

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *AGT Food and Ingredients Inc. v. Fibreco
Export Inc.*,
2025 BCSC 90

Date: 20250121
Docket: S235258
Registry: Vancouver

Between:

**AGT Food and Ingredients Inc., AGT Foods Switzerland SA
and Alliance Pulse Processors Inc.**

Plaintiffs

And

Fibreco Export Inc.

Defendant

Before: The Honourable Mr. Justice D.M. Masuhara

Ruling of Production of Documents

Counsel for the Plaintiffs:

W.E. Stransky

Counsel for the Defendant:

D. Miachika

Place and Date of Hearing:

Vancouver, B.C.
December 17, 2024

Place and Date of Judgment:

Vancouver, B.C.
January 21, 2025

Introduction

[1] The applicant, Fibreco Export Inc. (“Fibreco”) seeks the production of documents it says that it has demanded for over a year without success.

[2] The respondents, AGT Food and Ingredients Inc., AGT Foods Switzerland SA and Alliance Pulse Processors Inc. (collectively, “AGT”) now consent to the production of several categories sought (on terms for certain of them), however, AGT opposes the balance, which is considerable.

[3] The parties do not dispute the applicable principles and procedures to be followed. With respect to the latter, AGT argues that the requirements under the *Rules* have not been met, including lack of required specificity in Fibreco’s requests.

[4] In my view, the materials indicate considerable detail in the requests of Fibreco. I do not find any deficiencies in the procedures set out under the *Rules*. Where required the evidence provided supports the production requested.

[5] For the reasons that follow, the order for the documents sought by Fibreco is approved.

Documents Sought

[6] The documents sought and opposed as listed in the notice of application are as follows:

- b. any and all correspondence between the AGT Entities, the AGT Entities’ brokers, the AGT Entities’ insurers, and/or their adjusters including (but not limited to):
 - i. any enquiries and/or requests made for insurance coverage under any policies of insurance issued to any of the AGT Entities for damage or loss to the Agriproducts stored at the Terminal and/or for business interruption losses;
 - ii. any confirmations or denials of coverage for losses allegedly incurred during the term of the Terminal Services Agreement;
 - iii. the status of any adjusting in relation to any claims for coverage under policies of insurance issued to the AGT Entities for damage or loss to the Agriproducts stored at the Terminal and/or business interruption losses;

- iv. any agreements between the AGT Entities and their insurers regarding coverage for damage or loss to the Agriproducts stored at the Terminal and/or business interruption losses;
 - ...
 - vii. any agreements between the AGT Entities and their insurers relating to settlement of any claims of insurance monies relating to the Silo Collapse or subrogation or pursuit of Fibreco for any monies paid out by the insurers or others;
 - viii. any proof(s) of loss or other documents submitted to the AGT's insurer(s) or adjusters relating to the Terminal Services Agreement; and
 - ix. evidence of any payments made to the AGT Entities, or any of them, by their insurer(s) relating to losses that allegedly occurred during the term of the Terminal Services Agreement;
- c. any internal (within or among any AGT Entities) communications regarding the Terminal Services Agreement with Fibreco, and its terms, and / or the negotiation of that agreement (including amendments), including as follows:
- i. any and all internal AGT correspondence or other documentation which evidences the so-called "Ad Hoc Agreements" in relation to direct-hit shipments prior to the Commercial Operations Date of the TSA (as referred to in AGT's Amended Claim @ paras. 25-27);
 - ii. any and all internal AGT correspondence or other documentation regarding the 2019 Completion Notice and reliance thereon by AGT (as referred to in AGT's Amended Claim @ paras. 28-29);
 - iii. any and all internal AGT correspondence or other documentation regarding AGT's awareness of the Fox Creek Silo collapse (as referred to in AGT's Amended Claim @ paras. 31-33);
 - iv. any and all internal AGT correspondence or other documentation regarding the Purported Amended Completion Notice and AGT's consideration of and/or rejection of that notice (as referred to in AGT's Amended Claim @ paras. 36-38);
 - v. any and all internal AGT correspondence or other documentation regarding the October 1, 2019 Notice of Event, the December 1, 2019 update to the notice, Fibreco's 2019 Force Majeure Notice, and AGT's consideration of and/or denial or assessment of those notices (as referred to in AGT's Amended Claim @ paras. 40-46 and Fibreco's Response @ para. 42);
 - vi. any and all internal AGT correspondence or other documentation regarding the 2020 Force Majeure Notice and AGT's consideration of and/or disagreement with the Updated Notice of Event (as referred to in AGT's Amended Claim @ paras. 59 and 62 and Fibreco's Response @ para. 66);
 - vii. any and all internal AGT correspondence or other documentation regarding the Fibreco's Purported Completion Notices and Commencement Date Notice and AGT's consideration of and/or

