COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gondor v. British Columbia (Attorney General),* 2025 BCCA 281

Date: 20250808
Docket: CA49994

Between:

Guy Gondor

Appellant
(Respondent)

And

Attorney General of British Columbia

Respondent
(Petitioner)

Before: The Honourable Madam Justice Bennett
The Honourable Justice Riley
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated June 21, 2024 (*British Columbia (Attorney General) v. Gondor*, 2024 BCSC 1077, Vancouver Docket S233690).

Counsel for the Appellant: J.M. Hutchison, K.C.

Counsel for the Respondent: N.J. Isaac
S.A. Davis

Place and Date of Hearing: Vancouver, British Columbia
March 31, 2025

Place and Date of Judgment: Vancouver, British Columbia
August 8, 2025

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Justice Riley
The Honourable Justice MacNaughton

Summary:

The appellant appeals an order granted under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 requiring him to return certain records and destroy any copies. He claims that he does not possess the records in question. The appellant was an IT manager for the District of Saanich (District). After he left that position, his adult child appended records containing private information to an email to the District. The Office of the Privacy Commissioner (OPIC) anonymously received DVDs with some of the same records. An investigation by KPMG found that the appellant had downloaded and copied some of the same records to an external memory stick before leaving his employment. The appellant deposed that he had copied the records to complete an assigned task that required testing issues with the network and the memory stick. The appellant further deposed that he did not know how his child came into possession of the records. The child did not testify. The chambers judge rejected the appellant's evidence. He concluded that the appellant provided the records containing personal information to his child and to OPIC or at least to whoever provided them to OPIC. The appellant submits that the chambers judge erred by not addressing whether he in fact possessed the records; erred in admitting expert opinion evidence that did not comply with Rule 11-6; erred in drawing an adverse inference against the appellant for failing to call his child as a witness; and made palpable and overriding errors in finding the appellant not credible.

HELD: Appeal dismissed. When read as a whole, the chambers judge's reasons clearly show that he concluded that the appellant was in possession of the impugned records. There was no error in the chambers judge's exercise of discretion to admit the independent consulting report despite its non-compliance with Rule 11-6. The chambers judge did not err in admitting an affidavit from the District's Chief Information Officer on the organization of the electronic system that contained the records. The chambers judge struck out portions of the affidavit. The remaining content of the affidavit contains factual statements within the knowledge of the affiant. On the adverse inference issue, the trial judge applied the correct legal principles. The judge made no palpable and overriding error in drawing the inference. Finally, there is no basis to overturn the chambers judge's credibility findings, which were amply supported by the record and comprehensively set out in his reasons.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] Guy Gonder appeals the decision indexed at 2024 BCSC 1077, ordering him to return records and destroy copies of records (referred to as the "Identified Records") that he was found to have copied and disseminated contrary to the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 [*FIPPA*].

[2] I would dismiss the appeal for the following reasons.

Background

[3] Mr. Gondor was employed by the District of Saanich ("the District") as an Information Technology manager between October 15, 2014 to February 17, 2022.

[4] In order to be respectful to Mr. Gondor's adult child, I will refer to them as "D.G." or "they" as D.G.'s pronoun preference is unclear.

[5] D.G. made numerous FOI requests of the District in part relating to ongoing disputes they had with their neighbours; however, it appears that they did not receive the FOI records due to non-payment for the requests.

[6] In March 2022, the District learned that two DVDs containing District records had been anonymously sent to the Office of the Information and Privacy Commissioner (OIPC). The records contained personal information of District residents as defined under *FIPPA*. The *FIPPA* prohibits the public dissemination of this information.

[7] On March 24, 2022, D.G. sent the District an email regarding a dispute with neighbours and attached two documents that had been part of the Identified Records. D.G. was in a dispute with the District and neighbours regarding clearing and filling an area on their hobby farm. Mr. Gondor had a copy of D.G.'s email and attachments since March 2023, but he testified that he never asked D.G. where or how D.G. obtained the documents. Mr. Gondor denied providing the documents to D.G.

[8] A technical investigation by KPMG showed that Mr. Gondor copied the Identified Records from a shared drive onto his work laptop on December 23, 2021 and January 24, 2022, and then downloaded them onto a USB stick. It also revealed that the records had been burned onto the DVDs on February 14, 2022. The records were Engineering records and were located in three specific subfolders in the Engineering section of the shared drive: Bylaw infractions; Bylaw photos; and FOI [Freedom of Information].

[9] The investigation also showed that Mr. Gondor was the only person who copied the Identified Records in bulk to an external location. To access them by

using a shortcut, Mr. Gondor needed to select the applicable shared drive, then select Engineering, and then select each of the subfolders.

[10] However, Mr. Gondor testified that he did not select the subfolders, he was just copying a large quantity of information to conduct tests. He testified that he just clicked on the Engineering folder in the shared drive and dropped it onto his computer. He said he did not know the contents of the folder as his goal was only to download large amounts of data. He testified that he was unaware that he had downloaded the three subfolders. He further testified that those folders should not have been in the Engineering folder as they were protected by privacy, and he never expected them to be part of the download. Mr. Gondor said that he was unaware that the documents he downloaded related to bylaw infractions for fill (which was one of D.G.'s disputes) and included six of D.G.'s 24 FOI requests. He testified that those records were supposed to be in an application called Tempest, which he could not access. In his mind, he could copy anything on the shared drive, and it would not contain personal information.

[11] The network activity for the download indicated that it took three minutes. Mr. Gondor said it took hours and could not explain the discrepancy.

[12] Mr. Gondor testified that while he helped D.G. prepare a template for the FOI requests, he did not help them make the detailed requests.

