

Court of King’s Bench of Alberta

Citation: LJ Resources Co Ltd v Indepth Energy Inc, 2025 ABKB 676

Date: 20260811
Docket: 1601 02031
Registry: Calgary

Between:

**LJ Resources Co Ltd
(formerly Goldenkey Oil Inc)**

Plaintiff
(Respondent)

– and –

Indepth Energy Inc, Indepth Investments Inc, Qiping Men Professional Services Ltd, CMC Professional Energy Services Corp, Spring Resources Ltd, JH Petroleum Enterprises Inc, Fangyuan Ceramic Proppant Canada Inc, Copro Oil Services Inc, Somani & Associates Inc, Accurate Directional Drilling Inc, Diamond Proppants Inc, Kobo Consulting Inc, Musta Consulting Inc, Musta Petroleum Solutions Inc, Petroleum Steel Depot Inc, Proficient Drilling Fluids Inc, Pro-Tech Drilling Fluids Inc, Quality Petroleum Solutions Inc, Seismic Master Inc, Summit Directional Drilling Inc, Emerald Energy Services Inc, Kobo Proppant Inc, Rainbow Petroleum Solutions Inc, Round Steel Inc, ABC Corp, XYZ Corp, Shougen Song, Heiju Song, Qiping Men, Camilla Men, Chunku Dou, Xiaoyu Gu, Fangzhi Guo, Aziz Somani, John Doe and Jane Doe

Defendants
(Applicants)

Corrected judgment: A corrigendum was issued on August 11, 2026; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Decision of the
Honourable Justice D. Jugnauth**

I. Introduction

[1] This is an application by the Defendants to admit additional evidence into the record for their rule 4.31 applications to dismiss the Plaintiff's claim. Those delay applications are scheduled to be heard on December 11, 2025. The Plaintiff opposes the admission of the additional evidence. For reasons that follow, the application is granted.

II. Background

[2] The thrust of the dispute underlying the claim is an alleged fraud by former corporate officers of Goldenkey Oil Inc (now LJ Resources Co Ltd). Certain Defendants are alleged to have set up shell companies that secured contracts with Goldenkey at inflated prices for the provision of oilfield services. The Defendants are then alleged to have subcontracted that work to legitimate service providers at a lower cost and profited from the difference.

[3] Certain activities forming part of the claim are alleged to have occurred in 2012-2013. The Plaintiff filed its Statement of Claim in February 2016. The Defendants filed their Statement of Defence in April 2016 denying the allegations in their entirety.

[4] The litigation has been ongoing since then. On August 12, 2024, a group I will term the "Indepth Defendants" filed an application to dismiss the Plaintiff's claim pursuant to rule 4.31 of the *Alberta Rules of Court*, Alta Reg 124/2010. On August 13, 2024, a group I will term the "Men Defendants" filed a similar application.

[5] In support, the Indepth Defendants filed an affidavit of Shougen Song, affirmed August 8, 2024. Thereafter, the Plaintiff filed an application to set a litigation plan and obtain trial dates.

[6] The Plaintiff's application to approve a litigation plan was heard by Justice Silver on August 30, 2024, at which time it was adjourned to a rule 4.10 case conference. In relation to the dismissal applications, Justice Silver set interim deadlines for the exchange of affidavit material and cross-examination on those affidavits.

[7] Those deadlines required the Plaintiff to file its responding affidavit by October 11, 2024, and that all questioning by both parties be complete by November 29, 2024. All questioning on undertakings was to be complete by December 20, 2024.

[8] On November 26, 2024 Justice Silver presided over the 4.10 case conference during which she approved a litigation plan and ordered the Plaintiff to produce two former Goldenkey directors for questioning. Those individuals are Wenfeng (Jeff) Liu and Xingli (Alex) Zhang.

[9] Further, in respect of the dismissal applications, Justice Silver ordered that when those applications are heard, "the Court shall make its determination as if the Applications to Deal with Delay had been heard on November 27, 2024".

[10] Following the appointment of a Case Management Justice, the dismissal applications were scheduled for December 11, 2025. The Defendants were to file their brief and authorities by October 31, 2025. The Plaintiff was to file its brief and authorities by November 21, 2025.

[11] In January 2025, the Plaintiff filed a further responding affidavit of the Plaintiff's corporate representative, James Dai. In February 2025, the Indepth Defendants filed the first supplemental affidavit of Shougen Song. Both parties accepted the opposing party's supplemental affidavits without objection or complaint.