rejection of those notices (as referred to in AGT's Amended Claim @ paras. 65-71); and

viii. any and all internal AGT correspondence or other documentation regarding the negotiation, agreement and/or application of the following provisions in the TSA: Article 12, Article 13.2, Article 16.1, Article 16.2 and the \$5,000/day credit in Schedule "I" (as referred to in Fibreco's Response @ paras. 11, 13-17, 91-101);

d. any internal (within or among any AGT Entities) or external correspondence to / from the following AGT personnel: Murad Al-Katib, Gaetan Bourassa, Steve August, Tim Bergen or Lanny Stevens, regarding Agriproducts to be processed through the Terminal (whether stored or direct hit) from January 1, 2018 to April 30, 2024;

...

i. all correspondence from AGT to Fibreco wherein AGT recommended Fibreco use AGI as the equipment supplier of the Agriproducts handling equipment at the Terminal.

(the "**Requested Documents**")

[7] The Requested Documents fall into the following categories:

- a) Correspondence with AGT's Insurers;
- b) AGT's Internal Communications Regarding the Terminal Services Agreement;
- c) Internal and External Correspondence among Key AGT Personnel;
- d) Documents re: Agriproducts purchased by AGT Entities for processing through the Terminal;
- e) Documents re: Agriproducts Purchased by AGT Entities and Processed at other Facilities;
- f) Documentation of Service Contracts between AGT and other Entities; and
- g) AGT Correspondence to Fibreco Recommending AGI as Equipment Supplier.

[8] I will address the categories in the order set above.

Background

[9] The within action is one of several that I have been case managing. There are many parties pursuing or being pursued for significant damages. The various actions have arisen as a result of problems with the design, manufacturing, supply of materials, and/or construction of a new agriproducts facility at Fibreco’s marine terminal in North Vancouver, B.C. (the “Terminal”) including 18 new silos to store agriproducts for shipping to markets (the “Silos”). In these reasons I will refer to Fibreco’s construction of the agriproducts facility at the Terminal as the “Terminal Expansion Project” or “TEP”. The problems included welds and the catastrophic collapse of a silo at the time of commissioning in September 2020. Following an investigation, Fibreco decided to demolish and replace all the Silos. The new facility commenced operations on April 1, 2022. A further feature of the litigation is a negligence claim against Fibreco’s insurance broker who is alleged to have let construction coverage lapse prior to commissioning. The litigation is complex.

[10] A central feature of the present action is the agreement entered between Fibreco and AGT Canada dated December 18, 2017, and amended on July 6, 2018 (the “TSA”), whereby Fibreco agreed to receive and ship agriproducts for AGT Canada over a 20-year term following the construction of the agriproducts facility.

[11] On July 24, 2023, AGT commenced the within action against Fibreco, seeking damages for physical loss and damage to its cargo stored at the Terminal in the Silos as well as business interruption losses to AGT’s cargo business during the period of delay in completing the TEP. The legal bases being largely in negligence and breach of contract.

