Date: 20210510
Docket: CI 20-01-27758
(Winnipeg Centre)
Indexed as: Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited
Cited as: 2021 MBQB 101

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	**APPEARANCES:**
CHRISTIE BUILDING HOLDING COMPANY, LIMITED,	JANET I. JARDINE CHARLOTTE MEEK CORY A.M. TOKAR
applicant,	for the applicant
- and -	
SHELTER CANADIAN PROPERTIES LIMITED,	GRANT A. STEFANSON CURTIS G. PARKER
respondent.	for the respondent
	Judgment delivered May 10, 2021

JOYAL C.J.Q.B.

I. OVERVIEW

[1] Following an oral hearing on November 4, 2020, on April 7, 2021, this Court released to the parties its written decision respecting the question of what constitutes "the record" for the purpose of Christie Building Holding Company, Limited's ("Christie") upcoming application for leave to appeal the decision of an arbitrator. This Court's April 7, 2021 decision was amended by the Court in small and insignificant detail on April 8, 2021. The decision is reported at 2021 MBQB 77.

[2] The Court's decision followed a full consideration of the submissions raised by counsel prior to and at what was a sometimes bitterly contested hearing where the respective arguments were thorough if not quarrelsome, fractious and at times, unduly personal. This Court's decision stipulated that for the purpose of the leave applications and any eventual appeal, the record from the arbitration hearing would consist of the Awards and accompanying reasons for decision, the arbitration record (i.e., the pleadings) and the five (5) exhibits marked as such at the arbitration hearing.

[3] With this Court's decision released and pronounced (although not yet endorsed or taken out), Christie now seeks in its relief, an order that would vary this Court's decision so as to include the following items as part of the record of the arbitration hearing:

(i) the exhibits introduced electronically at the arbitration hearing;

(ii) the transcription of the audio recordings that were provided for the arbitrator by the parties as part of their respective written arguments or alternatively, a professionally prepared transcription of that portion of the audio recordings referred to at the arbitration hearing by the parties in their written arguments;

(iii) the written decisions and orders of both Arbitrator Riley and Arbitrator Marr relating to interlocutory motions brought by the parties; and

(iv) Christie's motion dated August 4, 2020 requesting the arbitrator to reconsider part of his decision of June 17, 2020.

[4] Shelter Canadian Properties Limited ("Shelter") opposes Christie's motion.

[5] Christie seeks its relief pursuant to *Queen's Bench Rule* 59.06(2)(a) and/or the common law.

[6] Rule 59.06(2)(a) reads as follows:

> **Setting aside or varying**
>
> 59.06(2) A party who seeks to,
>
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made . . .
>
> may make a motion in the proceeding for the relief claimed.

[7] Alternatively, Christie seeks pursuant to this Court's discretion under the common law (and what Christie describes as the Court's inherent jurisdiction to do substantive justice) an opportunity to reopen this matter. To be able to do so using the common law, Christie must satisfy the two-prong test set out in ***671122 Ontario Ltd. v. Sagaz Industries Canada Inc***., 2001 SCC 59. In that connection and in the context of what is supposed to be "new" or newly discovered evidence unavailable at the hearing, the Court on the common law test need address the justification for reopening the hearing by answering the following two questions:

(i) Would the evidence, if presented at trial (or at the hearing), probably have changed the result?

(ii) Could the evidence have been attained before trial (or the hearing) by the exercise of reasonable diligence?

[8] In addition to Christie seeking an opportunity to vary the decision pursuant to Rule 59.06(2)(a) and an opportunity to reopen the hearing pursuant to the common

law test in ***Sagaz***, Christie also seeks costs on a solicitor-client basis or in the alternative, elevated costs against Shelter's counsel personally.

[9] The grounds for Christie's motion and the relief Christie seeks, both pursuant to Rule 59.06(2)(a) and the common law, include the suggestion that this Court's April 7, 2021 decision in respect of what constitutes "the record" from the arbitration hearing is based on representations made by Shelter's counsel (as found in both his brief and oral submissions), which Christie says were discovered after the hearing to be false and/or misleading (and unsupported by the evidence). Christie identifies the impugned written and oral representations made by Shelter at paragraphs 6 and 7 (at page 5) of its initial brief on this motion:

> 6. In paragraphs 8-10 of Shelter's Brief, the following representations were made:
>
> a) The parties intentionally did not create a record of the proceedings;
>
> b) The parties agreed that a digital audio recording would be made of the Arbitration as it was thought that portions of the recordings could be "useful to counsel for preparing their closing arguments" [emphasis in original];
>
> c) The parties typed out portions of the recordings as part of their closing arguments "simply as a means of reminding the Arbitrator what the parties believed the witness had said on a particular subject".
>
> 7. During oral submissions, Shelter's counsel specifically advised the court that:
>
> a) The electronic documents referred to during the Arbitration were never intended to be exhibits;
>
> b) There was no record of the documents referred to electronically during the Arbitration, nor provided to the Arbitrator;
>
> c) The tape recordings of the Arbitration were never intended to benefit the Arbitrator, only counsel in preparing their arguments;

d) All of the above was intentional and by design and agreed upon by the parties and the Arbitrator.

[10] Christie characterizes the above representations as "misrepresentations". Christie suggests that this was not discoverable prior to the hearing, at the hearing or at any time prior to the release of my written decision. Christie further suggests that had these so-called misrepresentations been exposed, along with the connected clarifying evidence, both this Court's analysis and decision may have been different with respect to the question of the record.

[11] The purported supporting information and/or evidence for Christie's allegations respecting Shelter's so-called erroneous and misrepresentative assertions, were — says Christie — found and/or identified only after the hearing. It would seem that the purported discovered and newly relevant information or evidence consists of the June 2, 2019 email exchange between Charlotte Meek and Curtis Parker (members of the respective Christie and Shelter legal teams), the transcript prepared by counsel respecting the first day of the arbitration hearing and the May 10, 2019 email exchange between Shelter's counsel Grant Stefanson and Arbitrator Marr.