[13] As required by *FIPPA*, Angila Bains, who was the Director of Legislative and Protective Services/Corporate Officer for the District, sent a May 11, 2022 demand letter to Mr. Gondor seeking return of the documents within 20 days. Another letter was sent on June 9, 2022, providing Mr. Gondor with seven more days to reply.

[14] On June 16, 2022, Mr. Gondor replied denying that his username had the ability or privilege to use the applications to access personal information relating to District residents. He did not advise the District that he had in fact downloaded a large number of documents onto his computer and onto a USB stick as part of a planned test of the computer systems.

[15] When Mr. Gondor did not comply with the demand letter, the District asked the Attorney General of British Columbia ("AGBC") to file a petition on the District's behalf for orders pursuant to s. 73.2(2) and (3) of *FIPPA* requiring Mr. Gondor to return the Identified Records, destroy copies in his possession, delete any

publications or disseminations of the Identified Records, and disclose the names of anyone to whom he had provided the Identified Records. The petition was filed on May 17, 2023.

Chambers Judgment

[16] In advance rulings, the chambers judge ordered that the petition would proceed by way of a hybrid procedure. He ordered that three of the AGBC's witnesses—Angila Bains, Trevor Hurst, and Christian Fletcher—could be cross-examined before a court reporter and permitted the AGBC to require Mr. Gondor to testify before the Court, all of which occurred.

[17] He also ruled, as an exercise of his discretion, that the affidavit of Eric Berg, along with the appended KPMG report, was admissible as an expert report. Finally, he struck out portions of Mr. Hurst's affidavit. Those rulings form a ground of appeal and will be addressed further below.

[18] The chambers judge, relying on Justice Thompson's distillation of the requirements of s. 73.2 in *British Columbia (Attorney General) v. Fuller*, 2018 BCSC 1981 at para. 6, concluded that the order sought required the AGBC to demonstrate that the following conditions were met: (1) the material was personal information; (2) it was in the custody or under the control of a public body; (3) it was possessed by a person not authorized by law to possess it; (4) there was a demand in writing for its return or destruction; and (5) the recipient of the demand failed to comply. No issue is taken on appeal with respect to the correctness of these requirements.

[19] The only criterion seriously in dispute at the hearing was (3). Mr. Gondor admitted that he copied the records and that they contained personal information but says that the only copies he made remained on the laptop and USB stick, and that he had returned both to the District at the end of his employment.

[20] The chambers judge characterized the central question as whether Mr. Gondor's "denial that he retained, promulgated and remains in possession" of the records was credible: at para. 14. The issue was whether, on a balance of probabilities, Mr. Gondor had provided the records to D.G. and to the OIPC (or to the person who provided them to the OIPC).

[21] The chambers judge identified the following inconsistencies and difficulties with Mr. Gondor's evidence:

i. He did not create a "ticket," as required by District policy, for the copying of the personal information and his explanations for why he did not do so changed between his affidavit, his cross-examination, and within the cross-examination.

ii. His explanation for why he copied the files onto a USB was to check if the USB port was functioning correctly. He said that he chose the subfolders because he needed a large volume of material that would take an hour to copy, but records show that the copying took just three minutes.

iii. He insisted that the shared drive (where the material was copied from) should never have contained personal information, a position that "strains credulity" for an IT Manager.

iv. He claimed that it was "a mere coincidence" that the subfolders he selected to copy happened to correspond to information related to D.G.'s ongoing disputes with their neighbours.

v. There was no supporting evidence for his claim that the original copying of the subfolders to his computer was related to a task assigned to him by someone in Council Chambers.

[22] The chambers judge noted that in submissions, Mr. Gondor did not offer an alternative explanation for how the Identified Records were publicized, concluding that this was "because there is none that is plausible": at para. 39.

[23] The chambers judge drew an adverse inference from the fact that D.G. did not swear an affidavit explaining where they obtained the documents they had appended to the email to the District, and Mr. Gondor failed to explain why such an affidavit could not be obtained.

[24] Although the chambers judge acknowledged that there was no direct evidence that Mr. Gondor retained the records, on a balance of probabilities he

found that Mr. Gondor made and disseminated unauthorized copies of them and that the AGBC was entitled to the orders it sought, as well as costs.

Issues on Appeal

[25] Mr. Gondor raises four grounds of appeal. He says that the chambers judge:

i) erred in failing to address whether Mr. Gondor was in possession of personal information;

ii) erred in admitting expert opinion evidence in the KPMG Post-Mortem Assessment and the affidavit evidence of Trevor Hurst;

iii) erred in drawing an adverse inference against Mr. Gondor for failing to tender D.G.'s evidence; and

iv) committed palpable and overriding errors of fact in his assessment of the evidence and credibility of Mr. Gondor.

Discussion

Legislative framework

Freedom of Information and Privacy Act.

Recovery of personal information

73.1 (1) If the head of a public body has reasonable grounds to believe that personal information in the custody or under the control of the public body is in the possession of a person or an entity not authorized by law to possess the information, the head of the public body may issue a written notice demanding that person or entity to do either of the following within 20 calendar days of receiving the notice:

(a) return the information to the public body or, in the case of electronic records, securely destroy the information and confirm in writing the date and the means by which the information was securely destroyed;

(b) respond in writing and declare why the person or entity considers that

(i) the information was not in the custody or under the control of the public body when the person or entity acquired possession of the information, or

(ii) the person or entity is authorized by law to possess the information.

(2) The written notice referred to in subsection (1) must

(a) identify, with reasonable specificity, the personal information claimed to be in the custody or under the control of the public body and in the possession of the person or entity not authorized by law to possess the information, and

(b) state that the public body may undertake legal action to recover the personal information if the person or entity fails to respond in writing within the required time or does not adequately demonstrate that

(i) the information was not in the custody or under the control of the public body when the person or entity acquired possession of the information, or

(ii) the person or entity is authorized by law to possess the information.

