

Court of King's Bench of Alberta

Citation: CNOOC Petroleum North America ULC v 801 Seventh Inc, 2026 ABKB 570

Date: 20260813
Docket: 1901 06261
Registry: Calgary

Between:

CNOOC Petroleum North America ULC

Plaintiff

- and -

**801 Seventh Inc, OPTrust Office Inc, Centurion Holdings Ltd, Quantico Capital Corp,
Westhills Development Corporation, Canadian Income Fund Group Inc, and Tokay
Capital Corp**

Defendants

- and -

CNOOC Limited

Third Party

**Memorandum of Decision
of
Associate Chief Justice
D.B. Nixon**

I. Introduction

[1] The underlying litigation involves a dispute over a commercial lease (the “Lease”). The trial was bifurcated. The first segment of the case addressed the liability issue (the “Liability Trial”), and a decision has been issued on that matter: see *CNOOC Petroleum North America ULC v 801 Seventh Inc*, 2025 ABKB 145.

[2] The decision in the Liability Trial has been appealed. The appeal was argued on February 12, 2026, but no decision has yet been issued by the Alberta Court of Appeal concerning the decision in the Liability Trial.

[3] The applications underlying this hearing arise between the conclusion of the Liability Trial and before resumption of trial concerning the second segment. The second segment of the trial will address damages. I am case managing this litigation in preparation for the second segment of this trial.

[4] For ease of readability, I shall refer to the plaintiff CNOOC Petroleum North America ULC (“CPNA”) and the defendant by counterclaim CNOOC Limited collectively as the “CNOOC Parties”. I will refer to the defendant 801 Seventh Inc as the “Landlord”. The other defendants are OPTrust Office Inc, Centurion Holdings Ltd, Quantico Capital Corp, Westhills Development Corporation, Canadian Income Fund Group Inc, and Tokay Capital Corp, and I will refer to these other defendants collectively as the “Beneficial Owners”.

II. Background

[5] In an earlier decision this year, I permitted the CNOOC Parties to amend their Statements of Defence to Counterclaim: see *CNOOC Petroleum ULC v 801 Seventh Avenue Inc*, 2026 ABKB 361. Following those amendments, the Landlord provided a fifth supplemental affidavit of records with new records that had become producible (the “Fifth Supplemental Affidavit of Records”). The Beneficial Owners also provided supplemental affidavits of records wherein they stated that all further relevant and material records in their control had already been produced by the Landlord.

[6] The CNOOC Parties have applied for an order for further and better affidavits of records. They argue that there are relevant and material records that were not included in these supplemental affidavits of records.

III. Issues

[7] The issues underlying this hearing are framed as follows:

- a) Have the Landlord and Beneficial Owners employed effective modes of record collection and preservation?
- b) Are all the lender communications, including the Shoraka call logs, producible records?
- c) Are the financial records of the Beneficial Owners producible records?
- d) Are Mr. Shoraka’s communications with the Landlord’s insurance broker producible records?

IV. The Law

[8] Record production is an important component of pretrial discovery. Each party must serve an affidavit of records listing all the relevant and material records under its control: *Rules* 5.5 and 5.6 of the *Alberta Rules of Court*, Alta Reg 124/2010 (“*Rule*”); ***CNOOC Petroleum North America ULC v ITP SA***, 2024 ABCA 139 at para 14.

[9] There is an ongoing responsibility to disclose. The litigation system in the Province of Alberta depends on the good faith of the parties and their counsel, and it cannot be displaced merely by lack of trust due to contentious litigation: ***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2023 ABCA 97 at para 25 [801 ABCA].

[10] Absent an agreement to the contrary, it is up to each party to employ appropriate procedures to comply with their respective disclosure and production obligations: ***H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd***, 2024 ABKB 424 at para 47. If a party is of the view that disclosure is deficient, *Rule* 5.11(a) allows for an application to this Court requesting a record be produced. That *Rule* will be invoked if the Court is satisfied that a relevant and material record under the control of a party has been omitted from an affidavit of records.

