

Court of King's Bench of Alberta

**Citation: ENMAX Power Corporation v Remington Development Corporation, 2026
ABKB 596**

Date: 20260827
Docket: 0801 14506
Registry: Calgary

Between:

ENMAX Power Corporation

Applicant

- and -

Remington Development Corporation

Respondent

Reasons for Decision of the Honourable Justice N. Dilts

Introduction

[1] This is an application by ENMAX to:

1. strike all or portions of six primary expert reports served on it by Remington in June 2025;
2. preclude Remington from relying on the documents disclosed in its Ninth Supplemental Affidavit of Records sworn July 24, 2025; or, alternatively,
3. compel production of privileged records of discussions and correspondence between Remington and its expert as referenced in the Sharp Report and to permit

ENMAX to conduct Part 5 questioning of Remington in relation to the records produced and the issues raised in the Sharp Report.

[2] ENMAX encourages me to make these pre-trial determinations as to the admissibility of the expert reports to avoid any delay and expense from having to respond to expert reports that it says are irrelevant, unnecessary or peripheral to the central issues between the parties.

Background

[3] The background to this litigation has been well documented many times by this Court and the Alberta Court of Appeal. I do not propose to review those facts. I rely on the history of proceedings set out in the decisions at **Remington Development Corporation v ENMAX Power Corporation**, 2016 ABCA 6, **Remington v Enmax**, 2019 ABCA 69, **Remington Development Corporation v ENMAX Power Corporation**, 2022 ABCA 71, and **Remington Development Corporation v ENMAX Power Corporation**, 2025 ABCA 402.

[4] As it relates to this application, I add the following.

[5] Remington's Statement of Claim was filed on November 19, 2008 and was amended on August 8, 2016. The allegations against ENMAX include at paragraph 17 that "ENMAX has continued to occupy the Interlink Lands without paying any consideration." Remington claims for lost rent calculated at 8 per cent of the value of the Interlink Lands *per annum* or other market rental value of the Interlink Lands from June 30, 2005 until such time as the Transmission Line is removed from the Interlink Lands. The Interlink Lands are those described in Schedule A to the Offer to Purchase between Remington and Canada Pacific Railway Company on November 30, 2002.

[6] At paragraph 20 of the Amended Statement of Claim, Remington claims that ENMAX has been unjustly enriched from its unauthorized use of the Interlink Lands.

[7] In the relief sought, Remington seeks judgment against ENMAX in an amount to compensate it for ENMAX's unauthorized use of the Interlink Lands, restitution of ENMAX's unjust enrichment, and interest in accordance with the *Judgment Interest Act*, RSA 2000, c J-1.

[8] In its Amended Amended Statement of Defence to the Amended Statement of Claim, ENMAX states, amongst other things, that the Transmission Line occupies a small portion of the Interlink Lands and that the Interlink Lands remain undeveloped with no development plans. It denies that Remington is entitled to market rent in respect of the presence of the Transmission Line on the Interlink Lands at 8 per cent of the value of the Interlink Lands or at all.

[9] In addition, ENMAX pleads that Remington failed to mitigate its losses by failing to apply to the Alberta Utilities Commission (AUC) to remove or relocate the Transmission Line from the Interlink Lands despite having the option and ability to do so, and by not offering to contribute any funds towards the removal or relocation of the Transmission Line.

[10] Central to the dispute between the parties is a September 1, 2010 Letter Agreement (Letter Agreement) in which Remington agreed to "drop its claims for damages – other than its claim rent [*sic*] for unauthorized use of the Interlink Lands, calculated at 8 per cent of the value

of the land, per annum – and execute the proposed Release” in exchange for certain actions by ENMAX. Remington executed a Release on December 13, 2010 (Release) by which Remington released ENMAX for the loss of development profit claim originally claimed in this Action. Remington released ENMAX from liability for:

damages in an amount to be determined at trial but expected to exceed \$200 million reflecting claimed losses suffered by Remington because of its inability to develop the Interlink Lands (as defined in its Statement of Claim in the Action) as planned, and the delays to development allegedly caused by ENMAX’s breaches which claimed damages include Remington’s expected loss of profits and interest on this amount in accordance with the *Judgment Interest Act*.

[11] In numbered paragraph 2 of the Release, Remington specifically reserved its claim for “compensation for unauthorized use of the Interlink Lands, calculated at 8 per cent of the value of the land, per annum.”

[12] I am advised that Remington’s theory of damages is that the rent claimed from ENMAX for its unauthorized use of the Interlink Lands must be calculated on the entire Interlink Lands as the presence of the Transmission Line until removed in 2024 sterilized the development of the Interlink Lands as a whole. The Transmission Line crossed the Interlink Lands perpendicular one to the other.

[13] ENMAX asserts, amongst other defences, that any rent payable by ENMAX, if at all, should be calculated only for the area of the Interlink Lands that the Transmission Line occupied, described by Remington as the Transmission Line “footprint”.

