KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 94**

Date: **2025 06 27**
File No.: KBG-RG-01570-2023
Judicial Centre: Regina

BETWEEN:

ALLIANCE CRANE INC.

PLAINTIFF

- and -

TODD SAPERGIA, ANT ENTERPRISES 306 LTD., ANDREW BUMPHREY, and KELLY BUMPHREY

DEFENDANTS

- and -

BRADLEY ROBERTSON and CANADIAN PACIFIC KANSAS CITY LIMITED

NON-PARTIES

Counsel:

Virgil Thomson	for the plaintiff
Eric Marcotte	for the defendants
Deron Kuski, K.C.	for the non-parties

FIAT — ROBERTSON J.
June 27, 2025

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I. INTRODUCTION

[1] This decision addresses applications from both the plaintiff and the

defendants. The applications seek discovery through production of records from each other and questioning by the defendants of a non-party.

[2] For the reasons which follow, the applications for production of documents are allowed in part. The application to question a non-party is dismissed.

II. BACKGROUND

A. The Claim

[3] The dispute arises from the decision of the defendant, Todd Sapergia, a former employee of the plaintiff, Alliance Crane Inc. [Alliance], to go into business for himself. The Statement of Claim seeks damages on several causes of action: breach of fiduciary duty; conversion; conspiracy; unjust enrichment; and interference with economic relations.

B. Affidavit Evidence

[4] The parties filed the following affidavits:

- Affidavit of James Beattie, director and shareholder of the plaintiff, sworn January 10, 2025 [Beattie Affidavit #1];
- Affidavit of James Beattie, sworn March 25, 2025 [Beattie Affidavit #2];
- Affidavit of Todd Sapergia, sworn April 10, 2025 [Sapergia Affidavit];
- Affidavit of Andrew Bumphrey, a defendant, sworn April 15, 2025 [Bumphrey Affidavit]; and
- Affidavit of James Beattie, sworn June 4, 2025 [Beattie Affidavit #3].

C. Procedural History

[5] From the affidavit evidence, I construct the following timeline of events:

2014

June 1 — Alliance and Canadian Pacific Railway [CPR] enter into Master Service Agreement for train derailment services, renewable every three years (Beattie Affidavit #1 at para. 4)

2017

March 14 — Alliance employs Todd Sapergia as shop-hand and truck driver; Mr. Sapergia is later promoted to rail supervisor (Beattie Affidavit #1 at paras. 6-7)

2022 - 2023

January 12, 2022-January 16, 2023

Alliance contracts with Kelly Bumphrey and Andrew Bumphrey (father and son) through their company, Cactus Hill Farms Ltd., to work as subcontractors in providing derailment service to Canadian Pacific Kansas City Limited [CPKC] (Bumphrey Affidavit at para. 5; Sapergia Affidavit at para. 15)

2023

January 16 — Mr. Sapergia decides to leave Alliance (Sapergia Affidavit at paras. 6 and 21)

January — Mr. Sapergia tells Bradley (Brad) Robertson, Vice-President of Mechanical Car at CPKC, that he is planning on leaving

	Alliance (Sapergia Affidavit at para. 7; Beattie Affidavit #2 at paras. 3-5)
February 15	Mr. Sapergia tells Andrew Bumphrey he is planning on leaving Alliance (Sapergia Affidavit at para. 8; Bumphrey Affidavit at para. 4)
February 24	Mr. Sapergia gives notice to Alliance (Beattie Affidavit #1 at para. 9)
February 27	Mr. Sapergia's last working day at Alliance (Beattie Affidavit #1 at para. 9; Sapergia Affidavit at para. 20)
February 27	CPKC does not contract any work from Alliance after this date (Beattie Affidavit #1 at para. 11; Beattie Affidavit #3 at para. 3; Sapergia Affidavit at para. 3)
February 28	Ant Enterprises 306 Ltd. [Ant Enterprises] incorporated, with Mr. Sapergia, Andrew Bumphrey, and Kelly Bumphrey as shareholders (Beattie Affidavit #1 at para. 10; Sapergia Affidavit at para. 2)
March 1	Meeting scheduled between representatives of Ant Enterprises and Brad Robertson of CPKC for March 3 (Sapergia Affidavit at para. 2; Bumphrey Affidavit at para. 5)
March 3	Meeting between representatives of Ant Enterprises and Brad Robertson of CPKC (Beattie Affidavit #1 at para. 10; Sapergia Affidavit at para. 2)
April 7	Ant Enterprises does derailment work for CPKC (Beattie Affidavit #1 at para. 36)

August 9	Ant Enterprises and CPKC enter into Master Service Agreement for derailment services (Beattie Affidavit #1 at paras. 18 and 31, and Exhibit "E")
December 31	Master Service Agreement between Alliance and CPKC expires and is not renewed (Beattie Affidavit #1 at para. 4)
2024	
April	Mr. Sapergia leaves Ant Enterprises, since business unprofitable (Sapergia Affidavit at para. 14; Bumphrey Affidavit at paras. 7 and 23)
2025	
April 25	Eric Marcotte telephone conversation with Brad Robertson (Bumphrey Affidavit at para. 27)

[6] From the Court file, I construct the following timeline of the litigation:

2023	
July 10	Statement of Claim issued
August 8	Noted for default of defence
September 5	Noting set aside by agreement
November 9	Statement of Defence filed
December 14	Mandatory mediation completed
2024	
June 3	Appearance Day Notice filed by plaintiff seeking Defendants'

Affidavit of Documents

June 18 — Morris J. orders defendants to serve and file Affidavit of Documents within 45 days

September 9 — Affidavit of Documents of Andrew Bumphrey and Ant Enterprises sworn (Beattie Affidavit #1 at Exhibit "F")

2025

January 16 — Plaintiff's application for defendants to produce documents

February 10 — Plaintiff's application adjourned by consent to February 24

February 24 — Plaintiff's application adjourned by consent to April 1

March 27 — Plaintiff's application adjourned by consent to April 10

March 27 — Plaintiff's amended application for defendants to produce documents

April 8 — Plaintiff's amended application adjourned by consent to May 1

April 22 — Defendants' applications for plaintiff to provide better disclosure, for summary judgment, and for leave to question Brad Robertson, a non-party

Supplemental Affidavit of Documents filed by defendant, Todd Sapergia

Supplemental Affidavit of Documents filed by defendants, Andrew Bumphrey and Ant Enterprises

April 24	Both applications adjourned by consent to June 12
June 10	Notice of Objection to Affidavit Evidence filed by plaintiff
June 12	Robertson J. hears all applications, with decision reserved

[7] The litigation is now in the discovery stage. Affidavits of Documents have been exchanged. The parties have been requesting and producing records from and to each other. There has not yet been any questioning of the parties.