[12] Separate from whether Christie's claims about the inaccurate or misleading and misrepresentative assertions by Shelter are valid and substantiated, I note Christie's reasons explaining why it had not "found" or responded with the supposedly clarifying information or evidence prior to or at the November 4, 2020 hearing respecting the record. The essence of Christie's explanation in this regard is contained at paragraphs 9 to 13 of its first written brief submitted on the present motion. For the

purpose of completeness, I reproduce below (in their entirety), those identified paragraphs:

> 9. Upon receiving and reviewing the Decision, it became apparent that this Court had based its decision on both the written and oral submissions of Shelter that the electronically introduced documents were not exhibits in the proceeding, that no record of the documents referred to electronically was kept or provided to the Arbitrator, and that the intention of the parties and the Arbitrator regarding the use of the recordings of the Arbitration proceedings was strictly for the benefit of counsel to prepare argument and not for the benefit of the Arbitrator.
>
> 10. As can be seen from Christie's Brief filed October 30, 2020, prior to the hearing and the Decision, Christie's focus regarding its submissions as to what constituted the record for the purposes of leave to appeal was on whether or not the written arguments of the parties (including the documents, viva voce evidence, and legal authorities incorporated by reference therein), ought to be included in the record. It was not on convincing this court that all the electronic documents were exhibits, or that the parties intended the audio recordings to be used by the Arbitrator to make his decision.
>
> See Court document no. 14
>
> 11. Following receipt of the decision, it took two members of Christie's legal counsel approximately one and a half days to find the following:
>
> a) Tape recordings where Arbitrator Marr confirmed that the electronic documents presented during the course of the Arbitration would be exhibits to the Arbitration;
>
> b) The recordings of counsels' agreement that the electronic documents would be exhibits and that copies would be provided to the Arbitrator of all such documents referenced along with indexes indicating the day on which the documents were introduced;
>
> c) The email exchange between counsel evidencing the production of both copies of the documents and indexes that were vetted by counsel for accuracy;
>
> d) The email exchange between Shelter's counsel and Arbitrator Marr dated May 10, 2019 regarding the agreement to provide a digital audio recording of the Arbitration proceedings for the benefit of the parties and the Arbitrator for purposes of argument, which Shelter's counsel describes as "a reliable and yet less expensive

alternative to transcripts". [emphasis in original]. Arbitrator Marr's response was "This would be of assistance"

See Affidavit of Shanna-Rae Lee affirmed April 15, 2021 (the "Lee" Affidavit) para. 2 and Exhibit "A" enclosures to letter

12. On April 9, 2021 Christie's counsel wrote to Shelter's counsel providing them with copies of the emails and a transcript of the discussion during the Arbitration regarding the agreement that the electronic documents would be exhibits and a record of same provided to the Arbitrator, and requesting that they consent to a reconsideration motion being brought given that it appeared that they had forgotten about these communications at the time they argued the motion.

See Lee Affidavit, para. 3 and Exhibit "A"

13. On April 13, 2021 Shelter's counsel responded:

    a) It would not consent to a motion for reconsideration;

    b) "There was no mistake on our part with respect to our submissions to the Court or in the characterization of the manner in which the Arbitration was conducted";

    c) Threatening costs against Christie's counsel personally, on a full indemnity basis, should Christie choose to proceed with its reconsideration motion.

See Lee Affidavit, para. 4, Exhibit "B"

[13] In making the submissions respecting fraud and misrepresentation that Christie and its counsel make on this motion, they clearly suggest that Shelter's and/or its counsel's conduct falls within the meaning of fraud as put forward in ***JV Mechanical v. Steelcase***, 2010 ONSC 1443 (at paragraph 24). In this regard, it is Christie's position that insofar as Shelter and its counsel made a false representation either knowingly or without belief in its truth or else recklessly, and careless as to whether it was true or false, the definition of fraud for the purpose of Rule 59.06(2) has been satisfied. Christie further suggests that Shelter's counsel has ignored their duties as

officers of the Court and breached important rules of the *Code of Professional Conduct* adopted by the Benchers of The Law Society of Manitoba.

Shelter's Response to Christie's Motion

[14] Shelter for its part, characterizes Christie's motion as completely inappropriate, without merit and based upon unfounded accusations towards Shelter's counsel, which accusations themselves, are unprofessional, unethical and deserving of the punitive cost sanctions. Shelter strongly asserts that its submissions (oral and/or written) made at and for the November 4, 2020 hearing, remain accurate and are accordingly unchanged on this motion. Shelter maintains that the so-called newly relevant evidence discovered by Christie after the hearing (which it failed to adduce at the hearing on the record) was evidence or information that was within the knowledge and possession of Christie and available to it leading up to and on November 4, 2020. Shelter insists that the information or evidence in its earlier submissions in no way demonstrates fraud, misrepresentation or anything misleading. Indeed, Shelter contends that in the context of Christie's attempt to obtain the extraordinary remedy of reopening a hearing, the information and evidence that Christie now alludes to contains nothing new and it has no bearing now and would have had none earlier on the analysis that was carefully conducted by this Court on all of the issues that were squarely before it prior to this Court coming to its April 7, 2021 decision.

[15] In response to Christie's motion, Shelter brought a motion of its own in respect of which it sought short leave and for which short leave was in fact granted. That motion moved to expunge all or part of the affidavit of Shanna-Rae Lee affirmed

April 15, 2021. Shelter argued that as a threshold matter, this affidavit evidence on which Christie relies on in its motion to vary the decision, should be expunged as it is improper and offends the long-standing rule that counsel cannot act as a witness and advocate in the same proceeding. In that connection, it was Shelter's position that the totality of the information contained in the affidavit is based on the advice that the affiant received directly from Christie's counsel, Ms Jardine, and is directed at matters in respect of which there is complete disagreement between the parties.

[16] Despite my concerns about the nature and contents of that affidavit, given Christie's allegations, given the stakes that have been raised on this motion (for the parties, counsel and for the integrity of the administration of justice) and given Shelter's position that Christie's new and/or discovered evidence changes nothing in Shelter's position and should change nothing in this Court's analysis or decision, I did determine at the hearing of this motion that I would not expunge the affidavit as requested by Shelter and that Christie's motion would be dealt with on its merits with that affidavit as an available evidentiary reference point.

[17] Like Christie, Shelter also seeks solicitor-client costs and as well, an order for costs against Christie's counsel personally.

II. ISSUES

[18] Based on the submissions made by counsel and the applicable and governing law, the issues for my determination reduce to the following questions:

1) Should this Court exercise its discretion to reopen the hearing?
2) What cost consequences if any, should flow from this motion?

III. FACTUAL BACKGROUND

[19] To properly assess Christie's claim for relief and the connected allegations it makes, it is necessary to revisit some of the factual background and context respecting the November 4, 2020 hearing and what preceded and followed that hearing.

[20] By way of a letter to the Court on September 17, 2020, Shelter requested case management in respect of Christie's application for leave to appeal the Arbitration Award dated June 17, 2020. As part of their request for case management, counsel explained that it was anticipated that a separate application for leave to appeal the costs/interest Award dated September 1, 2020 (the Supplemental Award), would be filed and consolidated into the existing proceeding. I note as well that in support of its request for case management, Shelter raised, amongst other things, concern as to what constitutes "the record" of the arbitration hearing as there was no official record or transcript. Accordingly, counsel for Christie would have been aware of Shelter's perspective and concern as it relates to this issue of the record as early as September 17, 2020. Indeed, the need for the clarification or confirmation of "the record" is one of many important reasons that may justify the designation of case management in a case involving, for example, a judicial review or appeal. That need certainly played a part in the decision to designate case management in this case. I mention that fact as context and as well, because it ought to be remembered in the face of Christie's insistent claim that the adjudication this Court made respecting the record was in some way a "bench motion". Put simply, that is not accurate. The question of "the record" was an identified issue that was already alive for the parties

and it constituted one of the justifications for the designation of case management in the first place.

