselbach testified he usually travels to Whitehorse mid-July to get things ready for the hunting season. In 2016, Kiselbach was in the Yukon by July 18.

[87] Kiselbach spoke to Bussoli after he reported back to him by email on his appearance at the July 18 case management conference. Bussoli told him he had a 50/50 chance of success with his case. Kiselbach had never heard this before. He thought his chances of success were too low and he wanted to talk to DeFilippi. DeFilippi had a different view and suggested they continue. Kiselbach agreed knowing there would be costs associated with the litigation.

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[88] From July 30 to August 2, Kiselbach exchanged emails with DeFilippi to set up a meeting at his office in Vancouver to discuss the application of the Yukon *Wildlife Act* to his situation and how it could help him resolve his matter. Kiselbach wanted Kennedy to accompany him to that meeting. Kennedy was a former federal public servant and an acquaintance of Kiselbach. Kiselbach knew him because Kennedy had been involved with the Yukon Outfitters Association. According to Kiselbach, Kennedy had helped multiple outfitters in the Yukon and had acquired an in-depth knowledge of the *Wildlife Act*. Kiselbach asked Kennedy to help because of his knowledge of the *Wildlife Act* and of his experience with court cases as a former federal government employee. Kennedy was a resource for him not a mentor. He agreed that Kennedy was confident and had a good handling of negotiations. Kiselbach was of the view that Kennedy commented and gave his opinion but did not provide legal advice. Kiselbach acknowledged that Kennedy had a lot of input in a number of emails he sent to his counsel and that some of his emails were written largely by Kennedy. Kiselbach acknowledged he asked Kennedy to help with the matter and to help with developing the argument.

[89] Kiselbach agreed in cross-examination that, on July 26, he sent an email to his lawyers informing them that, while he was in the office signing documents for the concession, the head of Yukon Environment had told him that, once the season was over, Kiselbach could cancel the company's paper and Yukon Stone would no longer be able to book hunts or take deposits. Kiselbach agreed it confirmed what Kennedy had said to him and he was hoping he could get Florian to settle with that argument.

[90] By the beginning of August, DeFilippi had resumed conduct of the matter. He suggested that Kiselbach apply for an injunction to allow him to manage the concession

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without interference from Florian and others and to have access to Yukon Stone's books. This would allow Kiselbach to run the concession properly all the while putting pressure on Florian who had already retained someone to replace him. Kiselbach agreed that situation would add pressure on Florian. He added that it was in his best interest that the season go well and that the clients he had booked had a good season.

[91] On August 4, Kiselbach and Kennedy met with DeFilippi and Barton. DeFilippi talked about the Trust Declaration argument, Kennedy talked about the application of the *Wildlife Act* to Kiselbach's case. At some point during the meeting, while Barton was giving his input on the trust issues, DeFilippi was rude with Barton, which was very surprising to Kiselbach and Kennedy. Nonetheless, Kiselbach thought the meeting was productive and positive.

[92] On August 13, 2016, Kiselbach sent an email to DeFilippi entitled "Road Map for moving forward". According to Kiselbach, Kennedy had a lot of input and put a lot of effort into that email. When asked by his counsel what he meant when he wrote "the juice must be worth the squeeze" in that email, Kiselbach explained that he was trying to understand where DeFilippi saw the case going and how much it was going to cost; what was coming up and what to expect. Kiselbach does not recall whether DeFilippi ever followed up on that email.

[93] Kiselbach agreed with the offer to settle for $500,000 by August 24, 2016 that DeFilippi sent by email to Florian's lawyer on August 22. That amount was consistent with the previous offer of approximately $409,000 plus legal fees that had been made at the end of May. Kiselbach still wanted to settle the matter.

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Hearing of the injunction application and settlement offer of September 1, 2016

[94] From Kiselbach's point of view, the hearing of August 24 and 25 was to explain to the Court why it was in Yukon Stone's best interest to allow him to finish the season and ensure that everything was in order – in the hope they could reach a settlement – because Florian was still trying to get him to leave. They also decided to seek an order preventing Florian from interfering with the operations of Yukon Stone's outfitting business because he was of the view that Florian was acting in a way that was detrimental to Yukon Stone's business.

[95] Kiselbach, his wife, and Kennedy attended the hearing in Whitehorse on August 24 and 25. Kiselbach's impression of the hearing of the application was that DeFilippi was more prepared, more composed, and more in control. At the end, the Court adjourned the matter to September 2 at 2 p.m. for a decision on the injunction application.

[96] After the hearing, Florian and his lawyer approached DeFilippi at the courthouse. Kiselbach asked DeFilippi what this was about and DeFilippi indicated they wanted to talk. However, DeFilippi told him he was not interested in engaging in settlement discussions. He told them: "Let him stew, let him think about it". Kiselbach, his wife, and Kennedy were caught off guard by DeFilippi's attitude. Kiselbach testified his wife was very emotional and he did not know what was going to happen. In cross-examination, Kiselbach disagreed that DeFilippi refused to meet with Florian's lawyer as a matter of strategy.

[97] Kiselbach had never been in court prior to August 24 and 25, 2016, and never had to testify before this trial.

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[98] After the hearing, Kiselbach returned to Yukon Stone's main camp with his wife because he had hunters in the field and a concession to run. Yukon Stone's main camp is located at Lapie Lake off the Canol Road, approximately a five-hour drive from Whitehorse.

[99] On August 29, 2016, Kennedy commented on an email that Kiselbach had forwarded to him and DeFilippi about the fact that Florian was looking for a new lawyer and that he had contacted Weigelt, Kiselbach's lawyer on the Terminus Deal, in that regard. Weigelt declined to act for Florian. Later that day, DeFilippi also responded by email. His email touched upon a number of topics, including the possibility that Yukon Stone may have an unjust enrichment claim against Kiselbach, if he were to end up with Concession 15, but that they would "cross that bridge when we come to it". Kiselbach testified that this was the first time he had heard the term "unjust enrichment". He did not know what that meant at the time. He only found out later. DeFilippi also told Kiselbach and Kennedy not to discuss the case with anybody, and, if asked about it to simply say the matter his before the court and they cannot comment on it. Kiselbach testified that DeFilippi made that comment quite often.

[100] On August 31, Florian emailed Kiselbach indicating they could resolve their dispute in one of the three ways outlined in his email. One of the settlement scenarios proposed by Florian was an offer at $237,000. Kiselbach was not expecting Florian to make an offer. Kiselbach testified that he never fully understood the specifics of what Florian proposed. Kiselbach forwarded the proposal to Kennedy who responded in the morning of September 1 stating, among other things, that Florian's proposal was a "dog dung offer". DeFilippi also responded a few minutes later asking Kiselbach to let him

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review the email before any further contact with Florian. In cross-examination, Kiselbach acknowledged that he could have taken that offer. He added that he spoke to his wife about it. He explained they did not respond to the offer because he did not think it was a fair offer considering the legal costs that were adding up. He did not instruct DeFilippi to accept any of the scenarios put forward by Florian.

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[101] In the morning of September 1, DeFilippi sent an email to Kiselbach to inform him of his thoughts on where the matter stood. In that email, DeFilippi informed Kiselbach that he would attend court by phone on September 2 to receive the decision from the Court and that he would be in contact with Kiselbach and Kennedy at the conclusion of the hearing by email and, if possible, by phone. Kiselbach therefore expected that DeFilippi would contact him after the hearing. DeFilippi also set out in that email that, on a moving forward basis, Kiselbach was not to accept any communications whatsoever from Florian concerning the legal proceedings; if Kiselbach were contacted by Florian, he should direct Florian to his own lawyer and tell Florian that his lawyer should contact DeFilippi; and if Florian or others sought to involve themselves in Yukon Stone's business Kiselbach should let DeFilippi know immediately.

[102] Later that morning, at 11:44 a.m., DeFilippi sent to Kiselbach and Kennedy, for their review, a proposal at $550,000. DeFilippi proposed to send it to Florian's lawyer in response to the settlement scenarios that Florian had sent. The proposal included a number of terms, including that Kiselbach would complete the 2016 hunting season as the outfitter for Yukon Stone. The offer was open for acceptance up until one minute before the court's decision on September 2.

[103] At 12:17 p.m., Kiselbach responded by email to DeFilippi that he was in agreement with the proposed settlement offer. Kiselbach wrote: "this looks great also and will send his [Florian] head spinning as it has taken 6 months to get him to $230 k roughly…thank you".

[104] Kiselbach did not recall whether he had a telephone conversation with DeFilippi before receiving his email. However, he recalled they talked several times that day. Yukon Stone had a satellite phone as well as Wi-Fi at its main camp. Kiselbach could text with his own phone using the Wi-Fi, but could not have a telephone conversation with it. The satellite phone was the only means by which Kiselbach could communicate by phone at Yukon Stone main camp. Based on the record of the satellite calls, Kiselbach noted he had several calls that day with DeFilippi from 12:30 p.m. to 2:23 p.m. the longest being of approximately six minutes in length.

[105] At 12:07 p.m. MST[2], Kiselbach received an email from Kennedy following Kiselbach's attempts to reach him by phone. Kennedy wrote he could not talk on the phone because there was too much noise on the line.

[106] At 12:20 p.m., Kiselbach had a phone conversation with Kennedy that lasted approximately nine minutes during which Kennedy advised Kiselbach he thought the offer should be higher.

[107] DeFilippi sent the offer that Kiselbach had approved to Florian's lawyer at 12:23 p.m. At 12:24 p.m., DeFilippi forwarded that email to Kiselbach stating: "Craig, thanks for getting back to me. FYI. We will see".

[2] Mountain Standard Time ("MST") is displayed on certain emails. The Mountain Time Zone was one hour ahead of the Yukon all year long in 2016.

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[108] At 12:34 p.m., after his conversation with Kennedy, Kiselbach sent an email to DeFilippi asking him not to send the offer: “Don’t send anything yet it needs to higher, just talked to Terry and he seems pretty confident that if we stay on course the juice will be worth the squeeze..$900k …thoughts?” [as written]. Kiselbach testified his email reflected what Kennedy thought and what he and Kennedy had discussed on the phone. Kiselbach explained he sent that email to DeFilippi not because he agreed with the $900,000 figure but because he wanted to discuss with DeFilippi what Kennedy had said. Kiselbach added that, the whole time, the three of them (Kiselbach, Kennedy, and DeFilippi) were discussing everything.

[109] Kiselbach added that the settlement offers sent to Florian by his legal team were based on: the value of the shares in Yukon Stone that Kiselbach should have received over the years; his 2016 annual fee; his bonuses; as well as his legal fees, which increased over time. However, Kennedy’s $900,000 figure was based on his opinion that Kiselbach already “owned” the area (as the holder of Concession 15 under the *Wildlife Act*). Kennedy thought the concession was worth $2.5 to $3 million. Kiselbach understood Kennedy’s position. However, he was not comfortable with it because he was trying to sever his relationship with Yukon Stone and move on. Kiselbach was of the view that Kennedy was alive to his difficult position and acknowledged that it was Kiselbach’s decision to make.

[110] At 12:37 p.m., DeFilippi wrote back to Kiselbach that there was still time to increase the amount of the offer if that is what he wanted. He told Kiselbach to phone him and they would fix the amount.

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[111] At 12:49 p.m. Kiselbach wrote to DeFilippi that there was a word missing at para. 3 of the proposal and that he was not willing to surrender his cell phone number, which he had had for over 19 years. Kiselbach indicated he would call DeFilippi as soon as the satellite phone worked again. Kiselbach testified that the changes he requested in that email were motivated by his telephone conversation with Kennedy.

[112] At 1:12 p.m., Kiselbach had a 5:36 minute conversation with DeFilippi during which they discussed Kennedy's position on the offer. At the time, DeFilippi was open to changing the amount and asked him what he wanted to do. Kiselbach, in consultation with his wife, decided to keep the offer at $550,000 to see if they could get the matter resolved. He did not recall DeFilippi recommending they stay at $550,000. Kiselbach testified they were focused on the amount at that point but agreed he did not ask DeFilippi to change the deadline. His understanding was that if Florian did not accept the offer, they would receive the judgment on the injunction. They were stressed because they did not know whether they were going to be successful on the injunction.

[113] At 1:18 p.m., Kiselbach had a 28:48-minute conversation with Kennedy. Kiselbach testified that he explained to Kennedy he had a conversation with DeFilippi and had decided to let the offer stand at $550,000. Kennedy thought Florian would take the offer. He added that Florian would be stupid not to. Kiselbach thought Kennedy reiterated his position but understood it was for him and his wife to decide. Kiselbach felt he was in a delicate situation where he was mitigating between two individuals with "egos", and who would challenge each other positions from time to time. However, Kiselbach believed that both brought something to his case. He felt he needed DeFilippi as his lawyer and Kennedy as someone knowledgeable of *Wildlife Act* matters.

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[114] At 1:36 p.m. DeFilippi forwarded to Kiselbach and Kennedy the amended proposal he had sent to Florian's lawyer at 1:35 p.m. with revisions in bold to the original offer. Kiselbach stated he agreed with all the changes except for the last paragraph, which they had not discussed and he had not approved. That last paragraph read:

> Finally, we have been instructed to advise that if this proposal is not accepted, the amount required will simply increase over time. More importantly, and regardless of whether an injunction, in whole or in part or at all, is granted, the Trust Issues remain outstanding and once determined and following Mr. Kiselbach's resignation as a director of Yukon Stone, he will be the sole owner of Concession #15, Yukon Stone will be out of business, and there will be nothing left to discuss. [bold and italics in original omitted]

[115] At 1:41 p.m., Kiselbach sent an email to DeFilippi stating: "Why did we just tell them the case?" At 1:42 p.m., Kiselbach sent another email to DeFilippi stating: "All negotiations like this need to be discussed or reviewed prior to emailing. Now we need to amend the offer for sure". Kiselbach testified he wanted that last paragraph removed because they had not discussed it and he thought it was very aggressive and not conducive to settlement. He further explained that he did not want Kennedy's theory of the case to come into play in the settlement's discussions. Kiselbach did not want to go there; he did not want another lawsuit that would unnecessarily prolong the legal proceedings. In cross-examination, Kiselbach confirmed he and Kennedy were unhappy about the escalating technique DeFilippi had employed. However, Kiselbach did not know whether any negative consequences flowed from that additional paragraph. Kiselbach agreed he did not want DeFilippi to send a unilateral offer without his

approval. He agreed he made it clear to DeFilippi that all negotiations needed to be reviewed and discussed prior to sending.

[116] At 1:48 p.m., Kiselbach had a telephone conversation with DeFilippi that lasted 1:51 minutes. At 2:00 p.m., he had a telephone conversation with DeFilippi that lasted six minutes. Kiselbach told DeFilippi he was not comfortable with that last paragraph, he did not know why he had added it and what its purpose was. He asked DeFilippi if they could remove it.

[117] At 2:04 p.m., Kennedy sent an email to DeFilippi, with a blind copy to Kiselbach, criticizing DeFilippi's strategy in adding the last paragraph to the offer, which in Kennedy's views telegraphed the case, without making other changes to the offer, including setting the offer at $900,000 to $1 million, a reasonable concession value in Kennedy's views, to give them room to counter. At 2:24 p.m. MST, Kennedy sent an email to Kiselbach explaining why he had blind copied Kiselbach on his email to DeFilippi and why he was angry at DeFilippi. Kiselbach testified he saw those emails.

[118] Kiselbach acknowledged receiving the email that DeFilippi sent to him and Kennedy with copy to Barton at 4:18 p.m. DeFilippi wrote that the revised offer had been sent without prejudice, that Florian and his counsel had known shortly after he filed the outline of the injunction application on August 18 that they were seeking to have the Trust Declaration declared void, which would result in Kiselbach remaining the holder of Concession 15 with no obligations towards Yukon Stone except for the possibility that they bring a claim in unjust enrichment, which concept he explained later in that email. In addition, he pointed out that if Kiselbach resigned from Yukon Stone right away and the permit fell, Yukon Stone's ability to complete the outstanding

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contracts may be compromised and Yukon Stone may be in a position to claim bad faith, which could expose Kiselbach to a claim in damages. Kiselbach testified that DeFilippi appeared to be responding in part to what Kennedy had written to him. Kiselbach testified he did not know what unjust enrichment was before receiving that email. However, he understood from that email that if he were successful on the trust issues, he could very well be facing a second lawsuit and this possibility scared him even more. DeFilippi also insisted that all negotiations be conducted between him and Florian's lawyer only. Kiselbach understood he was not supposed to discuss settlement directly with Florian at all. Finally, Kiselbach felt the last paragraph of DeFilippi's email was directed more at Kennedy than him. That last paragraph read:

> Remember, $550,000.00 may not be exactly half the value of the Concession. But even if the Concession is worth $2.5 million (or even more) the likelihood of Craig getting it for "free" or getting it without a further lawsuit from Florian is remote in the extreme. To be sure, that may be the preferred outcome of Yukon Environment and the YOA; however, as discussed, the law takes a very dim view of people getting "windfalls" that they do not, as a matter of equity, really deserve.

[119] Kiselbach agreed that by raising the issue of unjust enrichment with him, DeFilippi was warning him about the risks in his case. Kiselbach agreed he wanted his counsel to warn him about those. He agreed that DeFilippi was telling him about what his realistic expectations should be on settlement. Kiselbach thought DeFilippi was not happy about being challenged.

[120] At 6:19 p.m., Kennedy sent a long email to DeFilippi with copy to Kiselbach challenging, among other things, DeFilippi's opinion on the legal protection afforded to

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"without prejudice" communications. Kennedy reiterated his views that $550,000 was too low and explained why.

[121] At 9:51 p.m. MST, Kennedy sent a long email to Kiselbach only in which he explained his personal reasons and rationale for challenging and criticizing DeFilippi. Kiselbach testified that he thought Kennedy was essentially apologizing to Kiselbach for his reaction.

[122] On September 2, 2016, DeFilippi wrote to Kiselbach and Kennedy that:

> Craig/Terry,
>
> I have in hand's Terry's latest communication and in general, it appears that you are of the view that $550,000 is too low in the circumstances. Craig approved that figure yesterday, in contrast to, say, $900,000 that we discussed, but nothing is chipped in stone for the moment.
>
> If you want to go higher, or indeed withdraw the proposal altogether, ***let me know immediately and I will do so***. As to what a new figure might be, I wish I could be of more assistance. There is no rule of law or reported case that I can turn to. This is very much a "gut feel" analysis. Let me [k]now, in any event, one way or the other as soon as you can this morning.
>
> Two other points. First, this is not a pure business negotiation; rather, it is extortion albeit one sanctioned by the legal process. Barring a settlement, one party will lose and the other will win, and that contest will eventually occur in Court, barring a settlement. It will not be a matter of simply failing to agree on something and then walking away. When one is doing the extorting, one needs to make sure, in no uncertain terms, that the target of the extortion knows, exactly, what will happen if the requests (demands) are not complied with. Second, I can assure you that the road to legal hell is paved with lawyers who underestimated their opponents/opposing clients about what their legal abilities are, what they know, what they plan to do and what they will do and more importantly, what their financial and emotional resources are. [Florian's lawyer] apparently missed the trust issues (or could have recognized them and Florian

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> determined to proceed in any event hoping that Craig and his lawyers would not pick up on them), but we will never know for sure. I do know that if the Concession remains with Craig, that likely will not end the matter and then we are in another lawsuit, which, always, is best avoided. [emphasis in original]

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[123] Kiselbach testified that it was Kennedy who thought that $550,000 was too low, not him.

[124] At 9:25 a.m., Kiselbach responded to DeFilippi's email with copy to Kennedy reiterating that he agreed that the offer should remain at $550,000. Kiselbach agreed that, in that email, he was summarizing the discussion he had had the day before with DeFilippi.

[125] Kiselbach testified that, in his view, the $550,000 figure was consistent with the previous offers that had been made and the fact that legal fees were getting higher. He was not basing the settlement figure on the value of the concession. He added that, even though he recognized that the offer he approved had a deadline of one minute before the court's decision, his focus was on the amount not the timing. Therefore, when he wrote in his email of September 2 that "after today they would seek a higher value", he testified he meant the end of the whole day on September 2, and that the offer was to stand for the whole day on September 2. Kiselbach explained that he was hearing Kennedy's side of the story, but his wife thought the number was high, and he understood that DeFilippi thought they should stay at $550,000, so he decided to stay at $550,000. In cross-examination, he agreed he knew the offer had a deadline. He also agreed that he wrote they would stay at $550,000, but if Florian did not accept the offer on its terms and within the imparted time, the next offer would be higher. Kiselbach

testified he wrote that passage to appease Kennedy but acknowledged DeFilippi did not know that. Kiselbach agreed he did not think that Florian would accept the offer.

