

Court of King's Bench of Alberta

Citation: National Bank of Canada v Sunterra Food Corporation, 2025 ABKB 708

Date: 20251203
Docket: 2501 06120
Registry: Calgary

Between:

2501 06120

National Bank of Canada

Applicant

- and -

Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., Sunterra Enterprises Inc., Ray Price, Debbie Uffelman and Craig Thompson

Respondents

**Endorsement
of the
Honourable Justice Michael J. Lema**

I. Introduction

[1] Should witnesses cross-examined on affidavits and others examined under Rule 6.8 be compelled to answer objected-to questions, provide taken-under-advisement-but-declined and refused undertakings and, as applicable, undergo further examinations on such answers and undertakings?

[2] Per Sunterra, the answers are yes. The consent procedural order governing the lead-up steps to applications set for December 4 and 5, 2025 is silent on these steps. However, in Sunterra's view, the steps are implicitly recognized and, in any case, required for fairness and effective truth-seeking.

[3] Per Compeer, the answers are no. The procedural order was intended to provide certainty and discipline, it worked equally in Sunterra's favour when its witnesses objected to questions and declined undertakings (i.e. with Compeer not seeking to compel answers), and other factors dictate moving directly to the upcoming applications i.e. with no further lead-up steps.

[4] As well, should late-filed affidavits from Compeer be allowed? Sunterra is opposed.

[5] I find that the amended consent procedural order governs and that, properly interpreted, it precludes both Sunterra's "compel" applications here and Compeer's additional affidavits, as explained below.

II. Background

[6] In July 2025, Sunterra and National Bank of Canada, on one hand, and Sunterra and Compeer Financial PCA, on the other, agreed to separate procedural orders outlining the lead-up steps (with timing) for applications (set for December 4 and 5) to determine the nature and quantum of each creditor's claim in Sunterra's CCAA proceeding.

[7] The latter order contemplated, among other steps, Sunterra cross-examining named Compeer affiants and examining two other Compeer officials, to be selected by Sunterra, for examination on any affidavits supplied by them or, if none, under Rule 6.8

[8] Sunterra cross-examined the two affiants, with various questions objected to and various undertaking requests either taken under advisement (and later declined) or refused.

[9] It also selected two additional Compeer officials, namely, its president and its chief risk officer.

[10] Compeer objected to those selections, saying neither executive had any relevant and material evidence or, in any case, any that was not privileged.

[11] Sunterra applied for and obtained an order obliging the named executives to undergo Rule 6.8 examination (with neither providing an affidavit): *National Bank of Canada v Sunterra Food Corporation*, 2025 ABKB 606.

[12] The examinations were held on November 13, 2025, again with various questions objected to and undertakings taken under advisement (and later declined) or refused.

[13] On December 1, Sunterra applied for a compelling order (seeking the requested information and opening the door to follow-up examinations) as well as an order striking three affidavits recently advanced by Compeer, which are late per the procedural order.

[14] This is my decision on those issues.

III. Procedural orders

[15] Here is the original Sunterra-Compeer consent procedural order (key segment), granted July 24, 2025 (key provisions for current application bolded):

Litigation Plan

1. This litigation plan may be amended only by written agreement between the parties to Court of King's Bench Action No. 2501-06120 (the "Action"), or by Court Order.

2. The Defendants in the Action shall file and serve their defences to the Statement of Claim filed in the Action and any affidavits in response to Compeer's application for declaratory relief and summary judgment in the Action filed on June 23, 2025 in these proceedings (the "Application") by September 5 2025 and **shall advise Compeer Financial, PCA ("Compeer") what two additional current employees of Compeer, if any, it wishes to examine. Such examinations shall occur pursuant to Rule 6.8 of the Alberta Rules of Court unless the additional witnesses file Affidavits.**

3. Each of Ray Price, Art Price, Debbie Uffelman and Craig Thompson (collectively, the "Sunterra Witnesses") shall attend for examination, by no later than October 24, 2025. Such examination shall be limited to 3 days to be apportioned by Compeer unless the parties otherwise agree or the Court directs. Such examinations shall occur pursuant to Rule 6.6 if they file affidavits or Rule 6.8 if they do not of the Alberta Rules of Court.