[14] The parties have been governed by a Complex Litigation Plan since December 2022. The deadlines in the Complex Litigation Plan have been amended multiple times since, including in 2023, 2024 and 2025. The most recent Complex Litigation Plan, contained in the Order of Applications Judge Farrington dated August 27, 2025, requires that Remington’s Supplemental Affidavit of Records be served by February 13, 2023 and ENMAX’s Supplemental Affidavit of Records be served by February 28, 2023. Questioning was to be completed by April 23, 2024, and primary expert reports were to be served by October 9, 2025 with rebuttal reports to those reports for which there is no objection due on November 28, 2025.

[15] Despite the deadline for service of Remington’s Supplemental Affidavit of Records by February 13, 2023, Remington served its Sixth, Seventh, Eighth and Ninth Supplemental Affidavits of Records on July 24, 2025. ENMAX objects to Remington’s use of the records produced in its Ninth Supplemental Affidavit of Records. It submits that Remington failed to comply with Rules 5.10 and 5.16 of the *Alberta Rules of Court*. Some of the records produced in Remington’s Ninth Supplemental Affidavit of Records were relied upon in preparing the Sharp Report.

[16] Despite the age of this Action, no trial dates are set.

ENMAX's Application to Strike the Expert Reports

[17] ENMAX applies to strike all or portions of six primary expert reports served by Remington on ENMAX on June 16, 2025, being the June 16, 2025 expert report of Mark Kolesar (the Kolesar Report), the June 16, 2025 expert report of Paul Sharp as updated (the Sharp Report), the June 16, 2025 expert report of David Crane (the Crane Report), the June 30, 2024 expert report of Jacob Hofer, the June 16, 2025 expert report of Bill Mitchell (the Mitchell Report), and the June 16, 2025 expert report of Randy Magnussen (collectively the Reports). ENMAX notified Remington of its objection to the admissibility of the reports under Rule 5.36.

Expert Opinion Evidence

[18] Opinion evidence is generally inadmissible. Expert opinion evidence is one exception to that general rule. When considering the admissibility of expert opinion evidence, the factors set out in *R v Mohan*, 1994 CanLII 80 as refined in *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 form the basis for the admissibility inquiry to be conducted before expert opinion evidence can be introduced at trial. At the first stage of the admissibility inquiry, the court must determine whether the expert evidence satisfies the four *Mohan* factors for admissibility: whether the evidence is i) relevant, ii) necessary to assist the trier of fact, iii) not subject to an exclusionary rule, and iv) proffered by a properly qualified expert. If satisfied that the evidence meets these preconditions, the trial judge is to assess whether the evidence is sufficiently beneficial to the trial process to warrant its admission. At this second stage of the admissibility inquiry relevance, reliability and necessity are measured against the counterweight of consumption of time, prejudice and confusion: *R v J-LJ*, 2000 SCC 51 at para 47. Stage two operates as a cost benefit analysis that involves weighing the helpfulness of the evidence against the risks associated with its admission: *White Burgess* at para 24.

[19] Trial judges and case management judges are to be vigilant in monitoring and enforcing the proper scope of expert evidence: *R v Sekhon*, 2014 SCC 15 at para 46. Expert evidence need not be just accepted or rejected as put forward by the parties.

[20] Rule 4.14 of the *Rules of Court* permits a case management justice to decide issues that can be decided before trial, including the admissibility of expert evidence. An early determination of the admissibility of expert evidence prevents the unnecessary use of the parties' resources and the court's trial time in what is an already overtaxed system.

[21] When the admissibility of expert evidence is challenged prior to trial before someone other than the trial judge, the court should limit its examination to the first stage of the admissibility inquiry. Confining the pre-trial admissibility inquiry to a stage one analysis reflects the fact that a case management justice or pre-trial justice is not immersed in the trial evidence to permit a full evaluation of the benefits of or prejudice from the proposed expert evidence.

[22] For that reason, I am of the view that the court on a pre-trial application is wise to restrict its consideration to whether the reports meet the *Mohan* preconditions for admissibility. While that exercise includes a contextual analysis of the evidence and might involve identifying factors that may bear on a trial judge's ultimate weighing of the evidence, it falls short of the ultimate gatekeeping function that includes the cost benefit analysis under the second stage of the *White*

Burgess test, including the assessment of whether the prejudicial effect of the evidence outweighs its probative value: **R v DD**, 2000 SCC 43 at para 12.

[23] I reached this same conclusion in **CNOOC Petroleum North America ULC v 801 Seventh Inc**, 2022 ABQB 284 and continue to hold the view that the court on a pre-trial application is not situated to fairly and fully consider the benefits or risks of the proposed expert evidence, including whether the evidence will assist or confuse the decision maker or distort the issues at trial, or if admitting the expert evidence will consume an inordinate amount of time not commensurate with its value. The trial judge serves as the ultimate gatekeeper to ensure the benefits in admitting the evidence outweigh any potential harm to the trial process: **R v Bingley**, 2017 SCC 12 at para 16.

[24] As a result, on a pre-trial application such as this one, the court should only exclude all or portions of an expert report where it is clear that the proposed evidence fails to meet any of the four **Mohan** threshold criteria of relevance, necessity, exclusion, or proper qualification.

