

Court of King's Bench of Alberta

Citation: Piikani Nation v Raymond James Ltd, 2025 ABKB 493

Date: 20250826

Docket: 0601 13081, 0801 05039, 1601 01693, 1701 01341

Registry: Calgary

Between:

Piikani Nation

Plaintiff

- and -

Raymond James Ltd., Liliana Kostic and Janet Potts

Defendants

- and -

CIBC Trust Corporation and CIBC World Markets Inc.

Third Party

And Between:

Docket: 0801 05039

Liliana Kostic

Plaintiff

- and -

Piikani Nation, its Chief in Council

Defendant

And Between:

Docket: 1601 01693

Liliana Kostic

Plaintiff

- and -

CIBC Trust Corporation

Defendant

And Between:

Docket: 1701 01341

Liliana Kostic

Plaintiff

- and -

CIBC Trust Corporation

Defendant

**Reasons for Case Management Decision
of the
Honourable Justice M.A. Marion**

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I. Introduction

[1] This action is part of a larger set of actions (**Case Managed Actions**)¹ now under my case management as case management justice (**CMJ**).

[2] Pursuant to an endorsement² I issued on March 10, 2025, persons seeking to file applications in the Case Managed Actions are required to follow a process (**Fiat Process**) by which they require my permission (by way of a request (**Fiat Request**) for a fiat (**Fiat**)) before they may bring an application in the Case Managed Actions. I explained the Fiat Process, the historical use of fiat processes in the Case Managed Actions, and the framework for considering Fiat Requests in *Piikani Nation v McMullen*, 2025 ABKB 481 [**2025 AKBB 481**] at paras 8-12.

[3] These Reasons address numerous Fiat Requests in or related to action 0601-13081 (**0601 Action**), action number 1601-01693 (**Kostic-CIBC Trust Action #1**), action number 1701-01341 (**Kostic-CIBC Trust Action #2**), and possibly action number 0801-05039 (**0801 Action**), namely:

- (a) Fiat Request of Liliana Kostic (**Kostic**) dated May 30, 2025, seeking permission to file an application striking portions of the March 1, 2018, amended statement of claim (**ASOC**) filed in the 0601 Action (**Proposed 0601 Action Striking Application**);

¹ As defined in Endorsement #4.

² Endorsement #4.

- (b) Kostic’s Fiat Request dated June 13, 2025, to permit the filing of a Notice to Co-Defendant against Raymond James Ltd (**RJL**) in the 0601 Action (**Proposed Notice to Co-Defendant Application**);
- (c) Kostic’s Fiat Request dated May 23, 2025, seeking permission to file an application for summary dismissal of all or part of the 0601 Action against her (**Proposed Summary Dismissal Application**);
- (d) Kostic’s Fiat Request seeking permission to file an application to further amend the originating application in the Kostic-CIBC Trust Action #1 and to have the further amended originating application set down for a hearing for “immediate save harmless relief” (**Proposed CIBC Trust Action #1 Amendment Application**);
- (e) Fiat Request of CIBC Trust Corporation (**CIBC Trust**) seeking permission to file an application to strike or dismiss Kostic-CIBC Trust Action #2 pursuant to rule 3.68 and/or rule 4.33 (**Proposed CIBC Trust Strike/Dismissal Application**);
- (f) Kostic’s Fiat Request dated July 4, 2025, seeking permission to file an application to amend the statement claim in Kostic-CIBC Trust Action #2 (**Proposed CIBC Trust Action #2 Amendment Application**);
- (g) Piikani Nation’s Fiat Request dated May 30, 2025, seeking permission to file an application to validate service of the statement of claim in the 0601 Action against Janet Potts (**Potts**) (**Proposed Service Validation Application**);
- (h) Potts’ Fiat Request dated May 23, 2025, seeking permission, among other things, to file an application seeking to set aside her noting in default and striking the ASOC against her in the 0601 Action; (**Proposed Potts Application**);
- (i) CIBC Trust’s Fiat Request dated June 26, 2025, to compel Kostic to attend for further questioning in the 0601 Action (**Proposed CIBC Trust Discovery Application**);
- (j) Piikani Nation’s Fiat Request dated July 18, 2025, to compel Kostic to respond to undertakings and to conduct further Kostic questioning in the 0601 Action (**Proposed Piikani Discovery Application**);
- (k) Kostic’s Fiat Request dated July 25, 2025, seeking further and better particulars and to compel better answers in the 0601 Action (**Proposed Kostic Particulars/Discovery Application**); and
- (l) Kostic’s Fiat Request dated August 15, 2025 seeking further records production from CIBC Trust and Piikani Nation in the 0601 Action and possibly in the 0801 Action (**Proposed Kostic Records Application**).

[4] My reasons with respect to these various matters are detailed below.

II. Background

[5] These Reasons primarily engage a subset of the Case Managed Actions, namely the 0601 Action, Kostic-CIBC Trust Action #1, Kostic-CIBC Trust Action #2 and possibly the 0801 Action. These actions have been the subject of numerous reported decisions. A quick search on CanLII for “Piikani” and/or “Kostic” or “Raymond James” generates numerous hits, many of which are discussed below and which themselves provide background summaries. The parties to these actions are acutely aware of the background and I will not lengthen these already lengthy reasons by further repeating it here.

III. Issues

[6] The issues addressed in these Reasons are:

- (a) Should Kostic be granted permission to file the Proposed 0601 Action Striking Application?
- (b) Should Kostic be granted permission to file the Proposed Notice to Co-Defendant Application?
- (c) Should Kostic be granted permission to file the Proposed Summary Dismissal Application?
- (d) Should Kostic be granted permission to file the Proposed CIBC Trust Action #1 Amendment Application?
- (e) What, if any, Fiat Requests should be granted with respect to Kostic-CIBC Trust Action #2?
- (f) What, if any, Fiat Requests should be granted with respect to the Proposed Service Validation Application and the Proposed Potts Application?
- (g) What, if any, Fiat Requests should be granted with respect to particulars and discovery in the 0601 Action?
- (h) What is an appropriate order or direction?

IV. Analysis

A. Should Kostic be Granted Permission to File the Proposed 0601 Action Striking Application?

1. Background

[7] On April 30, 2025, and May 1, 2025, I held two case management conferences (CMCs) collectively for the 0601 Action, Kostic-CIBC Trust Action #1, Kostic-CIBC Trust Action #2 and the 0801 Action. On May 9, 2025, I issued Endorsement #7 which provided directions in respect of those actions.

[8] During those CMCs, Kostic raised that Piikani Nation had made secret, unilateral changes to the statement of claim in the 0601 Action. Mr. Hawkes, for Piikani Nation, explained that there was a typo in the ASOC. In Endorsement #7 I stated:

[43] Arising out of our discussion related to the amended statement of defence in the 0801 Action, there was some reference in our discussions to an alleged typo in the 2018 Amended Statement of Claim, or some other issue related to an alleged surreptitious or unapproved change to Piikani Nation’s pleading.

[44] These types of matters need to be resolved, one way or the other, so they do not create ongoing confusion or distraction in this matter. I direct Piikani Nation to advise me what is the “typo” to which counsel referred at the CMC.

[45] I direct that if Piikani Nation wishes to amend its amended statement of claim to correct an asserted typo, it shall provide a Fiat Request by **May 30, 2025**, failing which it shall be deemed to represent to the Court it does not intend to do so.

[46] Similarly, if Ms. Kostic wishes to bring an application to strike a portion of the 2018 Amended Statement of Claim as being unapproved or surreptitiously obtained, she shall provide a Fiat Request to do so by **May 30, 2025**, failing which she shall be deemed to have represented to the Court she does not intend to do so.

[9] On May 30, 2025, Piikani Nation’s counsel wrote to me, explained that the typo was the use of the word “direction” instead of “discretion” in paragraph 62 of the ASOC, that Piikani Nation became aware of this for the first time in January 2019 when it was raised by Kostic’s counsel (Mr. Klym), that Mr. Hawkes believed the typo (and some other minor typographical changes (collectively the **Typos**)) related to the conversion of a PDF version of the statement of claim to another format, that Piikani Nation offered to correct the Typos, that counsel raised the issue with CMJ Nation in January 2019, and that Piikani Nation was of the view that a Fiat Request to amend the ASOC to correct the Typos was unnecessary and an inefficient use of resources. Piikani Nation did not provide a Fiat Request to correct the Typos.

[10] On May 30, 2025, Kostic provided her Fiat Request for the Proposed 0601 Action Striking Application.

2. Positions

[11] The Proposed 0601 Action Striking Application seeks to strike numerous paragraphs of the ASOC, broken down into several categories: (1) paragraphs required to be deleted to comply with an April 7, 2014, order of ACJ Rooke (**April 2014 Order**); (2) paragraphs that were deleted without authorization and which must be restored; (3) paragraphs that were modified without authorization which must be restored; and (4) new paragraphs added that were unauthorized. The Typos referenced by Mr. Hawkes are in category (3). Kostic’s position is that the changes requested in these four categories are required to conform with the April 2014 Order.

[12] Piikani Nation argues that the ASOC was filed in compliance with a February 9, 2018 order of CMJ Nation (**2018 Order**), which approved the ASOC in the exact form it was filed. It argues that the

Proposed 0601 Action Striking Application is an abusive attempt to relitigate and undermine the 2018 Order.

3. Decision and Discussion

[13] When reviewed in context, perhaps with the exception of the Typos, it is clear that the Proposed 0601 Action Striking Application is an abusive attempt to relitigate the 2018 Order and would cause delay and unnecessary expense.

[14] Some context is necessary.

[15] The statement of claim was filed in November 2006 by Piikani Nation's previous counsel, with Piikani Nation and Piikani Investment Corporation (**PIC**) as plaintiffs and naming several defendants: R JL, Kostic, Peter Strikes with a Gun, Rod North Peigan, Brian Jackson, Daniel Northman, Potts, Dexter Junior Smith (**DJS**), Neil Sharp Adze (deceased), Ron S. Maurice and Dale S. Szakacs (of the law firm Maurice Law).

[16] On March 3, 2011, Piikani Nation discontinued its claim against Ron S. Maurice and Dale Szakacs (of the law firm Maurice Law). On April 12, 2011, Piikani Nation discontinued its claim against Brian Jackson, Daniel Northman, Rod North Peigan, and Peter Strikes with a Gun.

[17] On August 16, 2013, Piikani Nation discontinued its claim against Neil Sharp Adze (deceased). Piikani Nation also proposed an amendment to the statement of claim, which would have confirmed the removal of all defendants other than R JL, Kostic, Potts, and DJS, among other amendments. Kostic interpreted this amendment as seeking to withdraw fraud allegations against her on a without costs basis.³

[18] On September 13, 2013, PIC was removed as a plaintiff and PIC's claim was dismissed with prejudice.

[19] On January 22, 2014, Kostic applied to have the allegations of fraud and conspiracy against her in the 0601 Action struck or summarily dismissed. Her application was heard (along with other applications) on April 7, 2014. ACJ Rooke granted the April 2014 Order which was not finalized and entered until July 2016.

[20] The April 2014 Order, as entered, provided:

1. The Application to strike the SWIFT transfer allegations as a separate cause of action is granted.
2. The facts related to the allegations with respect to the SWIFT transfer facts may be maintained in the Statement of Claim if they go to other allegations in the Claim, but not to sustain an independent cause of action.
3. The Statement of Claim shall be amended to reflect the foregoing as counsel can agree or, failing agreement, as will be further determined by the Court.

³ Kostic January 17, 2014 Affidavit (filed January 22 and 23, 2014), paras 10-13.

[21] On June 18, 2015, Piikani Nation provided its proposed form of amended statement of claim and, by April 8, 2016, Kostic had not consented to Piikani Nation's proposed amended statement of claim.⁴

[22] On June 9, 2016, Piikani Nation filed an application to settle the terms of the April 2014 Order and to obtain leave to file a proposed amended statement of claim. On June 16, 2016, Kostic filed a cross-application seeking, among other things, to finalize the terms of the April 2014 Order and to disallow Piikani Nation's proposed amendments.

[23] On June 22, 2016, ACJ Rooke granted an order that provided, among other things, that no applications could be brought in the 0601 Action without a fiat. With respect to the April 2014 Order, he ordered it would be finalized without prejudice to Kostic applying for reconsideration or amendment of the April 2014 Order to correct slips or because of new evidence.

[24] On July 20, 2016, the April 2014 Order was executed by the Court and entered. To my knowledge, the April 2014 Order was not appealed.

[25] On December 21, 2016, Kostic sought leave to file several applications, including to amend the April 2014 Order to award her enhanced costs. On February 7, 2017, ACJ Rooke granted her leave to file that application against Piikani Nation only: *Piikani Nation v Raymond James Ltd*, 2017 ABQB 81 [2017 ABQB 81]. It is not presently clear to me whether Kostic ever filed this application.

[26] On January 20, 2017, Piikani Nation sought leave to bring an application to amend the statement of claim. On February 17, 2017, ACJ Rooke granted leave in *Piikani Nation v Raymond James Ltd*, 2017 ABQB 113 [2017 ABQB 113], which provides further context at paras 5-13:

[5] This Memorandum of Decision is in respect of the Piikani Nation's Leave Application to amend its Statement of Claim (S of C) (Amendment Application) dated January 20, 2017 (referencing and subsuming a previous similar application dated June 9, 2016, for which a previous leave was given by me on April 12, 2016), relying only on the pleadings, and the response of Zinner, on behalf of Kostic, on January 25, 2017, opposing Leave to make the Amendment Application.

[6] Leave Application – The Leave Application seeks leave as set out in the previous paragraph. Solomon⁵ asserted that the purpose of the amendments was to “remove allegations of fraud”, which Solomon asserted it first sought to do on August 16, 2013, but could not then, or since, get Kostic's consent – thus making the Amendment Application necessary. Solomon noted my Order of August [sic] 7, 2014, filed finally on July 20, 2016, which directed the S of C to be amended by agreement or application to the Court. Solomon asserted that this was all in accord with the AALP, para. 7. Finally, Solomon argued that the Amendment Application was necessary as “[t]he [p]arties cannot agree on the form of the amendments”, the result further necessary “to allow for the parties to understand the scope of questioning and to efficiently deal with the numerous other proposed applications”. Finally, Solomon asserted that the proposed amendments

⁴ Doan Crowe Shoe Affidavit sworn April 8, 2016 (filed June 9, 2016), para 2 and Exhibits D and G.

⁵ Piikani Nation's counsel at the time.

are neither prejudicial to the opposing parties, nor hopeless, but would rather “narrow and clarify the issues”.

[7] Solomon relied on, *inter alia*, Rules 1.2 and 3.68(2) respectively as to when a Fiat should be refused - if “it does not go to resolving a real issue in dispute or facilitate the quickest means of resolving the claim at least expense”, and “if the application discloses no reasonable likelihood of success or is otherwise frivolous, irrelevant, improper or an abuse of process”, “otherwise leave should be granted”.