4. **The Defendants shall conduct any examination of Nicholas Rue, Steve Grosland and the additional witness(es) identified in accordance with paragraph 2, if any, by no later than October 24, 2025.** Such examination shall be limited to 3 days to be apportioned by counsel for the Defendants unless the parties otherwise agree or the Court directs.

5. Any amendments to the parties to the Application, shall be made by October 27, 2025.

6. **Any undertaking responses shall be provided by October 30, 2025.**

7. Compeer shall file its brief by November 10, 2025 and the Defendants shall file their briefs by November 24, 2025.

8. The Application shall proceed to judgement on a date fixed by the Court.

9. **The parties to the Action are at liberty and are hereby authorized and empowered to apply to the Court for assistance in carrying out the terms of this plan and may seek to vary this plan on not less than seven day's notice.**

[16] Messrs. Rue and Grosland of Compeer were cross-examined on October 21 and 22, respectively.

[17] On November 13, the Sunterra-Compeer consent procedural order was amended and restated by the following consent procedural order (key changes bolded):

Litigation Plan

1. This litigation plan may be amended only by written agreement between the parties to Court of King's Bench Action No. 2503-10998 (the "Action"), or by Court Order.

2. The Defendants in the Action shall file and serve their defences to the Statement of Claim filed in the Action and any affidavits in response to Compeer's application for declaratory relief and summary judgment in the Action filed on June 23, 2025 in these proceedings (the "Application") by September 5 2025 and shall advise Compeer Financial, PCA ("Compeer") what two additional

current employees of Compeer, if any, it wishes to examine. Such examinations shall occur pursuant to Rule 6.8 of the Alberta *Rules of Court* unless the additional witnesses file Affidavits.

3. Each of Ray Price, Art Price, Debbie Uffelman and Craig Thompson (collectively, the "Sunterra Witnesses") shall attend for examination, by no later than October 24, 2025. Such examination shall be limited to 3 days to be apportioned by Compeer unless the parties otherwise agree or the Court directs. Such examinations shall occur pursuant to Rule 6.6 if they file affidavits or Rule 6.8 if they do not of the Alberta *Rules of Court*.

4. The Defendants shall conduct any examination of Nicholas Rue, Steve Grosland and the additional witness(es) identified in accordance with paragraph 2, if any, by no later than **November 13, 2025**. Such examination shall be limited to 3 days to be apportioned by counsel for the Defendants unless the parties otherwise agree or the Court directs.

5. Any amendments to the parties to the Application, shall be made by October 27, 2025.

6. Any undertaking responses shall be provided by **November 3, 2025**.

7. Compeer shall file its brief by **November 19, 2025** and the Defendants shall file their briefs by **November 28, 2025**.

8. The Application shall proceed to judgment on **December 4 and 5, 2025**.

9. The parties to the Action are at liberty and are hereby authorized and empowered to apply to the Court for assistance in carrying out the terms of this plan and may seek to vary this plan on not less than seven day's notice.\

IV. Analysis

A. Affiants

[18] I start with cross-examinations of Messrs. Rue and Grosland.

[19] The key factor here is that both cross-examinations had been held (on October 21 and 22) when the procedural order was amended.

[20] Sunterra knew, when agreeing to the updated order, that both witnesses had (via counsel) objected to questions and taken undertakings under advisement and refused others. And it had received (on November 3) Compeer's undertaking responses, with some taken-under-advisements declined and refused undertakings still refused. (Note: in its brief (para 8), Sunterra stated it received the undertaking responses on October 30. Receipt that date versus on November 3 makes no difference in these circumstances.)

[21] Aware of those objections and refusals and aware of those responses, Sunterra agreed to the amended procedural order, intended (I infer) to outline all lead-up steps for the December 4 and 5 applications, with no contemplation of a "compel" application.