Kolesar Report

[25] Mr. Kolesar is a former Chair of the AUC and was retained by Remington to provide a response to the following questions:

1. Is there a process by which ENMAX could have removed the Transmission Lines from the Interlink Lands without having to seek the AUC's approval for doing so?
2. Could ENMAX have applied to the AUC for permission to move the Transmission Lines without recovering the costs as a system cost? If yes, please explain this process and the likely outcome of such an application.
3. If ENMAX had applied to the AUC for permission to move the Transmission Lines and pay for the cost to move the Transmission Lines as an ENMAX corporate expense rather than recover the costs as a system cost, would the AUC have approved this application?
4. If ENMAX had made the AUC aware of the ROW agreements, which stated that ENMAX was required to remove the Transmission Lines at its own cost, would the AUC have granted ENMAX's application to remove/relocate the Transmission Lines from the Interlink Lands? In your response, please address whether it would have made a difference if ENMAX had applied for the cost of the removal to be made a system cost or paid for by ENMAX as a corporate cost.
5. Could ENMAX have reapplied to the AUC after its initial application was denied (either by seeking a reconsideration of the AUC's first decision, or as a new application)?

[26] ENMAX objects to the Kolesar Report. It submits that the Kolesar Report is neither relevant to the issues in dispute nor necessary. It submits that the Kolesar Report violates the principle that an expert is to provide information outside of the trial judge's experience or knowledge. It says Mr. Kolesar interprets AUC decisions, judicial decisions and legislation, a function that is squarely within the capability of the court. It also says that the Kolesar Report is inadmissible as it is speculative.

[27] While Remington concedes that portions of the Kolesar report are speculative and that the Kolesar Report is not directly relevant to the issues between the parties, Remington submits the Kolesar Report is sufficiently relevant that it should be left to the trial judge to determine its admissibility and the weight to be given to the evidence. In defending the Kolesar Report, Remington's counsel says this in a July 22, 2025 letter to ENMAX counsel:

Mr. Kolesar's report will be submitted to support Remington's assertion that: a) Remington did mitigate appropriately; b) ENMAX's obligations did not end simply when the AUC rejected ENMAX's initial application; and c) that ENMAX could have re-applied to the AUC to have the Transmission Lines removed and reduced the amount of time that the Transmission Lines were present on the Interlink Lands. None of these issues are matters that the Courts or the AUC have opined upon already.

[28] I am satisfied that the Kolesar Report is neither necessary nor relevant. While Remington quite rightly observes that Mr. Kolesar has significant regulatory experience and expertise, the question is not whether the proposed expert possesses expertise, but whether expertise is required for the court to understand the evidence that is being offered. Necessity requires that the opinion expressed be outside the experience and knowledge of the trier of fact. Expert opinion evidence must be necessary to enable the court to appreciate the matters in issue: **Mohan** at para 26. Interpretation of domestic law, including analysis of judicial and administrative decisions, statutory interpretation, and the interpretation of contractual provisions, is within the purview of the court and is not properly the subject of expert evidence. Where an expert expresses an opinion on domestic law that evidence is not admissible.

[29] The Kolesar Report runs directly afoul of that principle. Mr. Kolesar offers his view on legislation, AUC decisions and judicial decisions. By way of example, the Kolesar Report includes an interpretation of the terms of various agreements including the Power Transmission Line Agreement and Right of Way Agreements. The author interprets the decision of this Court in **Remington Development Corporation v Enmax Power Corporation**, 2011 ABQB 694, the content of the ENMAX applications submitted to the AUC, and the AUC decisions. The value of expert evidence is to provide information outside of the trial judge's experience or knowledge. Where an expert undertakes functions similar to that of the court, including by offering conclusions on the law, those portions of the opinion should be excluded as not necessary.

[30] In addition, I share the view expressed by ENMAX that the remaining portions of the Kolesar Report offer highly speculative opinions as to the decisions the AUC would have made had ENMAX's application to remove the Transmission Lines from the Interlink Lands been different than as submitted. By way of example, in response to question two, Mr. Kolesar states:

In my view, approval of ENMAX's application – if ENMAX had applied for the cost to be borne by ENMAX as a corporate cost – would be determined to be in the public interest....

In response to question 3, Mr. Kolesar states:

In my view, the Commission would have approved the application proposed in response to Question 2 above.... I consider that it is very likely that the Commission would have found the proposal to be in the public interest and

approved the application, providing all the other criteria for the granting of a permit and license were satisfied.

In response to question 4, Mr. Kolesar states:

If ENMAX had filed an application for a permit and license to remove/relocate the Transmission Lines from the Interlink Lands on the grounds that it had an obligation to do so, pursuant to the ROW Agreements, and given that that obligation had been affirmed in *Remington Development Corp. v Enmax Power Corp.*, 2011 ABQB 694 and subsequently upheld by the Alberta Court of Appeal in *Remington Development Corp. v Enmax Power Corp.*, 2012 ABCA 196, the Commission would very likely have approved the application.

[31] It is difficult to conceive how that evidence, even if admissible, would assist the trial judge. It represents no more than the author's view of how an application might be considered if one component of an application was changed. It runs the risk of oversimplifying the decision making process and in any event is purely speculative.

[32] I am also not satisfied that the evidence is relevant to an issue at trial. Remington submits that the Kolesar Report sets parameters around Remington's obligation to mitigate by explaining the applications ENMAX could have made to the AUC for removal of the Transmission Lines from the Interlink Lands. Remington also submits that the Kolesar Report is relevant to its Amended Reply where it says that ENMAX's application to the AUC was deficient and not in compliance with the Letter Agreement.

