



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Skinner's Plumbing & Heating Ltd. v. Western Petroleum Newfoundland Limited*, 2026 NLSC 47

Date: April 22, 2026

Docket: 202101G3195

BETWEEN:

**SKINNER'S PLUMBING & HEATING
LTD.**

PLAINTIFF

AND:

**WESTERN PETROLEUM
NEWFOUNDLAND LIMITED**

DEFENDANT

AND:

**WESTERN PETROLEUM
NEWFOUNDLAND LIMITED**

PLAINTIFF BY
COUNTERCLAIM

AND:

**SKINNER'S PLUMBING & HEATING
LTD.**

FIRST DEFENDANT BY
COUNTERCLAIM

AND:

DEREK SKINNER SR.

SECOND DEFENDANT BY
COUNTERCLAIM

AND:

BARBARA SKINNER

THIRD DEFENDANT BY
COUNTERCLAIM

Before: Justice Justin S.C. Mellor

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: November 17 -18, 2025

Summary:

Skinner's Plumbing & Heating Limited (SPHL) objects to Western Petroleum Newfoundland Limited (WPNL) putting into evidence six documents to prove damages from an alleged breach of contract. It asserts that the Documents were not properly disclosed prior to trial. It also objects to WPNL's employees testifying to the alleged damages on the basis that this amounts to an improper attempt to adduce opinion evidence without meeting the necessary requirements.

Held: Four of the Documents are inadmissible because they were not disclosed in accordance with the *Rules of Court, 1986*, and the Court is not willing to exercise its discretion to admit them. WPNL's employees are not permitted to give their observations about the data in the inadmissible documents as this would subvert the ruling on the admissibility of the Documents and permit WPNL to do indirectly that which it cannot do directly.

Appearances:

David P. Goodland, K.C.
and Edward Lewis

Appearing on behalf of the Plaintiff, and
the First, Second and Third Defendants by
Counterclaim

J. Alexander Templeton
and Adam N. Foote

Appearing on behalf of the Defendant, and
the Plaintiff by Counterclaim

Authorities Cited:

CASES CONSIDERED: *Carter v. Municipal Construction Ltd.* (2001), 204 Nfld. & P.E.I.R. 112, 614 A.P.R. 112 (Nfld. S.C. (T.D.)); *R. v. Scheel*, [1978]

O.J. No. 888, 42 C.C.C. (2d) 31 (C.A.); *R. v. Kanagasivam*, 2016 ONSC 2250; *O’Kane v. Lillqvist-O’Kane*, 2021 ABQB 925; *Bonnell v. Durnford* (1998), 161 Nfld. & P.E.I.R. 290, 497 A.P.R. 290 (Nfld. S.C. (T.D.)); *Stone v. Ellerman*, 2009 BCCA 294; *Health Quest Inc. v. Arizona Heat Inc.*, 2018 NLSC 64; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37; *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249; *Ehresman v. The King*, 2025 TCC 78; *R. v. Ajise*, 2018 ONCA 494

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D; *Alberta Rules of Court*, Alta. Reg. 124/2010

TEXTS CONSIDERED: Benjamin Teng, “Loss Counterfactuals” (2026) *Oxford Journal of Legal Studies* Vol. 00, No. 0 pp. 1–28 <https://doi.org/10.1093/ojls/gqag001>

REASONS FOR JUDGMENT

MELLOR, J.:

INTRODUCTION

[1] Skinner’s Plumbing & Heating Limited (SPHL) objects to Western Petroleum Newfoundland Limited (WPNL) putting into evidence six documents (Impugned Documents) to prove damages from an alleged breach of contract. It asserts that the Impugned Documents were not properly disclosed prior to trial. It also objects to WPNL’s employees testifying to the alleged damages on the basis that it is an improper attempt to adduce opinion evidence without meeting the necessary requirements.

[2] I have determined that four out of six of the Impugned Documents are inadmissible because they were not disclosed prior to trial in accordance with the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the “Rules”). To admit these Documents when the case is near its end, would amount to trial by

ambush. The prejudice SPHL will suffer cannot be remedied by adjourning the trial and awarding costs.

[3] I am not prepared to allow WPNL's witnesses to opine on the information contained in the Documents. Allowing such testimony would be highly prejudicial and would subvert my ruling on the admissibility of the Documents. In essence, it would permit WPNL to do indirectly that which it cannot do directly.

BACKGROUND

[4] SPHL is a small family-owned company. Prior to October 2018, it repaired furnaces and delivered petroleum. Derek Skinner Sr. was responsible for furnace repairs, and his wife Barbara ran the fuel delivery part of the business. Their son Derek Skinner Jr. was a full-time employee of the company but was not an owner. He assisted his father with furnace repairs and occasionally drove the oil delivery trucks. The entire enterprise operated out of the basement of the Skinners' family home.