[12] Between June 4-12, 2025, the Indepth Defendants questioned Wenfeng Liu and Xingli Zhang for the first time. The undertakings were responded to in July 2025. On August 20, 2025, Shougen Song affirmed a second supplemental affidavit that was served on the Plaintiff on September 5, 2025. It is this August 20 affidavit of Mr. Song that is the subject of this application (hereafter the "August 20 Affidavit").

[13] As it happened, the Plaintiff was scheduled to question Mr. Song in person in Calgary on September 24, 2025. The Indepth Defendants offered to permit the Plaintiff to cross-examine Mr. Song on the August 20 Affidavit at the same time on a without prejudice basis given the parties' contrary positions with respect to its admissibility. The Plaintiff declined to do so.

III. Positions of the Parties

[14] The Defendants argue that the evidence contained in Mr. Song's August 20 Affidavit is both new and material, and that it only came to light during the questioning of the former Goldenkey directors in June 2025. Given this was the first opportunity to question those witnesses, the Indepth Defendants argue this evidence was not reasonably discoverable prior to previous deadlines set in relation to the dismissal applications.

[15] Further, the Indepth Defendants assert the affidavit evidence is material to the question of prejudice, which is a central consideration in the test for dismissal pursuant to rule 4.31. The Indepth Defendants also argue that the Plaintiff will not suffer prejudice given the affidavit was served well in advance of the briefing deadlines and the Plaintiff was offered an opportunity to cross-examine Mr. Song in September, well in advance of the hearing date.

[16] The Plaintiff argues that Mr. Song's August 20 Affidavit is both procedurally and substantively inadmissible. In relation to the former, the Plaintiff argues that the impugned affidavit was served ten months after the evidentiary record for the delay application was closed, without advance notice to the Plaintiff and without leave of the court.

[17] The Plaintiff argues that Justice Silver's order of November 26, 2024 effectively froze the record upon which the delay application will be decided. The Plaintiff further points out that Mr. Song's August 20 Affidavit is not compliant with either Civil Practice Note 1 nor rule 6.6(2) of the *Rules of Court*.

[18] On the question of substantive inadmissibility, the Plaintiff argues it does not meet the test for fresh evidence set out by the Supreme Court in *Palmer v The Queen*, [1980] 1 SCR 759. In sum, the Plaintiff asserts that the evidence in the impugned affidavit: (i) could have been obtained earlier with due diligence; and (ii) is not relevant to a decisive issue in the delay application.

IV. Analysis

a. *Palmer* does not apply

[19] Both parties agree that the test for the admission of fresh evidence is that which was set out in *Palmer*. Responding to the formulation of this test was the framework in which both parties advanced their respective arguments on admissibility. With the greatest of respect to counsel, I disagree that *Palmer* applies to the situation before me.

[20] The test in *Palmer* sets out four criteria for admitting fresh evidence *on appeal*. In other words, *Palmer* generally applies after a decision has been rendered when a party seeks to introduce new evidence that was not before the original decision-maker.

[21] In support of its argument, the Defendants cite three cases:

- (i) *Saunders v 360373 Alberta Ltd (Arlington Apartments)*, 2021 ABCA 222
- (ii) *Xerex Exploration v Petro-Canada*, 2005 ABCA 224
- (iii) *Yu v University of Alberta*, 2025 ABKB 408

[22] None stand for the proposition that the *Palmer* test applies in the context before me, i.e., where a party seeks to introduce additional evidence *before* an application is heard.

[23] In *Saunders*, the Appellant appealed a trial decision that declined to find the Respondent's conduct amounted to oppression. On appeal, the Appellant sought to "admit fresh evidence that he says proves the reductions that were *in issue at trial* were not isolated transactions": *Saunders* at para 6 [emphasis added]. After applying the *Palmer* test, the Court of Appeal dismissed the application for fresh evidence.

[24] In *Xerex*, the parties were embroiled in a dispute over royalties from an oil producing well. At trial, the judge found Petro-Canada liable in trespass, conversion and misrepresentation and awarded more than \$8M in damages: *Xerex* at para 3. Petro-Canada appealed the finding of liability and Xerex appealed the quantum of damages.

[25] Xerex argued that the trial judge failed to consider that Xerex would have pursued the option for enhanced recovery had it been a 50-50 partner with either Petro-Canada or Progress Energy Ltd (another entity involved in the original action). The trial judge originally dismissed this argument given the enhanced recovery option was only a "theoretical possibility": *Xerex* at para 115.