[126] In cross-examination, Kiselbach stated he agreed with Kennedy on the *Wildlife Act* but not with everything that he said. He thought Kennedy's advice was excellent. He agreed he thought the case was a good precedent for him and others. Kennedy very much wanted to test the *Wildlife Act* but Kiselbach had to think about his family's situation. Kennedy had a much higher figure in his head for his own reasons.

Decision on the application, Florian's late acceptance, and communications during the Labour Day weekend

[127] On September 2, Kiselbach traveled from Yukon Stone's main camp to Whitehorse with his family. He was without cell phone service for extended periods of time. He believed they left Yukon Stone's main camp at around 11:00 a.m.

[128] Kiselbach did not recall if he received Kennedy's email of September 2 at 10:06 a.m. before he arrived in Whitehorse. Kiselbach believed he was in Faro (1.5 hours from Yukon Stone's main camp) when he had a number of phone conversations with Kennedy between 12:22 p.m. and 2:16 p.m. At the time, they only talked about his travel. Kiselbach knew he was going to be travelling at the time of the court's decision and Kennedy was keeping an eye on it for him.

[129] Kiselbach thought he was in Carmacks at 1:01 p.m., when DeFilippi emailed him and Kennedy: "We won. Report to follow".

[130] At 2:36 p.m., Kiselbach phoned Barton while he was still in Carmacks. Kiselbach believed he was checking with Barton to find out what had transpired after talking to Kennedy because DeFilippi was still tied up in court at that point. Barton was going to inquire for him.

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[131] At 2:43 p.m., Kiselbach left a voicemail to DeFilippi while in Carmacks. Kiselbach phoned DeFilippi at 4:24 p.m. but was not successful in talking to him and left a message.

[132] The only information that Kiselbach had at that point was that he had won the injunction. Kiselbach testified that he did not know about Florian's purported acceptance of his offer when DeFilippi sent he and Kennedy an email, at 3:09 p.m., stating that he had just gotten out of the case management conference via teleconference; that he had to leave early; and that he would report on Tuesday. Kiselbach acknowledged sending an email to DeFilippi at 5:06 p.m., saying "sounds good thanks".

[133] Kiselbach noted that DeFilippi never forwarded him a copy of the September 2 email Florian's lawyer had sent at 1:53 p.m. indicating he was instructed to accept the offer, nor did DeFilippi forward him a copy of his response to Florian's lawyer at 2:01 p.m. stating it was now too late because the Reasons for Judgment had already been delivered at 12:58 p.m.

[134] On September 2, Kiselbach received an invoice of $11,748 for Boughton Law's professional services by email. That amount was paid in full with funds that were already in trust.

[135] At 8:52 p.m., Kiselbach received an email from Barton entitled "Congrats re $550+, you deserve it, cheers PKB". Not long after, Kiselbach replied by email that there was nothing attached to Barton's email and was unsure of what it meant. On September 3, at 7:05 a.m. Kiselbach reached out to Barton by email saying "Don't leave me hanging.…'' because he had not heard anything about a possible settlement prior to Barton's email. Barton replied at 9:01 a.m. stating that DeFilippi had told him that

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Florian's lawyer wanted to settle for $550,000 and that he simply wanted to congratulate Kiselbach on a settlement that was much better than the $400,000 Kiselbach wanted back in May/June. Kiselbach responded by email at 9:03 a.m. "Well shit never heard a thing? Really?" Barton replied a few minutes later stating that "If you never heard then I must be confused. I will ask RRED [DeFilippi] on Tuesday. Then congrats for winning the injunction!" Kiselbach ended the exchange by responding: "Okay thanks ya I haven't heard that so I doubt it…unfortunately". Kiselbach testified that he and his wife were a bit excited, but a bit confused at the same time when Barton told him that Florian was prepared to settle for $550,000 because it was the first time they had heard about it. They wanted to settle and were disappointed when Barton later stated that he must have made a mistake. Kiselbach added that they were hopeful it had been accepted and it was very confusing.

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[136] On September 3, between 11:41 a.m. and 4:08 p.m., Florian and Kiselbach exchanged a number of text messages. The exchange was prompted by Florian's message to Kiselbach that they needed to meet because Florian wanted to give him documents to comply with the court decision. Kiselbach replied he did not want to meet with him. He added his lawyer was in the process of making a list of all the documents they would require and that it was probably better to wait. Kiselbach testified about this exchange that DeFilippi had been very clear about Kiselbach not communicating directly with Florian about the case and he thought he should keep his distance.

[137] Later during the exchange, Florian stated: "We also have a golden opportunity to put everything behind us and move forward. You do understand that I accepted the last proposal and it was turned down". Kiselbach responded: "Not sure what you mean

nope”. Florian wrote: “You mean your lawyer didn’t tell you that I accepted the $550K offer simply to bring all this ugliness between us to an end and it [as written] he decided to reject it for some unknown technical reason?” Kiselbach responded: “I haven’t been able to get ahold of him as I was traveling when all this was decided by the judge…. He is out of contact for the long weekend.” Florian replied:

> I don’t know what to say other than we should talk about it because I can’t thing [as written] of any reason other than just wanting to continue the fight to turn that down. Either way, I’m leaving town tomorrow morning so if you want to talk and settle this let me know and if you want to continue the battle then I guess we continue.

[138] Kiselbach wrote back: “Was the offer before or after the ruling”. Florian responded: “The acceptance was made about ten minutes before the conference began”. Kiselbach stated: “I’ll have to review it”. Florian responded: “Not sure how long you need to look at 45” ram that scores 185”. At trial, Kiselbach commented that Florian was using hunter imagery to convey to Kiselbach that it was a really good settlement. Kiselbach responded: “I saw the ruling … I need to discuss with my lawyer”. Florian replied: “Sounds like you don’t make the decisions and you want to continue to fight”. The exchange ended with Kiselbach writing: “Easy or I won’t look into this”.

[139] Kiselbach testified, in relation to this exchange, that he did not know what was going on and what had transpired when Florian told him he had accepted the offer before the case management started. Kiselbach added that, at the time, he did not think he could do anything about Florian’s offer to settle and to put everything behind them. DeFilippi had been very clear that he was not supposed to meet with Florian; that all the discussions should occur between the lawyers; and, consequently, he was being careful about that. Kiselbach added that this was the reason why he responded to Florian that

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he needed to discuss the situation with his lawyer. In cross-examination, Kiselbach agreed he did not give any encouragement to Florian to talk about the offer or that the lawyers sit down to talk about the offer. Kiselbach agreed he asked Florian whether the offer had been made before or after the ruling because he knew there was a timetable on the offer. Kiselbach added he was confused and did not know entirely what was happening. He did not fully understand what the decision on the injunction implicated, which is the reason why he said he had to review it and needed to discuss it with his lawyer. It appeared that Florian was using is obligation to give him documents as an excuse to meet with him. Kiselbach was really nervous about engaging with Florian at the time, which is why he took pictures of the text messages and gave them to DeFilippi. When counsel for the defendants put to him that he asked Florian whether he accepted before or after the ruling because he knew that if the offer had been accepted before the ruling it would be an acceptance, and if it were accepted after the ruling it would not be, Kiselbach agreed that he was asking Florian whether he had accepted the offer. Kiselbach added he was getting Florian's messages in conjunction with Barton's emails and he did not know what was going on. Kiselbach agreed he ended the conversation by saying he needed to discuss this with his lawyer.

[140] On September 3 at 1:05 p.m., Kiselbach had a telephone conversation with Kennedy for 11 minutes. On September 3 at 3:31 p.m. Kennedy emailed Kiselbach and wrote: "Ask yourself why does Aaron want to settle now after you were so sure he never would??" Later in that email Kennedy wrote:

> The court order injunction indirectly allowed us all including your lawyer and then the judge to see what the concession is really worth, and whom [as written] built it and whom [as written] abused it. To give up as we get the lid open to see

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> inside is not a wise decision if considering it. Of course Aaron agreed to 550, he would agree to 900 or inbetween or perhaps more depending on what the real books show - … BUT we will not know until we look and never know if you settle now- so if now is when you settle then do it for a hell of alot more that the 550 he jumped at.

[141] Kiselbach agreed that what Kennedy wrote reflected Kiselbach's belief that Florian would never settle. Kiselbach stated in cross-examination that the email was consistent with Kennedy's belief and what he had said multiple times already that a settlement should be higher than $550,000. At 2:50 p.m., Kiselbach had a 74-minute long call with Kennedy. Kiselbach testified that his conversation with Kennedy took place after he had received Kennedy's email. Kiselbach had another phone call with Kennedy at 6:52 p.m.

[142] Kiselbach testified that, at the time, he was not confused about whether or not he should accept the offer. He was confused about whether the offer was accepted or not. He did not know he could accept Florian's late acceptance and did not know he could do so on his own. That is the reason why he told Florian he needed to talk to his lawyer. Kiselbach testified he was waiting to talk to his lawyer whom he had tried to reach multiple times. However, DeFilippi was away and he was not getting any answers. Kiselbach pointed out that he had to ask Kennedy, a former federal government employee with a background in forestry, to explain the meaning of the injunction decision to him because he did not have experience in that field and nobody else had explained the decision to him at that point. Kiselbach added that he was just trying to make sense of what was going on for him and his wife.

[143] On September 3, at 6:18 p.m., Kennedy sent another email to Kiselbach. Kiselbach testified he showed the email to his wife. In that email, Kennedy reiterates

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and explains his position regarding settlement. Portions of that email were put to Kiselbach in cross-examination.

> Craig
>
> To put into words often makes issues real and something to believe in or take counter to.
>
> **On the acceptance of deal or offer**
>
> 1. Richards [as written] terms and timing was definitive. So to turn an acceptance by Aaron or [Florian's lawyer] down he would have either received the offer later than the deadline or the the [as written] offer did not meet the terms of the offer he put forth or [as written] your behalf. Richard would have not violated your trust or his responsibility to turn one down if the offer was made to meet both conditions. So not an issue until you talk to him and see if and why.
>
> 2. Any offer made after the start of the court and the result is an open and new offer by Aaron and [Florian's lawyer] as your offer was officially dead. Richard would have turned it down until he talked with you in any case. [H]e also had instructions not to agree to any offer at that level after the time ran out on his so would not. [bold in original]

[144] Kiselbach agreed in cross-examination that Kennedy had put in writing what they had discussed on the phone. However, he did not agree that DeFilippi had no authority to accept settlement on his behalf at $550,000 if Florian accepted after the deadline, as stated in Kennedy's email. He disagreed with the proposition that he had made it clear to DeFilippi that if the offer was not accepted in a timely manner it needed to go up. Kiselbach added he did not accept the timetable DeFilippi put for strategy purposes. Kiselbach testified he was of the view that DeFilippi did not like the fact that he and Kennedy challenged him on the last paragraph DeFilippi added to the revised offer without consulting them, and that his discontent carried over to the moment he was in court on September 2. Kiselbach believed that DeFilippi decided he was going to make

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the decision on the offer because DeFilippi did not come to him after court on September 2 asking him if he wanted to accept the offer even if it were a few minutes late.

[145] On September 4, at 8:37 a.m., Kennedy wrote another long email to Kiselbach.

September 5 to September 13, 2016

[146] On September 5, 2016, at 7:02 a.m., Kiselbach sent an email to DeFilippi and Kennedy.

> Hi Richard
> Didn't get to talk much but appears our injunction not only was successful but also got the judge thinking also especially about the Trust Declaration, Wildlife Act and the whole situation. Looks like I need to answer that last Affidavit that Aaron swore to so could you send that to me which you already may be doing and I'll get to it. Also Aaron has been trying to contact me and using documents to hand to me as an excuse to talk. Anyways he mentioned that they had excepted [as written] our offer 10 min before the injunction? I doubt this, and suspect he is playing games as there is no way I believe he would agree to our terms unless he already read the injunction comments by the judge. Will need some clarity on that also please. Hope you had a good long weekend and thank you, we are getting somewhere so let's find out where that takes us.
> Time to set up a new proposal which I will contact Terry about and draft something for you to look at as this is his specialty as well as the act and will save you time.…
> Thanks and all the best.
> Craig Kiselbach

[147] Kiselbach testified he wrote this email to DeFilippi because he was looking for clarity. He did not trust Florian, he thought Florian was playing games with him, and he did not know what was happening. Kiselbach added that all he knew at the time was what Barton and Florian had told him, and he was confused. In cross-examination,

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Kiselbach testified he did not know at the time what had happened to the $550,000 offer.

[148] In cross-examination, Kiselbach agreed he had decided to keep the offer at $550,000 with the understanding that the offer would go up if it were not accepted. Kiselbach agreed that Florian's acceptance came after the offer had expired because it came after the judgment was rendered. Kiselbach agreed they had never discussed what would happen or what to do if Florian tried to accept the proposal after it expired. Kiselbach confirmed that he and Kennedy did not draft a new offer following that email. Kiselbach assumed the new proposal would have been higher because there would have been additional litigation costs. Kiselbach stated there was a power struggle going on between DeFilippi and Kennedy and he was trying to mitigate it.

[149] In addition, Kiselbach agreed that when he received Florian's text messages, he thought Florian had read the injunction first. Kiselbach acknowledged he understood the offer expired one minute before the judgment. He asked DeFilippi about the acceptance because he thought it was too good to be true. Kiselbach agreed that he believed Florian would not accept the offer without reading the injunction decision first and that he is conveying in his email to DeFilippi it is time to continue with the litigation and to set up a new offer. Kiselbach added that he wanted to discuss the situation with DeFilippi.

[150] Kiselbach testified he did not know he could accept the offer even if it were late. When challenged about the fact that Kiselbach had not even spoken to DeFilippi about that issue when he sent his September 5 email, Kiselbach responded he had no clarity at that point. He repeated that he did not know he could accept the late acceptance. Kiselbach added that DeFilippi was quite strict and insisting that everything had to go

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through and be handled by the lawyers. Kiselbach testified he did not know he could walk up to Florian, shake his hand, and accept the $550,000. Kiselbach acknowledged he did not write an email to DeFilippi on September 5, or at any other time, stating he was good or happy with $550,000, and that he was prepared to take it whether it was accepted before or after the injunction decision.

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[151] The next day, on September 6 at 7:55 a.m., DeFilippi responded that a lengthy report was to follow. He added that there should be no new proposal from them; that Kiselbach had to learn to stop negotiating against himself; and to let Florian and his lawyer put an offer on the table if they wanted to negotiate.

[152] On September 6 at 3:50 p.m., DeFilippi sent a long report by email to Kiselbach and Kennedy. In that email, DeFilippi went over the Reasons for Judgment. He then reviewed the chronology of the proposal and explained that Florian purported to accept the offer after it had already expired. He wrote that Florian's acceptance was too late because there was no offer left to accept. DeFilippi also explained that, to put additional pressure on Florian and his lawyer, he requested that the Court set a timeline for them to file a stay application, if they wanted to enforce settlement, by the end of the day on September 13.

[153] Kiselbach agreed that in that email DeFilippi told him that, as a matter of law, the offer had expired and there was nothing left to accept. Kiselbach also agreed that DeFilippi told Kiselbach about where the case stood and what Kiselbach's legal position was at the time. Kiselbach added that, when he received the email, he understood that Florian through his lawyer needed to make an application by September 13, for him to have the option of either accepting the offer or opposing the stay application. He also

understood that if Florian and his lawyer did not file the application, which DeFilippi did not think they would, the proceeding would simply continue.

[154] Kiselbach testified he accepted DeFilippi's advice to wait for Florian to make a proposal. In cross-examination, Kiselbach acknowledged he did not tell DeFilippi that he did not want to work on a new proposal but wanted to accept a settlement at $550,000. Kiselbach testified he did not because he thought the $550,000 was gone.

[155] Kiselbach agreed that, from then on, they continued to work on advancing the case, moving along with the trust argument, and he went back to managing Concession 15 in accordance with the injunction decision. Kiselbach testified that, after receiving DeFilippi's email, he was waiting to see if Florian was going to make an application to stay.

[156] On the morning of September 7, Kiselbach had a telephone conversation with DeFilippi. Kiselbach testified he did not recall whether he and DeFilippi talked about the settlement during that telephone conversation. Kiselbach testified he told Kennedy and his wife he wanted to settle. However, he acknowledged there is no communication from him to Boughton Law by email, text, letter, or telephone indicating that he was prepared to take $550,000. However, Kiselbach pointed out that he tried to put an offer in later and he was told not to negotiate against himself. Kiselbach testified that DeFilippi swore at him for the first time during that telephone conversation. DeFilippi did not want Kiselbach to speak with a representative of Yukon Environment because he may say something that would hurt his case. Kiselbach was at Yukon Stone's main camp at the time and did not take notes of that conversation.

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[157] Kiselbach believed it was fair to say that DeFilippi wanted to keep the control over the communications. He did not agree DeFilippi had his best interest at heart.

[158] Kiselbach did not recall if he did or did not tell DeFilippi that, if Florian filed an application to enforce the settlement, he would take it. Kiselbach added he told Florian he would settle if he made the application.

[159] On September 7, at 2:31 p.m., Florian texted Kiselbach that: "Sounds like you aren't interested in settling …". Kiselbach texted back at 4:49 p.m.: "Sounded like you saw the response at 1:08 p.m. then settled at 1:53 p.m. on Sept 2 which wasn't the deal. Disappointing move. Can't see your hand and then bet". Florian wrote back:

> Interpret or spin things however you want, it was accepted with the desire to put this in the rear view mirror and with the understanding that the meeting was the deadline. I guess it's up to you whether you want to settle or not.

Kiselbach then changed the subject of the conversation.

[160] Kiselbach explained that, at the time, he did not know he could resurrect the offer. He thought Florian's lawyer had to make an application before he could accept the offer. He did not know he could shake Florian's hand and take the deal. Kiselbach testified he would have taken the deal at $400,000, $450,000, or $500,000, if Florian had gotten back to them at that amount because he and his wife wanted it over. Kiselbach agreed that, in those exchanges, Florian is telling him he still wants to settle and it is up to him whether he wants to settle or not. Kiselbach testified that he responded by relaying what DeFilippi had told him. Kiselbach added that DeFilippi had made it clear what the next process was for Florian to accept the offer. DeFilippi said not to be in communications with Florian about legal proceedings which is why Kiselbach changed the subject. Kiselbach could not say whether he told DeFilippi about

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these text messages or not. He had no recollection of writing or letting DeFilippi know about the exchange he had with Florian.

[161] Kiselbach testified he discussed with Florian and encouraged him to file an application to accept the offer, but Florian never did. Kiselbach did so because he thought that it was the only way the settlement at $550,000 could be concluded. Kiselbach testified he was anxious to know if Florian would follow up with the application. In his view, his email of September 13 to DeFilippi asking whether Florian had filed an application or whether "we were past that now" reveals he was anxious about it. Kiselbach did not tell DeFilippi about the conversations he had with Florian encouraging him to take the offer. That is the reason why he sent that email to DeFilippi.

[162] Kiselbach testified it did not make sense to him that Florian would have to make an application by September 13 to settle for $550,000. However, Kiselbach had suggested to make a new proposal, but DeFilippi told him not to negotiate against himself. Kiselbach agreed that Kennedy thought the next offer should be higher but not him. He testified he did not know if the next offer would have been higher at that point.

[163] Kiselbach agreed that, during the period starting on September 1, Kennedy was trying to convince him and DeFilippi to seek a higher figure than $550,000. However, Kennedy understood it was for Kiselbach and his wife to make the decision because they were the ones who would have to live with the consequences. Kiselbach agreed that he and Kennedy exchanged emails without copying DeFilippi. He added that DeFilippi would not have been happy if they had done so. He acknowledged that Kennedy drafted emails for him to send to DeFilippi as the case unfolded, and that he did not tell DeFilippi that Kennedy was the author of or had worked on some of those

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emails. Kiselbach agreed he reached out to Kennedy before reaching out to DeFilippi fifty percent of the time. He noted that Kennedy was free. Kiselbach denied Kennedy's opinion confused him on how to handle his case. Kiselbach testified he consulted his wife throughout the case as well.

[164] Kiselbach acknowledged that, after the offer expired on September 2, he did not tell DeFilippi that he would have taken less than $550,000 to settle the case.

[165] Kiselbach agreed that there were no discussion with DeFilippi about settlement between September 7 and September 12.

[166] On September 13, Kiselbach had an email exchange with Kennedy about the case and an issue regarding day-to-day management of the concession. He did not know whether Florian and his counsel had filed an application to enforce the settlement at the time. In that exchange, Kiselbach wrote: "No shit let's just get to the Trust Declaration and move forward if it stands or end this play school shit". Kiselbach testified he was just trying to get through the situation and Kennedy was telling him to go on with the case. At that point, they were just going through the injunction process and what the judge ordered. Kiselbach agreed that Florian's lawyer did not file an application to stay, and the case continued.