[11] This application centres around the definition of the phrase “relevant and material”. This phrase is defined in *Rule* 5.2(1) as follows:

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

[12] This is helpfully described in detail by Justice Marion in ***Goold v Allen***, 2023 ABKB 66 where he notes at paras 14-16:

Courts are not to be overly strict in assessing relevance and materiality: ***The Canada Trust Co (McDiarmid Estate) v Alberta (Infrastructure)***, 2022 ABCA 247 at para 28 [*Canada Trust Co*], citing ***Weatherill (Estate of) v Weatherill***, 2003 ABQB 69.

Relevance must be determined with respect to the issues set out in the pleadings: ***Canada Trust Co*** at para 29; ***Dow Chemical Canada ULC v Nova Chemicals Corp***, 2014 ABCA 244, at para 17.

Materiality, on the other hand, while also dependent on the issues, is more a matter of proof: ***Canada Trust Co*** at 29; ***Weatherill*** at para 16. Courts must consider whether the records could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or to ascertain evidence that could do so: *rule* 5.2; ***Canada Trust Co*** at para 30; ***Weatherill*** at paras 15-17. Whether a record is material depends on whether it can help, directly or indirectly, prove a fact in issue: ***Tolton v Tolton***, 2020 ABCA 218 at para 24; ***Dow Chemical Canada ULC v Nova Chemicals Corporation***, 2014

ABCA 244 at para 17. At the interlocutory stage, courts should not measure the proposed line of argument too finely – if a party can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient because the purpose of the rule is to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry: *Canada Trust Co* at para 29, citing *Weatherill*. However, the proposed discovery should not be unrealistic, speculative, or without any air of reality: *Dow Chemical* at para 21.

[13] These disclosure obligations are not limitless. As noted in *Goold* at para 12, “[t]hey are not designed to allow every stone, or every potential, possible, speculative or theoretical stone, to be turned over.”

[14] In *801 ABCA*, the Court of Appeal highlights that there are mechanisms in place to help ensure that missed records are revealed via cross-examination on the affidavit, or via references in produced records or through questioning: at para 26. As explained in *H2 Canmore* at para 53 “a party seeking further and better disclosure will have to be able to explain or prove that the records they seek likely exist, are relevant and material, and that the request is not a fishing expedition based on unrealistic or speculative premises.”

V. Analysis

[15] I turn to consider each of the issues as framed above.

A. Have the Landlord and Beneficial Owners employed effective modes of record collection and preservation?

[16] The CNOOC Parties argue that the Landlord and Beneficial Owners had a record collection process that was fundamentally flawed, which resulted in incomplete and inadequate production that led to the destruction of relevant and material records. In particular, the CNOOC Parties assert that no retention policy concerning records was sent to the relevant custodians.

[17] In their application, the CNOOC Parties requested that the Landlord and Beneficial Owners draft a proposed e-discovery plan. The CNOOC Parties wanted to review that plan, provide comments, and ultimately approve it, prior to the e-discovery plan being implemented.

[18] The Landlord and Beneficial Owners responded that the record collection process was appropriate in this case, and that there is no evidence that relevant and material records were missed or destroyed. The Landlord and Beneficial Owners contend that the CNOOC Parties have not met their burden that the alleged records actually exist. The Landlord and Beneficial Owners further argue that the CNOOC Parties are simply inferring that certain documents must exist.

[19] Based on my review of the evidence and analysis of the law, I am of the view that the CNOOC Parties have not satisfied me, on a balance of probabilities, that there are relevant and material records that have been missed or were destroyed.

[20] In reviewing the record collection policy that was sent to custodians, I find that the record collection process employed was appropriate. In making this determination, I note in the section on “Relevance and Materiality” within the record collection policy provided by Counsel to the Landlord and the Beneficial Owners, it states the following:

It is important to keep in mind that the obligation is to produce all relevant and material records, whether they may help or hurt 801’s case. In fact, we often say

that if you come across a record that you really do not want to produce, it likely means you have to. We ask that when you are considering your records, if you are not sure about whether a particular item should be included in the Affidavit, please err on the side of providing the record to us and we will consider its producibility further with you.