[21] Once case management had been granted, a case management meeting was held on October 22, 2020. It was at that time that this Court requested submissions on the issue of the record and a formal hearing was scheduled for November 4, 2020. Leading up to the hearing, the parties submitted written briefs on October 30, 2020. I note that Shelter's position respecting the record and what it ought to consist of (and why) has not changed leading up to this present motion. Reply briefs were then received on November 3, 2020. Having seen the position taken by Shelter, at no time did Christie request an adjournment of the November 4, 2020 hearing nor was there any mention or issue raised by counsel for Christie in terms of not having adequate time to prepare or provide materials to the Court to better respond, clarify or represent what happened at the arbitration hearing as it related to "the record".

[22] I heard submissions from counsel on November 4, 2020. Based on the arguments that took place, Christie seemed perfectly content to have the issue decided on the basis of the materials submitted to the Court and at no time did they request an opportunity to correct any perceived deficiencies in the evidence. Neither did Christie make any allegations at that stage about misrepresentations or fraud on the part of Shelter or its counsel. To repeat, Christie would have been in possession of Shelter's written submissions wherein Shelter's position was clearly stated. Shelter's position as outlined in its written brief was repeated and underscored in its oral

submissions to which Christie had a chance to reply. Shelter's position and submissions remain the same on this motion to vary the Court's April 7, 2021 decision.

[23] Following the provision of the written and oral submissions, in the intervening four (4) months prior to the release of my written decision, Christie raised no issues with respect to supposedly "new" or clarifying evidence in respect of which it did not have an opportunity to argue or emphasize in its written or oral submissions. Neither was there anything raised or mentioned respecting fraud or misrepresentations on the part of counsel for Shelter.

[24] On April 7, 2021, the Court released its decision in respect of the matter of the record. On April 8, 2021, counsel were provided with an amended but in substance, identical decision with only slight clarifications. In that decision, for the specific reasons given, I determined that the record would consist of the Awards and accompanying reasons for decision, the arbitration record (i.e., the pleadings) and the five (5) exhibits marked as such at the arbitration hearing. Shelter is correct to say that in all material respects, the decision aligned with the position taken by Shelter as to what the scope of the record should be for the purpose of leave and any eventual appeal.

[25] Subsequent to the release of my decision, by way of a letter dated April 9, 2021, counsel for Christie sought Shelter's consent to a motion to "reconsider" the decision after purporting to identify "oversights" made by Shelter in its submissions to the Court. Enclosed with the letter was what Shelter characterizes as a "homemade transcript" prepared by Christie's counsel. Also included in Christie's letter was email

correspondence dating back to 2019 to which Christie's counsel, Ms Jardine or Ms Meek, were parties. Christie contends that what Shelter characterizes as the homemade transcript is in fact evidence of an agreement by counsel and the arbitrator that all electronic documents used at the arbitration hearing would be "exhibits". Christie further contends that the email correspondence from 2019 demonstrates that indexes of the documents sent to the arbitrator "were vetted by counsel" and that the arbitration hearing was recorded for the benefit of the arbitrator.

[26] Counsel for Shelter responded by way of a letter dated April 13, 2021, confirming that Shelter does not consent to any motion for reconsideration of the decision and it denied any mistake on the part of counsel in the making of their submissions. In the letter of April 13, 2021, counsel for Shelter tried to underscore for Christie and its counsel that nothing in counsel's letter of April 9, 2021 was new or impacted upon the decision. Perhaps more importantly, the point was made that there was nothing new that would have addressed the concerns about the uncertainties and dangers that this Court clearly raised regarding Christie's proposed record and its potential effect on the integrity on the proceedings.

[27] There was no response by Christie to Shelter's letter of April 13, 2021. Instead, Christie proceeded with its motion along with the accompanying and highly personal attack on the professional ethics and personal honesty of Shelter's counsel. Counsel for Christie suggested to counsel for Shelter that it would not consent to any order in respect of the decision until this motion to vary the decision was heard and decided.

Accordingly, no order has yet been entered in respect of the decision that I rendered on April 7, 2021.

IV. ANALYSIS

A. SHOULD THIS COURT EXERCISE ITS DISCRETION TO REOPEN THIS HEARING?

Is Christie Entitled to the Relief it Seeks Pursuant to Rule 59.06(2)(a)?

[28] Like Shelter, I question the source of the relief that Christie seeks when it stipulates that it wishes an "order varying the decision". The confusion flows from the fact that at paragraph 8 of its notice of motion, Christie seeks to rely on *Queen's Bench Rule* 59.06, which provides a party a jurisdictional path to varying an order of the Court. I emphasize the word "order" as in this case, no order in respect of the decision that I rendered on April 7 and 8, 2021 has yet been endorsed by Christie. Accordingly, it is not clear how Christie can rely on Rule 59.06 to establish the Court's jurisdiction to vary the decision. It is for that reason that Shelter argues that this motion as formulated pursuant to Rule 59.06 is premature.

[29] In response to Shelter's position that Rule 59.06(2)(a) is not triggered, Christie argues that the relevant reference point for the consideration of whether there is an order is not the so-called endorsement of the order by Christie (or the taking out of the order), but rather it is the day the order was "pronounced" in the decision.

[30] Irrespective of the differing positions of Christie and Shelter respecting the available use and application of Rule 59.06(2)(a), that rule cannot and will not provide the relief Christie seeks in the circumstances of this case. For the reasons I provide

below, there is a complete absence of persuasive evidence that would establish either fraud or new relevant facts arising or discovered after an order was made.

[31] Later in this decision, I also address Christie's alternative reliance upon the common law to reopen this matter. As I will explain, Christie has similarly and also failed to meet the applicable test at common law for obtaining the relief it seeks.

Allegations of Fraud and Misrepresentation

[32] Given the relevance of the allegations of fraud and misrepresentation in this case, both to Rule 59.06(2)(a) and their apparent connection to what Christie said it discovered only after the hearing on November 4, 2020 and upon the release of my decision of April 7, 2021, I will address those allegations first and separately.

[33] While it may not be uncommon for counsel in a given case to be in passionate disagreement in relation to disputed matters, those disagreements and passions should not descend into personal attacks that impugn the integrity of an opposing counsel whose positions and interpretations about such matters as facts or events, may be different, but not misrepresentative.

[34] Words like fraud or misrepresentation — however broadly defined — have, in a profession dependent upon professional ethics, integrity and public confidence, a significance that all lawyers should understand.