Court order for return of personal information

73.2 (1) If a person or an entity that receives a written notice and demand from the public body under section 73.1 (1) fails to

(a) return the described personal information or, in the case of electronic records, to securely destroy the information and confirm in writing the date and the means by which the information was securely destroyed,

(b) respond to the notice and demand within the required time, or

(c) adequately demonstrate that

(i) the personal information was not in the custody or under the control of the public body when the person or entity acquired possession of the information, or

(ii) the person or entity is authorized by law to possess the personal information, the head of the public body may ask the Attorney General to petition the superior court in the jurisdiction in which the personal information is located for an order requiring the return of the personal information.

(2) If, after a hearing, the court determines that the personal information is in the possession of a person or an entity not authorized by law to possess the personal information and the public body is entitled to custody or control of the personal information, the court must order the personal information to be delivered to the head of the public body.

(3) The court may issue any order necessary to protect the personal information from destruction, alteration or transfer by the person or entity in possession of the personal information and may order that the personal information be surrendered into the custody of the head of the public body until the court reaches a decision on the petition.

(4) This section does not limit any remedy otherwise available to a public body, or other person by law.

1) Was the issue of possession addressed?

[26] Mr. Gondor submits that the only question raised was whether he was "in possession" of the Identified Records. He says that the chambers judge never answered that question and therefore committed an error of law. He says that while the judge stated the issue at paras. 5 and 9 of his reasons, he never responded to the question. The chambers judge said:

> [5] In this proceeding, the Attorney General maintains that it was Mr. Gondor who promulgated the personal information contained in the Identified Records without lawful authority. She asks me to infer that Mr. Gondor remained in possession of the Identified Records following his termination, and has them even today.

[27] At para. 9, the chambers judge noted that the only element of the five-part test that was seriously in issue was the third element — "the personal information must be in the possession of a person or entity not authorized by law to possess it."

[28] Mr. Gondor contends that the chambers judge did not refer to the only direct evidence of possession—that of Mr. Gondor, who denied he ever had possession of the Identified Records outside his office when he was employed by the District. I do not understand that submission, as the chambers judge extensively reviewed Mr. Gondor's evidence as follows:

> [6] Mr. Gondor denies the accusation. He denies that he copied any District records without authority or that he is in possession of records containing personal information as alleged by the petitioner. He acknowledges only that he copied the Identified Records in December 2021 and January 2022. He says that he was investigating networking problems and technical issues, and that he did not know or care what was in the records. Mr. Gondor says that he copied files he had downloaded onto a USB memory stick only for the purpose of testing the USB port on the laptop to see if the port was configured correctly. He says that he did not further copy or keep the data, and he left the memory stick with the District when his employment ended. He specifically denies under oath that he had anything to do with the burning of the DVDs containing the Identified Records. Mr. Gondor denies that he provided anything belonging to the District to Darian Gondor.

[29] Indeed, throughout the reasons, the chambers judge refers to, analyses and makes findings of credibility with respect to Mr. Gondor's evidence.

[30] The chambers judge narrowed the issue at para. 14, where he stated, "[t]he essential question is the credibility of Mr. Gondor's sworn denial that he retained,

promulgated, and remains in possession of the personal information he copied in December 2021 and January 2022." In other words, Mr. Gondor acknowledged that he was in possession of the Identified Records, however the issue was whether he was truthful when he denied continuing to be in possession after he left his employment in February 2022.

[31] The chambers judge set out detailed reasons for not accepting Mr. Gondor's evidence. His findings of fact are subject to a standard of review of palpable and overriding error. The credibility findings form the fourth ground of appeal and will be discussed more fully there.

[32] The chambers judge did not accept Mr. Gondor's evidence and concluded that he gave the documents to D.G. and either sent the records to the OIPC or gave them to the person who sent them to the OIPC. Implicit in drawing that conclusion is that the chambers judge found Mr. Gondor was "in possession" as defined in the *FIPPA*.

[33] The reasons are clear, when read as a whole, that the chambers judge engaged the only real issue in the case, addressed it extensively, and made conclusions that are only consistent with a finding that Mr. Gondor was in possession of the Identified Records after he left his employment with the District.

[34] The chambers judge noted that the case for the AGBC was circumstantial, as there was no direct evidence that Mr. Gondor was in possession of the Identified Records at the relevant time. He correctly, in my view, noted that "drawing inferences from circumstantial evidence is perfectly proper, so long as the inferences are persuasive and point towards the conclusion sought on a balance of probabilities, as they do in this case": at para. 42. There is, in my opinion, no error as alleged by Mr. Gondor and I would not give effect to this ground of appeal.

2) Did the chambers judge err in admitting the affidavits of Eric Berg and Trevor Hurst?

[35] Mr. Gondor submits that the chambers judge erred in admitting the affidavit of Eric Berg, which appended the KPMG report and parts of the affidavit of Trevor Hurst. Mr. Gondor submits that both affidavits consisted of expert evidence and

did not conform with the requirements of Rule 11-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 as the application was brought by way of a petition.

[36] Rule 16-1(6.1)(a) requires an expert report to conform with Rule 11-6 to be admissible in a petition proceeding:

> Rule 11-6
>
> Requirements for report
>
> (1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2(2) and must set out the following:
>
> (a) the expert's name, address, and area of expertise;
>
> (b) the expert's qualifications and employment and educational experience in the expert's area of expertise;
>
> (c) the instructions provided to the expert in relation to the proceeding;
>
> (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
>
> (e) the expert's opinion respecting those issues;
>
> (f) the expert's reasons for the expert's opinion, including
>
> (i) a description of the factual assumptions on which the opinion is based,
>
> (ii) a description of any research conducted by the expert that led the expert to form the opinion, and
>
> (iii) a list of every document, if any, relied on by the expert in forming the opinion.