[21] I agree with the statement of Justice Marion in **H2 Canmore** at paras 35-37 to the effect that it would be preferable for the parties in a matter as complicated as this to have agreed to a discovery plan in advance of this litigation. However, such a plan did not come about. That being the case, I agree with the Landlord and Beneficial Owners that it is now too late to require that a discovery plan be drafted and agreed to by the parties. The record production obligations under the *Rules* remain in effect for the parties, and those controls on the system identified in **Demb v Valhalla Group Ltd**, 2017 ABCA 340 at para 4 continue to apply.

[22] I acknowledge that the CNOOC Parties rely significantly on **H2 Canmore**, and in particular the list at para 70 of that decision to argue that in the present case the Landlord and Beneficial Owners have made many of the same errors. That said, I do not find the factual scenario of **H2 Canmore** to be apposite here. As noted by Justice Marion in **H2 Canmore**, the respondents candidly admitted in that case that they had missed numerous relevant and material records. There was no formally documented e-discovery plan: **H2 Canmore** at para 68. The list in para 70 of **H2 Canmore** is not a statement of law, but rather discrete examples of inadequate document discovery based on the evidence in that case.

[23] Further, the specific problem cited by the CNOOC Parties is that custodians screened records prior to providing those records to legal counsel. However, the statement made in **H2 Canmore** is “some custodian-initiated screening or organization of records prior to their provision...to counsel, without any apparent process in place to educate on the issues in the Action or what might be relevant and material;” [emphasis added]. In contrast to the **H2 Canmore** circumstances, in this case there was explicitly in the record collection process a memo provided by the Landlord and the Beneficial Owners to the custodians of the documents which furnished an explanation of which records could be relevant and material.

[24] The CNOOC Parties emphasized that there was no retention policy included in the record collection process memo. While I agree with the CNOOC Parties that such a retention policy should have been included in the memo or alternatively sent out to the custodians, that alone does not prove, on a balance of probabilities, that relevant and material records were destroyed or not disclosed.

[25] After considering matters in context, I am also not satisfied, on a balance of probabilities, that there is enough evidence in these circumstances to determine that the handwritten notes of Mr. Killi’s phone calls with Mr. Shoraka were relevant and material records that were destroyed. There must be more than simple speculation to such allegations. The testimony of Mr. Killi in cross-examination was that he would occasionally take notes during phone calls but would discard them if there was “no information of an enduring nature” regarding the relationship with the lenders. He further testified that there were no other records that were destroyed. Based on these particulars, the CNOOC Parties have not satisfied me that relevant and material records were destroyed by Mr. Killi.

[26] Based on my review of the evidence and analysis of the law, I am not satisfied that there were issues with the record collection process of the Landlord and the Beneficial Owners such

that a new process would have to be drafted. Given this determination, this portion of the application is dismissed.

B. Are all the lender communications, including the Shoraka call logs, producible records?

[27] The CNOOC Parties have challenged the sufficiency of the lender communication records that were produced by the Landlord and the Beneficial Owners. The CNOOC Parties argue that there must be additional relevant and material records which need to be produced to help them understand the factual and legal matrix of the agreement with the lenders.

[28] The Landlord and Beneficial Owners respond that they agree that the lender communications are relevant and material. However, they go on to highlight that they have already provided 600 records of these communications to the CNOOC Parties in the Fifth Supplemental Affidavit of Records.

[29] The Landlord and Beneficial Owners emphasize that the onus remains on the CNOOC Parties to demonstrate that there are relevant and material records under the control of Landlord and Beneficial Owners that have not been produced. Those Defendants reiterate that they have already produced all the relevant and material records to the CNOOC Parties.

[30] Based on my review of the evidence and analysis of the law, I find that the CNOOC Parties have not satisfied me, on a balance of probabilities, that there are relevant and material records which have not been produced. I make this determination because the inferences made by the CNOOC Parties that the Lenders were the decision makers does not align with the full response of Mr. Killi in cross-examination. My conclusions concerning this point are also consistent with the comments of Justice Diltz in her desk endorsement of December 2, 2025 to the effect that there is no indication that the Landlord and Beneficial Owners were not directing this litigation.