Mid-September 2016 to March 2017

[167] On September 14, Kiselbach received a lengthy email from DeFilippi indicating that by mid-October they would know more about the trust issues. DeFilippi set out options for settlement at that point. Kiselbach testified he was aware at the time that they were moving to another phase of the litigation, on the Trust Declaration issues, which was going to be more costly. Kiselbach testified he did not raise that he wanted to

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settle the case again because he had already done so and was told not to negotiate against himself. Kiselbach testified it is around that time he started to talk to Kennedy about how to get this resolved because DeFilippi was interested in litigation not mediation and the bills kept adding up.

[168] On September 14, at 1:35 p.m. DeFilippi sent a long email to Kiselbach and Kennedy requesting their assistance on certain topics to finalize the notice of application for a summary trial regarding the trust issues. Kiselbach testified that what he understood from DeFilippi's email was that if he were to obtain the concession, he would have to face another legal matter. This situation was not good because he did not want to deal with another legal matter.

[169] Kiselbach testified that, around that time, he discussed with Kennedy the possibility of entering into a mediation with Florian because he wanted to try to get the matter settled. Kennedy had done some mediation in the past and offered to act as a mediator for a fee. Kennedy knew Kiselbach wanted to settle and agreed to do it for him even though Kennedy's preference would have been to take the case to a decision. Over the next few days, they tried to set up a mediation with Florian, but they were not successful. Kiselbach believed their attempt at mediation occurred at the same time Florian retained new counsel. At first, Kiselbach testified he did not believe he discussed this possibility with DeFilippi because they had asked about outside mediation in the past and he did not get an answer from him. Kiselbach then stated he did not tell DeFilippi they were planning a mediation on the side with Florian.

[170] The mediation did not take place because Florian hired a new lawyer, and the new lawyer told DeFilippi about the mediation.

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[171] On September 19, DeFilippi informed Kiselbach and Kennedy that Florian had retained a new counsel from Vancouver. DeFilippi requested they have a conference call. On the same day, Kiselbach and Kennedy had a lengthy phone call with DeFilippi. Kiselbach remembered some but not all of the things they discussed during that call. Kiselbach testified that DeFilippi's tone had changed, that he seemed very worried about the change in lawyer, and that he was noticeably rattled about it. DeFilippi went over the case and did not seem very confident while explaining it to them. DeFilippi stated that Kiselbach would be lucky to get $300,000 to $350,000. Kiselbach told DeFilippi that, if he had known, he would have taken the $550,000. DeFilippi replied that it was not an option. Kennedy asked how they had ended up where they were. DeFilippi talked about the trust issues at length during that telephone conversation. Kiselbach testified that he came out of that meeting feeling extremely scared that whatever position they had was gone from some reason because of that new lawyer. Kiselbach testified that the $300,000 to $350,000 figures had never been provided to him before. In cross-examination, Kiselbach acknowledged that he did not send an email to DeFilippi asking him to make an offer to Florian for $550,000 after that conversation.

[172] On September 19, after their conference call, DeFilippi sent a long email to Kiselbach and Kennedy. Kiselbach testified he thought DeFilippi was trying to cover himself or to defend himself by putting in writing what they had discussed in their conference call. Kiselbach reiterated that the $300,000 figure had never been discussed with him before. Kiselbach disagreed that the $300,000 was the base amount that had been discussed from the beginning based on the value of his shares, his annual fees and bonuses. Kiselbach acknowledged Kennedy had explained at length why he

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thought the $550,000 offer was not adequate. Kiselbach added that he always wanted to settle and the fact he would have settled was discussed on September 19. Kiselbach also confirmed that, by the time he sent his email, DeFilippi had been made aware by Florian's new lawyer that Kiselbach had been in contact directly with Florian to set up a mediation in Kelowna.

[173] On September 20, Kiselbach responded by email to DeFilippi. Kiselbach testified that, in that email, he wrote he agreed to make an offer at $550,000 and would have settled at that amount if DeFilippi thought they "had have made a proper attempt or [DeFilippi] felt it was". Kiselbach testified he also told DeFilippi in that email that Florian had mentioned mediation before he attempted to accept the offer on September 2. In cross-examination he agreed this response was in relation to DeFilippi's comment about their recent attempt at mediation on the side and that he was not completely open with DeFilippi on that issue. Kiselbach explained that he apologized to DeFilippi for being upset and having an outburst during their phone call when he told DeFilippi he would have taken the offer if he had known he could. Kiselbach added that he was in the process of purchasing another area for $3.5 million, which was not easy. He did not want Concession 15, nor did he want to keep the area. For him, the trust argument was just legal positioning to get Florian to come to the table by taking away what he had, which is why Kennedy thought the settlement offers were low.

[174] In cross-examination, Kiselbach testified that the argument that was being developed from August to November 2016 was to have the Trust Declaration declared invalid and then resign as director of Yukon Stone. The resignation would render Yukon Stone an ineligible company to operate Concession 15, leaving Concession 15 under

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the control of Kiselbach alone. The argument and the injunction were developed to put pressure on Florian to negotiate. Kiselbach agreed the injunction did put pressure on Florian because it allowed him to operate Concession 15 without any interference from Florian. The order also allowed Kiselbach to have access to the books of the corporation, which could potentially help him develop an argument that Florian had not administer the concession properly.

[175] Kennedy also responded to DeFilippi's email criticizing his position. Kennedy did not copy Kiselbach on that email. Kiselbach testified that Kennedy's email was forwarded to him by DeFilippi, who wrote that they needed to discuss how they would move forward and asked Kiselbach to call him. Kiselbach did not recall if he had been blind copied on that email. Kiselbach spoke to Kennedy before calling DeFilippi.

[176] On September 20, DeFilippi informed Kiselbach he was withdrawing as his lawyer. Kiselbach testified he had a feeling this was going to happen considering the recent exchanges they had. Kiselbach testified that DeFilippi's announcement made him feel very scared and worried. He did not know how much he owed and how he would be able to pay the legal fees. To date, he had been able to manage by putting money on credit cards. Kiselbach was wondering how he could get another lawyer when he could not afford to pay DeFilippi. Kiselbach testified he phoned DeFilippi and begged him to come back. He also had a conversation with Barton who told Kiselbach he would look at his account. In cross-examination, Kiselbach testified he thought the key factors that led to DeFilippi wanting to withdraw from his case where the fact that Florian had retained new counsel and the fact Kiselbach was questioning DeFilippi.

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[177] On September 20, DeFilippi emailed Kiselbach that he agreed to continue to act as his lawyer but that he did not want to deal with Kennedy anymore. DeFilippi confirmed the goal was to avoid a trial one year away and get a settlement through the application regarding the Trust Declaration. DeFilippi also confirmed that Kiselbach would only be required to pay a reduced amount of $15,000 in legal fees at that point.

[178] On September 20, Kiselbach emailed DeFilippi to thank him for agreeing to stay on board; that from now on Kennedy would no longer be involved; and to apologize for having conversations behind his back about mediation. Kiselbach testified that he wrote that email because he was desperate. Kiselbach also contacted Kennedy who agreed to no longer work with DeFilippi. Kiselbach disagreed that Kennedy denigrated DeFilippi's views. However, he agreed the relationship between DeFilippi and Kennedy was stressed. Kiselbach agreed he continued to consult with Kennedy on various issues regarding his case after that date. He agreed he thought Kennedy was more knowledgeable than his lawyers with respect to the *Wildlife Act*. Kiselbach agreed, he thought they were in a better position with Kennedy on board.

[179] On September 29, Kiselbach sent an email to DeFilippi suggesting they put forward a settlement proposal for $550,000 plus legal fees incurred since the injunction. DeFilippi agreed and attached a draft proposal letter for Florian's lawyer in the amount of $700,000 for Kiselbach's review. Kiselbach reviewed and approved a proposal at $650,000 instead, which was sent on October 4 and was open for acceptance until 4:00 p.m. on October 7, 2016. Florian's lawyer did not respond to that offer. Kiselbach was not sure if he considered proposing a lower amount than $650,000 after that.

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[180] In cross-examination, Kiselbach agreed that, with respect to settlement numbers, DeFilippi was not directing him what to do and never forced his ideas on Kiselbach. DeFilippi sought instructions from him as to what proposal he should be making and acted on those instructions. Also, Kiselbach acknowledged DeFilippi did not have any unilateral authority to do or react in any way on the offers without Kiselbach's authorization.

[181] Kiselbach returned to his home in British Columbia at the end of the hunting season (between October 7 and 10). Kiselbach then started to work on Yukon Stone's accounting to ensure it remained in good standing. Kiselbach agreed the restraining order (injunction) ended at the end of the 2016 hunting season.

[182] On November 17, DeFilippi sent an email to Yukon Stone's counsel that Kiselbach would attend his office in Whitehorse shortly to resign as a director of Yukon Stone. Kiselbach testified he did not recall whether DeFilippi had discussed this course of action with him prior to sending that email. He did not agree and sent an email to DeFilippi questioning his move. DeFilippi asked Kiselbach to call him. Ensued a conversation where DeFilippi yelled and cursed at Kiselbach. Kiselbach resigned as a director of Yukon Stone but he did not know exactly when.

[183] On December 15, DeFilippi emailed Kiselbach to inform him, among other things, that they would set a date for the hearing of the application regarding the trust issues at a case management conference on January 18, 2017.

[184] On December 19, DeFilippi resigned as Kiselbach's lawyer after Kiselbach forwarded to him an email from Kennedy criticizing DeFilippi's legal position on a number of issues. Kiselbach acknowledged that, in that email, Kennedy suggested it

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was time for Kiselbach to retain new counsel. Kiselbach did not try to convince DeFilippi to remain as his counsel a second time especially after the way he had spoken to him on the phone on November 17.

[185] After DeFilippi resigned, Kiselbach looked for another lawyer. Ultimately, he retained J.J. McIntyre ("McIntyre"), who is also his counsel in this matter. Kiselbach decided to enter into a mediation rather than proceeding with the trust issues because he wanted to resolve the legal dispute with Florian. In cross-examination, Kiselbach testified his new lawyer did not have much faith in the trust issues. Kiselbach asked his new lawyer for an opinion on the trust issues but did not recall requesting a written opinion. He recalled discussing this issue with his counsel. However, mediation was Kiselbach's main goal and they did not talk much about the trust issues. Kiselbach acknowledged that, at that point, he had concluded the Terminus Deal. Kiselbach agreed that, at that time, he was still exposed to the breach of fiduciary duty argument raised by Florian. Kiselbach agreed he decided to abandon the application challenging the validity of the Trust Declaration. He agreed they canceled the case management conference scheduled for January 18. He acknowledged they set the matter for a mediation that was based on the value of his shares, and what was owed to him in terms of salary and bonuses, which was the basis of the negotiations back in May 2016, and the case was settled on that basis. Kiselbach agreed the trust argument was what brought Florian to the table at the beginning of September, but, in his view, it was no longer a big issue after Florian retained his new counsel.

[186] Kiselbach and Florian, through their respective counsel, retained Ernst and Young to do a valuation of Kiselbach's shares. In a report dated March 6, 2017, Ernst

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and Young valued Kiselbach's shares at $100,000. Kiselbach acknowledged he asked Kennedy to comment on the valuation. Kennedy did not agree with the valuation report.

[187] On March 7, 2017, Kiselbach signed a release agreement in the amount of $250,000 payable over five years. The legal costs associated with the work of his new lawyer, from December 20 to March 14, amounted to $46,534.95.

[188] Kiselbach testified his case should have been settled on September 2, 2016. Consequently, he has not paid anything to Boughton Law since receiving their invoice of December 12, 2016.

The Terminus Deal

[189] Kiselbach agreed that the purchase of the Terminus Deal was going to close after the end of the Terminus season in 2016. However, he did not want two concessions. His plan was to guide in the Terminus area in 2016 to learn about the area and the operation of the concession while it was operated by the previous owners. That is the reason why he did not want to go to the Yukon for the 2016 season.

[190] Kiselbach agreed DeFilippi told him not to proceed with the Terminus Deal. Kiselbach also agreed that Kennedy advised him against completing the Terminus Deal considering the impact it may have if the court found against him in the Yukon Stone matter. Kiselbach agreed that he completed the deal despite what Kennedy said. Kiselbach agreed that he could have decided not to close the Terminus Deal instead of paying an additional $200,000 to revive the deal.

DeFilippi's Evidence

[191] DeFilippi testified that Kiselbach's initial telephone inquiry about his services occurred in February 2016. At the time, Kiselbach provided general information to the

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effect that he was an outfitter, part-owner, and shareholder of Yukon Stone with Florian. Kiselbach also informed DeFilippi that he and Florian had agreed to end their business relationship and it was a matter of negotiating a buy-out. This was not a litigation matter at the time. DeFilippi sent Kiselbach a retainer letter on February 17, 2016. Two days later, he informed Kiselbach his hourly rate was $450. There was no mention of C.S.H., Kiselbach's company, at the time. DeFilippi recalled that the preference, at the time, was for a negotiated arrangement.

[192] On April 29, 2016, DeFilippi received the retainer letter signed by Kiselbach and some documents. He agreed to reduce the required deposit from $8,000 to $5,000. Boughton Law was retained to represent Kiselbach and C.S.H. in their commercial dispute with Florian and Yukon Stone. Boughton Law was not retained to advise Kiselbach on the Terminus Deal. DeFilippi testified that Kiselbach had already retained another lawyer to deal with that transaction.

[193] DeFilippi was of the view that, initially, he did not have to become a member of the Law Society of Yukon in relation to this matter. However, DeFilippi obtained what he described as a temporary call to the bar on August 10, 2016.

Early negotiations

[194] In May 2016, DeFilippi obtained the assistance of Barton to handle Kiselbach's file because it was not a litigation matter at the time. DeFilippi testified they had an initial call to introduce Barton to Kiselbach. The issues raised by Kiselbach's matter at the time were the value of Kiselbach's compensation, based on salary, bonuses, and shares, and "who should buy out who". DeFilippi did not review the documents provided by Kiselbach then as the matter was put into Barton's hands. The numbers discussed

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were between $150,000 and $300,000. In DeFilippi's view, there was no need for him to be involved at that time, and no point in Kiselbach being billed for more lawyers than necessary. DeFilippi knew generally that the negotiations were going along when the file was handled by Barton.

[195] DeFilippi recommended to Kiselbach that the Yukon Stone file and the Terminus Deal be handled by the same firm. However, DeFilippi only became concerned about the Terminus Deal when Florian filed his pleadings alleging that Kiselbach had breached his duty with that transaction.

[196] DeFilippi testified there was a phone call with Kiselbach on May 27, 2016. Kiselbach wanted to know what the options would be if they were to take the litigation route. At the time, Kiselbach still wanted to see what they could achieve through negotiations before taking steps to initiate legal proceedings. DeFilippi did not take notes of that conversation and could not be definitive about the extent of it.

[197] DeFilippi became actively involved in the file at the beginning of June 2016 when it appeared that litigation would have to take place. At the time, DeFilippi discussed with Kiselbach a claim under the *Business Corporations Act*, RSY 2002, c 20 ("*Business Corporations Act*").

[198] DeFilippi was of the view that Florian's corporate manoeuvres at the end of May 2016 were not surprising and constituted evidence of oppression. In DeFilippi's opinion, the value of Concession 15 very much informed the value of Yukon Stone.

Petition filed in the Supreme Court of Yukon

[199] DeFilippi testified that, in his mind, the case changed when the Directors' resolution was passed and Florian filed his petition. Kiselbach, Barton, and DeFilippi

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agreed that they needed to position Kiselbach in a manner that would get Florian to come to the table and increase his offer. DeFilippi received the transition email from Barton on June 1. Florian filed his petition on June 7.

[200] On June 14, 2016, DeFilippi sent a detailed email to Kiselbach explaining the procedural aspect of the judicial proceeding, setting out the background of the dispute between Kiselbach and Florian, as he understood it, explaining the matters in issue (lack of performance of the employment agreement; whether the Trust Declaration was enforceable against Kiselbach; and "ownership" of the concession) and counterclaim pursuant to the *Business Corporations Act* (seeking an oppression remedy – including the liquidation and dissolution of Yukon Stone). DeFilippi also addressed other issues such as Kiselbach's continued work for Yukon Stone, and court appearance in Whitehorse, among other things. DeFilippi testified it is his practice to send detailed emails about the litigation process to clients who may not be familiar with litigation.

[201] DeFilippi testified that his understanding at the time was that Kiselbach would prefer a negotiated settlement, but Florian was not responsive. DeFilippi knew the last settlement proposal to Florian was for $409,750, but Kiselbach had not told him what figure he was prepared to accept.

[202] On June 17, 2016, DeFilippi sent an email to Kiselbach reiterating he would be away from June 23 to July 18, 2016, that he would be checking his emails periodically during that time, but that Barton and other lawyers would be in a position to assist Kiselbach if anything happened while he was away. DeFilippi believed he had told Kiselbach about his absence in one of the phone conversations they had prior to sending that email to ensure he knew that if they were to start litigation, he would not be

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around for the beginning of it. Bussoli became involved at or around that time. He was already called to the Yukon Bar and his legal fees were half of DeFilippi's.

[203] DeFilippi testified that Kiselbach's views on litigation were to defend the legal proceeding and to use the litigation as a lever to bring Florian to a negotiated solution.

[204] DeFilippi saw the email Kiselbach sent to him on June 23, 2016, while he was travelling. He asked Bussoli to follow up with Kiselbach. DeFilippi testified that Kiselbach's mention of the Terminus Deal in that email was odd because they had not been retained to deal with that transaction and they knew nothing about it. DeFilippi added that, contrary to what Kiselbach wrote in that email, he never recommended he go ahead with the Terminus Deal.

[205] DeFilippi testified that Kennedy was not involved in the matter when he left for his vacation at the end of June. DeFilippi was not aware of the content of the discussions Kiselbach and Bussoli had during his absence. DeFilippi added that no settlement had been reached when he came back around July 18, 2016. He reviewed the file and the pleadings when he came back from vacation.

[206] DeFilippi testified he did not want to be involved again in Kiselbach's file because he had been away for six weeks and his hourly rate was high for a case of that value. However, Bussoli was not available on the dates set for the hearing of the applications (August 24 and 25), and Kiselbach wanted him back on the file.

[207] DeFilippi testified that what Kiselbach wrote in his email of June 25, 2016, that "[i]f he doesn't take this the gloves are off" is consistent with Kiselbach's expressed views of his matter. By that time, the parties had gone back and forth several times, and Kiselbach was not happy with the responses he was getting from Florian, who had not

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moved to any appreciable figure. Kiselbach wanted something from them to rely upon to get Florian to pay attention to his claim and get Florian to a higher amount. However, if Florian was not prepared to do that, Kiselbach wanted to go "full bore" with litigation. DeFilippi testified that those instructions did not change until October 4, 2016, when Kiselbach asked him to go back to Florian's lawyer with an offer of $650,000.

[208] DeFilippi brought the issue of the validity of the Trust Declaration and whether Kiselbach actually "owned the Concession" to Kiselbach's attention in his email of June 14, 2016. DeFilippi's understanding at the time was that the negotiation had stalled. The Trust Declaration was an issue that, if well put forward, would get Florian to come back at a higher amount because it put the existence of Yukon Stone or its right to do business in jeopardy.

[209] DeFilippi testified that Kiselbach, Kennedy, and himself agreed that the validity of the Trust Declaration was the main issue that could be raised on behalf of Kiselbach. DeFilippi testified that Kennedy's position was that Yukon Stone had breached the *Wildlife Act* and the *Business Corporations Act* in many ways. Consequently, Kiselbach was in his right to leave the corporation and to run Concession 15 on his own. DeFilippi did not want to get into a fight about facts that revolved around whether Florian had participated in hunting trips as a guide or a photographer, among other things. DeFilippi testified that what he liked about the Trust Declaration argument was that it was a pure legal issue. It did not matter with that argument whether Florian had done something wrong or not.

[210] DeFilippi became aware of Kennedy's involvement when Kennedy's lengthy comments of July 26, 2016, were forwarded to him by Kiselbach. DeFilippi was nervous

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and bothered about the suggestion that they report Florian to Yukon Environment because he is always reluctant to use the threat of reporting an offence to bring someone to a settlement. Also, Florian's alleged breaches were not documented or had not been crystalized. In addition, DeFilippi did not like the idea of Kiselbach resigning as a director of Yukon Stone at that point. Kiselbach had a duty of good faith as a director of the company and his resignation at that time raised a lot of issues regarding, among other things, the existing hunting contracts, employees, camps, and horses, which were all Yukon Stone's.

