Date: 2014 03 31
Docket: S-0001-CV 2004 000304

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

FDA ENGINEERING LTD.

Plaintiff
(Defendant by Counterclaim)

- and -

ABORIGINAL ENGINEERING LTD.

Respondent
(Plaintiff by Counterclaim)

- and -

JOHN TYMSTRA and TYLER DEANS

Defendants by Counterclaim

MEMORANDUM OF JUDGMENT

## A) INTRODUCTION

[1] This action arises from a consulting contract between the Plaintiff and the Defendant. The Plaintiff is a corporation whose sole shareholders are Tyler Deans and John Tymstra.

[2] The Plaintiff filed its action in 2005, claiming that the Defendant breached the contract by failing to comply with its compensation terms. The Defendant filed a Defence as well as a Counterclaim against Deans and Tymstra. It claims that Deans and Tymstra breached several of their obligations under the contract. The Defendant seeks, among other things, a judgment for debt and damages as well as punitive or exemplary damages.

## B) GENERAL BACKGROUND

### 1. Overview of the action

[3] I do not propose to set out all the details of the pleadings filed in this action. However, to put the motions in context, it is useful to recount, in a general way, what this litigation is about.

[4] The Plaintiff was incorporated as 5163 NWT Ltd and is now called FDA Engineering Ltd. In this Memorandum I will simply refer to it as FDA.

[5] Aboriginal Engineering Ltd (AEL) entered into a consulting contract with FDA in March 2003. Under the contract, FDA was to provide project management services to AEL.

[6] The terms of the contract were discussed by the parties, and reduced to writing in draft form, but no final document was ever signed. What was in fact agreed to, as far as compensation, will be in issue at trial.

[7] In 2004, Diavik Diamond Mines (Diavik) required project management services for a specific project at the mine site. Diavik contracted with AEL for that service, on an "as needed" basis. The work associated with that contract was performed by FDA. The circumstances that led to Diavik and AEL entering into this contract will also be in issue at trial.

[8] The agreement between FDA and AEL was that their contract would be for a period of two years. However, the relationship between the parties deteriorated and came to an end at the end of July or early August 2004. The circumstances and reasons that led to the breakdown in the relationship are in issue as well. What appears undisputed is that FDA delivered a Notice of Termination to AEL, effective 30 days later. Upon receipt of this, AEL issued an immediate termination of contract to FDA. It also put a stop payment order on a cheque that had already been issued to FDA.

[9] It is also undisputed that during that same summer, Diavik entered into a contract with FDA, on an "as needed" basis, in relation to the same project management services that were the subject of Diavik's contract with AEL.

[10] In its action against AEL, FDA claims monies it says are owed for work performed in June and July 2004; for loss of compensation for the month of August, and for a share of AEL's profits for the year 2004, which FDA says it is entitled to under the contract.

[11] In its Defence and Counterclaim AEL alleges that Deans and Tymstra breached several of their duties and obligations. It alleges among other things that they conspired with Diavik and negotiated, for themselves, a service contract that effectively supplanted AEL's contract with Diavik, thereby causing AEL losses in revenue. AEL also claims damages for other breaches of the contract that it alleges Deans and Tymstra committed.

[12] At the time of these events, Deans, an engineer, was a member of the Association of Professional Engineers, Geologists and Geophysicists of the Northwest Territories (and Nunavut) (NAPEGG). AEL lodged a complaint against him with NAPEGG. A hearing was held into this complaint in September 2006. In March 2007, NAPEGG issued a decision concluding that Deans had breached certain rules of the engineers' code of ethics. Deans filed an application in this Court for a judicial review of that decision, seeking to have it quashed. He did not succeed in getting the findings regarding the ethical breaches overturned. But this Court remitted the matter back to NAPEGG on the issue of penalty because it found that insufficient reasons were given for that aspect of the decision. *Deans* v. *Assoc. of Prof. Engs.*, 2007 NWTSC 66.

[13] After filing their pleadings, the parties underwent the usual processes set out in the *Rules of Court of the Supreme Court of the Northwest Territories* (the *Rules of Court*). Issues arose during the discovery processes, which led to the three motions that were heard in Special Chambers on March 5, 2014.