[5] Barbara Skinner had great difficulty finding reliable employees to deliver oil and diesel to her customers. By 2018, she had had enough of the petroleum delivery business and approached WPNL about purchasing that part of the business. On 1 October 2018, SPHL's fuel delivery operations were sold to WPNL.

[6] Under the terms of the sale, SPHL was to provide: delivery trucks, its customer and business records, along with the goodwill and the personal property of the petroleum delivery business. In exchange, WPNL was to pay SPHL \$125,000 in cash, \$196,054.29 for the accounts receivable and \$1,274,307.84 in "future management fees". The management fees were to be paid out in 48 monthly installments of \$23,085.29. The Skinners did not actually perform any form of monthly management work for WPNL. Its CFO testified that the payments were deliberately characterized as management fees, so WPNL could deduct them on its taxes as an operating expense rather than a capital expenditure.

[7] In addition to the Asset Purchase Agreement (APA), SPHL and the Skinners signed a “Non-Competition and Confidentiality Agreement”. This agreement prohibited the company and its owners from competing with WPNL in the fuel distribution business or assisting others to do the same. Under the terms of the Non-Competition Agreement, SPHL was forbidden from sharing customer information with WPNL’s competitors.

[8] Shortly after the transaction closed, Derek Skinner Jr. and two partners started a new oil delivery company called Reliable Fuels. Once WPNL became aware of this, it alerted the Skinners, who immediately terminated Derek Skinner Jr.’s employment with SPHL.

[9] In the months and years that followed, WPNL discovered that it was not retaining SPHL’s customers at the rate it had anticipated. WPNL suspected that the customers were being poached by Derek Skinner Jr. and his partners at Reliable Fuels.

[10] On 21 April 2021, WPNL wrote to the Skinners alleging that they had violated the Non-Competition Agreement by deliberately giving the customer contact list to Derek Skinner Jr. and Reliable Fuels. WPNL immediately ceased paying the monthly future management fee.

[11] SPHL commenced an action against WPNL for breach of contract, and WPNL responded, counterclaiming against both SPHL and the Skinners.

[12] In its Pre-trial Conference Brief, WPNL stated that it intended to file “actuarial evidence” to prove its damages. On 25 April 2024, Justice Chaytor ordered that WPNL had to provide SPHL any actuarial report “no later than 60 days prior to the Settlement Conference”. No actuarial report concerning damages was ever filed. On 12 December 2024, the matter was scheduled for a six-day trial beginning on 31 March 2025.

[13] Six weeks before the trial commenced, WPNL indicated to SPHL that it intended to prove its damages by comparing the customer retention rates from the

SPHL acquisition with those it achieved when it purchased another fuel delivery company called Bluewater.

[14] The trial commenced on 31 March 2025. It is now close to completion, and WPNL intends to call its Controller, Vanessa Whiteway to give evidence regarding damages. On 10 September 2025, WPNL wrote to SPHL indicating that as part of Ms. Whiteway's testimony it intended to put the following six Documents into evidence:

- **Document A - Bluewater Actual Volumes Achieved** - This is a list of Bluewater customers and the volumes those customers purchased after the acquisition by WPNL.
- **Document B - Summary of WPNL's Expected Profits** - "Information Prepared by WPNL - Analysis of Skinner's Impact".
- **Document C - SPHL Customer List** - This is a reordered customer list.
- **Document D - SPHL Actual Volumes Achieved** - This is a list of SPHL customers and the volumes the customers purchased after the acquisition of SPHL by WPNL (2018-2024).
- **Document E - Expected Profits to February 2025** - This Document provides the sales in dollars, the average price, average cost, profit and unit margin for both furnace oil and diesel monthly for the period between October 2018 and July 2025. It also provides the expected profits and an estimate of damages in dollars.
- **Document F - Expected Profits to July 2025** - This is an updated version of Document E.

[15] SPHL objects to the admissibility of the Impugned Documents, and to WPNL officials opining on the company's damages using Bluewater as a comparator. It claims that the Impugned Documents and the related testimony are an attempt to put into evidence expert opinion without meeting the required procedural and threshold requirements. The essence of SPHL's argument is that WPNL failed to commission

an expert report before trial, and it is now seeking to put this evidence in through its own employees. It claims that this amounts to trial by ambush.