[35] The allegations of fraud and misrepresentation as made by Christie's counsel, Ms Jardine, are stark, regrettable and unjustifiable. They are also, like so much else about this case, not proportionate.

[36] Even if as I will explain, those allegations are unsubstantiated, the information or evidence upon which those extreme allegations are based, did not suddenly fall from the sky. That information or evidence involves a reality in which counsel for Christie was personally involved (emails and appearances at the arbitration hearing and the hearing respecting the record) and in which Ms Jardine and the rest of Christie's legal team played a part. In other words, the so-called discovered evidence after the hearing, was already within the knowledge of, available to and in the possession of Christie's counsel. To the extent that they "discovered" what they thought was Shelter's error and/or inculpatory proof of fraud and misrepresentation, one would have thought that given the obvious seriousness and the foundational importance of such an allegation to the integrity of the administration of justice, the evidence, information and allegations would have been brought to the Court's attention as early as possible. As I earlier mentioned, counsel for Shelter, Mr. Stefanson, has not changed his position since his initial written brief filed prior to the November 4, 2020 hearing. His position on behalf of Shelter was strenuously argued at the November 4, 2020 hearing. Nonetheless, the matters of fraud and misrepresentation are only now being raised and they are being raised only after Christie received the unfavourable decision that I rendered respecting the record.

[37] To repeat, given the seriousness of the allegations and the potential implications for the administration of justice, the timing of these allegations are at best incongruous and at worst, strategic and opportunistic. Christie received Shelter's original written submissions and was present at the time Shelter made its oral submissions on

November 4, 2020. It is simply not reasonable to suggest that it was only after receiving this Court's decision that counsel for Christie would have realized the scope and emphasis of Shelter's position and the potential implications of that position in relation to this Court's potential determinations respecting what would constitute the record for the purpose of the applications for leave and any eventual appeal.

[38] Leaving aside the timing, the serious allegations of fraud and misrepresentations made by Christie and Ms Jardine are in any event not at all persuasive or convincing as they are unsupported in the evidence before me. Indeed, it should be discerned — based on the totality of the evidence and the arguments before me on November 4, 2020 — that any differing positions, understandings and interpretations of what actually occurred at the arbitration hearing and the connection or disconnection from previous email exchanges as between counsel and/or comments made by counsel or the arbitrator at the arbitration hearing itself, come nowhere close to establishing that counsel for Shelter conveyed anything that would constitute misrepresentation. Insofar as counsel for Shelter (in raising his concerns about Christie's approach to creating a record) put before me prior to and on November 4, 2020, a position and an interpretation of what actually happened at the arbitration hearing (i.e., the actual practice and approach employed by the parties before the arbitrator), I see such a submission as an attempt to show what may have been an implied or *de facto* agreement and/or acceptance by the parties as to how they decided or resigned to proceed with such things as the exchange and presentation of documents. Such a submission by counsel for Shelter is in no way exposed as

fraudulent or misrepresentative in light of anything Christie has presented by way of earlier emails or by way of an unofficial or homemade transcript of what was said to or by the arbitrator at the arbitration hearing.

[39] As Shelter emphasized in its submissions on the present motion, Christie has been "unyielding" in its position that this Court should have before it for the purpose of the applications for leave to appeal, all of the thousands of electronic documents that were referred to at the arbitration hearing. What Shelter has consistently maintained in response is that these thousands of documents (or whatever else may have been at one point contemplated) were not organized and made exhibits in the traditional fashion or in any fashion and there is as a result, no independent or objective record of which documents form part of "the record" before the arbitrator. Importantly, Shelter has always acknowledged (and I have taken them to acknowledge) that the notes of counsel and the arbitrator would presumably contain a record of some of those documents, perhaps most of them. What is critical and unchanged however, is that none of the so-called discovered or new evidence as presented by Christie for this motion, establishes the existence of anything resembling an unassailable list of documents relied upon at the arbitration hearing or by the arbitrator. This says Shelter — and I agreed in my decision on the issue of the record — has implications for identifying a record in a way that necessarily maintains the integrity of the arbitration hearing process and this Court's task on appeal.

[40] Put simply, whatever submissions were made about the record leading up to and at the hearing before me on November 4, 2020, I take Shelter and Mr. Stefanson's

position as suggesting that whatever may have been discussed, considered and perhaps even tentatively agreed to respecting how the documentary evidence might have been organized and compiled, there was in fact, a different approach adopted and implicitly accepted shortly after the arbitration hearing itself commenced. For that reason, I agreed with Mr. Stefanson, who submitted on behalf of Shelter, that the actual approach adopted by the parties to not marking the documentary evidence in a traditional and reliable way, created, in light of the manner in which all of the evidence was received (including the accompanying *viva voce* testimony/commentary) a serious problem for a court attempting to discern "the record".

[41] As a consequence, the actual approach adopted by the parties a few days into the 43-day arbitration hearing did not permit me (beyond noting the five (5) marked exhibits) to identify an evidentiary record that would, amongst other things, properly allow me to consider the potentially disputed *viva voce* testimony, which was not officially transcribed and which, in some cases, would have commented on specific parts of the voluminous but unmarked documentary evidence. In this regard, irrespective of what the parties may have discussed and what the arbitrator may have mused, Mr. Stefanson argued (and was justified in arguing) that the reality of what actually occurred at the arbitration hearing, left this Court — for the purpose of its appellate task — little by way of identifiable evidence that was compiled and arranged in a coherent and indexed manner so as to ensure a level of reliable completeness and accuracy necessary to discern a record beyond that which I identified in my April 7, 2021 decision and which would preserve the integrity of the arbitration hearing itself.

[42] There was clearly a dispute joined before me at the November 4, 2020 hearing on the specific subject of the exchange of documents and how those documents were or may have been presented at the arbitration hearing. Irrespective of what may have been discussed or considered by counsel in emails or at the arbitration hearing, the issue or question of what actually transpired at the arbitration hearing (in relation to the documents) was squarely addressed at the hearing before me about the record. The differing positions and practice adopted at the arbitration hearing was addressed by Shelter at paragraph 55 of its written brief in respect of the present motion wherein Shelter described part of the discussion at the November 4, 2020 hearing and the position it adopted about what occurred at the arbitration hearing:

> The practice of exchanging document lists and seeking input from opposing counsel was adopted only for the first few days of the hearing, and discontinued thereafter as it became far too time consuming to cross-reference hundreds of documents against personal notes while preparing for the following day of the hearing. Mr. Stefanson pointed this out in reply [on November 4, 2020] and confirmed how the document exchange was actually handled:
>
> > And when -- and when we talk about, you know, my friend suggesting that the document list is somehow ironclad. It's not. I canvassed this with Mr. Parker on a break, and he advises that for the first couple of days there was a concept and a process that was agreed upon, look, let's submit the lists and we'll make sure they're accurate, and back and forth the lists went for a few days. And there were -- there were mistakes and there were problems with them, so there were corrections made. But after -- after the challenges associated with getting that done and the timing of -- of -- of the hearing and the multiple days that were in with this hearing list it just didn't happen after that, and so the practice was discontinued. And from that point forward the parties just sent the documents off to counsel and to the arbitrator concurrently [emphasis in original].
>
> Transcript of the Hearing before C.J. Joyal on November 4, 2020

[43] Clearly, the issue of the electronic documents and the manner in which they were presented and compiled, was before me at the November 4, 2020 hearing. In making the related submissions to support his position, while he may have offered a different interpretation and a distinct point of view as to what was actually, implicitly and/or expressly endorsed as a *de facto* approach at the arbitration hearing, Mr. Stefanson did nothing in my view that was fraudulent and said nothing that was misrepresentative.