[8] Response – Zinner, on behalf of Kostic, responded, essentially only arguing that the Amendment Argument was hopeless, and referencing Kostic’s cross-application for Summary Dismissal and related relief that she brings under another Leave Application. Specifically, he asserted that “[a]t law there is to be no amendment where the amendment would be hopeless, for example, if it could be struck out had it been part of the pleadings from the outset”. I will deal with the Summary Dismissal Leave Application in a separate decision. If I grant the Summary Dismissal Leave Application, I may consider whether the applications – the Amendment Application and the Summary Dismissal Application - should be heard at the same time.

[9] Zinner also objected to amendments to the Statement of Claim to remove [PIC], but I do not need to consider such arguments, because PIC has already been removed as a party, as discussed in [2017 ABQB 81] (Leave Application #1) dated February 7, 2017.

[10] Decision – Leave is granted.

[11] Brief Reasons – First, leave has been previously granted and, indeed, directed by the Court, and this is not substantively different, except for any “renewal” required under the AALP. In essence, the granting of Leave is *res judicata*.

[12] Second, it is *res judicata* as to the removal of PIC.

[13] Third, absolutely no reasons have been advanced as to why the proposed amendments are hopeless, other than Kostic’s cross-application for leave to bring a Leave Application for Summary Dismissal. As I said above, I will determine that Leave Application in a separate decision and, if Leave is granted, I may allow the two applications to be heard at one time.

[27] Piikani Nation’s application to amend the statement of claim was heard by CMJ Nation on February 9, 2018. She granted the 2018 Order approving the filing of the ASOC. While Kostic filed an appeal, she did not seek to set aside the approval of the ASOC⁶ but complained that CMJ Nation did not also permit her to file a Counterclaim. Her appeal was dismissed: *Piikani Nation v Kostic*, 2018 ABCA 358. The 2018 Order is a final order.

[28] I have reviewed the March 1, 2018 filed ASOC and confirm it is in precisely the form approved by CMJ Nation in the 2018 Order. Disappointingly, Kostic did not even refer to the 2018 Order in her Fiat Request. Unfortunately, her Fiat Request is premised on a patently false premise – that the impugned

⁶ Civil Notice of Appeal filed March 12, 2018 (Court of Appeal File Number 1801-0081AC).

paragraphs of the ASOC which she now objects to were not authorized by the Court. They were, in fact, authorized by CMJ Nation by the final 2018 Order.

[29] Further, the Briefs filed by the parties in 2018 confirm that the question of whether the proposed ASOC was compliant with the April 2014 Order was squarely before the Court.⁷ It was also obvious, based on a review of the filed statement of claim and the proposed ASOC, that there were deleted paragraphs, modified paragraphs and new paragraphs (matters of which she now complains) and the issue before the Court was whether to approve the ASOC as presented.

[30] Before CMJ Nation, Kostic represented that she “has no objection to the amendments as proposed” except for five specific paragraphs.⁸ In the Proposed 0601 Action Striking Application, Kostic has expanded her objections to include some paragraphs she represented to the Court in 2018 that she had no objection to.

[31] Following the 2018 Order, Piikani Nation filed the ASOC. Then, Kostic filed an amended amended amended statement of defence⁹, and amended third party claims¹⁰, both *specifically relying on or referencing* the ASOC. RJL did the same.¹¹ Piikani Nation filed replies to the amended defences.¹² CIBC Trust filed an amended third party statement of defence.¹³ The currently closed pleadings in the 0601 Action all flowed from and relied on the approved and filed ASOC.

[32] Later, in 2019, Kostic sought relief from CMJ Nation to provide particulars relating to the allegations made in the ASOC (and raised some of the same arguments she made before CMJ Nation in 2018). She continues to do so before me. In 2019, and following a December 2019 order of CMJ Nation, the parties engaged in significant discovery processes, presumably based on the ASOC and other amended pleadings noted above.

[33] I find that the Proposed 0601 Action Striking Application is barred by issue estoppel (a branch of *res judicata*). Issue estoppel was recently summarized by the Court of Appeal in *Williams v ATB Financial*, 2025 ABCA 207 at para 14:

[14] The preconditions to the operation of issue estoppel are that: (1) the same question has been decided; (2) the judicial decision which is said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. If the preconditions are established, the court determines whether, as a matter of discretion, issue estoppel ought to be applied. In the context of court proceedings, such discretion is limited: *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at paras 25, 33, 62

⁷ Kostic’s Brief, filed on February 2, 2018 by the same counsel as assisted her with this Fiat Request, had an entire section entitled “Even if the Order Survives Rule 3.65, Proposed Amendments are Not Within the Parameters of the April 7, 2014 Order”.

⁸ Kostic’s February 2, 2018 Brief at para 22.

⁹ Amended Amended Amended Statement of Defence of the Defendant Liliana Kostic, filed March 22, 2018.

¹⁰ Amended Third Party Notices of the Defendant Liliana Kostic (separately against CIBC Trust and CWM), both filed April 12, 2018. In fact, Kostic specifically responded to some of the paragraphs she now seeks to strike via the Proposed 0601 Action Striking Application.

¹¹ Amended Third Party Notice of the Defendant Raymond James Ltd filed April 6, 2018.

¹² Reply to the Amended Amended Amended Statement of Defence of the Defendant Liliana Kostic filed April 4, 2018; Reply to the Amended Amended Amended Statement of Defence of the Defendant Raymond James Ltd filed April 4, 2018.

¹³ Amended Third Party Statement of Defence filed April 26, 2018.

[*Danyluk*]; *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 23; *Ernst & Young Inc v Central Guaranty Trust Company*, 2006 ABCA 337 at paras 30-41 [*Ernst & Young*].

[34] These elements are present here with respect to the approval of the ASOC in the 2018 Order. I find that there would be no reason not to apply this doctrine if the proposed application were to proceed.

[35] Further, even if issue estoppel did not apply, the Proposed 0601 Action Striking Application would be an abuse of process. Abuse of process engages the “inherent power of the court to prevent the misuse of its procedure” and where allowing the litigation to proceed would nonetheless violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 37; *Condominium Corporation No 0828219 v Carrington Holdings Ltd*, 2023 ABCA 222 at para 10. One circumstance in which it applies is where the litigation before the court is “in essence an attempt to relitigate a claim which the court has already determined”: *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 37. The abuse of process would be amplified here, and the administration of justice brought into disrepute, if Kostic were allowed to resile from her earlier non-objection to numerous paragraphs in the ASOC.

[36] Further, arguments “that could have been made, but were not, are captured by the rationales underlying abuse of process, *res judicata*, merger, and the jurisprudence prohibiting relitigation and litigation by instalment”: *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2022 ABCA 111 at para 86; *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2021 ABCA 153 at paras 56-58 (and cases cited therein). Kostic was recently told by CMJ Graesser that parties “are expected to put their best foot forward on any application they make and are rarely given ‘do-overs’”: *Piikani Nation v Kostic*, 2024 ABKB 137 [*2024 ABQB 137*] at para 108. These principles apply to the paragraphs in the ASOC that Kostic did not object to before CMJ Nation but now seeks to object to with a new position and new arguments.

[37] The Proposed 0601 Action Striking Application would also be a collateral attack of the 2018 Order. “Court decisions are to be obeyed and respected, and are to be attacked only by a proper appeal, not a collateral attack at the same level”: *Piikani Nation v Kostic*, 2015 ABCA 60 at para 1; *Piikani Nation v McMullen*, 2020 ABCA 366 at para 41; *Kabir v Complaints Director (College of Registered Nurses of Alberta)*, 2025 ABCA 254 at para 21. A collateral attack can be struck as an abuse of process: *Parenteau v Skoreyko*, 2024 ABCA 213 at para 5, citing *Trimove Inc v Servus Credit Union Ltd*, 2017 ABCA 320.

[38] As it is barred by doctrines of issue estoppel, abuse of process, and collateral attack, the Proposed 0601 Action Striking Application would be hopeless. Further, it would likely cause additional delay and costs inconsistent with rule 1.2. I find that seeking this Fiat in these circumstances, and without drawing my attention to the 2018 Order, was improper.

[39] Kostic’s Fiat Request to file the Proposed 0601 Action Striking Application is denied.

[40] With respect to the Typos, I am satisfied that an administrative error was likely made by Piikani Nation’s current counsel’s office when it converted the ASOC prepared by former counsel into a format current counsel could use to propose amendments, and unintentionally used the word “direction” instead of “discretion” in paragraph 62 of the ASOC, together with some further non-material Typos. This likely caused Piikani Nation not to comply with rule 3.63, which requires all amendments to be identified. It

appears nobody noticed the error until after the 2018 Order. Piikani Nation offered to correct the error, but Kostic did not take it up on that. Then, after she raised it before me, and although I directed Kostic to provide a Fiat Request to correct any Typos, Kostic instead chose to attempt to relitigate the 2018 Order.

[41] In the circumstances, I agree with Piikani Nation that no further material time should be spent on this issue. If all parties agree to a consent order to fix the Typos, they may present that to me and shall do so forthwith. Otherwise, I find that no further amendment is necessary. It was raised with CMJ Nation and no further steps were taken. It is a pleading, not evidence. Further, the history of the Typos is now documented and well-known. These Reasons may be put before the trial judge or any other Court in the event anything material turns on the specific use of “direction” versus “discretion”. A further application to challenge the ASOC, as authorized by the 2018 Order, is inconsistent with rule 1.2 and will not be permitted.

B. Should Kostic be Granted Permission to file the Proposed Notice to Co-Defendant Application?

1. Background

[42] Following my appointment as CMJ, on December 20, 2024, I wrote to parties in the Case Managed Actions to provide me information to allow me to get up to speed, including (among other things), a short summary of the nature of the action, current procedural status, outstanding applications, next steps, and “any and all currently anticipated applications they intend to seek permission to bring (or which they understand another party intends to bring)”.¹⁴

[43] On March 5, 2025, Kostic provided me information that referenced, as an outstanding application, leave to “re-file Amended (2019) Notice to Co-Defendant RJL”.¹⁵ In Endorsement #4, I added this issue to the agenda for the CMCs. At the CMCs, Kostic asserted her intention to proceed with this relief. I directed RJL to advise whether RJL would consent to a notice to co-defendant being filed against RJL. Ultimately, it refused to consent and Kostic provided her Fiat Request.

2. Positions

[44] The proposed notice to co-defendant Kostic seeks to file is in Form 15 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*), which provides the form of notice to co-defendant under rule 3.43. Kostic asserts several grounds in support of the Fiat Request: (1) Piikani Nation provided its damages particulars in July 2024 at the direction of CMJ Graesser (**Damages Particulars**)¹⁶, which confirm that its claim is for fees and commissions paid by CIBC Trust, which Kostic asserts were paid to RJL not her; (2) RJL provided undertaking responses (**RJL Undertaking Responses**) that were inconsistent with RJL-produced records and RJL’s pleadings, including that RJL is unable to provide any trading authorizations from CIBC Trust for certain accounts; and (3) Kostic sought leave to file the notice to co-defendant against RJL in 2019 but that process was adjourned and never brought back on despite attempts by her to do so.

¹⁴ Endorsement #1, Appendix A.

¹⁵ Endorsement #4, Schedule U.

¹⁶ By referencing and defining the Damages Particulars in this way, and noting that there is a dispute about it, I am not at this time making any findings as to whether the Damages Particulars complied with my or CMJ Graesser’s directions.

[45] Kostic also noted that further information may become available following questioning of RJL's corporate representative on RJL's undertakings. She requested that she be permitted to provide an amended Fiat Request and to defer the Fiat Request decision until that process is complete.

[46] RJL opposes the Fiat Request on several grounds: (1) it is non-compliant with the Fiat Process (including because it does not include a proposed form of application); (2) it is barred by the *Limitations Act*, RSA 2000, c L-12; (3) the Damages Particulars and the RJL Undertaking Responses do not give rise to a new cause of action or reset the limitation period; (4) it is barred by *res judicata*; and (5) Kostic's Fiat Request is not the appropriate forum to address the issue of indemnity given Kostic's appeal of CMJ Graesser's decision in **2024 ABKB 137**.

3. Decision and Discussion

[47] Context is again necessary.

[48] As noted, the 0601 Action was commenced in late 2006. On January 15, 2007, a joint statement of defence was filed on behalf of RJL and Kostic by Miller Thomson. By July 2007, the joint statement of defence had been amended twice.

[49] In August 2013, Miller Thomson withdrew as Kostic's lawyer of record. In September 2013, Mr. Klym (then of Docken Klym) became Kostic's lawyer of record.

[50] On September 22, 2015, Kostic commenced an action (**Kostic-Thom Action**), which is one of the Case Managed Actions, against Miller Thomson (and one of its partners, Jeffrey N. Thom (**Thom**)). In the Kostic-Thom Action, Kostic pleads that Thom/Miller Thomson acted in a material conflict because "their ongoing representation of RJL created a conflict where the interests of RJL diverged from the interests of Kostic"¹⁷ in respect of the 0601 Action. She also pleads that Thom/Miller Thomson failed to advise Kostic to obtain independent legal advice and that she terminated Thom/Miller Thomson in fall 2013.

[51] As noted above, on March 1, 2018, Piikani Nation filed the ASOC. On March 22, 2018, Kostic, through her new counsel (by then Mr. Klym at DD West LLP), filed her amended amended amended statement of defence. Kostic did not file a notice to co-defendant against RJL within 20 days of filing her new defence (or since).

[52] According to Kostic, on August 30, 2019, she provided CMJ Nation with a proposed application seeking leave to file a notice of co-defendant against RJL. Her proposed affidavit says that the matter was before CMJ Nation on September 6, 2019, and was adjourned at the request of Piikani Nation, RJL, and CIBC Trust, and that she attempted again to bring the issue forward in 2023. In December 2019, Kostic swore an affidavit in which she said she could not finalize her notice to co-defendant against RJL until she receives all the particulars she was seeking at that time.

[53] Rule 3.43 provides that a notice claiming contribution must be filed and served on the co-defendant within 20 days after the date on which the defendant files the statement of defence or demand for notice. Kostic did not do that, regardless of whether the time is calculated from her first statement of defence or one of her amended defences. Accordingly, even if the Fiat Process did not exist, an

¹⁷ Statement of Claim in the Kostic-Thom Action, filed September 22, 2015, at para 10.

application for leave to file a late notice to co-defendant is required: *Amoco Canada Petroleum Co Ltd v Propak Systems Ltd*, 1999 ABQB 716 at para 21; *Stefanyk v Stevens*, 2017 ABQB 402 at para 38; rule 13.5. I agree with RJL that Kostic’s Fiat Request is deficient because it did not include her form of proposed application, rather it simply provided the proposed notice to co-defendant and Kostic’s proposed affidavit.

