

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**CATHERINE MALLON**

**Plaintiff**

**-and-**

**TOWN OF NORMAN WELLS, CATHY CLARKE,  
DARREN FLYNN and FRANK POPE**

**Defendants**

**MEMORANDUM OF JUDGMENT**

**INTRODUCTION**

[1] This is Catherine Mallon’s application to compel the individual defendants to produce certain documents and provide answers to questions objected to during cross-examination on affidavit. It engages questions of how and when solicitor and client privilege and litigation privilege are waived; the extent to which an affiant who is cross-examined can be compelled to search for and provide documents in the possession and control of another; and relevance.

**BACKGROUND**

[2] The action is for defamation. It is related to an action the Town of Norman Wells (the “Town”) brought against Ms. Mallon and others for fraud (the “fraud action”). The relevant information, based on the Amended Statement of Claim in this action, is included below.

[3] Ms. Mallon was the Senior Administrative Officer (“SAO”) for the Town from 2015 until November of 2018. At her request in 2017 the Town was placed under administration by the Government of the Northwest Territories’ Department of Municipal and Community Affairs (“MACA”). Ms. Mallon remained as the SAO

after the Town was placed under administration. She officially left her position when her contract ended in November of 2018, although she had ceased active duties in the previous September, when MACA appointed the defendant Darren Flynn as the interim SAO.

[4] Mr. Flynn was the interim SAO from September of 2018 until March 6, 2019. During his tenure he requested that MACA conduct a forensic audit into Ms. Mallon's pay and benefits and her use of the Town's corporate credit card. The forensic audit was conducted and resulted in a report (the "EPR report"). A draft of that report was completed after Mr. Flynn left the position of interim SAO.

[5] There was an election on October 15, 2018 and the defendant Frank Pope was elected mayor. Following the election, MACA's administration over the Town ceased.

[6] The defendant Cathy Clarke was appointed SAO on March 6, 2019 and she remains in that position.

[7] The Town filed the fraud action on May 3, 2019. As part of that action, the Town applied for injunctive relief against Ms. Mallon. The application was supported by an affidavit from Ms. Clarke which made reference to evidence of fraudulent conduct discovered through the audit Mr. Flynn requested and embodied in the EPR report. Ms. Mallon alleges that the EPR report had a number of shortcomings which were known to Ms. Clarke, Mr. Pope and the Town, and pointed out to them by the Town's solicitors, including erroneously stating Ms. Mallon had been dismissed from her position as SAO.

[8] On May 8, 2019, the Town and Mr. Pope held a public meeting to inform residents of Norman Wells about the fraud action. Ms. Mallon alleges that Mr. Pope made a number of defamatory statements about her at that meeting. On May 10, 2019, court documents related to the fraud action, including Ms. Clarke's affidavit, were made available to residents of Norman Wells at the town office.

[9] Ms. Mallon says that in making the court documents available at the town office, Ms. Clarke, Mr. Pope and the Town defamed her.

[10] Ms. Mallon also alleges that Ms. Clarke made defamatory statements about her to a third party.

[11] The allegations against Mr. Flynn are that during his employment as interim SAO, he made statements to third parties suggesting that Ms. Mallon had engaged in fraudulent conduct.

### ***The Application***

[12] The individual defendants and the Town have each brought two identical applications, which are scheduled to be heard shortly. The first is to strike out certain paragraphs of the Amended Statement of Claim for disclosing no cause of action and the second is for summary judgment dismissing the action entirely.

[13] Under the heading “Legal Basis”, the Notice of Motion in the summary judgment application puts state of mind in issue with respect to Ms. Clarke and Mr. Pope, as follows:

32. Both Pope and Clarke sought and received advice from the Town’s legal counsel about the communications that form the basis of the plaintiff’s claim against them. Pope and Clarke received assurances from legal counsel that, because the statement of claim and affidavit filed by the Town [in the fraud action] were publicly available documents, these could be made available at the public meeting. Pope’s speaking notes for the town hall meeting, which are substantially similar to the remarks Pope delivered at the meeting, were review and approved by legal counsel.
33. Counsel for the Town approved Pope’s speaking notes, knowing that Pope’s remarks would be delivered publicly. Pope and Clarke’s reliance on legal advice is a clear indication that they acted in good faith and without malice.
34. Pope and Clarke also trusted in the reliability of the audit report received from MACA. MACA contracted with the audit firm and the audit report was sent directly to MACA. Pope and Clarke believe that the report they received from MACA was what the Town requested in 2018: a forensic audit into Mallon’s payroll and expense claims. Both Clarke and Pope collaborated with MACA in planning the May 8, 2019 town hall meeting based on the audit report.
35. Neither Pope nor Clarke were motivated by a desire to injure Mallon. Both had a positive and honestly held belief in the truth of their statements and in the truth of the contents of the statement of claim and affidavit. Contrary to what is pled at paragraph 35 of the Amended Statement of Claim, neither Pope nor Clarke was recklessly indifferent as to the truth or falsity of their

statements. Both believed the audit report received from MACA was a document they could rely on and refer to in order to communicate accurate, evidence-based information to residents of Norman Wells.