2. The motions

a) Motion to compel production of AEL's financial statements

[14] Robert Johnson was the officer who was produced by AEL for examination. During examination for discovery in October 2005, he undertook to provide information about the loss of revenue alleged by AEL in its Counterclaim. He also undertook to provide 2004 financial information about AEL, up to the end of July 2004.

[15] After the answers to those undertakings were provided, Mr. Johnson was examined again, this time in May 2007. During that examination, he was asked if he would provide financial information from July 2004 to the AEL's year end (October 31st 2004). He refused to provide this information. The reason given was that financial information in that time frame is not relevant, as the contract between the parties came to an end at the end of July 2004.

[16] Following Mr. Johnson's refusal to provide this information, FDA filed a motion to compel AEL to produce it. FDA wants AEL to produce its financial statement and related ledgers for the full financial year which ended October 31 2004. FDA also wants AEL to produce an officer to be examined for discovery about this information. AEL continues to oppose this on the ground that the information is irrelevant.

b) Motion to compel AEL to file a Supplementary Statement as to Documents

[17] Through the discovery process, FDA learned of the existence of two invoices that relate to AEL's contract with Diavik and were not included in AEL's Statement as to Documents. FDA has asked AEL to file a Supplementary Statement as to Documents to include those invoices, and to have an officer produced for further discovery of AEL with respect to them. AEL has refused to do this. FDA has filed a motion to compel both the filing of the Supplementary Statement as to Documents and the production of an officer to be examined about those invoices.

[18] During the hearing, counsel for AEL advised that AEL was no longer contesting this motion. The only remaining issue is that of conduct money, which I address later in this Memorandum.

c) Motion to compel Deans to re-attend examinations for discovery

[19] Deans was examined for discovery in October 2011. During that process he was asked about the disciplinary proceedings referred to above at Paragraph 12. He refused to answer those questions. The reason given for the refusal was that the disciplinary proceedings are proceedings that a separate and distinct from the civil action and are not relevant to this litigation. AEL has filed a motion to compel Deans to re-attend examination for discovery to answer those questions.

C) ANALYSIS

a) Legal framework

[20] The parties are in general agreement about the rules and principles that apply to the discovery process and govern these three motions.

[21] Rule 251 of the *Rules of Court* sets out the scope of information that can be obtained in through an examination for discovery:

> 251. (1) A person who is examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relating to

> any matter in issue in the action and no question may be objected to on the ground that
>
> (a) the information sought is evidence;
> (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or
> (c) the question constitutes cross-examination on the statement as to documents of the party being examined.

[22] The Rule is worded quite broadly, which makes sense, considering the objective of the discovery process. Put simply, that process is intended to give parties access to all the information that the other party has and that may be relevant to the litigation. It is designed to ensure full disclosure of all potentially relevant information to all parties, which in turns greatly reduces the risk of the trial process getting derailed.

[23] There are, of course, limits to the scope of questions that can be asked in an examination for discovery. When a question is objected to, inevitably, the Court, in deciding on the validity of the objection, must consider the issue from the point of view of relevance, in the context of the pleadings. If the information sought is clearly irrelevant to the action, there is no reason to compel a party to produce it. At the same time, the Court's task is not, at that stage, to decide ultimate relevancy or the weight that the evidence will carry in the determination of the issues. *Everest & Jennings Canadian Ltd.* v. *Invacare Corp.* [1984] 1 FC 865, at paras 3-4.

[24] This Court has recognized the broad scope to the issue of relevance in the context of discovery processes:

> Rule 251(1) says that a person who is examined for discovery shall answer "any proper question relating to any matter in issue in the action". There is a broad scope to the issue of relevance at the discovery phase. As stated in *Czuy* v. *Mitchell* (1976), 1 Alta. L.R. (2d) 97 (C.A.), at page 101: "The greatest latitude should be allowed to a party who is examining an adverse party for discovery so that the fullest inquiry may be made as to all matters which can possibly affect the issues between the parties." (Emphasis in original)
>
> *Fullowka* v. *Royal Oak Mines Inc. et al.*, Unreported, CV05408, March 10, 1998, at para.4.

