

**Citation:** *Macro Properties v Bell Aliant and Vistacare*, 2025 NBKB 191

**IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK**

**TRIAL DIVISION**

**JUDICIAL DISTRICT OF MONCTON**

**MC-545-2020**

**BETWEEN:**

**MACRO PROPERTIES INC.,**

**PLAINTIFF**

(Applicant on Motion #1 and Respondent on Motion #2)

- and -

**BELL ALIANT,**

**DEFENDANT**

(Respondent on Motion #1 and Applicant on Motion #2)

- and -

**VISTACARE COMMUNICATION SERVICES OF  
CANADA INC.**

**THIRD PARTY**

(Respondent on Motion #1 and Respondent on Motion #2)

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**DECISION**

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**BEFORE:** Justice Maya Hamou

**AT:** Moncton, New Brunswick

**DATE OF HEARING:** April 23, 2025

**DATE OF DECISION:** August 22, 2025

**APPEARANCES:** Emmy Chiasson and Bryan P. Morris, counsel for the Plaintiff,  
Macro Properties Inc.

Edward W. Keyes, K.C. and John P. Morrissy, counsel for the  
Defendant, Bell Aliant

Julie Young, counsel for the Third Party, Vistacare  
Communication Services of Canada Inc.

## OVERVIEW

### Factual Background

1. The Plaintiff, Macro Properties Inc., owned two properties at 5 and 9 Green Valley Drive in Sussex, New Brunswick (the “Properties”). Following a major rain event on January 24, 2019, the Properties flooded and required remediation services.
2. The Plaintiff suggests the point of entry for the rainwater was underground service ducts utilized by the Defendant, Bell Aliant, and asserts the Defendant’s employees, agents or subcontractors failed to seal the underground service ducts allowing flood water to enter the Properties, allegedly in violation of the Canadian Electrical Code.

### Procedural History

3. The Plaintiff filed a Notice of Action with Statement of Claim Attached on September 17, 2020, against the Defendant. The Defendant filed a Statement of Defence and Third Party Claim against Vistacare Communication Services of Canada Inc. on December 2, 2020, and subsequently, the Third Party filed a Third Party Defence on September 28, 2021.
4. The Plaintiff then filed a motion seeking summary judgment and alternatively seeking summary judgment on the issue of liability (Original Motion #1). The Plaintiff’s Original Motion #1 was filed on November 20, 2024, along with the Affidavit of Robert Baird Vale.
5. A few months later, on January 15, 2025, the Plaintiff filed an Amended Motion seeking the additional relief of leave to adduce expert opinion evidence by way of the Affidavit of Robert Baird Vale. Additionally, the Affidavit of Christian Landry was also filed (Amended Motion #1).
6. On March 14, 2025, the Defendant filed a motion seeking to strike the Affidavit of Robert Baird Vale in its entirety or paragraphs thereof, seeking the denial of the request for leave to admit the Affidavit of Robert Baird Vale on the Amended Motion and seeking a further and better Affidavit of Documents from the Plaintiff (Motion #2). In addition, the Defendant filed the Affidavit of Edward Keyes, K.C.
7. On the same day, March 14, 2025, the Third Party filed a motion seeking summary judgment along with the Affidavit of Keith Bennett (Motion #3).
8. The Plaintiff subsequently filed a further amended motion, on April 8, 2025, referencing additional documents, namely the Affidavit of Tony Goddard, the Amended Affidavit of Robert

Baird Vale and the Amended Affidavit of Tony Goddard (Further Amended Notice of Motion #1).

9. The parties, through case management conference calls with the Court, requested the hearing of Motion #2 prior to hearing Motion #1, the Plaintiff's Motion for Summary Judgment and Motion #3, the Third Party's Motion for Summary Judgment. The Court's decision on Motion #2 could potentially narrow the scope of issues to be determined in the two other motions.
10. The Third Party attended the hearing on Motion #2 and supported the Defendant's position.

## **ISSUES**

11. Should the Court consider the Amended Affidavit of Robert Baird Vale, the Amended Affidavit of Tony Goddard and the Further Amended Notice of Motion in the context of Motion #2 despite their delayed filing and service?
12. Should the Amended Affidavit of Robert Baird Vale be struck in its entirety or alternatively, should portions of the Amended Affidavit of Robert Baird Vale, including Exhibits B and C, be struck? Should leave be granted to admit the Amended Affidavit of Robert Baird Vale into evidence pursuant to Rule 22.02(3)?
13. Should the Plaintiff be required to file and serve a further and better Affidavit of Documents?