[211] At the beginning of August 2016, DeFilippi suggested they apply for an injunction based on the trust issues. If granted, it would allow Kiselbach to run the concession as he had always done without any interference and then determine the right time to resign. DeFilippi added that, if Kiselbach had complied with the Directors' resolution requiring him to transfer the operating certificate to someone else, it would have negatively impacted Kiselbach's bargaining power. The plan was to ask for an injunction to allow Kiselbach to finish the hunting season and to get the issue of the validity of the trust determined by way of a summary trial

[212] DeFilippi met Kiselbach and Kennedy for the first time in person on August 4, 2016. Barton was also present at that meeting. They discussed the status of the file, the validity of the Trust Declaration, what could be done to get Florian to increase his offer, what needed to be done before the hearing. In addition, Kennedy went through all the breaches he thought Florian had committed. DeFilippi did not know if Kiselbach paid Kennedy for his services. DeFilippi acknowledged that Kennedy was helpful in setting out the provisions of the *Wildlife Act.* However, Kennedy did not understand the trust

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issues. After that meeting, Kiselbach's instructions to him were to proceed with the application. DeFilippi started to prepare the materials to advance the matter.

[213] At the meeting of August 4, 2016, Kiselbach and Kennedy made it clear to DeFilippi that, in their view, the valuation of the concession, at approximately $2.5 million, that Florian had obtained was unreasonable based on the value of comparable businesses. Kiselbach and Kennedy thought the value of Yukon Stone's concession was worth a lot more.

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[214] DeFilippi did not know, at the time he received it, that the email Kiselbach sent to him on August 13, 2016, was a copy of what Kennedy had written to Kiselbach. He understood that Kiselbach was setting out what he wanted and was referring to the August 24 and 25 hearing at para. 3 of that email:

> 3. What are our potential gains or losses and potential costs of each step based on your road map? I would prefer an all out approach to a solution. In stage 1- I am prepared to settle for costs plus a settlement that is substantial for time and work lost but includes all costs to date plus my rights to ownership and shares as per my version [as written] of service agreement and trust agreement so entitled had all ran as expected. If this case goes to a first hearing or beyond, then I would like the Concession as the current holder of it, free and clear of the trust agreement and the service agreement with the corporation removed.

[215] DeFilippi testified that, at the time, they did not discuss a specific settlement amount that Kiselbach wanted.

[216] DeFilippi filed the application for an injunction (restraining order) on August 15, 2016, with the intent to have it heard on August 24 and 25, 2016, which is what occurred. DeFilippi sent a copy of the application to Kiselbach and Kennedy who did not formulate any objection to it being filed.

The hearing of the injunction application in Whitehorse

[217] On August 22, 2016, DeFilippi left a voicemail for Kiselbach that Florian's lawyer had contacted him to discuss settlement. DeFilippi informed Kiselbach he would be sending Florian's lawyer an email and would talk to Kiselbach about it the next day in Whitehorse. At the time, Florian's lawyer had received the notice of application, the affidavits, and their outline concerning the trust issues. DeFilippi was leaving for Whitehorse on August 23 to appear in court on August 24. He wrote back to Florian's lawyer that he would be meeting with his client and discuss this matter with them.

[218] DeFilippi did not recall Kiselbach saying that he would be over the moon with anything close to or lower than $409,750.

[219] In his August 22 email to Florian's lawyer, DeFilippi stated that he would be prepared to recommend to Kiselbach that he settle for $500,000 if Florian wanted to settle the matter before August 24 at 10:00 a.m. DeFilippi did not consider his correspondence to be an offer; he was simply letting Florian's lawyer know he would be prepared to recommend settlement at a certain amount. DeFilippi sent the email because he wanted to get the communication going. DeFilippi sent to Kiselbach and Kennedy a copy of that email immediately thereafter indicating that he did not know whether Florian was serious about doing a deal (which had always been a question for all of them) and that there was no point in adjourning the matter, because adjourning is always a bad negotiations tool. DeFilippi did not have any record of Kiselbach replying to his email. DeFilippi did not receive anything back in writing from Florian's lawyer in response to his email.

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[220] DeFilippi met with Kiselbach and Kennedy in Whitehorse in the afternoon of August 23. They discussed and went through the legal proceedings, the materials filed, and the three applications (Yukon Stone's initial application for specific performance of the Trust Declaration, Kiselbach's application to have the matter put on the trial list, and Kiselbach's application for an injunction) in detail. The Trust Declaration was now front and center, they discussed the steps moving forward. In DeFilippi's view, there were very good prospects of them being successful on the Trust Declaration issues. In his view, they had a very strong argument that Yukon Stone was not the beneficial owner of the Trust Declaration; and that the Trust Declaration did not vest in Yukon Stone a beneficial interest. In addition, an argument could be made that, contrary to the legislation, Yukon Stone had attempted to do indirectly what it could not do directly, meaning being the owner of the concession. DeFilippi recalled going through that in detail. They were focused on the injunction application at the time. They did not discuss specific settlement numbers. However, there was an agreement that they would press the Trust Declaration issues with the objective to get Florian to increase his offer. Later during his testimony, DeFilippi testified that he was certain they discussed what would be a viable amount for Kiselbach during that meeting but did not recall any specific details.

[221] On the morning of August 24, Florian and his lawyer were at the doors of the courthouse when he arrived. They wanted to adjourn the application to allow them to "maybe" talk about this. By that time, Florian and his lawyer had received Kiselbach's appearance and response to the petition, an injunction application, and a list of four trust issues that would put the viability of Yukon Stone in jeopardy if they were

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successful. DeFilippi's advice to Kiselbach and Kennedy was that they were only talking about a dollar figure at that point, because the other essential terms of a settlement had already been well-defined during the earlier negotiations that had taken place, and that issue did not require a meeting. DeFilippi also said that there was no point in adjourning the application. Instead, he said that if Florian wanted to settle, he could send a proposal and DeFilippi would send it to his client right away. In addition, considering the history of the relationship between Kiselbach and Florian prior to the dispute, DeFilippi was worried and concerned about them meeting on their own without lawyers. DeFilippi testified that, at that point, they had received nothing back from Florian on Barton's last offer.

[222] DeFilippi appeared before the Court in Whitehorse on August 24, 2016. Kiselbach and his wife as well as Kennedy were present at the hearing. Florian was there as well. Florian's lawyer approached DeFilippi saying that Florian wanted to talk to Kiselbach. DeFilippi told Florian's lawyer that they were opened to settlement discussion, and that, if they wanted to make an offer, they should do so. There was no need for a meeting to do so.

[223] DeFilippi testified that, at the hearing, Florian's lawyer surprisingly indicated he wanted the matter on the trial list, with full examinations for discovery and other legal steps. The Court agreed that the application for an injunction should go ahead that day and it was heard. The hearing concluded on the morning of August 25. The reasons for decision were adjourned to a case management conference on September 2, 2016.

[224] DeFilippi recalled talking to Kiselbach, his wife, and Kennedy after the hearing. They did not have much time for a discussion. Kiselbach and his wife were going on

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vacation; Kennedy was going to Kelowna, and DeFilippi was going to the airport to see if he could fly back to Vancouver early. DeFilippi thought the hearing had gone really well. DeFilippi did not remember anything other than them saying good job and "will see what will happen" during their brief conversation.

[225] DeFilippi recalled seeing Weigelt's email of August 29 to Florian indicating he could not represent him because he was in conflict and telling Florian that Kiselbach did not need the expense of a lawsuit. DeFilippi testified he was livid when he saw Weigelt's response to Florian. DeFilippi testified that Florian was a relatively successful American businessman, and he did not want another lawyer telling the other side that Kiselbach did not need the expense and, as a result, Florian thinking he could outspend his client. DeFilippi added Weigelt should have said nothing about that.

[226] DeFilippi testified that he did not think the matter was right for mediation because the only question at that point was the dollar amount of the settlement.

[227] On August 29 at 10:45 a.m. DeFilippi sent an email to Kiselbach and Kennedy recapitulating where they were at that time. DeFilippi was of the view that the trust issues were front and center in the legal proceedings and they could not retract from that. The possibility of an unjust enrichment claim had already been discussed at the meeting he had with Kiselbach and Kennedy on August 23. He also stated that they would cross that bridge, if and when the issue was raised. DeFilippi wanted to make sure that Kiselbach and Kennedy knew that if they were successful on the Trust Declaration, they could face an unjust enrichment claim down the road. DeFilippi just wanted to temper their expectations. DeFilippi stated later there were defences they could put forward, such as illegality.

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The settlement offer

[228] On September 1, 2016, Kiselbach sent to DeFilippi a without prejudice email he had received from Florian on August 31, 2016. In that email, Florian set out three scenarios to settle the case. One of the scenarios was a proposal to settle for $237,000. DeFilippi understood from Kiselbach's email that he was not interested in Florian's proposals. Kennedy's negative views of Florian's proposals were also forwarded to DeFilippi. Based on those emails, DeFilippi concluded that the figures proposed by Florian were not remotely acceptable for Kennedy and, most importantly, Kiselbach. DeFilippi added that they knew, by then, that Florian was dissatisfied with his counsel and was looking for a new lawyer. DeFilippi thought that, even though Florian's numbers were not great, they had been successful in getting Florian to engage in negotiation discussions, and DeFilippi saw that as an opportunity to reengage with Florian. That is the reason why DeFilippi wanted to have a further look at the email and develop a response even if Kennedy and Kiselbach wanted to reject the offer. DeFilippi provided his response in writing to Kiselbach and Kennedy half an hour later.

[229] Later on the same day, DeFilippi prepared a draft proposal in response to Florian's scenarios. At 11:44 a.m., DeFilippi sent that draft proposal by email to Kiselbach and Kennedy for their review. DeFilippi testified that he was the one who came up with the $550,000 settlement figure. DeFilippi described the number as his best guess or gut feeling at the time. He suggested the offer be open for unconditional acceptance on or before September 2, 2016, at one minute before the Court began its judgment to put more pressure on Florian and his lawyer; he wanted a certain date and time so all the parties would know where they stood with respect to the subsequent

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events. He tied the offer to the decision because there was enough uncertainty about what would happen, and he did not want to enter into negotiations after the decision had been rendered. He was confident they were going to win the application and he thought Florian and his lawyer also believed they were going to win. DeFilippi had no recollection of Kiselbach asking him to put together that offer. In cross-examination, DeFilippi agreed that the $550,000 figure was part of his step-up approach and pressure tactic to get Florian to increase his offer.

[230] DeFilippi understood from Kiselbach's email at 12:17 p.m. that he approved the draft proposal and that he was at liberty to send it out. He also understood from that email that Kiselbach had communicated directly with Florian to let him know he was not interested in his settlement scenarios. DeFilippi was not surprised that Florian would use the excuse of discussing the operations of Concession 15 to talk about the legal proceedings. DeFilippi sent the settlement proposal to Florian's lawyer right away because the deadline of September 2 was fast approaching. He then forwarded it to Kiselbach and Kennedy.

[231] DeFilippi testified that, approximately ten minutes later, he received an email from Kiselbach asking him not to send the offer because the amount needed to be higher. DeFilippi responded that they could still increase the amount. DeFilippi added that Kiselbach's next email, at 12:49 p.m., indicated to him that Kiselbach had gone through the offer in some detail. At the time, DeFilippi had no idea it was Kennedy who had caught the things Kiselbach wanted to change, because there was no indication of that from Kiselbach. DeFilippi had a telephone conversation with Kiselbach, and potentially Kennedy, between that email and the revised offer he sent to Florian's lawyer

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at 1:35 p.m. DeFilippi was certain there were phone calls between him and Kiselbach at the time, but he had no specific recollection of those conversations. However, he recalled that Kiselbach and Kennedy were adamant that the figure should have been higher.

[232] DeFilippi then testified that he recalled a conversation with Kiselbach before sending the revised offer to Florian's lawyer, which contained the two small changes Kiselbach wanted him to make and an additional paragraph. During that conversation, DeFilippi asked Kiselbach if he wanted to increase the amount. Kiselbach said he had talked to Kennedy about it, and he was leaning toward increasing the offer to $900,000. They went back and forth on whether he should increase the amount or not. In the end, Kiselbach decided to stick with the offer at $550,000. However, Kiselbach said that if they did not accept the offer, they would increase the amount and they would move with the Trust Declaration issues. Kiselbach's decision was not particularly surprising to DeFilippi because that was the plan all along. In cross-examination, DeFilippi acknowledged he had no notes of that conversation, but he pointed out that he had the email that Kiselbach sent after their conversation.

[233] Following that discussion, DeFilippi sent the revised proposal to Florian's lawyer by email with changes in bold and italics. DeFilippi testified that he added the last paragraph of his own volition to reinforce what would happen if the offer was not accepted. The paragraph was consistent with the plan to put as much pressure on Florian to get the proposal accepted and to make sure he knew what would happen if he did not accept it.

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[234] DeFilippi found Kiselbach's email to him at 1:41 p.m. stating "[w]hy did we just tell them the case?" baffling because they had just gone through what the case was about at the hearing, and it was fresh in everyone's mind. There was no secret as to where Kiselbach was going with respect to the Trust Declaration if it were declared invalid. DeFilippi testified that Kiselbach never said anything to him about the deadline that was part of the offer.

[235] DeFilippi received a subsequent email that Kiselbach sent at 1:42 p.m. saying: "[a]ll negotiations like this need to be discussed or reviewed prior to emailing. Now we need to amend the offer for sure". DeFilippi commented that he was fine with Kiselbach wanting all negotiations go through him as that had been DeFilippi's practice for years. However, he did not understand why Kiselbach was thinking that the offer needed to be increased at that time. DeFilippi then received an email from Kennedy at 2:04 p.m. DeFilippi understood that Kennedy was upset with the $550,000 number and was of the view that the offer should have been closer to $900,000 to $1 million. DeFilippi was hearing from Kiselbach and Kennedy that the amount was too low. DeFilippi did not know that Kennedy had blind copied Kiselbach on the confidential email he had sent to him.

[236] In cross-examination, DeFilippi testified he had no recollection of a telephone conversation between he and Kiselbach at 2:00 p.m. on September 1, 2016, after he sent the revised offer. Counsel for the plaintiffs put to him that during that conversation, Kiselbach told him that he did not want to take over Concession 15 at the end of the hunting season because he had the Terminus Deal he wanted to proceed with, and he did not like the fact that DeFilippi wrote that subsequent offers needed to be higher.

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DeFilippi denied responding that the added paragraph was a matter of strategy. He then agreed it was. DeFilippi recalled telling Kiselbach that the final paragraph DeFilippi added to the revised proposal for settlement was an effort to put pressure on Florian. DeFilippi added that Kiselbach, Kennedy, and he had agreed the amount of subsequent offers would be higher, that it was the plan, and that those were his instructions.

[237] At 4:18 p.m., DeFilippi responded to Kiselbach and Kennedy by email. In that email, DeFilippi responded to the concern that Kennedy had raised about the possible use of without prejudice communications. DeFilippi found the stated concern baffling because he had raised something similar in a previous communication with Florian's lawyer and neither Kiselbach nor Kennedy had raised any concern of that sort. In addition, everybody knew what the case was considering the materials filed and what had been argued. DeFilippi also tried to downplay Kiselbach's and Kennedy's expectations and put into perspective why he thought that $550,000, in all of the circumstances, was a defensible amount. DeFilippi also raised the issue of unjust enrichment in that email. Kennedy was in no uncertain terms dismissive of the possibility of an unjust enrichment claim. Kennedy and DeFilippi had different views on how to challenge the Trust Declaration. However, they both agreed that no matter what route they took, putting the validity of the Trust Declaration at issue was the best way to get Kiselbach where he wanted to be. However, DeFilippi was certain that even if the Court declared the Trust Declaration invalid they would be faced with an unjust enrichment claim. Kennedy disagreed with that view because of Kiselbach's sweat equity in Yukon Stone, which was not a legally sound position according to DeFilippi. DeFilippi testified he explained the concept of unjust enrichment to Kiselbach in relation

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to his case. Kennedy was not shy about sending emails to DeFilippi and putting him to task about what he was saying. DeFilippi had no recollection of Kiselbach saying that he disagreed with Kennedy and to disregard what Kennedy had said after Kennedy had communicated to DeFilippi that he was taking issue with his strategy, or anything else DeFilippi was doing. As far as DeFilippi knew, everything that Kennedy was saying had Kiselbach's full blessing. Kiselbach had told DeFilippi that Kennedy was there to assist him.

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[238] In cross-examination, DeFilippi agreed he also stated in that email that all communications regarding negotiations had to go through the lawyers. DeFilippi stated it was about controlling communications, not about controlling Kiselbach, who had the final say on the amount of settlement.

[239] DeFilippi received another email from Kennedy at 6:19 p.m. on September 1, 2016, reiterating that he should be asking for more money. DeFilippi stated that Kiselbach was copied on that email. Unless Kiselbach told him something to the contrary, he assumed that what Kennedy said had Kiselbach's blessing when Kiselbach was copied on Kennedy's emails.

[240] DeFilippi stated that he was not privy to or aware of the content of the communications between Kennedy and Kiselbach that he was not included in.

[241] On September 2, at 8:49 a.m., DeFilippi sent an email to Kiselbach and Kennedy asking them to let him know if they wanted to go higher or to withdraw the offer altogether. He sent that email because the time of the decision was approaching and if they wanted to make any changes DeFilippi needed to know. Kiselbach responded at 9:25 a.m. DeFilippi testified that he understood from that email that Kiselbach and

Kennedy were firmly of the view that $550,000 was too low, and if the offer was not accepted within the time imparted, they would ask for a higher amount and would be focussing their energy on the issue of the validity of the Trust Declaration. DeFilippi did not know what advice Kennedy gave to Kiselbach regarding the scope and protection afforded to "without prejudice" communications that Kiselbach mentioned in that email, but DeFilippi decided not to make an issue of it.

[242] DeFilippi testified that, in a sense, he welcomed the email, in which Kennedy stated that they should stick with the plan.

The court's decision and Florian's late acceptance

[243] DeFilippi testified he was in his office preparing for the case management conference when the correspondence from the Supreme Court of Yukon appeared on his screen at 12:58 p.m. on September 2, 2016. The Reasons for Judgment were attached to that email. He immediately read the decision. The Court granted the injunction. At 1:08 p.m., DeFilippi received the email from Florian's lawyer to the court acknowledging receipt of the Reasons for Judgment. At the time, DeFilippi had not received any communications from Florian's lawyer in response to the revised settlement proposal he had sent the day before. DeFilippi understood that pursuant to its terms the proposal had lapsed.

[244] DeFilippi testified he sent an email at 1:01 p.m. to Kiselbach and Kennedy that they had won and that a report would follow because he wanted to review the reasons in detail and discuss next steps. He testified he forwarded the reasons because he wanted to keep them informed. He commented that it is his standard practice to do so. DeFilippi attached the Reasons for Judgment to his email. Kennedy responded saying

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congratulations. DeFilippi commented that Kennedy did not say anything about the offer. DeFilippi understood from the information provided in Kennedy's email that it was not possible to communicate with Kiselbach at the time.

[245] DeFilippi testified that he was aware that Kiselbach and Kennedy were talking to each other on the phone. DeFilippi perceived there was a very close relationship between Kiselbach and Kennedy. DeFilippi added that he perceived Kennedy always had first approval on anything discussed, proposed, or responded to by DeFilippi on behalf of Kiselbach.

[246] DeFilippi testified he was in his office waiting for the case management conference to start when he received the email from Florian's lawyer at 1:53 p.m. stating he was instructed to accept the settlement offer. DeFilippi responded at 2:01 p.m. that it was too late because the Reasons for Judgment had already been delivered. The case management conference had not started at that point. They were still on hold. DeFilippi testified he was of the view the offer had expired, which is why he responded the way he did as those were his instructions. Kiselbach had told him in no uncertain terms that all negotiations or proposals had to be approved and agreed to by him before being sent out. Those were standing instructions. As a result, the most DeFilippi could say to Florian's lawyer was that it was too late. DeFilippi testified he had no instructions and, in fact, it would have been contrary to his instructions to make any type of response or do anything with the purported acceptance of the offer at that point until he had forwarded on to Kiselbach and Kennedy for their comments and instructions. DeFilippi testified he was still under the impression that Kiselbach was

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driving somewhere in central Yukon and was out of email or satellite telephone communication at the time.

[247] DeFilippi testified that, during the case management conference, Florian's lawyer informed the Court that Kiselbach had made an offer that had been accepted. DeFilippi stated they had a different view. Florian's lawyer stated during the case management conference that he had skimmed over the Reasons for Judgment prior to being instructed to accept and he sent the email accepting the offer. DeFilippi asked for an order, which was granted, that if Florian's lawyer wanted to apply for an order staying the legal proceedings on the ground that a settlement had been reached, he should do so within a specific period of time. DeFilippi testified that the case management conference took place on a Friday before the Labour Day long weekend.

