Court of King's Bench of Alberta

Citation: Fluor Enterprises Inc v Leder Investments Ltd, 2025 ABKB 234

Date: 20250416
Docket: 2301 07978
Registry: Calgary

Between:

Fluor Enterprises Inc

Applicant

- and -

Leder Investments Ltd

Respondent

Reasons for Judgment
of the
Associate Chief Justice
D.B. Nixon

I. Introduction

[1] These Reasons address two applications concerning questions, undertakings, a request for a restricted court access sealing order, and settlement privilege. There are two additional applications that form part of the context. All these matters are touched on below.

[2] The first application, filed January 23, 2024, was made by Leder Investments Ltd ("**Leder**") (the **"Objections Application**"). Leder seeks an order directing Mark Brown, a witness for Fluor Enterprises Inc ("**Fluor**"), to provide answers to undertakings and questions listed in

Schedules A and B to the Objections Application. The subject undertakings and questions were refused, objected to, or taken under advisement during the cross-examination of Mr. Brown on his affidavit on December 6, 2023 (the "**Brown Questioning**").

[3] The second application addressed in these Reasons was brought by Fluor and was filed July 16, 2024. Fluor seeks a restricted court access order sealing certain filed materials (the **"Disputed Materials**") on the basis that they are privileged and inadmissible as evidence in the underlying action (the "**Privilege Application**").

[4] By way of context, Fluor commenced the underlying action by originating application on June 16, 2023 (the "**Originating Application**"). In the Originating Application, Fluor states it seeks an order declaring that an alleged arbitration agreement between it and Leder does not exist. It also seeks an order striking the arbitration on the grounds that the Notice to Arbitrate was invalid, the arbitration is premature as against Fluor, or that the applicable limitation period had expired. Fluor later clarified in a letter dated February 4, 2025, that its limitations argument is based on the fact that Leder has not filed a statement of claim in relation to the dispute that formed the subject of the Notice to Arbitrate. Thus, if Leder is not entitled to pursue the claim by way of arbitration, as Fluor argues, then the claim would be time barred. As Fluor's counsel stated in his letter of February 13, 2025, the parties are not disputing that the Notice to Arbitrate was served within the limitation period.

[5] Concerning the scope of this hearing, the Originating Application is not before me. That application will be heard at a later date.

II. Issues

[6] The issues in this decision, framed as questions, are as follows:

A. Are the Disputed Materials covered by settlement privilege?

B. If the Disputed Materials are covered by settlement privilege, do they fall within an exception to settlement privilege?

C. Is a permanent sealing order appropriate in this instance?

D. Should Mr. Brown be directed to provide answers to the undertakings and questions that were refused, taken under advisement, or objected to at the Brown Questioning?

III. Facts

[7] Fluor is a company incorporated under the laws of Texas. It is a global engineering, procurement, and construction company. It operates in Canada through its affiliate, Fluor Daniel Holdings Canada Inc ("**Fluor Holdings Canada**").

[8] Mr. Brown is a former officer of Fluor. He held the position of Vice-President of that entity. Mr. Brown, as Fluor's witness, provided affidavit evidence, on which Fluor relied in support of the Originating Application.

[9] Leder is an Alberta corporation and a partner in the Supreme Group LP ("**Supreme Group**"). Supreme Group is a limited partnership that specializes in the steel manufacturing and fabrication business. Peter Heinen is the Chief Legal Officer and Corporate Counsel of Leder. Mr. Heinen provided evidence for this hearing in affidavit form, on behalf of Leder.

[10] Supreme Modular Fabrication Inc ("**SMFI**") was incorporated in New Brunswick for the purpose of carrying on a modular fabrication business, which was a joint venture between Supreme Group and Fluor Holdings Canada. It was dissolved in September 2022.

[11] Leder and SMFI were parties to a lease agreement, dated April 18, 2013 (the "**2013 Lease**"), under which SMFI leased certain lands and premises from Leder. The 2013 Lease named Fluor and Supreme Group as guarantors.

[12] Clause 13.2 of the 2013 Lease sets out the dispute resolution process to be followed for contested claims arising from that agreement. It states that the process begins with good faith negotiations, followed by mediation. If those methods fail, the dispute is to proceed to arbitration governed by the *Arbitration Act*, RSA 2000, c A-43. The provision contained a "space" for the parties to identify the applicable rules of arbitration, but none were specified. That is, the "space" was never completed in the 2013 Lease document.

[13] On or about April 25, 2018, SMFI gave Leder notice of its intention to terminate the 2013 Lease, effective June 30, 2018. According to Leder, SMFI failed to pay the "Improvement Termination Fee" upon termination of the 2013 Lease. Leder asserts the "Improvement Termination Fee" is required under the 2013 Lease and is defined in Clause 14.3.

[14] Believing that Clause 13.2 of the 2013 Lease required the dispute to be arbitrated, Leder served Fluor with a Notice to Arbitrate on or about April 1, 2020. By serving this notice, Leder purported to initiate an arbitration against SMFI, Fluor, and Supreme Group (the "**Arbitration**").

[15] The issues in dispute are listed in the Notice to Arbitrate. In summary, those issues are as follows: (i) whether the 2013 Lease has been terminated; (ii) the determination of the Improvement Termination Fee; and (iii) the lease payments owing and the liability for payment of same.

[16] As for a remedy, the Notice to Arbitrate states that Leder seeks the following: (i) a declaration that the Improvement Termination Fee under the 2013 Lease is $10,500,000.00; (ii) a determination of the termination date of the 2013 Lease; (iii) a declaration that SMFI owes Leder lease payments from July 1, 2018, until the date the 2013 Lease was terminated, and a determination of the amount owing; (iv) an order for payment of the Improvement Termination Fee and unpaid lease payments by SMFI [payable by Fluor and Supreme Groups as per their guarantees] within 30 days of the final determination of the Arbitration; (v) costs; and (iv) disbursements and interest (collectively, the "**Leder Claims**"). It should be noted that Mr. Heinen later clarified in an email dated June 1, 2021, that the dollar value in the Notice to Arbitrate should be $15,000,000, as that was the amount stated in a settlement agreement into which the parties entered a few weeks later.

[17] Fluor's counsel, Josh Fraese, acknowledged service of the Notice to Arbitrate on April 1, 2020.

[18] Leder, Supreme Group, Supreme Steel LP, Fluor Holdings Canada, Fluor Canada Ltd, and Fluor entered into a settlement agreement, dated April 24, 2020, to resolve some of the disputes amongst the parties (the "**Partial Settlement Agreement**"). The Partial Settlement Agreement expressly stated that Leder was not releasing the Leder Claims resulting from the termination of the 2013 Lease. The Partial Settlement Agreement also stayed any proceedings in relation to the Leder Claims until the following had occurred: (i) SMFI's final tax return had been completed and filed, and any tax liabilities identified by Ernst & Young on an initial basis had been paid to the Canada Revenue Agency ("**CRA**"); (ii) certain SMFI funds had been distributed; and (iii) SMFI had been wound-up and dissolved, and all necessary notices having been given, or regulatory filings made as necessary, to give full effect to SMFI's dissolution. The Partial Settlement Agreement also included a standard confidentiality clause, which prohibited the parties from disclosing the terms of the agreement to a third party, without the consent of the parties to the agreement.

[19] Following the execution of the Partial Settlement Agreement, the parties worked to wind-up and dissolve SMFI. The Court of Queen's Bench of New Brunswick, as it was then, granted a consent Order on August 28, 2022, directing that SMFI be dissolved. A Certificate of Dissolution was issued on September 23, 2022.

[20] Between May 29, 2021 and June 22, 2023, counsel for Leder and Fluor exchanged email correspondence regarding the wind-up and dissolution of SMFI, as well as the Arbitration. The discussions relating to the Arbitration considered the terms of reference and other procedural matters, such as the selection of arbitrators for a potential arbitration of the Leder Claims. Some of these emails were sent "without prejudice". These emails were attached as Exhibits "E" and "G" to "K, inclusive (the "**Disputed Emails**"), to the Affidavit of Peter Heinen, sworn on February 2, 2024 (the "**Heinen Affidavit**").

[21] As mentioned above, Fluor filed the Originating Application on June 16, 2023. Fluor relied on the Affidavit of Mark Brown, which he swore on June 12, 2023 (the "**2023 Brown Affidavit**").

[22] In response, Leder filed an application on August 3, 2023, seeking an order to stay the Originating Application, directing the parties to the Arbitration, or, in the alternative, referring the parties to mediation pursuant to the dispute resolution provisions of the 2013 Lease (the "**Stay Application**"). Leder claimed that Fluor had agreed to proceed to arbitration by signing the Partial Settlement Agreement.

[23] Leder asserts the issues raised in the Originating Application fall within the scope of the arbitration agreement. Given that argument, it claims the Court does not have jurisdiction to hear the matter and was required to refer the matter to arbitration. As a result, the Stay Application filed by Leder was adjourned *sine die* by consent on September 1, 2023.

[24] During the Brown Questioning on December 6, 2023, Fluor objected to certain undertakings and questions. The objections were advanced based on settlement privilege, relevancy, and the claim that the requested undertakings exceeded the scope of cross-examination on an affidavit. Despite the objections of Fluor, Leder read details of the Disputed Emails into the transcript. Given those read-ins, Fluor asserts that the transcript contains privileged information (the "**Brown Transcript**").

[25] Leder subsequently filed the Objections Application. Schedule "B" to the Objections Application lists the questions to which Fluor had objected and which it claims contain privileged information. Leder also sought to rely on the Brown Transcript.

[26] As mentioned above, Leder filed the Heinen Affidavit on February 2, 2024. The Disputed Emails were attached to the Heinen Affidavit.

[27] On July 16, 2024, Fluor filed an application for a restricted court access order sealing the Disputed Materials. The Disputed Materials are particularized as follows:

(i) Schedule "B" to the Objections Application;

(ii) the Disputed Emails, which are attached as Exhibits "E" and "G" through "K," inclusive, to the Heinen Affidavit; and

(iii) the Brown Transcript.

[28] Fluor also sought a declaration that the Disputed Materials were privileged and inadmissible as evidence in the action. It asked that Leder be directed to file a redacted version of the Brown Transcript, the Heinen Affidavit, and the Objections Application, to exclude the Disputed Materials. In the alternative, it sought an order directing that the Objections Application be heard *in camera*, as a special application, and that the Briefs and materials filed in relation to the Objections Application be sealed.

[29] On July 4, 2024, Justice Horner granted Fluor's application for an Interim Restricted Court Access Order, thereby temporarily sealing the Disputed Materials. She directed that Fluor's application for a permanent restricted court access order and declaratory relief would be heard with Leder's Objections Application as a Special Chambers application. This application was heard on September 4, 2024.

IV. Positions of the Parties

A. Privilege Application

1. Position of Fluor

[30] The applicant in the Privilege Application, Fluor, asserts that the Disputed Materials are protected by settlement privilege and that privilege has not been waived. Therefore, it argues the Disputed Materials should not be publicly disclosed. Fluor advances this argument on the basis that many of the Disputed Emails contain settlement discussions relating to the underlying dispute between the parties and the procedure to be adopted to resolve the dispute. As for the other emails in the communication chain, Fluor argues they are related to these settlement discussions and are captured by the broad scope of settlement privilege.

[31] Fluor claims that since none of the recognized exceptions to settlement privilege apply, the emails are inadmissible. Specifically, Fluor claims that the Disputed Emails do not prove that a settlement was reached. Moreover, Fluor claims that Leder has not demonstrated "an alternative policy objective that clearly outweighs the underlying objective of the settlement privilege":

Bellatrix Exploration Ltd v Penn West Petroleum Ltd, 2013 ABCA 10 at para 39 [***Bellatrix Exploration* CA]**, rev'g ***Bellatrix Exploration Ltd v Penn West Petroleum Ltd***, 2011 ABQB 551.

[32] Since the Disputed Materials are allegedly protected by settlement privilege and none of the exceptions apply, Fluor asserts that it is entitled to a restricted court access order. Specifically, Fluor contends that the Disputed Materials satisfy the test in ***Sherman Estate v Donovan***, 2021 SCC 25, because the protection of settlement privilege is an important public interest that justifies limiting court openness.

2. Position of Leder

[33] The respondent in the Privilege Application, Leder, alleges that the Disputed Emails are not privileged, despite the "without prejudice" language appearing on some of the communications. It advances this argument on the premise that the Disputed Emails were not sent as part of a settlement negotiation. Moreover, Leder claims that they were not sent with the purpose of effecting a settlement. Leder argues that Fluor has conflated emails intended to settle procedural issues with negotiations intended to effect a settlement of the entire dispute.