III. ISSUES

[8] The issues arising from the applications are:

1. Should the plaintiff's objections to parts of the Sapergia Affidavit and the Bumphrey Affidavit result in striking of those parts?
2. Should the defendants' application for summary judgment be scheduled for hearing?
3. Should the plaintiff's application for production of documents be granted?
4. Should the defendants' application for production of documents be granted?
5. Should the defendants' application for questioning of Brad Robertson as a non-party be granted?
6. What award, if any, of costs should be made?

IV. POSITION OF PARTIES

1. Plaintiff

[9] Alliance says its application for production of documents under Rule 5-12(1) of *The King's Bench Rules* meets the test for production. Alliance wants as much disclosure as possible to prepare for questioning.

[10] Alliance says the defendants' application for production of documents does not meet the test for production because: the requests for emails between Jim and Jarred Beattie and their emails with former accountants involving Mr. Sapergia and for credit card statements are overbroad as to time and not relevant to an issue at trial; the emails of Alliance and its employees about contract disputes are irrelevant and are either privileged or do not exist; the request for copies of credit cards and ledger items for the past five years are overbroad and irrelevant; and the request for all communications with CPKC about negotiation of the Master Services contract and invoices under that contract are irrelevant. The defendants' application should be dismissed.

[11] Alliance supports CPKC in opposing Mr. Sapergia's application to question Brad Robertson.

2. Defendants

[12] The defendants say the records requested in its application for production are relevant to issues in trial.

[13] The defendants say Alliance's application for production of records is either overbroad or seeks records which do not exist, so should be dismissed.

[14] Given the cross-applications for production of documents, there should be no award of costs on those applications, regardless of outcome.

[15] The defendants say their application to question Brad Robertson should be granted because Mr. Robertson has vital information which would corroborate the defence that there were no negotiations with CPKC while Mr. Sapergia was working for Alliance. This corroboration would help in supporting the summary judgment application which might thereby resolve the action.

[16] If the application is denied, a cost award of $500 would be appropriate.

3. Non-Party

[17] CPKC says the defendants' application to question Brad Robertson is premature, in that discovery is not complete, and is not necessary, since the information sought is within the personal knowledge of Mr. Sapergia. The application should therefore be dismissed with costs awarded to CPKC fixed at $10,000.

[18] CPKC supports the plaintiff's objection to affidavits.

V. ANALYSIS

[19] I will address the issues in the order set out above.

1. Should the Plaintiff's Objections to Parts of the Sapergia Affidavit and the Bumphrey Affidavit Result in Striking of Those Parts?

[20] Rules 13-30 to 13-38 of *The King's Bench Rules* govern the form and content of affidavits and exhibits. A party may apply by notice of objection to strike an affidavit, in whole or part, where the affidavit or its content does not comply with *The King's Bench Rules*.

[21] Affidavit requirements on content to which objection may be taken include:

- Rule 13-30(1): an affidavit must be confined to facts that are within

the personal knowledge of the person swearing or affirming the affidavit

- Rule 13-30(2) and (5): failing to disclose the source of the information if sworn or affirmed on the basis of information and belief
- Rule 13-30(3): unnecessary hearsay or argument
- 13-30(4): repeating content of prior affidavits, rather than referencing the prior affidavit
- Rule 13-33: scandalous

[22] The Beattie Affidavit #1 does not comply with Rule 13-34(5) of *The King's Bench Rules* which requires affidavits, including exhibits, over 25 pages to have numbered pages and tabs utilized to separate exhibits.

[23] The practice is for the objecting party to highlight the parts of the affidavit to which objection is taken and to write in the margin the nature of the objection. While parties may file written argument, the practice is for the Chambers judge not to receive oral argument and, at the start of the hearing, to go through the objections and state which are upheld and which are dismissed, without giving reasons. The hearing then proceeds on the basis of the remaining affidavit. This practice avoids delay and allows the hearing of the main motion to proceed.

[24] In this case, I had overlooked the notice of objection. Rather than adjourn the hearing on the substantive applications, counsel agreed I could rule on the objections later in my reserved decision on the main applications.

[25] Alliance took objection to parts of the Bumphrey Affidavit (para. 27: "lawyer is giving substantive evidence, also is double hearsay") and the Sapergia Affidavit (para. 6: "hearsay – source not identified"; and para. 39: "speculation"). The

objections are dismissed. The affidavits stand.

2. Should the Defendants' Application for Summary Judgment be Scheduled for Hearing?

[26] Rules 7-2 to 7-5 of *The King's Bench Rules* allow for summary judgment. General Application Practice Directive #9: Scheduling of Summary Judgment, Set Aside and Judicial Review Applications [GA-PD9] applies to summary judgment applications. GA-PD9 provides a two-stage process for summary judgment proceedings, which is to reduce the cost of litigation and expedite the resolution of disputes.

[27] The first stage involves a review of the application to ensure it is ready for hearing. GA-PD9 responded to the Court's experience with hearing summary judgment applications that were either not ready for hearing or not suitable for summary judgment. Those failed hearings wasted both Court time and counsel time, with attendant cost to the public purse and to litigants. When that occurred, it frustrated the very intent of the summary judgment procedure.

[28] The first stage is intended to screen out those applications which are obviously unsuitable for summary judgment and to ensure those applications which proceed to hearing are ready for hearing. This review process, if done properly, promotes successful summary judgment hearings. The second stage is a hearing on the merits, including whether the case is suitable for summary judgment.

[29] GA-PD9 has been applied to require filing of all materials, including briefs of law, at the first stage. See: *Richardson Pioneer v Lamb*, 2024 SKKB 214 at paras 24-28; *Standing Buffalo Dakota First Nation v Ron S. Maurice Professional Corporation (Maurice Law Barristers and Solicitors)*, 2023 SKKB 42 at para 41; *Kuffner v Jacques*, 2023 SKKB 14 at para 67; *Yildir v Athol Murray College of Notre*

Dame, 2021 SKQB 278 at paras 15-16; and *Chernick v Chernick*, 2020 SKQB 168 at para 18. This ensures the chambers judge conducting the review at the first stage is able to certify it as ready to proceed to hearing.

[30] Since the first stage review is both as to content and format, it is preferable for the parties to agree to relevant facts and records. The applicant should file a binder, with an index and tabbing of contents, containing all materials from both parties which are intended to be relied upon at the hearing. This helps the justice doing the first stage review to be satisfied that the application is ready for hearing. It also promotes a better hearing at the second stage where both the lawyers and hearing judge can easily locate any materials referred to at the hearing.