[54] I have not been provided authorities related to the legal framework the Court might apply to an application for permission to file a late notice to co-defendant. However, the length of delay, whether there is a reasonable excuse for the delay, and the potential prejudice will clearly be considered: *Amoco* at para 23; *Stefanyk* at para 38. I canvassed the framework for late-filed third party notices in *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd*, 2024 ABKB 428 [*H2 Canmore – Third Party Claim*], which for present purposes (and pending more fulsome argument) might reasonably apply by analogy. *H2 Canmore – Third Party Claim* illustrates that other factors that may be relevant include the merits of the proposed claim and the stage, status, and pace of the underlying action.

[55] Kostic doesn’t expressly address all these potential factors in her proposed affidavit, although some of it can be gleaned from the context and other matters incorporated by reference from the materials she provided. However, there is sufficient evidence and procedural context, in my view, to satisfy me that the Proposed Notice to Co-Defendant Application should not be prejudged and should be allowed to proceed.

[56] RJL’s arguments in response do not change my view. While Kostic’s Fiat Request was non-compliant because it did not include a proposed form of application, there is no point in rejecting it on this basis only to then allow her to correct that deficiency and restart the Fiat Process. Further, on the materials provided, several non-exhaustive issues are raised that warrant the application proceeding:

- (a) if Kostic’s potential notice to co-defendant is statute barred as RJL asserts, whether it could be permitted to be added under section 6 of the *Limitations Act*;
- (b) from what date delay should be calculated. RJL asserts that it should start at least in 2013 when Mr. Klym became involved, but it is an open question whether it could also be calculated from the date Kostic filed her new defence in March 2018, in which case the length of delay would be significantly less;
- (c) the reason for the delay. RJL responds to Kostic’s assertion about the allegedly new matters that arose in 2024 as not giving rise to a new cause of action or resetting the limitations clock. I interpret Kostic’s assertions, together with what happened in 2019 before CMJ Nation, as at least a partial explanation for Kostic’s delay. Although she did not expressly state it, the context (as apparently acknowledged by RJL in its response) to Kostic’s position is also that she asserts she was represented by a lawyer in a conflict of interest until 2013;
- (d) what exactly Kostic sought leave to file against RJL that became the subject of CMJ Graesser’s decision in *2024 ABKB 137*. It appears likely that the proposed application seeking “indemnification and save harmless remedies” were, as against RJL, contractual or by virtue of agency or employment. The proposed notice to co-defendant is proposed to be filed under rule 3.43, which applies to claims for contribution or indemnity under

the *Tort-feasors Act*, RSA 2000 c T-5 or the *Contributory Negligence Act*, RSA 2000, c C-27; and

- (e) whether the proposed application is barred by *res judicata*, including whether the passage RJJ relies on, from *Kostic v CIBC Trust Corporation*, 2018 ABCA 355 [2018 ABCA 355] at para 44, supports RJJ's *res judicata* position. The proposed notice to co-defendant, as I understand it, only seeks to have contribution and indemnity, as between RJJ and Kostic and as contemplated under rule 3.43, to be one of the issues decided at trial (not before trial).

[57] For the above reasons, Kostic is granted permission to file an application and affidavit seeking leave to file a late notice to co-defendant against RJJ. She is permitted to amend her proposed affidavit to address the factors I highlighted above that may be relevant to determining whether to grant the application.

C. Should Kostic be Granted Permission to file the Proposed Summary Dismissal Application?

1. Background

[58] On March 5, 2025, Kostic confirmed her intent to seek leave to apply to summarily dismiss the 0601 Action as against her.¹⁸ In Endorsement #4, I indicated that I would not grant a Fiat for her to pursue this as CMJ Graesser had already rejected her request in *Piikani Nation v Raymond James Ltd*, 2023 ABKB 710 [2023 ABKB 710]. Following the CMCs, in Endorsement #5, I clarified that I then understood that Kostic relies on matters that she asserts post-date CMJ Graesser's decision, so I advised I would consider a Fiat Request.

2. Positions

[59] The Proposed Summary Dismissal Application and related Fiat Request raise several grounds supporting summary dismissal, which I group and summarize as follows:

- (a) Non-Discretionary Accounts: all accounts involved were non-discretionary;
- (a) No Fiduciary Duty: the non-discretionary nature of the accounts supports her position, among other things, that she owed no fiduciary duty;
- (b) No Concurrent Personal Liability: Kostic was an employee, any damages claimed (as set out in the 2024 Damages Particulars) are against RJJ or a CIBC entity, not Kostic, and "relate only to fees and commissions" charged by her corporate employers. Kostic asserts there is no basis for concurrent personal liability;

¹⁸ Endorsement #4, Schedule U.

- (c) Limitations: claims against Kostic while she was at CIBC Wood Gundy (**CWM**)¹⁹ are statute-barred under the *Limitations Act*;
- (d) Contractual Limitations: Kostic is protected by limitation of liability provisions in account agreements between CIBC Trust and CWM (**CWM Account Agreements**) and CIBC Trust and RJL (**RJL Account Agreements**) to which she is not a party; and
- (e) Losses Offset By Gains: any losses are offset by gains made under Kostic's management, such that Piikani Nation suffered no loss.

[60] Kostic asserts these summary dismissal grounds should be considered now because of new admissions, information or evidence provided in 2024, including: (1) the Damages Particulars; (2) a CWM interrogatory response (**Interrogatory**) stating that accounts under the CWM Account Agreements were non-discretionary; and (3) 2024 admissions that no complaints were ever taken or voiced with respect to any of the trades, which Kostic argues engages the contractual limitations.

[61] I have also considered Piikani Nation's counsel's letter to me dated June 13, 2025, providing further particulars of misrepresentations alleged in the ASOC (**Misrepresentation Particulars**) in response to the direction in Endorsement #7 at para 22, and Piikani Nation's counsel's letter to me dated June 20, 2025, setting out its estimate of the gains realized on the portfolio under Kostic's management (**Gain Particulars**) in response to the direction in Endorsement #7 at para 17.

[62] I have also considered the various ways in which Kostic argues that the Damages Particulars, Misrepresentation Particulars and Gain Particulars are insufficient or incorrect and do not comply with court orders or directions.

[63] Piikani Nation objects to the Fiat Request, on at least these grounds: (1) Kostic is estopped from re-litigating the question of whether she should be given leave to pursue summary dismissal, as similar requests were rejected by ACJ Rooke in *Piikani Nation v Raymond James Ltd*, 2017 ABQB 140 [2017 ABQB 140] aff'd 2018 ABCA 234 [2018 ABCA 234] at paras 57-60 and by CMJ Graesser in 2023 ABKB 710; (2) the Fiat Request is an abuse of process; (3) the new evidentiary record does not assist Kostic; and (4) in any event, the Proposed Summary Dismissal Application is hopeless.

3. Decision and Discussion

[64] For the reasons set out below, I decline to grant Kostic permission to file the Proposed Summary Dismissal Application.

a. Procedural Context

[65] Kostic has previously attempted several summary dismissal applications. 2017 ABQB 140 appears to have been her fourth attempt: 2017 ABQB 140 at para 10.

¹⁹ I understand that CIBC Wood Gundy is or was a division of CIBC World Markets Inc., and/or was the result of a name change from CIBC Wood Gundy to CIBC World Markets Inc: 2024 ABKB 137 at para 3. For ease of reference and consistency I refer to them collectively as CWM, which is a reference to CIBC Wood Gundy and/or CIBC World Markets Inc. as the context requires. To the extent my understanding is incorrect my definition is not intended to be any substantive finding relating to the relationship between CIBC Wood Gundy and CIBC World Markets Inc.

[66] In **2017 ABQB 140**, Kostic raised some 16 grounds in support of summary dismissal, as summarized at para 7. Some of those grounds appear the same or similar to grounds in the Proposed Summary Dismissal Application. ACJ Rooke’s brief reasons for rejecting the proposed application were as follows:

[12] Brief Reasons – First, it will be hopeless, and there would be no likelihood of success contrary to Rule 3.68(2), to determine a summary dismissal without a full trial. The issues raised in the mammoth documentation that Kostic seeks to rely upon (even to the extent that it is proper, but, indeed, much of it has been challenged with leave being granted by the Court to the Nation to strike numerous Kostic affidavits), will require extensive cross-examination at trial on the facts and credibility, such that a trial is a simpler proposition than the motion, contrary to Rule 1.2. In essence, as the Nation argued, it “is not a proportionate, more expeditious and less expensive means to achieve a just result as required by *Hryniak*....”

[13] Second, knowing something of the allegations and intended factual and legal defences from trying to get these issues to trial over the last years of case management, I do not believe that I, or any Justice, could determine the issue herein on a Summary Dismissal application, but would be required to submit the matter to a trial anyway, after much unproductive delay and cost. The tests for Summary Dismissal, being “no triable issue”, or “no chance of success”, are extremely unlikely to be met by Kostic against the Nation, and, opposing, a “genuine issue for trial” seems apparent: *Milne*, at paras. 5 – 6.

[14] Third, while the intent of Kostic herein might be to consolidate all previous Summary Dismissal applications into one, to do so without withdrawing previous motions, subject to costs, represents an abuse of process relating to “serial summary judgment applications”: *Milne*, at para. 6, relying upon *Pocklington*, at paras. 7 – 9.

[15] Fourth, even if possible, any such application for Summary Dismissal should not proceed until the applications: to determine the amendments to the Nation’s Statement of Claim, for which Leave has been granted herein, in [2017 ABQB 113] (Leave Application #6); and to determine whether Kostic Affidavits should be struck, for which, Leave has also been granted herein, in *Piikani Nation v. Raymond James Ltd.* 2017 ABQB 102 and the further leave granted by Fiat on February 28, 2017; are heard and determined. In the former context see: *Elbow River Marketing v. Canada Clean Fuels Inc.*, 2011 ABCA 258.

[67] The Court of Appeal upheld this decision on the basis that ACJ Rooke’s decision that “an application for summary dismissal was inappropriate or premature is reasonable”: **2018 ABCA 234** at para 60.

[68] **2017 ABQB 140** is not a full answer to the proposed application, as it was decided before the ASOC was filed, which formally removed several allegations against Kostic, and ACJ Rooke seemed to leave open the possibility that it might be brought back after the amendment issue was resolved. Following the decision, there were significant discovery steps, including as discussed at the CMCs. Further, **2017 ABQB 140** pre-dated the Court of Appeal’s clarification of the proper approach to summary judgment/dismissal applications in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49.

[69] However, in **2023 ABKB 710**, CMJ Graesser substantively addressed at least nine grounds Kotic raised supporting that request to file a summary dismissal application, including at least some of the same grounds Kotic relies on now.

b. *Res Judicata*, Issue Estoppel and Abuse of Process in the Context of Attempts to Seek Summary Dismissal

[70] Contrary to Piikani Nation’s position, I am not satisfied the previous CMJ decisions related to Kotic’s unsuccessful attempts to achieve summary dismissal results in *res judicata* / issue estoppel in this instance. Unsuccessful summary judgment (dismissal) applications are considered interlocutory and doctrines such as *res judicata*, issue estoppel and merger do not apply *per se* to interlocutory orders: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2022 ABCA 111 at para 88, citing ***Kent v Watts***, 2019 ABCA 326 at para 23.

[71] However, Piikani Nation reasonably raises a concern about serial summary dismissal attempts and abuse of process. As noted by the Court of Appeal in ***PricewaterhouseCoopers Inc***, at paras 88-91:

[88] [...] We proceed, as other courts have done, on the basis that even if *res judicata* and related doctrines do not apply directly, their rationales influence the abuse of process analysis as applied to unsuccessful summary judgment applications.

[89] Serial summary judgment applications were considered by this Court in ***Milne v Barnes***, 2013 ABCA 379. At paragraph 6 the Court outlined applicable principles:

While serial summary judgment applications are obviously to be discouraged, interlocutory applications generally do not create an issue estoppel. A judgment granting summary judgment creates *res judicata*. But, unless it decides a discrete issue that is reflected in the formal judgment, a decision dismissing a summary judgment application generally only decides that on the then existing record there is a “genuine issue for trial”. Repeated applications on the same or a similar record are dealt with as an abuse of process, not as an issue estoppel, and are controlled by costs sanctions. Nevertheless, a second application is possible, subject to the court’s discretion, for example where brought on a new record, after extensive discoveries, based on an issue not raised or finally determined in the prior application. [citations omitted]

[90] The leading authority on whether relitigating an interlocutory application amounts to abuse of process is ***Alberta v Pocklington Foods Inc***, 1995 ABCA 111 [***Pocklington***]. [...]

[91] The Court of Appeal confirmed *res judicata* and issue estoppel did not apply to the second application; however, that did not mean that courts are powerless to deal with attempts to relitigate issues already decided. A second interlocutory application for the same relief may be permitted where the second application is not truly relitigation. The following factors, listed at paragraph 8, are relevant:

- (a) if the ruling on the first application was not based on the merits of the issue but on a technical objection;
- (b) if upon the first application the applicant failed to prove essential facts from mistake or inadvertence;
- (c) if there is new evidence that seriously justifies reconsideration of the issue;
- (d) if there is a material change of circumstances of a non-evidentiary nature.

Notably absent from this list of exceptions is the wish to advance an argument that could have been made at the first application but was not.

[72] In *PricewaterhouseCoopers Inc*, the Court of Appeal overturned a chambers judge’s decision to allow a second summary judgment application which was a “blatant attempt to relitigate, making arguments that were available and reasonably should have been made at the First Chambers Application”, and noting that it is “unfair to the other party and a waste of valuable resources of the court” to “permit this type of conduct”: *PricewaterhouseCoopers Inc* at para 98, citing *Pocklington* at para 14.

[73] I have considered this Court of Appeal guidance in assessing Kostic’s Fiat Request.

c. Legal Framework for Summary Judgment

[74] I summarized the legal framework for summary dismissal in *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd*, 2024 ABKB 423 [*H2 Canmore – Summary Dismissal*] at paras 21-25:

[21] Rule 7.3(1)(b) provides that a defendant may apply for summary judgment (in the form of summary dismissal) in respect of all or part of a claim where there is no merit to a claim or part of it.

[22] Summary judgment cannot be granted if the application presents a genuine issue for trial: *Hannam v Medicine Hat School District No 76*, 2020 ABCA 343 at para 13; *Clearbakk Energy Services Inc v Sunshine Oilsands Ltd*, 2023 ABCA 96 at para 5.

[23] The proper approach to summary dispositions in Alberta has been laid out by our Court of Appeal in [*Weir-Jones*] at para 47 (emphasis in original):

[47] The proper approach to summary dispositions, based on the *Hryniak v Mauldin* test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

- (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- (b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a “just result”, or there is a genuine issue requiring a trial.

[24] On a summary judgment application, the Court has a duty to take a “hard look” at the merits of the claim or defence on a summary judgment application: *Weir-Jones* at para 44, citing *Knee v Knee*, 2018 MBCA 20 at para 33.