[34] Leder references the timeline to support its position. Leder notes that the Partial Settlement Agreement was executed in April 2020, whereas the Disputed Emails date from May 2021 to June 2023. That being the case, Leder argues that the Disputed Emails could not have been attempts to effect a settlement. Rather, Leder asserts the Disputed Emails were attempts to coordinate the execution and implementation of the terms of the Partial Settlement Agreement, and to determine the Arbitration procedure and terms of reference. As a result, Leder asserts that the Disputed Emails are not privileged and should be admitted because they are relevant and material to Leder's Stay Application.

[35] In the alternative, Leder claims that if the Disputed Materials are privileged, they should be disclosed pursuant to a recognized exception to settlement privilege – that is, to prove the existence and terms of a concluded settlement agreement. According to Leder, Fluor feigned good faith engagement in executing the Partial Settlement Agreement, while delaying the advancement of the Arbitration in order to claim later that the Leder Claims were statute barred. Not admitting the Disputed Materials under this exception to settlement privilege would frustrate the purpose of promoting settlements as it would allow Fluor to avoid its obligations under the Partial Settlement Agreement.

[36] Moreover, Leder claims that there is support for the proposition that documents over which settlement privilege is claimed may be admitted if they are being produced for reasons apart from establishing the other party's liability for the underlying action, and apart from showing the weakness of the other's claim in respect of those matters. According to Leder, the Disputed Materials are relevant and material to its claims of waiver and estoppel in the Originating Application. Leder claims that they are also relevant and material to its response to Fluor's limitations defense.

B. Objections Application

1. Position of Leder

[37] The applicant in the Objections Application, Leder, asserts that the disputed questions and undertakings, listed in Schedules A and B to the Objections Application, are relevant and material to the following issues: (i) whether Fluor agreed to arbitrate the Leder Claims pursuant to the Partial Settlement Agreement; (ii) whether Fluor should be estopped from now denying that it agreed to proceed with an arbitration of the Leder Claims pursuant to the Partial Settlement Agreement; (iii) whether Fluor should be estopped from now asserting the Leder Claims are not arbitrable; and (iv) whether the Leder Claims are barred by the *Limitations Act*, RSA 2000, c L-12. As discussed, Fluor later clarified that it is not disputing that the Notice to Arbitrate was served within the applicable limitations period.

[38] In a letter dated February 11, 2025, Leder clarified that it disputes Fluor's assertion that the limitation period for filing a statement of claim in relation to the Leder Claims has passed. It cites section 51(2) of the *Arbitration Act* in support of its argument that until June 22, 2023, it did not know that Fluor was disputing the validity of the Arbitration. Thus, an action initiated by a statement of claim was not warranted until that date, and any time between the commencement of the Arbitration and the date of an order declaring the Arbitration invalid could be excluded from the computation of the limitation period.

2. Position of Fluor

[39] The respondent in the Objections Application, Fluor, asks that it be dismissed for three reasons. First, it asserts that Leder asked questions about certain confidential documents that were not relevant to the 2023 Brown Affidavit or the Originating Application. Specifically, Fluor asserts that Leder improperly asked questions about the Partial Settlement Agreement, which expressly excludes the Leder Claims and is without prejudice to Fluor's defence of those claims. Responding to the Leder assertions that the Disputed Emails are relevant and material to certain issues in the Originating Application, Fluor contends that the Disputed Emails are not necessary to interpret the Partial Settlement Agreement because it is an entire agreement. Contrary to Leder's assertions, Fluor asserts that the Disputed Emails do not show that it was trying to avoid the terms of the Partial Settlement Agreement, since the terms were fulfilled (*i.e.*, SMFI was dissolved and the stay expired).

[40] Second, Fluor claims that Leder improperly asked questions about the Disputed Emails, which are subject to settlement privilege, do not satisfy any exception to settlement privilege, and are therefore inadmissible as evidence. Fluor responds to Leder's argument that discussions relating to the dispute resolution process are not privileged by stating that even negotiations relating to procedure fall under the scope of settlement privilege.

[41] As for the argument that the Disputed Emails contain an agreement to proceed with the Arbitration, Fluor relies on the emails being sent on an express "without prejudice" basis, and states they do not evince a binding agreement. Moreover, Fluor claims that the Disputed Emails do not show that it took steps in the Arbitration because no terms of reference were formalized. Additionally, Fluor refers to case law indicating that a party can challenge an arbitrator's jurisdiction up to and beyond the appointment of an arbitrator, a step which had not yet occurred in this instance. For the same reason, Fluor argues that the Disputed Emails do not support estoppel because Leder, a sophisticated party represented by counsel, cannot have reasonably relied on

"without prejudice" communications. Finally, Fluor asserts that settlement negotiations do not extend limitation periods.

[42] Third, Fluor states that Mr. Brown should not be required to give undertakings on behalf of Fluor, or attend further cross-examination on the undertakings and questions listed in Schedules A and B of the Objections Application, because he was not questioned as Fluor's corporate representative pursuant to rule 5.4 and other rules relevant to Part 5 questioning. Instead, Mr. Brown was questioned on his affidavit pursuant to rule 6.7, which, according to Fluor, does not provide the other party the same entitlement to undertakings as Part 5 questioning.

[43] Finally, Fluor also suggested that procedural delay was at issue and that the Court could exercise its discretion to dismiss Leder's application on the basis that the relief sought would cause further unnecessary delay and would not assist the Court in deciding the factual and legal issues relevant to the Originating Application.

V. The Law

A. Principles of Settlement Privilege

[44] This Court recently summarized the principles of settlement privilege in ***Baker Law Firm v Colors Unlimited Inc***, 2024 ABKB 53 at para 36:

> Settlement privilege is said to be based on the overarching public policy goal of encouraging settlements of disputes without resorting to litigation. It protects disclosure to non-parties to negotiations, but also protects documents and communications made during negotiations from production to other parties to the negotiations. It allows parties to discuss and offer terms of settlement in an attempt to reach compromise: see ***Phoa v Ley***, 2020 ABCA 195 at para 12, citing [***Bellatrix Exploration* CA**] at para 21. As the Supreme Court of Canada has confirmed, settlement privilege is a class privilege, meaning there is a *prima facie* presumption of inadmissibility, with exceptions to be found only where it is demonstrated on balance that a competing public interest outweighs the public interest in encouraging settlement such as misrepresentation, fraud, or undue influence: ***Sable Offshore Energy Inc v Ameron International Corp.***, 2013 SCC 37 at para 19.

[45] Communications that fall within the scope of settlement privilege cannot be admitted into evidence: ***Thomson v University of Alberta,*** 2013 ABQB 128[1] at paras 16-17. The privilege belongs to both parties and cannot be unilaterally waived: ***Bellatrix Exploration* CA** at para 26**.**

[1] ***Thomson*** was a decision of an Applications Judge in chambers, which a Justice of this Court subsequently reversed in 2013 ABQB 410. The Queen's Bench Justice, as it was then, endorsed the Application Judge's statement of the law at para 2, but disagreed with its application. The Court of Appeal in 2013 ABCA 391 reversed the decision of the Queen's Bench Justice, on the grounds that the document over which privilege was claimed was not even relevant and, thus, the appeal could be resolved without answering the privilege question. Given this context, the Application Judge's statement of the law was not reversed.

[46] To find that a communication is protected by settlement privilege, the following three elements must be met (collectively, the "**Settlement Privilege Test**"):

a. a litigious dispute must exist or be within contemplation between the parties at the time the communication was made;

b. the communication was made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

c. the purpose of the communication was to attempt to bring about a settlement: ***Phoa*** at paras 11, 15; Sidney N Lederman, Michelle K Fuerst & Hamish C Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada Inc, 2022) at para 14.380 ("**Lederman & Sopinka**").

[47] The first element of the Settlement Privilege Test is often easy to determine. It only requires that a litigious dispute exist or be within contemplation between the parties at the time the communication is made. In my view, that is a low threshold.

[48] The second element of the Settlement Privilege Test is a bit more challenging. It requires careful consideration of the facts and context. The intention of the communication must be determined. Judgment is required, and the threshold is higher than that which is required to meet the first element of the Settlement Privilege Test. To illustrate the point, communications marked "without prejudice" may raise a presumption that they were intended to remain undisclosed. However, that phrase is not determinative of whether the communication is settlement privileged: ***Thomson*** at para 21. In ***Sable Offshore Energy***, Justice Abella adopted Lord Griffiths' conclusion in ***Rush & Tompkins Ltd v Greater London Council***, [1988] 3 All ER 737 (UKHL) at 739, that settlement privilege extends beyond communications labelled "without prejudice" to include those evincing an "intent of the parties to settle the action": at para 14.

[49] While communications missing the "without prejudice" label may be nonetheless privileged, the converse is also true. A communication which does not meet the Settlement Privilege Tests does not become privileged by the addition of "without prejudice" language: ***Bellatrix Exploration*** **CA** at para 25.

[50] Justice Graesser observed that "without prejudice" is often added to documents that are clearly not privileged and which the sender likely intends to rely on in subsequent proceedings, such as a demand letter or a notice of termination: ***Infiniti Homes Ltd v Gagnon***, 2020 ABQB 691 at para 69. In ***Imperial Oil Ltd v 416169 Alberta Inc***, 2002 ABQB 386, Justice Slatter, as he was then, noted that "[a] letter that is sent to fix or alter rights or discharge obligations between the parties should always be sent "with prejudice"": at para 30. These cases illustrate that settlement privilege does not apply to communications that do not make an offer of negotiation or compromise, but instead merely assert rights: ***Bellatrix Exploration*** **CA** at para 24.

[51] The third element of the Settlement Privilege Tests also requires more complex analysis. The purpose of the communication must be determined, and the purpose must be an attempt to bring about a settlement. Whether this test is satisfied often determines whether settlement privilege applies to a communication. A communication does not have to include a settlement offer to be privileged, so long as it forms "part of an exchange or negotiation that the parties reasonably

intend will lead to a settlement": ***Thomson*** at para 23. The Court must consider the context in which the communication was made to determine if settlement privilege applies: ***Thomson*** at para 22.

[52] For instance, a communication that serves as an "opening shot," such as a sentence asking if the parties could soon negotiate a settlement, may be privileged if negotiations result: ***Hansraj v Ao***, 2002 ABQB 385 at para 30 [***Hansraj* QB**], rev'd in part on other grounds 2004 ABCA 223 [***Hansraj* CA**]; ***Meyers v Dunphy***, 2005 NLTD 166 at paras 39-59, aff'd 2007 NLCA 1. However, if no such negotiations follow, then this Court has found that the connection to settlement is too tenuous to fall within the scope of settlement privilege: ***Infiniti Homes*** at para 81.

1. Communications that discuss procedure or set out parties' positions are not privileged.

[53] Courts have found that communications which are merely procedural were not attempts to effect a settlement. Therefore, such communications are not covered by settlement privilege. In ***Histed v Law Society of Manitoba***, 2007 MBCA 150, the Manitoba Court of Appeal held that a letter discussing the selection of a case management judge was not covered by settlement privilege despite "Strictly Confidential and Without Prejudice" having been written at the top of the letter: at paras 31-33.

[54] Likewise, in ***Hansraj* QB**, this Court observed that there "is no reason for the privilege to attach to merely routine correspondence": at para 20. ***Hansraj* QB** arose out of an automobile accident. The plaintiffs attached to their affidavit correspondence between their counsel, the defendant insurer, and the insurance adjusters marked "Without Prejudice." The correspondence requested further documentation, attached a statement of claim and affidavit of records, enclosed medical reports, and requested reimbursement: at paras 8-9. Justice Slatter, as he was then, determined that none of the correspondence was privileged because "the connection of this correspondence to any settlement negotiations is so marginal as to be virtually non-existent": at para 30. Justice Slatter's conclusions were upheld on appeal: ***Hansraj* CA** at para 8.

[55] Similarly, in ***Bellatrix Exploration* CA**, the Court of Appeal disagreed with an Application Judge's findings that certain "Without Prejudice" correspondence fell within the scope of settlement privilege. The case concerned two oil and gas companies that were involved in various joint projects, from which arose several disputes that proceeded to litigation. The pleadings raised a limitations defence, and the parties sought direction on the admissibility of their correspondence relevant to that issue.

[56] One of the impugned pieces of correspondence discussed Bellatrix's preferred approach — "a 'Time is of the essence' approach"—to resolving the dispute. Penn West responded with its "position on the concerns raised." Penn West also advised that it was conducting a review of the revenue from the other two property ventures between it and Bellatrix, and that it would pay any amounts owing: ***Bellatrix Exploration* CA** at paras 5, 7-8.