## **ANALYSIS**

### **Consideration of Amended Affidavits and the Further Amended Notice of Motion**

14. The Defendant argues that the Amended Affidavit of Robert Baird Vale, the Amended Affidavit of Tony Goddard and the Further Amended Notice of Motion (Motion #1) are not properly before the Court as the materials were served without prior notice and without leave of the Court two weeks prior to the hearing. The Defendant suggests the Court should not consider these documents.
15. The Defendant suggests the Plaintiff's decision to file amended materials without notice, without leave and outside of established timelines, in the context of a motion for summary judgment, constitutes an abuse of process. The Defendant argues that the late filing of these materials has hampered its ability to put its best foot forward in the summary judgment motions as directed by the Court of Appeal (*O'Toole v Peterson*, 2018 NBCA 8).

16. The New Brunswick Court of Appeal did address the need for a merits-based determination and the granting of necessary adjournments in *Village of Saint-François de Madawaska v Nadeau Poultry Farm Limited and Maple Lodge Farms Limited*, 2011 NBCA 55 at paragraph 40. This approach remains unchanged despite the introduction of the new Rule 22.

[40] In the result, however, the rejection of Maple Lodge's affidavit evidence has not prevented them from successfully resisting the Village's motion. The issues raised by the cross-appeal are therefore moot. That state of affairs acknowledged, I do not doubt the motion judge would have heard the parties on the appropriateness of giving Maple Lodge an opportunity to fill any evidential lacuna if he had concluded the rejection of Maple Lodge's affidavit evidence compelled summary judgment. In that regard, I would simply point out that, in *Cannon v. Lange*, at paragraph 23, **the Court urged consideration be given to all reasonable accommodations susceptible of promoting a merits-based determination of Rule 22 motions. In appropriate circumstances, those accommodations include but are not limited to adjournments required for the production of pivotal evidence.**

[Emphasis added]

17. The Plaintiff relies on Rules 1.02.1, 1.03(2) and 2.02 of the *Rules of Court* in support of its request to consider the Further Amended Notice of Motion, the Amended Affidavit of Robert Baird Vale and the Amended Affidavit of Tony Goddard.

1.02.1 In applying these rules, the court shall make orders and give directions that are proportionate to what is at stake in the proceeding and the importance and complexity of the issues.

1.03(2) These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits.

2.02 A procedural error, including failure to comply with these rules or with the procedure prescribed by an Act for the conduct of a proceeding, shall be treated as an irregularity and shall not render the proceeding a nullity, and all necessary amendments shall be permitted or other relief granted at any stage in the proceeding, upon proper terms, to secure the just determination of the matters in dispute between the parties. In particular, the Court shall not set aside any proceeding because it out to have been commenced by an originating process other than the one employed.

18. Rule 39.04 of the *Rules of Court* allows the service of affidavits up to four days before the hearing and the Court is granted wide discretion in deciding whether to allow filing outside the prescribed timelines (*Coates v Downing et al.*, 2019 NBQB 145 at paragraph 11 and *Chiasson v Thebeau*, 2009 NBCA 64 at paragraphs 9 to 12). However, in this case, the Amended Affidavits and Further Amended Notice of Motion filed by the Plaintiff are not affidavits in

response to Motion #2, rather these documents were the very object of Motion #2. The Plaintiff's amended filings sought to cure technical deficiencies raised by Motion #2 rather than make substantive amendments. In this case, the party seeking to cure deficiencies with its affidavits and notice of motion at the eleventh hour is the moving party on Motion #1, the Plaintiff's Motion for Summary Judgment.

19. The Court has a wide discretion in determining questions of this nature. In this case, it is in the interest of justice to determine the questions arising from Motion #2 by allowing the Plaintiff to put its best foot forward, albeit late. Though the delay in filing the Amended Affidavits and the Further Amended Notice of Motion has forced the Defendant to prepare its Brief and arguments in a short turnaround, this prejudice is compensable by costs.
20. Therefore, for the purpose of Motion #2, the Court will consider the Amended Affidavit of Robert Baird Vale, the Amended Affidavit of Tony Goddard, and the Further Amended Notice of Motion.

### **Striking of the Amended Affidavit of Robert Baird Vale**

21. The Defendant seeks to strike out the Amended Affidavit of Robert Baird Vale or alternatively strike out paragraphs of the Amended Affidavit of Robert Baird Vale filed in support of the Plaintiff's Further Amended Notice of Motion.
22. The Defendant addressed the two lines of objection to the admissibility of the Amended Affidavit of Robert Baird Vale: first, based on non-compliance with the *Rules of Court*, and second, based on non-admissible expert opinion evidence.