[25] A defendant applicant for summary dismissal has the initial burden to prove the factual elements of its defence (that is, the facts on which it relies), on a balance of probabilities, that there is no merit to the claim, and that there is no genuine issue requiring a trial: *Weir-Jones* at paras 31-35 and 47(b); *Eberle v Terroco Drilling Ltd*, 2022 ABCA 8 at para 10; *Giustini v Workman*, 2021 ABCA 65 at paras 22-24; *P & C Lawfirm Management Inc v Sabourin*, 2020 ABCA 449 at paras 38-39; *Hannam* at paras 145-151; [*H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd*], 2023 ABKB 659 at para 9. The resisting party must put its best foot forward and demonstrate a genuine issue requiring a trial and, in the end, the presiding

judge must be left with sufficient confidence that the state of the record permits a fair summary disposition: *Eberle* at para 10.

[75] The Proposed Summary Dismissal Application, if successful, would only end the 0601 Action by Piikani Nation against Kostic, not the other remaining defendants (RJL and Potts)²⁰. It therefore engages additional considerations, including the implications of only partial summary dismissal on the action as a whole, the risk of inefficient and duplicative proceedings, the potential for inconsistent findings, and whether partial summary judgment is appropriate and will “serve the objectives of proportionality, efficiency and cost effectiveness” in the context of the action as a whole: *H2 Canmore – Summary Dismissal* at paras 217-218 (and cases cited therein).

d. The Claims Against Kostic

[76] As noted in *Weir-Jones*, if the Proposed Summary Dismissal Application is to proceed, the Court would consider whether Kostic has met the burden to show there is no merit to the claims against her and no genuine issue requiring a trial. It is important to ground the analysis in the claims being made against her.

[77] At a high-level, the background to the 0601 Action was set out by the Court of Appeal in *2018 ABCA 234* at paras 2-5 (bolded definitions added):

[2] Pursuant to a 2002 Settlement Agreement [**Settlement Agreement**], the Piikani Nation agreed to allow a portion of its lands to be used for the development of the Oldman River Dam, which included a hydro-electric power plant. In exchange, the Piikani Nation received \$64.3M that was settled in the Piikani Trust [**Piikani Trust**]. The Settlement Agreement contemplated, among other things, that the trustee of the Piikani Trust could invest the funds. Piikani Investment Corporation (which later filed a proposal in bankruptcy through the Grant Thornton Group as trustee) was designated as the beneficiary of the Piikani Trust, as the Piikani Nation’s investment vehicle. The trust funds were to be invested through “Institutional Investment Counsellors”. The CIBC Trust Corporation was selected as the investment trustee.

[3] The trust agreement [**Piikani Trust Agreement**] between the Piikani Nation and CIBC Trust conferred upon the Piikani Nation the power to appoint not only the broker (the “**Institutional Investment Counsellor**”) but also such additional advisors as the Piikani Nation directed the investment counsellor to retain.

[4] The appellant, Ms. Kostic, was the advisor selected by the Piikani Nation, and the Piikani Nation covenanted with Ms. Kostic that it would direct whichever investment counsellor was appointed to retain her. At first the Piikani Nation retained CIBC Wood Gundy as the institutional investment counsellor, and directed it to hire Ms. Kostic as the advisor. When Ms. Kostic changed employers, Raymond James was retained as the institutional investment counsellor, and it was directed to hire her to be the advisor:

²⁰ I understand that Piikani Nation discontinued the 0601 Action as against DJS in May 2025, as contemplated by Endorsement #7 at para 31.

see *Kostic v Piikani Nation*, 2017 ABCA 53 [2017 ABCA 53] at paras 5-12, 48 Alta LR (6th) 310.

[5] In November of 2006, the Piikani Nation gave notice to Ms. Kostic of termination of their business agreement. The Piikani Nation and Piikani Investment Corporation commenced QB Action #0601 13081 against Ms. Kostic, Raymond James, some band councillors, and others alleging negligence, breach of fiduciary duty and conspiracy (the “Negligence Action”). This action alleges irregularities in the appointment of Raymond James and other dealings with the trust funds, that Ms. Kostic and Raymond James were not qualified to be appointed, and that the trust funds were placed in unauthorized investments. In a third party notice in this action, Ms. Kostic claims indemnity from CIBC World Markets Inc.

[78] There are distinct time periods relevant to the claim:

- (a) the period during which Kostic was employed by or an authorized representative of CWM, before RJL became involved (**Pre-RJL Period**). Very roughly, the pre-RJL Period encompasses a period from 2002 to March 2004 (Kostic leaving CWM) or later in 2004 (RJL’s engagement). I am aware that in *Kostic v CIBC Trust Corporation*, 2017 ABQB 747 [2017 ABQB 747], at paras 16, 28-29, ACJ Rooke found that there was no claim against Kostic in the 0601 Action related to the time she was employed by CWM: *2018 ABCA 355* at para 7. This finding was overturned by the Court of Appeal and, based on Piikani Nation’s 2024-provided Damages Particulars, is not currently accurate – Piikani Nation claims against Kostic for the Pre-RJL Period;
- (b) the period during which Kostic was employed by or an authorized representative of RJL (**RJL Period**). Very roughly, the RJL Period encompasses a period from late 2004 to January 2007 when RJL’s involvement was terminated; and
- (c) the period after the RJL Period.

[79] Based on the ASOC claims, the Misrepresentation Particulars, and the Damages Particulars, as against Kostic the Piikani Nation claims negligence, misrepresentation and breach of fiduciary duty, including at least in relation to the following:

- (a) Kostic failed to disclose that she and/or RJL did not meet the qualifications required under the Piikani Trust Agreement;
- (b) in late 2004, in the context of the transfer of the Piikani Trust funds investment management to RJL, Kostic prepared or assisted in preparing inaccurate band council resolutions (**BCR**) which inaccurately made misrepresentations about qualifications;
- (c) in December 2004, in the context of the transfer of Piikani Trust funds investment management to RJL, Kostic prepared an Investment Management Agreement (**IMA**) dated December 3, 2004, that misrepresented that RJL was an Institutional Investment Counsellor and that the BCRs were authorized and directed CIBC Trust to appoint Kostic as an institutional Investment Counsellor;

- (d) Kostic failed to disclose to Piikani Nation that it was paying commissions that were 3-7 times the fees that would typically be charged by investment counsellors, when under the Settlement Agreement and the Piikani Trust/Piikani Trust Agreement the funds could only be managed by an investment counsellor. In doing so, Kostic misrepresented that appropriate fees and commissions were being paid;
- (e) Kostic failed to disclose deferred service charges or additional fees that would be charged for early redemption of locked in mutual funds being purchased on Piikani Nation's behalf. In doing so, Kostic misrepresented that appropriate fees and commissions were being paid;
- (f) during the RJL Period, Kostic failed to follow the requirements of the IMA, the Piikani Trust Agreement, and approved investment policy requirements, by investing in non-compliant investments, failing to meet reporting obligations, failing to provide material information, and failing to ensure proper liquidity; and
- (g) during the Pre-RJL Period and the RJL Period, including through periodic email confirmations, Kostic misrepresented that the investments complied with the Piikani Trust Agreement and that compliance reports were provided.

[80] I turn to the grounds upon which Kostic asserts it is appropriate to permit her to file the Proposed Summary Dismissal Application.

e. The “Non-Discretionary Accounts” Ground

[81] Kostic's Fiat Request asserts that all accounts involved were non-discretionary, and that this was only recently admitted by CWM in respect of the CWM accounts in the Interrogatory. In a June 24, 2025, letter from its counsel, CIBC Trust also acknowledges the CWM accounts were non-discretionary.

[82] Kostic's proposed affidavit asserts that she obtained prior trading approval for any requested trades. The existence or validity of any trade approvals is expressly denied in Piikani Nation's reply to Kostic's amended amended amended statement of defence.²¹ Based on counsel's June 24, 2025, letter, CWM and CIBC Trust also appear to challenge that there were valid trade authorizations (because, it says, they could only be given by CIBC Trust not Piikani Nation).

[83] Even if it is accepted as true, for the sake of discussion, that Kostic obtained prior trading approvals for non-discretionary accounts, as she asserts, this does not necessarily or alone establish “no merit” to all the claims against her. For example, Kostic's proposed affidavit does not materially address many of the alleged misrepresentations claimed as noted above and so has not shown they have no merit. The determination of those misrepresentation claims give rise to genuine issues requiring trial. *Viva voce* evidence about various important meetings, including as reflected in the pleadings, will be required. Detailed evidence will likely be required about the circumstances surrounding each trade in which Kostic was involved, including the characteristics of the investment, whether it was compliant (with the Piikani Trust Agreement, the IMA, and/or approved investment policies), Kostic's knowledge about those

²¹ Reply to the Amended Amended Amended Statement of Defence of the Defendant Liliana Kostic, filed April 4, 2018 at paras 5-6.

investment characteristics, what was communicated by Kostic about the investment, and the knowledge of those approving the trade.

[84] Accordingly, even if all accounts are proven to be non-discretionary, and even if this is accepted as helpful to Kostic’s defence as she asserts, it does not establish there is no merit to all claims against her. The comments from previous CMJs about this matter requiring a trial remain pertinent today.

[85] The Proposed Summary Dismissal Application based on this ground would be hopeless.

f. The “No Fiduciary Duty” Ground

[86] Kostic asserts that the new information about the non-discretionary accounts supports her position that she owed no fiduciary duty. She relies on *TD Waterhouse Inc v Ghebrezghi*, 2019 ABCA 319 at paras 22-23.

[87] Kostic’s assertion that she did not owe Piikani Nation a fiduciary duty, and that this should be determined summarily, was advanced and rejected in *2017 ABQB 140*. Further, in *2023 ABKB 710*, CMJ Graesser referred to fiduciary duty several times to show why grounds raised by Kostic at that time were not an answer to the fiduciary duty claim: *2023 ABKB 710* at paras 72, 82, 129, 131. The implication from that is that CMJ Graesser also believed the fiduciary duty claim required a trial.

[88] I agree with the previous CMJs with respect to the breach of fiduciary duty claim raising genuine issues requiring a trial.

[89] For an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J in *Frame v Smith*, 1987 CanLII 74 (SCC), [1987] 2 SCR 99: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to the fiduciary’s control; (3) a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary’s exercise of discretion or control: *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 162 (Brown J in dissent); *Manitoba Metis Federations Inc v Canada (Attorney General)*, 2013 SCC 14 at para 50; *Breen v Foremost Industries Ltd*, 2023 ABKB 552 at para 385.

[90] In *TD Waterhouse Inc*, the accounts at issue were non-discretionary (meaning the investment advisor had no authority to make trades without client consent), the client authorized all trades, and at times rejected the advisor’s advice: *TD Waterhouse Inc* at para 17. I agree with Kostic that if all the CWM accounts were non-discretionary this is a helpful factor for Kostic’s position that she did not owe fiduciary obligations to Piikani Nation.

[91] However, in *TD Waterhouse Inc*, the Court of Appeal relied on a summary of the law with respect to fiduciary principles in the broker-client context as described in *Varcoe v Sterling*, 1992 CanLII 7478, as follows:

The relationship of broker and client is not per se a fiduciary relationship. As the cases cited above have stated, it depends on the circumstances of the individual case. Where the elements of trust and confidence and reliance on skill and knowledge and advice are present, the relationship is fiduciary and the obligations that attach are fiduciary. On the

other hand, if those elements are not present, the fiduciary relationship does not exist. ... The circumstances can cover the whole spectrum from total reliance to total independence. An example of total reliance is found in the case of *Ryder v. Osler, Wills, Bickle Ltd.* (1985), 1985 CanLII 2044 (ON SC), 49 O.R. (2d) 609, 16 D.L.R. (4th) 80 (H.C.J.). A \$400,000 trust for the benefit of an elderly widow was deposited with the broker. An investment plan was prepared and approved and authority given to operate a discretionary account. ... At the other end of the spectrum is the unreported case of *Merit Investment Corp. v. Mogil*, Ont. H.C.J., Anderson J., March 23, 1989 [summarized at 14 A.C.W.S. (3d) 378], in which the client used the brokerage firm for processing orders. He referred to the account executive as an “order-taker”, whose advice was not sought and whose warnings were ignored.

[92] The ASOC specifically pleads that the Council of the Piikani Nation had limited investment experience, were very unsophisticated, and relied upon Kostic’s good faith, skill, knowledge, reputation and expertise.²² Kostic does not materially address this claim in her proposed affidavit. I understand, based on what I have received and reviewed from then-councillor and former defendant Brian Jackson²³ and Potts, both of whom will likely be witnesses at the trial, that this is disputed by at least two of the councillors at the relevant time. In my view, the fact there were non-discretionary accounts, in the unique circumstances of this case, does not alone establish no merit to the fiduciary duty claim. As noted in the above passage, the “circumstances of the individual case” must be assessed. In the context of the complex legal and personal relationships apparent in this matter, this will likely require credibility findings and a trial before the existence of a fiduciary relationship can be fairly determined. It is highly unlikely a judge hearing a summary dismissal application would be confident in fairly resolving the question of fiduciary duty without a trial.

[93] In any event, even if the non-discretionary account establishes there is no merit to the fiduciary duty claim as asserted by Kostic, it is not an answer to the negligence and misrepresentation claims.

[94] The Proposed Summary Dismissal Application based on this ground would be hopeless.

g. The “No Concurrent Personal Liability” Ground

[95] Kostic relies on the Court of Appeal’s framework for determining personal concurrent liability in tort when a corporate actor is also involved. That framework was clarified in *Hall v Stewart*, 2019 ABCA 98 and later Court of Appeal cases, and so post-dates *2017 ABQB 140*. Although available at the time of *2023 ABKB 710*, it does not appear that this framework was expressly or materially raised before CMJ Graesser. However, elements of it were engaged by Kostic’s reliance on *Barnett v Rademaker et al*, 2004 BCSC 1060, and her reliance on contractual limitations in the CWM Account Agreements and the RJL Account Agreements.

[96] I addressed the personal concurrent liability framework in the context of summary dismissal in *H2 Canmore – Summary Dismissal*, at paras 26-36, which includes the *Hall* framework. I incorporate those paragraphs here:

²² ASOC para 61.

²³ See Endorsement #18.

[26] The Action and the Application engage the question of when human agents and a corporation should be concurrently liable in tort when carrying out corporate business. This is a separate but related concept from piercing the corporate veil and it is an error to conflate them: *Driving Force Inc v I Spy-Eagle Eyes Safety Inc*, 2022 ABCA 25 at paras 48-49; *Parks v McAvoy*, 2023 ABCA 211 at para 51 [*Parks CA*]; *Swanby v Tru-Square Homes Ltd*, 2023 ABCA 224 at para 42, leave to appeal to SCC refused, 2024 CanLII 40679.