[14] The Town adopts the legal basis set out in the individual defendants' Notice of Motion in its own application for summary judgment.

[15] Each of the individual defendants filed affidavits in support of the summary judgment motion and each was cross-examined on them. The individual defendants were not presented as representatives of the Town; however, the Town has expressly adopted their evidence in support of its own application.

[16] The individual defendants each took a number of undertakings under advisement, which were subsequently refused. As well, there were a number of questions to which objections were taken.

### ***Waiver of Solicitor and Client Privilege***

[17] Ms. Clarke and Mr. Pope both deposed that they had permission from the Town to disclose legal advice received from the Town's solicitors relating to the public meeting.

[18] Paragraph 8 of Ms. Clarke's affidavit is as follows:

. . . I have the Town's permission for the purpose of my affidavit in this proceeding to waive privilege over the narrow issue of [legal] advice sought and received about public statements and publications made by the Town and its officials regarding the lawsuit against Ms. Mallon and Mr. Watson. The Town has not waived its privilege over any other aspect of the advice received from [its lawyers]. For that reason, I have disclosed the substance of the advice in the body of this affidavit, but I have not attached the actual emails containing the advice. I am willing to disclose those emails for the purpose of this proceeding if determined necessary by the Court and provided my doing so does not waive privilege over any other part of the advice . . .

[19] Ms. Clarke went on to describe the steps she took to obtain legal advice from the Town's solicitor prior to the public meeting and the nature of the advice she received. The solicitor provided advice on speaking notes for the meeting, a press release to be distributed prior to the meeting and distribution of the court documents connected to the fraud action. Among other things, the solicitor advised against releasing copies of the court documents until Ms. Mallon and her co-defendant, Mr.

Watson, were served. He indicated that Mr. Watson could not be served until May 10, after the public meeting. Ms. Clarke sent another email to the solicitor on May 10 to confirm that Mr. Watson had been served. Upon being advised that he had been served, and at the direction of the Town, copies of the court documents in the fraud action were made available at the town office.

[20] Mr. Pope swore two affidavits, one on October 26, 2020 and the other on November 26, 2020. In the first affidavit, Mr. Pope stated that he sought legal advice from the Town's solicitor before the public meeting. He told the solicitor that he wanted to be able to address town residents about the reasons for the fraud action. He then sent an email to the solicitor stating he wanted to be able to tell residents where the court documents could be found. The solicitor's response is reproduced in Mr. Pope's affidavit, at paragraph 16:

Regarding the details of the claims made by the Town, the Statement of Claim is filed in Yellowknife, so community members would not be able to view it in Norman Wells. However, the Statement of Claim is a public document, so you can share it with anyone. You could have copies available for viewing at the meeting or at the Town Hall.

[21] The full email exchange was attached in its entirety as Exhibit "E" to Mr. Pope's affidavit. There was a subsequent response from the Town's solicitor which included the following advice:

. . . I would be particularly cautious about relying on the draft audit report. I think some of the analysis is flawed. We want to avoid Catherine and Nathan saying that we were intentionally trying to ruin their reputation by making these allegations. Stick to the facts.

[22] The extent to which Mr. Pope intended to waive privilege over legal advice is set out in his second affidavit as follows:

2. In advance of the town hall meeting held on May 8, 2019, I sought the advice and assistance of the Town's legal counsel . . . requesting information about how members of the public could access the documents filed in court with respect to the [fraud action]. An email exchange between myself and the Town's lawyer . . . was included in my affidavit filed in this matter on November 18, 2020. This email exchange contained advice I received . . . regarding the availability of filed court documents to members of the public.

3. I have the Town's permission for the purpose of my affidavit in this proceeding to waive privilege over the narrow issue of advice sought and received

about public statements and publications made by the Town and its officials regarding the lawsuit against Ms. Mallon and Mr. Watson. The Town has not waived privilege over any other aspect of the advice . . .