[248] DeFilippi testified that he sent an email to Kiselbach and Kennedy at 3:09 p.m. informing them the case management conference had ended; that he had to leave early; and that a report would follow on Tuesday. DeFilippi explained he had a fishing trip planned during the long weekend. DeFilippi did not say anything about the purported acceptance in his email because it was clear that it did not meet the terms of the offer, and he was going to report on it upon his return to the office on the Tuesday to get the comments and instructions from both Kennedy and Kiselbach. DeFilippi wanted to read the Reasons for Judgment in detail to give a comprehensive report about what happened and where to go from there. DeFilippi testified that Kiselbach responded "sounds good thanks" by email at 5:06 p.m.

[249] In cross-examination, DeFilippi testified he did not know whether he was still physically in the office when he sent emails to his legal assistant at 3:15 p.m. and

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4:09 p.m. because he leaves dictations and his assistant acts accordingly. DeFilippi added he did not recall how late he stayed at the office that day.

[250] DeFilippi did not dispute that Kiselbach tried to reach him on September 2. DeFilippi acknowledged he did not advise Kiselbach by phone or email that Florian had attempted to accept his offer on September 2. When asked why he did not inform Kiselbach on September 2, DeFilippi responded that Kiselbach was out of contact and he did not know he could be reached. DeFilippi did not even know if Kiselbach would be in contact with him later that day. DeFilippi testified he was out of the office until the Tuesday, and if Kiselbach had left a message he would have listened to it on the Tuesday morning. However, DeFilippi also acknowledged he had no recollection of whether Kiselbach had left any message for him at the time.

[251] DeFilippi agreed that it would not have taken much for him to forward the late acceptance email and his response to Florian's lawyer that the offer was too late to Kiselbach and Kennedy.

[252] DeFilippi testified he did not tell Barton about the late acceptance. He added that he did not tell his legal assistant either, but she read his emails. She told DeFilippi that she is the one who told Barton about the acceptance.

Communications over the Labour Day long weekend

[253] DeFilippi did not see the exchange of text messages that occurred between Florian and Kiselbach on September 3. However, it did not surprise him because it is something Florian would do. DeFilippi testified that he was not aware of any text communication that had occurred on September 3 between Kiselbach and Florian until this lawsuit. Also, DeFilippi testified that he was not a party to any of the

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communications that took place between Kennedy and Kiselbach on September 3 and 4.

[254] DeFilippi testified that, even though he had not observed communications between Kiselbach and his wife about the case, DeFilippi would have been shocked if Kiselbach had not had conversations about the case with her.

[255] DeFilippi testified he did not have any communication with Barton on September 3.

September 5 to September 13, 2016

[256] DeFilippi testified that he first saw Kiselbach's email of September 5 to him when he returned to the office on the morning of Tuesday, September 6. He read it before sending his report later that day. DeFilippi testified that Kiselbach's email was consistent with the plan they had to move forward with the case. DeFilippi also understood that Kiselbach wanted clarity on whether his offer had been accepted on time or not. It appeared to DeFilippi, and came as no surprise to him, that Florian had been in communication with Kiselbach over the weekend to try to get Kiselbach to accept his late acceptance. DeFilippi understood that Kiselbach had maintained his grounds, wanted to maintain the plan, and continue with the Trust Declaration argument. DeFilippi commented that, if Florian had accepted the offer on time, preparing a response to Florian's affidavit would not have been necessary because they would have had a deal. The same reasoning applied if there had been an acceptance of Florian's late acceptance. DeFilippi testified that the fact Kiselbach wanted to make a new proposal was consistent with the plan already in place. DeFilippi fully anticipated there

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would be a new proposal put forward, at a time to be determined, and that the new proposal would be higher.

[257] DeFilippi testified that, after reading Kiselbach's email, he sent a short email to Kiselbach and Kennedy at 7:55 a.m. to the effect that a lengthy report was to follow; that there would be no new proposal from them at the time; that Kiselbach had to learn to stop negotiating against himself; and to let Florian make an offer if he wanted to negotiate. Kennedy responded to that email at 8:11 a.m. providing further information regarding Florian's contacts with Kiselbach over the weekend. DeFilippi understood from Kennedy's email that they were all on the same page, they were all continuing according to plan, and that everything had been rejected or that nothing had been agreed to.

[258] DeFilippi also read the Reasons for Judgment in detail before sending his report. DeFilippi testified he sent his report to Kiselbach and Kennedy by email at 3:50 p.m. on September 6.

[259] DeFilippi testified that the email from Florian's lawyer to him of September 2 at 1:53 p.m. purporting to accept the offer as well as DeFilippi's email to Florian's lawyer approximately 15 minutes later informing him that it was too late to accept the offer are referenced in the report and attached to it. The other document referenced in the report and attached to it was a letter DeFilippi sent to Yukon Environment in which he requests copies of certain documents from the government file concerning Concession 15.

[260] In cross-examination, DeFilippi reiterated he assumed that the emails attached to his report were the ones sent by Florian's lawyer purporting to accept the offer and his response that the offer was too late because that was the important thing to report on at

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the time. However, after defence counsel showed him the attachments, DeFilippi acknowledged that the emails exchanged on September 2 were not attached to his report of September 6.

[261] DeFilippi testified he had no indication from Kiselbach or Kennedy, either at that time or anytime thereafter, that they were entertaining changing the plan and accept Florian's late acceptance. DeFilippi added that, at no time, did Kiselbach express any enthusiasm or happiness to him about Florian's willingness to settle at $550,000. DeFilippi acknowledged that Kiselbach asked about the status of his offer of September 1 in his email of September 5 when he asked whether Florian had accepted the offer on time. However, Kiselbach never asked DeFilippi if he could accept the late acceptance.

[262] DeFilippi testified that, in his report, he explained the passages of the Reasons for Judgment he felt were important. He also explained what they needed to do moving forward. DeFilippi testified that he would not have mentioned those next steps if there had been a settlement or a sense that Kiselbach wanted to settle at $550,000, his report would have focused on the implementation of the settlement not on the next steps of the litigation. DeFilippi added that everything he said in that report regarding the September 1 proposal is accurate. DeFilippi testified he understood they were moving forward with the case, but he did not want to foreclose the option of making an offer, that they had just established a bench mark, and that is what he conveyed in his report.

[263] DeFilippi testified he explained that the court had given Florian's lawyer until September 13 to file an application to stay the proceedings to try to enforce a settlement based on their acceptance of the offer. He outlined what Kiselbach's options would be if Florian's lawyer brought the application. He added that, if they did not bring the

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application, they were moving forward. DeFilippi explained that summarizing what options they had in that regard was part of a normal legal advice because it did not appear to him that Kiselbach or Kennedy had knowledge of or experience with the Rules of Court or stay applications. DeFilippi did not mean in any way to suggest that Kiselbach did not have the ability to settle at $550,000 unless Florian's lawyer brought an application to stay. He was simply pointing out the steps that may occur with respect to the stay application.

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[264] DeFilippi did not have any communications, before or after his report of September 6, whether over the telephone or by email, with Kiselbach or Kennedy that would have indicated to him that Kiselbach was willing to settle for $550,000 even if Florian's acceptance had come late. Neither of them communicated to DeFilippi, from September 2 onward, that Kiselbach wanted to accept a settlement at $550,000. Kiselbach never expressed any regret at any time that he did not go along with a settlement offer at $550,000 on September 2. DeFilippi added that the $550,000 figure was his; and that Kiselbach and Kennedy were upset with that figure, which is the reason why they went back and forth on that number. In the end, they agreed to stick with an offer at $550,000. However, if the offer were not accepted, they would be asking for more. Neither Kennedy nor Kiselbach asked him for clarification about the content of his email after September 6.

[265] In cross-examination, DeFilippi acknowledged that his report did not indicate to Kiselbach that he had the option to accept the late acceptance other than by an application being made by Florian's lawyer. DeFilippi stated he did not include the option of Kiselbach simply accepting Florian's late acceptance because he understood

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from the emails he had received from Kiselbach and Kennedy that the plan had not changed and that Kiselbach had held to the plan. DeFilippi also acknowledged that he did not recall if he had received voicemails from Kiselbach during the long weekend. However, DeFilippi testified that if he had had even a hint that Kiselbach was in any way interested in getting back to Florian, his report would have been drastically different. DeFilippi acknowledged he did not phone Kiselbach prior to sending his report to find out what his communications with Florian were and he did not know what Kiselbach's state of mind was. DeFilippi agreed he never advised Kiselbach that it was within his interest to accept the late acceptance at $550,000.

[266] DeFilippi reiterated that Kiselbach wanted a settlement up to the decision on the injunction, but if that did not occur the amount would go up. Those were his instructions.

[267] DeFilippi agreed that one of his duties as a lawyer is to put to his clients offers and counter-offers. He agrees that a late acceptance can constitute a new offer, in certain circumstances, depending on his instructions.

[268] When presented with the exchange of text messages between Kiselbach and Florian on September 3 and 7, DeFilippi agreed that Kiselbach used the language of his correspondence of September 6. He added that if Kiselbach had followed his advice he would have brought those emails to his attention. He added that Kiselbach never communicated to him he was interested in accepting the late acceptance at $550,000; and that there was no hint to that effect.

[269] DeFilippi testified that, on September 7, he emailed Kiselbach because it appeared that Kiselbach was in direct contact with the officer of Yukon Environment. DeFilippi was concerned that the officer would ask questions leading him to initiate an

investigation in relation to Yukon Stone's operations. DeFilippi remembered he had a telephone conversation with Kiselbach that day about the completion of an affidavit, the collection of documents, and about Kiselbach speaking on his own with the officer about allegations that Florian had breached the *Wildlife Act*, and the concerns DeFilippi had in that respect. DeFilippi was sure they also discussed moving the case forward. However, DeFilippi did not recall discussing the state of settlement discussions during that telephone conversation. DeFilippi testified he never told Kiselbach that he did not have the option to respond to Florian's late acceptance of the $550,000 offer unless and until Florian brought an application before September 13. DeFilippi added this topic did not come up at all in their discussion. DeFilippi acknowledged he swore at Kiselbach during that telephone conversation because he was concerned about what could happened to Kiselbach.

[270] DeFilippi testified he had no recollection of any communication(s) about settlement, the status of settlement or settlement offers between September 7 and September 12.

[271] DeFilippi testified that Kiselbach did not give him instructions or discuss with him what his instructions would be if Florian's lawyer filed an application to stay. DeFilippi testified that Florian did not file an application on or before September 13. Therefore, he continued to work to advance the case and their application to attack the validity of the trust issues as planned.

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Mid-September to December 2016

[272] DeFilippi acknowledged receiving an email from Kiselbach on September 14 requesting that he run all communications, not just settlement offers, by him before sending them out. He later told Kiselbach that this would add time and costs.

[273] In mid-September, DeFilippi received communications that Florian's lawyer was no longer acting for him and that Florian was in the process of retaining another legal firm. He contacted the new law firm who, not only confirmed the information, but told him that Florian and Kiselbach were in the process of setting up a meeting in Kelowna to work towards some sort of mediation. At the time, DeFilippi did not know anything about that proposed meeting. On September 19, at 8:15 a.m., DeFilippi sent an email to Kiselbach and Kennedy informing them that Florian had a new lawyer and he wanted to discuss. DeFilippi testified he was sure they had a conference call following that email because he followed up with an email at 12:37 p.m., as is his practice after a conference call or a meeting, summarizing what he understood and setting it out for all to have a clear record of what happened and where they are going. DeFilippi agreed that, in parts of his email, he set out the history of the settlement proposal on September 1 and 2. DeFilippi did not have a clear memory of discussing that issue during the call or the adequacy of the $550,000 settlement number but the fact that he put those passages in his email indicated to him that Kiselbach and Kennedy had voiced their displeasure about the $550,000 amount, which was too low, as opposed to a higher number. DeFilippi explained that the figure of $300,000 he mentioned in his email referred to the bundle of base claims (the value of Kiselbach's shares, the salary, and the bonuses) not to his view regarding the settlement value, which was reflected by

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the $550,000 number. DeFilippi testified that Kiselbach never said that he would have taken the $550,000 had he known his claim was only worth $300,000. DeFilippi added that neither he nor Kennedy ever said that Kiselbach's claim was worth $300,000. In cross-examination, DeFilippi denied saying to Kiselbach that he would be lucky to get $300,000 because he was never of that view. He did not recall Kiselbach saying that he would have taken the $550,000, and, more importantly, if Kiselbach had said that, DeFilippi would have certainly gone back to the new lawyer with an offer.

[274] Following their conversation, Kiselbach sent him an email on September 20 at 7:01 a.m. DeFilippi testified there was no suggestion in Kiselbach's email that Kiselbach would have taken the $550,000. DeFilippi received an email from Kennedy as well.

[275] After receiving those emails, DeFilippi wrote to Kiselbach and Kennedy at 8:00 a.m. that they needed to discuss whether and how to move forward.

[276] On September 20, at 2:30 p.m. he sent an email to Kiselbach informing him he needed to withdraw from his case. DeFilippi explained he resigned because he could not trust Kiselbach or Kennedy anymore and he felt compromised because they had taken active steps, behind his back, to set up a meeting with Florian without informing him. However, Kiselbach phoned him quickly after receiving his email. Kiselbach was in tears and begged him to stay. They were in the middle of a lawsuit and there were certain steps that needed to be taken. He did not want to leave Kiselbach in the lurch. However, DeFilippi was concerned about the degree of influence Kennedy had over Kiselbach, even though Kennedy was helpful with the *Wildlife Act*, and he made it clear to Kiselbach that if he were to stay it would be Kiselbach and him without Kennedy.

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[277] DeFilippi testified that, after he made the decision to stay on the file, he went back to work on the information collection process, drafting the Statement of Defence, and advancing the trust issues. At that point, no date had been set for the hearing of the trust issues. Eventually a case management conference was scheduled for January 18, 2017, to set a date to hear their application challenging the validity of the Trust Declaration.

[278] On September 29, DeFilippi received an email from Kiselbach asking him to send out a settlement proposal for $550,000 plus legal fees. DeFilippi agreed. He prepared and sent a draft proposal at $700,000 to Kiselbach for his review, to ensure the offer covered the legal fees. DeFilippi added that they went back and forth on the number and agreed to send an offer at $650,000. Neither Florian nor his lawyer responded to that letter. DeFilippi did not receive any other instructions for settlement from Kiselbach after that offer.

[279] DeFilippi testified that, at that stage, Florian's Statement of Claim had been filed or was filed shortly thereafter. The claim contained a number of allegations, including a breach of fiduciary duty in relation to the Terminus Deal. DeFilippi did not know what the state of that transaction was. He contacted Weigelt, who, he understood, had conduct of that matter, to obtain documents to address the allegations made against Kiselbach in the Statement of Claim. Weigelt refused to provide those documents on the basis they were privileged. DeFilippi disagreed that sharing those documents with him would result in the loss of the solicitor-client privilege, as they were both acting as counsel for Kiselbach. DeFilippi obtained further information directly from Kiselbach afterward, but Weigelt never provided his documents to DeFilippi.

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[280] On October 20, DeFilippi sent a copy of his draft submissions on the trust issues to Kiselbach and his wife. At that point, he had not yet filed the Statement of Defence.

[281] At or around that time, DeFilippi told Kiselbach it would be preferable that he not proceed with the Terminus Deal, at least, for some period of time, if he could, even though he recognized they may want to proceed with it. Shortly after that, Weigelt sent DeFilippi an email informing him that the Terminus Deal had collapsed. When directed to an email that Kiselbach had sent to him on November 1, DeFilippi agreed that it is how he learned the Terminus Deal had collapsed.

[282] The Statement of Defence was filed on November 3. It included a statement that the Terminus Deal had not occurred.

[283] On November 17, DeFilippi had a telephone conversation with Kiselbach. DeFilippi testified he was angry because Kiselbach wanted to resign right away as a director of Yukon Stone whereas they had decided that it would be done in an orderly manner considering the nature of the claims before the court. DeFilippi added that, it was then he heard the Terminus Deal may have been revived, but he did not really know what the status of the Terminus Deal was.

[284] After that, DeFilippi testified that he continued to work on the next steps of the litigation. DeFilippi had, at least, prepared a draft counterclaim.

[285] In December, Kiselbach forwarded an email communication between him and Kennedy to DeFilippi. It appeared that, despite their agreement that Kennedy would no longer be involved, Kiselbach had continued to have communications with and to take advice from Kennedy; and they were still in communications with Florian without involving DeFilippi. DeFilippi informed Kiselbach that this was not going to work. He

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resigned and received no objection from Kiselbach that time. On December 20, DeFilippi sent Kiselbach an email about his resignation and provided information as to what he should be doing going forward in the litigation.

[286] On January 5, 2017, DeFilippi sent an email to McIntyre, Kiselbach's new lawyer, to get him up to speed on the matter. DeFilippi never received a request from McIntyre for any documents, pleadings, information, or copy of the written argument prepared about the outstanding application challenging the validity of the Trust Declaration. DeFilippi was not aware of any legal opinion provided to Kiselbach on the strength of the legal argument regarding the validity of the Trust Declaration.

[287] DeFilippi acknowledged he read the mediation briefs prepared on behalf of Kiselbach and Yukon Stone for the mediation that took place in March 2017. He did not think there was anything surprising with the arguments advanced by Yukon Stone. As for Kiselbach's brief, DeFilippi noted that there was no mention whatsoever to the key litigation issue – whether Yukon Stone was or could be a beneficial owner of Concession 15. In his view, the brief was just a capitulation, insofar as Kiselbach was concerned. Hours of work and money were thrown away. DeFilippi had no idea what instructions Kiselbach gave to his new lawyer in that regard. DeFilippi was also of the view that the valuation they ordered was improperly done. In his view, it was improper to include a minority discount with respect to an outfitting business. According to DeFilippi, the mediation was designed in a manner that left Kiselbach with a minimal amount.

[288] DeFilippi reviewed Boughton Law's outstanding accounts in the principal amount of $96,044.49, as of January 24, 2017. DeFilippi testified that the invoices reflect the work undertaken by Boughton Law for Kiselbach. DeFilippi added that, at the time, he

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was aware Kiselbach was in the process of acquiring Terminus for a substantial amount, and he requested and obtained from the Finance Committee a reduction to $48,022.24 if paid within thirty days. However, Kiselbach did not respond to the letter sent to him on January 24, 2017, requesting the payment of the outstanding amounts.

[289] On April 3, 2017, he wrote to McIntyre indicating they were going to proceed with an appointment to have their account reviewed. McIntyre responded that there was going to be a lawsuit. However, no one challenged any of the particulars of the outstanding bills.

[290] DeFilippi agreed he was aware that Boughton Law had delayed bills, but explained it was to align with Kiselbach's cashflow. Kiselbach was to receive a sizeable amount at the end of the hunting season. DeFilippi acknowledged he was aware Kiselbach was in the process of buying another area at the time.

THE LAW

Professional Negligence

[291] Lawyers may be concurrently liable to their clients in contract or in tort. *Central Trust* at 210:

> While the solicitor's duty of care has generally been stated, for obvious reasons, in the context of contractual liability as arising as an implied term of the contract or retainer, the same duty arises as a matter of common law from the relationship of proximity created by the retainer. In the absence of special terms in the contract determining the nature and scope of the duty of care in a particular case, the duties of care in contract and in tort are the same. See *Esso Petroleum*, at p. 15; Mahoney, op. cit., p. 223; Dugdale & Stanton, op. cit., p. 218. [my emphasis]

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[292] In this case, the retainer signed by Kiselbach does not contain special terms regarding the nature and scope of the duty of care, and this matter has been advanced by the plaintiffs as a tort claim.

[293] To succeed in an action for professional negligence a plaintiff must demonstrate, on a balance of probabilities that:

> 1. A duty of care exists between the defendant and the plaintiff;
>
> 2. There has been a breach of that duty in that the defendant's conduct is negligent or in breach of the standard of care required of him;
>
> 3. Damages have been suffered by the plaintiff that have been caused by the conduct of the defendant; and
>
> 4. The damages are reasonably foreseeable as arising from the defendant's conduct or in other words the damages are not too remote a result of the defendant's conduct.

(See *Newton v Marzban*, 2008 BCSC 328 ("*Newton*") at para. 294, citing John A. Campion & Diana W. Dimmer, *Professional Liability in Canada*, looseleaf (Toronto: Carswell, 2007) at 3-18 [*Campion & Dimmer*])

Standard of Care

[294] "The standard of care defines the degree or content of the duty of care: *Ryan v Victoria (City)*, [1999] 1 S.C.R. 201 at para. 25. It guides the court in determining whether a defendant's particular act or omission breached that duty", *Newton* at para. 296.

[295] The general standard of care owed by lawyers to their client is that of a "reasonably competent solicitor". As stated by Le Dain J. in *Central Trust* at 208:

> A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. See *Hett v. Pun Pong* (1890), 18 S.C.R. 290 at 292. The requisite standard of care has been variously referred to as that of the reasonably competent

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> solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. …

[296] Therefore, the question to answer to determine whether DeFilippi breached the standard of care he owed to Kiselbach and C.S.H., is what would a reasonably competent lawyer have done in the circumstances? This question raises the issue of whether expert evidence is required to determine the parameters of the standard of care in this case.