[16] WPNL argues that Ms. Whiteway is a “litigant witness with expertise” and as such, is permitted to testify about what she observed regarding WPNL’s commercial data. It argues that “... since Ms. Whiteway was available for pre-trial questioning, formal advance notice of her opinions, if any, or her evidence, including the Impugned Evidence, was not needed”. WPNL’s position is that “... Skinners’ failure to appropriately prepare for trial by fully availing of pre-trial process can hardly be attributed to WPNL as “trial by ambush”.”

[17] During the hearing into the admissibility of the evidence, the issue repeatedly arose as to whether the Impugned Documents were disclosed in accordance with the *Rules*. This is important because improperly disclosed documents are inadmissible unless the Court exercises its discretion to admit them.

[18] Given that the disclosure of documents prior to trial is a fundamental precondition for ensuring a fair trial, the Court requested and received additional written submissions from both Parties on this issue.

ISSUES

[19] The issues are as follows:

1. Are the Impugned Documents inadmissible because they were not disclosed?
2. If the Impugned Documents are inadmissible, should WPNL’s officials be permitted to testify concerning their “observations” about the data contained in the Documents?

ANALYSIS

Issue 1: Are the Impugned Documents inadmissible because they were not disclosed?

[20] Determining the admissibility of the Impugned Documents is a two-step process. First, it is necessary to ascertain whether the document was properly disclosed in accordance with the *Rules*. If it was not, then the Court must consider whether to exercise its discretion to admit the document pursuant to Rule 46.14.

[21] Since each Document has a different history, it is necessary to do a separate analysis for each one.

Document A - Bluewater Actual Volumes Achieved

Was Document A disclosed in accordance with the Rules of Court, 1986?

[22] In the 10 September 2025 letter from WPNL to SPHL, this Document is referred to as “Bluewater Actual Volumes Achieved”. It is a list of former Bluewater customers and the volume of product that each customer purchased from WPNL during the period 2019-2024. At the end of the Document is the total percentage of Bluewater volume retained by WPNL for each of those five years. This percentage fluctuates from 82.5% in 2019, to a high of 93.9% in 2022. Document A contains the names of hundreds of former Bluewater customers, however, four of those customers dominate the list, constituting most of the volume.

[23] The first indication that WPNL might seek to put the Bluewater data into evidence was on 13 February 2025. On that date, WPNL’s counsel wrote a “Without Prejudice” letter to SPHL’s lawyers indicating that they intended to prove WPNL’s

damages by comparing Bluewater’s volume retention rates with those from the SPHL acquisition. In the letter, WPNL stated that its witnesses would testify that the two acquisitions had similar characteristics with respect to: geography, time, market, and fuel volume. The letter did not attach Document A but contained a summary of the total retained Bluewater volume for the years 2019-2024. On 11 March 2025, WPNL’s lawyers sent SPHL’s counsel a spread sheet specifying the actual retained fuel volumes for Bluewater and SPHL for the years 2019-2024. Counsel stated that they anticipated WPNL’s representatives referencing the document in their testimony. The Document was also included in WPNL’s Book of Authorities that was filed with the Court on 28 March 2025. WPNL did not file a Supplementary List of Documents as required by the Rules, and the trial commenced as scheduled on 31 March 2025.

[24] SPHL objects to the admission of Document A on the basis that it was not in WPNL’s List of Documents and furthermore, SPHL has not been provided with any “... documentation about the Bluewater Transaction beyond what has been summarized by counsel for the Defendant in letters, and Impugned Documents themselves.” This is true. WPNL served and filed its List of Documents on 10 September 2021, and Document A was not on the List. Obviously, when WPNL prepared its List in 2021, it would not have had Bluewater volume data for 2022-2024, but it would have possessed data for 2019, 2020 and part of 2021. The information for those years was not disclosed in its List of Documents.

[25] The late and informal disclosure of Document A is a clear contravention of the *Rules*. Under Rule 32.01(1), a party must within 10 days after the close of pleadings, file and serve on the opposing party a List of Documents “... which the party has knowledge at that time relating to every matter in question in the proceeding and file the list with the Court without a copy of any document being attached thereto.”

[26] WPNL claims that Document A along with the other Impugned Documents, are “logically relevant to the issues of ... [its] losses and quantification of an appropriate damage award”. This amounts to an admission that the Document should have been disclosed, as the threshold for disclosure is lower than relevance; it is any document “related to” a matter in issue. In *Carter v. Municipal Construction Ltd.*

(2001), 204 Nfld. & P.E.I.R. 112, 614 A.P.R. 112 (S.C. (T.D.)), at para. 21, Justice Green explained what the phrase “relating to” meant in the context of document disclosure:

A document will be said to "relate" to a matter in question in the proceeding where, it is reasonable to suppose it may throw any light on the case in the sense that it contains information which may either directly or indirectly enable the party receiving or seeking the information to advance his or her own case or to damage the case of his or her adversary on which may fairly lead him or her to a train of inquiry which may do so. With all due respect to those who have expressed a contrary view, I do not believe that the test for determining production of documents prior to trial should be tied to the concept of relevance at trial.

