

Court of King's Bench of Alberta

Citation: Fort McMurray Airport Authority v 994552 NWT Ltd, 2026 ABKB 228

Date: 20260325
Docket: 2003 16036
Registry: Edmonton

Between:

Fort McMurray Airport Authority

Plaintiff

- and -

994552 NWT Ltd and Nova Hotel Properties Ltd

Defendants

**Memorandum of Decision
of
Applications Judge B.W. Summers**

Introduction

[1] In this Special Chambers application before me the essence of the Defendants' applications is dismissal of the action under r. 3.68(4), or alternatively, under r 4.33 of Alberta *Rules of Court*. Central to the success of those alternative applications is consideration of rules 5.10 and 5.16, which deal with production of documents.

Procedural History

[2] The Plaintiff commenced this action on October 21, 2020. The Statement of Claim claims damages for breach of a lease by the Defendants. The Plaintiff is the landlord. The Defendant 994552 NWT Ltd is the original lessee and the Defendant Nova Hotel Properties Ltd is the assignee under the lease.

[3] The Defendants filed a Statement of Defense and Counterclaim on November 12, 2020.

[4] The Plaintiff filed its Defense to Counterclaim on January 12, 2021.

[5] The Plaintiff provided its Affidavit of Records (“AOR”) on March 11, 2021 (“Plaintiff’s Original AOR”) and the Defendants provided their AOR on May 18, 2021.

[6] Some questioning for discovery occurred in 2021 and 2022, including the Defendants’ questioning of the Plaintiff’s corporate representative Denean Robinson (“Robinson”) on July 21, 2021 and the Plaintiff’s former president Roelof-Jan Steenstra (“Steenstra”) on April 7, 2022.

[7] Both Robinson and Steenstra were asked for undertakings. Robinson provided answers to undertakings on May 16, 2022.

[8] The Defendants’ president was questioned for discovery on May 18, 2022. The Defendants assert that this was the last significant advance of this action.

[9] On May 14, 2025, counsel for the Plaintiff sent to counsel for the Defendants the following:

- (a) Amended Answers to Undertakings of Robinson;
- (b) Answers to Undertakings of Steenstra;
- (c) A Supplementary Affidavit of Records (“Plaintiff’s SAOR”).

The Plaintiff asserts that these three things that occurred four days before the expiry of the three year anniversary of the last step (on May 18, 2022) constitute a significant advance of the action.

The Applications

[10] The Defendants apply to the Court for the following:

- (a) An order striking the pleadings of the Plaintiff under r 3.68(4)(b)(ii) for failure to comply with the disclosure requirements of r 5.10;
- (b) Alternatively, an order under r 5.16(b) prohibiting the Plaintiff from using any previously undisclosed records as described in the Plaintiff’s SAOR; and
- (c) Further, or in the alternative, dismissal of the action pursuant to r 4.33(2); and
- (d) Costs of the application and action.

Analysis

Rule 3.68(4)

[11] Rule 3.68(4) provides:

- (4) The Court may
 - (a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;
 - (b) strike out all or any pleadings if a party without sufficient cause does not
 - (i) serve an affidavit of records in accordance with rule 5.5,

- (ii) comply with rule 5.10, or
- (iii) comply with an order under rule 5.11.

[12] The Defendants seek to strike the Plaintiff's pleadings on the basis that the Plaintiff did not comply with r 5.10.

Rule 5.10

[13] Rule 5.10 states:

5.10 If, after a party has served an affidavit of records on other parties, the first party finds, creates or obtains control of a relevant and material record not previously disclosed, the first party must

- (a) immediately give notice of it to each of the other parties,
- (b) written request and on payment of reasonable copying expenses, supply each of the other parties with a copy of it, and
- (c) prior to scheduling a date for trial, serve a supplementary affidavit of records on each of the other parties.

[14] The Defendants acknowledge that the Plaintiff complied with parts (b) and (c) of r 5.10, but argue that the Plaintiff failed to comply with part (a) of the rule.