[297] The defendants argue that the plaintiffs' failure to provide expert evidence regarding the applicable standard of care is fatal to their claim. The defendants assert that, with limited exceptions, trial judges ought not to determine claims of professional negligence in the absence of expert evidence as to the applicable standard of care. The defendants submit the circumstances of this case, which involve the interplay between DeFilippi, Kiselbach, and Kennedy, as well as the technical questions of offer and acceptance and the sufficiency and clarity of a lawyer's instructions, do not fall within the recognized exceptions. The defendants argue expert evidence is required, and, without it, the plaintiffs' case cannot succeed.

[298] The plaintiffs disagree. They submit no expert is required because this case is about the conduct of litigation and settlement of disputes, which are matters that trial courts are familiar with, not a matter related to legal practice in a specialized area.

[299] In *Krawchuk v Scherbak*, 2011 ONCA 352 ("*Krawchuk*") (leave to appeal refused [2011] SCCA No 319), the Court of Appeal for Ontario drew a distinction between the applicable general standard of care and the specific obligations a defendant is called upon to discharge in a specific set of circumstances. In that case, the defendant was a realtor. The court described the general standard as an obligation to exercise the care

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that would be expected of a reasonable and prudent real estate agent in the same circumstances. The court stated there was no need to establish that general standard of care through expert evidence. However, the court noted that the obligations the duty encompasses are dependant on the facts of the case before the court, and, generally, requires expert evidence:

> [125] … This general standard, a question of law, will not vary between cases and there is no need for it to be established through the use of expert evidence … The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact (Wong, [Wong v. 407527 Ontario Ltd. (1999), 179 D.L.R. (4th) 38 (Ont. S.C.)] at para. 23; Fellowes, [Fellowes, McNeil v. Kansa General International Insurance Co. (2000), 138 O.A.C. 28 (C.A.)] at para. 11). External indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standard, may inform the standard. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence. [citations omitted]

[300] Therefore, the general rule, in cases of professional negligence, is that evidence from an expert in the field in question is necessary for the trier of facts to determine the parameters of the applicable standard of care (see *R v Gardner and Fraser*, 2021 NSCA 52 at paras. 69, 72-73 (officers in a prisoners' care facility); *Krawchuk* at paras. 124-130 (real estate agents).

[301] The same rule appears to have been followed in professional negligence claims against lawyers. Courts have stated that it is generally inappropriate for a judge to determine what a lawyer was reasonably required to do in a specific set of circumstances to meet the standard of care without expert evidence (see *Tran v Kerr*, 2014 ABCA 350 ("*Tran*") at paras. 21-26; *Zink v Adrian*, 2005 BCCA 93 at paras. 43-44; *Thind v Smith-Gander*, 2022 BCSC 1167 at para. 110).

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[302] However, there are two recognized exceptions where expert evidence is not needed in professional negligence claims, including those against lawyers:

(i) for non-technical matters or those of which an ordinary person may be expected to have knowledge;

(ii) where the impugned actions of the defendant are so egregious that it is obvious that their conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard;

(See *Krawchuk* at paras. 134-135; *3021386 NS Limited v Harding*, 2022 NSSC 174 ("*3021386 NS Limited*") at paras. 264 and 276)

[303] Similarly, the Court of Appeal for Ontario held, in *King Lofts Toronto I Ltd v Emmons*, 2014 ONCA 215, that where the lawyer's duty is well-established and the evidence regarding the breach clear, the absence of expert evidence does not prevent the presiding judge from determining the applicable standard of care and finding a breach:

> [12] The appellants submit that the motion judge could not conclude that the solicitor breached the duty when expert evidence was not called to give testimony about the standard of care. We do not agree. The evidence was clear that the respondent was not warned of the risk that the city might expect payment. There was a clear duty to warn and the facts are not in dispute that there was no warning. On the contrary, there was erroneous advice that the matter could be "dealt with" by title insurance. We do not suggest that there is no need for expert opinion in solicitor's negligence matters generally. Here, there was a clear duty to warn that was not complied with and expert evidence was not required.

[304] In addition, courts have recognized that judges, who are familiar with the practice of law and the legal system generally, can take judicial notice of the standard of care expected of lawyers (*Malton v Attia*, 2013 ABQB 642 ("*Malton*"); *Tran* at paras. 21-22). However, "…a judge should only take judicial notice of the standard of care expected of

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a lawyer in cases where the court collectively (and not just individual judges on the court) could make a finding without the assistance of expert evidence" (*3021386 NS Limited* at para. 266).

[305] One line of cases has broadly interpreted the possibility for a judge to take judicial notice of the applicable standard of care without the assistance of an expert. See *Janik v Stillman*, 2016 ONSC 1801; and *Malton* at para. 175, where the court states that:"…I see no basis, in policy, logic or law, for why judges of this court require expert assistance to understand aspects of a lawyer's activities that relate to the routine functions and jurisdiction of this court."

[306] However, another, and more prevalent, line of cases has held that judges should be cautious about determining the perimeters of the standard of care without expert evidence. In *Tran* for example, the Court of Appeal of Alberta stressed that:

> [23] As the professions (including the legal profession) become more highly specialized, the circumstances in which a trial judge can properly take judicial notice of the standard of care become narrower and narrower. Judicial notice is only properly taken in cases where the court collectively (and not just individual judges on the court) could make a finding of the standard of care without the assistance of expert evidence: *Malton v Attia*, 2013 ABQB 642 at para. 214, 90 Alta LR (5th) 1; *MacDonald v Taubner*, 2010 ABQB 60 at para. 330, 485 AR 98. Judicial notice can only be taken of facts that are notorious and undebatable.
>
> [24] The trial judge inappropriately relied on his own experience in setting the standard of care. His personal experience was not shared by other members of the Court. Other judges who had different career paths (e.g. they were labour lawyers, insurance lawyers, criminal law lawyers, etc.) would not have been able to take judicial notice of the standard of care of a conveyancing lawyer in Calgary in 2006.

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[307] One of the reasons put forward by the Court of Appeal of Alberta to explain its cautious approach with respect to judicial notice is the absence of procedural safeguards:

> [25] Many of the standard procedural safeguards are absent when a trial judge sets a standard of care in the absence of expert evidence. The rules require that expert opinions (and the witness's qualifications) be disclosed in advance. Cross-examination is available on both, and the opposing side has the option of calling rebuttal evidence. None of these opportunities are available when the trial judge takes judicial notice of the standard of care, so "... courts should be restrained and cautious about setting the standard of care absent such evidence": *Adeshina v Litwiniuk & Co.*, 2010 ABQB 80 at para. 175, 24 Alta LR (5th) 67.

[308] Nonetheless, the Court of Appeal recognized that expert evidence is not the only way to establish the applicable parameters of the standard of care:

> [26] While expert evidence is the usual way of setting the standard of care in a professional malpractice case, there are other ways that a plaintiff can meet the burden of proof on this issue. One way would be admissions by the defendant. …

[309] In *Tellini v Bell Alliance,* 2022 BCCA 106 ("*Tellini*") at para. 17, the Court of Appeal for British Columbia accepted that the general standard of care that lawyers are expected to meet includes the following duties:

- to be skilful and careful;
- to advise their client on all matters relevant to their retainer, so far as may be reasonably necessary;
- to protect the interests of their client;
- to carry out their instructions by all proper means;

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- to consult with their client on all questions of doubt which do not fall within the express or implied discretion left to them;
- to keep their client informed to such an extent as may be reasonably necessary, according to the same criteria;
- to inform their client of all relevant matters, and
- to warn of risks that accompany a proposed course of action.

(See *Newton* at para. 605, citing *Millican v Tiffin Holdings Ltd* (1964), 49 D.L.R. (2d) 216 at 219 (Alta TD), aff'd [1967] SCR 183)

[310] I note there was no expert evidence in *Tellini*.

[311] In addition, in *Baniuk v Filliter,* 2010 NBQB 272 ("*Baniuk*"), (aff'd 2011 NBCA 110, on another issue), at para. 61, the trial judge stated that "undoubtedly" lawyers have a duty to inform their clients of all offers and counter-offers of settlement and to provide advice regarding them. The judge added that lawyers must also take instructions from their clients regarding settlement. There was no expert evidence on the parameters of the standard of care in that case (see also *Pelky v Hudson Bay Insurance Co.* (1982), 35 OR (2d) 97 (HCJ) ("*Pelky*"), where the court stated that a lawyer has a duty to report all offers of settlement to their client).

[312] Courts have recognized that the nature of the client's instructions as well as the experience and sophistication of the client are among the relevant considerations in assessing the reasonableness of a lawyer's conduct in the circumstances (*Baniuk* at para. 121; *Lenz v Broadhurst Main*, [2004] OJ No 288 at para. 54).

[313] For reasons I will address in my analysis, I am of the view that expert evidence is not required in this case.

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Causation

[314] It is not enough for a plaintiff to demonstrate that their lawyer breached the duty of care they owed to them to find liability. The plaintiff must also establish that the breach is the cause of the plaintiff's loss or damages (A.M. Linden et al., *Canadian Tort Law* (11th ed. 2018) at 195, para. 5.113).

[315] In *Nelson (City) v Marchi*, 2021 SCC 41 at para. 96, the Supreme Court of Canada held that the causation analysis involves two distinct inquiries. First, whether the defendant's breach is the factual cause of the plaintiff's loss. In other words, "[t]he plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act". Second, whether the defendant's breach is "… the legal cause of the loss, meaning that the harm must not be too far remote … . The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct" (see *Tellini* at paras. 42 and 48).

ANALYSIS

a) Did DeFilippi breach the duty of care he owed to his clients, Kiselbach and C.S.H.?

[316] As stated earlier, it is not disputed that DeFilippi owed a duty of care to his clients, Kiselbach and C.S.H. As such, the first question I have to address is whether DeFilippi breached the standard of care required of him.

[317] The plaintiffs submit that Kiselbach was a neophyte litigant who wanted his contractual dispute with Florian settled to allow him to move on and focus on the outfitting business he was in the process of acquiring at the time. The plaintiffs add that this information was well-known to DeFilippi.

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[318] The plaintiffs submit that the practice of litigation and settlement of disputes is a matter that trial courts are familiar with, and that the conduct at issue in this case involves basic and fundamental principles of the practice of law. The plaintiffs' position is that a lawyer's duty to advise their client on all relevant matters in a skillful and careful manner, as well as the duty to inform their client of all offers and counter-offers, and to provide advice regarding them, are well-established. The plaintiffs submit the evidence clearly establishes that DeFilippi breached those duties by:

(i) not advising Kiselbach, in a timely manner, of Florian's late acceptance of the $550,000 offer on September 2;

(ii) by misleading Kiselbach and failing to inform him at all that he could accept the late acceptance without the necessity for Florian to bring an application to the court to enforce the settlement;

(iii) by not explaining in a skillful and careful manner the law with respect to the ability of a person in the position of Kiselbach to accept a late acceptance of a settlement offer;

(iv) by failing to consult Kiselbach about the nature of the communications between him and Florian or to follow up on Kiselbach's email to Barton as to what he meant by his use of the word "unfortunately"; and

(v) by failing to ask Kiselbach what he wanted to do or seek to obtain any instructions that might be contrary to what he presumed Kiselbach wanted to do.

[319] The defendants' position is that expert evidence is required in this case to determine whether DeFilippi breached the applicable standard of care, and that the

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absence of expert evidence is fatal to the plaintiffs' case. In the alternative, the defendants submit that DeFilippi and Boughton Law were highly responsive and effective in providing legal services to the plaintiffs. In addition, the defendants submit that DeFilippi was not operating in a vacuum, and that I must look at the history of the relationship between the parties, including Kennedy's involvement (which added to the complexity of the situation), to assess the reasonableness of DeFilippi's understanding of his instructions, his conduct, and the report he provided to Kiselbach after Florian's late acceptance of the $550,000 offer. The defendants submit that the applicable standard of care – the reasonably competent lawyer – is not a standard of perfection. The defendants acknowledge that DeFilippi's report was not perfect. However, they submit it must be assessed in light of the settlement instructions DeFilippi had at the time, the information Kiselbach and Kennedy provided to him regarding their knowledge of Florian's purported acceptance, and Kiselbach's reaction to Florian's purported acceptance.

[320] As stated earlier, I am of the view that expert evidence is not required to determine what a reasonably competent lawyer would have done in the circumstances of this case because the lawyer's duty at issue is well-established and the evidence regarding the breach is clear.

[321] Courts have recognized that lawyers have a duty to inform their client of all relevant matters. They also have a duty to inform their clients of all offers and counter-offers of settlement (unless instructed otherwise by their client) and to provide advice regarding them (see *Baniuk* and *Pelky*).

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[322] In my view, the evidence is clear that DeFilippi breached his duty because he did not inform Kiselbach of Florian's late acceptance in a timely manner, and he never informed Kiselbach that Florian's late acceptance could be considered a new offer that Kiselbach could accept, or not, even if Florian did not make an application to the court to enforce settlement. DeFilippi had a duty to inform his client of Florian's offer, even if he were right in assuming or believing his client would reject it, based on the information he had at the time.

[323] My conclusion is based on the following facts, most of which are not disputed.

[324] On September 1, 2016, DeFilippi sent to Florian's lawyer by email an offer to settle for $550,000 opened for acceptance until one minute before Gower J.'s decision on the injunction application scheduled for September 2, 2016 at 2:00 p.m. Kiselbach approved the terms of the offer, including its deadline.

[325] The offer was not accepted on time. The documentary evidence reveals that Florian's lawyer purported to accept the offer by email to DeFilippi after he had acknowledged receipt of Gower J.'s decision and looked at it. DeFilippi responded to Florian's lawyer by email that it was too late to accept the offer.

[326] At 1:01 p.m., DeFilippi informed Kiselbach and Kennedy by email that they had won the injunction. DeFilippi wrote again to Kiselbach and Kennedy at 3:09 p.m. indicating that the case management conference had just ended; that he had to leave early; and that a report would follow on Tuesday. However, DeFilippi did not inform Kiselbach and Kennedy that Florian had attempted to accept the offer after it had expired. DeFilippi acknowledged that it would not have been difficult for him and would not have taken him long to forward the email from Florian's lawyer's, purporting to

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accept the offer, and his response that it was too late to Kiselbach and Kennedy before leaving the office on September 2. DeFilippi acknowledged he did not inform Kiselbach of Florian's late acceptance, either verbally or in writing, before he returned to the office on Tuesday, September 6, 2016.

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[327] Text messages exchanged between Florian and Kiselbach, on September 3, reveal that Florian told Kiselbach he had tried to accept his offer to settle for $550,000, that DeFilippi had rejected his acceptance on a technicality, but that Florian was still willing to settle for $550,000. Kiselbach responded that he did not know Florian had tried to accept his offer because he had not been able to get a hold of his lawyer who was away for the long weekend. Kiselbach asked Florian if the offer was made before or after the decision. Florian responded that his acceptance was before the case management conference. Kiselbach replied that he needed to discuss with his lawyer. This exchange reveals that Florian's offer to settle at $550,000 was still open at the time. In fact, a further exchange of text messages between Florian and Kiselbach reveals that Florian's offer to settle still stood on September 7.

[328] On September 5, Kiselbach wrote an email to DeFilippi acknowledging they had been successful on the application, and that it looked like he would have to answer to Florian's last affidavit. In that email, Kiselbach also sought clarity on Florian's assertion that he had accepted the offer to settle on time:

> … Also [Florian] has been trying to contact me and using documents to hand me for an excuse to talk. Anyways he mentioned that they had excepted [as written] our offer 10 min before the injunction? I doubt this, and suspect he is playing games as there is no way I believe he would agree to our terms unless he already read the injunction comments by the judge. Will need some clarity on that also please.

> Hope you had a good long weekend and thank you, we are getting somewhere so let's find out where it takes us.
>
> Time to set up a new proposal which I will contact Terry about and draft something for you to look at as this is his specialty as well as the act and will save you time ...

[329] DeFilippi saw Kiselbach's September 5 email upon his return to work, the morning of September 6. He responded by email to Kiselbach and Kennedy that a lengthy report was to follow. He added there would be no new proposal from them; that Kiselbach had to learn to stop negotiating against himself; and to let Florian put something on the table if they wanted to negotiate. There was no mention in that email of Florian's late acceptance on September 2.

[330] Kennedy responded to DeFilippi's email. Kennedy explained that, in his email, Kiselbach was referring to Florian's claim that the offer had been met; that Kiselbach and Kennedy thought that Florian had not met the offer otherwise DeFilippi would have told them; that Florian had tried to get around by negotiating directly with Kiselbach; nonetheless, Kiselbach had followed their advice not to negotiate except through DeFilippi. DeFilippi saw Kennedy's email before he sent his report.

[331] Later, on September 6, DeFilippi sent a lengthy report to Kiselbach and Kennedy explaining the Reasons for Decision on the injunction application and the implications of that decision. In that report, DeFilippi mentioned for the first time that Florian's lawyer had attempted to accept the offer after receiving the decision on the injunction. DeFilippi went on to state that Kiselbach's offer had already expired when Florian's lawyer purported to accept it, and that, as a result, there was no longer any offer capable of acceptance:

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> … as a matter of law, the proposal had expired pursuant to its terms by Friday, September 2, 2016, at 1:53 p.m. In short, there was nothing for [Florian] to "accept".

[332] DeFilippi also commented on Florian's late acceptance and its impact as follows:

> In the circumstances, this step by [Florian] is nothing more than a colorable attempt to salvage what they could once they had received the Reasons for Judgment but, for the reasons discussed above, it was too late.
>
> However, this behaviour by [Florian] has a positive outcome insofar as we are concerned. If and to the extent there are to be any further negotiations or proposals in relation to a comprehensive settlement of this matter, the ***base*** or *minimum* amount of cash on the table, in other words the starting point, has now been increased to $550,000. And in the result, that puts Craig/CSH in a fair stronger bargaining position, even apart from the Reasons for Judgment. [emphasis in original]

[333] DeFilippi then explained that, at the case management conference that took place after the decision had been issued, Florian's lawyer had told the Court that there had been settlement discussions between the parties, and that, in his view, an agreement had been reached. DeFilippi added that Florian's lawyer did not go any further than that before the judge. DeFilippi explained that, in order to put additional pressure on Florian, he had asked the Court to set a timeline within which Florian would be able to file an application to enforce the settlement agreement his lawyer said had been reached. The Court agreed and gave Florian until September 13, 2016, at 4:00 p.m. to file such an application if he wished to do so. DeFilippi then proceeded to inform Kiselbach that, if Florian filed an application within the ordered timeline, Kiselbach would then have the option of accepting a settlement at $550,000 or oppose the application. DeFilippi set out Kiselbach's options as follows:

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> Now whether [Florian] will do so, I do not know. Frankly, on balance, I suspect they will not. Then the proceedings will simply continue.
>
> However, you may wish to consider the following for the moment. <u>If the application is brought by [Florian], then Craig/CSH will have an option. You can either oppose the application, on one hand, or on the other, acknowledge that the proposal was accepted on September 2, 2016</u>, which requires at the outset, that Yukon Stone/Florian have the amount of $550,000, in cash, in our trust account no later than October 2, 2016, at 4:00 pm.
>
> Craig/CSH would then be in a position to accept the money, discharge the balance of the terms of the settlement agreement, and then apply those funds, at least in part, to the acquisition and operation of his other guide and outfitting business in B.C. This is, at the very least, something to consider.
>
> However, much will depend on whether and if so to what extent [Florian] actually determine to bring the stay application to the Court. For the reasons discussed above, I am doubtful that they will actually take that step given the frailty of their legal position, but again one never knows. And even if they do, that will open up some options to Craig/CSH for consideration. [my emphasis]

[334] At the time, DeFilippi was aware, after reading Kiselbach's email, that Florian had contacted Kiselbach over the long weekend claiming he had accepted the offer on time. DeFilippi had also been told that Kiselbach had not engaged in direct negotiation with Florian. Nonetheless, nowhere in his report did DeFilippi tell Kiselbach that Florian's late acceptance could constitute a new offer to settle for $550,000 that Kiselbach could accept, if he wanted, without involving the courts (see *Real Estate Center Ltd v Ouellette* (1974), 47 DLR (3d) 568 ("*Real Estate Center*") at 576). DeFilippi acknowledged that, on certain conditions, a late acceptance can be considered a counter-offer or a new offer. DeFilippi also acknowledged in his testimony that his report

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did not set out that option. DeFilippi explained that, based on the information he had at the time of writing his report, he had concluded that Kiselbach was aware of and had no interest in a settlement at $550,000 by that time. DeFilippi testified that Kiselbach had made it clear he thought their proposal at $550,000 was too low; and that he had agreed to leave the offer at $550,000 because he was certain Florian would not accept it before it expired, i.e. before the decision on the injunction was issued. Also, Kiselbach had made it clear that, if Florian did not accept the offer on time, the next offer would be higher. According to DeFilippi, Kiselbach's email of September 5 and Kennedy's email of September 6 confirmed that Kiselbach was still of the same view. DeFilippi added that, if he had had a hint that Kiselbach was interested in accepting Florian's late acceptance at $550,000, his report would have been completely different. It would have focused on settlement. In addition, DeFilippi acknowledged in his testimony that Kiselbach did not have any experience with litigation matters prior to his dispute with Florian. However, DeFilippi pointed out that Kiselbach had the benefit of an advisor, Kennedy, who was familiar with litigation. Also, Kiselbach had experienced the negotiation process earlier on in his matter against Florian. These considerations are relevant to the assessment. However, even if DeFilippi were right in concluding that Kiselbach had no interest in accepting Florian's late acceptance, and I am not deciding this point at this stage, and that he had some knowledge of the negotiation process, DeFilippi still had, in my view, the obligation to inform his client in a timely manner of all offers and counter-offers to settle, including Florian's late acceptance, which constituted a new offer to settle at $550,000. While the evidence reveals DeFilippi had no instructions to accept a late acceptance of Kiselbach's settlement offer at $550,000, he

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also had no instructions to disregard, dismiss or reject a new offer or counter-offer from Florian at the same amount. The emails DeFilippi received before he wrote his report did not go as far as giving him such instructions, and DeFilippi did not seek to clarify the situation with Kiselbach. I note that, on September 1, Kiselbach had told DeFilippi that all negotiations needed to be reviewed and approved by him.