### ***Compliance with Rules of Court***

23. First, the Defendant argues the Amended Affidavit of Robert Baird Vale should be struck for failing to comply with the *Rules of Court* (Rule 27.09 of the *Rules of Court*).

#### 27.09 Striking Out a Pleading or Other Document

The court may strike out any pleading, or other document, or any part thereof, at any time, with or without leave to amend, upon such terms as may be just, on the ground that it

- (a) may prejudice, embarrass or delay the fair trial of the action,
- (b) is scandalous, frivolous or vexatious,

- (c) is an abuse of the process of the court,
- (d) is a contempt of court, or
- (e) is not in conformity with the Rules of Court.

24. More particularly, the Defendant suggests the Amended Affidavit of Robert Baird Vale fails to comply with Rule 4.05(2) and Rule 39.01(4) of the *Rules of Court* as the Amended Affidavit of Robert Baird Vale contains vague references to information and photographs. The Plaintiff on the other hand, relies on these same *Rules of Court*, suggesting the Affidavit is compliant.

4.05(2) Every affidavit shall be confined to a statement of facts within the personal knowledge of the deponent, except as provided otherwise in these rules.

39.01(4) Subject to section 34 of the Judicature Act, an affidavit for use on a motion need not be confined to statements of fact within the personal knowledge of the deponent, but may contain statements as to the deponent's information and belief, if the source of the deponent's information and the deponent's belief in the statements are specified in the affidavit.

25. Paragraph 5 of the Amended Affidavit of Robert Baird Vale indicates "where information was provided to me by Tony Goddard, I do verily believe it to be true". The Defendant asserts that this statement is overly broad and is not tied to any of the information in the Amended Affidavit or the attached Exhibits. Similarly, the Amended Affidavit of Tony Goddard sets out items of information provided to Robert Baird Vale however, the information should be referenced in the Amended Affidavit of Robert Baird Vale. The information referenced in paragraph 5 is factual in nature and not within the personal knowledge of Robert Baird Vale.
26. Exhibit B to the Amended Affidavit of Robert Baird Vale outlines an investigation report completed upon review of a video, photographs and a site inspection of the Properties. The report then relates information about rain events, water levels and floods, and reaches a conclusion on the origin of the water infiltration to the Properties. The report also references the sealing of the utility pipes. There is no analysis provided in the report, merely a deduction on the source of the water infiltration.
27. In maintaining that the Amended Affidavit of Robert Baird Vale should be admissible on the Further Amended Notice of Motion, the Plaintiff suggests the Amended Affidavit of Robert Baird Vale contains fact evidence and lay opinion evidence. The Defendant maintains that the Amended Affidavit of Robert Baird Vale contains untested hearsay and factual assertions without identifying a source or establishing a proper evidentiary foundation.

28. The Court does not accept the Plaintiff's argument that the Amended Affidavit of Robert Baird Vale contains lay opinion evidence; Robert Baird Vale is presented as an expert witness.
29. The Court agrees that there are deficiencies in identifying the source of the information in the Amended Affidavit of Robert Baird Vale. Further, the reports appended as Exhibits to the Amended Affidavit of Robert Baird Vale are replete with unsourced information.
30. These deficiencies cause the Court significant concern regarding the reliability and accuracy of the reported information in the Amended Affidavit of Robert Baird Vale.

### ***Expert Evidence***

31. Secondly, the Defendant opposes the admissibility of the Amended Affidavit of Robert Baird Vale as inadmissible opinion evidence. The Plaintiff, in the Further Amended Notice of Motion, requests that the Amended Affidavit of Robert Baird Vale be deemed admissible as expert evidence under Rule 22.02(3) of the *Rules of Court*.
32. Rule 22.02(3) of the *Rules of Court* expands admissible affidavit evidence in summary judgment motions to allow opinion evidence of experts that would be allowed to give evidence while testifying in court.