[22] In contrast to the NBC-Sunterra consent procedural order, featuring this provision:

If any Party wishes to compel a response to a question asked at questioning to which objection is taken, or an undertaking that is requested and refused, or for a further and better response to an undertaking response, that Party must apply to Justice Lema to compel the response within 7 days of the Questioning or undertaking reply (as the case may be).

[23] Further, the amended Compeer-Sunterra procedural order expressly addresses undertakings, via paragraph 6, referring to an *already-passed deadline* (November 3), expressly signalling that no further undertaking responses were required.

[24] Another express signal here is the amended order's continued reference to "examinations" of Messrs. Rue and Grosland (para 4) and the November 13 deadline for the completion of all examinations of Compeer witnesses by that date. The amended order did not provide for any *re-examination* or *continued examination* of either named witness or, in any case, contemplate that any such extended examinations occur after the November 13 deadline, which was the very day of the amended order.

[25] Further, the original and amended procedural orders capped the collective examinations of Compeer witnesses at three days, which (if I understand correctly) were exhausted by the cross-examinations of Messrs. Rue and Grosland on October 21 and 22 and by those of Messrs. Moore and Wagner on November 13 (as discussed further below).

[26] On the fairness dimension, I accept Compeer's point that the street runs both ways here. As I understand it, Sunterra objected to some questions and declined to provide some requested undertakings during Compeer's examination of its witnesses, with no sign that Compeer sought to compel answers and information, whether formally (e.g. by applying to amend the procedural order to add a "compel" application) or informally (e.g. asking Sunterra if it would answer and provide voluntarily).

[27] Finally, Sunterra itself sought strict compliance with the procedural order in the debate over the examinations of Messrs. Moore and Wagner i.e. whether it should be read literally, in allowing Sunterra to examine *any* Compeer employee i.e. including its top executives.

[28] In my decision finding for Sunterra in that debate (2025 ABKB 606), I found that the parties had devoted "painstaking attention to mapping out the steps to the December hearings" (para 13) and that:

[t]he order was intended to provide certainty (via identifying the steps allowed en route to the December hearings) and discipline (i.e. the sequencing and strict timing of those steps) in the lead-up to the December hearing.

The parties left some procedural rights on the side when agreeing to a streamlined and intended-to-be-straightforward process. ... [paras 16 and 17]

[29] Where litigation parties jointly construct (and amend) a litigation plan, with awareness of circumstances now invoked (by Sunterra) as grounds for unilaterally sought changes i.e. where one party emphasizes fairness through flexibility, and the other emphasizes fairness through certainty (i.e. through adherence to the agreed-on plan), it is difficult conclude that the one call to fairness outweighs the other.

[30] I conclude on the Rue and Grosland examinations that, by committing to the amended litigation plan in the circumstances here (i.e. the state of the Rue and Grosland examinations,

with outstanding objections and declined and refused undertakings), Sunterra effectively waived its rights to apply for a “compel” order.

[31] If I am wrong in that conclusion, I would have sustained the first contested objection in the Rue examination (Compeer correct to say “asked and answered”) and overruled the second and third contested objections. In my view, Sunterra’s questions -- “what was the purpose of [a certain] meeting?” and “were any notes taken during [that] meeting?” – did not call for the disclosure of privileged information, instead for information that might go to whether privilege existed but not be privileged itself.

[32] Undertakings-wise, I accept Compeer’s position that the undertakings requested of Mr. Rue, all asking him to obtain information from other Compeer personnel (and not including Messrs. Grosland, Moore, and Wagner), effectively amounted to expanding the circle of witnesses beyond the four permitted by the consent procedural order.

[33] As for the Grosland examination, I would have overruled the first contested objection (on the same basis as above), sustained the second objection (as inquiring after what appears to be the substance of discussions with (in-house) legal counsel for the purpose of obtaining legal advice), overruled the third one (“purpose of ... [discussions]” not privileged in and of itself), and sustained the fourth (not relevant and material what opinion this witness formed of the matters in question), fifth (not relevant and material what previous dealings the witness had with the in-house counsel), and sixth (witness’s own determination of whether matter going to litigation not relevant or material) objections.