[26] On appeal, Xerex sought to admit fresh evidence that enhanced recovery was a viable option at the relevant time. While the Court of Appeal found that the proposed fresh evidence was not available at the time of trial, it was available before judgment had been rendered and no application was made to put it before the trial judge. On a full consideration of all four branches of the *Palmer* test the Court of Appeal dismissed the fresh evidence application.

[27] In **Yu**, the Applicant brought an application for judicial review of a decision to terminate her medical residency due to deficient academic performance. As part of the procedure, Dr. Yu sought to admit fresh evidence on the judicial review. Prior to the judicial review hearing Dr. Yu filed two supplemental briefs and other materials. The Respondent did not take issue with either the two additional briefs or the supplemental materials proffered by Dr. Yu.

[28] Dr. Yu was permitted to rely on her two additional briefs and supplemental materials. In his reasons Justice Mah noted that, in effect, Dr. Yu was seeking to adduce new records into evidence under rule 3.22, which expressly confers upon the Court hearing a judicial review the discretion to receive other evidence apart from the Certified Record of Proceedings.

[29] The Court also noted that the Respondent did not object to the receipt of new information, and the admission of the new records did not perpetrate any prejudice to the Respondent. It was also in the interests of justice to have all of Dr. Yu's concerns dealt with concurrently. The **Palmer** test was not mentioned anywhere in this decision.

[30] These cases do not stand for the proposition that **Palmer** is the applicable framework to guide the legal analysis to admit supplemental evidence on an original application. Both **Saunders** and **Xerex** refer to the **Palmer** test being employed to adjudicate applications to admit fresh evidence on appeal. That is entirely proper given that context underlies the very purpose for which the test was conceived.

[31] **Yu** does not assist either. It was decided in a context where the applicant was seeking to adduce new records on judicial review that were not before the original decision-maker. Moreover, in the context of judicial review, a specific rule governing the constitution of the evidentiary record expressly conferred wide discretion on the court.

[32] These decisions are not in concert with the interlocutory nature of the present application. As noted, the dismissal application is not scheduled to be heard until early December. In the context of a hearing that has not yet been held, **Palmer** does not apply.

b. The test is one of fairness

[33] The applicable law governing this application was set out by the Court of Appeal in **Guillevin International Co v Barry**, 2022 ABCA 144 in which the court offered its interpretation of rule 6.6(2).

[34] In that case the Appellants secured *ex parte* Mareva injunctions, a Norwich order, and an attachment order against multiple Respondents. Subsequently, by mutual consent, the Appellants and several Respondents agreed to replace and vary the original attachment order on the understanding that it would be subject to review at a scheduled hearing.

[35] During that hearing, the chambers judge excluded certain evidence offered by the Appellants and concluded that the Appellants had not satisfied the requirements for issuing an attachment order. The chambers judge thereafter set the attachment order aside.

[36] On appeal, these decisions were reversed. The Court of Appeal held that the chambers judge erred in excluding critical evidence. In relation to rule 6.3, 6.4 and 6.6, the Court commented that “these rules merely set out the normal process by which applications are brought before the court”: **Guillevin** at para 28.

[37] According to the Court of Appeal, after the ordinary exchange of the applicant’s original material and any response material by the respondent, the applicant may file further evidence pursuant to rule 6.6(3) so long as the applicant provides the respondent with reasonable notice. Going a step further, there is nothing in the rules that would prohibit the respondent from then filing further reply evidence: **Guillevin** at para 28.

[38] Importantly, the Court stated that rule 6.6 “should not be read as restricting the court’s ability to hear all of the relevant evidence”: **Guillevin** at para 30. Rules 6.3 and 6.6 seek to regulate the orderly exchange of information prior to the application being heard, but the chambers judge retains discretion to manage the application: **Guillevin** at para 31.

[39] This discretion may be employed to prevent “the phenomenon of ‘dueling affidavits’, by which each party endlessly responds to the other party’s latest affidavit with further affidavits that descend into opinion, argument, and attribution of motives. However, at the end of the day the objective is to ensure that a decision is made on a complete record, and that each party has a fair opportunity to present its case”: **Guillevin** at para 31.

[40] Prejudice resulting from evidence filed late can generally be dealt with through adjournments or costs awards, not by excluding relevant and material evidence: **Guillevin** at para 31.

[41] The Court also noted the fluidity that can accompany interlocutory applications and cited examples where an applicant may wish to supplement the record with evidence that was inadvertently omitted, or evidence that responds to a positive defence raised by the opposing party. The Court was express that “there is nothing objectionable about an applicant supplementing the record when that occurs”: **Guillevin** at para 32.