[27] Once WPNL determined that the Bluewater acquisition was a valid comparator, its disclosure obligations expanded. At that point, it was required to disclose not just the information contained in Document A, but any other Bluewater records that might allow SPHL to advance its case, or damage WPNL’s. This would include the Bluewater asset purchase agreement, external and internal documents, emails, correspondence, and notes pertaining to the acquisition as well as accounting records. How else could SPHL test WPNL’s claim that the Bluewater operation was like the SPHL in terms of “geography, time, market and volume”, and the two operations should have performed in a similar manner? Without these documents, how could SPHL strategically prepare its defence or discover witnesses?

[28] WPNL asserts that that Document A was created in January 2025, for the specific purposes of assisting with the trial and therefore could not have been disclosed earlier. This misses the point. The obligation to disclose attaches not just to the document but also to the information in the document. “Document” is broadly defined in Rule 1(f) as including: "... a sound recording, photograph, film, plan, chart, graph and a record of any kind". A “record of any kind” obviously encompasses data and information held in an electronic form.

[29] I do not accept WPNL’s argument that Document A, like the other Impugned Documents, is simply a demonstrative aid to assist in understanding the testimony of WPNL’s Controller. Demonstrative aids are employed to summarize voluminous amounts of evidence or to illustrate a specific point in a witness’s testimony. They

are not the original evidence of what happened. If a demonstrative aid is to be used, the evidence underlying it must be properly before the court. This point was made by the Ontario Court of Appeal in *R. v. Scheel*, [1978] O.J. No. 888, 42 C.C.C. (2d) 31 (C.A.), at para. 18, where the majority observed that “[t]he introduction of the summaries did not offend against the rule that requires the production of original documents since the documents which were the primary source of the summaries were in evidence.” [emphasis added] (See also *R. v. Kanagasivam*, 2016 ONSC 2250, at para. 43; *O’Kane v. Lillqvist-O’Kane*, 2021 ABQB 925, at para. 83)

[30] Document A is not a demonstrative aid; it is the actual evidence. The data it contains should have been disclosed in WPNL’s List of Documents. It is therefore *prima facie* inadmissible.

Should the Court exercise its discretion and admit Document A?

[31] Under Rule 46.14, evidence omitted from a List of Documents is inadmissible “unless the Court orders” otherwise. There are very few cases indicating what factors a court should consider in deciding if it should exercise its discretion to admit improperly disclosed evidence.

[32] In *Bonnell v. Durnford* (1998), 161 Nfld. & P.E.I.R. 290, 497 A.P.R. 290 (S.C. (T.D.)), at para. 23, Justice Adams identified the following factors:

- the extent of the breach of the rules;
- the reliability and relevancy of the documents;
- any prejudice to either party in allowing or refusing to admit; and
- the interests of justice generally.

[33] I do not view the list of factors in *Bonnell* as exhaustive. Notably absent from the list is consideration of whether there is a reasonable explanation for the failed

disclosure. It is a factor employed by courts in other jurisdictions. Under Rule 5.16 of the *Alberta Rules of Court*, Alta. Reg. 124/2010, a court is required to consider if “... there was a sufficient reason for the failure to disclose.” In British Columbia, like this province, the rules do not contain such a provision. However, in *Stone v. Ellerman*, 2009 BCCA 294, the British Columbia Court of Appeal concluded at paragraph 35, that “[t]he law leaves no doubt that this is a central factor to be considered ...”. Whether the failure to disclose is an honest oversight or an attempt to gain a tactical advantage is an important factor.

[34] Given this, I will consider not only the factors identified by Justice Adams in *Bonnell*, but also WPNL’s explanation for the failure to properly disclose Document A.

[35] The late disclosure of Document A is a significant breach of the *Rules*. WPNL’s List of Documents was served and filed on 10 September 2021. The Certificate of Readiness was signed on 1 March 2024 certifying that documents had been exchanged. Document A was not provided to SPHL’s counsel in its full form until just weeks before the trial commenced.

[36] WPNL’s explanation for the late disclosure is that Document A and the other Impugned Documents are recent creations (January 2025), done specifically for the purposes of the trial. Superficially, this is an attractive explanation; however, even if Document A is a recent creation, some of the information it contains could have been disclosed much earlier.