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[335] DeFilippi also acknowledged during his testimony that, at no time before the expiration of the September 13 deadline, did he inform Kiselbach that Florian's late acceptance could constitute an offer to settle at $550,000, and that Kiselbach had the option to accept it, without Florian being required to bring an application to enforce settlement before the court.

[336] As stated earlier, lawyers have a duty to inform their clients of all offers and counter-offers to settle (unless instructed otherwise by their client), not only those they think are acceptable to their client because it is the client, who, ultimately, makes the decision to settle or not.

[337] In my view, the evidence reveals that Florian's late acceptance of Kiselbach's offer could have been considered a new offer to settle at $550,000 capable of acceptance (*Real Estate Center* at 576). Therefore, DeFilippi had the duty to inform Kiselbach of the existence of this new offer in a timely manner and of the option Kiselbach had to accept it without involving the courts through an application. In failing to do so, DeFilippi breached the duty of care he owed to Kiselbach and C.S.H.

b) Is DeFilippi's breach of duty the cause of the plaintiffs' loss or damages?

[338] As stated earlier, to be successful in their professional negligence claim, one of the elements the plaintiffs must prove, on a balance of probabilities, is that DeFilippi's

breach of duty caused them a loss or damages. Causation does not necessarily flow from a finding of a breach of a duty of care. It is a separate issue.

[339] The plaintiffs submit that Kiselbach would have accepted Florian's late acceptance of his $550,000 settlement offer on September 2, had he known he could. The plaintiffs submit that, had Kiselbach been properly advised on the law, he could have been able to settle his dispute with Florian, as late as September 7, and would have done so. The plaintiffs assert that, because of DeFilippi's failure to advise Kiselbach he could accept Florian's late acceptance without the necessity for Florian to file an application to enforce settlement, they had to settle their matter against Yukon Stone for much less than what Florian and Yukon Stone were prepared to agree to in early September 2016; and they incurred unnecessary legal fees for legal proceedings that could have been settled on September 2. Included in those unnecessary expenses are Boughton Law's professional fees up to DeFilippi's withdrawal as his counsel in December 2016, and the costs of retaining new counsel, up to and including a mediation that led to a settlement on March 7, 2017.

[340] According to the plaintiffs, the evidence reveals that Kiselbach was prepared to accept a settlement at $550,000 on September 2, even if the acceptance came after the offer expired, i.e. after the decision on the injunction had been issued, because Kiselbach wanted to resolve his dispute with Florian to allow him to move on. The plaintiffs submit the documentary evidence as well as DeFilippi's evidence on the issue of the Terminus Deal, support Kiselbach's testimony that costs were a concern to him and that he wanted to move on to focus on the outfitting business he was in the process of "acquiring" at the time. The plaintiffs submit that Kiselbach did not have experience in

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litigation. They also submit that Kiselbach's actions after DeFilippi's September 6 report are consistent with him following the erroneous advice of his counsel. They submit that, at the time, Kiselbach believed he could not discuss settlement with Florian because DeFilippi had made it clear those discussions had to take place between the lawyers. Also, Kiselbach believed he would only have the option of accepting Florian's late acceptance if Florian or his counsel brought an application to enforce settlement on or before September 13. The plaintiffs submit that the text messages Kiselbach exchanged with Florian, on September 3 and 7, reveal he was following DeFilippi's clear directions not to engage in direct negotiations with Florian, and to leave the negotiations to the lawyers. In addition, they submit that Kiselbach's testimony to the effect that he did not share Kennedy's opinion that a settlement at $550,000 was too low, and that he should settle for much more, is supported by the documentary evidence.

[341] The plaintiffs submit Kiselbach was a credible witness, that: he was honest and answered questions in a straightforward manner; did not attempt to obfuscate; and his testimony at trial was in line with his actions at the relevant time. The plaintiffs submit that, to the contrary, DeFilippi's answers were evasive, especially concerning how Kiselbach was supposed to know he could accept Florian's late acceptance without the necessity for Florian to bring an application to enforce settlement, when DeFilippi did not inform him he could. In addition, the plaintiffs submit DeFilippi's lack of recollection of events on critical points also affect his credibility. The plaintiffs submit that, based on the totality of the evidence, Kiselbach's testimony is to be preferred.

[342] The defendants assert that the plaintiffs cannot establish causation because the evidence reveals that:

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(i) Kiselbach was not prepared to accept a settlement at $550,000 after winning the injunction application.

(ii) Kiselbach knew he could have chosen to settle for $550,000 but chose not to. Instead, Kiselbach chose to seek a higher settlement amount by continuing to challenge the validity of the Trust Declaration, and, as a result, increasing pressure on Yukon Stone.

(iii) Kiselbach, with new legal counsel, agreed in March 2017 to a less advantageous settlement for reasons unrelated to the merits of the claim against Yukon Stone, after abandoning the earlier litigation strategy — to challenge to the validity of the Trust Declaration — that had brought Florian and Yukon Stone to the settlement table.

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[343] The plaintiffs' assertion is that Kiselbach would have behaved differently had DeFilippi informed him he could. In *Fong v Lew*, 2015 BCSC 436 at para. 35 (aff'd 2016 BCCA 67), Adair J. made the following observations regarding the assessment of this type of assertion by a witness:

> The causation issues in this case are often based on the assertion that the client would have behaved differently (and avoided a loss) if only the client had received proper legal advice. In that respect, I have found the following observation of Neilson J. (as she then was) in *Newton* to be helpful:
>
> > [761] . . . I adopt the view of Groberman J. in *Sports Pool Distributors Inc. v. Dangerfield*, 2008 BCSC 9 at para. 97, that in cases of professional negligence a bare assertion that a client would have behaved differently if he or she had received proper advice should be viewed with some scepticism. Like Mr. Justice Groberman, I endorse this observation of Southin J.A. in *Hong Kong Bank of Canada v. Touche Ross & Co.* 36 B.C.L.R. (2d) 381 at 392 (C.A.):

> It is always easy for a witness to say what he would have done and for a judge to say he accepts that assertion. But such evidence is, in truth, not evidence of a fact but evidence of opinion. It should be tested in the crucible of reason.

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[344] I now turn to the assessment of Kiselbach's testimony on this issue. For the following reasons, I do not find Kiselbach's testimony credible on the following points: (1) that he did not know he could accept Florian's late acceptance; and (2) that he would have accepted Florian's late acceptance of his offer to settle for $550,0000 even after the injunction application had been decided in his favour. In my view, Kiselbach's testimony in that regard is in direct contradiction with the emails he exchanged with Kennedy and DeFilippi, as well as the text messages he exchanged with Florian at the time. In addition, I find Kiselbach's explanations of certain passages of those emails and text messages that do not align with his version of events, self-serving.

[345] Also, considering the content and timing of the emails and text messages filed in this case, I am of the view that this is not a matter where the objective modified test discussed at paras. 75 and 76 of *Century Services Corp v LeRoy*, 2018 BCCA 279, applies, as submitted by the plaintiffs, because the evidence reveals Kiselbach knew he could accept Florian's late acceptance without an application to enforce settlement even if his counsel did not inform him of that possibility.

[346] It is not disputed that, from the start, Kiselbach's preference was to settle his dispute with Florian. Kiselbach testified that costs were a concern for him because he was not making a lot of money and he was in the process of "acquiring" an outfitting business in British Columbia for $3.5 million. DeFilippi agreed that costs were a concern for Kiselbach to the extent that costs are a concern for all clients. It is not disputed that

Kiselbach was dealing with his legal dispute with Yukon Stone and Florian at the same time he was in the process of "acquiring" the Terminus business, which would have added financial and emotional stress for Kiselbach. It is not disputed that before his dispute with Florian, Kiselbach did not have experience with litigation.

[347] When DeFilippi took over the file from Bussoli, towards the end of July 2016, Yukon Stone's petition to enforce the terms of the Trust Declaration and Kiselbach's application to have the petition proceed as an action had already been set down for a hearing in Whitehorse on August 24 and 25. By that time, Kiselbach had asked Kennedy to help with the case. Kiselbach considered Kennedy an expert in the *Wildlife Act*. He was of the view that Kennedy had a better understanding of the *Wildlife Act* than his lawyers. Kennedy became a part of Kiselbach's litigation team at Kiselbach's request. Kiselbach thought he was in a better position with Kennedy on board.

[348] A legal argument was developed to attack the validity of the Trust Declaration. On August 15, DeFilippi filed an application for an injunction that, if granted, would allow Kiselbach to run Concession 15 for the 2016 hunting season, without any interference from Florian and to open Yukon Stone's books.

[349] Kiselbach understood that both the argument regarding the Trust Declaration, developed in response to Yukon Stone's petition, and the injunction put pressure on Florian to come to the negotiation table with a higher settlement number.

[350] On August 24 and 25, Florian's lawyer agreed the petition should be converted into an action. Only Kiselbach's application for an injunction proceeded. Kiselbach and DeFilippi both thought the hearing went better for them than for Florian. DeFilippi refused to meet with Florian and his lawyer to discuss settlement. DeFilippi had

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expressed to Florian's lawyer, in an email, that there was no need to meet to discuss settlement, as all the components, other than the amount, had been agreed upon. The matter was adjourned to September 2 at 2:00 p.m. for an oral decision on the injunction application.

[351] At the time, other than to convey through his lawyer that he wanted to discuss settlement, Florian had not responded to Kiselbach's last offer to settle for $409,750 and to DeFilippi's email indicating he was prepared to recommend that Kiselbach accept a settlement at $500,000. Kiselbach agreed with that last figure because he thought that $500,000 was consistent with the offers that had been put forward before in light of the additional legal costs he had to incur.

[352] On August 29, Kiselbach was informed by email that Florian was actively looking for a new counsel. He passed on that information to Kennedy and DeFilippi. On August 31, Florian emailed a settlement proposal directly to Kiselbach. The settlement proposal included three scenarios, one of which involved a settlement at $237,000. Kiselbach sent the offer to Kennedy and DeFilippi for comments. Kennedy responded by email on September 1 that "[n]one of the deals is worth the value of [Kiselbach's] rights or loss", that they were a "joke" and that the offer was a "dog dung offer". On September 1 at 8:19 a.m., DeFilippi responded: "Let me read this and get back to you before there is any further contact" When Kiselbach forwarded Florian's proposal to DeFilippi for the second time on September 1, at 10:03 a.m., Kiselbach qualified Florian's offer of a "poor offer". Kiselbach added in that email that he agreed with Kennedy's views of the offer. In addition, Kiselbach wrote in that email that "Nothing got me excited that's for sure. He's [Florian] been texting daily to talk and I have given him

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your response plus if you have a proposal send it and I will review". On September 1, at 12:17 p.m. Kiselbach wrote to DeFilippi that he had stated to Florian he was not interested in his offer to settle for $237,000 before receiving DeFilippi's proposed response to Florian, i.e. the $550,000 offer of September 1.

[353] At trial, Kiselbach acknowledged he could have taken the $237,000 offer, but he chose not to. Kiselbach did not think that $237,000 was a fair offer considering the legal costs that were adding up. I note that Florian's offer was very close to the $250,000 settlement that Kiselbach accepted on March 7, 2017.

[354] On September 1, at 11:44 a.m., DeFilippi sent to Kiselbach and Kennedy, for their review, a draft settlement proposal at $550,000 opened for acceptance up until one minute before the court's decision on the injunction on September 2. DeFilippi testified that the $550,000 figure was his "best guess" or "gut feeling" based on Kiselbach's last offer and the legal fees he had incurred since then. DeFilippi sent the offer to Florian's lawyer at 12:23 p.m. after it was approved by Kiselbach. However, after Kennedy told him that the amount was too low and the offer should be in the range of $900,000, Kiselbach sent an email to DeFilippi at 12:34 p.m., stating: "[d]on't send anything yet it needs to be higher, just talked to Terry and he seems pretty confident if we stay on course the juice will be worth the squeeze….$900K….thoughts?" DeFilippi responded at 12:37 p.m. that they could still increase the amount if that is what Kiselbach wanted. He asked Kiselbach to call him to discuss. Kiselbach testified he did not think the offer needed to be higher, but he wanted to know what DeFilippi thought of Kennedy's position. Kiselbach testified that DeFilippi was open to increasing the offer. Kiselbach and DeFilippi both testified they had a telephone conversation about this issue.

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Kiselbach testified that, during their conversation, he simply related to DeFilippi what Kennedy had said about the offer, asked him for his thoughts, and decided to stay at $550,000. DeFilippi testified he was open to increasing the amount. He added that Kiselbach decided to stay at $550,000 after a lot of back and forth on the settlement amount. The satellite phone records reveal the conversation between Kiselbach and DeFilippi at 1:12 p.m. lasted for 5:36 minutes. The plaintiffs submit the conversation was not long enough to allow for a lot of back and forth discussion on the settlement figure contrary to what DeFilippi testified. Objectively, a 5-minute conversation is not a long conversation.

[355] It is not disputed that Kiselbach decided to maintain his settlement offer at $550,000. At 1:35 p.m., DeFilippi sent a revised offer to Florian's lawyer that included the small changes Kiselbach had requested by email and an additional paragraph that DeFilippi decided to add on his own. However, the settlement amount remained the same. That additional paragraph stated that, if the proposal was not accepted, the amount required to settle would simply increase over time. Also, it stated that, regardless of the outcome of the injunction, the trust issues remained outstanding and "following Mr. Kiselbach's resignation as a director of Yukon Stone, [Kiselbach] will be the sole owner of Concession #15, Yukon Stone will be out of business, and there will be nothing left to discuss". Kiselbach testified he and Kennedy were not happy about that last paragraph being added to the proposal without his approval. Kiselbach testified the last paragraph was aggressive and not conducive to settlement. Also, Kiselbach testified that he was concerned the information contained in that paragraph could bring about another lawsuit, which he did not want. He questioned by email "[w]hy did we just

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tell them the case?" Kiselbach sent another email to DeFilippi requiring that all negotiations be discussed or reviewed by him prior to emailing. He added that they would "now" have to "amend the offer for sure". Following Kiselbach's emails, Kiselbach and DeFilippi had a telephone conversation at 2:00 p.m. DeFilippi acknowledged at trial his last paragraph was a matter of strategy. Around the same time (2:04 p.m.), Kennedy sent an email to DeFilippi, with a blind copy to Kiselbach, criticizing DeFilippi's approach to negotiation and advocating for a higher settlement figure in the range of $900,000 to $1 million. Kennedy followed up with an email to Kiselbach stating that he was "a bit pissed" and angry with DeFilippi.

[356] At 4:18 p.m., DeFilippi responded by email to Kiselbach's concerns about the last paragraph he added to the offer and Kennedy's criticism. In that email DeFilippi warned Kiselbach that, if he were successful with the trust issues he would likely be facing a claim in unjust enrichment. DeFilippi noted there were defences available to counter that claim. However, Kiselbach should want to avoid a second lawsuit on that basis. DeFilippi also reiterated that all communications regarding settlement needed to go through the lawyers. Kennedy responded by email to DeFilippi and Kiselbach, at 6:19 p.m., stating, among other things, that he disagreed with DeFilippi about the potential risks for Kiselbach of a successful unjust enrichment claim by Florian. At 9.51 p.m. Kennedy wrote to Kiselbach only, explaining why he had criticized DeFilippi.

[357] On September 2, at 8:49 a.m., DeFilippi reached out to Kiselbach and Kennedy by email asking them to let him know if they wanted to increase the offer or withdraw it altogether. Kiselbach responded by email, at 9:25 a.m., that he was prepared to let the offer stand, as is, at $550,000. His email reads as follows:

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> Hi Richard
>
> Thanks for the email. At this point we have stated an amount of $550K that has been pretty consistent since the beginning so no shock to them I think. As we talked Richard about a new value yesterday and agreed that after today a higher one will be imposed and that is clearly stated. I say let the amount stand for today as Florian is now in shock I believe with your statement Richard in the last paragraph that I was not comfortable with, or did I see before sending even though you feel it's a technique we should use. I guess we will see what unfolds but I am sure he will dig in further. I believe the amount is low but he won't settle today as it has taken 4 plus months for him to go up 60K on his offer? If your [as written] asking to retract on the price I say no. If for the last paragraph and the statement about the trust and taking the area, I would feel better yes if we retracted if possible…Just doesn't sit well with me as before they may have known but no confirmation and speculation was killing him…My thoughts. I have read a few case studies where they have actually used info from Without prejudice but maybe thats [as written] not apples to apples and I trust your knowledge and experience believe me. Just wearing the white hat and staying quiet doing my job felt better. Lol [my emphasis]

[358] Kiselbach testified that, after consultation with his wife, he had decided to keep the offer at $550,000 to see if they could get the matter resolved. Kiselbach also testified that, even though, he approved the terms of the offer, his focus was more on the amount than on its deadline. Kiselbach testified that when he wrote to DeFilippi on September 2, at 9:25 a.m. to confirm that the offer should stay at $550,000 but that, "after today a higher one will be imposed", he meant the end of the whole day on September 2. However, in cross-examination, he agreed he knew the offer had a deadline. He also agreed that he wrote that they would stay at $550,000, but if Florian did not accept the offer on its terms, the next offer would be higher.

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[359] Kiselbach testified he did not share Kennedy's views on high settlement figures. Kiselbach added he wrote that the next offer would have to be higher to appease Kennedy. Kiselbach testified that, at the time, he was trying to mediate between DeFilippi and Kennedy, who both had strong views and egos. Kiselbach added that Kennedy acknowledged in a number of emails that his views on settlement may not be shared by Kiselbach and his family. I note that Kennedy did send emails to Kiselbach in which he wrote that it was up to Kiselbach and his family to make the decision regarding settlement, after having explained and argued his position that a higher settlement number was more appropriate. However, Kiselbach's use of the expression "as we talked Richard about a new value yesterday and agreed that after today a higher one will be imposed…" in the above-mentioned email reveals that Kiselbach himself had told DeFilippi, in a prior conversation, that the next offer would have to be higher, which corroborates DeFilippi's testimony on this point.

[360] In cross-examination, Kiselbach agreed he did not think Florian would accept the offer before the decision on the injunction was issued. In addition, when Kiselbach was confronted with an excerpt of an email Kennedy had sent to him on September 3 at 6:18 p.m., stating Kennedy's understanding that DeFilippi "also had instructions not to agree to any offer at that level after the time ran out on his so would not." Kiselbach disagreed with that statement. He added that DeFilippi could have accepted Florian's late acceptance even if it were after the time limit of one minute before the court's gave its decision. Kiselbach added that DeFilippi knew he wanted to settle and that the deadline was not important to him. In my view, this statement again contradicts what Kiselbach wrote to DeFilippi in the above-noted email of September 2.

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[361] The plaintiffs submit that Kiselbach's exchanges with Barton on September 2 and 3, clearly reveal that Kiselbach would have settled for $550,000 on September 2 had he been told by DeFilippi about Florian's late acceptance in a timely manner. The plaintiffs emphasized Kiselbach's use of the word "unfortunately" at the end of that exchange. The exchange reads as follows:

- On September 2, at 8:52 p.m. Barton sent an email to Kiselbach entitled: "Congrats re $550+, you deserve it, cheers PKB" (There is nothing in the body of the email).