[23] Mr. Flynn’s affidavit does not contain any references to legal advice.

## ISSUES

[24] The individual defendants refused to give certain undertakings and objected to questions based on solicitor and client privilege, litigation privilege, and relevance. Objections and refusals were also taken on the basis that in cross-examination on affidavit, a witness cannot be compelled to produce documents over which they do not have possession or control.

[25] The issues are first, the extent to which the Town waived solicitor and client privilege through Ms. Clarke and Mr. Pope; second, whether the individual defendants can rely on litigation privilege with respect communications with MACA; and third, the scope of cross-examination on affidavit, specifically the extent to which an affiant can be compelled to provide records and relevance.

## ANALYSIS

### *The extent to which solicitor and client privilege has been waived*

[26] The questions to and requests of Ms. Clarke and Mr. Pope, which were refused or objected to on the grounds of solicitor and client privilege, are as follows:

Name	Request	Reason for Refusal
Clarke	Undertaking to produce all communication between the Town and [its former solicitors] in preparation for and with respect to the outcome of, the public meeting (under advisement)	“As noted in Mr. Clarke’s affidavit, Ms. Clarke has the Town’s permission for the purposes of her affidavit to privilege over the narrow issue of [legal] advice sought and received about public statements and publications made by the Town and its officials regarding the lawsuit against Ms. Mallon and Mr. Watson. As noted in the affidavit, the substance of the advice is already disclosed in the affidavit. Ms. Clarke is willing to disclose the actual emails in response to this undertaking, provided that her doing so does not waive privilege over any other part of the advice

	Undertaking to search Clarke’s records between May 8 and May 10, 2019 for any conversations about the EPR Report with [the Town’s lawyers] . . .	received from [the solicitors]. This could be achieved by consent order.”  Refused – solicitor and client privilege
Pope	“And after the meeting on May the 8 <sup>th</sup> of 2019, and up to the point in which the Town stopped making the Statement of Claim and the affidavit of Cathy Clarke available at the Town, what steps did you take to inquire with [the Town’s solicitors] with respect to his comments about some of the analysis in the EPR report being flawed?”	Objection on grounds that the information is subject to solicitor and client privilege and exceeded the waiver of privilege set out in Mr. Pope’s second affidavit (dated November 24, 2020).

[27] Solicitor and client privilege can be waived expressly or, in certain circumstances, by implication. There is no question in this case that the Town granted permission to Ms. Clarke and Mr. Pope to disclose the contents of certain communications between each of them and the Town’s solicitors relating to the public meeting. The question is whether the scope of the waiver went beyond those specific communications by implication, thus requiring disclosure of the additional information.

[28] There is no shortage of law on this point. The underlying principles were succinctly stated by Vertes, J in *Fullock v Royal Oak Mines Inc*, 1998 CarswellNWT 108, [1998] NWTR 217:

34 The modern rule as to solicitor-client privilege was stated in two Supreme Court of Canada judgments: *Solosky v. Canada* (1979), 105 D.L.R. (3d) 745 (S.C.C.), and *Descôteaux c. Mierzewski* (1982), 141 D.L.R. (3d) 590 (S.C.C.). The privilege attaches to any communication made in confidence for the purpose of the lawyer giving and the client receiving legal advice and services within the ordinary scope of the professional lawyer-client relationship. *It has been described as a fundamental civil and legal right that should be interfered with only to the extent absolutely necessary to do so. The basic principle justifying the privilege arises from the public interest requiring full and frank exchange of confidences between solicitor and client.*

35 The law also recognizes that the privilege may be waived by the client. It

may be waived by an intentional and voluntary decision by the client. *Or it may be waived impliedly where the client relies in part upon privileged communications to either assert a claim or base a defence. The underlying rationale for finding implied waiver in such circumstances is fairness. It would be unfair to permit a party who has set up a claim or defence based on privileged communications, or makes his or her intent and knowledge of the law relevant, to preclude the opposing litigant from discovering information relating to that claim or defence by relying on the privilege. If privilege were successfully raised, the opponent would have no effective method of exploring the validity of the claim or defence: Rogers v. Bank of Montreal, [1985] 4 W.W.R. 508 (B.C. C.A); Alberta Wheat Pool v. Estrin (1986), [1987] 2 W.W.R. 532 (Alta. Q.B.). [emphasis added]*

[29] I also take note of comments made by Slatter, J (as he was then) in *Iozzo v Weir*, 2004 ABQB 259, 2004 CarswellAlta 614:

21 When a party relies on legal advice in an action, and especially where his or her former counsel files an affidavit in support, the litigant is not entitled to decide unilaterally how much of the privilege will be lost. Mere reliance on legal advice does not negate the entire privilege, and does not give the other side access to all communications between the solicitor and the client. However, privilege is lost over any communication that has a relevant and material connection to the issue being brought forward.