[57] Penn West then sent another update, asserting that Bellatrix owed an estimated $2,000,000. It also sent some production accounting data that it had promised. The parties subsequently met to discuss matters and, shortly afterwards, Bellatrix advised Penn West that the applicable limitation period precluded the Penn West claim. Penn West responded that the same applied to the Bellatrix

claims and that it was "proceeding with a view to settle *all* amounts owing" between the parties: ***Bellatrix Exploration* CA** at paras 1-11.

[58] The Court of Appeal agreed that the impugned correspondence was not settlement privileged because it amounted to "simply statements of Penn West's position and [provided] no hint of compromise, a critical hallmark to any settlement discussion": ***Bellatrix Exploration* CA** at para 35. At the same time, the Court of Appeal declined to recognize that settlement privilege could be waived to answer a limitations defence. The Court observed that to do so would weaken the privilege, especially since there are other means of extending limitations periods, such as standstill agreements: ***Bellatrix Exploration* CA** at para 39.

[59] Likewise, in ***Infiniti Homes***, this Court held that a letter sent by the defendants' counsel to the plaintiff's counsel was not covered by settlement privilege. The letter proposed that the defendant homeowners would provide a breakdown of the costs of correcting the plaintiff builder's defective work. It also stated that pending the provision of that information, the defendants would not take any steps to obtain an order for discharge of the plaintiff's builders' lien: ***Infiniti Homes*** at paras 70-73.

[60] The Court found that the letter did not contain a compromise because the defendants were not offering the plaintiff anything of value. The defendants were already obligated to quantify their set off claim for defects and deficiencies, regardless of whether the builders' lien remained on title. Thus, the Court determined that the defendants "were merely restating their position": ***Infiniti Homes*** at para 76.

2. Communications covered by settlement privilege may be producible under an exception.

[61] Once a communication has been found to be subject to settlement privilege, it may still be producible if the party seeking the admission of the communication proves that it falls within the limited exceptions to settlement privilege. These exceptions were summarized as follows in ***Bellatrix Exploration* CA** at para 29:

> a. to prevent double recovery;
>
> b. where the communications are unlawful, containing for example, threats or fraud;
>
> c. to prove that a settlement (an accord and satisfaction) was reached, or to determine the exact terms of the settlement; [or]
>
> d. it is possible that the settlement posture of the parties can be relevant to costs. That is clearly the case with offers made under the *Rules of Court*, but also with respect to informal offers.
>
> [citations omitted]

[62] A party cannot merely allege that an exception applies to get around the privilege. One of the above exceptions must be established. Moreover, privileged documents cannot be admitted to respond to preliminary applications that do not involve adjudication of the issues in the underlying action: ***Phoa*** at paras 20-22; ***Bellatrix Exploration* CA** at para 39.

B. Principles of Limits on Court Openness

[63] Court proceedings are presumptively public: ***Sherman Estate*** at para 37. The Supreme Court of Canada set out the test for a restricted court access order in ***Sierra Club of Canada v Canada (Minister of Finance)***, 2002 SCC 41, which was recently confirmed in ***Sherman Estate*** at para 38. The three elements which must be established to obtain an order for restricted court access are as follows:

a. court openness poses a serious risk to an important public interest;

b. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

c. as a matter of proportionality, the benefits of the order outweigh its negative effects.

[64] Sealing orders have been granted to prevent disclosure of settlement-privileged communications: ***Kaufmann v Edmonton (City) Police Service***, 2019 ABCA 272 at paras 22-24.

C. Principles of Cross-Examination on Affidavits

[65] The scope of cross-examination on an affidavit is narrower than that of questioning for discovery: ***Edmonton (City) v Gosine***, 2020 ABQB 546 at para 8; ***Dow Chemical Canada Inc v Shell Chemicals Canada Ltd***, 2008 ABQB 671 at para 5. Thus, cross-examination on an affidavit is not "a gate into the field of examination for discovery": ***Alberta Treasury Branches v Leahy***, 1999 ABQB 829 at para 23.

[66] An individual "who is cross-examined on an affidavit is a witness for the purpose of a pending application, very much like a witness at trial": ***Rieger v Plains Midstream Canada ULC***, 2019 ABQB 666 at para 5; ***Rozak Estate v Demas***, 2011 ABQB 239 at para 38. In many circumstances involving an application, an affidavit takes the place of a direct examination: ***Rieger*** at para 5; ***Rozak Estate*** at para 38. The individual who is cross-examined is not, except incidentally, a party to the application; rather, they are a witness giving evidence relevant to the application.

[67] This Court summarized the principles of cross-examination on an affidavit in ***Gosine*** at para 16:

1. The scope of cross-examination on affidavit is more restrictive than on questioning for discovery, given the different objectives and purposes of each. The former should not be used as an impermissible gateway to a foray in the latter.
2. Having said that, cross-examination on affidavit is not confined to the four corners of the affidavit. The test is relevancy and whether the information sought will help the Court to determine the application before it.
3. Credibility is a legitimate field of inquiry in an examination on affidavit, but is restricted to the credibility of statements in the affidavit.
4. A deponent may be required to inform himself or herself after cross-examination on affidavit by way of responding to undertakings in circumstances where:

- the deponent referred to or relied upon documents or other information in making the affidavit; or
- where the undertakings relate to an important issue in the application, would not be too onerous to respond to and would significantly assist the Court in its determination of the application.

[68] The core concept underpinning these principles is relevance and materiality to the application before the Court: ***Gosine*** at para 17.

VI. Application of the Law to the Facts

[69] To properly consider the application of the law to the facts, the context surrounding the issues must be understood. In this case, the background dispute concerns the Originating Application. The subsequent applications on this file are the Objections Application, Privilege Application, and the Stay Application. While the Objections Application and the Privilege Application are the primary focus of this decision, to provide some context concerning these applications I note the following.

a. Concerning the Originating Application, Fluor seeks an order declaring that an alleged arbitration agreement between it and Leder does not exist. It also seeks an order striking the Arbitration on the grounds that the Notice to Arbitrate was invalid, the Arbitration is premature as against Fluor, or that the applicable limitation period had expired.

b. Concerning the Objections Application, Leder seeks an order directing Fluor to provide answers to undertakings and questions, which were refused, objected to, or taken under advisement during the Brown Questioning on the 2023 Brown Affidavit.

c. Concerning the Stay Application, Leder seeks an order to stay the Originating Application. In that application, Leder also seeks an order: (i) directing the parties to the Arbitration; or (ii) in the alternative, referring the parties to mediation pursuant to the dispute resolution provisions of the 2013 Lease. As mentioned above, Leder claimed that Fluor had agreed to proceed to arbitration by signing the Partial Settlement Agreement.

d. Concerning the Privilege Application, Fluor seeks a restricted court access order sealing the Disputed Materials on the basis that they are privileged and inadmissible as evidence in the underlying action.

[70] To provide further context concerning the Objections Application, Leder questioned whether Fluor had participated in the Arbitration. Leder also asserted that Fluor should be estopped from disputing the jurisdictional validity of the Arbitration because it failed to act promptly in bringing forth any alleged non-compliance. While the alleged participation of Fluor in the Arbitration and the estoppel issue are better addressed at the hearing of the Origination Application, this background is important context for purposes of the following analysis.

[71] Moreover, while Fluor argued that the Court could exercise its discretion to dismiss the Objections Application for delay, I reject this argument. I find that procedural delay was not

made out on the facts and that the Objections Application will assist the Court in deciding the factual and legal issues relevant to the Originating Application and Leder's cross-application.

A. Are the Disputed Materials covered by settlement privilege?

[72] As indicated above, the Disputed Materials include: (i) Schedule "B" to the Objections Application, which itemize the objections made at the Brown Questioning on the 2023 Brown Affidavit; (ii) the Disputed Emails, attached as Exhibits "E" and "G" through "K," inclusive, to the Heinen Affidavit; and (iii) the Brown Transcript. Since the determination of the settlement privilege concerning the Disputed Materials pivots on the analysis of the Disputed Emails, my initial focus is on whether the Settlement Privilege Test is satisfied in respect of those communications.

[73] With respect to the first element of the Settlement Privilege Test, I note that the Disputed Emails relate to the Notice to Arbitrate initiated by Leder. One of the disputes between the parties is whether an arbitration agreement exists between them. That dispute engages the question as to whether the Notice to Arbitrate was valid. These factors, amongst others, establish that there was a litigious dispute within contemplation between the parties. Given this context, the parties agree that the first element for a finding of settlement privilege is satisfied.

[74] I also note that the litigious dispute which existed between the parties at the time the alleged settlement discussions occurred, between May 2021 and April 2023, related to the Leder Claims, as set out in the Notice to Arbitrate. It was not until the email from Mr. Fraese, sent on June 22, 2023 (the "**June 2023 Email**"), that Fluor first notified Leder it had filed the Originating Application. That is when Fluor first indicated it was disputing that it was a party to any arbitration agreement.

[75] Based on my review of the evidence before me, I find no indication that the claims by Fluor regarding the existence of an arbitration agreement between the parties, as set out in the Originating Application, formed part of the dispute that existed or was within contemplation of the parties up to June 2023. Instead, the dispute, for the purposes of the Settlement Privilege Test, centers on the Leder Claims regarding the Improvement Termination Fee.

[76] While I make no finding as to whether an arbitration agreement existed between the parties, as that issue is to be addressed when the Originating Application is heard, in my view the Disputed Emails themselves do not evince a dispute between the parties that the Leder Claims would be arbitrated. Instead, they appear to show that the parties were proceeding on the assumption that an arbitration would take place. The suggestion that, from May 2021 to the June 2023 Email, the dispute included the issue of whether the parties had even agreed to arbitrate the Leder Claims is not consistent with the content of the Disputed Emails. I make that determination because the Disputed Emails reflect the back-and-forth discussions about procedural issues, such as possible candidates for the panel of arbitrators.

[77] With respect to the second element of the Settlement Privilege Test, Fluor claims that the fact that substantive emails were marked "without prejudice," and the fact that the discussions took place within a confidential context, demonstrate that it was intended that the emails were not to be disclosed to the Court in the event negotiations failed. The claims by Fluor require me to take a close look at these communications and to consider them in the context of the litigation.

[78] I acknowledge that three of the Disputed Emails contain "without prejudice" language. However, since "without prejudice" language is not determinative of whether the communication is settlement privileged, I must consider the context in which these emails were sent to determine if the prerequisite intent exists. That said, before I do so I will touch on the third element, so that I can consider intention and purpose concurrently.

[79] With respect to the third element of the Settlement Privilege Tests, I noted above that the communication does not have to include a settlement offer to be privileged. It just needs to form "part of an exchange or negotiation that the parties reasonably intend will lead to a settlement": ***Thomson*** at para 23. The Court must consider the context in which the communication was made to determine if settlement privilege applies: ***Thomson*** at para 22.

[80] Concerning the Disputed Emails mentioned above, the first of these is an email from Mr. Heinen to Mr. Fraese, dated June 1, 2021. In that email, Mr. Heinen briefly provides his opinion on the strength of one portion of the Leder Claims on an express "without prejudice" basis. That may be sufficient to establish a nexus to intent, but more is needed confirm that element. At the same time, Mr. Heinen states that "it's what [his] client wants," suggesting that there is little room for compromise or concessions to be made on this point. This acknowledgement of a potential point of compromise between the parties may be considered an "opening shot" to settlement discussions. That may be sufficient to establish a nexus to purpose, but more is needed to confirm that element.

[81] Similarly, the email from Mr. Heinen to Mr. Fraese, dated September 30, 2022, may also be characterized as an "opening shot." Mr. Heinen sets out the Leder Claims as issues that, from Leder's perspective, require determination at the Arbitration. He suggested that if the parties could agree on some of the issues, in the form of an agreed statement of facts, that would narrow the issues to be put to the arbitrator. Again, this email marginally invites Fluor to enter settlement discussions regarding the substantive issues in dispute, being the Leder Claims.

[82] However, despite these two emails, no further discussion regarding the Leder Claims occurred between the parties. Instead, the rest of the Disputed Emails contain discussions: (i) regarding the wind-up and dissolution of SMFI; and (ii) relating to the procedure and terms of reference to be adopted for the Arbitration.

[83] Notwithstanding the "without prejudice" reference, the nexus to an intention not to disclose is not strong enough. Similarly, I am not satisfied that the purpose of these communications was an attempt to bring about a settlement. Since the "opening shot" emails are not connected to any subsequent communications that satisfy the conditions for settlement privilege, I find the link to settlement is too tenuous to recognize the emails of June 1, 2021, and September 30, 2022, as being eligible for settlement privilege: ***Infiniti Homes*** at para 81.