[31] It should be obvious that this summary judgment application is premature and not ready for hearing, when both parties are actively pursuing discovery applications. This part of the defendants' application is dismissed, with leave to re-apply when such an application may be ready for first stage review.

The Production of Documents

The King's Bench Rules

[32] The following Rules may be relevant to the applications for production of documents:

> **Purpose of this Part**
>
> **5-1**(1) Within the context of rule 1-3, the purpose of this Part is:
>
> (a) to obtain evidence that will be relied on in an action;
>
> (b) to narrow and define the issues between parties;
>
> (c) to encourage early disclosure of facts and documents;
>
> (d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute; and

(e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.

(2) The Court may give directions or make any orders necessary to achieve the purpose of this Part.

…

Form and content of affidavit of documents

5-6(1) An affidavit of documents must:

(a) be in Form 5-6; and

(b) disclose all documents relevant to any matter in issue in the action.

…

Notice to produce documents

5-11(1) Every party is entitled at any time to give notice in writing to any other party in whose pleadings, affidavits or affidavit of documents reference is made to any document:

(a) to produce that document for inspection by the party giving the notice or for inspection by the party's lawyer; and

(b) to permit the party or the party's lawyer to make copies of the document.

(2) A notice to produce documents mentioned in subrule (1) must be in Form 5-11A.

…

Default in disclosure or production

5-12(1) A party desiring production of documents may apply to the Court for an order mentioned in subrule (2) if any party:

(a) has neglected, refused or objected to serve an affidavit of documents in accordance with this subdivision;

(b) has served an affidavit of documents that is not

satisfactory to a party entitled to be served with that affidavit;

(c) has made a claim of privilege with respect to documents referred to in an affidavit of documents;

(d) having been served with a notice to produce documents pursuant to rule 5-11, has neglected or refused to produce any document mentioned in that notice;

(e) has neglected to give notice to inspect documents or, having given that notice, has neglected or refused:

(i) to produce the documents for inspection;

(ii) to permit the lawyer for the other party to make copies of the documents; or

(iii) to furnish the lawyer for the other party with copies of those documents on payment of the proper fees; or

(f) has offered production at a place elsewhere than the address for service unless these rules provide for another place.

(2) In the circumstances mentioned in subrule (1), the Court may make any of the following orders:

(a) an order requiring the other party to produce documents;

(b) an order for further or better production of documents;

(c) an order for inspection;

(d) an order determining whether documents with respect to which privilege is claimed are in fact privileged.

(3) In an order made pursuant to subrule (2), the Court may make an order for production or inspection of documents in any manner that the Court thinks just.

Case Law

[33] In *Popowich v Saskatoon Police Service*, [1996] 8 WWR 609 (Sask CA) at paras 15-22 [*Popowich*], Cameron J.A. for the Court of Appeal commented on the requirements of the former *Queen's Bench Rules* (since rep), Rules 212 to 215:

> 15 These are rigorous duties, especially as they fall to be discharged by counsel, and they must be discharged in the manner laid down by the Rules.
>
> 16 Three prerequisites underlie the duty to disclose: First, of course, there must be, or have been, a document in existence. Second, the document must be, or must have been, in the "possession or power" of the party fastened generally with this duty. And third, the document must "relate to [a] matter in question in the action". The duty to produce is similarly founded but subject to legitimate claims of privilege.
>
> 17 According to current practice in the Court of Queen's Bench, a document, if not in the "possession" of a party in the narrow sense, may be taken as being within the "power" of that party in the broad sense if he or she has sufficient control over the situation, bearing in mind the legal duty borne by this party, to obtain the document on request of the person in whose possession it rests: See, for example, *Zerr v. Rahn* (1987), 63 Sask R. 74 (Q.B., Walker J.).
>
> 18 The expression "relating to any matter in question in the action" has long been regarded as meaning relevant to such matter, but relevant in an extended sense, one that extends beyond the sense of the term as it is employed at trial for the purpose of admissibility, because of the extended purposes of discovery: *Cominco Limited v. Phillips Cables Limited*, [1987] 3 WWR 562 (Sask. C.A); *Steier v. University Hospital Board*, [1988] 4 WWR 303 (Sask. C.A, Tallis J.A. In Chambers); and *Milton Farms Ltd. v. Dow Chemical Canada Inc*. (1987), 52 Sask. R. 264 (Q.B., Wimmer J.).
>
> 19 In *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.), drawn upon in these and other decisions of the Courts of the Province, Brett L.J. said this at p 63:
>
> It seems to me that every document relates to the matters

> in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* -- not which *must* -- either directly or indirectly enable the party [seeking the document] either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party [seeking it] either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences ....
>
> 20 Of course, discovery of documents constitutes just that, meaning the duties of disclosure and production do not extend beyond documents, to the furnishing of information generally. This falls within the province of the examination for discovery.
>
> 21 While the duties of disclosure and production remain in operation throughout the examination for discovery and beyond, clearly they arise and call for discharge in advance of the examination. The Rules leave no doubt about this, as demonstrated by reference to the times prescribed by Rule 212(1) and the indicia set forth in Rule 215(1). And as the duties arise, so does the right to have their performance enforced.
>
> 22 On occasion, for one reason or another, a document will not come to light until the examination for discovery, or will then give rise to controversy, but this does not excuse the performance of the duties in advance of the examination. Nor can it generally stand in the way of the right to the enforcement of their performance in advance, given the need for a logical, orderly progression from discovery of documents to oral discovery.

[34] In *L.(G.) v Canada (Attorney General)*, 2004 SKCA 137, [2005] 3 WWR 445 [*G.L.*], Cameron J.A. for the Court of Appeal explained the framework for discovery of documents. In doing so, at paras. 19-21, he noted the need for appropriate supporting evidence on an application for production:

> [19] In explanation, a brief account of the framework governing discovery of documents will be helpful. Rule 212(1)

> of *The Queen's Bench Rules* requires each of the parties to an action to serve a statement as to the documents "which are or have been in his possession or power relating to any matter in question in the action." In the main, the expression "any matter in question" means any question or issue in dispute in the action. And, as contemplated by the Rule, a document "relates" to any matter in question if it contains information which may either directly or indirectly enable the party opposite to advance its own case or damage that of the other party, or which may lead to a train of inquiry having either of these consequences: *Milton Farms Ltd. v. Dow Chemical Canada Inc.* (1986), 52 Sask. R. 264 (Q.B.).
>
> [20] A party who does not comply with Rule 212 may be compelled to do so on appropriate application to a judge. Judges of the Court of Queen's Bench are empowered by Rules 215 and 217 to enforce compliance, by ordering compliance, striking pleadings, and committing the party in default.
>
> [21] The traditional practice, where one party believes another has not complied with Rule 212, is for that party to demand of the other that the document or documents thought to be in the possession or control of the other, and to relate to a matter in question in the action, be disclosed and produced. If the demand is not met, an application is then made to a judge for an order requiring compliance. Having regard for the scope and rigour of Rules 212, 215 and 217, such applications have traditionally attracted the need for appropriate supporting material identifying the documents and the basis upon which their disclosure and production is sought, including their relation to a matter in question in the action as between the parties to the application.