[25] These comments are consistent with pronouncements made by other Courts:

> It seems to me that the clear right of the plaintiffs to have access to documents which *may* fairly lead them to a train of inquiry which *may* directly or indirectly advance their case or damage the defendant's case particularly on the crucial

> question of one party's version of the agreement being more probably correct than the other, entitles the plaintiffs to succeed on some parts of this application.
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> *Boxer and Boxer Holdings Ltd.* v. *Reesor, Gillepsie and Novan Properties Ltd.* (1983) 43 B.C.L.R, 352, at para. 26.

b) Merits of the motions before the Court

1. FDA's motion for production of financial statement

[26] FDA says that the full financial statement for AEL's financial year ending October 31 2004 is relevant because its agreement with AEL contemplated, as part of the compensation package, a performance bonus calculated on the basis of a percentage of AEL's annual profits. FDA's position is that the financial information for the full financial year is required for the calculation of this bonus.

[27] FDA has filed, as an exhibit to Dean's Affidavit sworn February 25 2011 and filed March 17 2011, an unsigned document that appears to be a draft that was produced in April 2003, while the parties were negotiating the terms of the agreement. Clause 3 refers to a performance bonus, to be "calculated and paid out as part of the AEL fiscal year-end review, which is defined as October 31". *Affidavit of Tyler Dean No.2*, Exhibit "B".

[28] In the same affidavit Deans deposes at Paragraph 13 that AEL "admits there was an agreement to share its profits but disputes the percentage that was to be divided". Based on the pleadings, this may not be an accurate statement of AEL's position on this matter. Paragraph 7 of the Statement of Defence acknowledges that the unsigned document referred to above represents the most accurate reflection of the terms of the agreement between the parties, but with some specific exceptions, including the clause that deals with the performance bonus. At the hearing of the motion, counsel for AEL stated that AEL disputes that there was any agreement with respect to the performance bonus.

[29] The question of whether a performance bonus was part of the agreement is one that will have to be decided at trial. That issue is not for me to resolve at this stage. If the trial court concludes that there was an agreement for a performance bonus, there will also be an issue as to how this bonus should be calculated.

[30] FDA has filed the Affidavit of Brent Hinchey, a Certified General Accountant who has examined the unsigned contract and deposes that in his opinion, the financial records for the full financial year are relevant:

> 8. (...) the financial statements of AEL for the year ended October 31, 2004 prepared in accordance with generally accepted accounting principles are relevant

> to this action. These statements would assist in determining the net profits of AEL for its year ended October 2004 which would lead to a determination of profit shares under the consulting agreement. The statements would further assist in determining the losses alleged by AEL in its Statement of Defence and Counterclaim.
>
> 9. (...) the general ledgers of AEL are relevant to this action. The general ledgers of a business entity should record the daily transactions that affect its financial position. The financial statements are prepared from the information in the general ledgers. The general ledgers are relevant to the matters noted in paragraph 8 above.
>
> 10. (...) a review of the DIAVIK records of payment under the 2004 contract attached as Exhibit "B" would be a helpful way of verifying AEL's records of revenue received under the contract.
>
> *Affidavit of Brent Hinchey*, paras. 8-10.

[31] The unsigned contract states that the bonus is to be calculated as part of the AEL fiscal year. It makes no reference to how the calculation will be done if the contract, for whatever reason, comes to an end during the financial year. From the submissions made at the hearing of the motion, I understand that AEL's position will be that only the profits earned during the part of the year where the contract was in place should be considered in the calculation of the bonus. FDA's position will be that the bonus should be calculated on the basis of the profit for the whole year, and then pro-rated in accordance to the portion of the year where the contract was in existence. The relevance of AEL's financial information for the period between August and October 2004 will depend on which of these two positions prevails.

[32] Again, this is not an issue for me to decide. There is at least a possibility that the financial information for the full year could be relevant to the determination of the amount of compensation that FDA is entitled to. Whether that information will be relevant or not will depend on findings made at trial.

[33] AEL has filed evidence that purports to contradict Mr. Hinchey's affidavit about the potential relevance of the financial information that FDA seeks to have produced. In his Affidavit, Robert Johnson deposes as follows:

> 12. As the Contract was never finalized and executed by the parties, it is my belief and understanding that the provisions in the Contract regarding the profits that the Consultants were entitled to are provisions that were never agreed upon and finalized by the parties.