[12] If the various preliminary applications presently before me reach a final determination, there may be a trial in which all the actions will be heard together. The estimated time is 100 days. An anticipated start date for the trial is in September 2025. However, there is uncertainty as to whether that will happen given the schedule of matters that counsel advised they intend to raise, including an appeal (by the unsuccessful side) to the Court of Appeal of an application regarding

privilege that has yet to be argued before me. The issues of privilege have arisen from an abuse of process application brought on by AGT against Fibreco in relation to an asserted delay in notification of a settlement between Fibreco and Ag Growth International Inc. (“AGI”) and other negative conduct. The abuse of process hearing was suspended at about the mid-way point in order for the privilege issues to be decided. There is also an application to strike pleadings which has been argued but is awaiting determination pending the abuse of process decision. There are other applications that are in the queue.

[13] I now turn to addressing the documents sought.

DISCUSSION

Correspondence with AGT’s Insurers

[14] The bases for Fibreco’s demands arise from the claims made against it in AGT’s pleadings; Fibreco’s defence as contained in its pleadings; and provisions of the TSA.

[15] In particular, Fibreco relies on a Waiver of Subrogation defence to the agriproduct losses based on s. 13.2 of the TSA. That provision reads as follows:

13.2 Shipper’s Insurance

[AGT] shall carry insurance for loss of, or damage to, Agriproducts, and carry workers’ compensation insurance for the protection of its employees and general liability insurance for the protection of third parties at the Agriproducts Facility, including its employees, agents, contractors, advisors, lenders, invitees or other visitors, which insurance shall include a waiver of the right of subrogation in favour of Fibreco, its directors, officers, shareholders, Affiliates, agents, employees, consultants, professional advisors and lenders. The general liability insurance shall be in an amount that is commercially reasonable in accordance with industry standards.

[16] Fibreco also relies upon s. 16.1 which states:

as the Terminal Services and Additional Services [as defined in the TSA] that Fibreco is providing to the Shipper [AGT Canada] under this [Terminal Services] Agreement are for the benefit of the Shipper, the Shipper shall not sue Fibreco except to the extent that Fibreco is grossly negligent in carrying out, or wilfully acts contrary to, its duties under this Agreement....The Shipper shall protect, indemnify and save Fibreco harmless from and against all

liability in connection with the Terminal Services, the Additional Services and this Agreement, including with respect to all Losses, liabilities, damages, costs, claims, actions and causes of action... that Fibreco may suffer except to the extent that Fibreco is grossly negligent in carrying out, or wilfully acts contrary to, its duties under this Agreement. For greater certainty, if any act or omission of the Shipper results in a claim or proceeding by a third party against Fibreco, then... the Shipper shall protect, indemnify and save harmless Fibreco from all resulting liabilities, obligations, and costs, including legal costs on a solicitor and own client basis.

[17] Meanwhile, s. 16.2 of the TSA states that Fibreco is not liable for any “consequential, incidental, aggravated, exemplary or punitive damages, or for any loss of profit or business interruption losses, which directly or indirectly arise out of or in conjunction with this Agreement”.

[18] As a result, Fibreco argues that any correspondence regarding insurance policies procured by AGT that potentially cover property damage and amounts claimed for the agriproducts losses are relevant and producible.

[19] It further notes that AGT admitted during examinations that it had in place a cargo insurance policy, that it made a claim for coverage of \$15 million for damage or loss to its agriproducts arising from the Silo collapse, and that the cargo insurer has to date adjusted and paid AGT \$11 million for its cargo damage claim. As such, any correspondence or documents evidencing AGT’s claims for cargo damage under the available insurance, the adjusting of that claim by the insurers, the insurer’s assertion of any rights of subrogation against Fibreco or others, and any agreements between AGT and its insurers regarding the cargo damage and related subrogation are directly relevant to the defences pleaded by Fibreco. Despite this, Fibreco argues that AGT has only produced one excel spreadsheet that appears to show information for submittal to marine insurer Eyssautier, one invoice from Eyssautier to Alliance Pulse Processors, and a handful of insurance certificates for vessels travelling in December 2020. Fibreco further argues that AGT has not produced any confirmations or denials of coverage, evidence of payments made to AGT by its insurer(s), agreements regarding further coverage or rights of subrogation by the Insurer(s), or any correspondence with adjusters or other insurance representatives. Finally, Fibreco claims that AGT has either refused to

produce or has yet to produce responses to the outstanding requests related to AGT’s insurance coverage made during the examination of Murad Al-Katib.