[84] I now turn to the second expressly "without prejudice" email, which was sent by Mr. Fraese to Mr. Heinen on December 12, 2022. In that email, Mr. Fraese sets out his proposal for a "simple terms sheet for a terms of reference agreement." Based on my review of the material, the terms sheet did not define the substantive issues between the parties. Instead, it set out a proposed process for the Arbitration, such as the number of arbitrators on the panel, the nature of document

production, the form direct evidence would take, the hearing procedure, and the timeline for post-hearing briefs and statement of costs.

[85] Since an arbitration is a "party-driven process," the participants generally agree in advance on the rules that the arbitration will follow: ***Singh v Modgill***, 2022 ABQB 369 at para 3. While I make no finding on the issues set out in the Originating Application and the Stay Application, I construe the email of December 12, 2022 to be an attempt by the parties to reach agreement as to the rules that would apply if the Arbitration were to proceed. Since the dispute resolution clause in the 2013 Lease is silent as to the arbitration process to be followed, neither party is entitled to a specific process.

[86] Again, notwithstanding the "without prejudice" reference, this communication does not evince an intent of the parties to settle the dispute. Similarly, I am not satisfied that the purpose of this communication was an attempt to bring about a settlement. Given that the nature of this communication is routine correspondence which lacks a "hint of compromise," I find the December 12, 2022, email does not fall within the scope of settlement privilege. In addition to the absence of a hint of compromise, I make this determination because I construe the email of December 12, 2022 to be routine correspondence discussing potential rules and processes that are to take place between parties in advance of an arbitration.

[87] As for the third expressly "without prejudice email," it consists of the June 2023 Email sent from Mr. Fraese to Mr. Heinen. In this email, Mr. Fraese sets out his client's position that: (i) Fluor is not a party to the arbitration agreement; (ii) Fluor was not asked to participate in a mediation, contrary to the dispute resolution clause of the 2013 Lease; and (iii) there was no demand on Fluor's guarantee. Further, Mr. Fraese asserts that his client believes that the Leder Claims are statute-barred. He states that he is "[h]appy to discuss further." Mr. Fraese also observes that the Originating Application will "need to be adjourned" and asks Mr. Heinen to let him know if he has "any objection to an adjournment *sine die* pending further discussions."

[88] As Justice Graesser observed in ***Infiniti Homes***, "without prejudice" is often added to documents that are clearly not privileged and which the sender likely intends to rely on in subsequent proceedings: at para 69. In this instance, the June 2023 Email sets out Fluor's position on the validity of the Arbitration, repeating the claims in its Originating Application.

[89] Notwithstanding the "without prejudice" reference, the nexus to an intention not to disclose is without merit in this instance. Rather than being "without prejudice," I find the June 2023 Email is "with prejudice" because it gives notice that Fluor will be seeking to fix its legal rights through the courts: ***Leonardis v Leonardis***, 2003 ABQB 577 at para 11. As for the invitation to "discuss further," it contains neither a "hint of compromise" nor any evidence that it was an "opening shot" to engage in settlement discussions. The June 2023 Email satisfies neither the second nor third condition for a determination that it is protected by settlement privilege.

[90] Based on my review of the evidence and analysis of the law, I find the June 2023 Email is not privileged.

[91] The remainder of the Disputed Emails, those that do not contain any "without prejudice" language, evince no "intent of the parties to settle the action": ***Sable Offshore Energy*** at para 14.

These remaining Disputed Emails discuss the wind-up and dissolution of SMFI, which is an obligation of the parties under the Partial Settlement Agreement. These remaining Disputed Emails also discuss procedural matters relating to the Arbitration, such as the identity of the arbitrators and the desire for an efficient arbitral process, but neither hint at a compromise nor constitute an opening shot.

[92] Based on my review of matters, there is no evidence that the parties intended to attempt to settle the issues in the underlying action, including the Leder Claims as set out in the Notice to Arbitrate. That is, the remainder of the Disputed Emails contain no hint of compromise since nothing is being conceded by the parties. Instead, these emails are routine correspondence. As such, they do not attract settlement privilege.

[93] Since I have found that the Disputed Emails do not fall within the scope of settlement privilege, it follows that the remainder of the Disputed Materials, namely Schedule "B" to the Objections Application and the Brown Transcript, which discuss the Disputed Emails, are also not privileged.

[94] Given the above analysis, I turn to address the question posed above. Based on my review of the evidence and my analysis of the law, I find that the Disputed Materials are not covered by settlement privilege.

B. If the Disputed Materials are covered by settlement privilege, do they fall within an exception to settlement privilege?

[95] Since I have determined that the Disputed Materials are not covered by settlement privileged, I do not need to consider whether an exception to settlement privilege applies in this instance.

C. Is a permanent sealing order appropriate in this instance?

[96] Since the Disputed Materials do not fall within the scope of settlement privilege, and Fluor has not made alternate arguments as to why the Disputed Materials should be permanently sealed if they are not privileged, I am of the view that Fluor has not rebutted the "strong presumption in favour of open courts": ***Sherman Estate*** at para 2.

[97] Based on my review of the evidence and analysis of the facts, I find that a permanent sealing order is not applicable in this instance.

D. Should Mr. Brown be directed to provide answers to the undertakings and questions that were refused, taken under advisement, or objected to at the Brown Questioning?

[98] Fluor has not provided answers to certain undertakings and questions. In particular, during questioning, Fluor: (i) took 21 undertaking requests under advisement (see Appendix A); (ii) refused one undertaking request (also part of Appendix A); and (iii) objected to 32 questions (see Appendix B).

[99] A court can only direct a party to respond to undertakings and questions if the answers to the objected-to questions and responses to the refused undertakings are likely to assist it in addressing the issues raised in the applications. The response to the undertakings will be directed if they are relevant and material to the questions and issues raised in the underlying application.

[100] Fluor filed the Originating Application. In that document, it seeks an order declaring that an alleged arbitration agreement between it and Leder does not exist. Fluor also seeks an order striking, dismissing, or permanently staying the Arbitration. To provide some context, Fluor seeks these remedies on the following grounds.

a. That there was no arbitration agreement as between Leder and Fluor. Accordingly, Fluor asserts that: (i) an arbitrator would not have jurisdiction over the Leder Claims as against Fluor; (ii) the Notice to Arbitrate is invalid; and (iii) the Arbitration cannot proceed.

b. In the alternative, the Arbitration was not properly commenced because Leder failed to satisfy the condition precedent of mediation before purporting to commence the Arbitration. Since the preconditions to arbitration under the 2013 Lease were allegedly not met, an arbitrator does not have jurisdiction. Accordingly, Fluor asserts that: (i) the Notice to Arbitrate was invalid; and (ii) the Arbitration cannot proceed.

c. In the further alternative, the Arbitration is premature as against Fluor because Leder did not first issue a written notice of default or otherwise make a demand on Fluor's guarantee. Fluor asserts that written notice is a pre-condition to its liability on the guarantee. Since Leder did not give the required notice, Fluor asserts that: (i) it is not liable; and (ii) the Arbitration cannot succeed as against it.

d. The limitation period applicable to the Leder Claims has expired.

1. Should Mr. Brown, as an affiant rather than a corporate representative, be required to answer undertakings or objected-to questions?

[101] As a preliminary issue, Fluor argues that Mr. Brown is not required to provide further answers because he was questioned on his affidavit under rule 6.7, rather than questioned as a corporate representative under Part 5 of the *Rules of Court*. As discussed, the scope of cross-examination on an affidavit is narrower than the scope of questioning for discovery; at the same time, the questioning party may ask questions that extend beyond the "four corners" of the affidavit, so long as the information being sought is relevant and will help the Court to decide the application before it. A court may also direct a party to provide undertakings when their proffered affiant was unable to answer all questions asked in cross-examination under rule 6.7, subject to certain restrictions, as articulated in ***Gosine*** at para 11. These principles apply to both objected-to questions and refused undertakings: ***Gosine*** at para 17.

[102] In this case, some of the undertakings and objected-to questions, as discussed in greater detail below, attempt to elicit relevant information which will help the Court to determine the Originating Application. Those undertakings which I direct to be fulfilled relate to important issues in the Originating Application. In my view, those undertakings would not be too difficult for Fluor to fulfill, and would significantly assist the Court in determining the Originating Application. Thus, the fact that Mr. Brown was not proffered as Fluor's corporate representative but was instead questioned on his affidavit pursuant to rule 6.7, does not prevent the Court from directing that certain objected-to questions be answered and refused undertakings be fulfilled. With these principles in mind, I consider the Objections Application below.

2. Undertakings Refused or Taken Under Advisement (see Appendix A)

[103] I turn first to address undertakings refused or taken under advisement at the time of the Brown Questioning on December 6, 2023 concerning the 2023 Brown Affidavit. For reference, I append as "Appendix A" a chart containing four columns. Appendix A addresses the following matters: (i) the Undertaking Number; (ii) the Leder Request – Undertaking Narrative; (iii) the Fluor Position; and (iv) the Court Holding/Determination.

[104] Concerning the undertakings refused or taken under advisement, my Reasons should be read concurrently with the comments in Appendix A. However, the comments in Appendix A are purely for the benefit of the reader. In the case of any discrepancy between these Reasons and comments in Appendix A, the Reasons are authoritative.

a. Undertakings Nos. 2 to 8; 10 to 12; and 15 to 19

[105] In a letter dated February 21, 2024, Fluor's counsel provided some answers to undertakings that were initially taken under advisement (the "**February 2024 Fluor Responses to Undertaking Letter**"). This Court has directed that when witnesses are being questioned on affidavits, questioners are to use greater restraint when seeking undertakings than they would when questioning witnesses under Part 5 of the *Rules of Court*: ***Gosine*** at para 10.

[106] Given my review of the evidence and analysis of the law, I direct that Mr. Brown is not required to answer Undertakings Nos. 2 to 8; 10 to 12; and 15 to 19. I make this determination based on my review of the answers that Fluor's counsel provided to the above-mentioned undertakings. Based on that review, I am satisfied that the answers to Undertakings Nos. 2 to 8; 10 to 12; and 15 to 19, are sufficient.

b. Undertaking No. 9

[107] Undertaking No. 9 was initially taken under advisement. The Leder request which gave rise to this undertaking was for Mr. Brown to make inquiries, review records, and to advise whether there were any tax liabilities identified by Ernst & Young because of the final tax return or thereafter. If so, Leder requested details as to the quantum and the nature of the tax liability and whether it had been paid to the CRA. If paid, Leder requested that Mr. Brown provide particulars concerning the payments and evidence of the payments.

[108] In its subsequent Responses to Undertakings which attached the February 2024 Fluor Responses to Undertaking Letter, Fluor stated that the Undertaking No. 9 question was best posed to John Leder. This response by Fluor is a non-answer to the question posed.

[109] When reviewed in context, I have determined that Fluor needs to provide a further response to Undertaking No. 9. I make this determination because the quantum and the nature of the tax liability is relevant to the question as to whether an arbitration agreement exists between Fluor and Leder, which is the fundamental focus of the Originating Application. I make this determination since the tax liabilities are relevant and material to the limitations defence in the Originating Application. As discussed, the Partial Settlement Agreement stayed any proceedings in relation to the Leder Claims until, amongst other conditions, the tax return had been completed and the tax liabilities paid. Moreover, as stated by Leder in its letter of February 11, 2025, the parties dispute

whether all SMFI's tax returns were filed, whether all tax liabilities were paid, and whether all funds were distributed by August 24, 2022.

[110] I reiterate, given my review of the evidence and analysis of the law, I direct Undertaking No. 9 be answered.

c. Undertaking Nos. 13 and 14

[111] In the February 2024 Fluor Responses to Undertaking Letter, Fluor stated that the Undertaking Nos. 13 and 14 questions were best posed to John Leder. While this is another non-answer, I have determined that Fluor need not provide any further response to Undertakings Nos. 13 and 14. Undertaking No. 13 asks Mr. Brown "[t]o review records and make inquiries and to advise what steps were taken to accomplish the windup and dissolution of SMFI after April 24, 2020." Undertaking No. 14 also relates to the dissolution of SMFI, in that it asks Mr. Brown "[t]o advise who was involved in taking the steps to accomplish the windup and dissolution of SMFI after April 24, 2020, including the names of any parties at Fluor Enterprises Inc. and/or at Leder Investments Ltd. And the names of any counsel representing Fluor Enterprises Inc. and/or Leder Investments Ltd. or SMFI."