[31] As a final comment under the question that I framed above, I am not satisfied that the call logs of Mr. Shoraka concerning his discussions with the Lenders are material to this litigation. Further, I am not satisfied that producing these call logs would “significantly help determine one or more of the issues” in this litigation. While I acknowledge that the subject call logs may identify that Mr. Shoraka had called a representative of the Lenders on certain dates, such facts are not in dispute in this litigation.

[32] I reiterate, the fact that Mr. Shoraka called a representative of the Lenders on a particular day would neither reasonably be expected to significantly help determine one or more of the issues raised in the pleadings nor reasonably be expected to help ascertain evidence that could do so. In my view, the pursuit of the call logs of Mr. Shoraka is a fishing expedition based on speculative premises. Given these determinations, I find that the call logs of Mr. Shoraka do not need to be disclosed to the CNOOC Parties.

C. Are the financial records of the Beneficial Owners producible records?

[33] The CNOOC Parties argued that due to the novel arguments of the Landlord concerning the damages portion of the trial, they need access to the financial records of the Beneficial Owners to be able to determine whether they properly mitigated their damages. The CNOOC Parties also argued that they need the financial records in order to respond to allegations that the

Landlord and Beneficial Owners were “forced” to enter the Relief Agreement with the Lenders or to sell the building in a depressed market.

[34] The Landlord and Beneficial Owners respond that financial records sought by the CNOOC Parties are neither relevant nor material. They further assert they have formally admitted, without admitting relevancy or materiality, that the Beneficial Owners at all material times had the financial capacity to pay off the mortgage, to fund the continued operation of the building, and to conduct immediately any and all asbestos removal that might be necessary (collectively, the “Admissions”).

[35] In my review of the evidence and analysis of the law, the CNOOC Parties have not satisfied me that the financial records of the Beneficial Owners are producible records. Given the circumstances, I find that at this stage the CNOOC Parties are on a fishing expedition. The net that the CNOOC Parties are casting is much too large.

[36] I also note that in a previous case management decision, Justice Dilts rejected the argument that the financial, tax and accounting records of each of the Beneficial Owners should be disclosed: see *CNOOC Petroleum North America ULC v 801 Seventh Inc*, 2021 ABQB 81 at para 30. She found that the sought-after records were not relevant or material: at paras 31, 38. Further, she stressed that the applicant “has not produced case law or evidence to satisfy me that how an owner or beneficial owner of commercial property records or accounts for the income from that property or for the capital asset itself is relevant to a calculation of its loss for breach of lease”: at para 32. Based on my review of the current evidence before me and my analysis of the law, I find the reasoning Justice Dilts still applies here.

[37] I also note that in *Hogarth v Rocky Mountain Slate Inc*, 2011 ABQB 537, Justice Hughes considered case law to determine whether, in calculating damages, any tax benefit that accrued should be taken into account: at para 258. Ultimately, Justice Hughes concluded that it was not clear that it was appropriate to take tax savings into account in assessing the damages in the case before her, in part due to the many ways tax losses or deductions could be applied: at para 270. This decision was appealed in 2013 ABCA 57, but the appellate court made no mention of the tax considerations concerning the issue of damages.

[38] Counsel for the Landlord and Beneficial Owners argue that a reason that damages for breach of contract should not be reduced or increased due to tax consequences is to ensure that it is not more profitable for a party to pay damages to breach a contract than to perform it. They cited *The Queen v Jennings*, 1966 CanLII 11 (SCC) at 545 and *Antonacci v Great Atlantic & Pacific Company of Canada, Limited*, 2000 CanLII 5496 (ON CA) at para 21 for the proposition that tax considerations are irrelevant as between the parties. Counsel for the Landlord and Beneficial Owners asserted that this principle applied more broadly than the wrongful dismissal circumstances that were underlying the *Antonacci* case.