[37] Relevance in a civil matter is dictated by the pleadings. WPNL, in its counterclaim, seeks damages for breach of contract, specifically lost profits due to the failure to retain SPHL customers at the anticipated rate. Proving a loss is an inherently comparative exercise requiring a court to consider a counterfactual scenario of what would have happened had the breach of contract not occurred. (Benjamin Teng, “Loss Counterfactuals” (2026) vol Oxford Journal of Legal Studies Vol. 00, No. 0 pp. 1–28 <https://doi.org/10.1093/ojls/gqag001>) Bluewater’s volume retention is relevant because it serves as a comparator by which WPNL’s

loss may be measured. How much weight should be given to the Bluewater comparison is an issue separate from its relevance.

[38] It will be difficult to test the reliability of Document A through cross-examination because WPNL has not disclosed any Bluewater documents other than the Impugned Documents. There is no meaningful way to assess whether there are any material omissions or inconsistencies.

[39] Prejudice is a significant factor when considering whether to admit improperly disclosed evidence mid-trial. In *Health Quest Inc. v. Arizona Heat Inc.*, 2018 NLSC 64, Justice Burrage refused a request for a late filing of an expert report, explaining at paragraph 14:

Our *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D are designed to promote trial fairness through the process of document disclosure, discovery, exchange of interrogatories, expert reports and so forth, not only prior to trial, but in most cases before signing the Certificate of Readiness and entry onto the pre-trial list. In this regard, I note that Justice Butler's Order regarding expert reports was but one of several Orders directed towards trial fairness. Gone are the days of trial by ambush. In reliance on the disclosure before trial, litigants strategically prepare their case, the introduction of exhibits, the line of questioning for the witnesses to come and so forth.

[40] There is no question that the late disclosure of Document A is prejudicial to SPHL. As it points out in its Brief, the “late disclosure had the effect of depriving the Skinners of the opportunity of either engaging a responsive expert ... , or the ability to examine any witness on these documents before trial.” SPHL was entitled to rely on the fact that WPNL had the signed Certificate of Readiness indicating that its List of Documents was complete.

[41] Refusing to admit Document A into evidence may limit WPNL’s ability to prove damages, however, this is prejudice of its own making. Prior to trial, WPNL planned to adduce an actuarial report to prove its damages but subsequently decided to instead rely on its own employees and utilize undisclosed information. The risks associated with this strategy are obvious, and the consequences predictable.

[42] Adjourning the trial at this point to allow SPHL to hire an expert would not remedy the prejudice. An adjournment would not be brief. Before SPHL could retain an expert, WPNL would have to disclose all documents “related to” the Bluewater acquisition, then new discoveries of WPNL officials may be required. After all that is completed and the trial resumes, SPHL may want to re-examine witnesses whose testimony and cross-examinations have already been completed. All of this would amount to ordering a “do-over”, when the trial is almost at its end. Civil litigation is not a casual game of golf, and there is no “mulligan rule”.

[43] The interests of justice weigh heavily in favour of not admitting Document A. To allow it would alter the landscape of the litigation, necessitate a prolonged adjournment thereby significantly prolonging the trial. Parties are entitled to a reasonably expeditious resolution of disputes, and this trial has already far exceeded its scheduled duration.

[44] For all these reasons, I must decline to exercise my discretion and admit Document A into evidence.

Document B - Summary of WPNL’s Expected Profits

Was Document B disclosed in accordance with the Rules?

[45] Document B is entitled “Information Prepared by WPNL - Analysis of Skinner’s Impact”. It was disclosed mid-trial on 10 September 2025. Although it appears some of the information contained in Document B was provided as early as 13 February 2025.

[46] It has three sections. The first section compares WPNL’s retained volume for SPHL and Bluewater in the years 2019 to 2024.

[47] The second section is entitled: “Summary of Expected Profits Tab - Prepared at the Start of Trial”. This section comprises a chart indicating the profit margin for furnace oil and clear diesel during the period 2019-2024. For each year, it states the profit that WPNL expected to earn if it had retained 90% of SPHL volume. It also shows the profit earned based on an average retention of 33.4%. There is no indication if the “expected profit” is gross or net profit.

[48] The third section repeats the expected profit analysis chart in the second section, but steps down the volume retention rate by 5% annually for furnace oil and by 1% for clear diesel fuel for a six-year period.

[49] The first section comparing the SPHL acquisition to Bluewater was not disclosed in accordance with the *Rules*. As I found with Document A, no information relating to the Bluewater transaction was disclosed to SPHL in WPNL’s List of Documents.