> 13. I am also advised by my counsel, Jack R. Williams and verily believe that the financial statements of AEL for the time period subsequent to the Consultants termination date are not relevant to the within action.

*Affidavit of Robert Johnson*, Paragraphs 12-13.

[34] This evidence does not assist AEL on this motion. Mr. Johnson deposes that the information is irrelevant, because there was no agreement. In so doing, he is merely stating the position that AEL is advocating: having a submission included in an affidavit does not bolster its substantive merit. As for Mr. Johnson recounting the opinion expressed by AEL's former counsel about the relevance of the information sought, all that does is explain why he refused to give the information. It does not add anything to the facts or otherwise strengthen AEL's position.

[35] There is another reason why the financial information for the full year may be relevant. AEL has, through its Counterclaim, put aspects of its financial situation in issue because it alleges losses in revenue as a result of FDA's actions. Paragraph 24 of the Counterclaim makes reference to the specific contract between AEL and Diavik, but that is not the only loss of revenue that is mentioned. To defend the allegation that their actions resulted in loss of revenue to AEL, FDA needs access to AEL's financial information at the relevant time.

[36] For those reasons, I cannot agree with AEL's submission that the information sought is necessarily irrelevant to the action, such that its production should not be ordered.

[37] AEL's alternative argument is that even if the information is relevant, this Court retains the discretion not to compel its production. AEL argues that the Court should exercise this discretion because the financial statements include confidential information that, if disclosed to FDA, could be used by FDA in a way advantageous to FDA and injurious to AEL, as FDA is now AEL's competitor. In its written submissions, AEL also argues that Deans and Tymstra have demonstrated a pattern of blameworthy conduct that raises significant concerns if they were to have access to this confidential information.

[38] I recognize that this Court has the discretion not to order the disclosure of relevant information or documents to protect the confidentiality of that information. Absent the existence of a class privilege, that assessment must be made on a case by case basis. *Husky Oil Operations Limited* v. *Anadarko Canada Corporation*, 2004 ABCA 154.

[39] I have considered the issue but conclude that this is not a case where this discretion ought to be exercised to curtail FDA's ability to obtain the information it seeks.

[40] The first reason is that FDA has filed evidence showing that Deans and Tymstra have not, for several years now, done any work in the Northwest Territories, and that they have no intention to resume working in the Northwest Territories in the future. Deans has deposed to this in an Affidavit and has testified to that effect at examinations for discovery in October 2011. *Affidavit of Tyler Deans (No. 5)*.

[41] The concerns raised by AEL, set out in Mr. Johnson's Affidavit, may have carried more weight some years ago, but those concerns must be assessed in the context of the present situation. In my view the risk of harm to AEL's business ventures is reduced given that the information sought to be produced dates back 10 years, and the fact that FDA has not, for some time, conducted any business in the Northwest Territories, and has no plans to do so in the future.

[42] The second reason is that as mentioned above at Paragraph 35, AEL has put its financial situation in issue, as far as the 2004 financial year is concerned, through its Counterclaim. Given that it alleges a loss of revenue at the relevant time and now seeks compensation and damages against Deans and Tymstra, it would be wholly unfair to allow it to use confidentiality as a shield to prevent them from having access to information that may be relevant to their defence to that Counterclaim.

[43] In its written submissions AEL suggests, in the alternative, that the Court should make the order for production subject to FDA having demonstrated its entitlement to this access, under the terms of the contract. This approach, a two-stage discovery process, has been adopted by the courts in certain circumstances. *R. v. Holding Co. Ltd.* v. *Martin's Vegetable Sales* (1982) *Ltd.* (1998), 175 Sask. R. 148 (Sask. Q.B.).

[44] Such an approach can be an effective compromise in some cases. Here, it if the only relevance of the financial information was in conjunction with the calculation of the performance bonus, such an approach could be contemplated. But this is not the case: for the reasons explained above, I have concluded that the financial information is also relevant to the Counterclaim. That being so, this is not a case where the two-step approach would be appropriate.

[45] AEL's reasons for opposing a direction compelling it to present an officer for further discovery on the financial statements is based on the same grounds as

its opposition to the production of the statements. As I have concluded that the financial information should be produced, and for the same reasons, I conclude that one of AEL's officers should be produced to be examined about that information.