[15] The Plaintiffs SAOR had 139 records which had not been provided in the Plaintiff's Original AOR ("New Records"). The Defendants note that 86 of these records have dates that are earlier than the date of the Plaintiff's Original AOR and the balance have dates after it. Some of the New Records were apparently sent to counsel for the Defendants in 2021 and 2022 from counsel for the Plaintiff.

[16] The Defendants say that since the Plaintiff has not provided any evidence or explanation as to when these 139 documents were created or located, the Court should infer that the New Records were found, created or came into the control of the Plaintiff on the date of the document.

[17] In response, the Plaintiff says that it did provide notice as documents were discovered or became known to be relevant and points to letters its counsel sent to counsel for the Defendants dated July 16, 2021, May 13, 2022 and May 16, 2022. The Plaintiff also says that some of the remaining New Records relate to the re-lease of the leased lands and sale of the Annex Building in February 2024 ("2024 Documents") and bundling of these documents with other documents was not an intention to withhold.

[18] The Defendants note that even the 2024 Documents relating to the re-lease of the leased lands and sale of the Annex Building were produced 15 months after their creation. They challenge the genuineness of the Plaintiff's production as it was done only four days before the drop-dead date.

[19] The Defendants say that the Plaintiff's failure to disclose some documents for almost three years, and at least for 15 months with respect to the 2024 Documents is certainly a failure to notify the Defendants of these documents *immediately*.

[20] Counsel for the Plaintiff says that the purpose of r 5.10 is to prevent ambush at trial, or an adjournment of a pending trial and the meaning of the word *immediately* should be considered with that in mind. He adds that the rules should not be used to create technical traps, or create impossible standards, but should be interpreted to achieve fairness.

[21] Counsel for the Defendants asserts that the Court should give such meaning to the word *immediately* in r 5.10 that is in keeping with the foundational rules (including r 1.2) which provide that the rules are intended to be used “to facilitate the quickest means of resolving a claim at the least expense”.

[22] To my knowledge, the only case in Alberta that has considered an application to strike pleadings pursuant to r 3.68(4) on the basis that the respondent has failed to comply with r 5.10 is the decision of Chief Justice Wittmann in *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2. That case is distinguishable from this case before me on the facts, including that it involved arguments that the respondent Nova had breached case management court orders regarding production of documents. However, I note that the Chief Justice stated (at paragraph 36):

It is plain and obvious from the ordinary meaning of ARC 3.68(4)(b) that the applicant must prove that a party failed, “without sufficient cause”, to do an act it is otherwise required to do. As stated earlier, getting past the “technical requirements” referred to by Nova, in the context of this matter, Nova must have failed, without sufficient cause, to disclose a relevant and material record in a **timely** way, or at all, or pursuant to one of the Case Management Orders of this Court. (emphasis added)

[23] How the Court interprets the word *immediately* in r 5.10 must be determined within the context of the case. For example, if a party discovered a new document shortly before a trial, *immediate* will likely be given a literal interpretation, like as soon as humanly possible. A literal meaning would not be appropriate when the discovery process stretches over years.

[24] I asked counsel for the Defendants if he was aware of any case where this court has struck pleadings under r 3.68(4) for a failure to give notice *immediately* to the other party of documents not previously disclosed, pursuant to r 5.10(a). He candidly admitted he had found none but suggested that the remedy would be appropriate in this case.

[25] I respectfully disagree with counsel for the Defendants that this case is an appropriate one for the Court to strike the Plaintiff’s pleadings under r 3.68(4) on the basis that the Plaintiff has not complied with r 5.10(a). Even if the Plaintiff failed to provide notice to the Defendants of new documents in a timely fashion, as contemplated by r 5.10(a), striking the Plaintiff’s pleadings is a disproportionate remedy. I venture to say that may be the reason there is apparently no prior case where it has been done.