[27] The question of concurrent personal liability has befuddled academics and jurists for years because appellate-level Canadian courts have not provided a unifying test and have left the law unclear: *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57 at para 107; *Hall v Stewart*, 2019 ABCA 98 at para 18; *Driving Force* at para 64; *698828 Alberta Ltd v Elite Homes (1998) Ltd*, 2020 ABCA 154, n 2 [*Elite Homes*]; Shannon O’Byrne, Yemi Phillip, and Katherine Fraser, “The Tortious Liability of Directors and Officers to Third Parties in Common Law Canada” (2017) 54:4 *Alta LR* 871 at 874; *Axiom Foreign Exchange International v Rudiger Marketing Ltd*, 2024 ABKB 224 at paras 66-78.

[28] The issue is a classic one of competing policy objectives that are difficult to reconcile. On the one hand, at a high level, tort law seeks to compensate parties injured by negligent, fraudulent, intentional, unlawful, reckless, or wilfully blind conduct: *Hall* at para 13. On the other hand, to foster the societal and economic benefits of capital resource pooling, corporate law provides that corporations are separate legal entities and that corporate shareholders are not personally liable for corporate obligations; there is a generalized concern that too-readily imposing personal liability in the context of corporate business will negatively impact the viability and efficacy of corporate structures (including because parties will use it to leverage the litigation process and corporate agents will be reluctant to take on corporate roles): *Hogarth* at paras 63, 110; *Hall* at paras 11-14; *ADGA Systems International Ltd v Valcom Ltd*, 1999 CanLII 1527 (ON CA) at paras 9, 43, leave to appeal to SCC refused, [2000] 1 SCR xv.

[29] Pending further appellate-court development or clarification of the common law, and recognizing that a unifying, comprehensive and integrated test remains elusive, the Alberta Court of Appeal has confirmed that there are a number of factors to be considered when determining whether concurrent liability should be imposed for corporate torts: *Hall* at paras 18-19; *Swanby* at para 37; *Driving Force* at paras 64-66. The factors start with those summarized by Slatter JA in his minority concurring decision in *Hogarth* and have been confirmed by the Court of Appeal several times in the past few years: *Hogarth* at paras 109-110; *Hall* at para 18; *Driving Force* at para 65; *Swanby* at para 37; *Parks CA* at para 51. This is a binding framework: *Swanby* at para 42.

[30] The relevant considerations were explained in *Hall* at para 18, which for ease of reference I refer to as the “*Hall* factors”:

[18] The law on when personal liability will attach to corporate torts is not clear. The case law was surveyed in the concurring reasons in [*Hogarth*] at paras. 75ff. A number of relevant factors have been identified by the courts:

- (a) Whether the negligent act was committed while engaged in the business of the corporation, and whether the negligence of the employee was contemporaneous with that of the corporation: [*London Drugs Limited v Kuehne & Nagel International Ltd*, 1992 CanLII 41 (SCC), [1992] 3 SCR 299] at pp. 405-6; [*ADGA Systems*];
- (b) Whether the individual was pursuing any personal interest beyond the corporate interest: *ADGA Systems* at paras. 18, 43;
- (c) Whether the director or corporate representative owed a separate and distinct duty of care towards the injured party: [*Hogarth*] at paras. 118ff; [*Nielsen Estate v Epton*, 2006 ABCA 382 at paras. 20-22];
- (d) That the conduct was “in the best interests of the company”;
- (e) Whether the plaintiff voluntarily dealt with the limited liability corporation, or had the corporate relationship “imposed” on it: *London Drugs* at pp. 405-6; *ADGA Systems* at para. 43;
- (f) The expectations of the parties: *Cooper v Hobart*, 2001 SCC 79 at para. 34, [2001] 3 SCR 537. Was it reasonable for the plaintiff to think that the individuals involved would be personally responsible for any damage that resulted? In the area of negligent misrepresentation, this factor takes on a particular importance: was it reasonable for the plaintiff to rely on the representation coming from the individual, rather than the corporation?: *Hercules Managements Ltd. v Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 SCR 165 at paras. 24-6; [*Hogarth*] at para. 131;
- (g) Whether the tort was “independent”. The cases sometimes say that the employee or individual is liable for his or her “independent” torts, implying that there are some torts which are so closely identified with corporate activity that they are not fairly categorized as “individual torts” as well: *London Drugs*; *ScotiaMcLeod Inc. v Peoples Jewellers Ltd.* (1995), 1995 CanLII 1301 (ON CA), 26 OR (3d) 481 at paras. 25-6 (CA), leave refused [1996] 3 SCR viii; *Blacklaws v Morrow*, 2000 ABCA 175 at para. 41, 84 Alta LR (3d) 270, 261 AR 28, leave refused [2001] 1 SCR vii; [*Hogarth*] at paras. 112ff. However, in *Peracomo Inc. v TELUS Communications Co.*, 2014 SCC 29 at paras. 16-

7, [2014] 1 SCR 621 varying *Peracomo Inc. v Société TELUS Communications*, 2012 FCA 199 at para. 43, 433 NR 152 it was held that the (intentional) tort was essentially individual, and the issue was more correctly whether the corporation was responsible for the individual tort, not the other way around;

(h) The case law clearly recognizes the exception in *Said v Butt*, [1920] 3 KB 497, specifically respecting claims of inducing breach of contract, without identifying whether it is a narrow or wide exception, nor the principles upon which it is based;

(i) The nature of the tort, and particularly whether it was an intentional tort: *Peracomo Inc.*, SCC at paras. 16-7, FCA at para. 43; *Hercules Managements* at paras. 21, 25-6; *ScotiaMcLeod* at paras. 25-6; *ADGA Systems* at para. 43; *Blacklaws v Morrow* at para. 41;

(j) Whether the damage was physical or economic: *Peracomo Inc.* SCC at paras. 16-7; *London Drugs*; *Hercules Managements* at paras. 21, 25-6; *Blacklaws v Morrow* at paras. 42-3; [*Hogarth*] at para. 131. This partly relates to accessibility to insurance, which is more common for physical damage: *London Drugs* at pp. 339-41.

[31] This binding framework provides a flexible foundation for assessing the personal tort liability of corporate agents: *Axiom* at para 78. The identified factors or criteria must be weighed and applied on a principled basis in the circumstances of each case while having regard for corporations, their legal status, and the generalized concern about the effect personal liability can have on the viability and efficacy of corporate structures: *Co-Solve Solutions Inc v Purdy*, 2023 ABCA 324 at paras 12-13; *Driving Force* at para 66. There is no universal or categorical rule, and “which of the identified factors will prevail in any particular case depends heavily on the factual circumstances”: *Driving Force* at paras 65-66.

[32] “Concurrent liability is more likely to be found in cases of intentional torts, particularly those causing physical damage, and any tort involving an element of deceit or dishonesty”: *Driving Force* at para 66; *Co-Solve* at para 11. The *Hall* factors must be considered in the context of the specific claims being made against each specific defendant. Consideration of the *Hall* factors may lead to different results for different claims, or against different individuals, based on each claim’s specific facts and applicable legal framework. In some cases, it may be appropriate for an individual to be concurrently liable for some claims and not others.

[33] The relevant considerations are not closed. Another (potentially overlapping) factor is the presence of a contract between the corporation and the plaintiff: *Driving Force* at paras 22-28; *Hogarth* at paras 77-79, citing *London Drugs*.

[...]

2. Principles of Concurrent Liability in the Context of Summary Dismissal

[35] Assessing whether concurrent liability can or should be summarily decided includes further considerations based on the *Weir-Jones* framework set out above. Like any other matter, concurrent liability can be determined summarily, in whole or in part, provided the test for summary judgment is met: *Parks CA*. However, where there is a genuine issue requiring trial on a *Hall* factor that is important in the context of a particular claim, or against a particular defendant, it may make summary determination inappropriate for that claim. Finally, partial summary judgment may or may not be appropriate in the circumstances of a particular claim and may have an enhanced role when considering multiple different claims, against multiple individuals, in the context of corporate business operations.

[36] Given the nature of the *Hall* factors, it is more difficult to apply a sequenced analysis of first deciding whether an individual defendant has met their burden to show no merit and no genuine issue requiring a trial, and then whether the responding party has demonstrated a genuine issue requiring a trial. Ultimately, the test requires that there is no genuine issue requiring a trial and that the Court is left with sufficient confidence in the state of the record to exercise its discretion to summarily resolve the claims: *Weir-Jones* at para 47.

[97] Kostic's Fiat Request asserts several factors which, if proven, could support her position that she should bear no personal concurrent liability: she was an employee; she had no independent duties in relation to the allegations made against her; she acted while engaged in corporate business; the accounts were non-discretionary; any torts were not intentional; she was not paid commissions or fees; Piikani Nation voluntarily dealt with her and the corporations; she did not "receive any funds directly from Piikani Nation or the Trust"; she is protected by the contractual limitations, any damage was not physical; and she acted in the best interests of Piikani Nation because she made \$10,000,000 in gains for the Piikani Trust.

[98] In my view, however, it would be hopeless for Kostic's argument that she has no personal concurrent liability to proceed to a summary dismissal application. I am not satisfied on the record that she could ever meet the initial burden to establish "no merit" based on this defence, or that there are no genuine issues requiring trial. Further, it is highly unlikely that a judge considering summary dismissal in the complex facts of this case would be satisfied that the record would permit a fair resolution of this question on a summary basis.

[99] I point to three non-exhaustive reasons for my conclusion.

[100] First, even if it is proven Kostic did not received fees or commissions from Piikani Nation or CIBC Trust, this does not mean there is no genuine issue requiring trial on the question of whether she

received a personal benefit. It appears that her employment at RJL was dependent on RJL taking over from CWM, and that her compensation from both CWM and RJL was linked to the commissions they were paid. As stated by the Court of Appeal in *2017 ABCA 53*, in the context of the 0801 Action, at para 11 (emphasis added):

[11] When these facts are considered in the context of the exchange of promises in the business agreements, it is apparent that by agreeing with Ms. Kostic to appoint her as the Nation’s investment advisor for five years, the Nation was also committing to appoint an investment counsellor who would retain Ms. Kostic who would then manage the Nation’s investment account. The Nation’s promise to pay Ms. Kostic all necessary commissions was fulfilled when the trustee, the CIBC, paid commissions on the Nation’s behalf to the investment counsellors (Wood Gundy and later Raymond James) **who, in turn, paid Ms. Kostic in accordance with the terms of their employment agreements with her. Ms. Kostic’s income from both Wood Gundy, and Raymond James, was tied directly to the payment of these commissions on trades of the Nation’s investments.** When the Nation, by Band Council Resolution in November of 2006, gave notice of termination to Ms. Kostic, her income was reduced to zero.

[101] In her Fiat Request materials, Kostic did not address the benefits she may have *indirectly* received as suggested in the above passage.

[102] Second, a key *Hall* factor is whether conduct was intentional. Personal liability is more likely in any tort involving an “element of dishonesty”: *Driving Force* at para 66. At ASOC para 61, it is alleged that Kostic and RJL “chose to take steps for their own personal benefit”. At ASOC para 63, it is alleged that Kostic and RJL “proceeded in flagrant disregard” of the terms of the Piikani Trust Agreement from December 2004 to February 2007. Kostic’s assertion that the torts are not intentional requires findings about her intentions, which will require a credibility assessment made in the context of all the evidence (including her knowledge and conduct). These matters raise genuine issues requiring trial regardless of whatever evidence Piikani Nation might adduce in response to the Proposed Summary Dismissal Application.

[103] Third, in negligent misrepresentation, an important factor will be whether it is reasonable for Piikani Nation to think Kostic would be personally responsible for any damage that resulted, or to rely on the alleged misrepresentations as coming from Kostic personally rather than the corporation: *Hall* at para 18(f). In my view, this will require an assessment of all the circumstances at the time of the various alleged misrepresentations. Further, an assessment of Kostic’s relationship with Piikani Nation and/or specific individuals on the Council at the time will be required to assess their reasonable expectations. This issue is not sufficiently addressed in Kostic’s Fiat Request materials and is one that inevitably gives rise to a genuine issue requiring trial.

[104] I need go no further. The *Hall* factors “must be weighed in the circumstances of each case”: *Co-Solve* at para 12. “Which of the identified factors will prevail in any particular circumstance depends heavily on the factual circumstances”: *Driving Force* at para 66. In my view, based on Kostic’s proposed affidavit, and the likely response from Piikani Nation, it is clear that at least three important *Hall* factors cannot reasonably or fairly be resolved summarily because they genuinely require a trial assessment of the factual circumstances. In turn, therefore, I find that it is not realistic that the question of Kostic’s personal concurrent liability can reasonably or fairly be resolved summarily.

[105] In my view, allowing the Proposed Summary Dismissal Application to proceed on this ground would be hopeless.

h. The “Limitations” Ground

[106] Kostic’s potential partial limitations defence appears materially the same as the one raised in **2023 ABKB 710**. CMJ Graesser found the limitation defences to be “far too complex a situation to be appropriate for summary determination”, and that “there are no limitations issues that have been raised that are appropriate to be dealt with summarily”: **2023 ABKB 710** at paras 87-93. I am not satisfied the allegedly new information obtained in 2024 sufficiently changed the record justifying a reconsideration of this issue and it would be an abuse of process to allow it to be raised again. In any event, on the record before me, I agree with CMJ Graesser’s conclusion. There remain genuine issues requiring trial to resolve Kostic’s potential partial limitations defence.

i. The “Contractual Limitations” Ground

[107] Kostic’s claim that contractual limitations preclude claims against her, as a ground for summary dismissal, appears to have been raised before ACJ Rooke in 2017. Then, this argument was clearly raised and addressed by CMJ Graesser in **2023 ABKB 710**. Again, I am not satisfied the record is sufficiently different based on any 2024 information for me to revisit this issue and I find it would be an abuse of process to allow it to be raised again. In any event, on the material now before me (including the May 23, 2025, Potts affidavit referred to by Piikani Nation), I agree with CMJ Graesser’s conclusions – there remains genuine issues requiring trial.

j. Other Considerations

[108] There are several other considerations which support my conclusion that the Proposed Summary Dismissal Application is hopeless and should not be permitted to proceed.

[109] First, the significant volume of materials and the likely extensive scope of a summary dismissal evidentiary process will not promote expedient summary resolution of this case. ACJ Rooke described “mammoth documentation” in **2017 ABQB 140** at para 12. In **2023 ABKB 710**, at para 127, CMJ Graesser noted the significant list of materials Kostic proposed to rely on, which would take days to present, and stated that “it is obvious that what Ms. Kostic is looking for is a trial”. In the Proposed Summary Dismissal Application before me, Kostic is less transparent about everything she intends to ultimately rely on in the proposed application, and I expect the vague reference to “material previously filed in this action” in the proposed application would likely encompass a similarly mammoth set of materials, if not more. Further, a summary dismissal procedure would likely give rise to further pre-application disputes. I agree with CMJ Graesser that it will be “far easier and more expedient to have this matter set for trial”: **2023 ABKB 710** at para 128.