[44] Insofar as counsel for Christie, Ms Jardine, also invokes the May 10, 2019 email exchange between Mr. Stefanson and the arbitrator to suggest that the exchange "unequivocally confirms that the audio recordings were not meant to be used only by counsel for the purposes of preparing argument, but were also to be used for the benefit of the arbitrator in reaching his decision …", I am in agreement with Shelter when it maintains that the identified email falls short of establishing any such claim. In this regard, it is important to note as was contended by Shelter, the parties, at this very early stage of the arbitration hearing, were still only contemplating that the audio recording would be used for the purpose of argument and for the purpose of resolving potential disputes as to the evidence given by a witness. Shelter insists that it was never suggested or contemplated that the arbitrator ought to rely on the audio recordings "in reaching his decision" and the email of May 10, 2019 does not say otherwise. Moreover, again, as Shelter maintains, the arbitrator did not in fact use the audio recordings to reach his decision, or for any purpose, as he never received them. Shelter submits that whatever the arbitrator may have believed the recordings might

be useful for in connection with the arbitration hearing, that is not something that has any bearing on the Court's analysis in respect of what should constitute the record for the purpose of the leave applications before this Court. In this connection, Shelter is correct to argue the obvious point: even if the arbitrator did at one point in time remark that he thought it would be of assistance (to him or to the parties) to make an audio recording of the arbitration hearing, that remark has no significance in respect of my earlier determination with respect to the record and/or the issue before me on this motion respecting the reopening of the hearing. Neither does it in anyway, substantiate the serious allegations made by Christie and Christie's counsel that there is something fraudulent and misrepresentative about Shelter's earlier submissions.

[45] Christie's allegations respecting fraudulent and misrepresentative submissions by Shelter cannot be substantiated. They ought not to have been made.

[46] Christie has not persuaded me that it is entitled to the relief it seeks pursuant to Rule 59.06(2)(a).

In the Alternative, is Christie Entitled to the Relief it Seeks Pursuant to the Common Law?

[47] The jurisprudence governing the possible reopening of a hearing once a decision has been made is well established. Put simply, a court's discretion to reopen a hearing, once a decision has been made, is a discretion that is to be invoked sparingly. In ***Chase Industries Ltd. v. Vermette et al***., 2004 MBQB 152, for example at paragraphs 7 and 8, Scurfield J. noted as follows:

> [7] Although *Sykes, supra*, is a decision of the British Columbia Court of Appeal, in my view, it summarizes the common law principles referred to by the

> Manitoba Court of Appeal in *Ridout, supra*. Thus, while a trial judge's discretion is said to be unfettered, a trial judge should still be exercising the discretion to receive new evidence judicially. The integrity of the process cannot be preserved if the trial or motion process can be reopened easily by unsuccessful litigants. In *Beck v. Harris*, [2001] P.E.I.J. No. 64, it was said that a trial judge may set aside an executed order granting summary judgment where:
>
> (a) the new evidence would have had an important influence on the decision whether or not there was a triable issue;
>
> (b) the evidence is apparently credible; and
>
> (c) it could not have been obtained by reasonable diligence before summary judgment.
>
> [8] These principles provide general guidance to the court. However, the jurisdiction to admit new evidence and change a decision is clearly broader where an order or judgment has not yet been signed. Practically speaking, while the court should always be extremely reluctant to reopen a matter after evidence has been heard and a decision rendered, the concern is greatest when there has been a trial on the merits, or where it is clear that one party is merely changing tactics in response to an adverse decision.
>
> (See also ***6165347 Manitoba Inc. et al. v. The City of Winnipeg***, 2020 MBQB 60, at paragraphs 6 to 9 and ***Sagaz***, at paragraph 61.)

[48] As I noted at paragraph 7 of this judgment, in ***Sagaz***, the Supreme Court of Canada confirmed a two-prong test to be used by any court in determining whether a court's discretion to reopen a hearing should be exercised after a decision has been pronounced. In deciding the question, presumably in the context of what is supposed to be "new" foundationally supportive evidence, the court need answer the following two questions:

(i) Would the evidence, if presented at trial, probably have changed the result?

(ii) Could the evidence have been obtained before trial by the exercise of reasonable diligence?

[49] Both branches of this test must be satisfied in order to reopen a hearing. See ***Risorto v. State Farm Mutual Automobile Insurance***, [2009] O.J. No. 820 (Ont. Sup. Ct.) at paragraph 35.

[50] The jurisprudence is clear that the court's discretion to reopen a hearing once a decision has been rendered must be exercised sparingly and with the greatest of care. There is indeed a strong interest in finality to litigation. That objective should only be departed from in exceptional circumstances. A court should be extremely cautious and reluctant to reopen a hearing without a rigorous consideration of the legal criteria for doing so and without the necessary supportive evidence.

[51] In ***Alberta (Child, Youth and Family Enhancement, Director) v. B.M.,*** 2009 ABCA 258, the Alberta Court of Appeal addressed a somewhat similar situation to that currently being confronted by this Court in the present case. In ***B.M.***, the court was being asked to address the possible reopening of a hearing and varying of a decision made before a formal order had been signed. At paragraphs 11, 12 and 31, the court provides useful instruction and caution respecting how courts ought to address such applications and how due diligence must be seen as an essential element of the test to reopen any hearing (at paragraphs 11, 12 and 31):

> [11] Leaving aside those cases which do not discuss the point, or simply go off on want of jurisdiction because of formal entered order or judgment, the cases all seem to agree on one thing. That is that the Courts should be very sparing in their reopening of a pronounced decision, and should not do so simply for the asking. This is not an occasion for the losing party to advance new argument which he or she simply did not think of before. Or worse still, one which he or she held back. If parties are not forced to prove fully their whole case once and for all, then endless wrangling and never-ending rehearings will result: *Kay v. Wirstiuk* (1977) 1977 CanLII 673 (AB QB), 8 A.R. 405 (para. 18); *Simpson v. The Co-operators*, 1998 ABCA 302, 228 A.R. 96

(C.A.); *Sagaz Ind. Can. v. 671122 Ont.*, 2001 SCC 59, [2001] 2 S.C.R. 983, 274 N.R. 366 (para. 61).