[30] Ms. Mallon argues that in stating that they relied on legal advice in deciding to hold the public meeting and to make the court documents available at the town office, Ms. Clarke and Mr. Pope have each put their state of mind squarely in issue. Therefore, they cannot selectively disclose some parts of the legal advice while relying on privilege to withhold other aspects.

[31] Ms. Mallon's argument succeeds in part.

[32] The request that Ms. Clarke produce all communication between the Town and its solicitors in preparation for the meeting is, in my view, within the express terms of the waiver; however, the request for disclosure of legal advice with respect to the *outcome* of the meeting goes beyond it. Further, the extent of the waiver is not expanded by implication to include all legal advice sought and received *after* the meeting regarding its outcome. Neither Ms. Clarke's, nor Mr. Pope's state of mind after that point has been put in issue. Ms. Clarke has disclosed the substance of the legal advice received *before* the meeting where the alleged defamatory statements



were published. Through counsel she has stated she is prepared to produce email correspondence pertaining to that advice.<sup>1</sup> This is sufficient.

[33] Mr. Pope's counsel properly objected to the question put to him. This goes beyond the scope of the express waiver. Mr. Pope's state of mind *after* the meeting has not been put in issue and therefore, the waiver has not been expanded by implication.

[34] The request that Ms. Clarke search her records for conversations with the Town's solicitors between May 8 and May 10, 2019, respecting the EPR report is somewhat different. It is tied to specific action taken by Ms. Clarke, Mr. Pope and the Town, namely making court documents available at the town office on May 10. As noted, Ms. Clarke and Mr. Pope assert in their Notice of Motion for summary judgment that they relied on legal advice in making those documents available and that they relied on the accuracy of the EPR report. In my view, this necessarily leads to the conclusion that privilege over legal advice received on this point between May 8 and May 10, 2019, when the court documents were made available, has been waived by implication.

### ***Litigation Privilege***

[35] The undertakings refused on the basis of litigation privilege are as follows:

<b>Name</b>	<b>Undertaking Requested</b>
Clarke	To search Clarke's records between May 8 and May 10, 2019 for any conversations about the EPR Report . . . with representatives of MACA  To search records (notes, calendar, emails) setting out the communication between the Town and MACA between April 5 and May 8, 2019.
Pope	To search calendar, email and notes for any phone call that occurred with representatives of MACA from April 5 to May 8, 2019
Flynn	To search records and produce any emails from anyone at the Town, or on behalf of the Town, who provided the EPR report to Flynn

<sup>1</sup> Ms. Clarke's counsel indicated during the cross-examination that the terms of the disclosure could be worked out through a consent order.

[36] Litigation privilege operates independently from solicitor and client privilege. It attaches to communications where two conditions are met. First, there must be a reasonable prospect of litigation or actual litigation when the document or communication is created. Second, the dominant purpose of the communication must be to assist in that contemplated or existing litigation. It is up to the party claiming the privilege to prove these two requirements on a balance of probabilities. *Blank v Canada (Minister of Justice)*, [2006] SCJ No. 39, paras 58-60, [2006] 2 SCR 319; *LTS Infrastructure v Rohl et al*, 2019 NWTSC 10, at para 39.

[37] With respect to the requests made to Ms. Clarke and Mr. Pope to search for communications with MACA between April 5 and May 8, 2019, the assertion of litigation privilege puts the cart before the horse. The request is very broad. They were asked to search for records. One of the things that implies is that there is some uncertainty as to whether those records even exist. If they do not, then the question is settled. If they do exist, then presumably the defendants' counsel would examine the documents with a view to determining whether they are relevant to a matter in issue and if so, whether there is a legitimate claim for litigation privilege. Because there has been no search for and no review of the documents, there is no evidence before the Court which would allow it to determine whether the refusal to give the undertaking on the basis of litigation privilege has merit.

[38] Accordingly, I will direct that Ms. Clarke and Mr. Pope search for the records as requested. In the event any of them identify documents over which either their counsel or the Town's counsel wish to assert litigation privilege and the parties are unable to agree, they may bring a motion for determination of that issue.