[110] Second, as noted, allowing the Proposed Summary Dismissal Application to proceed would likely impede the progress of the 0601 Action against the remaining defendants. Then, after a costly and time-consuming process, the outcome and its timing would be uncertain. Most likely it would result in a direction to proceed to trial anyway and, regardless of the outcome, would likely lead to appeals. The impact of interlocutory appeals on the progress of Case Managed Actions is obvious from the many reported decisions. In either scenario, the progress of the 0601 Action would be delayed or unduly

complicated. This could potentially, in turn, affect the progress of the 0801 Action because Piikani Nation's defence includes some of the same allegations against Kostic as made in the 0601 Action.

[111] Third, Kostic would continue to be involved as a critical witness at trial even if the claims against her were summarily dismissed.

[112] Fourth, there would be a risk of inconsistent findings at trial based on a more complete trial record.

[113] Fifth, in *2019 ABCA 29*, the Court of Appeal stated at para 31:

[31] This litigation has been ongoing for many years, and has been the subject of numerous applications, cross-applications and appeals. We encourage the parties to proceed expeditiously to take this matter to trial so that the issues originally raised between them can be finally resolved.

[114] I am committed to assisting the parties to do just that. The 0601 Action is reasonably well progressed through the discovery phase. After receiving input from the parties, in Endorsement #7 I directed a procedural schedule to have records production and final questioning completed by end of October 2025, and all expert reports exchanged by March 2026. While this will prove to be unachievable given the many subsequent and ongoing Fiat Requests and disputes (as noted later elsewhere in these Reasons), in my view it is fair and more expedient that the various issues are resolved as expeditiously as possible with an eye toward moving the matter to trial. A duplicative summary process and the likely further disputes and procedures within that process will not serve the interests of justice. I note Kostic has recently written to me expressing her difficulty meeting the various deadlines in the Case Managed Actions.

[115] These parties need to get the 0601 Action to trial as soon as reasonably possible. We will discuss this at our next CMC (as referenced further below in these Reasons).

k. Conclusion

[116] For at least the above reasons, I find the Proposed Summary Dismissal Application, whether each ground is considered separately or collectively, is hopeless and would be inconsistent with rule 1.2. I agree with the conclusions of the previous CMJs, and also make that finding based on the augmented additional record before me.

[117] I adopt these words of CMJ Graesser from *2023 ABKB 710*, at paras 138-139:

[138] I want to make it clear that none of my comments or decisions above go to the merits of the Nation's claims or Ms. Kostic's defences. Commenting on the merits of procedural matters, or of purely technical defences does not mean that grounds to terminate the relationships between the Nation and Ms. Kostic and RJL existed, or that the Nation has sought any loss for which it should be compensated, or whether the Defendants have valid and meritorious defences.

[139] The role of the case management judge is not to pre-judge the case on its merits; it is to assist the parties identify the real issues in dispute and try to manage an efficient and effective process to have the issues resolved.

[118] Kostic’s Fiat Request to file the Proposed Summary Dismissal Application is denied.

D. Should Kostic be Granted Permission to file the Proposed CIBC Trust Action #1 Amendment Application?

1. Background

[119] On March 5, 2025,²⁴ Kostic confirmed her intent to seek leave in Kostic-CIBC Trust Action #1, as follows:

Leave to Schedule **Immediate Hearing 1601-16983 to enforce ABKB 747** Save harmless from CIBC Trust given the July and August 2024 admissions, the admissions the high court deferred pending the outcome of those admissions that we now have. Noting ALL the parties knew these facts in advance of PIC filing the claim, and right to July-August 2024 when the CMJ and Court Finally forced their hand to admit after 18 years of intentional delay and holding Kostic and others into captivity.

[120] In Endorsement #4, I added Kostic’s intention to amend the claim in Kostic-CIBC Trust #1 and seek an immediate hearing to the agenda for the CMCs. Following the CMCs, I gave Kostic a deadline to provide a Fiat Request, which she has provided (following an agreed extension).

2. Positions

[121] The Proposed CIBC Trust Action #1 Amendment Application seeks to further amend the originating application to provide particulars of steps that have occurred in the context of the 0601 Action since the last amendment of the originating application and, as a result, requesting the Court revisit the “issue of immediate save harmless relief” against CIBC Trust. The proposed amendments and the Fiat Request assert that CIBC Trust misrepresented to the Court of Appeal, in the context of **2018 ABCA 355**, that accounts created under the CWM Account Agreements were discretionary when they were non-discretionary. CIBC Trust recently confirmed in correspondence (**June 2025 Letter**) that the accounts were non-discretionary, which Kostic asserts proves CIBC Trust made a material misrepresentation to the Court of Appeal (**Alleged CA Misrepresentation**).

[122] The proposed amendments also reference that the Damages Particulars in the 0601 Action include a claim during the Pre-RJL Period. Kostic asserts CIBC Trust had argued mootness before the Court of Appeal because no claim had been advanced by the Nation against Kostic for damages during the time she was employed by CWM. Kostic asserts that this too has proven to be incorrect.

[123] In addition to seeking permission to file the Proposed CIBC Trust Action #1 Amendment Application, Kostic’s Fiat Request asks for “approval to schedule a hearing forthwith to determine Ms. Kostic’s entitlement to immediate save harmless relief”. To support her request, Kostic asserts that the Alleged CA Misrepresentation “significantly impacted” the Court of Appeal’s decision, and the fact that Piikani Nation now claims against Kostic for the period while she was employed with CWM “undercuts” the Court of Appeal decision.

[124] CIBC Trust asserts that the Kostic-CIBC Trust Action #1 has already been finally disposed of and it would be hopeless to seek to revive it by way of the amendments due to the doctrine of *res judicata*.

²⁴ Endorsement #4, Schedule U.

It also argues that it is not open to this Court to reopen or reconsider the Court of Appeal decision and, in any event, the evidence or issues Kostic relies on were irrelevant to the Court of Appeal's decision. CIBC Trust asserts that Kostic should not be permitted to attempt to relitigate her claim for defence costs and indemnification costs.

3. Decision and Discussion

[125] Again, I start with context.

[126] Kostic-CIBC Trust Action #1 was filed in February 2016. It was amended, and then amended again by July 11, 2016 order, which set the pre-hearing steps for the action. That order set the matter down for hearing in November 2016.

[127] Following that hearing, in *2017 ABQB 747*, ACJ Rooke made preliminary rulings and findings, as summarized in *2018 ABCA 355* at paras 7-8:

[7] The case management judge's reasons are reported: [*2017 ABQB 747*]. He made a number of preliminary rulings, including:

- i. it was premature to determine whether [CIBC Trust] was obliged to indemnify Ms Kostic for any losses arising from the [0601 Action] as that decision could not be made until trial (para 26);
- ii. there was no claim against Ms Kostic in the [0601 Action] that related to the time she was employed by [CWM] (para 28); and
- iii. the [CIBC Trust]'s duty to defend only applied to her defence costs in the [0601 Action], not to defence costs related to any actions she took as a plaintiff, claimant or interested party.

[8] He then proceeded to address what he described as substantive issues. First, he concluded that there was no privity of contract between Ms Kostic and [CIBC Trust] (para 35–36). However, as an agent of [RJL] she benefitted from the indemnity and save harmless provisions in the [RJL] Account Agreements between [CIBC Trust] and [RJL] through application of the “principled exception to privity” (paras 37–39). He concluded that trading authorizations (para 19 of the Terms and Conditions) had been given (para 40) and that a joint account had been opened, in which both the Piikani Nation and [CIBC Trust] could deal (paras 20, 21 and 37 of the Terms and Conditions) (paras 41-42). Second, on the question of whether Ms Kostic had a right to defence costs on the basis of the Account Agreements, he found that the [RJL] Account Agreements did not provide defence costs *per se*, but did apply to Ms Kostic to the extent they were supported by the facts under which they operated (para 45). He found that the evidence on the application supported a preliminary determination of Ms Kostic's right to defence costs but “[f]or more detailed fact, and findings of credibility where they differ, resort can only be made to the record of the trial of the [2006] Action” (para 45).

[128] The Court of Appeal majority found that ACJ Rooke erred by making preliminary fact findings and inferences. They set aside his preliminary fact findings, his determination that Kostic was entitled

to have her defence costs associated with the RJL Account Agreements paid by CIBC Trust, and his determination that Kostic had no claim for indemnity and defence costs with regard to the CWM Account Agreements: **2018 ABCA 355** at para 43.

[129] The Court of Appeal then stated, at para 44:

[44] Ms Kostic’s claims for defence costs (past and future) and indemnity from CIBC in respect of the [RJL] and [CWM] Account Agreements are to be determined at the trial of the [0601 Action]. The preliminary factual findings made by the case management judge on the application are also set aside and left to be determined at trial.

[130] Kostic unsuccessfully applied to the Court of Appeal to reargue the appeal: **Kostic v CIBC Trust**, 2019 ABCA 29 [**2019 ABCA 29**]. Then, the Supreme Court of Canada denied her application for leave to appeal: **Liliana Kostic v CIBC Trust Corporation**, 2019 CanLII 37469. Then, Kostic again unsuccessfully applied to the Court of Appeal to reargue the appeal: **Kostic v CIBC Trust**, 2019 ABCA 173. That time, she also sought to adduce new evidence from questioning of Piikani Nation to show it was claiming against her for the Pre-RJL Period/while she was employed by CWM. The Court of Appeal stated, at para 19, that whether “the chambers judge erred in concluding that the Nation was not pursuing Kostic for conduct while she was employed with Wood Gundy is not relevant to the Defence Costs Appeal”. And then repeated, at para 19: “Kostic’s entitlement to indemnity and defence costs pursuant to both [CWM Account Agreements] and the [RJL Account Agreements] will be determined at the trial of the 2006 Action”.

[131] Some of this history was canvassed by CMJ Graesser in **2024 ABKB 137**.

[132] Turning now to the substance of Kostic’s Fiat Request, Kostic seeks two main things. First, and primarily, she wants to revisit the result of **2018 ABCA 355** so that she can try again to get immediate defence costs from CIBC Trust. Second, she wants to advance a claim for aggravated and punitive damages for the Alleged CA Misrepresentation.

[133] With respect to the first matter, the relief she seeks is not something I have the jurisdiction to grant nor, in any event, would I do so. The decision of the Court of Appeal is clear: Kostic’s claims against CIBC Trust for indemnity (and save harmless or defence costs) pursuant to both the CWM Account Agreements and the RJL Agreements (which I interpret as including those claims as pleaded in the amended amended originating application in **Kostic-CIBC Trust Action #1**), are to be dealt with at the trial of the 0601 Action. That is a binding decision on me which I do not have jurisdiction to ignore or vary.

[134] If Kostic is of the view that the Alleged CA Misrepresentation significantly impacted the Court of Appeal, or that the effect of **2018 ABCA 355** is different, her recourse is to again to seek relief from the Court of Appeal. In fact, she has also stated that this “issue remains before the Court of Appeal”.²⁵ I will not grant her a Fiat to revisit the question of immediate save harmless relief against CIBC Trust pursuant to the CWM Account Agreements or the RJL Account Agreements, as requested. If the Court of Appeal directs or decides otherwise in the future, Kostic can make a new Fiat Request.

²⁵ Kostic July 25, 2025 letter.

[135] For the same reason, I will not grant her a Fiat that permits her to seek to further amend her originating application to seek the revisiting of immediate save harmless relief (as set out in the proposed amendment at para 1.aa).

[136] With respect to the other proposed amendments, the fundamental question is whether Kostic should be allowed to apply to further amend the originating application to provide particulars of CIBC Trust's litigation conduct to support a claim for aggravated or punitive damages for the Alleged CA Misrepresentation.

[137] I start by saying that I do not agree with CIBC Trust's position that Kostic-CIBC Trust Action #1 has been completely and finally decided. For example, it seeks costs on a solicitor-client basis, which obviously cannot be dealt with until claim to indemnity and save harmless is decided in the trial in the 0601 Action. If Kostic is successful in that claim, her costs claim will then have to be decided, either in the 0601 Action or Kostic-CIBC Trust Action #1.

[138] As noted, the Alleged CA Misrepresentation relates to CIBC Trust's litigation conduct in Kostic-CIBC Trust Action #1. The general rule is that conduct of a party in the context of an action is a matter properly resolved by way of costs, whereas claims for punitive damages (and I expect, on a similar basis, aggravated damages) typically relate to pre-filing conduct: *Bard v Canadian Natural Resources*, 2016 ABQB 267 at paras 52-54; *Astolfi v Stone Creek Resorts Inc*, 2023 ABKB 416 at para 82. However, it is possible there may be exceptions to the general rule, or that I might be persuaded the general rule should not apply here. I would benefit from legal briefing from the parties.

[139] It is possible that my refusal to allow Kostic to effectively revisit *2018 ABCA 355*, and my confirmation that the general rule is that litigation conduct is (and can be in the future) properly addressed as a matter of costs, will change her view about whether she wishes to proceed with the remaining aspects of the proposed amendment application. Accordingly, I will give her time to consider her options. If she wishes to pursue the amendment application, solely to support a proposed claim for aggravated or punitive damages, notwithstanding the general rule noted above, and notwithstanding the potential cost consequences if she proceeds and is unsuccessful, I will permit her to do so and will allow that aspect of her proposed application to proceed. Kostic is directed to advise me **within two weeks** of these Reasons whether she wishes to pursue it. If she does not do so, she will not be permitted to proceed with the remaining aspects of the proposed amendment application.

E. What, if any Fiat Requests Should be Granted with Respect to Kostic-CIBC Trust Action #2?

1. Background

[140] On January 15, 2025, CIBC Trust confirmed its view that the next step in Kostic-CIBC Trust Action #2 was to schedule a hearing date for its July 19, 2017 application to strike the action (**2017 Strike Application**) and its October 19, 2022 application (**2022 Dismissal Application**) to dismiss the action for delay. In her March 5, 2025 materials, Kostic expressed a need to amend the claim. We discussed these matters at the CMCs and, in Endorsement #7, I directed both parties to provide Fiat Requests, which they have done.

2. Positions

[141] With respect to CIBC Trust's Fiat Request, it asserts that ACJ Rooke previously granted leave to file the 2017 Strike Application which was then adjourned *sine die* on October 11, 2017, and never rescheduled. CIBC Trust says that when ACJ Rooke transferred case management for Kostic-CIBC Trust Action #2 to CMJ de Wit in September 2022, he invited parties to bring applications for long delay, which CIBC Trust did but the application was adjourned *sine die*. CIBC Trust acknowledges it did not have a fiat to file the long delay application but asserts it was consistent with the spirit of ACJ Rooke's invitation.