[12] Much the same is true of the question of whether to admit further evidence on that motion to vary the earlier pronounced judgment or order. Indeed, most of the cases say that the rules as to when that should or should not be done are very similar to the well-known rules for receiving new evidence on appeal to the Court of Appeal. (Doubts on that in *Stevenson v. Dandy* (1918) 1918 CanLII 358 (AB CA), 43 D.L.R. 238 (Alta. C.A.) are overruled by *Sagaz Ind. Can. v. 671122 Ont.*, *supra*). Those rules for new evidence are variously stated, but usually boil down to the following:

1. Could the evidence have been obtained earlier if due diligence had been observed? [citations omitted] That the evidence was available to the applicant but not looked for because it was hard to access and because other matters pressed, is fatal: *Nat. Arts v. Bank of B.C.*, *supra* (para. 33).

2. Is the evidence credible? *Re Petruik Est.*, *supra* (para. 38).

3. Would the evidence have been practically conclusive in producing the opposite result to that earlier pronounced? [citations omitted] A debatable matter of opinion is not sufficient: *Kay v. Wirstiuk*, *supra* (para. 33). Nor is controvertible evidence which would open up an extremely complex and convoluted exercise: *Luscar v. Pembina (#2)* (1992) 1992 CanLII 6120 (AB QB), 128 A.R. 77 (para. 13). Some criminal cases use a test less strict, such as likely to produce a different result. The difference does not matter here. Neither version of this test is met.

4. Is the evidence in its present form admissible under the ordinary rules of evidence? *R. v. R.S.D.L.*, 2009 NSCA 74, [2009] N.S.J. #289, file CAC 277660 (June 24) (para. 17).

. . .

[31] In my view, due diligence is one of the criteria to be weighed when deciding whether to take the rare step of reopening a pronounced decision. Litigation will rarely have any finality if a party can keep disclosing another part of his or her case, confident in the knowledge that if that does not work, he can wait, hear the judge's decision, and then adduce some more evidence, and try again to plug whatever holes in the case that the judge has identified….

[emphasis added]

[52] Shelter's reliance on ***Fritschij v. Bazan***, 2006 MBQB 82 is also apt. In ***Fritschij***, the respondent brought a motion to reopen a hearing of the parties' competing notices of motion, which were argued and were the subject of a

determination by written reasons. No order had yet been entered and the respondent sought to admit fresh evidence. The evidence sought to be admitted was a physician's report upon which the application was based for the reopening of the hearing of the motion. In applying the two-prong test in ***Sagaz***, Yard J. addressed the matter of whether the evidence could have been obtained with reasonable diligence before the hearing just as he addressed the fact that no request was made for an adjournment to bring forward evidence on the relevant issues at the original hearing. He observed as follows (at paragraphs 21 and 27):

> [21] While the assessment observations, test results and assessor's impressions are new in the sense that all of the work was done following the argument and judgment in this case, none of the facts behind any of them are or were new to Mr. Bazan himself when this case was prepared and presented. He has experienced the medical symptoms and conditions described and their effect on his day-to-day activities, abilities and life continuously from at least 1993 when Dr. Stambrook first reviewed and assessed him through the present. Yet in the evidence which Mr. Bazan and his counsel chose to present at the hearing of this matter in April of 2005 (affidavits sworn by Mr. Bazan February 14, 2005 and March 8, 2005) there is not a syllable devoted to the question of his health or wellbeing.
>
> . . .
>
> [27] At the time, no request was made for an adjournment to bring forward evidence of these health issues. The evidentiary record remained utterly silent on the question of Mr. Bazan's health notwithstanding these representations by counsel. The case was accordingly decided by me based upon the evidentiary record which the parties had presented to the court. Whether this failure to tender evidence of Mr. Bazan's health represents an oversight, a strategic decision or something else, I am unable to say and in the end it does not matter.
>
> . . .
>
> The additional evidence was available to the respondents before the trial commenced. They chose not to develop and present it. (para. 15)
>
> [emphasis added]

[53] Given the test in ***Sagaz*** and the clarity with which the governing jurisprudence speaks to the issue of how rare the situation will be where a court is convinced that it

ought to exercise its discretion to reopen a hearing once a decision on the merits has been made, this Court in the present case, must be assured that the identified evidence and information adduced by Christie is not only compelling, persuasive and likely to change the result of the hearing, but also, that the invoked evidence could not have been discovered and used by Christie had it exercised the appropriate and reasonable diligence expected of a party in the context of a motion such as this one and in the context of the particular circumstances of this case. After a full consideration of Christie's arguments, I am not satisfied that it has met its onus on either prong of the test in ***Sagaz***.

[54] I agree with the submissions of Shelter when it contends that as a threshold matter, it is worth noting that Christie is not raising anything "new" on this motion that was not previously known or available to it. As important in my view, Christie, while perhaps changing its emphasis, is doing little more than using the newly invoked but unpersuasive evidence in respect of fraud and misrepresentations to repeat what was already in its essence squarely addressed in Shelter's submissions leading up to and at the hearing of November 4, 2020. Even if I was to have accepted more fully the significance of Christie's so-called newly relevant and invoked evidence (which I do not) and even if I had accepted Christie's interpretation of that evidence as it relates to its allegations of fraud and misrepresentation (which I do not), that evidence does nothing to adequately address or negate all of the concerns that I raised in my April 7, 2021 decision respecting the problems with Christie's proposed record. Whatever the newly invoked evidence suggests about what may have been discussed or mused

about, what actually happened at the arbitration hearing leaves the Court in an untenable position when facing the prospect of discerning and confirming a record in a way that does not compromise the integrity of the arbitration hearing and its adjudication.

[55] In its argument on this motion, Christie alleges that the newly relevant and discovered evidence consists of the following:

(i) the June 2, 2019 email exchange between Charlotte Meek and Curtis Parker;

(ii) a transcript prepared by legal counsel relating to day one of the arbitration hearing; and

(iii) the May 10, 2019 email exchange between Grant Stefanson and Arbitrator Marr.

[56] I repeat, not only is the above evidence incapable of establishing fraud or misrepresentation, neither does it have a bearing on the analysis that I undertook in coming to the determination that I did with respect to the record.

[57] As it relates to the second prong of the test in ***Sagaz*** and Christie's need to demonstrate that the now invoked evidence could not have been obtained or presented before the hearing, Christie once again falls far short.