[112] Leder seeks additional information relating to the wind-up and dissolution of SMFI, arguing that it is relevant and material to the existence and terms of the Partial Settlement Agreement, to the issue of whether Fluor was bound by and executing the Partial Settlement Agreement, and to Fluor's limitations defence. The existence and terms of the Partial Settlement Agreement are not in dispute insofar as that agreement expressly does not release the parties from the Leder Claims. Likewise, whether Fluor was bound by and executing the terms of the Partial Settlement Agreement is not an issue in the Originating Application.

[113] The Partial Settlement Agreement is linked to the issue of Fluor's limitations defence in the Originating Application in that it relates to the stay of proceedings clause in that agreement. The Partial Settlement Agreement states that any proceedings in relation to the Leder Claims are stayed until, amongst other conditions, SMFI has been wound-up and dissolved, as set out in certain paragraphs of the Partial Settlement Agreement, and that all necessary notices have been given or regulatory filings made as necessary to give full effect to the dissolution of SMFI.

[114] According to section 140(5) of the *Business Corporations Act*, SNB 1981, c B-9.1, a "corporation ceases to exist on the date shown in the certificate of dissolution." Attached to the 2023 Brown Affidavit is the Certificate of Dissolution of SMFI, dated September 23, 2022. Thus, as of September 23, 2022, SMFI ceased to exist and this condition in the stay of proceedings clause was satisfied.

[115] Given my review of the evidence and analysis of the law, I direct Undertakings Nos. 13 and 14 need not be answered. In my view, additional information regarding the process which led to the wind-up and dissolution of SMFI is not material to the limitations issue. I make that determination because the parties have the information which they need to determine when this condition in the stay of proceedings clause relating to the wind-up and dissolution of SMFI was satisfied.

d. Undertaking No. 20

[116] Undertaking No. 20 was initially taken under advisement. The Leder request which gave rise to this undertaking was for Fluor "[t]o review records and make inquiries and to advise whether

Fluor Enterprises Inc. was aware that between May 9, 2022, and November 17, 2022, Mr. Fraese was having discussions on behalf of Fluor Enterprises Inc. with Mr. Heinen with respect to arbitration procedure and terms of reference." Fluor subsequently refused this undertaking.

[117] In order for me to decide whether Undertaking No. 20 is to be answered by Fluor, I must determine whether the undertaking relates to an important issue in the underlying application, would not be too onerous for Mr. Brown to respond to, and would significantly assist the Court in determining the Originating Application: ***Gosine*** at paras 16-17. The Originating Application seeks a declaration that the arbitration agreement does not exist. That being the case, the status of the arbitration agreement is a key issue.

[118] Given this context, I reviewed the Disputed Emails with this issue in mind. Based on that review, I find the contents of the Disputed Emails touch directly on the arbitration issue. Accordingly, the Disputed Emails are relevant to the issues raised in the Originating Application, which includes the limitation argument.

[119] Given my review of the evidence and analysis of the law, I direct Undertaking No. 20 be answered.

e. Undertaking No. 21

[120] Undertaking No. 21, which asks Mr. Brown to "produce any records internally, as between Fluor Enterprises Inc employees, related to the assertion that the claim was limitation barred," was refused on the basis of privilege. The problem with the bold assertion by Fluor of "privilege" during the Brown Questioning is that no context was given. In its letter of February 4, 2025, Fluor clarified that the requested records were subject to litigation privilege.

[121] I am not satisfied that litigation privilege has been made out; with any case-by-case privilege assertion, the presumption is that the communications are not privileged and are admissible: Lederman & Sopinka at para 14.38. Further, the incidence of an evidential burden means that a party such as Fluor, which is raising the privilege issue, has the obligation to adduce evidence or to point to evidence on the record: Lederman & Sopinka at para 3.18. An evidential burden compels a party such as Fluor to produce evidence in support of an issue it seeks to raise (*i.e.*, litigation privilege), failing which the party shall not be permitted to raise it at all. Since Fluor did not point to any evidence to support its assertion of litigation privilege, it has not satisfied its evidential burden.

[122] While the information being sought is not privileged, I find, however, that it would be too onerous for Mr. Brown to fulfill the requested undertaking. Mr. Brown is not Fluor's corporate representative, as discussed, and is no longer employed by that company.

[123] Given my review of the evidence and analysis of the law, I direct that Mr. Brown need not answer Undertaking No. 21.

f. Undertaking No. 22

[124] Undertaking No. 22, initially taken under advisement, is "[t]o make inquiries and review records and to advise what Fluor Enterprises Inc.'s position is as to when the limitation period

began to run and what facts or information it is basing that position on." Whether the limitation period for the Leder claims has expired is an important issue in the Originating Application.

[125] However, this undertaking seeks information that would be difficult for Mr. Brown to acquire, as he is no longer employed by Fluor. Moreover, Fluor's counsel in his letter of February 13, 2025, conceded that the Notice to Arbitrate was served within the limitation period. Thus, the information being sought would not significantly help the Court in determining the Originating Application.

[126] Given my review of the evidence and analysis of the law, I direct that Mr. Brown need not answer Undertaking No. 22.

g. Undertaking No. 23

[127] Finally, Undertaking No. 23, initially taken under advisement, is "[t]o make inquiries and review records and to advise when Fluor Enterprises Inc. says that the limitation period expired, and to provide whatever evidence or facts it has in relation to that matter." As noted above in the context of Undertaking No. 22, whether the limitation period for the Leder claims has expired is an important issue in the Originating Application. However, the same reasoning that applies to Undertaking No. 22 also applies to Undertaking No. 23, *i.e.*, it would be too onerous and would not significantly assist the Court in determining the Originating Application.

[128] Given my review of the evidence and analysis of the law, I direct that Mr. Brown need not answer Undertaking No. 23.

3. Objected-to Questions (see Appendix B)

[129] I turn to address the objections made at the Brown Questioning on December 6, 2023, concerning the 2023 Brown Affidavit. For ease of reference, I append as Appendix B a chart containing five columns. Appendix B addresses the following matters: (i) the Objection Number; (ii) the Objection Narrative; (iii) the Leder Position; (iv) the Fluor Position; and (v) the Court Holding/Determination. It should be noted that the "Leder Position" and "Fluor Position" columns were copied *verbatim* from a table that the parties' counsel helpfully submitted to the Court.

[130] Concerning the objected-to questions, these Reasons should be read concurrently with the comments in Appendix B. However, the comments in Appendix B are purely for the benefit of the reader. In the case of any discrepancy between these Reasons and comments in Appendix B, the Reasons are authoritative.

[131] In my consideration of the objections lodged, I note that cross-examination on an affidavit is not limited to the four corners of that document. The test is whether the information is relevant and will help the Court to determine the application before it: ***Gosine*** at paras 16-17.

[132] The objected-to questions deal with: (i) the Partial Settlement Agreement; (ii) the Disputed Emails; (iii) Fluor's claims that it is not a party to the arbitration agreement; and (iv) the assertion that the Leder Claims were statute-barred. The 2023 Brown Affidavit refers to neither the Partial Settlement Agreement nor the Disputed Emails. As a result, many of the objected-to questions extend beyond the four corners of the affidavit. To determine whether the objected-to

questions need to be answered, I must determine whether the Partial Settlement Agreement and the Disputed Emails are relevant to the Originating Application.

[133] When considering the application of settlement privilege above, I focused on the Disputed Materials. Based on my review of the evidence and analysis of the law, I found above that the Disputed Emails were not covered by settlement privilege or any other form of privilege. I was also not provided with any substantive arguments regarding the confidentiality clause in the Partial Settlement Agreement. That being said, a brief comment on whether the Partial Settlement Agreement itself is covered by settlement privilege is necessary.

[134] Settlement privilege applies even after settlement has been reached and covers the concluded settlement agreement: ***Union Carbide Canada Inc v Bombardier Inc***, 2014 SCC 35 at para 34; ***Sable Offshore Energy*** at paras 14-18. However, a protected communication may be disclosed in certain recognized circumstances, like when it is necessary to prove the terms of the settlement agreement: ***Union Carbide*** at para 35. A confidentiality clause in a settlement agreement may prevent the application of recognized exceptions to settlement privilege, but it must be clear that such a result is what the parties intended: ***Union Carbide*** at paras 54-56.

[135] While documents covered by settlement privilege are presumptively inadmissible, this privilege is subject to certain exceptions, as mentioned. When determining whether to permit disclosure, a court considers whether the competing public interest favouring disclosure outweighs the public interest in encouraging settlements: ***Dos Santos (Committee of) v Sun Life Assurance Co of Canada***, 2005 BCCA 4 at para 20; ***McDiarmaid Estate v Alberta (Infrastructure)***, 2023 ABKB 14 at para 26. In addition to the widely recognized exceptions, this Court has recognized an exception to settlement privilege that exists when a party seeks disclosure of a settlement agreement for purposes other than using it as evidence of liability for the conduct that is the subject of the negotiations, or revealing the weakness of one party's claim with respect to those matters: ***McDiarmaid Estate*** at paras 30-32; ***Sabre Inc v International Air Transport Association***, 2009 CanLII 9452 (ONSC) at para 20.

[136] Based on my review of the evidence and analysis of the law, the Partial Settlement Agreement is protected by settlement privilege and is presumptively inadmissible. However, as the Partial Settlement Agreement is relevant and material to the Originating Application, and Leder is seeking to rely on it for purposes other than establishing Fluor's liability or the weakness of its claim, it is producible as an exception to settlement privilege. Alternatively, it is producible to prove the terms of the Partial Settlement Agreement, specifically the terms relating to the lifting of the stay in relation to the Leder Claims. While the Partial Settlement Agreement does contain a confidentiality clause, I have reviewed this clause and have concluded that it is a standard clause that does not clearly state that the parties to the Partial Settlement Agreement intended it to override the application of recognized exceptions to settlement privilege.

[137] Specifically, Leder sought to question Mr. Brown on the Partial Settlement Agreement, as it relates to Fluor's pleaded limitations issue in the Originating Application. The Partial Settlement Agreement stated that Leder was not releasing the Leder Claims, but the agreement stayed any proceeding in relation to the Leder Claims until certain events had occurred. There is a dispute between the parties as to when those events occurred and, as a result, the stay of the Leder Claims was lifted. Leder is not seeking to rely on the Partial Settlement Agreement to establish Fluor's liability for the conduct that was the subject of that agreement, nor is Leder attempting to show the weakness of Fluor's claim in respect of the matters covered by the Partial

Settlement Agreement. Instead, Leder is attempting to establish when the limitation period for the Leder Claims began to run, which requires Leder to prove the existence of the stay term in the Partial Settlement Agreement.

[138] As stated above, I find the contents of the Disputed Emails touch directly on the arbitration issue and are therefore relevant to the issues raised in the Originating Application.

a. Objection No. 1

[139] In framing the question, Leder asks Fluor to confirm that the subject document is a "settlement agreement". I note that the document is described on its face as a "Settlement Agreement" on the front page and is again referred to as the "Settlement Agreement" on the signature page.

[140] As phrased, I am of the view that this query asks Mr. Brown to draw a legal conclusion concerning the nature of the subject document. Had Leder used different language to ask the question this inquiry likely would have been acceptable. For example, if Leder had asked whether the subject document "purports to be" a settlement agreement, that likely would be acceptable. Similarly, had Leder asked Mr. Brown whether the subject document was titled "Settlement Agreement" that would have been a factual question, and the question would have been acceptable.

[141] Given my review of the evidence and analysis of the law, I have determined that Objection No. 1 need not be answered. I make this determination because of the decisive language used, which seeks a legal conclusion from the witness rather than an answer to a factual question.

b. Objections Nos. 2 to 5; 7 to 11; 14; 16; 17; 19; 21; 22; 24 to 28; and 30 to 32

[142] I found above that the Disputed Emails and Partial Settlement Agreement, as it relates to the limitations argument, are relevant to the Originating Application.

[143] Objections Nos. 2 and 3 relate to questions of fact. Objection No. 2 relates to the date of the Partial Settlement Agreement. Objection No. 3 relates to whether Mr. Brown is one of the signatories to the Partial Settlement Agreement. Both matters should be within the knowledge of Mr. Brown. Given the circumstances, Mr. Brown is directed to answer Objections Nos. 2 and 3.

[144] Objections Nos. 4 and 5 relate to questions of fact. The underlying questions are relevant and material to the issues in dispute. Given the circumstances, Mr. Brown is directed to answer the particular questions but only if he was present and saw Mr. Pike and Mr. Bray, respectively, sign the documents.