[39] Based on my consideration of the facts and analysis of the law, I find that although as noted in *Hogarth* and *Toronto-Dominion Bank v Leigh Instruments Ltd. (Trustee of)*, 1997 CanLII 12149 (ON CTGD) tax implications may be considered for the purposes of mitigation, I am not satisfied that the CNOOC Parties have demonstrated that the sought-after records are relevant and material in the present case. Paralleling the determination of Justice Hughes in *Hogarth*, it is not clear to me that it is appropriate to take tax savings into account in assessing the damages in this case. I make this determination because there are many limitations concerning the application of tax losses or deductions, and various temporal issues can impact

the present value of alleged tax benefits. Absent particulars on how the tax saving may be effected and the timing of when such fiscal benefits may be realized, the value of any alleged tax benefits is speculation. As I have stated above in other contexts, it is not appropriate to order the disclosure of a tax records based on speculation. Further, to so order the disclosure of the tax records at this stage would be condoning a fishing exercise.

[40] Concerning another issue, I do not find that the Landlord made misrepresentations claiming that they were forced to sell the building. The Landlord argued that it signed the Relief Agreement to obtain forbearance while it pursued the claim of unlawful termination of the Lease. While I am not making a finding on the point, common sense tells me that such a protective step was sensible in the circumstances of this case. I further note that there were also previous submissions by the CNOOC Parties that the building should be sold.

[41] As a penultimate comment, I find that the Admissions made by the Landlord and the Beneficial Owners were conceded to narrow the issues as between the parties. To be clear, I do not find such Admissions to be improper.

[42] As a final comment, I find the focus by the CNOOC Parties on the novelty of the arguments advanced by the Landlord does not displace the usual definitions of, or approach to, relevance and materiality. As a result, I find that I am not satisfied, on a balance of probabilities, that the financial records of the Beneficial Owners are relevant and material in the circumstances of this case.

D. Are Mr. Shoraka's communications with the Landlord's insurance broker producible records?

[43] The CNOOC Parties argue that additional communications between the Landlord and its insurance broker are relevant and material, and have not been produced. In particular, the CNOOC Parties argue that the Landlord was obligated to hold insurance under the Lease and that it has not demonstrated that it properly mitigated its damages.

[44] The CNOOC Parties advanced this argument on the premise that the Landlord either failed to hold the proper insurance policies or failed to enforce the relevant provisions of the insurance policies. Concerning their pursuit of the alleged additional communications, the CNOOC Parties argue that it is not credible that there would only be a single message between the Landlord and the insurance broker which is relevant and material.

[45] The Landlord and Beneficial Owners respond that there is no insurance policy that covered the specific scenario at issue here. Counsel for the Landlord verified the coverage under the insurance policy. In particular, Counsel took those steps to determine whether the insurance would extend to the circumstances underlying this case.

[46] Counsel for the Landlord found that the insurance cover did not extend to the circumstances of this case. Those efforts have satisfied me that the Landlord did its job in terms of assessing the scope of the insurance cover. I am further comforted by the fact that the Landlord reiterated that the relevant and material records have been properly produced.

[47] Based on my review of the evidence and analysis of the law, the CNOOC Parties have not satisfied me, on a balance of probabilities, that there are any communications between Mr. Shoraka and the Landlord's insurance broker that are relevant and material which were not disclosed. I make this determination grounded on the evidence tendered and because I do not find it likely that there was insurance coverage that would apply in the circumstances of a tenant

ceasing to pay rent under the Lease due to allegations of health concerns related to asbestos. This line of inquiry by the CNOOC Parties is akin to a fishing expedition based on unrealistic or speculative premises: *H2 Canmore* at para 53.

VI. Conclusion

[48] Turning to the issues as framed above, I determine as follows:

- A. Have the Landlord and Beneficial Owners employed effective modes of record collection and preservation? Yes, for the reasons outlined above.
- B. Are all the lender communications, including the Shoraka call logs, producible records? No, for the reasons outlined above.
- C. Are the financial records of the Beneficial Owners producible records? No, for the reasons outlined above.
- D. Are Mr. Shoraka's communications with the Landlord's insurance broker producible records? No, for the reasons outlined above.

VII. Costs

[49] The parties may speak to costs if they cannot otherwise agree.

Heard on the 15th day of July 2026.

Dated at the City of Calgary, Alberta this 13th day of August 2026.

D.B. Nixon
A.C.J.C.K.B.A.

Appearances:

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