[50] The second and third sections of Document B deal with WPNL’s estimated lost profits. WPNL argues that information relating to lost profits was disclosed on 30 May 2023 when WPNL’s counsel transmitted a document (Schedule G) specifying the volume and dollar amount of sales WPNL made to each former Skinner’s customer for the period 1 October 2018 to 3 April 2023. The Document also contains the combined total amount for the 54-month period.

[51] The second and third sections of Document B contain different information from “Schedule G” that was disclosed to SPHL on 30 May 2023. The second section of Document B not only specifies the dollar amount of WPNL’s alleged damages from September 2019 to September 2024, but it demonstrates how the number was calculated using year and product specific profit margins. SPHL could not have derived this information from any documents disclosed in WPNL’s List of Documents.

[52] While not all the information contained in Document B can be found in WPNL’s List of Documents, some is in a 13 February 2025 “Without Prejudice”

settlement letter from WPNL’s counsel to SPHL’s counsel. The chart in that letter sets out the profit margins per litre along with WPNL’s expected profits for the period of October 2018 to September 2023. Document B contains an additional year’s data, ending in September 2024.

[53] The requirements under Rule 32.01(1), that a party must within 10 days after the close of proceedings, file and serve on the opposing party a List of Documents, cannot be fulfilled through providing the information in a “Without Prejudice” settlement offer shortly before trial commences. Information contained in such letters is subject to settlement privilege and “... there is a *prima facie* presumption of inadmissibility ...”. (*Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, at para.12)

[54] Document B is a profit analysis based on improperly and undisclosed information. It is *prima facie* inadmissible.

Should the Court exercise its discretion and admit Document B?

[55] I am not willing to exercise my discretion to admit Document B.

[56] The breach of the *Rules* with Document B is serious with far-reaching consequences for the conduct of the trial. The Document constitutes the late disclosure by WPNL of the quantum of damages it is seeking. WPNL has claimed from the outset that Skinner’s “breaches led to material loss in the volume of annual sales”, yet it failed to disclose its fuel profit margins. It is axiomatic that a party claiming a loss of profits must disclose all information “related to” profit.

[57] WPNL’s failure to disclose this information is not excused by SPHL failing to ask for an undertaking to provide such information during discoveries. This is not a valid defence to non-disclosure. Under the *Rules*, WPNL had a positive obligation

to disclose all “documents relating to every matter in question” in its possession, control or power. The obligation to disclose exists even if no discovery takes place.

[58] There is no question as to the relevancy of Document B. It is the quantification and calculation of WPNL’s lost profits which directly relates to its claim of damages. In terms of reliability, WPNL indicated that the figures are “estimates”, but they are reliable because WPNL monitored the SPHL transaction and tracked the information contemporaneously.

[59] The prejudice analysis with respect to Document B is the same as Document A. While its exclusion may harm WPNL’s counterclaim, admitting it would be highly prejudicial to SPHL’s defence. Time will not cure the prejudice, and costs will not adequately indemnify SPHL for the loss.

[60] The consideration of the interests of justice for Document B is the same as Document A.

Document C - SPHL Customer List

Was Document C disclosed in accordance with the Rules?

[61] This is Skinner’s Customer List as of 1 December 2018. It was disclosed in WPNL’s List of Documents, although it has since been re-ordered. It is already in evidence in a different format.

Document D – SPHL Actual Volumes Achieved

Was Document D disclosed in accordance with the Rules?

[62] Document D is a list of former SPHL customers. It sets out the volume of product sold to individual customers in each year between 2018 to 2024. It also indicates the last delivery date.

[63] During discovery of WPNL’s Dave Brown on 25 January 2022, WPNL undertook to provide SPHL’s solicitors with a list of the volume of product sold to former SPHL customers, post-acquisition. On 30 May 2023, WPNL fulfilled the undertaking, and provided a list of the total sales by volume and dollar amounts up to 3 April 2023. This is referred to by the Parties as “Schedule G”.

[64] Document D and Schedule G both contain customer numbers, names, delivery locations, and dates. Document D breaks down the volume sold to each customer by the year. It also contains the customer acquisition date and the source of the customer referral.

[65] Document D is in substance an updated version of Schedule G that was disclosed to SPHL in advance of trial.

[66] There is no debate that this evidence is relevant. In its Reply Brief, SPHL states that evidence relating to the performance of Skinner’s business after it was acquired by WPNL is relevant “subject to the Defendant’s obligation to disclose it”.

[67] Since the evidence is relevant to the issue of damages, and the substance of the Document was properly disclosed, I am prepared to admit it.

Document E - Expected Profits to February 2025

Was Document E disclosed in accordance with the Rules?