[145] Objections Nos. 7 to 11 relate to questions of fact associated with the Partial Settlement Agreement. Based on my review of the evidence and analysis of the law, that agreement is producible by way of an exception to settlement privilege, namely that to prove that a settlement (an accord and satisfaction) was reached, or to determine the exact terms of the settlement. Further, the confidentiality clause in that agreement does not clearly prevent the application of exceptions to settlement privilege. Given that determination, Mr. Brown is directed to answer each question associated with Objections Nos. 7 to 11.

[146] Objections Nos. 14, 16, 17, 21, 22, 24, and 25 all relate to questions of fact. Fluor seeks to avoid answering the questions associated with each of these objections on the premise that

they are protected by either settlement privilege and/or solicitor-client privilege. Fluor also argues that as Mr. Brown was not a party to the Disputed Emails, the information being sought lies outside his personal knowledge. Based on my review of the evidence and analysis of the law, I find that none of Objection Nos. 14, 16, 17, 21, 22, 24, or 25 are protected by any sort of privilege. Further, I find the questions underlying each of these objections to be relevant and material to the issues in dispute. Given those determinations, Mr. Brown is directed to answer each question associated with Objections Nos. 14, 16, 17, 21, 22, 24 and 25.

[147] Objection No. 19 is not a question, but rather the introduction of an email exchange that Leder's counsel sought to have entered as an exhibit for identification. Mr. Brown need not answer this non-question.

[148] Objection No. 26 concerns a question that may appear at first blush to be simply a question of fact. While a hypothetical ordinary person on the Calgary C-Train may characterize the question in that fashion, I do not.[2]

[149] Given the nature of inquiry underlying Objection No. 26, I infer that Leder is seeking an answer to a question that almost certainly involved legal advice. I make that determination because the ordinary person on the Calgary C-Train typically would not have the knowledge to form the view that Fluor was not a party to the alleged arbitration agreement in these circumstances unless they had the benefit of legal counsel. I draw that inference because legal analysis would be necessary to properly address this question. While I see no indication that Fluor pleaded solicitor-client privilege in relation to this objection, I read the question as asking, "when did your counsel advise you that you were not a party to the arbitration agreement?" Given that determination, I am going to exercise my discretion and direct that Mr. Brown need not answer the question associated with Objection No. 26.

[150] Objection No. 27 relates to a question of mixed fact and opinion. Similar to Objection Nos. 14, 16, 17, 21, 22, 24, and 25, Fluor objects to this question because it alleges that Mr. Brown was not a party to the Disputed Emails and that the question appears to seek disclosure of privileged communications. As I also noted above, questions may extend beyond the four corners of an affidavit if they are relevant. Moreover, an affiant may be required to answer objected-to questions where the questions relate to an important issue in the application, it would not be too onerous to respond to the questions, and it would significantly assist the Court in determining the application. In this case, the question asks whether the June 2023 Email was the first time that Fluor advised Mr. Heinen or Leder that it was taking the position that it was not a party to any arbitration agreement. As Mr. Brown is no longer employed by Fluor and, therefore, likely does not have the requisite access to Fluor's emails and records, it would be too onerous for him to respond to the question. Given that determination, I am going to exercise my discretion and direct that Mr. Brown need not answer the question associated with Objection No. 27.

[151] Objection No. 28 concerns a question that may appear to be simply a question of fact. While a hypothetical ordinary person on the Calgary C-Train may characterize the question in that fashion, I do not.

[2] Analogous to a hypothetical ordinary and reasonable individual on the Clapham omnibus: see ***McQuire v Western Morning News*** [1903] 2 KB 100 at 109 per Collins MR.

[152] The question underlying Objection No. 28 is "[w]hen did Fluor first determine that, in its view, the claim was limitation barred?" Given the nature of inquiry underlying Objection No. 28, I infer that Leder is seeking an answer to a question that almost certainly involved legal advice. I make that determination because the ordinary person on the Calgary C-Train typically would not have the knowledge to determine when a claim was statute barred because of a limitation issue, unless they had the benefit of legal counsel. I draw that inference because legal analysis would be necessary to properly address this question. Fluor pleaded solicitor-client privilege in relation to this objection, with which I agree. I read the question as asking, "when did your counsel advise you that the claim was statute barred?" Given that determination, I am going to exercise my discretion and direct that Mr. Brown need not answer the question associated with Objection No. 28.

[153] Objections Nos. 30 and 31 both relate to Fluor's limitations argument. Specifically, Leder asked Mr. Brown "[w]hat facts or information is Fluor basing its allegation on that [the] claim is limitation barred?" Fluor's counsel conceded in its February 13, 2025, letter that it was not disputing that the Arbitration was commenced within the applicable limitation period. The limitation argument only applies if a court finds that there was no arbitration agreement and that Leder should have sought resolution of the Leder Claims by a court action. As Leder has not filed a statement of claim in relation to the Leder Claims, it would be statute barred. Thus, the information being sought would not significantly assist the Court. Moreover, it would be too onerous for Mr. Brown to inform himself, as he is no longer a Fluor employee. Given these determinations, I direct that Mr. Brown need not answer the questions associated with Objections Nos. 30 and 31.

[154] Objection No. 32 concerns a question that may appear to be simply a question of fact. Fluor objects to this question on the premise that negotiations are not a proper subject of questioning. Given my above findings, a question to Mr. Brown as to whether Mr. Fraese was acting on behalf of Fluor is not covered by settlement privilege. However, in Exhibit D of the Heinen Affidavit, in an email from Mr. Fraese to Josie Marks (Leder's former counsel) on April 1, 2020, Mr. Fraese stated that he was authorized "to acknowledge service of these notices [Notice to Arbitrate Leder Claims] and to accept further service in relation to these matters". Given this context, Mr. Brown need not answer this question. I make that determination because the answer to this question would not significantly assist the Court in determining the Originating Application, as it is understood that Mr. Fraese was acting on behalf of Fluor in relation to the Arbitration because he accepted service for them.

c. Objections Nos. 6; 13; 15; 18; 20; 23; and 29

[155] Based on my review of the evidence and analysis of the law, I direct that the documents objected to by Fluor, as listed in Objections Nos. 6, 13, 15, 18, 20, 23, and 29, are to be marked as exhibits for identification. This determination is made because the documents are relevant and not protected by privilege.

[156] In making this determination, I acknowledge that Counsel for Fluor has asserted in the context of Objection No. 6 that the Partial Settlement Agreement should not be marked for identification purposes because it is alleged that Mr. Brown has not looked at the document and that he is therefore unfamiliar with it. While I acknowledge the argument, it is my understanding of the law that whether the witness has looked at a document has no bearing on whether that document may be marked for identification purposes only.

[157] If the witness is unfamiliar with a document put to him or her during questioning, then that reason (*i.e.*, not having looked at it) would be relevant to the issue of whether the document could be marked as a full exhibit. However, that is not the case here.

[158] For the reasons mentioned above, I reiterate that none of Objections Nos. 6, 13, 15, 18, 20, 23, and 29 are protected by privilege or confidentiality.

d. Objection No. 12

[159] The request of Fluor concerning Objection No. 12 was for Mr. Brown to read an email exchange. This was objected to because the email exchange was alleged by Fluor to be subject to settlement privilege.

[160] Based on my review of the evidence and analysis of the law, I direct that Mr. Brown is to read the email specified under Objection No. 12. I make this determination because this communication is not protected by settlement privilege.

VII. Conclusions

[161] The answers to the issues, framed as questions, are as follows:

A. Are the Disputed Materials covered by settlement privilege? For the reasons mentioned above, the answer is no.

B. If the Disputed Materials are covered by settlement privilege, do they fall within an exception to settlement privilege? For the reasons mentioned above, the answer is not applicable.

C. Is a permanent sealing order appropriate in this instance? For the reasons mentioned above, the answer is no.

D. Should Mr. Brown be directed to provide answers to the undertakings and questions that were refused, taken under advisement, or objected to at the Brown Questioning? For the reasons mentioned above, the answers are as follows:

   a. Concerning the undertakings refused or taken under advisement (see Appendix A), Undertaking Nos. 9 and 20 are to be answered; and

   b. Concerning the objected-to questions (see Appendix B):

      i. Objections Nos. 2 to 5; 7 to 11; 14; 16; 17; 19; 21; 22; 24 to 28; and 30 to 32:

         1. Mr. Brown is directed to answer Objections Nos. 2 and 3;

         2. Mr. Brown is directed to answer the particular questions associated with Objection Nos. 4 and 5 but only if he was present and saw Mr. Pike and Mr. Bray, respectively, sign the documents;

         3. Mr. Brown is directed to answer each question associated with Objections Nos. 7 to 11; and

         4. Mr. Brown is directed to answer each question associated with Objections Nos. 14, 16, 17, 21, 22, 24, and 25;

ii. the documents objected to by Fluor, as listed in Objections Nos. 6, 13, 15, 18, 20, 23, and 29, are to be marked as exhibits for identification; and

iii. Mr. Brown is to read the email specified under Objection No. 12.

VIII. Costs

[162] The parties may speak to costs if they cannot otherwise agree.

Heard on the 04th day of September, 2024.
Subsequent Submissions on the 04th, 11th and 13th days of February, 2025.
Subsequent Submissions on the 08th and 09th days of April, 2025.
Dated at the City of Calgary, Alberta this 16th day of April, 2025.

D.B. Nixon
A.C.J.C.K.B.A.

Appearances:

Joshua D. Fraese
for Fluor Enterprises Inc.

Trevor McDonald
for Leder Investments Ltd.

APPENDIX A

UNDERTAKINGS REFUSED OR TAKEN UNDER ADVISEMENT AT THE QUESTIONING OF MARK BROWN ON HIS AFFIDAVIT ON DECEMBER 6, 2023

Undertaking Number	Leder Request – Undertaking Narrative	Fluor Position	Court Holding/Determination
2	To make inquiries and review records and to advise, if able to be determined, whose any of the signatures are on pages 51 and 52 of the signed lease agreement dated April 18, 2013, marked Exhibit A for Identification, including who provided the stamp that indicates "Reviewed Legal" and	• Initially taken under advisement • Subsequently, given the uncontroversial nature of the matter, Fluor confirms its understanding that the 2013 Lease was signed as noted in Footnote [3], below.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.

[3] Response to Undertaking No. 2 in the letter from Fluor's counsel, dated February 21, 2024:

1. All of the signatures appear to be witnessed by Jesse Joose, who we understand at the time was a Director of the tenant Supreme Modular Fabrication Inc.
2. On behalf of the "Landlord", Leder Investments Ltd., we understand that the signature is that of John Leder, but again your client would be best able to confirm.
3. On behalf of the "Tenant", Supreme Modular Fabrication Inc., we understand that the first signature is again that of John Leder, but your client would be best able to confirm. The second signature is that of Jim Brittain. Adjacent to his signature, on the same row on behalf of "Tenant", is the signature of Robert Beekhuizen, who at the time was a Director of Supreme Modular Fabrication Inc.
4. On behalf of the first "Guarantor", the signature again appears to be that of John Leder, subject to your client's confirmation.
5. On behalf of the second "Guarantor", the signature is that of Carlos Hernandez, who at the time was the Chief Legal Officer of the second Guarantor, Fluor Enterprises Inc.
6. The "reviewed legal" stamp is endorsed with the initials of Michelle McDonald, Fluor legal counsel.

	who signed or initialled that particular stamp.		
3	To make inquiries and review records and advise whether or not Fluor Enterprises Inc. has a signed copy of either guarantee at Exhibit C to Mr. Brown's affidavit sworn/affirmed June 12, 2023, and if so, to produce it or them.	• Initially taken under advisement • Subsequently, Fluor stated that it does not have other signed copies of the guarantees.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
4	To make inquiries and review records and to determine whether or not Mr. Hernandez is still employed with or involved in Fluor Enterprises Inc., and to advise of same.	• Initially taken under advisement • Subsequently, Fluor stated that Mr. Hernandez is no longer employed with or involved in Fluor Enterprises Inc.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
5	To make inquiries and review records and to determine whether or not the signature on the guarantee of Fluor Enterprises Inc. dated April 18, 2013, marked Exhibit 1 is, in fact, Mr. Hernandez's signature.	• Initially taken under advisement • Subsequently, Fluor stated that Mr. Hernandez executed the guarantee marked as Exhibit 1.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
6	To make inquiries and review records and to advise what Mr. Hernandez's last role was with Fluor Enterprises Inc. as well as what his role was as of April 18, 2013, the date of the guarantee of Fluor Enterprises Inc. marked Exhibit 1.	• Initially taken under advisement • Subsequently, Fluor stated that Mr. Hernandez's last role with Fluor Enterprises Inc. was Chief Executive Officer and board member. Mr. Hernandez retired July 1, 2021 but remained a consultant to Fluor Enterprises Inc. for a one-year period ending June 30, 2022. On April 18, 2013, he was a Director of Fluor Enterprises Inc.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.