[20] Fibreco in particular relies upon *Lehigh Hanson Materials Limited v. Sea Imp XI (Ship)*, 2022 BCSC 1556 (aff’d 2024 BCCA 348), in which Justice Coval refers to Justice Newbury’s summary in *Kruger Products Limited v. First Choice Logistic Inc.*, 2013 BCCA 3 at paras. 24–32 (leave to appeal ref’d) of cases regarding covenants to insure in commercial leases, and wherein she notes that such a promise was a “supervening covenant” that prevailed even where the tenant’s negligence had caused the loss. Newbury J.A. states:

[37] A helpful summary of the evolution of the trilogy was provided in *Madison Developments Ltd. v. Plan Electric Co.* (1997) 36 O.R. (3d) 80 (Ont. C.A.), where Carthy J.A. stated:

... The law is now clear that in a landlord-tenant relationship, where the landlord covenants to obtain insurance against the damage to the premises by fire, the landlord cannot sue the tenant for a loss by fire caused by the tenant's negligence. A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against. This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss. This is a matter of contractual law, not insurance law, but, of course, the insurer can be in no better position than the landlord on a subrogated claim. The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence ...

[Emphasis added in *Kruger*.]

[21] Newbury J.A. also commented at para. 56 of *Kruger* that “[i]t would make no commercial sense to permit an indemnity provision to overwhelm or supersede an insurance provision”. Under s. 16.2 of the TSA, there exists an indemnity provision under which Fibreco is to indemnify AGT from all liabilities, damages, costs, claims, actions and causes of action that AGT may suffer relating to Fibreco’s gross

negligence in carrying out, or willfully acting contrary to its duties under the agreement.

[22] I note that as a result of Fibreco’s application, AGT now consents to producing documents material to any confirmation or denial of the waiver of subrogation between AGT and its insurer(s), as may be material to the pleaded defence. However, AGT argues that the remainder of the documents sought are not properly particularized. In furtherance of their opposition to production of the Requested Documents, AGT says that the benefits received through private insurance are not relevant to a claim; a defendant is not entitled to insert itself into the relationship between the insured and the insurer, including in the context of a subrogated claim; and detailed insurance information—including how the insurer calculated its payout and the reasoning for the same—are “irrelevant” to the establishment of a defence or proof of the plaintiffs’ damages. Any further order is accordingly inappropriate as under R. 7-1(10) or R. 7-1(11), if appropriately engaged, AGT concludes.

[23] AGT relies upon the following cases: *IBM Canada Limited v. Waterman*, 2013 SCC 70 at para. 41 [*IBM Canada*]; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 at 399-401; *The Insurance Corporation of British Columbia v. Teck Metals Ltd.*, 2020 BCSC 259 [*Teck*]; and *Poplawski v. McGrimmon*, 2009 CanLII 14796 (Ont. S.C.) at paras. 16 and 18.

[24] In my view, these cases are distinguishable from the issue at hand. While *Teck* does look at subrogation, it is not in the context of a defence of waiver of subrogation, as claimed in the underlying action here by Fibreco. Meanwhile, *IBM Canada*, *Cunningham*, and *Poplawski* concern the assessment of damages, with the latter considering document discovery, but only in the context of assessing damages. Indeed, *Cunningham* and *IBM Canada* are focused on the collateral benefits rule, and whether benefits such as employment insurance or disability payments should be deducted from the penultimate damages award (in accordance

with the compensation principle). Neither deal with a substantive immunity defence or document discovery.