[42] The Court also noted that case splitting is generally a trial issue that becomes objectionable when a party attempts to take tactical advantage of withheld evidence, or when splitting a case wastes court resources: **Guillevin** at para 32. “On an interlocutory application exclusion of the ‘split’ evidence is rarely a proportionate remedy, except where there was a failure to make proper disclosure on an *ex parte* application”: **Guillevin** at para 32.

c. The correct test favours admitting the additional evidence

[43] The dismissal application is a critical step for all parties since it has the potential to end the litigation altogether. In my view, that application should be adjudicated based on a complete record that contains all relevant and material evidence that the parties wish to put forward.

[44] In this case, the Indepth Defendants argue that the evidence elicited from the questioning of the two former Goldenkey directors, and questioning of some of the Defendants, speaks

directly to the issue of prejudice resulting from delay. Specifically, Mr. Song's August 20 Affidavit points out that:

- (i) Mr. Liu admitted to using a personal email address for Goldenkey business that was not searched for relevant records as part of the litigation disclosure process, that he lacked the technical knowledge to retrieve messages, and that he had never been instructed to preserve relevant records;
- (ii) Mr. Zhang admitted that he used his wife's personal email address for Goldenkey business, he had not searched that account for relevant records, and that he had discarded physical Goldenkey records over the years if he considered them not important;
- (iii) Qiping Men failed to produce relevant records and that he no longer has access to certain data required to produce financial statements for certain service companies, and that many of the tax and banking records that the Plaintiff is seeking are more than a decade old and outside of the retention periods governing Canadian banks; and
- (iv) Chunku Dou failed to produce several categories of relevant records including emails, banking records for various companies, credit card statements from the service companies, and tax documents related to the service companies.

[45] In addition, Mr. Song's second supplemental affidavit set out the unsuccessful efforts undertaken by the Indepth Defendants to secure a third former Goldenkey Director – now residing in China – for questioning.

[46] Prejudice is an essential element to the remedy the Defendants seek in their applications pursuant to rule 4.31. In this respect, the materiality of evidence bearing on the issue of prejudice is clear.

[47] In my view, the potential loss of financial information, tax records, digital communication between relevant actors, and other records relevant to the Plaintiff's overarching allegation all bear on the question of prejudice in terms of what information, records and other material may or may not be available to the Defendants to defend the claim. So, too, does the inability to obtain evidence from a former Goldenkey Director.

[48] For these reasons, I find the August 20 Affidavit of Shougen Song to be admissible in respect of the dismissal applications. Admitting this evidence is in keeping with the foundational rules of court that promote a fair and just determination of the dispute between the parties.

[49] I would not give effect to the Plaintiff's arguments that Justice Silver's Order of November 26, 2024 froze the evidentiary record, or that civil practice note 1 favours exercising my discretion to bar the receipt of the impugned affidavit.

[50] Justice Silver's Order directed that, in adjudicating the dismissal applications, the Court shall make its determination "as if the Applications to Deal with Delay had been heard on

November 27, 2024. [...] None of the Parties shall be put in a worse position at the Applications to Deal with Delay because of Institutional Delay”.

[51] In my view, the proper interpretation of Justice Silver’s Order is to protect the Plaintiff from any additional delay occasioned on account of attempting to secure court time to hear the dismissal applications. Indeed, approximately 12.5 months have elapsed between Justice Silver’s Order and the date upon which the dismissal applications are to be heard in December 2025.

[52] The effect of Justice Silver’s direction is two-fold. First, it protects LJ Resources from the impact of an additional year feeding into the Defendants’ claim of inordinate and inexcusable delay.

[53] Second, it protects the Defendants from any hurried conduct on the part of LJ Resources to suddenly move the matter forward after November 27, 2024 given an application to dismiss pursuant to rule 4.31 is ordinarily assessed as of the date the application is heard.

[54] Justice Silver’s Order did not intend to bar relevant and material evidence from being available to the Court hearing the dismissal application. Nothing in the November 26 Order can be said to support or give effect to that interpretation.

[55] The Plaintiff also points to civil practice note 1, section 21(b)(iii), which reads:

It is the Court’s expectation that parties and/or counsel will take the steps necessary to ensure that the evidentiary record is complete, prior to the scheduling of the Special Application. All affidavits and any other evidence permitted under Rule 6.11 intended to be relied on at the Special Application must be filed, served, and any cross-examination completed (including undertakings), prior to requesting a date for a Special Application. The Applicant’s Request Form must include a copy of the application to be heard, an estimated time required for argument and a list of all affidavits or other evidence permitted under Rule 6.11 that will be referred to by the parties at the hearing. No other affidavits or other evidence will be permitted to be referenced at the hearing without leave of the Court presiding over the Special Application.