2. AEL's motion to have Tyler Deans re-attend examinations

[46] AEL seeks to have Deans re-attend examinations so that he can be asked questions about the disciplinary proceedings held by NAPEEG. AEL argues that since those proceedings stemmed from the same circumstances as those that give rise to this litigation, it is entitled to ask Mr. Deans some questions about them.

[47] FDA's first argument is that AEL's motion cannot succeed because there is an error in the manner in which its Notice of Motion is worded. The grounds listed on the Notice of Motion are as follows:

> 1. During his examination for discovery held on the 26th, 27th and 28th days of October, 2011, Tyler Deans, Defendant by Counterclaim, refused to answer question relating to his Northwest Territories and Nunavut Association of Professional Engineers and Geoscientists ("NAPEGG") Disciplinary Hearing of September 2006.
>
> 2. Aboriginal Engineering Ltd., the Defendant and Plaintiff by Counterclaim, claims that Tyler Deans, Defendant by Counterclaim, and FDA Engineering Ltd., Plaintiff and Defendant by Counterclaim, induced Diavik Diamonds Mine Inc. to breach its contract with Aboriginal Engineering Ltd.
>
> 3. As a result of this potential inducement to breach the contract, a complaint was made to NAPEG in regards to Tyler Dean's involvement and he was found to have breached of his professional ethics and disciplined by NAPEG for his involvement in the contract and potential inducement to breach that same.
>
> 4. Such further and other grounds as counsel may advise.

[48] FDA points out that the third ground asserts that Deans was disciplined by NAPEGG "for his involvement in the contract and potential inducement to breach same" and that the Record of Decision does not bear this out. FDA says that because of this, on its face, the motion is not supported by the materials and should be dismissed.

[49] The conclusions reached by NAPEGG that Deans breached various rules of the code of ethics were based on conclusions that he did not act with fairness and justice to all parties when administering his contract with AEL; that he should have disclosed to AEL his intention to terminate his contract with them, his interest in competing for the work under the contract, and worked out an acceptable solution with them; that he did not disclose conflicts of interests to all parties when he

should have; that for a period of time he acted in a range of activities that placed him in a conflict of interest. The Record of Decision does not include a specific finding that he induced Diavik to breach its contract with AEL.

*Affidavit of Tanya Doherty*, Exhibit "C" (Record of Decision).

[50] Be that as it may, ground 3 of the Notice of Motion does not refer only to inducements; it also makes reference to NAPEGG having disciplined Deans "for his involvement in the contract". This language is broad enough to capture the findings made by NAPEGG. The motion is properly before the Court and must be decided on its merits.

[51] FDA argues that the subject matter of the NAPEGG proceedings is irrelevant because the civil suit relates to Deans' contractual relationship with AEL, whereas the NAPEGG hearing was concerned his ethical obligations as an engineer. FDA argues that the two processes relate to completely different subject-matters and that for that reason, the disciplinary proceedings are irrelevant to the law suit. Therefore, FDA says, Deans should not to be compelled to answer questions about it. FDA argues that the following excerpt of NAPEGG's Record of Decision support its position:

> Paragraphs 7, 8 and 9. Mr. Deans argues that the complaint has no merit because there is a written contract between 5163 and AEL. He argues that these matters are legal issues that need to be resolved by the courts and not by reference to the Code of Ethics.
>
> It is the position of the panel that, while Mr. Deans is free to sign a commercial contract that is not bound by the code of ethics, he cannot operate as a Professional Engineering Company nor style himself as a Professional Engineer unless he abides by the code of ethics. The legal issues of the contract should be decided by the court. The ethical issues are the subjects of this hearing.
>
> *Affidavit of Tanya Doherty*, Exhibit "C" (Record of Decision).