[142] CIBC Trust asserts that the Proposed CIBC Trust Strike/Dismissal Application is an updated amalgam of its two previous applications which it argues should be approved to proceed because they were previously approved or invited by the Court. In any event, it asserts the application should be permitted on its merits. It argues that Kostic-CIBC Trust Action #2 was filed without fiat approval and while a fiat request before ACJ Rooke to commence a similar claim against CIBC Trust was pending (and which was ultimately rejected, which rejection was then upheld on appeal). CIBC Trust further argues that Kostic-CIBC Trust Action #2 is statute-barred, and the claims seeking production of the Navigant Report are *res judicata*. In any event, CIBC Trust asserts that Kostic-CIBC Trust Action #2 should be struck for long delay under rule 4.33 because more than three years passed without a significant advance in the action.

[143] With respect to Kostic's Fiat Request, she seeks to significantly amend the statement of claim in Kostic-CIBC Trust Action #2. In fact, as far as I can tell, none of the original paragraphs in the statement of claim are proposed to survive. The proposed amended statement of claim would effectively convert or replace a five-page, 42-paragraph claim into or with a 35-page, 211-paragraph claim. The proposed amended claim is wide-ranging. It includes allegations of misconduct against parties other than CIBC Trust and raises some of the same issues raised, or to be raised, in other Fiat Requests she has made or intends to make.

[144] Kostic asserts she should be permitted to file the Proposed CIBC Trust Action #2 Amendment Application because she meets the low threshold for amending pleadings and for other reasons, including related to alleged ongoing concealment, failure to disclose, lack of proof or particulars of damages, and the need to clarify the record/facts to respond to, among other things, unauthorized substantive amendments in the ASOC (in the 0601 Action), recent admissions of CIBC Trust, the Alleged CA Misrepresentation, and the Gain Particulars.

[145] CIBC Trust's position is that Kostic's Fiat Request does not comply with the Fiat Process – the supporting affidavit is too long and does not include several exhibits purported to be attached. CIBC Trust also asserts the proposed amendments are abusive, vexatious, made in bad faith, lack sufficient evidentiary foundation, and are clearly barred by the *Limitations Act*. If Kostic's Fiat Request is approved, CIBC Trust's position is its Proposed CIBC Trust Strike/Dismissal Application should be heard first as it may be dispositive of Kostic's amendment application.

3. Decision and Discussion

a. Procedural Context

[146] The procedural context to the Kostic CIBC-Trust Action #2, and these Fiat Requests, requires me to go back again to the 0601 Action.

[147] As noted earlier, the 0601 Action was commenced in 2006. In 2007, Kostic, jointly with RJL, filed a third party claim against CIBC Trust related primarily to indemnity and save harmless relief based on the RJL Account Agreements.

[148] In 2008, Kostic filed the 0801 Action related to the termination of a November 2002 agreement she had with Piikani Nation, as amended in 2004. That claim was originally against Piikani Nation and CIBC Trust, but in 2009 the claim was amended to remove CIBC Trust as a defendant.

[149] On February 5, 2013, in another of the now Case Managed Actions (action 1201-15897), ACJ Rooke ordered, among other things, that no actions could be commenced against Piikani Nation “or any trustee or corporation associated with the Piikani Nation”, or “as between or among or against any of the parties” to the 0601 Action (among other actions), without leave of the Court.

[150] On January 20, 2017, Kostic sought approval (**2017 Fiat Request**) to proceed with an application in the 0601 Action to seek, among other relief, “leave to file a Counterclaim, or a new action, as may be appropriate, against CIBC Trust for interference in the contractual relationship” between Kostic and Piikani Nation. The proposed application purported to rely on, among other things, twelve affidavits she had sworn in the 0601 Action. However, a precise proposed form of counterclaim or new action against CIBC Trust does not appear to have been provided. Under the grounds for the proposed claim against CIBC Trust, it stated: “CIBC Trust aided and abetted the Plaintiff Piikani’s to terminate the Business Agreement between the Nation and the Application and the termination of [RJL]”.

[151] On January 26, 2017, before ACJ Rooke had decided whether to grant the 2017 Fiat Request, Kostic filed Kostic CIBC-Trust Action #2. It claims inducing breach of contract and interference with contractual relations and economic interests against CIBC Trust, in relation to the termination of Piikani’s relationship with Kostic and RJL.

[152] On March 1, 2017, ACJ Rooke denied Kostic’s 2017 Fiat Request. With respect to the proposed counterclaim or new claim against CIBC Trust, his reasons were at paras 25-30 of **2017 ABQB 140**:

[25] Leave Application – Kostic seeks leave to bring a counterclaim or a new action against CIBC Trust and the Canadian Imperial Bank of Canada on the basis that they “aided and abetted” the Nation’s termination of the Business Agreement between the Nation and Kostic, and the termination of Raymond James.

[26] Response – the Nation would not seem to be directly interested and made no submission.

[27] David Tupper of Blakes, by letter dated January 27, 2017, made submissions on behalf of CIBC Trust and/or Canadian Imperial Bank of Canada (herein collectively “CIBC”), supporting the Solomon general arguments on the basis of Rules 1.2 and 3.68(2).

[28] On the substance, Tupper argued:

- procedurally, under Rule 3.56(1)(b), a counterclaim could only be brought against CIBC if it did so against the Nation too, noting that Kostic already has a Third Party Notice against CIBC Trust;
- as a matter of limitations, the claim is barred by s. 3(1)(b) of the *Limitations Act*, RSA 2000, c. L – 12, on the basis of the passage of 10 years since the Nation terminated its relationship with Raymond James Ltd. in January 2007;
- relying on *O’Connor Associates Environmental Inc. v. MEC OP LLC*, 2014 ABCA, that CIBC “owes no fiduciary or other duties to Kostic or Raymond James”;
- the proposed application is, in any event, tangential to existing litigation by Kostic against CIBC herein; and
- is thus an abuse of process.

[29] Decision – the application to commence a further counterclaim or new action against CIBC is denied.

[30] Brief Reasons – while, the first grounds are more procedural than substantive, all of Tupper’s reasons. However, more substantively, Kostic has not shown a true new, viable, cause of action against [CIBC Trust], that isn’t precluded by limitations legislation, or already present, in substance, in the pleadings to date.

[153] Kostic appealed this decision, which was heard along with several other appeals in **2018 ABCA 234**.

[154] On July 13, 2017, CIBC Trust sought leave to file the 2017 Strike Application, which was granted and it filed the application on July 19, 2017. Briefs were filed, but the application was adjourned *sine die* on October 11, 2017 because of Kostic’s pending appeal.

[155] In **2018 ABCA 234**, the Court of Appeal said this about the 2017 Fiat Request and Kostic-CIBC Trust Action #2, at para 10:

[10] As a part of the litigation plan, the case management judge had directed that no new claims could be brought without prior approval. Because of concerns about a limitation period, Ms. Kostic commenced, without prior approval, QB Action #1701 01341 against CIBC Trust Corporation. It claimed that CIBC Trust was complicit in the termination of her agreement with the Piikani Nation, and that it had played a part in commissioning the Navigant Report that resulted from an investigation into the affairs of the Piikani Trust. The claim was for damages for interference with economic relations through knowingly making false allegations of embezzlement and other misconduct. This action also seeks production of the Navigant Report, which is subject to a claim of litigation privilege (see *infra*, paras. 48-56). Her subsequent request for approval to bring that action was denied: [**2017 ABQB 140**] at para 30 (see *infra*, paras. 57-61).

[156] At para 61, the Court of Appeal held that no reviewable error has been shown in ACJ Rooke’s conclusion that Kostic “has not shown a true, new, viable, cause of action against CIBC, that isn’t precluded by limitations legislation, or already present, in substance, in the pleadings to date”. The Court of Appeal did not comment further about Kostic-CIBC Trust Action #2.

[157] Following *2018 ABCA 234*, the 2017 Strike Application was not rescheduled.

[158] On September 16, 2022, as part of the appointment of CMJ de Wit, ACJ Rooke wrote to the parties:

I observe that many Piikani related actions are “stale dated”, past or approaching the “drop dead date” under Rule 4.33. As I pass on the torch to Justice deWit [sic], I invite the parties and Counsel to prepare Consent Orders, or equivalent applications, to terminate such actions.

[159] On October 19, 2022, CIBC Trust filed the 2022 Dismissal Application. On December 7, 2022, it was adjourned *sine die*. It has never been set down for a hearing.

[160] In a June 11, 2024 CMC before CMJ Graesser, Mr. Klym agreed to advise by July 11, 2024 whether Kostic intended to proceed with Kostic-CIBC Trust Action #2. It does not appear this was done, but it became obvious Kostic intends to do so given her communications with me and her Fiat Request. On July 8, 2024, CMJ Graesser wrote to Kostic and stated that Kostic-CIBC Trust Action #2 “is inactive and cannot proceed until CIBC Trust’s fiat requests or applications are dealt with”.

b. The Proposed CIBC Trust Strike/Dismissal Application

[161] I grant CIBC Trust’s Fiat Request.

[162] The 2017 Strike Application was previously approved for filing and, in the circumstances and timing of its filing, has a reasonable chance of success. Kostic has not provided me reason to find it is hopeless or abusive. Even if it had not been previously approved for filing, I would have granted leave now.

[163] The 2022 Dismissal Application was filed without formal approval, although such applications were certainly encouraged by ACJ Rooke in his letter. An application to dismiss this action for delay in this context raises several genuine and complex issues, is not hopeless or abusive, and has a reasonable chance of success. I grant CIBC Trust approval to proceed notwithstanding its non-compliance with the then existing protocols in 2022.

[164] There is also nothing abusive or improper with CIBC Trust updating the two applications and repackaging them for convenience into an amalgamated application. The Proposed CIBC Trust Strike/Dismissal Application may proceed. The hearing of the Proposed CIBC Trust Strike/Dismissal Application will, in effect, also be the hearing of the 2017 Strike Application and the 2022 Dismissal Application.

c. Proposed CIBC Trust Action #2 Amendment Application

[165] I consider Kostic’s Fiat Request in the context that I have permitted the Proposed CIBC Trust Strike/Dismissal Application to proceed and Kostic will have the right to provide response evidence. In

response to the striking aspect of the Proposed CIBC Trust Strike/Dismissal Application, I expect she will provide evidence as to why she did not file the action until 2017 and did so contrary to a court order and before receiving a decision on her 2017 Fiat Request. In response to the dismissal aspect of the Proposed CIBC Trust Strike/Dismissal Application, I expect she will provide evidence about post-2017 activity in this action and other Case Managed Actions. In that context, I find that the Proposed CIBC Trust Action #2 Amendment Application will not significantly add to the likely record before the Court.

[166] Further, while I am satisfied CIBC Trust's Proposed Strike/Dismissal Application has a reasonable chance of success, it raises genuine issues and I am not satisfied that it is inevitably going to succeed. Therefore, I cannot say that CIBC Trust's applications renders Kostic's amendment application completely hopeless. If Kostic's action survives the CIBC Trust application, Kostic should be allowed to have the Court consider her proposed amendments. While at least some of the proposed amendments are not likely to be granted, and could be refused to proceed at this stage, I find it will be more efficient in the circumstances, if necessary, to address all the proposed amendments in the context of a full application record.

[167] In these unique circumstances, I grant Kostic permission to file her Proposed CIBC Trust Action #2 Amendment Application, on the basis that it will be part of the same hearing as CIBC Trust's application, but will be decided after the Proposed CIBC Trust Strike/Dismissal Application because CIBC Trust's application may render Kostic's application moot.

[168] Notwithstanding this permission, I direct Kostic to consider scoping down her proposed amendments before the application is filed, and to obtain advice about some of the amendments which may be improper and unlikely to be allowed. She has my permission to amend her proposed amended statement of claim to reduce the number and scope of the amendments, having the benefit of these Reasons which touch on some issues addressed in the proposed amendments. Failing to do that may result in cost consequences if her proposed amendments, or some of them, are not ultimately permitted.

F. What, if any, Fiat Requests Should be Granted with Respect to the Proposed Service Validation Application and the Proposed Potts Application?

1. Background

[169] The materials I received in response to my December 2024 request for information, including Potts' January 15, 2025 response, left me unclear about Potts' involvement or status in the 0601 Action. I added this to the agenda for the applicable CMCs. Potts attended at least part of the CMCs and made submissions. In Endorsement #7, I provided Potts a deadline to provide a Fiat Request if she seeks to "set aside being noted in default, or relief relating to not being served with the statement of claim". I also provided Piikani Nation a deadline if it sought an order validating service.

2. Positions

[170] Piikani Nation seeks to file the Proposed Service Validation Application to validate service of the statement of claim filed on November 15, 2006 under rule 11.27. It argues its proposed application has merit, supported by an affidavit of service (**Larsen Affidavit**) indicating Potts was personally served on November 16, 2006. Potts did not formally respond to Piikani Nation's Fiat Request, but it is clear from her own Fiat Request that her position and evidence is that she was not in fact served.

[171] The Proposed Potts Application seeks numerous remedies, including: (1) setting aside her noting in default; (2) striking the ASOC against her; (3) requiring Piikani Nation to provide particulars; (4) ordering Piikani Nation to pay retroactive indemnity for costs; (5) ordering advance costs for her legal defence and preparation of her application; (6) declarations; and (7) costs. She relies on, among other things, rule 9.15(3). She asserts that she was never served with the statement of claim or the ASOC and that she meets the test for setting aside noting in default as stated in *Kraushar v Kraushar*, 2019 ABCA 186 at para 5.

[172] Piikani Nation argues that, with respect to the noting in default, the Proposed Potts Application is hopeless given the Larson Affidavit, an affidavit Potts swore in Federal Court proceedings acknowledging that she was aware of the statement of claim, and her participation in the 0601 Action (including being questioned for and making admissions in discovery, and a 2025 affidavit). Piikani Nation argues that Potts cannot meet the test for setting aside a noting in default, as articulated in *Yehya v Thomas*, 2019 ABCA 164 at para 11 because, among other things, she hasn't presented an arguable defence, no valid excuse for not filing a defence has been offered, and she has delayed nearly 18 years in seeking relief.

3. Decision and Discussion

[173] The context to these matters includes:

- (a) the statement of claim was filed November 15, 2006;
- (b) the Larsen Affidavit states that “Janet Potts” was served by leaving the statement of claim with her. Potts denies she was ever served;
- (c) Potts has never filed a statement of defence in the 0601 Action;
- (d) on January 2, 2007, a Praecipe to Note in Default was filed against Potts;
- (e) on August 1, 2012, a Noting in Default in Form 14, as contemplated in rule 3.36(1), was filed against Potts;
- (f) as noted earlier, on February 9, 2018, the ASOC was approved by CMJ Nation. It is not clear to me whether Potts had notice of this application or participated in it; and
- (g) on March 1, 2018, the ASOC was filed. It is unclear if this was ever served (or attempted to be served) on Potts.