[68] Document E details the profits that WPNL expected to earn from the SPHL acquisition. It sets out: the quantity of product sold, the sales in dollars, the average price, average cost, profit and unit margin[s] for both furnace oil and diesel for each month between October 2018 and February 2025. It also contains a projection of WPNL's expected profits for each year if it had retained 90% of SPHL's former volume.

[69] Document E was not included in WPNL's List of Documents. Part of the information was sent to SPHL's counsel on 11 March 2025 and inadvertently included in WPNL's Book of Authorities that were filed on 28 March 2025. No attempt was subsequently made to comply with Rule 32.09 and file a Supplementary List of Documents.

[70] WPNL submits that Document E was not created until January 2025 and that it has "substantially complied with its disclosure obligations" because the "calculations for expected profit ... are all based on data disclosed in the 2018-2020 Volumes Document [Tab 27], disclosed on September 10, 2021, and Schedule G disclosed on May 30, 2023."

[71] I have examined both Tab 27 and Schedule G carefully. Even when the data in these two Documents are combined, it is still not possible to calculate net profits or expected profits because neither Tab 27 nor Schedule G state the costs of the product sold. Obviously, to calculate profit, it is necessary to know both the selling price and the cost. Only Document E contains this information. Based on the data disclosed, it was impossible for SPHL to calculate WPNL's damages.

[72] Document E was not disclosed in accordance with Rule 32.01(1) and is *prima facie* inadmissible.

Should the Court exercise its discretion and admit Document E?

[73] The failure to disclose Document E is a significant breach of the *Rules*. Data pertaining to cost and price was available when WPNL filed its List of Documents. There is no denying that WPNL's planned to use this type of data because in its Pre-trial Conference Brief it indicated an intention to employ "actuarial evidence" to prove its damages. The breach is compounded by WPNL's failure to comply with Rule 32.09(b) and file a Supplementary List of Documents.

[74] WPNL has provided no reasonable explanation for the failure to disclose Document E. Asserting that the Document was only created after WPNL's List of Documents was filed in September 2021 is not a plausible explanation. The data for the period 2018-2021 was undoubtedly in WPNL's possession and could have been disclosed when the List of Documents was initially served. WPNL admitted in its Trial Brief of 26 March 2025, that "... source numbers were kept contemporaneously as WPNL tracked [SPHL's] performance in the months and years following the Asset Purchase Agreement." As the data for subsequent years became available, WPNL had an obligation under Rule 32.09(b) to disclose it.

[75] I also reject WPNL's explanation that "Skinners' counsel did not ask WPNL's Mr. Brown about the profit margins realized by WPNL in connection with its sales to the former Skinner's customers". Again, if a party omits to ask a question during discovery, that omission does not alleviate the other party of its document disclosure obligations.

[76] While Document E is relevant because it quantifies WPNL's alleged loss of profits, the Document's reliability is questionable. SPHL points to a massive discrepancy between the volumes stated in Document E and those in Tab 27 of WPNL's List of Documents. Document E states that the volume of furnace oil sold for the period 1 October 2019 to 30 September 2020 is 474,252.90 litres, whereas Document E shows the amount to be 5,255,096.00 litres for the same period. Perhaps there are explanations for the discrepancies; however, I cannot accept WPNL's argument that the evidence is inherently "accurate and reliable" simply because it is "data pulled from WPNL's internal systems".

[77] The exclusion of this evidence will be prejudicial to WPNL's ability to prove its damages. However, its admission at this late stage of the trial will be far more prejudicial to SPHL. Had the evidence of WPNL's lost profits been properly disclosed, SPHL may have chosen to discover WPNL's officials on it, especially concerning the large volume discrepancies. Timely disclosure of Document E may well have influenced SPHL trial strategy. As with the other inadmissible Documents, the prejudice to SPHL cannot be overcome by an adjournment or by the awarding of costs.

[78] Interests of justice are the same with respect to this document as with Document A.

[79] I am not willing to exercise my discretion to admit Document E.

Document F - Expected Profits to July 2025

[80] Document F is an updated version of Document E, showing WPNL's alleged profits up to July 2025.

[81] This Document is inadmissible for all the same reasons as Document E.

Issue 2: If the Impugned Documents are inadmissible, should WPNL's officials be permitted to testify concerning their "observations" about the data contained in the Documents?

[82] WPNL contends that Ms. Whiteway's evidence "... would be admissible with the benefit of the Impugned Documents, or without." WPNL anticipates that she will testify to the following matters:

- her credentials, education, and role with Western Petroleum;

- what she observed of WPNL’s commercial data regarding the former SPHL customer base post closing of the APA;
- what she observed of WPNL’s commercial data regarding the former Bluewater customer base post closing of that acquisition;
- what she did to compile the Impugned Evidence; and
- her observations of what the commercial data within the Impugned Evidence shows.