[37] However, Rule 16-1(6.1)(b) allows for the judge to exercise discretion in a petition proceeding to admit a report that is non-compliant:

> (6.1) Unless the court otherwise orders, a party of record may tender a report setting out the opinion of an expert if
>
> (a) the report conforms with Rule 11-6 (1), or
>
> (b) the court orders that the report is admissible even though it does not conform with Rule 11-6 (1).

The KPMG report

[38] The KPMG report, referred to as the "Post-Mortem Assessment" was prepared in June 2022 at the request of the District. The report summarizes the observations and conclusions drawn by KPMG based on its review of the District's information systems. The chambers judge noted, at para. 3 of the preliminary

ruling (dated January 15, 2024), when the report was prepared, it was not to be considered an expert report and was only for internal use by the District. However, a number of months after the preparation of the report, Mr. Berg waived KPMG's objection to the use of the report in the petition proceeding and consented to its use by attaching the report to his affidavit. Mr. Berg stated, "I understand and agree with the content of the Post-Mortem Assessment." The chambers judge concluded that statement incorporated the substance of the report into Mr. Berg's evidence as though it were set out in the body of his affidavit.

[39] Despite the KPMG report not complying with the requirements of Rule 11-6, the chambers judge exercised his discretion under Rule 16-1(6.1)(b) as explained in the following extract from his reasons:

> [7] …I conclude that I should exercise my discretion to admit the report, for the following reasons:
>
> > a) The report is prepared by an independent person with professional expertise;
> >
> > b) The report is conservatively drawn, and the authors are at pains not to overstep what conclusions can fairly be taken from the analysis they have performed. That is apparent on the face of the report;
> >
> > c) The report has been available to the respondent since May 2023, when Mr. Berg's affidavit was sworn, before that, actually; and
> >
> > d) Mr. Gondor is himself possessed of expertise and is in a position to fairly critique the report and the conclusions drawn in it.
>
> [8] I am satisfied overall that it is in the interests of justice that the observations and conclusions set out in the report be available to the trier of fact.
>
> [9] I am not deciding that the report is necessarily to be taken as correct. It is open to the respondent to challenge it in argument or by placing other evidence to be weighed against it.

[40] Mr. Gondor argues that the judge erred in admitting the affidavit because of the non-compliance with Rule 11-6(1). He further submits that the exercise of discretion was unreasonable. He contends that the report is not independent because it was prepared under the District's direction. He further says that the report was not properly served in compliance with Rule 16-1(6.2)(a).

[41] The chambers judge concluded that Mr. Berg was an independent third-party with the appropriate qualifications. Although the report was not served,

Mr. Gondor had it for a considerable period of time and had the expertise to critique it. Mr. Gondor did not seek to cross-examine Mr. Berg (ruling in relation to the hybrid procedure at para. 21). Rule 16-1(6.2)(a) also provides the judge with discretion to admit expert evidence notwithstanding a failure to serve an expert report as required under subparagraphs (a) to (c).

[42] In my view, the chambers judge did not err in the exercise of his discretion to admit the KPMG report and the affidavit of Mr. Berg. He stated the basis for his conclusion, which is founded on the evidence.

Affidavit of Trevor Hurst

[43] Mr. Gondor takes issue with the admission of the following paragraphs from Mr. Hurst's affidavit:

> 9. As Chief Information Officer, I am familiar with the processes, approvals, and practicalities that would be associated with Alleged Task. As noted at paragraph 5 of this affidavit, above, I am informed by Mr. Fletcher and believe to be true that those processes, approvals and practicalities are the same now as they were at the relevant time.
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> …
>
> 22. The nature of the copy mechanisms used by Mr. Gondor is not consistent with any method or tool that the District would normally have used to analyse potential networking or technical issues. The District's IT Division has several tools it uses to analyze potential networking and technical issues, which Mr. Gondor would have had access to an IT Manager. None of those tools or processes would require involve copying files from the District's shared drive – whether to a laptop's hard drive, removable media such as a USB thumb drive, or any other location – let alone the thousands of Engineering Records copied by Mr. Gondor on December 23, 2021 and January 24, 2022.
>
> …
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> 24. The nature of the copy mechanisms used by Mr. Gondor is not consistent with task of determining whether a USB port is configured correctly or not. In order to test a USB port it would only be necessary to insert a USB thumb drive, verify that it connects and shows up in Windows explorer, and open up any file on that USB thumb drive to confirm that it is readable. If it is not working, Windows has a built-in troubleshooter in Device Settings to determine why not. Testing the configuration of a USB port would not require or involve the copying of files from the laptop's hard drive to USB thumb drive, let alone copying the Engineering Records Mr. Gondor downloaded to the laptop's hard drive on December 23, 2021 and January 24, 2022.