[26] During oral argument, I pointed out to counsel for the Defendants that r 5.12 also provides a sanction of a monetary penalty for breach of r 5.10. That sanction would be much more appropriate in a situation such as this.

[27] I dismiss the Defendants' application to strike the Plaintiff's pleadings for a failure to comply with r 5.10.

Rule 5.16

[28] I will turn to the alternative application under r 5.16. That rule states:

5.16 A party who

- (a) does not disclose a relevant and material record in an affidavit of records referred to in rule 5.6,
- (b) does not disclose as required by rule 5.10 a relevant and material record that is found, created or obtained, or
- (c) does not produce a relevant and material record in accordance with a valid request to do so under rule 5.14

may not afterwards use the record in evidence in the action unless the parties otherwise agree or the Court otherwise orders on the basis that there was a sufficient reason for the failure to disclose.

[29] In considering this application before me, it is important to note that the Plaintiff has complied with r 5.10 (b) and (c). That is the Plaintiff has provided to the Defendants copies of the New Records and the SAOR.

[30] I further note that there is no prejudice to the Defendants. There is no trial by ambush. There is no adjournment of the trial. The only prejudice is that this action is taking far too long to reach a conclusion.

[31] An order that the Plaintiff is not able to use the New Records, including the 2024 Documents is also a disproportionate remedy. The 2024 Documents dealing with the re-lease of the leased lands and sale of the Annex Building are apparently very important as they deal with the issue of damages and mitigation of damages.

[32] The Defendants' application under r 5.16 barring the Plaintiff from using the New Records is dismissed.

Rule 4.33

[33] This brings me to the Defendants' third alternative application. That application is to dismiss the Plaintiff's action under r 4.33. This rule requires me to dismiss this action if there has not been a significant advance in a three year period.

[34] This application turns on whether the steps taken by Plaintiff on May 14, 2025 constitute a significant advance. As previously noted, on that date the Plaintiff provided further answers to undertakings of Robinson, answers to undertakings of Steenstra and the New Records. I understand there were 63 answers to undertakings provided in addition to the 139 New Records.

[35] A great deal of the parties' briefs and oral argument involved a detailed discussion of precedent cases and the principles to be applied with respect to r 4.33 applications. Although I

have undertaken a detailed analysis of the law in considering this application, I need not discuss it in this Memorandum of Decision as a result of an admission made by counsel for the Defendants.

[36] After some discussion in argument regarding the importance of the 2024 Documents regarding re-release of the leased lands and sale of the Annex Building, I asked counsel for the Defendants whether his r 4.33 application hinged upon the success of the Defendants' application to exclude further use of the New Records and in particular use of the 2024 Documents under r 5.16. He candidly admitted that it did.

[37] Since I have ruled that the Defendants' application to stop the Plaintiff from using the New Records, including the 2024 Documents is dismissed, the Defendants' application for dismissal for long delay under r 4.33 must be dismissed.

[38] However, I do want to say by way of *obiter dictum* that I also conducted a functional analysis with respect to the New Records in the SAOR and the answers to undertakings provided by the Plaintiff on May 14, 2025 and conclude that they constitute a significant advance of the action considering their nature, value, importance and quality. Furthermore, even though the May 14, 2025 production occurred only four days before the drop-dead date, I am satisfied that these steps were genuinely provided to move the action forward in a meaningful way. The steps taken were not just "housekeeping".

Costs

[39] Although the Plaintiff was completely successful in defeating the Defendants' applications, I am only going to award ½ Schedule C costs to the Plaintiff. I have reduced the costs as an admonition to the Plaintiff for its tardiness in moving the action and in recognition that if the Defendants had asked for a monetary sanction under r 5.12, I would have granted one.

Heard on the 11th day of March, 2026.

Dated at the City of Edmonton, Alberta this 25th day of March, 2026.

B.W. Summers
A.J.C.K.B.A.

Appearances:

Rod Wasylyshyn
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for the Plaintiff

Robert O'Neill KC
DLA Piper Inc
for the Defendants