[33] Relevance is a primary consideration when considering the admissibility of any type of evidence. It requires the court to consider the purpose or need to be addressed by the evidence and to be satisfied that it will tend to prove or disprove a disputed fact. Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than it would appear in the absence of that evidence: *J LJ* at para 47.

[34] Relevance is established in relation to a cause of action pled in a Statement of Claim. The issue in this Action is the compensation Remington is entitled to, if any, for ENMAX's actual occupation of the Interlink Lands. Whether ENMAX could have submitted a different or further application to remove the Transmission Line does not alter the compensation period. If the information in the Kolesar Report is relevant to Remington's theory of damages that compensation is payable on the entire Interlink Lands, counsel will be able to direct the court to the regulatory framework and past decisions to make that argument. Although Remington submits that the Kolesar Report is relevant to ENMAX's pleading in its Amended Amended Statement of Defence that Remington failed to mitigate its losses by not submitting its own application to the AUC to remove the Transmission Lines, notably all opinions expressed in the Kolesar Report are confined to applications ENMAX could have made, not Remington.

[35] Without detracting in any way from Mr. Kolesar's qualifications and experience as a regulator with particular expertise in utility regulation, I am not satisfied that the Kolesar Report is relevant or necessary. I am satisfied that the Kolesar Report represents the clearest of cases where a pre-trial determination of the admissibility of the expert report is appropriate. I find that the Kolesar Report is inadmissible.

Mitchell, Crane, Hofer, Magnussen Reports

[36] Mr. Mitchell is an architect who provides an opinion from an architectural perspective as to the development potential of the Interlink Lands with and without the Transmission Line. His opinion, at a very high level, is that the presence of the Transmission Line on the Interlink Lands presents a hindrance to the development of the Interlink Lands as a whole.

[37] Mr. Crane is a construction costing expert who provides an opinion as to the fair market construction costs associated with the two design scenarios described in the Mitchell Report.

[38] Mr. Hofer is a property appraiser. Using the Mitchell designs and the Crane cost estimates, he identifies three approaches to estimating the market value of the Interlink Lands for the purpose of providing an opinion as to the retrospective market value of the leased fee interest in the Interlink Lands. He also provides an opinion of the development profit relating to the Interlink Lands by subtracting the development costs for the Interlink Lands from their market value.

[39] Finally, Mr. Magnussen is a real estate advisor who provides an opinion as to the commercial likelihood that a real estate developer would develop the Interlink Lands with or without the presence of the Transmission Line.

[40] ENMAX submits that all but limited excerpts of the Mitchell and Magnussen Reports are inadmissible because they are not relevant to the matters in issue in the litigation and, in any event, are duplicative. ENMAX submits that each of the proposed experts provides an opinion as to Remington's loss of development profits, a claim that Remington released in December 2010. It submits that the experts purport to describe the design and development potential of the Interlink Lands and related construction costs to establish the quantitative and qualitative parameters around Remington's expected loss of development profits from its inability to or delay in developing the Interlink Lands. It submits that the only possible relevant portions of the Reports appear in the Mitchell Report and Magnussen Report where the experts express an opinion whether a developer would move forward with development of the Interlink Lands with the Transmission Line in place.

[41] Remington acknowledges that it released ENMAX from liability Remington's claim for loss of development profits. It submits that the Reports are not tendered to support a loss of development claim but are relevant to its surviving claim for the loss of rentable value of the Interlink Lands. It submits that the Reports will assist in demonstrating that the "value of the Interlink Lands" must be calculated by reference to the Interlink Lands as a whole and not just the footprint of the Transmission Line. Remington submits that the Reports are offered to demonstrate that there was no possible viable development of the Interlink Lands while the Transmission Line was present. In Remington's words, the Reports are intended to address the "developability" of the Interlink Lands to demonstrate that the presence of the Transmission Line "sterilized" the development of the Interlink Lands as a whole. It advises that in addition to the Mitchell, Crane, Hofer and Magnussen reports, it has served other primary expert reports as to the value of the Interlink Lands as bare lands as the basis for the rent calculation.

[42] ENMAX submits that the Expert Reports are simply a disguised claim for loss of development profits and that the Reports are offered for that purpose.

[43] In its letters to ENMAX counsel, in its briefs filed with the Court and in its oral submissions, Remington has stated clearly that it does not claim damages for lost profits; it acknowledges that it released its claim for lost profits as part of the Letter Agreement and the Release. With the Mitchell, Crane, Hoffer and Magnussen Reports, Remington seeks to provide evidence as to one potential pathway to proving its surviving claim. Remington submits that it should be given the latitude to present the Reports as evidence that its surviving claim for lost rent requires the trial judge to understand the development potential of the Interlink Lands with and without the Transmission Line.

[44] The scope of Remington's rental claim is a central and complex issue in this litigation. In my view, it would be contrary to the interests of justice and my role in this pre-trial application to strike the Reports on the basis that they are not relevant to an issue at trial. To do so would constrain Remington's ability to determine its trial strategy and to present its case. The trial judge will be better positioned to consider the admissibility of the Reports and the benefits or costs of the proposed expert evidence at trial.