> …
>
> 26. By default, District records are saved to the Tempest System which generates a unique ID for that record and saves a link to the record and folder based on service type (e.g. development permits). Only the department that owns the record has access to these links. As such, the Tempest System does not allow for collaboration and sharing amongst departments.
>
> …
>
> 33. These three subfolders were not easily accessible off the main page or "root" of the District's shared drive. Rather, the subfolders were located amongst many other folders, subfolders and records on the shared drive. For example, this was the location of the "Bylaw Infractions" subfolder: \\FileServer2\\Corporate\ApprovedShared\Engineering\BylawInfractions. Further, by default the folders are listed in alphabetical order and the three subfolders containing the Engineering Records would not be contiguous.
>
> 34. This means that in order to access and copy the contents of the three subfolders containing the Engineering Records, Mr. Gondor would have had to first navigate from "FileServer2", to "Corporate", to "ApprovedShared", to "Engineering", and then specifically select and copy the three subfolders containing "Bylaw Infractions", Bylaw Photos", and "FOI", individually and amongst various interspersed subfolders. A simple indiscriminate drag and drop style of copying would not be possible given how the folders were structured.
>
> 35. I note also that KPMG's post-mortem assessment of the incident found that that [*sic*] the Engineering Records were copied twice, on December 23 2021 (between 10:38:27 to 10:41:25) and January 24, 2022 (from 9:48:54 to 10:07:12). This means that Mr. Gondor would have had to perform the exercise I have described above, navigating to, selecting, and copying the same three subfolders, twice over a month apart.

[44] Mr. Gondor submits that these paragraphs are clearly expert opinion that fails to comply with the rules noted above.

[45] In his ruling, the chambers judge addressed paras. 22 and 24 and struck portions of those paragraphs:

> [1] Concerning paragraphs 22 and 24 of the Affidavit of Trevor Hurst (the "Affidavit"), the objection is that these paragraphs are argumentative and provide opinion evidence. I think that it is important in these cases to examine closely the paragraphs.
>
> [2] At paragraph 22 of the Affidavit, I think the first sentence is an argument. It states:
>
>> The nature of the copy mechanisms used by Mr. Gondor is not consistent with any method or tool that the District would normally have used to analyze potential networking or technical issues.

I think that sentence should be struck.

[3] However, the next several sentences, I think, fall into a different category. They state:

> The District's IT Division has several tools it uses to analyze potential networking and technical issues, which Mr. Gondor would have had access to as an IT Manager. None of those tools or processes would require or involve copying files from the District's shared drive -- whether to a laptop's hard drive, removable media such as a USB thumb drive, or any other location...

And, I am going to stop there.

[4] I think these are assertions of fact pertaining to matters which could ordinarily be expected to be within the personal knowledge of a manager of IT services. I will not strike them.

[5] I will strike the concluding words of paragraph 22 of the Affidavit that state:

> … let alone the thousands of Engineering Records copied by Mr. Gondor on December 23, 2021 and January 24, 2022.

In my view, this is advocacy and should not be included in the Affidavit.

[6] I turn to paragraph 24 of the Affidavit where the first sentence states:

> The nature of the copy mechanisms used by Mr. Gondor is not consistent with the task of determining whether a USB port is configured correctly or not.

That, in my view, is argument and should be struck.

[7] The following sentences state:

> In order to test a USB port, it would only be necessary to insert a USB thumb drive, verify that it connects and shows up in Windows explorer, and open up any file on that USB thumb drive to confirm that it is readable. If it is not working, Windows has a built-in troubleshooter in Device Settings to determine why not.

I think those sentences are things that anybody in his job could be expected to know. I do not think they should be struck.

[8] The following sentence states:

> Testing the configuration of a USB port would not require or involve the copying of files from the laptop's hard drive to a USB thumb drive, let alone copying the Engineering Records Mr. Gondor downloaded to the laptop's hard drive on December 23, 2021 and January 24, 2022.

[9] From the first part of the sentence to the words "let alone", I think, is close to the line because it deals with a hypothetical situation. However, I think it is something that could fairly be known by and stated by a person in Mr. Hurst's position. The balance of the sentence beginning with the words "let alone," in my view, is purely argument and should be struck.

[46] After the ruling, Mr. Gondor abandoned his objection to para. 26, and in my view, his objection should not be considered for the first time on appeal.

[47] Mr. Gondor objected to paras. 33 and 34 on the basis that they were opinion evidence. The chambers judge concluded that para. 33 was admissible, explaining that, “the evidence is no different than that of a person in charge of a filing system who explains how the filing system is organized. I think he is simply describing how electronic files are organized within a shared drive.” The judge further reasoned that “paragraph 34 is a continuation of the description of the manner in which the files are organized on the shared drive in paragraph 33. I think some of the wording is, perhaps, unfortunate in that it is personalized to Mr. Gondor, but I think it simply—the information conveyed is simply appropriate information for a trier of fact.” The chambers judge struck para. 35.

[48] Several other paragraphs were objected to including para. 9, on the basis that Mr. Hurst did not have direct knowledge of the facts contained therein because he only started in his role at the District in September 2022. However, the objections, although not abandoned, seem to have been alleviated by the filing of an affidavit by Mr. Fletcher, who gave direct evidence of the facts.

[49] It is clear that the evidence that was admitted from the Hurst affidavit was considered by the chambers judge as factual statements a person in Mr. Hurst’s position would be able to make. It was not opinion evidence, and there was no error by the chambers judge in admitting the affidavit. Mr. Hurst and Mr. Fletcher testified before a court reporter (following the chamber judge’s ruling on the hybrid procedure). Mr. Gondor had the opportunity to challenge the factual evidence provided in the affidavits.

[50] I would not accede to this ground of appeal.

3) Did the chambers judge err in drawing an adverse inference against Mr. Gondor for failing to tender the evidence of D.G.?

[51] As noted above, D.G. sent documents that were part of the Identified Records to the District. The documents were not obtained by an FOI request. D.G. did not file an affidavit explaining where they obtained the Identified Records. Mr. Gondor did not explain why such an affidavit could not be obtained, other than he did not feel it was necessary. The fact that D.G. sent the documents to the

District was a strong piece of circumstantial evidence that Mr. Gondor had taken the Identified Records when he left his employment with the District and had given at least some of them to D.G.