[52] FDA also points to comments made by this Court in its decision on the judicial review application referred to above at Paragraph 12:

> The Appellant also put considerable emphasis on the ongoing litigation arising out of the contractual issues. He submits that the issues dealt with by the Council are more properly the subject of that litigation. I have no doubt that many of the issues arising from the contractual relations between the various parties belong in that forum. However, whether the Appellant's actions constituted a conflict of interest that he should have disclosed and whether he breached the applicable Rules of Conduct are matters properly the subject of disciplinary proceedings under the Engineering, Geological and Geophysical Professions Act; see Terra

Energy Ltd. v. Kilborn Engineering Alberta Ltd. (1999), 170 D.L.R. (4th) 405 (Alta. C.A.).

*Deans* v. *Assoc. of Prof. Engs., supra,* at para. 27.

[53] The comments in NAPEGG's Record of Decision and in this Court's decision on the judicial review must be placed in context. Those comments were made in addressing the submissions made by Deans at the NAPEGG hearing and at the judicial review about the ongoing litigation being a bar to the disciplinary process taking place.

[54] Both NAPEGG and this Court found that what arose between the parties could be examined as part as two processes, one concerned with potential breaches of the code of ethics, and the other with potential breaches of a contractual obligation. The existence of these parallel processes stem from the fact that Deans was, at the material times, bound both by his corporation's contract to AEL, and by his ethical obligations as a professional engineer. Recognizing that two separate processes may arise from the same circumstances does not amount to a finding that they are entirely irrelevant to one another.

[55] AEL has indicated that it intends on arguing at trial that findings made at the conclusion of the disciplinary process are one of the factors that the Court can consider in deciding whether Deans breached his obligations under the contract. FDA and Deans disagree and will take the position that the outcome of the disciplinary proceedings is of no assistance. That issue is better left for the trial judge to decide.

[56] There remains the question of whether the proposed questioning of Deans about the disciplinary proceedings is barred for another reason. As noted by AEL in its written submissions, some statutes and regulations that provide the framework for monitoring the conduct of professionals have express language preventing disciplinary proceedings from being raised at an examination for discovery. *Huerto* v. *College of Physicians and Surgeons*, 2011 SKQB 431, at para.18. AEL argues that absent such explicit language, there is no bar to questions being asked during discoveries about such proceedings.

[57] The *Engineering, Geological and Geophysical Professions Act*, R.S.N.W.T. 1988, c. E-6 (the *Act*) does not have a provision that deals specifically with examinations for discovery, but it does have a provision that makes reference to civil proceedings:

> 41. (1) The practitioner whose conduct is the subject of inquiry, and any other person the Board of Inquiry considers to have knowledge relevant to a complaint, is a compellable witness at a hearing inquiring into that complaint.
>
> (2) A witness at a hearing may be examined on oath or affirmation on all matters relevant to the inquiry, and is not excused from answering a question on grounds that the answer might
>
> (a) tend to incriminate the witness,
> (b) subject the witness to punishment under this Part, or
> (c) tend to establish the liability of the witness
> (i) in a civil proceeding at the instance of a person or the Government of the Northwest Territories, or
> (ii) to prosecution under any Act,
>
> but an answer so given may not be used or received against the witness in any civil proceedings or in any proceedings under any other Act of the Northwest Territories, except in a prosecution for or proceedings in respect of perjury or the giving of contradictory evidence.

[58] Neither party made reference to this provision in their written submissions or during the hearing of these motions. I became aware of this provision during my deliberations. I filed a Note to the Parties inviting further submissions as to whether section 41 had a bearing on the issue of whether Deans could be compelled to answer questions about the disciplinary proceedings as part of the discovery process on the civil suit. I gave the parties until March 26th 2014 to file further submissions on the point. Both have now done so.

[59] AEL's supplemental submissions include, at Tab 2, a provision that has nothing to do with the issue raised, namely, section 41 from an earlier version of the *Act* that has since been repealed. That is unfortunate. Counsel should ensure that materials filed with the Court are in order. That said, the submissions themselves appear to address the correct provision.

[60] AEL's position is that the purpose of section 41 is the protection of confidential information from those not involved in the disciplinary hearings, and that the *Act* seeks to protect the testimony and records produced within those hearings.

[61] AEL has taken this opportunity to file a supplementary affidavit that includes the portion of Deans' examination for discovery where he was asked the impugned questions. AEL notes that the questions were limited to the existence of the disciplinary proceedings and resulting consequences of the hearing, and that the questions were not to explore any confidential information provided through testimony at the hearing nor at admitting documents produced at the hearing. AEL argues that the questions it seeks to ask are not within the purview of section 41.