[25] Fibreco is not arguing deduction of damages as the basis of the application; rather, the Requested Documents are being requested in the context of a defence of claim immunity. Therefore, these cases are of little assistance.

[26] In the circumstances, I find that the order sought by Fibreco under this category has been justified and production is so ordered.

AGT’s Internal Communications Regarding the TSA

[27] Fibreco points out the following in AGT’s Amended Notice of Civil Claim (the “Claim”) in support of production of the documents under this category:

1. AGT and Fibreco entered into a series of “Ad Hoc Agreements” for the shipment of agriproducts before the TEP was completed and commissioned (paras. 25–27);
2. Fibreco sent, and AGT relied to its detriment on, the “2019 Completion Notice” with respect to commencement of Terminal Services (paras. 28–29);
3. Fibreco was aware “at all material times” of the collapse of another set of silos designed by AGI, in Fox Creek Alberta (the “Fox Creek Collapse”), whereas AGT did not become aware of the Fox Creek Collapse until September 2020 (paras. 31-33);
4. the Terminal Services did not commence in accordance with the 2019 Completion Notice, and Fibreco, without justification or adequate notice to AGT, sent AGT a “Purported Amended Completion Notice,” a step that AGT says was not permitted under the TSA (paras. 36–38);
5. Fibreco was in breach of the TSA, or grossly negligent, in that its actions contributed to the delays related to the Tower Defects and Tower Remedial Work (para. 44);

6. the September 17, 2019 failure of the welded connection in a catwalk was not in fact an Event of Force Majeure as contemplated by the TSA (paras. 39–43), and AGT “incurred additional costs, expenses, and losses as a result of not having access to the Agriproducts Facility” during delay necessitated by the Tower Remedial Work (paras. 46–48);
7. Fibreco was in breach of the TSA, or grossly negligent, in that its actions contributed to the delays related to the Silo Collapse (para. 55);
8. the Silo Collapse was not an Event of Force Majeure as contemplated by the TSA (paras. 54–60), and AGT incurred “additional costs, expenses, and losses as a result of not having access to the Agriproducts Facility” during the further delay necessitated by the Silo Collapse (paras. 62–63); and
9. the completion notices issued by Fibreco from October 2021 through October 2022 were invalid (paras. 65–70).

[28] Fibreco further refers to parts of its Response to Civil Claim where it states:

1. all shipments made by AGT through the Terminal were made pursuant to the terms of the TSA (para. 22);
2. the Towers Defects and Tower Remedial Work, and the delays necessitated by same, and the Silo Collapse, and delays necessitated by same, were valid Events of Force Majeure (paras. 11, 39, 43);
3. pursuant to the terms of the TSA, Fibreco issued valid Notices of Force Majeure to AGT on October 1, 2019 and September 14, 2020 (paras. 42, 66), and Fibreco kept AGT apprised of the delay in the completion and commissioning of the TEP on a regular basis (paras. 43, 67–76);
4. Fibreco took all reasonable steps to mitigate the delay resulting from the Events of Force Majeure (paras. 44, 68);

5. AGT Canada agreed not to hold Fibreco liable for any delay or failure to perform its obligations under the TSA resulting from Force Majeure (para. 11);
6. the Expected Project Completion Date, Anticipated Commissioning Completion Date and Longstop Date (as those terms are defined in the TSA) were subject to extensions of time as a result of Events of Force Majeure (para. 13); and
7. as stated above, in executing the TSA, AGT Canada agreed to “carry insurance for loss of, or damage to, Agriproducts.” Such insurance coverage would include a waiver of the right of subrogation in favour of Fibreco (para. 14).

[29] AGT in response argues that the demands lack specificity and in essence are fishing expeditions. They say that it provides no discernable explanation of what such documents would reveal, including how any of AGT's internal communications (reflecting, at best, its subjective understandings of the agreement or negotiations) would be material or relevant to the interpretation of the terms of the TSA as material for its dispute.