[52] The chambers judge, in drawing an adverse inference against Mr. Gondor said this:

> [40] [D.G.] knows how [they] obtained the two Identified Records [they] sent the District on March 24, 2022. [They] have not sworn an affidavit. Mr. Gondor coaches [D.G.] in [their] business affairs, helped [them] draft freedom of information requests, has offered evidence on [their] behalf in a court proceeding, and had spoken with [D.G.] as recently as the evening before Mr. Gondor's attendance in court for cross-examination. During the cross-examination, Mr. Gondor was asked whether he had asked [D.G.] how [they] had obtained the documents. He said that he had not asked, because he was not involving [D.G.] in his personal affairs. If Mr. Gondor were truly innocent in this affair, I do not accept that he would be reluctant to ask [D.G.] for evidence that would tend to exonerate him.
>
> [41] I draw an adverse inference from the failure to obtain an affidavit from [D.G.] or explain why an affidavit could not be obtained; *Insurance Corporation of British Columbia v. Mehat,* 2018 BCCA 242 at paras. 85-89. [D.G.] is a witness with knowledge of the facts who, it can be assumed, would be willing to assist Mr. Gondor but not necessarily the Attorney General. I infer that [D.G.]'s evidence would not support Mr. Gondor's account of events.

[53] Thus, the chambers judge treated the failure of Mr. Gondor to call D.G. as an implied admission that D.G. would not support Mr. Gondor's evidence that he did not give at least some of the Identified Records to D.G.

Position of the Parties

[54] Mr. Gondor submits that the chambers judge erred in law in drawing an adverse inference as D.G. was available to be called as a witness by both parties, that there was other evidence overlooked by the chambers judge explaining other avenues for D.G. to obtain the Identified Records, and that Mr. Gondor offered a credible explanation for not calling D.G., in that he had had already provided evidence that he did not give any Identified Records to D.G., therefore D.G.'s evidence was unnecessary. Mr. Gondor stressed the point that he did not have "exclusive control" over D.G. as a witness, and thus it was an error to draw an adverse inference against him.

Standard of Review

[55] The standard of review with respect to a finding of an adverse inference is palpable and overriding error. See *Singh v. Reddy* 2019 BCCA 79 at paras. 19–22 and *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242:

> [90] The question of whether or not to draw an adverse inference is a question of fact owed deference on appeal**,** subject to there being a palpable and overriding error**:** *Benhaim* at paras. 36, 52.

Legal Framework

[56] In civil cases, an adverse inference may be drawn against a plaintiff who fails to call a material witness where privilege exists (often a doctor), no acceptable explanation is made for failing to call the witness, and, as a result of the privilege, the defendant has no access to the witness. In other words, the plaintiff has "exclusive control" over the witness. The adverse inference, if drawn, may amount to an implied admission of fact that the witness's evidence would not be favourable to the plaintiff, and may fill a gap in the evidence. However, those are not the only circumstances in which an adverse inference may be drawn, and an implied admission of fact is not the only conclusion that the trier of fact may draw from such an inference.

[57] I commence with a review of three of this Court's recent decisions. In *Mehat,* at para. 86, this Court set out the law in relation to the drawing of an adverse inference, quoting from Sopinka, Lederman & Bryant, *The Law of Evidence in Canada,* 3d ed. (Markham: LexisNexis, 2009), at 377:

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[58] In *Rain Coast Water Corp v. British Columbia*, 2019 BCCA 201 at paras. 70–71 (subsequently cited with approval in *British Columbia (Director of Civil Forfeiture v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA

70 at para. 181), Justice Dickson described the adverse inference concept this way:

> [70] Further, I note that an adverse inference may be drawn in a civil case where, without sufficient explanation, a party fails to call a witness over whom the party has exclusive control, who would presumably be willing to assist and who would be able to provide important supporting evidence. In such circumstances, failure to call the witness is akin to an admission that his or her evidence would harm the party's case or, at least, would not provide reasonably expected support. This principle is derived from ordinary logic and experience. Its application engages the discretion of the judge: *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316 at paras. 1–3; *Singh v. Reddy*, 2019 BCCA 79 at para. 8; *R. v. Jolivet*, 2000 SCC 29 at paras. 24–28.
>
> [71] Nevertheless, an adverse inference should not be drawn unless it is warranted in the circumstances. For this reason, a case-specific inquiry into the circumstances surrounding the failure to call a potential witness is required before an adverse inference is appropriately drawn. A judge should not draw an adverse inference where counsel has provided a reasonable explanation for failing to call a witness, such as a belief that the witness would not be reliable or that the testimony would be inferior to other available evidence. As with all inferences, if a judge decides to draw an adverse inference he or she must be precise about the nature of the inference that is drawn: *Parris v. Laidley*, 2012 ONCA 755 at para. 2; *Rohl* at paras. 1–3; *Calnen* at para. 113.

[59] In *Singh,* the Court noted the following:

> [10] The judge … began her analysis by stating, correctly, that the approach to drawing an adverse inference engages the court's discretion and requires the trier of fact to consider the following factors:
>
> a) Whether there is a legitimate explanation for failing to call the witness;
>
> b) Whether the witness is within the exclusive control of the party or is equally available to both parties; and
>
> c) Whether the witness has key evidence to provide or is the best person to provide the evidence in question.

[60] And at para. 25: "As long as the witness is available to be called by the other party, there can be no objection, in terms of trial fairness, to a court's declining to draw such an inference."

[61] As is apparent, those decisions refer to an adverse inference being drawn against a party for failing to call a witness over which the party had exclusive control or at least an unequal level of access. Importantly, the issue of availability

of the witness was not the central question in those cases. Those appeals were from the refusal of the trial judge to draw an adverse inference against a party for failing to call a witness. The Court was not required to examine the extent to which the witness was not "equally available to both parties," other than to confirm that circumstance as a factor.