[56] Fatal to the Plaintiff’s position is the Court’s discretion embedded directly within the passage above, i.e., that “[no] other affidavits or other evidence will be permitted to be referenced at the hearing *without leave of the Court* presiding over the Special Application” [emphasis added]. The very nature of this application is to seek leave of the Court.

[57] While it is true that the impugned affidavit was filed prior to leave being sought, I do not consider this fatal or of such force as to tip the scale in favour of barring the admissibility of the additional evidence. First, to give effect to the Plaintiff’s position would be to prefer procedure over substance.

[58] Procedure is not designed or intended to bar relevant and material evidence from being heard by the court adjudicating an application. Rather, procedure is designed and intended to facilitate a fair and orderly proceeding where a just result can be determined on the merits.

[59] In this case, Mr. Song's second supplemental affidavit was served on September 5, 2025 – more than three months prior to the hearing in December and nearly three months before the Plaintiff was required to file its written materials.

[60] While the filing of the impugned affidavit may be considered “late” in relation to the interim filing deadlines imposed in Justice Silver's Order dated August 30, 2024, this “late filing” is not prejudicial to the Plaintiff.

[61] Moreover, the evidence contained in Mr. Song's second supplemental affidavit was not previously known to the Defendants. It only arose following the questioning of both Plaintiff and Defendant witnesses that took place in June 2025. Further, this was the first time the two former Goldenkey directors were made available for questioning notwithstanding the Defendants' original request in August 2022, nearly three years earlier.

[62] Whether the Plaintiff was compelled to make these witnesses available or consented to doing so on its own accord makes no difference. The fact remains that the evidence of these witnesses was not known to the Defendants until well after the procedural deadlines imposed by Justice Silver's Order had passed, and the evidence gleaned from those cross-examinations is relevant to a material issue.

[63] Finally, I note that the Plaintiff's opposition to the admissibility of Mr. Song's August 20 Affidavit appears to be born more out of frustration than substance. In submissions, Mr. West indicated that he might not have objected to its admissibility but for a long history of procedural agreements having been made but not complied with by the Defendants. It appears to me that Mr. West's submission in this regard was a tacit acknowledgement of my earlier finding, that to admit the affidavit in question would not prejudice the Plaintiff.

V. Conclusion

[64] In the result, the Defendants' application to admit Mr. Song's August 20 Affidavit into the evidentiary record underlying the dismissal applications is granted.

[65] Given my ruling, the Indepth Defendants seek direction in respect of any questioning the Plaintiff may want to conduct given the Plaintiff declined to do so when Mr. Song was being questioned in person in September on his earlier affidavits.

[66] Given the substantive application is less than four weeks away, and Mr. Song ordinarily resides in Vancouver, Mr. Song shall be permitted to attend for questioning remotely provided the technology used permits contemporaneous audio and video transmission, such as WebEx, Zoom or another similar technology.

[67] Further, the Plaintiff shall complete that questioning as soon as practicable, such that the transcripts of that cross-examination can be made available and filed in time for the application on December 11th.

[68] The Indepth Defendants also seek a direction that the Plaintiff bear the costs associated with the questioning. This statement is subject to a broad interpretation, and I am not certain

what counsel meant given the questioning party ordinarily bears the expense associated with questioning.

[69] To be clear, I am directing that any expenses associated with questioning follow the ordinary course. That is to say, the Plaintiff shall pay the fee of the court reporter, pay the expenses associated with producing the corresponding transcripts that must be filed, and pay the conduct money owed to the witness to procure his attendance. Schedule C costs for questioning shall follow the cause.

[70] Given the Defendants' success in this application, costs related thereto shall be payable by the Plaintiff based on tariff item 7(1) of Schedule C, column 5 in the amount of \$2,025, payable forthwith.

Heard on November 7, 2025.

Dated at the City of Calgary, Alberta this 21st day of November 2025.

D. Jugnauth
J.C.K.B.A.

Appearances:

K. Marlowe KC, Osler Hoskin & Harcourt LLP, and
T. Wagner, Blake Cassels & Graydon LLP
for the Indepth Defendants / Applicants

L. Rasmussen, De Waal Law
for the Men Defendants / Applicants

B. West, McCarthy Tétrault LLP
for the Respondent

**Corrigendum of the Reasons for Decision of the
Honourable Justice D. Jugnauth**

Typographical errors that do not affect the substance of this judgment have been corrected in paras, 3, 6, 25, 56, 68 and 70.