[58] Again, I agree with Shelter when it contends that Christie's legal counsel had the emails in their possession for almost two (2) years and they themselves would have been in attendance on the first day of the arbitration hearing. The information that they suggest became newly relevant and then discovered, seems anything but

new or newly discovered. In this connection, Christie has not persuaded me with any reasonable explanation as to why this evidence was not brought forward before the hearing given what Christie knew was the position of Shelter (and the submissions it advanced) and given what Christie itself should have known was the relevant scope for any determination respecting "the record". Seen through the prism of what Christie could have or should have known, Christie's pointed and unfair allegations towards Shelter's counsel — which suggest amongst other things misrepresentations — are both unfounded and troubling.

[59] I do not accept Christie's premise that what it is now invoking represents newly relevant or discovered evidence respecting something that was not already in some way squarely before me. The explanation offered by Christie at paragraph 40 of its motion brief is that its counsel, Ms Jardine, made a strategic decision to focus on arguing that the written submissions to the arbitrator ought to form part of the record. It may be so that this was in fact part of the position or a point of emphasis that was strenuously advanced by Ms Jardine at the hearing. Be that as it may, it is far from clear how, as a consequence, Ms Jardine can now claim that she was deprived of the opportunity to fully consider whether the electronic documents at the arbitration hearing were exhibits. As Shelter argues and I agree, Ms Jardine's perhaps more narrow focus and her connected explanation is difficult to reconcile with the fact that Shelter, in its November 3, 2020 reply brief, addressed all of these matters in considerable detail. To that brief and the scope of that argument, one might reasonably expect a more full response or engagement by opposing counsel (assuming

disagreement, or worse — alleged misrepresentations). It is simply not reasonable to suggest at this stage that counsel for Christie was deprived of the opportunity to engage in the relevant issues with the necessary relevant facts that were or should have been part of the motion before me as it related to the question of the record.

[60] In the circumstances of this case, Christie has not advanced any persuasive evidence that would justify the court exercising its discretion to reopen this hearing. Neither has Christie advanced any clear or persuasive evidence that would suggest anything remotely resembling misrepresentation by Shelter's counsel. I agree with Shelter that on this motion, counsel for Christie is doing nothing more than repeating many of the same submissions that were made at the November 4, 2020 hearing, none of which were persuasive and all of which were quite clearly rejected by this Court.

B. WHAT COST CONSEQUENCES IF ANY, SHOULD FLOW FROM THIS MOTION?

[61] While clearly distinct and different, the awarding of solicitor-client costs and an order requiring that a lawyer pay costs personally, each represent cost consequences whose defining elements of rebuke and denunciation are intended to penalize.

[62] The costs that will be awarded in the present case are meant to have such an expressive function.

[63] Solicitor-client costs are awarded in those cases where a party has displayed reprehensible, scandalous or outrageous conduct. "Reprehensible" has been interpreted as having a wide meaning and conduct that is neither scandalous nor outrageous may nonetheless be reprehensible in that it is conduct deserving of rebuke

(see ***Judges of the Provincial Court of Manitoba v. The Queen***, 2012 MBQB 153, at paragraphs 7 and 8).

[64] The notion of "reprehensible conduct" was addressed in ***3812511 Manitoba Ltd., c.o.b. as Terry's Towing v. M.P.I.***, 2012 MBQB 252. As was noted (at paragraph 6):

> [6] "Reprehensible" conduct has been described as encompassing scandalous or outrageous conduct but also including milder forms of misconduct deserving of reproof or rebuke [citations omitted]. For example, situations such as those in which a party makes unsubstantiated and unfounded allegations of criminal conduct, breach of fiduciary duty, or fraud often attract an award of solicitor and client costs. Solicitor and client costs have also been awarded to penalize a party for its conduct prior to the litigation process. See *Somers v. Fournier* (2002), 2002 CanLII 45001 (ON CA), 60 O.R. (3d) 225 at para. 17 (C.A.), *B. (N.) v. Manitoba (Director of Child and Family Services)* (1999), 1999 CanLII 18643 (MB CA), 173 D.L.R. (4th) 343 (Man. C.A.), and more recently *Manitoba (Provincial Judges' Assn.) v. Manitoba*, 2012 MBQB 153, [2012] M.J. No. 203 at para. 12 (Q.B.) (QL).
>
> [emphasis added]

[65] Accordingly, a court may award solicitor-client costs where unfounded allegations of fraud are made.

[66] In ***Johnson v. BFI Canada Inc. et al.***, 2002 MBQB 326, the court noted with approval the judgment of Dambrot J. in ***Goulin v. Goulin*** (1995), 1995 CanLII 7236 (ON SC), 26 O.R. (3d) 472 (Gen. Div.) (at paragraph 36):

> [36] Dambrot J. held that a court may depart from the usual scale of costs and award costs on a solicitor-and-client scale where unfounded allegations of fraud or improper conduct seriously prejudicial to the character or reputation of a party are made in an action. A plaintiff who proceeds in this manner must be prepared for these cost consequences if the allegations turn out to be unfounded. The court awarded costs against the plaintiff on a solicitor-and-client scale until the date of abandonment of allegations, and on a party-and-party basis thereafter. …
>
> [emphasis added]

[67] In ***131843 Canada Inc. v. Double "R" (Toronto) Ltd.***, 1992 Carswell 437, [1992] O.J. No. 3879 (Ont. C.J. (Gen. Div.)), the court acknowledged that solicitor-client costs are generally only awarded in special and rare cases. The court noted however, that such rare cases may include those where allegations of fraud are made and determined to be totally unfounded. Those rare cases may also include "other allegations of improper conduct seriously prejudicial to the character or reputation of a party" which again, are ultimately determined to be unfounded (see paragraph 10).

[68] *Queen's Bench Rule* 57.07 speaks to the jurisdiction from which an order of costs can be awarded against a lawyer personally. The rule reads:

> **Order against lawyer**
>
> 57.07(1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, or other default, the court may make an order requiring the lawyer personally to pay the costs of any party.