[62] FDA argues that the plain objective of section 41 is to protect those who are compelled to take part in a disciplinary hearing, and that this protection extends to Deans. FDA argues that any inquiry into the facts and submissions presented to NAPEGG's Board of Inquiry is an inquiry into the evidence and that such inquiry is prohibited by section 41.

[63] There are many cases concerned with the interplay between disciplinary proceedings and civil actions in various contexts: *Huerto* v. *College of Physicians and Surgeons*, *supra*, related to proceedings against a doctor; *Kernoran* v. *Ontario*, 2009 CanLii 37711 (ONSC), related to information from disciplinary proceedings involving police officers; *Middleton* v. *Sun Media* (2006), 268 D.L.R. (4th) 347, involved proceedings against a cosmetic surgeon; and *S.(M.A.) (Litigation Guardian of)* v. *Ludwig* (2004), 190 O.A.C. 291 related to proceedings at a coroner's inquest.

[64] The extent to which information related to disciplinary or other administrative proceedings can be used or raised in the context of civil proceedings depends on the specific wording of the relevant provision. Section 41, it seems to me, is geared specifically at the protection of witnesses called at a hearing. It disentitles witnesses from refusing to answer questions on grounds that those answers might incriminate them, but prevents the use of those answers in civil proceedings, except proceedings for perjury or for giving inconsistent evidence. That protection extends to Deans. Any question relating to the evidence he gave at the disciplinary hearing would not be admissible to show his liability at the civil trial. Such questions, therefore, cannot be asked of him during examinations for discovery.

[65] But based on the transcript of Deans' examination for discovery, and based on the position set out in AEL's supplemental brief about the scope of the proposed questioning, that is not what AEL wishes to ask Deans about. AEL is not seeking to question him about his evidence during the disciplinary proceedings, is not seeking to use any of his answers as part of this action, and is not attempting to have any documents from the hearing produced. AEL simply wants to confirm,

through Deans, the existence of the proceedings and their outcome. The parties disagree about those matters are relevant to the civil action but as stated above at Paragraph 55, that issue, in my respectful view, is better left for the trial judge to decide.

[66] I conclude that section 41 does not constitute a bar to AEL asking the Deans questions of the limited scope proposed. Section 41 does constitute a bar to his being questioned about his testimony at the NAPEGG hearing.

3. Conduct Money

[67] Both parties have made submissions about conduct money in the event that further examinations are ordered as a result of these motions.

[68] Had I concluded that the refusal to answer questions that led to either of these motions was unreasonable, I might have made specific orders regarding conduct money. But such is not the case. Each party had reasons to take the position it did; the objections to answering the questions were not frivolous. Under the circumstances, I see no reason to make specific orders regarding conduct money.

D) CONCLUSION

[69] For those reasons, an Order will issue as follows to dispose of the three motions heard on March 5, 2014:

1. The Defendant shall file a Supplemental Statement as to Documents that will include invoices 56-03 and 56-04;

2. The Defendant is directed to produce one of its officers to be examined with for discovery with respect to those two invoices;

3. The Defendant shall file its financial statement and related ledgers for its financial year that ended October 31, 2004;

4. The Defendant is directed to produce one of its officers to be examined for discovery with respect to the financial information referred to at Paragraph 3 of this Order;

5. Tyler Deans is directed to re-attend examination for discovery to answer questions in regards to the disciplinary proceedings that resulted from AEL’s complaint to NAPEGG

[70] If the parties want to make submissions as to costs, they should contact the Registry within 14 days of the filing of this Memorandum. They can request a hearing date, or, if they both agree, ask that the issue of costs be dealt with on the basis of written submissions, in which case I will set timelines for the filing of those submissions.

L.A. Charbonneau
J.S.C.

Dated this 31st day of March 2014.

Counsel for FDA Engineering Ltd.: Austin Marshall
Counsel for Aboriginal Engineering Ltd.: Terri Lynn Bougie

**S-0001-CV 2004 000304**

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BETWEEN

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MEMORANDUM OF JUDGMENT
THE HONOURABLE JUSTICE L.A. CHARBONNEAU

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