[45] Addressing ENMAX's submission that the Reports are duplicative and offend Rule 8.16 of the *Rules of Court*, the parties appear to agree that the Reports build a cumulative picture as to the development potential of the Interlink Lands from design to costing to appraisal to the likelihood of development. They also agree that the experts have distinct areas of expertise and that each proposed expert offers their unique expertise to answer the question of whether the development of the Interlink Lands was viable with the Transmission Line in place.

[46] In ***Smith v Obuck***, 2018 ABQB 849 at para 21 the Court identified certain factors for consideration on an application that engages Rule 8.16:

1. Is the testimony of the proposed expert relevant to the subject matter in issue?
2. Can calling the proposed expert be considered "piling on" or duplicative?
3. Does the evidence of the proposed expert add anything to the evidence of the other expert?
4. Is the evidence of the proposed expert required to allow the party to present its case?
5. Will the evidence of the proposed expert assist the trial judge?
6. Is allowing the proposed expert to testify prejudicial to the other party?
7. Can any abuse, expense or delay that is determined to have been caused by the calling of the proposed expert be addressed by an award of costs at trial?

[47] A number of those factors mirror the admissibility requirements for expert opinion evidence, including relevance, necessity and prejudice to the trial process. With respect to the question of duplication, the pertinent factors are whether the evidence is redundant or intended to bolster evidence already tendered, whether it is additive, incremental or an extension of an opinion expressed by another, or whether the experts will give evidence on the same subject. Those factors

address the potential for the misuse of public and private resources and delay; they may also engage the question of unfairness from the distortion of issues or increased complexity.

[48] In my view, Remington does not propose to call multiple experts with similar expertise. Each expert brings their unique expertise to the question of whether the Interlink Lands are commercially developable. While the Reports each address that question, the specific subject matter of each Report is not already addressed by the others.

[49] The purpose of Rule 8.16 is to prevent the expense and delay from excessive expert evidence where it is unnecessary to assist the court in arriving at a just result: **Smith** at para 18. I am not persuaded that the Reports offend the principle in Rule 8.16. It may be that at trial, evidence that appeared cumulative or complementary may prove to be duplicative. If so, that can be addressed by the trial judge.

[50] I agree with Remington's submission that particularly in this pre-trial context Rule 8.16 should not be narrowly construed to prevent potentially relevant evidence from being offered.

Magnussen Report

[51] ENMAX applies to strike the Magnussen Report on the basis that Mr. Magnussen's personal relationship with Randy Remington prevents him from providing fair, objective and non-partisan assistance to the court. ENMAX submits that the evidence in this application establishes that Mr. Magnussen is not only Mr. Remington's friend, but that he has a close personal allegiance to Mr. Remington and is participating in the proceedings not as an impartial expert but because he aligns with Remington's position. ENMAX submits that Mr. Magnussen's bias is apparent by the fact that he provides little supporting reasoning for his opinion regarding the development potential of the Interlink Lands. In oral submissions, ENMAX argued that had it presented "significant evidence of disqualifying bias" to support its application.

[52] Remington says ENMAX has twice in this long-standing conflict challenged Mr. Magnussen's qualifications to give expert evidence by arguing that he is partial, biased and lacks objectivity. One such challenge was before Justice Simard who heard the appeal and cross-appeal of a compensation decision made under the *Surface Rights Act*, RSA 2000, c S-24. Justice Simard's oral reasons on the pre-trial motion to disqualify Mr. Magnussen are attached to the Affidavit of Randy Remington sworn February 6, 2025.

[53] It is notable that on this application before me, ENMAX relies on the same evidence that it relied on before Justice Simard to establish what it says is Mr. Magnussen's lack of qualification to give expert testimony, being excerpts from the cross-examination of Mr. Remington and Mr. Magnussen in the compensation hearing before the Land and Property Rights Tribunal (LPRT).

[54] I expressed my concern to counsel that bringing this application a second time on the same evidentiary record was improper and risked the court making inconsistent findings. Notably, other than its suggestion that bias is apparent from a lack of reasoning for his opinion, ENMAX does not argue that something inherent in the Magnussen Report betrays bias or an inability to be impartial. The evidentiary basis for the application before me was the same cross-

examination transcripts where both Mr. Remington and Mr. Magnussen frankly acknowledged their personal and professional relationship.

[55] As noted by Remington in its brief, quoting from *White Burgess* at para 49, the court is to examine the nature and extent of a connection between an expert and a party to determine whether the proposed expert can be impartial. The mere presence of a relationship or connection is not itself determinative.

[56] Justice Simard concluded that the evidence offered by ENMAX did not clearly establish that Mr. Magnussen was biased or could not be qualified as an expert:

A witness could be a personal friend or a litigant or a regular service provider to a litigant and still provide an independent and unbiased expert report.

[57] ENMAX appears to argue that Mr. Magnussen's lack of impartiality is even more critical in this case as he is the only expert Remington proffers who expresses an opinion on whether a reasonable developer would proceed with the development of the Interlink Lands. It perhaps bears stating that the relative importance of an expert's opinion does not influence the qualification analysis, meaning an expert's qualifications are not subjected to a different level of scrutiny at the admissibility stage because their opinion might be central to an issue rather than peripheral. The *Mohan* criteria apply to every expert witness who wishes to express an opinion based on certain evidence and assumptions.