[69] Rule 57.07(1) has been interpreted and given meaning in such cases as ***Eblie v. Yankoski***, 2007 MBQB 106. At paragraphs 11 to 14, Yard J. provided a useful summary of the law with respect to ordering costs against counsel personally:

> [11] Ordinarily costs are as between parties to a litigation and are compensatory in nature. <u>While costs may be ordered against counsel this is out of the ordinary and should not be done unless justified within the parameters of Rule 57.07(1) or in compelling circumstances which cry out for the exercise of the courts inherent jurisdiction to control or prevent the abuse of its own processes</u>. The jurisdiction should be exercised sparingly, with care and caution and only in clear cases. In *Young v. Young* 1993 C.J. No. 112; 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3 McLachlin J. (as she then was) in reasons concurred in by the majority of the Supreme Court of Canada expressed it this way at paragraph 254:
>
> > The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to compensatory order for costs

> if it is shown that repetitive and irrelevant material and excessive motions and applications, characterize the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court…. Courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order may conflict with these fundamental duties of his or her calling.
>
> [emphasis added]

[12] This statement of law was quoted with approval by the Manitoba Court of Appeal in *Hunter v. Hunter*, 2000 MBCA 138 at paragraph 6. There the court also approved of MacInnes J.'s reliance in *R. v. Smith* (1999), 133 Man.R. (2d) 189 (Q.B.) on the House of Lords' decision in *Meyers v. Elman* (1940), A.C. 282 (H.L.) at p. 319. There Lord Wright wrote:

> The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties <u>any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally</u>. … The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but <u>a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice</u>. … It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the court acts. <u>It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfill his duty to the court and to realize his duty to aid in promoting in his own sphere the cause of justice</u>. … The jurisdiction is not merely punitive but compensatory. …
>
> [emphasis in original]

[13] A review of reported cases in Manitoba yields the following circumstances in which costs had been found to be appropriately awarded against counsel personally:

1. Filing a fresh affidavit which repeats verbatim material previously expunged as scandalous, vexatious and irrelevant to the issues before the court: *Hunter v. Hunter*, *supra*;

2. Presenting evidence to the court knowing that it is capable of misleading or which could well leave an entirely false impression: *Hunter v. Hunter*, *supra*;

3. Failure to take reasonable steps to prepare oneself to proceed on a previously agreed hearing date and sending a proxy to plead for adjournment: *R. v. Smith*, *supra*;

4. Moving to set aside an order on grounds of fraud while presenting no evidence capable of supporting a finding of fraud: *M.E.M. v. E.O.S. and J.K.B.* (1996), 1996 CanLII 18300 (MB CA), 113 Man.R. (2d) 186 (MBCA);

5. Filing and prosecuting an appeal which obviously lacked merit in law and thereby causing a non-party to the proceeding (a trustee in bankruptcy) the trouble and expense of retaining counsel to appear on the appeal: *Cadotte v. Cadotte* (1994), 1994 CanLII 16734 (MB CA), 92 Man.R. (2d) 242 (MBCA); and

6. Filing and prosecuting a claim which was purposely misleading and proceeding with that claim in such a manner as to result in unnecessary costs: *Coates v. Coates* 1990 M.J. No. 451 (MBQB) (Master Lee).

[emphasis added]

[14] In addition, Justice Clearwater has expressed the view in *Bouteiller v. Bouteiller* 1997 CanLII 22928 (MB QB), 1997 M.J. No. 37 (MBQB) at para. 22 that:

> Counsel ought to be aware that pleadings that offend fundamental rules can result in counsel bearing costs personally, even if the client expressly instructs an embarrassing, frivolous or vexatious pleading.

[70] In the unique circumstances of this case, as it relates to its request for solicitor-client costs, Shelter expresses understandable outrage at what it describes as Christie's "unsubstantiated and extremely inappropriate allegations against Shelter's counsel, including of fraud, breach of ethical duties and other dishonest and outrageous

conduct, including 'lies, omissions and or partial truths'". In that connection, Shelter points to the following conduct on the part of Christie:

(i) allegations that Shelter and its counsel made false and misleading representations in their submissions and knowingly deceived the Court;

(ii) allegations that Shelter and its counsel made representations to this Court amounting to "fraud";

(iii) allegations that Shelter and its counsel abused the process of this Court; and

(iv) allegations that counsel for Shelter violated their duties under the *Code of Professional Conduct* as officers of the Court.

[71] I am in agreement with Shelter that Christie in this case went much farther than seeking an order reopening the hearing on the basis of new evidence. An important and critical part of its submission respecting this relief was rooted in its unsubstantiated allegations about Shelter's misleading and unprofessional conduct.

[72] On my review of the totality of the evidence and on a fair contextual reading and understanding of counsel's submissions (based on the issues squarely in play and which were argued before me), Christie's allegations are unfounded and as I noted earlier, ought not to have been made. Shelter is on solid ground when it expresses with appropriate indignation that if a litigant wishes to bring a motion and recklessly allege fraud and other dishonest conduct and impugn the reputation of a party's legal counsel, they must bear the risk of a significant cost award if there is a failure to prove such allegations.

[73] The impugned conduct by Christie in making these allegations can properly be characterized as "reprehensible". On a proper reading of my April 7, 2021 reasons for decisions, the problems with Christie's proposed record should have been clear. Nothing in the so-called newly relevant or discovered information or evidence provided by Christie, could have addressed those foundational concerns that I identify. Neither does that information or evidence in any way support Christie's connected, but inappropriate allegations of misrepresentation and fraud as made against Shelter's counsel. Christie's motion has resulted in a considerable waste of time and resources and the manner in which that motion has been formulated and argued, calls into question the integrity of Shelter's legal team and does nothing less than put their reputations at risk of serious damage. I am of the view that in the circumstances of this case, any cost award restricted to the Court of Queen's Bench Tariff will not adequately condemn and denounce the manner in which this motion was brought and the nature of the allegations that accompanied it.

[74] In addition to solicitor-client costs, Shelter is also requesting that the Court award costs against Christie's counsel personally.

[75] As it relates to the requested personal order of costs, when I examine Rule 57.07(1) and the connected jurisprudence, I am of the view that this case represents the sort of compelling circumstance where the conduct of counsel personally, requires this Court to exercise its inherent jurisdiction to control or prevent not only abuse of its own processes, but also, to ensure the appropriate and professional conduct of counsel. In the particular circumstances of this case, making

reckless and unfounded allegations of misrepresentation and fraud in the context of the arguments about issues that had already been squarely before this Court (and which were or should have been previously and fully addressed), is an abuse of this Court's process. It is also unprofessional and inappropriate.

[76] It will always be difficult for a court in any given case to be able to discern what precisely animates what are fortunately, the infrequent occasions when highly personal but unfounded attacks are made against the integrity of opposing counsel. Where it is a client that is the source of such attack, counsel in instructing that client has a duty and an obligation to dispassionately assess the evidence to ensure that such an allegation is not being made recklessly or desperately without convincing proof. Where such an attack emanates from counsel personally, that counsel need know that a failure to substantiate serious allegations such as fraud or misrepresentation, may very well result in that counsel bearing costs personally.

v. CONCLUSION

[77] For the foregoing reasons, I have determined that Christie is not entitled to the relief it seeks pursuant to Rule 59.06(2)(a) or pursuant to the common law. The motion that Christie has brought in that connection is dismissed.

[78] I have also determined that Shelter is deserving of an award of reasonable solicitor-client costs — $3,500 of which will be incurred personally by Christie's counsel.

_____ C.J.Q.B.