[30] Similarly, AGT argues that for each of the requests, Fibreco only cites to the pleadings as evidence to support the connection between the documents sought and the matters in issue. AGT claims that this provides no evidence or explanation for the potential relevance.

[31] With regard to the same, AGT argues that an application under R. 7-1(11) is subject to the governing concept of proportionality. Even in this litigation, requiring AGT to produce “all internal communication” or “all internal / external communications” on ill-defined subjects would require AGT to sort through more voluminous correspondence than reflected in even the ample production made, is disproportionate to the benefits of such disclosure.

[32] I am persuaded by Fibreco’s argument that AGT’s internal communications regarding the TSA are directly related to what has been pleaded by AGT and by

Fibreco, which documents are therefore relevant and producible. In the event any of these communications are relevant but privileged, they ought to be individually listed and the claims of privilege clearly identified in accordance with the *Rules*. While proportionality is a consideration, the circumstances of this entire litigation, including the vigour, steps and resources the participants have applied including AGT, the weight attributable to this factor is limited. The production sought under this head is approved.

Internal and External Correspondence among Key AGT Personnel

[33] Fibreco seeks documents under this category on the basis that AGT has alleged that it and Fibreco entered into a series of ad-hoc agreements for the processing of agriproducts through the Terminal in advance of the date when the TEP construction and commissioning were complete and Fibreco was ready to provide terminal services (the “Commencement Date”).

[34] Fibreco denies the existence of the ad-hoc agreements and says that all shipments AGT made through the Terminal from 2018 to present were made under the TSA.

[35] As such, Fibreco argues that the AGT personnel whose correspondence Fibreco seeks are those who were involved in the discussions about agriproducts processed through the Terminal before the Commencement Date. These personnel are as follows:

1. Murad Al-Katib, who was the Chief Executive Officer of AGT Canada and communicated with Fibreco and other AGT entities’ personnel regarding issues arising out of the TSA, which was in force during the entire course of business dealings between AGT Canada and Fibreco;
2. Gaetan Bourassa, who was the Chief Operating Officer of AGT Canada and communicated with Fibreco and other AGT personnel regarding agriproducts to be processed through the Terminal in advance of the Commencement Date;

3. Steve August, who was the Director, Supply Chain – Bulk Vessel for AGT Canada, and he too communicated with Fibreco and other AGT personnel regarding agriproducts to be processed through the Terminal in advance of the Commencement Date;
4. Tim Bergen, who was the Director, Freight and Logistics, for AGT Canada, and who also communicated with Fibreco and other AGT personnel regarding agriproducts to be processed through the Terminal in advance of the Commencement Date; and
5. Lanny Stevens, who was the Operations Manager and/or Division Head, North American Operations, for AGT Canada, and he communicated with Fibreco and other AGT personnel regarding agriproducts to be processed through the Terminal in advance of the Commencement Date.

[36] Fibreco submits that given the respective roles of Mr. Al-Katib, Gaetan Bourassa, Steve August, Tim Bergen, and Lanny Stevens, the internal and external correspondence to and from them regarding agriproducts to be processed through the Terminal are relevant and producible.

[37] Fibreco says that it requires these records to prove that AGT and Fibreco never entered into any ad-hoc agreements, and that all shipments were made pursuant to the TSA.

[38] AGT's arguments are the same as those set out above under the category of "AGT's Internal Communications Regarding the TSA".

[39] In my view, I accept the submissions of Fibreco, the circumstances justify the production of documentation sought by Fibreco. The materials supporting the production are sufficiently specific to key aspects of the claim and defence. The order sought is approved.

Documents re: Agriproducts Purchased by AGT Entities for Processing Through the Terminal

[40] The demand under this category relates to AGT's claim that it suffered losses as a result of agriproducts having been damaged or lost, as a result of delays in shipping of agriproducts to international markets, as a result of having to divert agriproducts for processing through other ports, and as a result of Fibreco's actions and the Events of Force Majeure.