[34] Undertakings-wise, on the request that Mr. Grosland to “review [his] records and ... provide any notes or any emails that were obtained in the course of his investigation”, which Compeer objected to for privilege and “not relevant or material” reasons, I would asked the parties to make further submissions on the law governing privilege and internal corporate investigations and, in particular, the privileged character (or not) of the investigation materials themselves.

B. Rule 6.8 witnesses

[35] I turn to contested objections and undertakings in the Rule 6.8 examinations of Messrs. Moore and Wagner.

[36] Applying the same analysis as above (i.e. in gauging the impact of the consent procedural order on the parties’ procedural rights), I find that Sunterra effectively waived the right to apply for a “compel” order on this front as well.

[37] Knowing on November 13 (the date of the amended procedural order) that examinations of Messrs. Moore and Wagner would be occurring, and had to occur by, that very day, and recognizing (I infer) the material possibility (from the cross-examinations of Messrs. Rue and Grosland, which covered at least some of the same ground) that Compeer would object to some questions, take some undertaking requests under advisement (and later decline them), and refuse other undertaking requests, in those examinations, and yet not building into the amended order a right to seek a “compel” order (or at least not achieving that right in the negotiations with Compeer producing that order), I find that Sunterra contented itself with the opportunity to examine the selected-by-them Compeer officials without any follow-up rights.

[38] Especially when contrasting the absence of a “compel” right to the presence of such a right in the NBC and Sunterra order.

[39] Here I also disagree with Sunterra’s submission that Compeer stymied these examinations to the point they should be characterized as a complete frustration of Sunterra’s examination right in the first place.

[40] The examinations covered various “open” subjects (i.e. via unobjected-to questions), recognizing the relative limited role these executives played in the Compeer-Sunterra dealings i.e. with both having had no involvement until February 2025 at the earliest and their involvement consisting, to some degree, of explorations of Compeer’s legal options with in-house and external counsel.

[41] If I am wrong on Sunterra having elected to proceed without a “compel” right and that it should be held to that election, I would have overruled the first three contested objections in the examination of Mr. Moore (finding that questions about the existence, purpose, and triggering event(s) of the investigation were proper i.e. as not encroaching into the (possibly privileged) zone of the investigation materials themselves) and sustained the objection to the question about possible regulatory breaches (as not relevant or material).

[42] As for the contested objections in the examination of Mr. Wagner, I would have sustained the first objection (re the U.S. regulator – not relevant or material), overruled the second objection (Sunterra allowed to ask about the nature of the “required paperwork”), sustained the third and fourth objections (more U.S. regulatory questions – not relevant or material), sustained the fifth objection (witness’s awareness of facts supporting a Compeer claim as against NBC not relevant or material), sustained the sixth objection (witness’s knowledge of “the obligations exist[ing] between lending institutions with respect to advising of material risks to other lending institutions” not relevant or material and also seeking an opinion on a legal question), and overruled the final four objections (Sunterra allowed to ask what materials were prepared for Compeer’s board, who prepared them, why they were prepared, and (again) what was prepared i.e. without getting into the (possibly) privileged contents of such materials).

[43] As for undertakings sought from Messrs. Moore and Wagner, the parties were divided on whether undertakings are properly requested of Rule 6.8 witnesses.

[44] Per Compeer, while the rule is silent on that point, Alberta case law – in particular, as gathered, analyzed, and summarized by Feasby J. in *Great North Equipment Inc v Penney*, 2024 ABKB 391 – holds that undertakings cannot be sought of such witnesses: see paragraphs 15-20 of that decision.

[45] Per Sunterra, whatever the approach for Rule 6.8 witnesses who are strangers to the proceedings in question (the focus of Feasby J.’s analysis), that approach does not apply to Messrs. Moore and Wagner. They are admittedly not parties to the Compeer-Sunterra litigation, but they represent or are the prime movers of Compeer, which is a (central) party.