22.02(3) With leave of the court, an affidavit for use on motion for summary judgment may contain opinion evidence if the deponent would be allowed to give that evidence while testifying in court.
33. To determine the admissibility of expert opinion evidence, the Court is guided by the principles of *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 (see also *Doucet v Leblanc & Steeves et al.*, 2020 NBQB 254). First, the Court must assess whether the threshold requirements of admissibility are met: (a) the evidence must be logically relevant, (b) the evidence must be necessary to assist the trier of fact, (c) the evidence must not be subject to an exclusionary rule, (d) the expert must be properly qualified, including being willing and able to fulfil their duty to the Court, and (e) for opinion evidence based on novel science or science used for a novel purpose, the underlying science must be reliable. Secondly, as gatekeeper, the judge must determine whether the benefit of admitting the evidence outweighs its potential risk.
34. On the question of relevance, the Defendant suggests the report and correspondence appended to the Amended Affidavit of Robert Baird Vale are not relevant. More particularly, the Defendant argues the Canadian Electrical Code references were not carefully reviewed

and do not apply in the circumstances. The Plaintiff suggests Robert Baird Vale can address the source of the water, the seal on the pipe, and the construction of the pipe, and thus constitutes relevant evidence. The Court agrees with the Plaintiff and concludes that the evidence presented in the Amended Affidavit of Robert Baird Vale is relevant to the issue in dispute, namely the source of the water and the cause of the water infiltration to the Properties.

35. On the question of necessity, the Defendant argues the Amended Affidavit of Robert Baird Vale does not assist the Court in understanding an issue. The report appended to the Amended Affidavit of Robert Baird Vale contained no analysis or reference to specialised knowledge to assist the Court in arriving at a conclusion. There is no analysis, testing or methodology provided to assist the Court in understanding a technical issue in dispute. The report appended to the Amended Affidavit of Robert Baird Vale contains conclusions reached by reviewing a video, photographs and a site visit. The Court agrees with the Defendant on this point; the Amended Affidavit of Robert Baird Vale does not provide information necessary to the Court.
36. On the question of qualification, the Defendant does not dispute the qualification of Robert Baird Vale as an engineer. However, the Defendant questions the experience of Robert Baird Vale to provide expert evidence on the source of the water infiltration. On that point, the Plaintiff points to Robert Baird Vale's experience in "structural building condition assessment". The one-page *curriculum vitae* appended to the Amended Affidavit of Robert Baird Vale does not satisfy the Court that Robert Baird Vale has experience in the assessment of water infiltration sources.
37. On the question of gatekeeping, the Defendant submits the Amended Affidavit of Robert Baird Vale contains significant risks to the administration of justice if it is admitted as evidence. The Defendant suggests the admission of the Amended Affidavit of Robert Baird Vale would result in prejudice to the Defendant, compromising the fairness of the summary judgment process and undermining the procedural safeguards intended to ensure the reliability of expert evidence. The Defendant maintains these concerns are compounded in the context of a motion for summary judgment where the party is precluded from cross-examining the witness except where the Court grants permission.
38. Considering its gatekeeping role, the Court is equally concerned with the admissibility of the Amended Affidavit of Robert Baird Vale as expert opinion evidence. The question of the source of the water infiltration and construction standards are at the heart of the dispute between the parties. The evidence outlined in the Amended Affidavit of Robert Baird Vale

addresses these questions directly but without scientific rigour, analysis, or detail. Robert Baird Vale conducted a site visit and reviewed a video and photographs provided to him by Tony Goddard and reached a conclusion which any member of the public could reach on the probable source of water infiltration to the Properties. With respect to the references to the Canadian Electrical Code, correspondence appended to the Amended Affidavit of Robert Baird Vale simply references a section of the Canadian Electrical Code without further analysis or context. Without further context or information, this evidence is of limited value.

39. While the evidence of Robert Baird Vale could constitute expert opinion evidence, if presented in a different form or presented at trial, in its current form, the Court does not permit the admissibility of the Amended Affidavit of Robert Baird Vale as expert opinion evidence, under Rule 22.02(3) of the *Rules of Court*, in the context of Motion #1.

#### **Further and Better Affidavits**

40. The Defendant seeks a further and better Affidavit of Documents from the Plaintiff based on documents and materials referenced in the Amended Affidavit of Robert Baird Vale:

- a. Video footage provided by the property manager, Mr. Goddard, which Mr. Vale claims to have reviewed;
- b. Photo sheet attached as Exhibit E to the Crawford Affidavit; and
- c. Canadian Electrical Code, referenced and excerpted.

41. The Defendant objects to the filing of these materials in an amended affidavit considering the prejudice to the Defendant at having been deprived of an opportunity to review, test, or challenge the material. The Defendant maintains that any reference to these undisclosed materials should be excluded from consideration. The Defendant relies on Rule 31.08 of the *Rules of Court* to preclude the Plaintiff from using the documents.