[39] With respect to Mr. Flynn, the request is to search for *and* produce the documents. In fairness, he should not be required to produce them before his counsel and the Town's counsel have a reasonable opportunity to determine if they believe the documents are subject to litigation privilege and they wish to assert that claim. Mr. Flynn will be directed to conduct the search and, should he find any such documents, turn them over to his counsel.

[40] I find the request made to Ms. Clarke to search her records for communications with MACA about the EPR report between May 8 and May 19, 2019 is appropriate. Reliance on advice from MACA with respect to the EPR report is expressly stated in the Notion of Motion for summary judgment, putting her state

of mind clearly in issue. She cannot claim reliance on information and advice from MACA and at the same time assert litigation privilege over that advice and information. I will direct that she search her records for those communications and provide them to her counsel to review them. Assuming there are such records, and assuming there is no other reason they should not be produced, they should be provided to Ms. Mallon's counsel.

### ***Objections based on the Scope of Cross-examination on Affidavit***

[41] As all counsel noted, there are key differences between cross-examination on affidavit and examinations for discovery. There is little to no case law on this topic from this Court; however, there is useful case law from Alberta, which counsel produced and which I accept as an accurate reflection of the general principles of law on cross-examination on affidavit as well as the differences between it and examination for discovery. These cases were considered and analyzed comprehensively by Mah, J in *Edmonton (City) v Gosine*, 2020 ABQB 546, 2020 CarswellAlta 1676. The following principles emerge:

- i. Cross-examination on affidavit is not a discovery. Discovery has a broader purpose and scope and therefore, questions are subject to a broader scope of relevancy. In cross-examination on affidavit, the rules of relevance are more limited and the questioning necessarily more restrictive: *Alberta Treasury Branches v Leahy* 1999 ABQB 829 at para 23, 1999 CarswellAlta 1027; *Gosine*, at para 16.
- ii. The person examined is a witness, not a party: *Leahy*, at para 23, citing *Merck Frosst Canada Inc v Canada (Minister of Health)* 1997 CarswellNat 2661, 146 FTR 249.
- iii. The answers given are evidence, not admissions: *Leahy* at para 23.
- iv. The affiant can only be asked to produce documents over which he/she/they have custody or control: *Leahy*, at para 23
- v. Generally, an absence of knowledge is an acceptable answer and thus the witness ought not to be required to provide undertakings in most cases. Undertakings should be directed only where (1) the affiant has referred to information or documents in the affidavit or deposed to things suggesting he/she/they would have had to review a document before swearing the affidavit; or (2) the undertakings are relevant to an important issue in the

application, providing the information would not be overly onerous, and it will help the court significantly in making a decision: *Dow Chemical Canada Inc v Shell Chemicals Canada Ltd* 2008 ABQB 671 (MC) at para 5, 2008 CarswellAlta 1685; *Rozak Estate v Demas* 2011 ABQB 239, 2011 CarswellAlta 577; *Gosine*, at para 16.

- vi. Questions aimed at the affiant’s credibility are restricted to credibility of statements made in the affidavit: *Leahy*, at para 26; *Gosine*, at para 16.

[42] It is within this framework that the following questions and requests for undertakings must be analyzed.

Name	Question/Request	Reason for Objection
Clarke	<p>Undertaking to search the records for correspondence in which 2016 and 2018 time sheets were provided by Mallon (under advisement)</p> <p>“Ms. Clarke, has the Town undertaken any further analysis into the alleged fraudulent credit card transactions or the expense claims set out in the EPR report since May the 3<sup>rd</sup> of 2019?”</p> <p>“Ms. Clarke, what steps have you taken personally to look into the alleged fraudulent credit card transactions or the expense claims [in] your May 3, 2019 affidavit?”</p>	<p>“On cross-examination, the witness can only be asked to produce records within her possession. Ms. Clarke has searched her records and has not found this correspondence”.</p> <p>Objection on grounds that the question relates to actions taken outside the time period during which the defamation is alleged to have occurred and relates to the fraud Action. The witness was not at liberty to divulge information relating to that action.</p> <p>Same as above</p>
Pope	<p>“What steps did you personally take following Madam Justice Shaner’s decision in December of 2019 to look into the EPR report or conduct any other investigation into the allegations set out in the Town’s Amended Statement of Claim against Ms. Mallon?”</p>	<p>Objection on grounds that the information is irrelevant, the alleged defamatory statements having been made prior to that date.</p>