[58] I am satisfied that this application is improper as this Court has previously ruled on the same issue on the same evidentiary record in related proceedings between these parties. In any event, I agree with Justice Simard that the evidence at this pre-trial stage does not clearly establish that Mr. Magnussen is unwilling or unable to provide fair, objective and non-partisan evidence. At the time Mr. Magnussen is presented to give evidence at trial, the trial judge will have the benefit of assessing his willingness, commitment and ability to provide impartial opinion evidence to assist the court.

Sharp Report

[59] In the Sharp Report the expert provides six alternate calculations of prejudgment interest on Remington's potential damages claim: i) the statutory rate under the *Judgment Interest Act*; ii) a risk-free rate (determined to be 20-year Canada Sovereign Strips); iii) Remington's historical annual weighted-average borrowing rate; iv) the Canada Bank Prime borrowing rate plus a spread of 4%; v) the annual capitalization rate as determined by Altus Group; and vi) Remington's pre-tax return on equity. The interest calculations range in value between \$21,295,455 and \$315,267,691. ENMAX objects to the admissibility of all but the expert's opinion on prejudgment interest calculated using the statutory rate under the *Judgment Interest Act*.

[60] ENMAX submits that the Sharp Report is an impermissible attempt by Remington to advance an interest claim that Remington did not plead. It further submits that the Sharp Report is inadmissible because the expert relies on records that Remington did not disclose in accordance with its obligations under Part 5 of the *Rules of Court*. ENMAX asks that the offending portions of the Sharp Report be struck. It also seeks an order precluding Remington

from relying on the documents contained in its Ninth Supplemental Affidavit of Records sworn July 24, 2025 some of which form the basis for calculating Remington's borrowing rate and return on equity. In the alternative, ENMAX seeks the opportunity to conduct Part 5 questioning of Remington in relation to the documents produced in the Ninth Supplemental Affidavit of Records.

Preliminary Issue Regarding Privileged Records

[61] ENMAX sought disclosure of certain records in Remington's Ninth Supplemental Affidavit of Records over which Remington asserted a claim of privilege. Those records relate to communications between Mr. Sharp and Remington representatives; they were relied on by Mr. Sharp in preparing the Sharp Report. During oral submissions, I was advised that Remington has agreed to produce those records.

[62] ENMAX asserted that Remington waived privilege over the records by serving the Sharp Report. It relied in part on *Alberta Drywall & Stucco Supply (Calgary) Inc v Alberta Drywall & Stucco Supply Inc*, 2023 ABKB 696 and *R v Stone*, 1999 CanLII 688 to support its position. Neither case stands for the proposition for which it is advanced. In fact, in *Drywall*, Justice Dunlop expressly disagreed that service of an expert report amounts to a waiver of privilege over documents relied on by an expert: *Drywall* at para 22. Justice Dunlop concluded in *Drywall* that the waiver of privilege over foundational documents relied on by an expert only occurs when a party commits to calling an expert at trial. In *Stone*, the waiver of the expert report arose when counsel referred to it in his opening statement. *Drywall* stands for the proposition that absent an active waiver of privilege as occurred in *Stone*, a party maintains its claim of privilege over documents relied on by an expert until the party calls the expert at trial.

Interest Calculations

[63] Section 2(3)(b) of the *Judgment Interest Act* gives the court the discretion to award interest at a rate higher or lower than the statutory judgment interest rate under s 4(1) of the *Act*: *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2020 ABCA 320 at para 114. The Sharp Report is offered by Remington to provide methods for calculating that enhanced interest.

[64] ENMAX says that to assert the "enormous" interest claim set out in the Sharp Report, Remington had to comply with Rule 13.6(2)(c)(iii) of the *Rules of Court* which requires a party to plead "a statement of any interest claimed, including the basis for the interest, and the method of calculating the interest". Relying on *CNOOC Petroleum North America ULC v 801 Seventh Avenue Inc*, 2025 ABKB 537 and the foundational principles of fairness and notice, ENMAX says that as Remington did not claim enhanced interest in compliance with Rule 13.6(2)(c)(iii), the Sharp Report must be struck as having no relevance to the claim pled.

[65] ENMAX submits that Remington's failure to plead a claim for enhanced interest results in ENMAX having no notice of the claim and the case it must meet until it received the Sharp Report, well after conclusion of Part 5 questioning. ENMAX submits that Remington's bare pleading in its Amended Statement of Claim seeking "interest in accordance with the Judgment Interest Act" is not sufficient to ground the interest claim set out in the Sharp Report. It submits

that Remington should not now be permitted to advance a new interest claim that was not pled and that Remington now improperly advances through an expert report. It submits that it is both surprised and prejudiced by Remington's claim for enhanced interest.

[66] In addition, ENMAX submits that the interest calculations in the Sharp Report are effectively a proxy for the lost development profits claim that Remington released in 2010. It submits that the inclusion of these alternate methods of calculating interest in the Sharp Report is an attempt by Remington to recover its lost development profits claim through the back door which it agreed by release that it would have no right to recover through the front door.