7	To make inquiries and review records and to advise who applied the "Reviewed Legal" stamp on the guarantee of Fluor Enterprises Inc. dated April 18, 2013, marked Exhibit 1 and who signed or initialled it.	• Initially taken under advisement • Subsequently, Fluor stated that the “Reviewed Legal” stamp on Exhibit 1 was endorsed with the initials of Michelle McDonald, Fluor legal counsel.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
8	To review records and make inquiries and to advise if SMFI's final tax return has been completed and filed, and if so, when it was filed; and to produce a copy of the final tax return as filed.	• Initially taken under advisement • Subsequently, Fluor stated that given the uncontroversial nature of the matter, its understanding is that the filing was made August 31, 2022. Copy provided.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
9	To make inquiries and review records and to advise whether there were any tax liabilities identified by Ernst & Young as a result of the final tax return or thereafter, and if so, what those tax liabilities were -- in other words, the quantum and the nature of the tax liability -- whether it was paid to Canada Revenue Agency, and if so, when, and to produce evidence of that payment.	• Initially taken under advisement • Subsequently, Fluor stated that the question is best posed to John Leder.	The limitation period claim is an important issue. Leder needs this information so that it can properly address the limitation argument. Given this context, I direct this undertaking be answered.
10	To make inquiries and review records and to advise whether or not the SMFI funds were distributed, and if so, when they were distributed and in what amounts, and to provide evidence of same.	• Initially taken under advisement • Subsequently, Fluor stated that given the uncontroversial nature of this information, it advised that its understanding is that the SMFI funds were distributed on March 31, 2022, in two equal payments of $137,025.76 to Fluor and to Supreme Group LP. Fluor went on to suggest that this should be confirmed with Mr. Leder.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.

11	To make inquiries and review records and to advise whether or not SMFI has been wound up and dissolved as set out in paragraphs 22 and 23 of the settlement agreement, and if so, when that occurred, and to provide any backup documentation to show when it was wound up and dissolved.	• Initially taken under advisement • Subsequently, Fluor stated that the dissolution records are attached as Exhibit "A" to the Affidavit of Mark Brown.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
12	To make inquiries and review records and to advise whether or not all necessary notices have been given or regulatory filings made as necessary to give full effect to the dissolution of SMFI, and if so, when it was done, and to produce the relevant documentation.	• Initially taken under advisement • Subsequently, Fluor stated that the dissolution records are attached as Exhibit "A" to the Affidavit of Mark Brown.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
13	To review records and make inquiries and to advise what steps were taken to accomplish the windup and dissolution of SMFI after April 24, 2020.	• Initially taken under advisement • Subsequently, Fluor stated that this question should be directed to Mr. Leder.	Mr. Brown need not answer this question, as the information being sought is too onerous and, when viewed in context, not material to an issue in the Originating Application.
14	To advise who was involved in taking the steps to accomplish the windup and dissolution of SMFI after April 24, 2020, including the names of any parties at Fluor Enterprises Inc. and/or at Leder Investments Ltd. and the names of any counsel representing Fluor	• Initially taken under advisement • Subsequently, Fluor stated that this question should be directed to Mr. Leder.	Mr. Brown need not answer this question, as the information being sought is too onerous and, when viewed in context, not material to an issue in the Originating Application.

	Enterprises Inc. and/or Leder Investments Ltd. or SMFI.		
15	To make inquiries and review records and to advise who within Fluor -- "Fluor" meaning Fluor Daniel Holdings Canada Inc., Fluor Canada Ltd., and/or Fluor Enterprises Inc. – was involved in the process of preparing SMFI's final tax return.	• Initially taken under advisement • Subsequently, Fluor stated that its understanding is that the final tax return was prepared by Ernst & Young LLP and signed by Kevin Guile of SMFI. This should be confirmed with Mr. Leder.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
16	To advise who the accountant or accountants were that were involved in preparing SMFI's final tax return.	• Initially taken under advisement • Subsequently, Fluor stated that this question should be directed to Kevin Guile.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient. It is also noted that Ernst & Young was designated to prepare the tax returns.
17	To make inquiries and review records and to determine whether, in fact, the letter dated May 28, 2021, was a letter sent by Rose LLP on or about May 28, 2021, to Mr. Heinen of Leder Investments Ltd., and to advise of same.	• Initially taken under advisement • Subsequently, Fluor stated that Rose LLP sent a letter on May 28 addressed to Mr. Heinen of Leder Investments Ltd.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
18	To confirm whether or not the letter dated May 28, 2021, was sent by way of an email dated May 29, 2021, from Ms. Steele to Mr. Heinen, copied to Mr. Fraese.	• Initially taken under advisement • Subsequently, Fluor confirmed this matter.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.

19	To produce a copy of the email dated May 29, 2021, from Ms. Steele to Mr. Heinen, copied to Mr. Fraese, with its attachments, being a consent order and officer's certificate.	• Initially taken under advisement • Subsequently, Fluor stated that Leder was already in possession of this record.	The answers to this Undertaking provided in the letter dated February 21, 2024 by Counsel to Fluor are sufficient.
20	To review records and make inquiries and to advise whether Fluor Enterprises Inc. was aware that between May 9, 2022, and November 17, 2022, Mr. Fraese was having discussions on behalf of Fluor Enterprises Inc. with Mr. Heinen with respect to arbitration procedure and terms of reference.	• Initially taken under advisement • Subsequently, Fluor refused to fulfill this undertaking.	The status of the arbitration agreement is a key issue. Given this context, I direct this undertaking be answered.
21	To produce any records internally, as between Fluor Enterprises Inc. employees, related to the assertion that the claim was limitation barred.	• Initially refused. The basis was "[p]rivilege". • Subsequently, Fluor refused to answer the undertaking for the following reasons, as set out in its letter dated February 4, 2025: (i) the requested records are subject to litigation privilege; (ii) a questioning party is only entitled to ask questions about facts, not evidence or argument; (iii) the scope of cross-examination on an affidavit is more limited that the scope of questioning for discovery and, as Mr. Brown is not Fluor's corporate representative, nor a current employee of Fluor, he is not required to inform himself of this information; and (iv) the calculation of the limitation period is not a relevant issue in the Originating Application (i.e. if Leder is entitled to arbitrate the Leder Claims, then it has met the limitation period; if it is not, then the limitation period has expired, as it has not filed a statement of claim).	Privilege was not established. However, Mr. Brown need not answer this question. As Mr. Brown is no longer employed by Fluor, this undertaking would be too onerous for him to fulfill. Moreover, Fluor's counsel conceded in its letter of February 13, 2025, that the Notice to Arbitrate was served within the limitation period. Fluor asserts that if a court finds that no arbitration agreement exists between the parties, then Leder is statute barred from proceeding with the Leder Claims, as it did not commence an action with a statement of claim, in relation to those claims, within the applicable limitation period. Therefore, the information being

			sought would not significantly help the Court in determining the Originating Application.
22	To make inquiries and review records and to advise what Fluor Enterprises Inc.'s position is as to when the limitation period began to run and what facts or information it is basing that position on.	• Initially taken under advisement • Subsequently, Fluor refused to answer the undertaking for the reasons set out in its letter dated February 4, 2025: (i) a questioning party is only entitled to ask questions about facts, not evidence or argument; (ii) the scope of cross-examination on an affidavit is more limited that the scope of questioning for discovery and, as Mr. Brown is not Fluor's corporate representative, nor a current employee of Fluor, he is not required to inform himself of this information; and (iii) the calculation of the limitation period is not a relevant issue in the Originating Application.	Mr. Brown need not answer this question for the reasons set out in Undertaking No. 21, above.
23	(Taken Under Advisement) To make inquiries and review records and to advise when Fluor Enterprises Inc. says that the limitation period expired, and to provide whatever evidence or facts it has in relation to that matter.	• Initially taken under advisement • Subsequently, Fluor refused to answer the undertaking.	Mr. Brown need not answer this question for the reasons set out in Undertaking No. 21, above.

APPENDIX B

OBJECTIONS MADE AT THE QUESTIONING OF MARK BROWN ON HIS AFFIDAVIT ON DECEMBER 6, 2023

Objection Number	Objection Narrative	Leder Position	Fluor Position	Court Holding/Determination
1	Do you agree, sir, that this is a settlement agreement between Fluor Daniel Holdings Canada Inc., Fluor Canada Limited, and Fluor Enterprises Inc., on the one part, and Supreme Group LP, Supreme Steel LP, and Leder Investments Ltd., on the second part?	This objection relates to Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement.	The existence and written terms of the Partial Settlement Agreement are not in dispute, and are in any event not relevant to Mr. Brown's affidavit or Fluor's application. Requiring Mr. Brown to answer this question would serve no purpose.	As phrased, this query asks for a legal conclusion and is inappropriate. Mr. Brown need not answer this question.
2	Do you agree that this settlement agreement is made effective the 24th day of April 2020?	This objection relates to Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement.	The existence and written terms of the Partial Settlement Agreement are not in dispute, and are in any event not relevant to Mr. Brown's affidavit or Fluor's application. Requiring Mr. Brown to answer this question would serve no purpose.	Based on my review, I find this question is relevant. Given this determination, I direct Mr. Brown to answer this question.
3	If you can turn to the signature page, which is under XVII, "Execution", can you confirm that that's your signature, Mark Brown, vice president and general manager of Fluor Canada Ltd.?	This objection relates to Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement.	Fluor has already identified the signatories to the Partial Settlement Agreement in its letter dated February 21, 2024. The question is not relevant to Mr. Brown's affidavit or Fluor's application. Requiring Mr. Brown to answer this	Based on my review, I find this question is relevant and was not answered in the February 2024 Fluor Responses to Undertaking Letter. Given this determination, I direct Mr. Brown to answer this question.

			question would serve no purpose.	
4	Can you confirm that this is also signed by James D. Pike, vice president, law of Fluor Enterprises Inc.?	This objection relates to Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement.	Fluor has already identified the signatories to the Partial Settlement Agreement in its letter dated February 21, 2024. The question is not relevant to Mr. Brown's affidavit or Fluor's application. Requiring Mr. Brown to answer this question would serve no purpose.	The question is relevant and was not answered in the February 2024 Fluor Responses to Undertaking Letter. However, Mr. Brown is only directed to answer the question if he was present and saw Mr. Pike sign the document.
5	Can you confirm that this is also signed by Scott Bray, vice president of Fluor Daniel Holdings Canada Inc.?	This objection relates to Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement.	Fluor has already identified the signatories to the Partial Settlement Agreement in its letter dated February 21, 2024. The question is not relevant to Mr. Brown's affidavit or Fluor's application. Requiring Mr. Brown to answer this question would serve no purpose.	The question is relevant and was not answered in the February 2024 Fluor Responses to Undertaking Letter. However, Mr. Brown is only directed to answer the question if he was present and saw Mr. Bray sign the document.
6	I'd like to make this an exhibit for identification. [The document in issue is the Partial Settlement Agreement.]	This objection relates to Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement.	The Partial Settlement Agreement is not relevant to Mr. Brown's affidavit or Fluor's application. Cross-examination should not be used as a method to exhibit irrelevant documents. To the extent Leder relies on this document, it is an exhibit to the Heinen Affidavit. No purpose is served by adding this exhibit to the transcript.	While Leder took the position that this was a question, it appears to be a request to mark the document as an exhibit for identification, which I direct be marked as such. I make this determination because the document is relevant, and it may be disclosed under exceptions to settlement privilege,

				namely that to prove that a settlement (an accord and satisfaction) was reached, or to determine the exact terms of the settlement
7	Sir, paragraph 18 of the settlement agreement refers to a number of claims that Leder Investments is making or was making against Fluor Enterprises and Supreme as a result of the termination of the lease, and they are collectively defined as the "Leder claims." You're aware of that?	This objection relates to paragraph 18 of Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement	The existence and written terms of the Partial Settlement Agreement are not in dispute, and are in any event not relevant to Mr. Brown's affidavit or Fluor's application. Requiring Mr. Brown to answer this question would serve no purpose.	Mr. Brown is directed to answer the question because it is relevant. The question does not attempt to elicit confidential or privileged information.
8	Sir, Fluor was served with a notice of arbitration which is set out as a schedule to this settlement agreement; correct?	This objection relates to Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement.	Mr. Brown was not served. This question relates to matters outside Mr. Brown's personal knowledge. Mr. Brown is not Fluor's corporate representative. Further, the existence and terms of the Partial Settlement Agreement are not in dispute, and are in any event not relevant to Mr. Brown's affidavit or Fluor's application. Requiring Mr. Brown to answer this question would serve no purpose.	Mr. Brown is directed to answer this question because it is relevant. The question is just an inquiry as to whether Fluor was served with notice.
9	And I understand your counsel is objecting, but I will ask you to confirm that that same notice to arbitrate is attached as a schedule to the	This objection relates to Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the	The existence and terms of the Partial Settlement Agreement are not in dispute, and are in any event not relevant to Mr. Brown's affidavit or Fluor's	Mr. Brown is directed to answer this question because it is relevant. The question does not attempt