[62] In *R. v. Jolivet*, 2000 SCC 29, the Court conducted a careful examination of the essence of the adverse inference. In that case, in its opening to the jury, the Crown stated that it intended to call a witness, Mr. Bourgade, who would corroborate the principal witness. The Crown later decided not to call Mr. Bourgade, and the defence wished to comment on that failure in his closing address to the jury, seeking an adverse inference against the Crown. The Court considered whether such a comment was justified and, if so, the precise nature of the adverse inference that could be drawn.

[63] Justice Binnie, writing for the Court, noted that the availability of an adverse inference is derived from ordinary logic and experience and is not designed to "punish" a party who exercises their right not to call a witness. Justice Binnie briefly set out the development of the rule:

> 25 The general rule developed in civil cases respecting adverse inferences from failure to tender a witness goes back at least to *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, where, at p. 65, Lord Mansfield stated:
>
>> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.
>
> 26 The principle applies in criminal cases, but with due regard to the division of responsibilities between the Crown and the defence, as explained below. It is subject to many conditions. The party against whom the adverse inference is sought may, for example, give a satisfactory explanation for the failure to call the witness as explained in *R. v. Rooke* (1988), 1988 CanLII 2946 (BC CA), 40 C.C.C. (3d) 484 (B.C.C.A.), at p. 513, quoting *Wigmore on Evidence* (Chadbourn rev. 1979), vol. 2, at § 290:
>
>> In any event, the party affected by the inference may of course *explain* it away by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for nonproduction. [Italics in original; underlining added.]
>
> 27 The party in question may have no special access to the potential witness. On the other hand, the "missing proof" may lie in the "peculiar

> power" of the party against whom the adverse inference is sought to be drawn: *Graves v. United States*, 150 U.S. 118 (1893), at p. 121. In the latter case there is a stronger basis for an adverse inference.
>
> 28 One must also be precise about the exact nature of the "adverse inference" sought to be drawn. In J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 297, § 6.321, it is pointed out that the failure to call evidence may, depending on the circumstances, amount "to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it" (emphasis added), as stated in the civil case of *Murray v. Saskatoon*, 1951 CanLII 202 (SK CA), [1952] 2 D.L.R. 499 (Sask. C.A.), at p. 506. The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference." Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony. Other jurisdictions also recognize that in many cases the most that can be inferred is that the testimony would not have been helpful to a party, not necessarily that it would have been adverse: *United States v. Hines*, 470 F.2d 225 (3rd Cir. 1972), at p. 230, *certiorari* denied, 410 U.S. 968 (1973); and the Australian cases of *Duke Group Ltd. (in Liquidation) v. Pilmer & Ors*, [1998] A.S.O.U. 6529 (QL), and *O'Donnell v. Reichard*, [1975] V.R. 916 (S.C.), at p. 929.

[64] The Court concluded that there was an insufficient basis for the jury to draw an adverse inference of "unfavourability" against the Crown, however, an adverse inference of "unhelpfulness" was a fair comment. Thus, even when the witness could be subpoenaed by the defence, the inference was permitted. Furthermore, the nature of the adverse inference that could be drawn was considered on a spectrum rather than solely the gravity of an implied admission. The Court related the degree of the control over the witness as a matter for consideration with respect to the strength of the inference to be drawn, as opposed to a mandatory requirement before the inference could be drawn. In *Jolivet*, either party could have called Mr. Bourgade.

[65] In *R. v. Ellis*, 2013 ONCA 9 at para. 46, Justice Watt noted that "…an adverse inference may be drawn against a party for failure to produce a witness reasonably assumed to be favourably disposed to that party". Exclusive control was not required.

[66] In *McCormick on Evidence*, placing a different interpretation on the meaning of "equally available," it states:

> If a witness is "equally available" to both parties, courts often state that no inference springs from the failure of either to call the witness. This statement can hardly be accurate, as the inference may be allowed when

> the witness could easily be called or subpoenaed by either party. What is meant instead is that when the witness would be as likely to be favorable to one party as the other, so no inference is proper…

Robert P. Mosteller, *McCormick on Evidence*, 9th ed (Toronto: Thomson Reuters, 2025) at 369.

[67] As noted above, adverse inferences for failing to call a witness are often drawn in cases where a party does not call their medical practitioner. In such cases, the evidence is protected by privilege and in the "exclusive control" of the party. However, there are cases, where the witness' availability will be subject to a subpoena by the opposing party, but it is not in the interests of the opposing party to call the witness. Often, they will not know what the witness will say under oath, the witness may be hostile, or the witness may not be considered trustworthy or credible. There are many circumstances where the opposing party may not wish to subpoena a witness who may be unfavourable.

[68] In my view, the case law does not support "exclusive control" over a witness as a mandatory requirement before an adverse inference may be drawn for failing to call a material witness. It may be drawn where the witness is more available to one party and would be expected to testify in that party's favour. See, for example, *Khan v. School District No. 39*, 2021 BCSC 49 at paras. 207–209.

[69] In summary, the decision to draw an adverse inference, and the nature or degree of any such inference, is part of the fact-finding process, based on a case-specific inquiry into all of the circumstances. It is founded on ordinary logic and experience. Whether an adverse inference may be drawn or the nature or degree of the adverse inference, if drawn, will vary depending, amongst other things, on the availability of the witness to both parties, and the explanation offered for not calling a material witness. The adverse inference may be an implied admission of fact that the witness's evidence would be contrary or at least not support the party's case (*Jolivet* at para. 28) to an inference of "unhelpfulness" (*Jolivet* at para. 30). There is a spectrum depending on the circumstances in each case. If the witness is in the "exclusive control" or "peculiar power" of the party, such as in cases where privilege prevents the other side from calling the witness, that may strengthen the basis for drawing an adverse inference (*Jolivet* at para. 27).