[35] In *Bell v Insulation Applicators Ltd*., 2023 SKCA 128 at paras 26-46, Kalmakoff J.A. for the Court of Appeal reviewed governing principles for production of documents under *The King's Bench Rules*, concluding at para. 46:

> [46] At the bottom line, where a party brings an application alleging that another party has failed to make proper disclosure, the onus is on the applying party to identify with sufficient precision the documents they say have not been disclosed and to provide a basis, with reference to issues raised in the pleadings, for why those documents are relevant or potentially relevant.

[36] See also: *Canadian National Railway Company v Clarke Transport*, 2013 SKQB 394 at paras 18-25, 432 Sask R 63.

Applicable Rules and Tests

[37] In addressing the applications of both the plaintiff and the defendants, I observe that discovery is ongoing. Affidavits of Documents have been exchanged. There has already been extensive production of records. The plaintiff acknowledged that some of the records sought in its application have since been produced.

[38] Applications under Rule 5-12 of *The King's Bench Rules* for production of documents should be uncommon. The discovery process is designed to avoid the need for judicial intervention.

[39] If a record is "relevant to any matter in issue in the action", as provided in Rule 5-6(1)(b) of *The King's Bench Rules* and not subject to privilege, then it must be disclosed. Lawyers have a professional duty to ensure that happens. Lawyers will impress upon their clients the need to cooperate and for diligence in identifying all relevant records, warning of the consequences of a failure to disclose.

[40] If a relevant document is not disclosed and that is revealed at trial, there will be consequences. Such a failure to disclose will adversely affect the standing and credibility of the offending party and, perhaps, the lawyer representing that party. Adverse inferences of fact may be drawn. Such failure is likely to influence any cost award. These consequences are usually sufficient to ensure that all relevant records are disclosed and produced.

[41] Before an application for production is contemplated, the parties should have exchanged affidavits of documents and then requested those documents they wish to view. Communication between counsel will usually resolve any question over whether the document discovery is complete. It is only when an impasse occurs that

counsel will need to serve Form 5-11A Notice to Produce Documents specifying exactly what document has not been produced. The reason for the failure to produce should be known from prior discussions between counsel. The question argued will usually be whether the requested document is relevant to an issue at trial or subject to a claimed privilege which precludes production.

[42] Generally, notices and applications for production should be specific and limited as to records sought to be produced so that they can be easily identified. Counsel should resist the temptation to cast a wide net, lest it undermine the credibility of any application. As Cameron J.A. observed in *G.L.* at para 25, "the disclosure provided for is so wide as to lead inevitably to difficulty and dispute."

[43] Relevance is key. Disclosure of irrelevant records is not only not required, but discouraged, since it tends to cause delay and confusion by obscuring the relevant documents. Parties should not have to sift through grit to get to the gold. Nor is it the function of the Court to parse relevant records out of an overbroad request for production.

[44] Rule 5-12(1) of *The King's Bench Rules* allows an application for production of documents in six distinct circumstances:

(i) Failure to serve an affidavit of documents;

(ii) Service of an affidavit of documents that is unsatisfactory;

(iii) Challenge to claim of privilege to document listing in affidavit of documents;

(iv) Failure to produce document listed in affidavit of documents after service of Form 5-11A Notice to Produce Documents;

(v) Failure to comply with Form 5-11B Notice to Inspect Documents; or

(vi) Challenge to offer to produce documents at address different from address for service.

[45] Neither of the applications say which clause is relied upon for their application. Since Affidavits of Documents were exchanged and there is no mention of any prior notice to inspect documents, I proceed on the basis that the applications rely upon Rule 5-12(1)(b). I will also briefly address Rule 5-12(1)(d), in case Form 5-11A was served.

[46] As stated in *Popowich* at para 16, the duty to disclose documents only arises where:

(i) The document exists;

(ii) The party has possession or control over the document; and

(iii) The document is relevant to any matter in issue in the action (The current Rules adopted in 2012 changed this part of the test from a broad relevance test to a direct relevance test).

[47] The test on an application under Rule 5-12(1)(b) requires that the applicant show:

(i) The party from whom production is sought served an affidavit of documents;

(ii) The affidavit of documents is unsatisfactory; and

(iii) The documents sought are relevant to a matter in issue in the action.

[48] The test on an application for production under Rule 5-12(1)(d) requires the applicant show:

(i) The party from whom production was sought was served with a Form 5-11A notice to produce the document(s) in question;

(ii) The document(s) was/were not produced; and

(iii) The document(s) is/are relevant to any matter in issue in the action.

[49] If the applicable criteria are satisfied, then the onus shifts to the respondent to establish a valid reason for not listing or producing the document. It is a complete answer if the document does not exist, exists but is not within the possession or control of the respondent, or is not producible because of a valid privilege.

3. Should the Plaintiff's Application for Production of Documents be Granted?

(a) Rule 5-12(1)(d) Application

[50] As discussed above, I proceed on the basis that the applications for production of documents are under Rule 5-12(1)(b) of *The King's Bench Rules*. If the plaintiff's application relied on Rule 5-12(1)(d), I would dismiss the application for the following reasons.

[51] The plaintiff's application does not show or claim that the defendants were served with Form 5-11A Notice to Produce Documents. The absence of a Form 11A Notice precludes an application relying on clause 5-12(1)(d). Email requests between counsel do not satisfy nor remove the requirement to serve Notice to Produce Documents in proper form. Service of the notice not only signals the preliminary step to an application, but it also then records what exactly is sought to be produced.

[52] The supporting Beattie Affidavit #1 at para. 24 says that plaintiff's lawyer sent an email to the defendants' lawyer "requesting additional disclosure". The Beattie Affidavit #1 goes on to say the plaintiff requested various documents, but I can find no evidence that the required form (Form 5-11A) was ever served.

[53] This falls far short of satisfying the test and is sufficient reason to dismiss the application.