[41] Fibreco notes, however, that AGT has not quantified the agriproducts purchased for processing through the Terminal, or the losses it allegedly incurred.

[42] As a result, it submits that all documents related to agriproducts purchased by AGT for processing through the Terminal, from 2018 to 2024, are therefore relevant and producible.

[43] AGT concedes that documentation of the agriproducts purchased by AGT with the intention of processing them through the Terminal are relevant and producible but consents only to documents for the period originally demanded by Fibreco, namely, 2019 to 2023.

[44] I am persuaded that the documents for the period 2018 through 2024 should be produced. The Fibreco argument that the information goes to the question of AGT's ability to meet the take or pay levels set out in the TSA is relevant. As a result, the order sought is approved.

Documents re: Agriproducts Purchased by AGT Entities and Processed at other Facilities

[45] Similar to the above category, AGT consents to producing the documentation under this category, but only for the period originally sought, 2019 to 2023. Fibreco notes that AGT has not quantified the agriproducts purchased for processing through the Terminal and diverted to other facilities, or the costs, if any, incurred for those diversions. This information is directly related to the losses AGT says it incurred. It is impossible Fibreco argues, to assess the extent of AGT's claims

against it without a clear accounting of AGT's alleged losses, including the costs it says it incurred by purchasing and shipping agriproducts through other terminals.

[46] AGT has conceded that documentation of the agriproducts they purchased with the intention of processing through the Terminal are relevant and producible. Mr. McEwan, in his January 23, 2024 letter, listed a series of 90 documents related to the diversion of agriproducts to other facilities. The relevant period for when AGT may have been diverting agriproducts originally intended for processing through the Terminal is December 2017 (effective date of the TSA) through April 1, 2022 (the Commencement Date). The documents cited by Mr. McEwan are dated only from September 2020 through January 2022.

[47] Fibreco notes that AGT states in its Claim that certain agriproducts were diverted specifically to ports in Montreal, Thunder Bay and Churchill (paras. 62–63). The documents cited by Mr. McEwan do not provide evidence of the agriproducts diverted to these locations or any locations other than the Fibreco Terminal. Fibreco says the documents produced by AGT to date do not tell the whole story. Therefore, it is argued that all other documents (i.e., documents in addition to those listed in Exhibit "L" to Affidavit #2 of Valerie Hollingdale) related to agriproducts purchased by AGT for processing through the Terminal, but in fact processed at other facilities, are relevant and producible.

[48] I agree with Fibreco. The order sought for the period 2018 through 2024 is approved.

Documentation of Service Contracts between AGT and other Entities

[49] Fibreco submits that despite AGT's claim that during the delays resulting from the Events of Force Majeure, AGT was compelled to have the agriproducts processed through facilities other than the Terminal. AGT claims that it incurred extra costs as a result of having to seek these services through other facilities. AGT has not produced any service contracts showing the costs of those services, or whether their terms were comparable to those of the TSA. AGT has refused to

produce any such agreements on the basis that they are “immaterial” and/or because they “contain confidentiality restrictions with third parties.”

[50] Fibreco argues that the services contracts, regardless of alleged confidentiality, are fundamental to AGT’s claim for damages, because any alleged loss of profit is relevant to the value of the contracts AGT entered into for the processing of agriproducts through other facilities. In addition, the service contracts are relevant to AGT’s duty to mitigate its losses during the alleged delay following the Events of Force Majeure.