[46] Moreover, per Sunterra, the consent procedural order’s reference to examinations under Rule 6.8 means only its technical rules, as was discussed in my decision in 2025 ABKB 606 examining the original Compeer-Sunterra consent procedural order:

The reasons above are generally applicable here and are even more compelling with no reference to Rule 5.17 in the scheduling order, instead one to **Rule 6.8**, which in the present context (i.e. the way in which that rule is folded into this scheduling order) does **not require any independent assessment of the proposed witnesses’ likely relevant and material evidence** (if any).

Given the overall structure of the procedural order, I find that **that reference to Rule 6.8 is purely to invoke its procedural mechanics (including associated Rules 6.16 to 6.20) i.e. not to subject a given selection to independent “likelihood of relevant and material information” scrutiny.** [paras 23 and 24] [emphasis added]

[47] Compeer is right on both aspects.

[48] First, whether or not Rule 6.8 strictly applies to these two witnesses (i.e. whether orders would have been granted under that rule compelling them to submit to examinations), Sunterra (and Compeer) invoked Rule 6.8 to provide the procedural mechanics for these examinations.

[49] In other words, even if the “strangers versus centrally involved persons” distinction were accepted, the parties still chose to invoke the Rule’s procedural mechanics.

[50] Second, Feasby J.’s reference to “strangers” was simply to non-parties. While Messrs. Moore and Wagner are key executives with Compeer and arguably centrally involved in directing Compeer’s course in the current litigation, they are not themselves parties.

[51] Third, Sunterra did not point to any Alberta case holding that Rule 6.8 witnesses are susceptible to undertaking requests.

[52] Fourth, I regard susceptibility to undertakings (or not) as part of the “procedural mechanics” of Rule 6.8 examinations i.e. as part of the surrounding set of rules governing how such examinations are conducted.

[53] Fifth, Sunterra did not point to evidence of having obliged either Rule 6.8 witness to bring any records to the appointment for questioning, as it might have done per Rule 6.16(1)(b), which might (in theory) have made for more fruitful examinations.

[54] Sixth, in its current application, Sunterra did not invoke Rule 6.16(3), which governs the resolution of disputes over mechanical aspects of Rule 6.8 examinations, including “any related matters.”

[55] Seventh, I interpret the consent procedural order’s reference to Rule 6.8 as including associated case law, here including *Great North Equipment v Penney*.

[56] Eighth, in other circumstances, with more time, the “solution” to the unavailability of undertakings may be to arrange a follow-up examination. Here, with the tight timelines, that solution was apparently not available.

[57] Ninth, as noted above, the amended procedural order expressly adverted to undertakings, albeit signalling that none could be pursued i.e. via the express reference on undertakings being provided by an already-passed date.

[58] Accordingly, and to summarize here, Compeer properly declined all undertaking requests made of Messrs. Moore and Wagner.

[59] If I am wrong on this aspect, I would have directed undertaking responses for all those sought from Mr. Moore, which factor out privileged material and with Compeer not raising privilege grounds for objecting (instead only its Rule 6.8 and “no operating undertaking deadline” reasons – both accepted as explained above).

[60] As for those sought from Mr. Wagner, I would have directed undertaking responses for the first, second, fourth, and fifth requests (albeit with privileged material to be excluded from all

four) and ruled the third request out of bounds (U.S. regulatory proceedings not relevant or material here).

C. Affidavits

[61] Consistent with the above conclusions on the impact of the consent procedural order, I accept Sunterra's position (affidavits too late and not otherwise contemplated by the procedural order) and accordingly direct their striking from the application materials for December 4 and 5.

D. Closing note

[62] I thank all counsel for excellent written and oral submissions on these points.

Heard on December 1, 2025.

Dated at Calgary, Alberta on December 3, 2025.

Michael J. Lema
J.C.K.B.A.

Appearances:

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