(b) Review of Requests for Production Under Rule 5-12(1)(b)

[54] The plaintiff's Amended Notice of Application in para. 1 and 2 under identifies the relief sought and grounds as follows:

> **Remedy claimed or sought:**
>
> 1. An order pursuant to Rule 5-12(2) of *The King's Bench Rules*, requiring the Respondents, Todd Sapergia, Ant Enterprises 306 Ltd., Andrew Bumphrey, and Kelly Bumphrey, to disclose and provide access to the following documents related to these proceedings:
>
> …
>
> **Grounds for making this application:**
>
> 2. The Respondent's affidavit of documents, sworn on September 9, 2024, is extremely deficient given the issues to address in this matter.

[55] Assuming the application is based upon Rule 5-12(1)(b), I will go on to consider the categories of documents sought to be produced.

[56] Alliance did not file a brief of law. Alliance's Notice of Application does not really explain how the requested categories are "relevant to any matter in issue in the action". There is some explanation in paras. 4 to 10 of the Notice of Application, but it fails to match most of the requested items to a claim or defence raised in the pleadings. It is not the Court's role to guess.

[57] Alliance's application lists twelve categories of documents sought for production. Mr. Sapergia's lawyer described it as a "laundry list". I will go through each of the categories. I have summarized and shortened the descriptions. Even so, it is evident that the categories are broadly stated, casting a wide net.

(i) All Correspondence from March 14, 2017, and February 28, 2023, Between the Individual Defendants About Starting up Ant Enterprises

[58] This request is overbroad in that it seeks all correspondence over a six-year period prior to the incorporation of Ant Enterprises.

[59] Although not tied to this specific request, I take the apparent justification for this request is as stated in para. 4 of the Notice of Application:

> 4. The requested documents are the type of documents, which, as a matter of logic and human experience, tend to prove or disprove a matter in issue, particularly the Statement of Claim pleads that Todd Sapergia and Andrew and Kelly Bumphrey engaged in an unlawful act conspiracy to start a new company that is a direct competitor to Alliance Crane and relied on unlawfully obtained confidential information and Todd's breach of fiduciary duty in doing so.

[60] The Sapergia Affidavit at para. 10 states:

> 10. … I had almost no text messages with Andrew and never communicated at all with Kelly. I never emailed Andrew. I have reviewed Andrew's text messages as disclosed and that is accurate, to my recollection, of the extent of our minimal text messaging or written communication.

[61] As discussed above, the Court will not order production of documents that do not exist, are not in the possession or control of the party from whom production is sought, or have already been produced.

[62] This request is therefore dismissed.

(ii) Minute Book of Ant Enterprises

[63] The Bumphrey Affidavit at paragraph 13 states:

> 13. [22] All documents relating to the incorporation of Ant Enterprises 306 were in the hands of our corporate lawyer Tim McLeod at Chow McLeod. We asked Chow McLeod to send the minute book to our lawyer Mr. Marcotte and it was received on February 13, 2025. No written communication took place with any Alliance Crane customers, contractors or employees.

[64] At the hearing of the application on June 12, 2025, the defendants' lawyer said the minute book had been previously provided. He offered to do so again, if the plaintiff did not have it. Plaintiff's lawyer did not take issue with the defendants about that.

[65] This request for production is similarly dismissed.

(iii) All Correspondence from March 14, 2017, and February 28, 2023 Between: the Defendants About Interactions with Alliance Clients, in Particular CPKC; and Mr. Sapergia, Brad Robertson, and Sean Hunter

[66] The Sapergia Affidavit at para. 8 states, "Brad and I had no communication in writing except perhaps the odd text message. Copies of those text messages have been disclosed." The Sapergia Affidavit at para. 26 states, "I do not have any emails with Bradley Robertson aside from what has already been disclosed. Again, most of my communications with Brad would have been by phone conversations, which can be seen by our text messaging chain."

[67] The Sapergia Affidavit at paras. 11 and 13 state:

> 11. I have no written communication or test communication with anyone from Xpert Rail Consulting Inc. SaskPower, Viterra, Great West Rail, Parrish and Heimbecker, Standard Rail or Evraz. If I communicated with any of these people or companies it would have been done by phone call. Again, the

> entirety of my text chain with Brad Robertson has been disclosed in an unedited video.
>
> …
>
> 13. CP would send me emails when I was employed by Alliance but Brad knew the day that I left Alliance and Jim Beattie called CP and told them I had left. I did not receive a single email from CP or any Alliance customers to my email toddsapergia@gmail.com after the day I left Alliance's employment. I am not withholding information, there is simply nothing there.

[68] The Bumphrey Affidavit at para. 7 states:

> 7. … We had no contact with Brad Robertson or CP before Todd left Alliance Crane. Our first direct contact with CP rail was in March of 2023. After that, Todd continued to handle all of the communications with CP Rail until he left Ant Enterprises in April of 2024.

[69] The Bumphrey Affidavit at para. 13 states, "No written communication took place with any Alliance Crane customers, contractors or employees."

[70] This request is dismissed.

(iv) Authorization to SaskTel or Other Telephone Provider to Obtain Text Messages Between the Individual Defendants and Bradley Robertson and Sean Hunter of CPKC

[71] The Sapergia Affidavit at para. 8 states, "Brad and I had no communication in writing except perhaps the odd text message. Copies of those text messages have been disclosed." The Sapergia Affidavit states at para. 12, "I have no relevant text messages with Sean Hunter or Scott McGraw but will be disclosing my entire text history with those two for the sake of clarity.

[72] This request is granted to the extent of requiring Mr. Sapergia to produce his text history with Sean Hunter.

(v) Telephone Records from January 1, 2022, to December 31, 2023, for Telephone Numbers Held by the Defendants

[73] The Sapergia Affidavit at para. 10 states, "I have reviewed my phone and have no communication with Andrew or Kelly stored on my phone. I believe this was likely lost when I traded in my phone and transferred information from my old phone to my new phone." The Sapergia Affidavit at para. 35 states, "This would be disclosed in my phone records from Telus if the Plaintiff wishes to obtain them direct from source. I do not have these documents myself." The Sapergia Affidavit at para. 36 states, "this can be obtained from a third party, Telus, and I have no issue with providing an authorization for this information."

[74] This request is granted to the extent of requiring Mr. Sapergia to provide an authorization for the plaintiff to obtain his telephone records for 2022 and 2023.

(vi) 'Correspondence' to be Inclusive of Phone Records, Text Messages, Emails, Notes and Any Other and All Documentation that Records or Stores Such Correspondence

[75] This is not a proper request for production. I assume it was intended as a definition. If so, the intent was to cast as wide a net as possible.

[76] In so far as this could be construed as a request for production, it is dismissed.

(vii) Documents Created Between January 1, 2023, and December 31, 2023, About Hiring of Former Alliance Employees

[77] This is overbroad. Presumably, Alliance knows which of its former employees left its employ and went to work for Ant Enterprises. If so, why not identify those employees by name?