- Kiselbach responded on September 2, at 9:07 p.m.:

  "Nothing was attached Philip not sure what this means? Just had subject".

- Barton wrote back on September 3, at 9:01 a.m.:

  "RRED told me that [Florian's lawyer] now wants to settle for $550. Just saying congrats for kicking ass. Much better than the $400 you wanted back in May/June, cheers Philip".

- Kiselbach responded on September 3, 2016 at 9:03 a.m.:

  "Well shit never heard a thing? Really?"

- Barton wrote back on September 3, at 9:11 a.m.:

  "If you never heard then I must be confused. I will ask RRED on Tuesday. Then congrats for winning the injunction!"

- Kiselbach responded on September 3 at 9:38 a.m.:

  "Okay thanks ya I haven't heard that so I doubt it… unfortunately."

[362] Kiselbach testified that he and his wife were excited and confused at the same time when he received Barton's email because it was the first time they had heard about Florian's lawyer wanting to settle. Kiselbach added they wanted to settle and were disappointed when Barton later wrote that he must have made a mistake. Kiselbach

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added that they were hopeful that the offer had been accepted and this was very confusing.

[363] In addition, the plaintiffs pointed out that, back on August 22, 2016, Barton had written to DeFilippi stating that “anything close to’’ the last offer of $409,750 “would result in Craig being over the moon.” However, in that email, Barton continued on to state: “However, maybe he wants more to cover Boughton legal fees for June and July and August??” I note the evidence reveals that Barton had transferred Kiselbach’s file to Boughton Law’s litigators at the end of May/beginning of June and had not worked regularly on Kiselbach’s file since then.

[364] Also, Kiselbach’s exchange of emails with Barton and Barton’s comments cannot be read in isolation. In my view, the emails exchanged between Kiselbach, Kennedy, and DeFilippi between September 2 and September 7, as well as the text messages Kiselbach exchanged with Florian on September 3 and 7, reveal that the time limitation put on the $550,000 offer was an important consideration for Kiselbach, contrary to what the plaintiffs assert and what Kiselbach testified to at trial. Those emails and text messages also contradict Kiselbach’s testimony that he would have settled at $550,000, even after winning the injunction.

[365] On September 3, when Florian texted to Kiselbach that he had attempted to accept his offer, Kiselbach responded that he had not been able to speak to his lawyer who was away for the long weekend and that he would have to check with him. In that exchange, the only question Kiselbach asked Florian about his acceptance was whether it was made “before or after the ruling”. Florian responded that the “acceptance was made about ten minutes before the conference began”. In addition, when Florian

commented on the fact that this would be a good settlement, using hunters' jargon, as explained by Kiselbach in his testimony, Kiselbach's response was "I saw the ruling… '' and "I need to discuss with my lawyer".

[366] In cross-examination, when counsel for the defendants put to Kiselbach that the reason he had asked Florian whether he accepted the offer before or after the ruling was because Kiselbach knew that if the offer had been accepted before the ruling it would be an acceptance, and if it were accepted after the ruling it would not be. Kiselbach agreed that he was asking Florian whether he had accepted the offer. Kiselbach added that he was getting Florian's messages in conjunction with Barton's emails, and he did not know what was going on. He added that he was getting mixed messages about whether Florian had accepted the offer and that was confusing. Kiselbach agreed he ended the conversation by saying he needed to discuss with his lawyer. In my view, Kiselbach's text messages to Florian reveal it was important for Kiselbach to find out whether his offer had been accepted before its expiry, i.e. before the court's decision on the injunction, which Kiselbach had won.

[367] On September 3 and 4, Kiselbach had a number of lengthy telephone conversations with Kennedy. On September 3, at 2:15 p.m., after one of their conversations, Kennedy wrote to Kiselbach "[a]sk yourself why does Aaron want to settle now after you were so sure he never would??" Kennedy went on to say that it was because Florian saw the decision and wanted to avoid the consequences of the resulting order. He then told Kiselbach that if he wanted to settle now, he should settle for much more than $550,000:

> … The court order injunction indirectly allowed us all including your lawyer and then the judge to see what the

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> concession is really worth, and whom built it and whom abused it. To give up just as we get the lid open to see inside is not a wise decision if considering it. Of course Aaron agreed to $550, he would agree to 900 or in between or perhaps more depending on what the real books show … BUT we will not know until we look and never know if you settle now– so if now is when you settle then do it for a hell of alot more than the 550 he jumped at.

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[368] In that email, Kennedy clearly referred to the possibility for Kiselbach to accept Florian's late acceptance of a settlement at $550,000. In addition, Kennedy clearly expressed to Kiselbach why he thought accepting $550,000 after winning the injunction was not a wise idea.

[369] On September 5 (before DeFilippi's report of September 6), Kiselbach sent an email to DeFilippi with copy to Kennedy inquiring about the timing of Florian's acceptance and the next steps. Kiselbach testified that, at that point, he was confused and just trying to figure out if Florian had accepted the offer or not. He denied he was considering whether to accept Florian's late acceptance or not, which, in my view, is inconsistent with the content of the emails that Kennedy sent to Kiselbach after or around the time he spoke with him on the phone, on several occasions, on September 3 and 4. Kiselbach's September 5 email reads as follows:

> Hi Richard:
> Didn't get to talk much but appears our injunction not only was successful but also got the judge thinking also especially about the Trust Declaration, Wildlife Act and the whole situation. Looks like I need to answer that last Affidavit that Aaron swore to so could you send that to me which you already may be doing and I'll get to it. Also Aaron has been trying to contact me and using documents to hand me for an excuse to talk. Anyways he mentioned that they had excepted [as written] our offer 10 min before the injunction? I doubt this, and suspect he is playing games as there is no way I believe he would agree to our terms unless he already read the injunction comments by the judge. Will need some

> clarity on that also please. Hope you had a good long
> weekend and thank you, we are getting somewhere so let's
> find out where that takes us.
> Time to set up a new proposal which I will contact Terry
> about and draft something for you to look at as this is his
> specialty as well as the act and will save you time….
> Thanks and all the best
> Craig Kiselbach [my emphasis]

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[370] When cross-examined about this email, Kiselbach agreed he had decided to keep the offer at $550,000 on September 2 with the understanding that the offer would go up if it were not accepted. Kiselbach then added he assumed the new offer he referred to in that email would be higher considering the increase in legal fees.

[371] Nowhere in that email did Kiselbach communicate any interest or excitement about the possibility that Florian had accepted his offer, no matter when it was accepted. Kiselbach's only question is about the timing of the acceptance, followed by his belief that Florian would not have accepted his offer before the decision was issued, and, if he were right, that it was time to prepare a new offer, drafted by him and Kennedy, who had made it quite clear he believed the offer at $550,000 was too low. I note the history of Kiselbach's communications with DeFilippi up to that point reveals Kiselbach was not shy about communicating his views or asking questions on issues arising in his file.

[372] DeFilippi responded by email on September 6, at 7:55 a.m. that his report would follow, that no new offer should be coming from them at that point, that Kiselbach should stop negotiating against himself, and to let Florian put something on the table if he wanted to negotiate.

[373] In addition, Kiselbach testified he did not know he could accept Florian's late acceptance because DeFilippi had told him on September 6 that the only way he could

settle at $550,000 was if Florian filed an application to enforce settlement. However, on September 3 at 6:18 p.m., at the beginning of a lengthy email, Kennedy wrote to Kiselbach that Florian's late acceptance constituted a new offer capable of acceptance:

> Craig
>
> To put into words often makes issues real and something to believe in or take counter to.
>
> **On the acceptance of deal or offer**
>
> 1. Richards [as written] terms and timing was definitive. So to turn an acceptance by Aaron or [Florian's lawyer] down he would have either received the offer later than the deadline or the the [as written] offer did not meet the terms of the offer he put forth or [as written] your behalf. Richard would have not violated your trust or his responsibility to turn one down if the offer was made to meet both conditions. So not an issue until you talk to him and see if and why.
>
> 2<u>. Any offer made after the start of the court and the result is an open and new offer by Aaron and [Florian's lawyer] as your offer was officially dead. Richard would have turned it down until he talked with you in any case. [H]e also had instructions not to agree to any offer at that level after the time ran out on his so would not.</u>
>
> (I made my points on why the offer was far to low considering the juice now worth the squeeze. No need to go over again as that is your decision with your wife for the good of the family.) [bold in original, underline my emphasis]

[374] In cross-examination, Kiselbach agreed that Kennedy's lengthy email reflected what they had discussed in a preceding telephone call. When the second paragraph of Kennedy's email was put to Kiselbach, he testified he had difficulty understanding what Kennedy had written in that paragraph. I acknowledge Kennedy's paragraph is somewhat convoluted. However, Kiselbach acknowledged that Kennedy's email reflected the earlier discussion they had on the phone. Therefore, the email reveals that

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Kiselbach and Kennedy discussed the question of offer and acceptance in an earlier telephone conversation. In addition, I note that, later in that lengthy email, Kennedy put forward his position that a settlement below $760,000 “is taking a loss in real terms of financial input alone”.

[375] In the morning of September 7, Kiselbach and DeFilippi had a telephone conversation about Kiselbach’s intention to meet with an officer of Yukon Environment to talk about issues related to the case. DeFilippi testified he did not want Kiselbach meeting alone and speaking with the officer because he was concerned Kiselbach could say something against his own interest. DeFilippi admitted he was angry and swore at Kiselbach during that telephone conversation. Kiselbach testified that DeFilippi wanted to remain in control of the communications.

[376] Nonetheless, Kiselbach testified he encouraged Florian to file an application to enforce the settlement at $550,000 because he thought it was the only way he could settle their dispute at the time. Kiselbach did not provide any specific information regarding that or those encouragements. Kiselbach added he sent an email to DeFilippi at 12:02 p.m. on September 13 because he wanted to know if Florian had filed the application. In that email Kiselbach wrote: “[d]id [Florian’s lawyer] and Florian put in an application on the proposal? Or are we past that now?” However, nowhere in the text messages Kiselbach exchanged with Florian in the afternoon of September 7, did Kiselbach encourage Florian to file an application to enforce settlement. The issue of the application is not even mentioned. The only thing Kiselbach wrote to Florian about his acceptance is that it was too late and that it was a disappointing move:

> Florian: “Sounds like you aren’t interested in settling…”

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Kiselbach: "Sounded like you saw the response at 1:08pm then settled at 1:53pm on Sept 2 which wasn't the deal. Disappointing move.

Can't see your hand then bet."

[377] When Florian texted back that it was up to Kiselbach to decide whether he wanted to settle or not, Kiselbach did not ask or suggest to Florian that he file an application to enforce the settlement with the court; Kiselbach did not tell Florian he could not negotiate directly with him because his lawyer had told him that settlement discussions had to go through the lawyers; nor did Kiselbach invite Florian to contact his lawyer to discuss settlement or to make an offer to settle, in keeping with DeFilippi's directions to him in his two emails of September 6; instead Kiselbach simply changed subject by saying that one of their clients had just had a successful hunt. That exchange reads as follows:

Florian: "Interpret or spin things however you want, it was accepted with the desire to put this in the rear view mirror and with the understanding that the meeting was the deadline. I guess it's up to you whether you want to settle or not."

Kiselbach: "Ram down, Russian".

[378] In my view, Kiselbach's responses to Florian's invitation to settle at $550,000 are not consistent with someone who wanted to settle but believed Florian had to file an application with the court to do so. They are not consistent with someone who wanted to settle but did not think he could engage in discussions on his own because his lawyer directed him not to do so either. I note Kiselbach testified he did not remember if he showed the September 7 text messages to DeFilippi. DeFilippi testified he did not see those messages prior to this action. In my view, Kiselbach's responses to Florian on

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September 7 are consistent with someone who was not interested in a settlement at $550,000 after winning an injunction that allowed him to open Yukon Stone's books and to manage Concession 15 for the 2016 hunting season without any interference from Florian; and who thought he was in a good position to obtain a higher amount.

[379] No other direct exchanges between Florian and Kiselbach were filed in evidence at trial. I note the plaintiffs did not direct me to any documents, such as emails, that would contain a mention of Kiselbach contacting Florian orally or in writing to invite him to file an application.

[380] Kiselbach and DeFilippi testified they did not discuss settlement between September 7 and September 12.

[381] In my view, the fact that, on September 29, 2016, Kiselbach wrote to DeFilippi that he was prepared to settle for $550,000 plus his legal fees since the injunction, does not support Kiselbach's version that he would have settled for $550,000 at the beginning of September because, by then, the situation was different. Florian had retained new counsel, Kiselbach's attempt to set up a mediation directly with Florian had been discovered by his lawyer, and Kennedy was no longer a "member of the team" actively involved in litigation discussions even if Kiselbach continued to reach out to him.

[382] As stated earlier, I do not find Kiselbach's version of events credible. I am of the view that the emails and text messages Kiselbach exchanged with DeFilippi, Kennedy, and Florian, at the time the events occurred, do not align with, and contradict in many ways Kiselbach's testimony that he did not know he could accept Florian's late acceptance and that he would have accepted to settle had he known he could, even

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after his offer had expired. Again, in my view, those messages reveal Kiselbach knew he could settle for $550,000, even after his offer had expired, but decided not to because he had won the injunction, and, thought he was in a good position to obtain a higher amount.

[383] As a result, I find that the plaintiffs have not established, on a balance of probabilities, the element of causation. Therefore, their claim in professional negligence must be dismissed.

[384] In light of my conclusion, I do not need to address the defendants' argument that the cause of Kiselbach's losses was not DeFilippi's breach of duty, but the decision Kiselbach made, with his new legal counsel, to agree to a less advantageous settlement for reasons unrelated to the merits of the claim against Yukon Stone.

COUNTERCLAIM

[385] Boughton Law advances a counterclaim against Kiselbach for outstanding unpaid accounts for legal fees and disbursements in the amount of $96,044.49 (including taxes) plus interest at 12% per annum pursuant to the retainer agreement.

[386] Kiselbach agreed that he entered into a retainer agreement with Boughton Law on April 26, 2016. Kiselbach acknowledged that DeFilippi withdrew as his counsel on September 20, 2016 but that he asked him to remain as his counsel. DeFilippi continued to act as counsel for Kiselbach and to work on the file until he withdrew again on December 19, 2016.

[387] Boughton Law's invoices and related documents were filed as evidence at trial. Those documents reflect the amount sought by Boughton Law.

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[388] The retainer agreement signed by Kiselbach was filed as evidence at trial. I note that C.S.H. is not identified as a party to the retainer. With respect to the interest rate, the retainer provides that: "[u]npaid bills will accrue interest at the rate of 12% per annum from the 31st day after the date of the bill until it is paid in full. No interest will be payable if the bill is paid in full within thirty days of its date".

[389] At the hearing, counsel for the plaintiffs submitted that they did not take issue with the amounts of the bills that were submitted to Kiselbach, and that are still outstanding. They did not question that the work was performed. They took issue with the necessity of the work performed based on the plaintiffs' position that the matter should have been settled on September 2. The plaintiffs also raised an issue regarding the British Columbia provincial sales tax being applied to the legal services rendered by Boughton Law in 2016.

[390] As I have dismissed the plaintiffs' claim in professional negligence, there is no reason, considering the plaintiffs' position and the work performed by Boughton Law at the relevant period, not to grant judgment to Boughton Law in the amount of $11,750 (December 12, 2016 invoice) plus $50,159 (January 24, 2017 invoice), for a total of $61,909 for their legal fees; and $1,343.65 (December 12, 2016 invoice) plus $7,345.15 (January 24, 2017 invoice) for a total of $8,688.80 for their disbursements; for a grand total of $70,597.80, plus any applicable taxes.

[391] With respect to the tax issue raised by the plaintiffs, they submit that Kiselbach should not be ordered to pay the British Columbia provincial sales tax on any outstanding amounts that may be due to Boughton Law. They assert that, once it became clear that the case was a Yukon matter involving a Yukon plaintiff (Yukon

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Stone), i.e. when the petition was filed on June 7, 2016, in the Supreme Court of Yukon, Boughton Law should have stopped collecting the British Columbia sales tax on its services. The plaintiffs did not provide any case law or refer to any provisions of the British Columbia legislation in support of their position.

[392] There is no territorial sales tax in the Yukon. There was no such tax in 2016 either. It is not disputed that Kiselbach was a British Columbia resident in 2016. It is also not disputed that Boughton Law's office, where DeFilippi worked, was located in British Columbia in 2016. Sections 126 to 129 of the British Columbia *Provincial Sales Tax Act*, SBC 2012, Ch 35, provide that British Columbia residents must pay the provincial tax on the provision of legal services in British Columbia at the provided tax rate. However, British Columbia residents do not have to pay the provincial tax rate if the legal services are provided outside British Columbia in relation to a matter that do not relate to British Columbia.

[393] It also appears that the *Provincial Sales Tax Act* has its own administration, enforcement, and appeal scheme. It is unclear to me that the Supreme Court of Yukon has jurisdiction to determine whether Kiselbach must pay the British Columbia provincial sales tax for the legal services provided to him by Boughton Law, which are still outstanding, including those rendered by DeFilippi when he was in Whitehorse on August 23, 24, and 25, 2016. Considering the plaintiffs did not provide any reference materials in that regard, I decline to make any determination regarding the application of the British Columbia legislation to Kiselbach's case.

[394] I now turn to the issue of pre-judgment and post-judgment interests. Boughton Law seeks pre-judgment and post-judgment interests at the contractual rate of 12%.

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[395] The award of pre-judgment interest is governed by s. 35 of the *Judicature Act*, RSY 2002, c 128. Subsection 35(1) provides that the "prime rate" is the lowest rate of interest quoted by chartered banks, as determined by the bank of Canada. Subsection (3) provides that a person entitled to pre-judgment interest may claim the prime rate existing for the month preceding the month in which the action was commenced "from the date the cause of action arose to the date of judgment". Also, ss. 7 provides that:

> The judge may, if considered just to do so in all the circumstances, in respect of the whole or any part of the amount for which judgment is given,
>
> (a) disallow interest under this section;
>
> (b) set a rate of interest higher or lower than the prime rate;
>
> or
>
> (c) allow interest under this section for a period other than that provided.

(See *Kareway Homes Ltd v 37889 Yukon Inc*, 2014 YKSC 35 ("*Kareway*") at para. 14).

[396] In *Trans North Turbo Air Ltd v North 60 Petro Ltd*, 2003 YKSC 26 (var'd on other grounds, 2004 YKCA 9), Veale J. stated at para. 23: "Section 35(7) gives the trial judge a wide discretion to vary the rate of interest charged where it would be "just to do so in all the circumstances" (*Trans North* was cited with approval by Gower J. in *Kareway* at para. 15).

[397] The award of post-judgment interest is governed by s. 36 of the *Judicature Act*. As stated by Gower J. in *Kareway* at para. 16:

> Post-judgment interest applies by operation of law and is governed by s. 36 of the *Judicature Act*. Subsection (1) states that the "prime rate" has the same meaning as in

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> s. 35. Subsection (2) then provides that a judgment for the payment of money "shall bear interest at the prime rate from the day the judgment is pronounced…" Finally, subsection (5), which is at issue here, states:
>
> > "If the court considers it appropriate, it may, on the application of the person affected by, or interested in a judgment, vary the rate of interest applicable under this section or set a different rate from which the interest shall be calculated."
>
> Again, there are no statutory limits on the discretion available under this subsection.

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[398] As the parties have not made specific submissions on pre-judgment and post-judgment interests, I will reserve my decision on this issue. Boughton Law is to provide its submissions on pre-judgment and post-judgment interests by April 12, 2024. These submissions are not to exceed a total of five pages. Kiselbach is to provide his submissions in response by April 30, 2024. Kiselbach's submissions are not to exceed a total of five pages. Any reply submissions by Boughton Law are to be submitted by May 15, 2024. These reply submissions are not to exceed a total of three pages.

COSTS

[399] I encourage the parties to agree on the issue of costs. If they cannot, the defendants are to provide their costs submissions in the main action and the defendant, Boughton Law, its costs submissions on the counterclaim by April 12, 2024. These submissions are not to exceed a total of five pages. The plaintiffs are to provide their responding costs submissions, that are not to exceed a total of five pages by April 30, 2024. Any reply submissions by the defendants in relation to the main action or counterclaim are to be submitted by May 15, 2024. These reply submissions are not to exceed a total of three pages.

CONCLUSION

[400] The plaintiffs' action in professional negligence is dismissed.

[401] Boughton Law's counterclaim for the payment of its professional services is granted in the amount of $70,597.80, plus any applicable taxes. Judgment is reserved on pre-judgment and post-judgment interests.

[402] The issue of costs is to be determined if the parties cannot agree.

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CAMPBELL J.