[83] WPNL argues that she is a fact witness who is simply summarizing financial evidence that she “observed”. WPNL asserts because of her experience and credentials, she falls within the category of “litigant-witness with expertise”.

[84] In *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249, at para. 35, the Alberta Court of Appeal described these witnesses as “[l]itigants (including the officers and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation.” This new category of expert witnesses is not required to be independent, they are not subject to a qualification *voir dire*, and there is no requirement to provide a report in advance in accordance with the rules of court. While some appeal courts have recognized this new category of witness, the Supreme Court of Canada has yet to do so.

[85] *Kon* contains no discussion of how this type of expert evidence might impact trial fairness. There is no question that a litigant expert witness who is emancipated from the strictures governing independent expert witnesses poses a potential threat to trial fairness. Some courts have suggested that these types of witnesses should still be subject to the judicial gatekeeping function that applies to independent experts. (*Ehresman v. The King*, 2025 TCC 78, at para. 40)

[86] The absence of any discussion of trial fairness in *Kon* may stem from the fact that there was no risk of trial by ambush. At paragraph 40, the majority commented

that: “The nature of his [the litigant-expert's] opinion about the invoices was well known, and lay at the heart of the litigation. The raw data he relied on had been disclosed and was available for analysis by the appellant's external expert witness.” The same cannot be said about the case before this Court. Ms. Whiteway’s opinion about the similarities between SPHL and Bluewater acquisitions was not “well known” nor does her opinion “lay at the heart of litigation”. A review of the correspondence between counsel reveals that it was not clear until less than three weeks before trial that Ms. Whiteway would be the WPNL witness testifying about the Bluewater transaction. Furthermore, WPNL has only disclosed two documents about the Bluewater transaction despite claiming that it is an appropriate comparative standard by which WPNL’s damages should be measured.

[87] WPNL also referred to *R. v. Ajise*, 2018 ONCA 494, which is a tax prosecution. In *Ajise*, the Crown called the lead investigator who was a general accountant. She provided documents and testified that in her opinion all the accused’s 2003-2005 donation claims were false. At trial, there was no objection to the admission of either the documents or the testimony. The spreadsheets summarizing the evidence were admitted by consent and distributed to the jury. On appeal, the accused argued that the trial judge had erred by admitting non-expert opinion evidence. The majority found that the investigator was properly characterized as a fact witness and “... was doing nothing more than explaining her sources and her methodology in a way that would allow the jury to understand and to assess the numbers ...”.

[88] *Ajise* is also distinguishable. In that case, as in *Kon*, there was no failure to disclose data. Sharpe, J.A. commented at paragraph 24 that “[t]he background sources were available for the jury's consideration.” and “The trial judge also referred to the background sources in reviewing the evidence during his charge to the jury.” Again, the absence of pre-trial disclosure of records distinguishes the case before me from other cases in which a litigant with expertise was permitted to testify. I was not pointed to any case in either a civil or criminal context in which a witness was permitted to testify about calculations performed on data when the underlying data was not properly disclosed and therefore inadmissible.

[89] Ms. Whiteway’s “observations” are not observations in the conventional sense of a fact witness, who has observed an accident or a crime. Rather, she was

tasked with compiling data for the purposes of this case and using that data to calculate the actual and expected profits. I have already found most of this data is inadmissible, which means that Ms. Whiteway's testimony would concern inadmissible evidence.

[90] I cannot permit Ms. Whiteway to give testimony about the contents of the inadmissible Documents for several reasons. First, I have already determined that the failure to disclose the Documents and other information related to the Bluewater transaction violates the *Rules* and amounts to trial by ambush. To allow Ms. Whiteway to recite the contents of inadmissible documents through her testimony would subvert this ruling. I would be permitting WPNL to do indirectly that which it cannot do directly.

[91] Second, allowing such testimony would put SPHL in a much worse position than if the Documents were admitted. In this scenario, the contents of the Documents would be put into evidence through Ms. Whiteway's *viva voce* testimony, but SPHL would not be able to use them for cross-examination. SPHL would then have to choose between restricting its cross-examination or seeking to put into evidence the very documents it successfully argued to exclude. This would result in WPNL significantly benefiting from its non-compliance with the *Rules*.

DISPOSITION

[92] Documents A, B, E, F are inadmissible for the reasons provided. Trial fairness dictates that WPNL's witness cannot provide testimony about the inadmissible Documents.

[93] Costs shall be in the cause.

JUSTIN S.C. MELLOR
Justice