#### 31.08 Effect of Failure to Disclosure or Produce for Inspection

(1) Where a party fails to disclose a document in his Affidavit of Documents or fails to produce a document for inspection in compliance with this rule or an order made thereunder, he may not use such document at the trial, except by leave of the trial judge.

42. The Defendant also relies on the comments of the New Brunswick Court of Appeal in *Whelton v Mercier*, 2004 NBCA 83, at paragraph 26 which suggests that a motion for summary

judgment should be dismissed with costs where the moving party has not complied with the disclosure requirements of Rule 31.

43. The Plaintiff argues that the video and the photo sheet form part of information previously disclosed to the Defendant and Third Party and do not constitute new information.
44. The Plaintiff acknowledges its disclosure obligation under *Whelton v Mercier*, 2004 NBCA 83 and under Rule 52.01(4) of the *Rules of Court* which requires the production for inspection of the expert's file contents if a party seeks to call the expert witness at trial. The Plaintiff maintains that as the matter is not yet at the trial stage, the file materials had not been disclosed but will be shortly.

(4) Where a report has been served under paragraph (1) or paragraph (2), on motion the court may order that any records, documents or other materials on which the report is based be produced for inspection and copying.

45. The Court agrees that the Plaintiff has failed to disclose the materials referenced in the Amended Affidavit of Robert Baird Vale. Despite the similarity of the documents to other documents previously disclosed, the materials appended to the Amended Affidavit of Robert Baird Vale were not disclosed to the Defendant and Third Party and must be disclosed prior to the hearing of Motion #1.
46. With respect to the Canadian Electrical Code, the Court agrees with the Plaintiff that the Canadian Electrical Code is included by reference in legislation. As noted by the Plaintiff, the duty to comply with the Canadian Electrical Code arises from section 3 of the *Electrical Installation and Inspection Act*, RSNB 2011, c 144, which requires conformity with all standards prescribed by regulation.

3(1) All electrical installations and lightning protection systems and all electrical work performed in the Province shall conform to the standards prescribed by regulation.

3(2) No person shall perform electrical work except in accordance with this Act and the regulations.

47. Further, the Canadian Electrical Code is referenced in the *General Regulation – Electrical Installation and Inspection Act*.

“Code” means the CSA Standard C22.1-21, Canadian Electrical Code, Part I, (25th Edition), Safety Standard for Electrical Installations, including all errata, with the exception of Rule 6-302(1)(c) and with the following modifications:

[...]

48. The Court accepts that pursuant to subsection 70(1) of the *Evidence Act*, judicial notice shall be taken of both the *Electrical Installation and Inspection Act*, RSNB 2011, c 144 and the *General Regulation – Electrical Installation and Inspection Act*. However, while the Code is defined in the *General Regulation – Electrical Installation and Inspection Act*, it remains that the Code itself is not part of the legislation and judicial notice of its contents cannot be taken. Relevant portions of the Code which are referenced should form part of the Plaintiff’s Affidavit of Documents.
49. The Plaintiff is required to comply with its disclosure obligations and provide the Defendant and Third Party with a sworn Amended Affidavit of Documents prior to the hearing of Motion #1.

## **DISPOSITION**

50. The Court allows consideration of the Amended Affidavit of Robert Baird Vale, the Amended Affidavit of Tony Goddard and the Further Amended Notice of Motion in the context of Motion #2, despite the delay in filing and serving of the documents.
51. The Court does not permit the admissibility of the Amended Affidavit of Robert Baird Vale as expert opinion evidence, under Rule 22.02(3) of the *Rules of Court*, in the context of Motion #1.
52. The Plaintiff is required to comply with its disclosure obligations and provide the Defendant and Third Party with a sworn Amended Affidavit of Documents prior to the hearing of Motion #1.
53. Considering the Plaintiff’s late filing of the Further Amended Notice of Motion and the Amended Affidavit of Robert Baird Vale and Amended Affidavit of Tony Goddard, the Plaintiff must bear the costs consequences of this Motion and, considering the success of the Defendant on the Motion, the Plaintiff shall bear costs of \$2,000 on Motion #2 payable to the Defendant.

54. The Plaintiff and the Third Party shall advise the Clerk within 30 days of the date of issuance of this decision should a hearing date be required for the hearing of Motion #1 and Motion #3.

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Justice Maya Hamou  
Court of King's Bench of New Brunswick