[78] The Bumphrey Affidavit at para. 6 states, “Todd handled everything in relation to Clayton and Tyler as they were former friends of his. We have no formal written contract with them and no emails.”

[79] This request is dismissed.

(viii) Documents Which Allow for the Assessment of Damages

[80] This item is overbroad and lacks specificity.

[81] This request is dismissed.

(ix) Documents Relating to Purchase or Lease of Equipment by Ant Enterprises

[82] The Sapergia Affidavit at para. 27 states, “I had nothing to do with any equipment purchases or leases. This was all handled by either Andrew or Kelly Bumphrey. I understand that most of the equipment existed before they started Ant Enterprises.”

[83] The Bumphrey Affidavit, at paras. 10-11 and exhibit “B”, list and describe equipment used by Ant Enterprises.

[84] The plaintiff did not explain what more it might seek in terms of documentation.

[85] This request is dismissed.

(x) All Documents Relating to Conversion of Alliance Property to the Benefit of the Defendants, Including Receipts of Purchases Made on Alliance’s Credit Card Totaling $11,881.51

[86] The Sapergia Affidavit at para. 39 states:

> 39. [41(h)] Any receipts I had for the purchase on the credit cards would have been provided to the office admin at Alliance. The Defendant has included credit card statements from January of 2021, 2 years before I left. I do not have any receipts for expenses I made on the company credit card one month before I left, let alone 2 years before I left. I did not keep any of these as they would have been provided to Mary-Ellen Sadlemyer, the accountant. …

[87] This request is dismissed.

(xi) Documents Relating to Conversion of Alliance Property Held by Mr. Sapergia, Specifically Remote-Controlled Drone and SIM Card

[88] The Sapergia Affidavit at para. 30 states:

> 30. … I did retain the drone on the agreement that the cost would be deducted from my regular employee bonus, all as outlined in paragraph 14 of my Defence. I have no documents to disclose in this respect.

[89] This request is dismissed.

(xii) All Documents Maintained by Mr. Sapergia During his Employment with Alliance, Specifically Workbooks

[90] The Statement of Defence at para. 15 states:

> 15. That in reply to paragraph 11 and 19 of the claim, the Defendants state that Todd left all his workbooks with Alliance.

[91] The Sapergia Affidavit at para. 30 states, "…I have no workbooks."

[92] This request is dismissed.

(c) Conclusion

[93] Except for items (iv) and (v), the requests for production of documents are dismissed because the requested documents did not exist, were not in the possession or under the control of the defendants, or had already been produced.

4. Should the Defendants' Application for Production of Documents be Granted?

(a) Review of Requests for Production Under Rule 5-12(1)(b)

[94] The defendants' Notice of Application in paras. 1 and 6 identify the remedy and grounds as follows:

> **Remedy claimed or sought:**
>
> *As against the Plaintiff, Alliance Crane Inc.*
>
> 1. An order pursuant to KB Rule 5-12(2) requiring the Plaintiff to provide further and better disclosure as follows:
>
> …
>
> 6. The Plaintiffs have not disclosed any internal email communications, particularly in relation to the credit card charges.

[95] The Notice of Application in paras. 1.1-1.4 list four categories of documents sought to be produced:

> 1.1 All email communications over the last five years between Jim and Jared Beattie and all emails involving Mary Ellen Sadlemeyer or Pam Lizee involving either Todd Sapergia or credit card expenses for any employee;
>
> 1.2 All emails of the plaintiff or any of its employees and CP Rail;
>
> 1.3 Copies of all company credit card statements for all Alliance employees and ledger items relating to credit cards over

> the last five years;
>
> 1.4 All emails with CP Rail relating to the historical negotiation of the Master Service Agreement and invoices.

[96] While not as numerous as the plaintiff's requests, the defendants' requests are broadly worded to cast a wide net. I will review each in turn.

1.1 Internal Email Communications Over Five-Year Period

[97] The reason put forward for this request in the Notice of Application at para. 6 is stated as follows:

> 6. The Plaintiffs have not disclosed any internal email communications, particularly in relation to the credit card charges.

[98] The Beattie Affidavit #3 at para. 2 states:

> 2. (1.1) I do not actually use email. Rather I have always had support staff respond as needed to emails as per my instructions. Pam Lizzee did not use the Alliance email. Mary-Ellen Sadlemyer never emailed me as her desk was located across from mine so we just spoke to each other.

[99] Lawyers and parties have a duty of candour to the Court. Weasel words will not do.

[100] I take the plaintiff to assert a blanket denial of possession of any internal email communication relevant to any matter in issue in the action, including the departure of Mr. Sapergia, his use of company credit cards, or the starting of a competitor business. While I agree with the defendants that it seems surprising that there was no such internal email communication, I take that as Alliance's answer.

[101] If that turns out to be false, Alliance will pay the price, as discussed above.

[102] This request is dismissed on the basis that the requested documents do not exist.

1.2 Emails Between Alliance and CPR/CPKC

[103] On its face, the request is overbroad. The request does not have a time frame, unless one applies the last words "after February 1, 2023" to the entire request. Without a timeframe, the request would presumably go back at least to 2014 or earlier.

[104] No reason is put forward for this request in the Notice of Application. However, I infer it may relate to the defence that CPKC was dissatisfied with Alliance's work, which in turn motivated CPKC to encourage the defendants to go into business as a competitor for CPKC business.

[105] The Beattie Affidavit #3 in para. 3 states that Alliance received four work orders from CPKC in February 2023, while Mr. Sapergia was still working for Alliance. Mr. Sapergia would have handled these work orders. There were no emails from CPKC after February 2023.

[106] This request is granted only to the extent of requiring Alliance to provide any emails between CPKC and Alliance in 2022 and 2023 involving any contractual dispute between them or a CPKC complaint about Alliance or its work.

1.3 Company Credit Card Statements Over Five-Year Period

[107] This obviously relates to the Statement of Claim at paras. 10 and 19 where Alliance, under the tort of conversion, makes a very serious allegation of improper use by Mr. Sapergia of the company credit card for personal purchases totalling $11,881.51. The claim does not identify the period over which these purchases were made.

[108] The Statement of Defence at para. 12 denies the claim, and at para. 13 says the credit card purchases were authorized. The Sapergia Affidavit at para. 39 says

that his use of the company credit card accorded with accepted company practices.

[109] Given the serious nature of the claim asserted by Alliance, I find that the request is clearly relevant to a matter in issue in the action and is not overbroad, since the evident purpose is to show company practice during the time Mr. Sapergia was an employee.