	settlement agreement. Correct?	existence and terms of the Settlement Agreement.	application. Requiring Mr. Brown to answer this question would serve no purpose.	to elicit confidential or privileged information.
10	You will see in paragraph 25 of the settlement agreement that the settlement agreement provides that the dissolution of SMFI, which is a defined term meaning Supreme Modular Fabrication Inc., shall be without prejudice to Leder Investments' ability to advance the Leder claims as addressed in the agreement. You are aware of that; correct?	This objection relates to paragraph 25 of Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement.	The interpretation of contractual terms is outside the proper scope of cross-examination.	Mr. Brown is directed to answer the question because it is relevant. The question does not attempt to elicit confidential or privileged information.
11	You'll agree with me, sir, that after this settlement agreement was signed, the parties worked together to fulfill the conditions in paragraph 25 of the agreement; correct?	This objection relates to paragraph 25 of Exhibit A in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement.	This question is irrelevant and outside Mr. Brown's personal knowledge and the proper scope of cross-examination. In substance it has been answered by Fluor and is not in dispute. No purpose would be served by requiring Mr. Brown to answer this question.	Mr. Brown is directed to answer the question because it is relevant. The question does not attempt to elicit confidential or privileged information.
12	I am going to show you some emails now. So the first email is an email exchange between Mr. Fraese, Mr. Josh Fraese, of Rose LLP and Mr. Heinen, Peter Heinen, of Leder Investments. And I will ask you to just read through that email.	This objection relates to Exhibit E in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Mr. Brown was not a party to the Without Prejudice E-mails. Mr. Fraese is counsel to Fluor. Questions relating to these emails are outside Mr. Brown's personal knowledge and are directed at solicitor-client privileged	While Leder took the position that this was a question, it appears to be a request to for Mr. Brown to read the subject emails, which I direct him to do. These communications are neither protected by settlement privilege nor solicitor-client privilege.

			communications between Mr. Fraese and Fluor.	
13	So I am going to ask to enter this email as an exhibit for identification. It's an email exchange between Mr. Fraese and Mr. Heinen dated June 1, 2021, back to May 29, 2021.	This objection relates to Exhibit E in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Mr. Brown was not a party to the Without Prejudice E-mails. Mr. Fraese is counsel to Fluor. Questions relating to these emails are outside Mr. Brown's personal knowledge and are directed at solicitor-client privileged communications between Mr. Fraese and Fluor.	While Leder took the position that this was a question, it appears to be a request to mark the document as an exhibit for identification, which I direct be marked as such. I make this determination because the email exchange is not privileged.
14	… This one is an email chain that starts May 9, 2022, at 1:02 PM and ends on November 17, 2022, at 4:04 PM, and it's, again, between Mr. Heinen and Mr. Fraese. You agree that that's what it appears to be?	This objection relates to Exhibit G in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Mr. Brown was not a party to the Without Prejudice E-mails. Mr. Fraese is counsel to Fluor. Questions relating to these emails are outside Mr. Brown's personal knowledge and are directed at solicitor-client privileged communications between Mr. Fraese and Fluor.	Mr. Brown is directed to answer the question because, as phrased, it does not require him to disclose information about communications protected by settlement privilege or solicitor-client privilege.
15	Okay. I'll ask to enter it as an exhibit for identification.	This objection relates to Exhibit G in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence.	While Leder took the position that this was a question, it appears to be a request to mark the document as an exhibit for

		Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.		identification, which I direct be marked as such. I make this determination because the email exchange is not protected by settlement privilege.
16	The email exchange is between May 9, 2022, at 3:45 PM and December 12, 2022, at 11:53 AM between Mr. Heinen and Mr. Fraese. And the question is: Were you aware that in December of 2022, Mr. Fraese proposed terms of reference for the arbitration?	This objection relates to Exhibit H in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Mr. Brown was not a party to the Without Prejudice E-mails. The question appears to seek disclosure of solicitor-client privileged communications.	Mr. Brown is directed to answer the question because it is relevant. As phrased, the question does not require him to disclose information about communications protected by settlement privilege or solicitor-client privilege.
17	Were you aware that Mr. Fraese has proposed arbitration by a panel of three arbitrators on December 12, 2022?	This objection relates to Exhibit H in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Mr. Brown was not a party to the Without Prejudice E-mails. The question appears to seek disclosure of solicitor-client privileged communications.	Mr. Brown is directed to answer the question because it is relevant. As phrased, the question does not require him to disclose information about communications protected by settlement privilege or solicitor-client privilege.
18	I'll ask to enter this email as an exhibit for identification.	This objection relates to Exhibit H in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence.	While Leder took the position that this was a question, it appears to be a request to mark the document as an exhibit for identification, which I direct be marked as such. I make this determination because the email

				exchange is not protected by settlement privilege.
19	The next email exchange I'm going to show you is between Mr. Fraese and Mr. Heinen. It starts May 9, 2022, and ends January 13, 2023. I assume your counsel is objecting; so I'll just wait for that.	This objection relates to Exhibit I in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence.	This objection is not a question, but instead the introduction of emails which Leder's counsel sought to have entered as exhibits for identification. Mr. Brown need not answer this non-question.
20	Okay. I'd like to enter that as an exhibit for identification.	This objection relates to Exhibit I in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence.	While Leder took the position that this was a question, it appears to be a request to mark the document as an exhibit for identification, which I direct be marked as such. I make this determination because the email exchange is not protected by settlement privilege.
21	I am going to suggest to you, sir, that between June of 2021 to at least January of 2023, Mr. Fraese was discussing the proposed procedure and terms of reference for the arbitration with Mr. Heinen. Do you agree with that?	This objection relates to Exhibit I in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Mr. Brown was not a party to the Without Prejudice E-mails. The question appears to seek disclosure of solicitor-client privileged communications.	Mr. Brown is directed to answer the question because it is relevant. As phrased, the question does not require him to disclose information about communications protected by settlement privilege or solicitor-client privilege.
22	Next email is February 1, 2023 … it's an exchange beginning May 9, 2022, at	This objection relates to Exhibit J in the Heinen Affidavit. The question and answer are relevant and	The Without Prejudice Emails are subject to settlement privilege and inadmissible as	Mr. Brown is directed to answer the question because it is relevant. As

	1:02 PM, ending February 1, 2023, at 6:02 PM. Are you familiar with this email exchange?	material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	evidence. Mr. Brown was not a party to the Without Prejudice E-mails. The question appears to seek disclosure of solicitor-client privileged communications.	phrased, the question does not require him to disclose information about communications protected by settlement privilege or solicitor-client privilege.
23	I'd ask to enter it as an exhibit for ID.	This objection relates to Exhibit J in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence.	While Leder took the position that this was a question, it appears to be a request to mark the document as an exhibit for identification, which I direct be marked as such. I make this determination because the email exchange is not protected by settlement privilege.
24	Were you aware that Mr. Fraese offered on January 2, 2023, to provide draft terms of reference soon for the arbitration?	This objection relates to Exhibit J in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Mr. Brown was not a party to the Without Prejudice E-mails. The question appears to seek disclosure of solicitor-client privileged communications.	Mr. Brown is directed to answer the question because it is relevant. The answer to this question will assist the Court in determining the application before it. As phrased, the question does not require him to disclose information about communications protected by settlement privilege or solicitor-client privilege.
25	Here is the last one. It's an email exchange starting May 9, 2022, 1:02 PM, ending June 22, 2023, 3:36 PM, further emails between Mr. Heinen and Mr. Fraese	This objection relates to Exhibit K in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Mr. Brown was not a party to the Without Prejudice E-mails. The	Mr. Brown is directed to answer the question because it is relevant. As phrased, the question does not require him to disclose information about

	related to the arbitration. Are you familiar with this email, Sir?	communications demonstrate Fluor's participation in the Arbitration.	question appears to seek disclosure of solicitor-client privileged communications.	communications protected by settlement privilege or solicitor-client privilege.
26	When did Fluor first discover that, in its view, it was not a party to the arbitration agreement?	This objection relates to Exhibit K in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Further, the question is in substance a request for solicitor-client privileged information.	Mr. Brown need not answer the question. I make that determination because the ordinary person typically would not have the knowledge to form the view that Fluor was not a party to the alleged arbitration agreement in these circumstances, unless they had the benefit of legal counsel.
27	This is the first time that Fluor, through its counsel or otherwise, ever advised Mr. Heinen or Leder that it was taking the position that it wasn't a party to the arbitration agreement; correct?	This objection relates to Exhibit K in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Mr. Brown was not a party to the Without Prejudice E-mails. The question appears to seek disclosure of solicitor-client privileged communications.	Mr. Brown need not answer the question. While it is relevant, it would be too onerous for Mr. Brown to answer, as he is no longer employed by Fluor and, therefore, likely does not have the requisite access to Fluor’s systems to determine whether the June 2023 Email was the first time that Fluor communicated its position to Mr. Heinen or Leder.

28	When did Fluor first determine that, in its view, the claim was limitation barred?	This objection relates to Exhibit K in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration. Also relevant for Leder's defence against Fluor's time bar claim.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Further, the question is in substance a request for solicitor-client privileged information.	Mr. Brown need not answer the question. As phrased, the question elicits communications that would be protected by solicitor-client privilege.
29	I can't remember if I asked to enter this as an exhibit for ID. I know it's objected to, but I will make that request. [The documents in issue are only records that Fluor is directed to produce because of Undertaking 21.]	This objection relates to Exhibit K in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration. Also relevant for Leder's defence against Fluor's time bar claim.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence.	While Leder took the position that this was a question, it appears to be a request to mark the documents as exhibits for identification. Any documents produced under Undertaking 21 are to be marked as an exhibit for identification. I make this determination because these documents are not protected by privilege. That said, given the determination concerning Undertaking No. 21 in Appendix A, there may be no documents to mark for identification purposes.
30	What facts or information is Fluor basing its allegation on that [the] claim is limitation barred?	This objection relates to Exhibit K in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The	Mr. Brown is not Fluor’s corporate representative. He is a witness. He is not authorized to answer this question, as posed, on Fluor’s behalf. The question is improper in the	Mr. Brown need not answer this question as it would be too onerous, as a former employee of Fluor, and it would not significantly assist the

		communications demonstrate Fluor's participation in the Arbitration. Also relevant for Leder's defence against Fluor's time bar claim.	context of cross-examination. In any event, Fluor's position is set out in its Notice of Application.	Court in determining the Originating Application. In any event, Fluor's counsel has conceded that there is no dispute that the Notice to Arbitrate was served within the applicable limitation period.
31	What facts or information is Fluor basing its assertion on that Fluor is not a party to the arbitration agreement?	This objection relates to Exhibit K in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration.	Mr. Brown is not Fluor's corporate representative. He is a witness. He is not authorized to answer this question, as posed, on Fluor's behalf. The question is improper in the context of cross-examination. In any event, Fluor's position is set out in its Notice of Application.	Mr. Brown need not answer the question, as it would be too onerous for him to do so, as a former employee of Fluor. Moreover, Fluor set out the facts which support its assertion that Fluor is not a party to the arbitration agreement at para 11 of the Originating Application. Thus, the answer will not assist the Court in determining the application before it.
32	In conducting the ongoing communications with Mr. Heinen as relates to the arbitration, Mr. Fraese, to your understanding, was acting for Fluor Enterprises Inc.; correct?	This objection relates to Exhibit K in the Heinen Affidavit. The question and answer are relevant and material for proving the existence and terms of the Settlement Agreement. The communications demonstrate Fluor's participation in the Arbitration. Also relevant for Leder's defence against Fluor's time bar claim.	The Without Prejudice Emails are subject to settlement privilege and inadmissible as evidence. Further, the question is in substance a request for solicitor-client privileged information.	Mr. Brown need not answer this question. Exhibit D of the Heinen Affidavit provides the information being sought by this question, since in an email from Mr. Fraese to Josie Marks (Leder's former counsel) on April 1, 2020, Mr. Fraese stated that he was authorized "to

				acknowledge service of these notices [Notice to Arbitrate Leder Claims] and to accept further service in relation to these matters”.