[67] Remington submits that its claim for enhanced interest is not an indirect claim for loss of profits. It submits that it claims a higher rate of interest on damages for unpaid rent to compensate it for the time value of the rental payments for ENMAX's unauthorized use of the Interlink Lands. In addition, Remington submits that when it prepared the Statement of Claim, the *Rules of Court* did not require the particulars that are now required under Rule 13.6(2)(c)(iii). Remington submits that its failure to amend its Statement of Claim to accord with the changes to the *Rules* in 2010 was an oversight and can be remedied by amendment to its Amended Statement of Claim. It submits that the proposed amendment to plead the basis of its interest claim would not engage any of the exceptions to the general rule that amendments can be made regardless of how careless or late the party seeking amendment: ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited***, 2014 ABCA 74 at para 25. In any event, Remington says ENMAX is not prejudiced as it has had notice of Remington's claim for enhanced interest since June 2025 when the Sharp Report was served along with the records Mr. Sharp relied on to prepare his calculations.

[68] Remington expressed its intention to bring an application to amend its Amended Statement of Claim to plead a claim for enhanced interest.

[69] Section 2(1) of the *Judgment Interest Act* creates a presumptive entitlement to pre-judgment interest: ***Malig v Kaur***, 2020 ABCA 111 at para 2. Under section 2(3) of the *Judgment Interest Act*, where the court considers it just to do so, the court may refuse to award interest, award interest at a higher or lower rate than the Part I rate, or award interest for a period other than provided in Part I. The factors that may be considered in the exercise of that discretion are changes in market interest rates, the circumstances of the case and the conduct of the action.

[70] In ***CNOOC Petroleum North America ULC v 801 Seventh Avenue Inc***, 2025 ABKB 537 the Court noted that the requirements in Rule 13.6(2)(c)(iii) serve the interests of fairness by ensuring that a party knows the case it must meet.

[71] In contrast, in ***Barry v Industrial Alliance Insurance and Financial Services Inc***, 2022 ABQB 265, the Court exercised its discretionary authority under s 2(3) of the *Judgment Interest Act* to award enhanced interest where the Statement of Claim did not include a claim for enhanced interest.

[72] In ***Dow Chemical Canada ULC v NOVA Chemicals Corporation***, 2020 ABCA 320 the relief claimed included a contractual rate of interest under the Co-Owners Agreement or alternatively interest under the *Judgment Interest Act*. Damages at trial were awarded under a

different agreement in which there was no agreed rate of contractual interest. The Alberta Court of Appeal declined to conclude that in awarding interest under the Co-owners Agreement the trial judge exercised her discretion under s 2(3) of the *Judgment Interest Act*. Instead, the Court of Appeal exercised “afresh” the discretion under s 2(3) of the *Judgment Interest Act*. It noted that some agreements between the parties stipulated a contractual interest rate. It awarded prejudgment interest after considering the sophisticated commercial context of the parties and the dispute, and the contractual rate of interest in various agreements: **Dow** at para 117. For the purposes of this application to strike, it bears comment that the Court of Appeal noted that there was no evidence at trial of the borrowing costs of either party, the implication being that had there been evidence, it may have assisted the Court. I am satisfied that where a party seeks enhanced interest a trial judge may find it helpful to receive expert evidence addressing possible methods of calculating interest.

[73] In **Jonk v Mercier**, 2026 ABKB 513 at para 456 relying on **Dirk v Toews**, 2020 ABCA 477 at para 31 the Court commented that the discretion under s 2(3) of the *Judgment Interest Act* should not be construed so narrowly that it erodes the beneficial effects of a prejudgment interest award. Those benefits, and by implication, the deterrent features of an award of prejudgment interest were discussed in **Neste Canada Inc v Allianz Insurance Company of Canada**, 2008 ABCA 71 at para 81. Prejudgment interest compensates a plaintiff for its losses from litigation delay “whether by inflation, investment income foregone, interest paid to lenders or otherwise.”

[74] This canvas of the law in Alberta leads me to the following. While I agree with ENMAX that a failure to plead the particulars of an interest claim may offend the principles of trial fairness and notice as reflected in Rule 13.6 and elsewhere in the *Rules of Court*, the *Rules of Court* cannot modify or constrain the discretion afforded the Court under the *Judgment Interest Act*. As already discussed, the Court has exercised its discretion to award enhanced interest where it is just to do so even where the plaintiff did not claim enhanced interest but claimed only interest under the *Judgment Interest Act*. I was not provided any cases where a party’s claim for enhanced interest was denied because of a failure to plead the basis for its interest claim.

[75] Given Remington’s intention to apply to amend its Amended Statement of Claim to include a claim for enhanced interest, I am satisfied that ENMAX’s application to strike the Sharp Report based on relevance is premature. However, I am of the view that expert opinion evidence like that in the Sharp Report may be admissible to assist the trial judge in addressing an award of prejudgment interest.