Flynn	<p>Undertaking to produce any written agreements setting out Flynn’s retainer as interim senior administrative officer (under advisement)</p> <p>Undertaking to search records, or request of the Town, for emails sent to the administrator or MACA relating to the investigation of Mallon and the requests for a forensic audit between September 2018 and the end of Flynn’s term as interim SAO (under advisement)</p> <p>Undertaking to make inquiries of the Town and produce any records created in the initial investigation October 11, 2018 and referred to in Exhibit 1 (under advisement)</p>	<p>Refused – Irrelevant</p> <p>Refused – on cross-examination, the witness cannot be asked to produce records outside his possession”</p> <p>Same as above</p>
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[43] The request for Ms. Clarke to search for correspondence in which 2016 and 2018 time sheets were provided by Ms. Mallon was reasonably refused. In reaching this conclusion, I have considered the unique circumstances presented in this case. Specifically, Ms. Clarke did not state in her affidavit, nor during her cross-examination, that she was providing evidence as a representative of the Town; however, she is the SAO and obtaining and providing the information would not be an overly onerous task. Moreover, the Town has expressly indicated that it is relying on her evidence in its own application for summary judgment, making it unclear if she has given evidence solely on her own behalf or on behalf of herself and the Town. Nevertheless, I can see no relation between this information and the issues in the summary judgment application, nor is it apparent how it would assist me in deciding any of the matters in issue.

[44] Similarly, I am not satisfied that the two questions posed to Ms. Clarke would elicit information relevant to the summary judgment application. It is clearly connected to the fraud action. I recognize that the allegations in the fraud action form a substantial part of the basis for the defamation action, but it is not clear why any further steps that Ms. Clarke or the Town have taken to analyze the disputed

transactions would inform the summary judgment application. This also holds true for the question asked of Mr. Pope.

[45] The undertakings requested of Mr. Flynn were properly refused. He cannot be compelled to produce these materials. Mr. Flynn was not an officer or employee of the Town at the time that either the fraud action or this action were filed, and he was not an officer or employee when he brought the application for summary judgment. The records requested belong to the Town and are within its possession and control.

[46] With respect to the request that Mr. Flynn provide written agreements relating to his retainer with the Town, I find it is beyond the scope of the cross-examination on the basis of relevance. The application is for summary judgment in a defamation action. Mr. Flynn is alleged to have published defamatory statements about Ms. Mallon in connection with his employment. The proof of Mr. Flynn's employment with the Town is set out in a bylaw, a copy of which is appended as an exhibit to his affidavit. At this point, there is nothing before me to suggest that further information, if any, about the terms of his employment would assist in making a decision in the summary judgment application.

## **ORDER**

[47] I order the following:

- a. Ms. Clarke shall search her records for conversations with the Town's solicitors between May 8 and May 10, 2019, respecting the EPR report.
- b. Ms. Clarke shall search her records from between May 8 and May 10, 2019 for any conversations about the EPR Report with representatives of MACA and she shall search records, including notes, calendar and emails, setting out communication between the Town and MACA between April 5 and May 8, 2019.
- c. Mr. Pope shall search his calendar, email and notes for any phone calls that occurred with representatives of MACA from April 5 to May 8, 2019.
- d. Mr. Flynn shall search his records for any emails from anyone at the Town or on behalf of the Town, who provided the EPR Report to him.

- e. Should any documents be found as a result of the foregoing searches, they shall be turned over to Mr. Kruger and, if they are documents created by the Town, Mr. Penner.
- f. In the event either Mr. Kruger or Mr. Penner wish to assert privilege over any such documents or any part of a particular document, and if Mr. Woodley does not agree, I will hear submissions. Those submissions can be heard immediately before the summary judgment application and the application to strike.
- g. In the event the parties are unable to reach an agreement on a consent order respecting the disclosure of emails between Ms. Clarke and the Town's solicitors about the public meeting, I will hear submissions at the same time as I hear submissions on privilege, if any.
- h. The balance of this application is dismissed.
- i. If the parties wish to make submissions on costs, they may make arrangements through the registry to do so.

K. M. Shaner  
J.S.C.

Dated at Yellowknife, NT, this  
22<sup>nd</sup> day of March 2021

Counsel for the Plaintiff/Applicant:

Matthew Woodley

Counsel for the Individual Defendants/  
Respondents:

Toby Kruger

Counsel for the Defendant/Respondent  
Town of Norman Wells:

Michael Penner

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**CATHERINE MALLON**

**Plaintiff**

**-and-**

**TOWN OF NORMAN WELLS, CATHY  
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**Defendants**

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**MEMORANDUM OF JUDGMENT OF  
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