Application to this Case

[70] The chambers judge did not specifically address the degree of control Mr. Gondor had over D.G. in terms of obtaining their evidence, however, he did note the close and continuing relationship between Mr. Gondor and D.G.

[71] The evidence was that Mr. Gondor maintained close contact with D.G. and had been at their home the day before he was to be cross-examined. He assisted D.G. in making FOI requests, which parenthetically, related to the same addresses that appear in the Identified Records. There was a continuing relationship between father and child. Mr. Gondor testified that he did not call D.G. to testify because Mr. Gondor himself provided affirmative evidence that he did not give the documents to D.G. He did not want to involve D.G. in his personal matters. Despite their continuing contact, there was some tension because of D.G.'s personal life choices.

[72] It is clear, in my view, and in that of the chambers judge, that D.G. was more available as a witness to Mr. Gondor than to the AGBC.

[73] Mr. Gondor also points to other evidence that potentially explained how D.G. came into possession of the documents and not referred to by the chambers judge when drawing the adverse inference, found in Affidavit #1 of Angila Bains.

[74] Mr. Gondor says that the documents were available to others and were being disseminated in the community. In particular, Mr. Gondor tendered a legal assistant affidavit enclosing a collection of emails referencing or alluding to at least some of the Identified Records, derived from sources other than D.G. Mr. Gondor pointed to these emails as a basis for an inference that the Identified Records were available to others and were being disseminated in the community.

[75] He submits that the chambers judge did not refer to that evidence when considering whether to draw the adverse inference.

[76] The chambers judge did not specifically refer to the so-called other explanation set out in the affidavit of Ms. Bains. However, he noted, in reasons at para. 39, that there was no other plausible explanation for the Identified Records to be made public. A judge is not required to refer to every piece of evidence. It

was apparent that the chambers judge considered that the explanation offered was not plausible. No error is demonstrated in that finding.

[77] In the circumstances of this case, there was, in my view, no error by the chambers judge by drawing an adverse inference. He summarized the circumstances that explained why D.G. was not someone who was "equally available" to both parties. He did not accept Mr. Gondor's explanation for not calling D.G. as a witness. Drawing an adverse inference is a highly factual case specific inquiry, and unless a palpable and overriding error is shown, will not be interfered with on appeal.

[78] There was one person who could give direct and unequivocal evidence as to how D.G. obtained some of the Identified Records. D.G. did not testify or file an affidavit, and it was not an error for the chambers judge to draw an adverse inference against Mr. Gondor for failing to tender D.G.'s evidence.

[79] I would not give effect to this ground of appeal.

4) Did the chambers judge err with respect to his findings of credibility?

[80] Mr. Gondor submits that the chambers judge committed a number of errors in his reasoning that led him to reject Mr. Gondor's evidence. The standard of review with respect to findings of fact, including credibility, is "palpable and overriding error." It is useful to reiterate the meaning of that standard. As noted in *Benhaim v. St-Germain*, 2016 SCC 48:

> [38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
>> Palpable and overriding error is a highly deferential standard of review . . .. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[81] As noted above, and repeated for convenience, the chambers judge identified the following inconsistencies and difficulties with Mr. Gondor's evidence:

i. He did not create a "ticket," as required by District policy, for the copying of the personal information and his explanations for why he did not have a ticket changed between his affidavit and cross-examination, and within cross-examination.

ii. His explanation for why he copied the files onto a USB was to check if the USB port was functioning correctly. He said that he chose those files because he needed a large volume of material that would take an hour to copy, but records show that the copying took just three minutes.

iii. He insisted that the shared drive (where the material was copied from) should never have contained personal information, a position that "strains credulity" for the manager of IT.

iv. He claimed that it was a "mere coincidence" that the folders he selected to copy happened to correspond to information related to D.G.'s ongoing disputes with neighbours.

v. There was no supporting evidence for his claim that the original copying of the files to his computer was related to a task assigned to him by someone in Council Chambers.

[82] Mr. Gondor submits that his evidence that he did not need a ticket and never used the ticketing system was not contradicted. Mr. Gondor says the chambers judge erred when he failed to refer to the evidence of Mr. Fletcher, who said that the ticketing system was not yet in play.

[83] This submission misstates Mr. Fletcher's evidence. His evidence was that a *revised* ticketing system was not in play. The system of ticketing existed when Mr. Gondor worked for the District. The evidence, other than that of Mr. Gondor, was that everyone who was copying and moving engineering records would require a ticket.

[84] Mr. Gondor raises points that he submits the chambers judge overlooked in relation to the ticketing process, whether the information on the DVDs could have

come from another source and provided insufficient reasons.

[85] The AGBC submits that Mr. Gondor is asking this Court to reweigh the evidence and substitute our opinion on the credibility of Mr. Gondor.

[86] The chambers judge gave comprehensive reasons for not accepting Mr. Gondor's denial. Mr. Gondor has not pointed to any sustainable palpable and overriding error.

[87] The chambers judge had the benefit of seeing and hearing Mr. Gondor testify in the hybrid proceeding. In my view, there is no basis shown on which I would overturn the chambers judge's findings with respect to the credibility of Mr. Gondor, or the conclusion that he drew that Mr. Gondor had possession of the records outside of his employment, and that he was responsible for providing some of the Identified Records to D.G. and either directly or indirectly, for the information found on the DVDs sent to the OIPC.

[88] I would not give effect to this ground of appeal.

<u>Conclusion</u>

[89] In my opinion, Mr. Gondor has shown no error on the part of the chambers judge.

[90] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Riley"

I AGREE:

"The Honourable Justice MacNaughton"