Remington’s Late Disclosure

[76] ENMAX seeks to strike the Sharp Report because it says the documents relied on to support the opinions expressed were not produced in accordance with the *Rules*. ENMAX submits that Remington’s late disclosure of records in its Ninth Supplemental Affidavit of Records violates Rule 5.10 which requires a party to produce its records in a timely fashion and Rule 5.16 which precludes a party from relying on undisclosed records without permission of the court. It submits that as Remington should not be permitted to use the records produced in the Ninth Supplemental Affidavit of Records in evidence without permission of the court, the Sharp Report is left without any foundation for admission and is impermissible.

[77] ENMAX submits that the Sharp Report is based on late disclosure produced well after the deadline the Court ordered for the exchange of Supplemental Affidavits of Records, well after the date for exchange of primary expert reports, and after questioning was to be completed. It points to the authorities that say that document production is fundamental to ensuring a party has notice of the claims being made and that Rules 5.10 and 5.16 are designed to avoid trial by ambush and the unfairness that arises: *Smith v Smith*, 2016 ABCA 376 at para 42.

[78] Remington's Ninth Supplemental Affidavit of Records was served on July 24, 2025 and the records themselves were produced to ENMAX in July 2025. Counsel for Remington advises, and I accept, that the documents in the Ninth Supplemental Affidavit of Records can be placed into five categories:

1. Category 1 represents 84 records comprising 14,363 pages of material that are documents produced in previous proceedings involving the parties, primarily the LPRT Appeal Hearing which was heard in October and November 2024;
2. Category 2 represents 31 records comprising 86 pages of documents produced by Remington in February 2024 in response to undertakings;
3. Category 3 represents 4 records being correspondence between the parties from November 2024 and June 2025;
4. Category 4 represents 12 records comprising 590 pages that counsel advises are environmental documents created in 2025 in response to ENMAX's Amended Amended Statement of Defence filed May 2024 in which it pleads that the Interlink Lands contain material environmental contamination; and
5. Category 5 represents 113 records comprising 1,660 pages of documents relied on by Mr. Sharp and that were produced after Remington received the Sharp Report.

[79] While ENMAX argues that Remington should be precluded from using any of the records disclosed in the Ninth Supplemental Affidavit of Records, that argument is most certainly an overreach. Remington advises and I accept that the records in Categories 1 and 2 were previously produced to ENMAX and that they are catalogued in the Ninth Supplemental Affidavit of Records as a housekeeping measure. The records in Categories 3 and 4 were produced within a reasonable time of their creation. I find that Remington has fully complied with its disclosure obligations respecting the records in Categories 1-4.

[80] The real issue relates to the Category 5 records which include Remington financial records, some of which date back decades and all of which were relied on by Mr. Sharp to calculate Remington's return on equity and borrowing rate. ENMAX effectively argues that Remington's late production of the records cannot be saved by serving the Ninth Supplemental Affidavit of Records as the records were long in existence, known to Remington, and not disclosed "immediately". ENMAX says there is presumed prejudice arising from Remington's delayed disclosure as memories fade and evidence may be lost. It says the prejudice it will suffer is irredeemable and not compensable in costs.

[81] Remington acknowledges that the records were in existence and known to Remington at the time they were created but says that their relevance to the claim was not known until Remington received the Sharp Report. It says that it promptly complied with its disclosure

obligations once that relevance was known. It agrees that ENMAX can conduct questioning on the records and suggests that given that the records are largely Remington's financial records, there is less concern about the loss of evidence from faded memories.

[82] Undoubtedly the *Rules of Court* and modern jurisprudence are aimed at promoting efficient, cost-effective litigation. That can be achieved by parties setting realistic deadlines and abiding by them regardless of how complex the action may be.

[83] Remington missed the deadline for serving further Supplemental Affidavits of Records. In the circumstances of this case, however, I am not satisfied that Remington is required to bring an application under Rule 5.16 for an order permitting it to adduce the records at trial or to otherwise rely on the records. It properly swore its Ninth Supplemental Affidavit of Records once aware that the records were relevant to Remington's interest claim. Given the status of the Action, there is opportunity for questioning on the records, including an opportunity to test the reliability of the memories of witnesses who can speak to the records. Rule 5.16 is to prevent unfairness, last minute trial adjournments and the waste of resources by precluding undisclosed records from being produced at trial: *ATCO Energy Solutions Ltd v Energy Dynamics Ltd*, 2024 ABKB 162 at para 47. Here, Remington disclosed the records in its Ninth Supplemental Affidavit of Records, albeit after the ordered deadline. The records are Remington financial records from years past, not typically the kind of evidence that weakens with time. ENMAX has the opportunity to prepare its case for trial based on the disclosed records and to argue that costs following trial should account for Remington's late disclosure.

[84] I therefore decline to strike the Sharp Report on the basis that it lacks foundation for admission. As agreed by Remington's counsel, ENMAX is to have a reasonable opportunity to conduct Part 5 questioning with respect to the records produced in the Ninth Supplemental Affidavit of Records.

Costs

[85] The parties have had mixed success on this application. Each party shall bear its own costs.

Heard on the 19th day of August, 2026.

Dated at Calgary, Alberta this 27th day of August, 2026.

N. Dilts
J.C.K.B.A.

Appearances:

Dalton McGrath, KC and Tom Wagner
for the Applicant

Grant Vogeli, KC and Alixandra Stoicheff
for the Respondent