[110] This request is granted to the extent of requiring Alliance to provide its record of company credit card purchases from the years 2018 to 2022, inclusive. This can be done by providing the monthly purchase statements for company credit cards issued to Alliance employees.

1.4 Emails with CPR About Negotiation of 2014 Master Service Agreement

[111] The rationale put forward for this request is found in para. 7 of the defendants' Notice of Application:

> 7. The Plaintiff claims that the negotiations with CP rail are long term and complex and yet has not disclosed any of these communications. The communication between Alliance and CP in this respect are key to determining the question of whether Todd was a key employee (because of his involvement, or lack thereof, in those negotiations).

[112] The reference to the "Plaintiff's claims" apparently relates to the Beattie Affidavit #1 at para. 19 in which Mr. Beattie expresses surprise that Ant Enterprises was able to negotiate its Master Service Agreement so quickly, saying "In my experience the negotiation of a complex Master Services Agreement typically takes many months, even up to 9 months, …". As it happens, CPKC and Ant Enterprises executed a Master Service Agreement on August 9, 2023 – just over six months after their first meeting on March 3, 2023: Beattie Affidavit #1, Exhibit "E".

[113] The tests for disclosure and production of documents include that the document is "relevant to any matter in issue in the action", not to collateral issues raised

in affidavits.

[114] I could find nothing in the pleadings which would make the negotiation of the 2014 Master Service Agreement between Alliance and CPR an issue in the action. Mr. Sapergia was not employed by Alliance until 2017, so would have had no involvement in the negotiation, whatever his status with Alliance.

[115] This request is dismissed as irrelevant and vexatious.

(b) Conclusion

[116] Two of the four requests for production of documents are granted.

5. Should the Defendants' Application for Questioning of Brad Robertson as a Non-Party be Granted?

(a) Rule 5-20

[117] Rule 5-20 of *The King's Bench Rules* is reproduced below:

> **When non-parties may be questioned**
>
> **5-20**(1) The Court may grant leave to question any person who may have information relevant to any matter in issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.
>
> (2) The Court may grant leave pursuant to subrule (1) on any terms respecting costs and other matters that the Court considers just.
>
> (3) An order pursuant to subrule (1) must not be made unless the Court is satisfied that:
>
> > (a) the applicant has been unable to obtain the information from other persons whom the applicant is entitled to question or from the person the applicant seeks to question;
> >
> > (b) it would be unfair to require the applicant to proceed

> to trial without having the opportunity of questioning the person; and
>
> (c) the questioning will not:
>
> (i) unduly delay the commencement of the trial of the action;
>
> (ii) entail unreasonable expense for other parties; or
>
> (iii) result in unfairness to the person the applicant seeks to question.

(b) Case Law

[118] The defendants relied upon *Custom Cycle (1996) Ltd. v Honda Canada Inc.*, 2013 SKQB 335, 429 Sask R 251 [*Custom Cycle*], a decision of Chief Justice Popescul granting leave to question a non-party to the action. In doing so, he set out at paras. 12-13 the test to be applied on such an application:

> [12] Before the court may exercise its discretion to grant leave to question a non-party, the applicant must satisfy the court that the following eight conditions are present:
>
> (1) the non-party may have information relevant to any matter in issue in the action;
>
> (2) the non-party is not an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation;
>
> (3) the applicant has been unable to obtain the information from other persons whom the applicant is entitled to question;
>
> (4) the applicant has been unable to obtain the information from the person the applicant seeks to question;
>
> (5) it would be unfair to require the applicant to proceed to trial without having the opportunity of questioning the person;

> (6) the questioning will not unduly delay the commencement of the trial of the action;
>
> (7) the questioning will not entail unreasonable expense for other parties;
>
> (8) the questioning will not result in unfairness to the person the applicant seeks to question.
>
> [13] Further, even if all eight conditions are established, the court retains a residual discretion to refuse leave to examine the non-party. This is made clear from the use of the phrase, "[t]he court may grant leave" in Subrule 5-20(1). However, the court is precluded from granting leave if any of the criteria in Subrule 5-20(3) are not met. As stated in Subrule 5-20(3), "An order pursuant to subrule (1) must not be made" unless the court is satisfied that conditions (3) through (8) as outlined above have been met. (See *International Minerals & Chemical Corporation (Canada) Limited*, *supra*, [(1992), 107 Sask R 185 (QB)] at para. 9.)

[119] The non-party agreed that *Custom Cycle* is the controlling authority, but pointed out that it is also the exception in reported cases in granting leave to question a non-party.

[120] *Custom Cycle* involved a dispute between an automobile manufacturer (Honda) and one of its dealerships (Custom Cycle) in which Custom Cycle as plaintiff claimed damages for interference with economic relations based on alleged communication between Honda and another automotive business. Discovery, including questioning, was complete. Custom Cycle applied to question the owner of the other automotive business. The owner had no objection to being questioned. Honda as defendant argued that there was no need to question the non-party, since Honda's representative had already answered questions on the subject. The plaintiff argued that the answers to those questions were vague and unsatisfactory, and the information sought was crucial to the determination of the action. Popescul, C.J. agreed, stating at para. 19:

> [19] I conclude that the applicant has also satisfied the fourth condition because it has not been able to obtain highly relevant information from the person sought to be examined. …

[121] Popescul C.J. granted the application, finding at para. 21 that all eight conditions were satisfied.

[122] The facts of *Custom Cycle*, where discovery – including questioning of parties – was completed before the application to question a non-party, distinguish it from this case.

[123] CPKC and Mr. Robertson, as the non-party in this case, referred to other decisions both before and since *Custom Cycle* in which leave to question a non-party was denied.

[124] In *Cheng v Worldwide Pork Company Limited*, 2009 SKQB 186 at para 91, 334 Sask R 227, Dawson J. dismissed as premature an application under former Rule 222A to question a non-party. The parties were currently in discovery and examinations for discovery (questioning) had not yet occurred. Dawson J. held at para. 91 that questioning of the opposite party to obtain the sought information was a condition precedent to Rule 222A:

> [91] The plaintiffs seek an order, pursuant to Rule 222A of *The Queen's Bench Rules of Court* for leave to examine that officer of the Government that is currently in charge of AFEF. Nothing in the affidavit filed in support of this application indicates the basis upon which the plaintiffs might be entitled to an order under Rule 222A. The Cheng affidavit states at paragraph 19 that the parties are currently at the discovery of documents stage. There is no evidence to suggest that examinations for discovery of any of the defendants have yet occurred. Rule 222A states that an order should not be made under this Rule unless the court is satisfied that the applicant is unable to obtain the information from other persons. In *D.K. v. Miazga* 2002 SKQB 521; [2002] S.J. No. 775 (Sask. Q.B.), this Court held that where there has been no attempt to obtain information directly from a non-party, and where examinations

> of a party would perhaps make it possible to obtain the information, the conditions precedent for this rule have not been met and the court should not order the examination of a non-party. It is my view that the relief requested by the plaintiffs here is premature, and I decline to make the order at this time.