[51] AGT now states that it consents to the order sought for this category but submits that there should be terms as to access, undertakings, et cetera, to preserve and protect the interest of those third parties. AGT points out that the information sought involves the obtaining of commercial terms from competitors of Fibreco. In the circumstances of this case, such terms should include, as a term for the production or accessing such documents:

- a) that counsel for AGT be permitted to redact the non-economic terms of such agreements;
- b) that Fibreco provide a list of the legal advisors and experts to AGT who are proposed to be at liberty to inspect the documents;
- c) the legal advisors and experts of Fibreco may inspect and make minutes of their contents and be entitled to be supplied with copies thereof and extracts therefrom as the applicants shall be advised on payment of appropriate copying fees;
- d) except as outlined in (b) and (c), Fibreco's legal advisors and experts must not disclose the economic terms of such agreements to Fibreco without notice to and the consent of AGT or further order of this court; and
- e) a condition that any use of the materials is restricted to the purposes of this litigation.

[52] AGT cites two cases in support of its terms: *Cxy Chemicals Canada Ltd. Partnership v. Kvaerner Chemetics Inc.*, 1998 CanLII 6660 (BC SC); and *Altec Design Group Ltd. v. Motion Works Inc.*, [1992] B.C.J. No. 2451 (S.C.).

[53] My first observation is that AGT has not provided evidence that it is prohibited from holding the economic terms of its service contracts confidential. I also note that the TSA has a term of 20 years, and on my reading of the terms it appears that the fee structure has a fixed/annual and variable component that is subject to an annual adjustment by formula related to the Consumer Price Index and labour costs. Thus, the competitive information is not particularly prejudicial to AGT under the TSA.

[54] Unlike the two cases cited by AGT, the present case does not involve trade secrets or proprietary information. I also note that the obligation, imposed by law, to maintain as confidential documents obtained through the discovery process is binding upon the parties and their representatives. In this regard, it is the responsibility of counsel to ensure that their client understands the obligation of confidentiality that is attached to the discovery received. Similarly, counsel's responsibilities extend to any experts retained: *Iser v. Canada (Attorney General)*, 2016 BCSC 2594 at para. 43, rev'd on other grounds 2017 BCCA 393.

[55] In my view, terms a), c) and e) are warranted. Term b) is not required given the implied obligation of confidentiality and there is no requirement for Fibreco to identify its legal advisors or experts at this stage. I do not see how term d) can operate against Fibreco given the need to be able to properly defend against the action.

AGT Correspondence to Fibreco Recommending AGI as Equipment Supplier

[56] Fibreco argues that the correspondence is relevant and producible on the basis that AGT has alleged the following:

1. that Fibreco warranted it would act as the “prime or general contractor” for the TEP;

2. that Fibreco was “negligent or grossly negligent” in that it did not “properly manage, coordinate, supervise, and oversee the design, engineering, manufacturing, supply, construction and inspection of the Agriproducts Facility”;
3. that Fibreco responded that it “was not the general contractor, construction contractor, designer, engineer, manufacturer, or supplier of structures and equipment for the Agriproducts Facility”; and
4. that AGT was the one to suggest that Fibreco engage AGI as designer and supplier of the Silos and the Towers and Related Components.

[57] Fibreco points to the examination for discovery testimony of Mr. Al-Katib in which he provides considerable testimony of his advocacy of AGI to various individuals, including to Fibreco.

[58] AGT argues that the documents are immaterial and irrelevant. It argues that Fibreco has failed to provide any coherent explanation or cite any applicable authority supporting how AGT’s alleged recommendation of AGI would inform or impact Fibreco’s performance of its obligations under the TSA or at law with respect to the management and operation of the facility. It further argues that Fibreco fails to disclose some evidence of the existence of such documents—including from the parties in Fibreco who would presumably have received such correspondence—or any explanation of how or why such documents are producible by AGT alone.

[59] I am persuaded in the circumstances that the allegations of AGT against Fibreco, including gross negligence, combined with the evidence of AGT’s endorsement of AGI, justify the granting of the order in respect of this category of documents.

Costs

[60] Unless the parties seek to address costs within 10 days of this decision, the applicant, Fibreco having been successful is awarded costs at Scale B.

“The Honourable Justice Masuhara”