[125] In *Canpar Holdings Ltd. v Signet Investments Ltd*., 2012 SKQB 368 at paras 30-31 and 34, Dawson J., applying the former Rule 222A, dismissed an application to question non-party lawyers in a dispute over ownership of mineral rights. She did so on the basis that the application was premature and the failure of the applicant to show that the information could not be obtained from questioning of the other party:

> [30] Canpar and TAQA/Northrock have not been able to obtain the information from BDP through the examination of Signet and Edwards, only because they have not attempted to do so. They did not ask questions, or seek undertakings. Instead, they entered into the Interrogatories Agreement, but then failed to ask the questions through that process.
>
> [31] The jurisprudence is clear that on the occasions where this Court has made an order for the examination of a non-party, the court has been satisfied that the applicant was unable to obtain the information from the discovery of a party: (*Hill v. Saskatchewan Power Corp.* (1993), 110 Sask.R. 202, [1993] S.J. No. 251 (QL) (Sask.Q.B.); *Dick v. Saskatoon (City)* (1989), 77 Sask.R. 39, [1989] S.J. No. 64 (QL) (Sask.Q.B.); *Popowich v. Saskatchewan*, 2002 SKQB 118, 218 Sask.R. 171; *Alvin's Auto Service Ltd. v. Clew Holdings Ltd.* (1993), 108 Sask.R. 81, [1993] S.J. No. 14 (QL) (Sask.Q.B.); *D. K. v. Miazga*, 2002 SKQB 521, [2002] S.J. No. 775 (QL)) The discoveries of Signet and Edwards are not complete. Canpar and TAQA/Northrock did not ask questions about BDP, but chose instead to enter into the Interrogatories Agreement, but then have not proceeded with that questioning. They have not been unable to obtain the information.
>
> …
>
> [34] There is no evidence before me that satisfies me that the information Canpar and TAQA/Northrock seek relative to BDP cannot be obtained from or through the discovery of Signet and

> Edwards. The relief requested is premature and I decline to make the order.

[126] In *Nagy v Wu*, 2014 SKQB 325 at paras 11-12, Scherman J. dismissed an application to question a non-party doctor. Sherman J. referred to Rule 5-20(1) as establishing threshold requirements to question a non-party, including that the person "may have information relevant to any matter in issue in the action".

> [11] The threshold issue here is whether, as stipulated in Rule 5-20(1), Dr. Buwembo is a person who "may have information relevant to any matter in issue in the action". There are two aspects which need to be examined:
>
> > i. What are the matters in issue in the action against Dr.Wu; and
> >
> > ii. Is there any basis to conclude that Dr. Buwembo may have information relevant to one or more of these issues.
>
> [12] If the applicant gets beyond the threshold issue then, Rule 5-20(3) provides that an order "must not be made unless the Court is satisfied that" the conditions listed in that subsection are met.

[127] Sherman J. found at para. 19 that the applicant had not met the onus of showing the non-party doctor had information relevant to a material issue in the lawsuit.

[128] In *Figley v Figley*, 2018 SKQB 102 at paras 10-12, 21 CPC (8th) 149 [*Figley QB*], aff'd 2019 SKCA 94 [*Figley CA*], Mills J. dismissed an application to question a non-party lawyer who had witnessed the execution of a disputed will. Mills J. held that the failure of the applicant to ask the executor during questioning as a party was fatal to the application, since the applicant had not demonstrated he could not otherwise obtain the information sought:

> [10] In coming to a consideration as to whether to allow a questioning of a third party *Custom Cycle* provides that the factors listed must be satisfied for the questioning to take place.
>
> [11] I need only to refer to Rule 5-20(3)(a).

> [12] Eugene Figley was examined for discovery, as questioning was then called, in 2009. The applicant had the opportunity at that time to question Eugene Figley in his capacity as the purported executor of the estate and the person advancing the validity of the Will. Eugene Figley would have to inform himself of the discussions that the deceased had with his lawyer surrounding the Will, including documents prepared by the lawyer, and provide answers to questions surrounding that situation to Ronald Figley. Ronald Figley did not ask any questions of Eugene Figley to attempt to obtain this information. He has not satisfied this precondition. The application fails on this basis.

[129] In upholding *Figley QB*, then Chief Justice Richards in *Figley CA* at paras 20-21 wrote for the Court of Appeal:

> [20] It may be that the transcript and the authorization were on the Court file, but the case management judge could not have been expected, on his own initiative, to review the file in order to ascertain whether it might contain something relevant to Ronald's application. Simply put, Ronald failed to develop an adequate record for the purposes of his application. He did not establish, as per Rule 5-20(3)(a), that he had been unable to obtain the information from other persons whom he was entitled to question or from Mr. Barry himself. In this regard I note, parenthetically, that the nature of the information sought through the proposed questioning of Mr. Barry has never been identified or specified.
>
> [21] In my respectful view, it is not open to Ronald, on appeal to this Court, to point to documents that he should have brought to the attention of the case management judge and then argue that the case management judge erred by failing to consider those documents.

[130] In *Peepeetch Sr v Madsen*, 2018 SKQB 165, Layh J. cited *Custom Cycle* in refusing leave on the basis that the application was premature. The applicant had not yet questioned named parties who might be able to provide the information sought. Layh J. commented at para. 23:

> [23] Rule 5-20 makes good sense. To allow parties to bring applications to permit questioning of non-parties before the

> named parties are questioned could be chaotic. The ordinary procedure of questioning and undertakings should be exercised and exploited before the court is asked to decide whether or not the yet-to-be-undertaken questioning of the named parties will leave the applicant prejudiced in taking its case to trial.

(c) Conclusion

[131] From these cases, I take it that a party cannot use questioning of a non-party as a short-cut to obtain information which might be obtainable through discovery, including questioning of parties. Applications to question non-parties before discovery is complete will invariably be dismissed as premature.

[132] I dismiss this application as premature.

6. What Award, if Any, of Costs Should be Made?

[133] Given the limited and mixed success on the applications for production of documents and the position of the defendants on costs, I make no award of costs as between the plaintiff and defendant.

[134] The non-party was successful in resisting the application for questioning and is entitled to an award of costs. Having regard to the Tariff of Costs, in particular Item 26 of Part 6 of Schedule I-B, I award CPKC costs of $1,000, payable forthwith by the defendants.

J.
D.N. ROBERTSON