[174] With respect to the Piikani Nation's Proposed Service Validation Application, I agree with Piikani Nation that it has a reasonable chance of success given the Larsen Affidavit and other materials. However, I am unclear about the utility of this application and how it advances the purpose and intention of the rules as set out in rule 1.2. The statement of claim for which Piikani Nation seeks validation of service was later amended by the ASOC in 2018. As noted, Piikani Nation has not offered any proof that the ASOC was served on Potts after it was filed, and has not addressed whether it was required to be served on Potts under rule 3.62(2)(b). That is, it has not addressed what, if any, effect the amendment had on the prior noting in default.

[175] Further, on my review of the ASOC, there remain no specific allegations identified as being made against Potts, and no particulars of damages suffered as a result of any conduct of Potts, yet she remains a defendant. Other than para 7 of the ASOC, Potts is not specifically mentioned in the ASOC. Paras 16 of the ASOC pleads that “some” of the Plaintiff’s councillors “conspired and plotted”, but does not identify Potts as one of them. Also, this general reference to conspiracy is never mentioned again in the ASOC. Paragraph 61 particularizes losses incurred by other breaches by the “Defendants” (which would include Potts), but no particulars are provided in respect of any Potts conduct.

[176] I am presently unclear about the utility of validating service for a since-amended statement of claim, in respect of a defendant where, at the request of the plaintiff, seven years ago the Court approved an amendment removing any specific allegations against that defendant. However, that does not necessarily render the proposed application hopeless or not having a reasonable chance of success.

[177] With respect to the Proposed Potts Application, I start with her request to set aside the noting in default and to strike the claim against her for improper service and “no cause”.

[178] With respect to setting aside the noting in default, in addition to the principles for setting aside a noting in default set out in *Kraushar* at para 5 and *Yehya* at para 11, the Court of Appeal more recently also noted, after citing *Kraushar*, that “the court retains discretion to grant relief where fairness requires”: *Hunt v Riehl*, 2024 ABCA 298 at para 5.

[179] I find that the setting aside of the noting in default/striking claim aspects of the Proposed Potts Application have a reasonable chance of success, and are consistent with identifying the real issues in dispute (including, for example, whether she remains or should remain in the 0601 Action). Those aspects should proceed.

[180] As noted, regardless of whether Potts was served with the statement of claim (which she disputes), Potts’ evidence is that she was never served with the ASOC and this was not rebutted by Piikani Nation in its response. Even if Potts is found to have been served with an earlier version of the statement of claim in 2006, the subsequent facts raise real issues that warrant an application. Further, as noted, there are no specific allegations made against Potts in the ASOC. Whether a pre-ASOC noting in default precludes her from applying to strike a claim that does not make allegations against her is an issue that warrants her application proceeding. Paragraphs 1(a), (b) and (g) of the Proposed Potts Application relief are permitted to proceed.

[181] As for the other relief, as set out in paragraphs (c) through (f) of the Proposed Potts Application, I do not permit this to proceed at this time as it is not efficient. It is efficient to first see if Potts will remain in the 0601 Action and, if she does not, her other relief will be moot. If Potts remains in the 0601 Action after the permitted part of the Proposed Potts Application is decided, she can consider whether to resubmit a Fiat Request dealing with the ongoing conduct of the 0601 Action.

[182] I encourage Piikani Nation and Potts to consider immediate resolution of the 0601 Action vis a vis Potts. Failing resolution, Piikani Nation will be permitted to file the Proposed Service Validation Application but is warned that there may be cost consequences against it, even if it is successful, and even if Potts is self-represented, if I later find (after hearing full submissions on a full record) that it was a wasteful application that does not advance the 0601 Action in accordance with rule 1.2.

[183] The permitted aspects of the proposed Potts Application and the Proposed Service Validation Application shall proceed together.

G. What, if any, Fiat Requests Should be Granted with respect to Particulars and Discovery in the 0601 Action?

1. Background

[184] During and leading up to the CMCs for these actions, it became apparent that there were numerous remaining disputes amongst the parties to the 0601 Action with respect to particulars and discovery (including ongoing questioning, interrogatories, undertakings, and records). Accordingly, in Endorsement #7, I directed, among other things:

- (a) all parties to provide me information they provided in response to the direction made by CMJ Graesser at para 143 of *2023 ABKB 710* (Endorsement #7 at para 59);
- (b) all parties to provide outstanding undertakings (Endorsement #7 at paras 17, 61(a), (b));
- (c) Piikani Nation to provide and file misrepresentation particulars (Endorsement #7 at para 22);
- (d) Piikani Nation to provide gain particulars (Endorsement #7 at para 17);
- (e) the parties to provide Fiat Requests if there were any disputes about entitlement to conduct further questioning, or the format thereof (Endorsement #7 at para 61(c));
- (f) dispensing with the need to provide a Fiat Request to apply to compel further and better answers to undertakings or questions refused or objected-to, but requiring an application to be filed (Endorsement #7 at para 61(d)); and
- (g) directing the parties to provide any Fiat Request to compel production of records not yet produced (whether from a party or third party) (Endorsement #7 at para 61(f)).

[185] Since Endorsement #7, I have received numerous Fiat Requests related to these matters.

2. Positions

[186] CIBC Trust seeks continued questioning of Kostic. It asserts that Kostic refused to attend for a day of questioning on April 26, 2019, over six years ago. Following Endorsement #7, the parties corresponded about Kostic's further questioning by CIBC Trust. In her response on June 26, 2025, Kostic stated that a motion to remove Piikani Nation's corporate officer²⁶, and "all the required first steps must occur" before she will agree to be questioned.

[187] Piikani Nation seeks to compel Kostic to respond to her undertakings #71-84, and then to question her on the answers to those undertakings in the form of written interrogatories or other approved format. Kostic's response raises several issues, including the alleged surreptitiously obtained approval

²⁶ There is no such application or Fiat Request in this regard of which I am aware.

for the ASOC and concerns about the Gains Particulars and the June 2025 Letter, among other things. Kostic's position is that nothing remains outstanding.

[188] The Proposed Kostic Particulars/Discovery Application, in summary, seeks responses (or better responses) to outstanding undertakings and interrogatories, and further particulars about alleged misrepresentations, damages, and gains. Kostic asserts that each of Piikani Nation, CIBC Trust, and RJL have failed to answer undertakings/interrogatories. She further complains that the Damages Particulars, Misrepresentation Particulars, and Gains Particulars are insufficient and do not comply with the Court's directions. She points to an August 14, 2024, email from CMJ Graesser that stated, "You will not need leave to apply for better particulars if the particulars [Piikani Nation] provides at the end of the month are inadequate".

[189] CIBC Trust, Piikani Nation, and RJL all take issue with Kostic's Particulars/Discovery Application Fiat Request because she does not identify exactly which undertakings and interrogatories she says have not been answered or properly answered. They also point to the scope and nature of Kostic's proposed affidavit, which purports to seek additional relief not in the Proposed Kostic Particulars/Discovery Application. RJL asserts it has fully discharged its discovery obligations, and takes issue with the costs claimed in the application.

[190] Piikani Nation asserts that this Kostic Fiat Request reflects her misunderstanding of the role and purpose of interrogatories, undertakings, particulars, and notices to admit. It points out that this is the sixth time she has requested particulars or admissions. Piikani Nation's position is that the Fiat Request is procedurally improper and an abuse of process.

[191] The Proposed Kostic Records Application seeks, in summary, records relating to (1) a portfolio review conducted after she moved from CWM to RJL; (2) records relating to the alleged "SWIFT transfer"; (3) records relating to CIBC Trust's involvement in accusations of fraud and embezzlement against Kostic; and (4) production of a Piikani Nation expert report.

[192] CIBC Trust and Piikani Nation both oppose the Proposed Kostic Records Application. CIBC Trust argues that Kostic has failed to provide a clear legal or factual foundation for the request for further records, she seeks records that are only relevant to the 0801 Action to which CIBC Trust is not a party, and she seeks privileged records (including the Navigant Report). Piikani Nation argues that it has produced all relevant and material records in its possession and the request for a Piikani Nation expert report is based on a misunderstanding about ACJ Rooke's October 17, 2016 approved amended litigation plan.

3. Decision and Discussion

[193] In 2019, CMJ Nation dealt with a flurry of matters relating to the discovery process, which I do not need to repeat or detail for the purposes of these Reasons. There may be some disagreement between Kostic and the other parties about what exactly occurred in that process, or what CMJ Nation decided. What is clear is that the process culminated with her December 9, 2019 order, which set a process for the next steps. I find that it will be more appropriate to address any effect of CMJ Nation's orders and processes, if necessary, in the context of applications on a full record.

[194] It is clear further court intervention is necessary to get the discovery process in the 0601 Action back on track. If possible, I would like to resolve as many of those issues as possible at one time, rather

than in a piecemeal fashion. I find that none of these Fiat Requests are hopeless or will unduly delay the matter. Rather, it is clear they need to be resolved to allow the matter to move forward.

[195] Having said that, the Proposed Kostic Particulars/Discovery Application Fiat Request cannot be approved in the proposed form. Kostic's proposed affidavit is improper. It is in an omnibus form and appears to attempt to detail the entire history of the matter, much of which is not relevant to the Proposed Kostic Particulars/Discovery Application. Further, it is duplicative of other proposed affidavits provided in relation to other Fiat Requests. It includes improper argument, advocacy, bald factual conclusions without backup support, references to other documents not appended or clearly identified, legal conclusions, and opinion: see *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd*, 2023 ABKB 659. Allowing Kostic's proposed affidavit to be filed would only invite time-consuming and wasteful applications to strike portions of it.

[196] Further, Kostic's Proposed Records Application and related Fiat Request are unclear as to which of the Case Managed Actions her application relates. Her Fiat Request references both the 0601 Action and the 0801 Action, but the proposed form of application only references it to be filed in the 0601 Action. It is unclear whether this was intentional or inadvertent. Further, I agree with Piikani Nation that its obligation to provide Kostic a litigation expert report has not yet crystallized and that part of this proposed application has no merit.

[197] Accordingly, I direct as follows.

[198] The Proposed CIBC Trust Discovery Application is approved for filing.

[199] The Proposed Piikani Discovery Application is approved for filing.

[200] The Proposed Kostic Particulars/Discovery Application is approved for filing, with these directions:

- (a) before filing, Kostic shall amend the Proposed Kostic Particulars/Discovery Application by adding an appendix detailing:
 - (i) for each party, precisely which undertakings or interrogatories she seeks answered or further or better answered (by undertaking or interrogatory number), and including an attached schedule of those undertakings/interrogatories and the responses received to date;
 - (ii) precisely which particulars she seeks in respect of misrepresentations, damages and gains, if any, beyond those set out in paragraphs 2(b)-(e) of the Proposed Kostic Particulars/Discovery Application; and
- (b) if she seeks to conduct further discovery based on the outcome of her application, Kostic may amend the Proposed Kostic Particulars/Discovery Application to include relief to conduct further discovery of CIBC Trust, RJL and Piikani Nation on the interrogatories / undertakings identified in the amended application, and her proposed format for that discovery; and
- (c) Kostic shall file, with her application, an affidavit that provides only factual evidence that addresses the issues engaged by her application, and does not purport, by way of affidavit,

to seek additional relief beyond what is in the approved application or which has been sought pursuant to other Fiat Requests. Any references to previously filed materials will be clear and courtesy copies of those materials will be provided to the other parties and the Court when the affidavit is filed. Kostic shall limit her requests to materials that are “relevant and material” as contemplated in rule 5.2; see for example: *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd*, 2024 ABKB 424 at para 46. Kostic’s failure to follow my directions may result in costs or a penalty.

[201] The Proposed Kostic Records Application is approved for filing, with the exception of para 2(c) related to the Piikani Nation expert report, which is not approved for filing. To address the confusion about which action in which she proposes to seek relief, Kostic has leave to amend the Proposed Kostic Records Application to include the style of cause in the 0801 Action, in the event she also seeks production of the requested records in the 0801 Action.

[202] These approved applications shall be dealt with together.

[203] There is some indication in the material provided that Kostic needs a further questioning/interrogatory process of Brian Jackson. The status of that is not clear to me. If Kostic intends to pursue this, then I will address this at the same time as these other applications. If she wishes to pursue this, Kostic has permission and is directed to include this relief in her amended Proposed Particulars/Discovery Application when it is filed.

H. What is an Appropriate Order or Direction?

1. Revisiting Certain Deadlines and Next Steps

[204] There are presently numerous deadlines and matters in the various Case Managed Actions. Based on the several applications permitted to proceed in these particular actions, it is clear that the deadlines I set in Endorsement #7 at para 61(g)-(k), with respect to the 0601 Action, need to be revised to accommodate the many applications the parties wish to bring, some of which I have permitted. The deadlines in those sub-paragraphs are vacated and shall be revisited in due course.

[205] The parties to the 0601 Action, Kostic-CIBC Trust Action #1, Kostic-CIBC Trust Action #2 and the 0801 Action are directed to attempt to reach an agreement on a litigation plan to accommodate the various applications (including the proposed required time for each), while also addressing finalizing discoveries and exchange of expert reports in the 0601 Action. If the parties are unable to reach agreement, will shall discuss it at our next CMC and I would ask the parties to provide me their respective proposed litigation plan/schedules at least one week in advance of the CMC (together with the agenda as per Endorsement #7 at para 71).

[206] Further, one of the agenda items at the next CMC will be determining the number of trial days required for the 0601 Action, and we will discuss whether it should be set down for trial.

2. Costs

[207] On August 8, 2025, in Endorsement #15, I confirmed to all parties in the Case Managed Actions that I would consider cost consequences related to Fiat Requests. I gave any party that had made a Fiat

Request, or opposed a Fiat Request, the opportunity to withdraw the Fiat Request (or their opposition to a Fiat Request), which could be done without costs consequences. Nobody took me up on that offer.

[208] Although the Fiat Requests addressed above did not involve an oral hearing, I received significant written materials under the Fiat Process and it is obvious the parties incurred time and expense in preparing and responding to the requests. In my view, cost consequences for Fiat Requests should be considered.

[209] Parties that are substantially successful are presumptively or *prima facie* entitled to costs: **2025 ABKB 481** at para 112; *JWS v CJS*, 2022 ABCA 63 at para 24; *McAllister v Calgary (City)*, 2021 ABCA 25 at para 21.

[210] In the matters addressed in these Reasons, I find:

- (a) Piikani Nation was successful in opposing the Proposed 0601 Action Striking Application and is *prima facie* entitled to costs from Kostic;
- (b) Kostic was successful in obtaining permission to file the Proposed Notice to Co-Defendant Application, which was opposed by RJL. Kostic was represented by counsel with respect to that Fiat Request and is *prima facie* entitled to costs from RJL;
- (c) Piikani Nation was successful in opposing the Proposed Summary Dismissal Application and is *prima facie* entitled to costs from Kostic;
- (d) Kostic and CIBC Trust had mixed success with respect to the Proposed CIBC Trust Action #1 Amendment Application and neither party is *prima facie* entitled to costs;
- (e) CIBC Trust was successful in obtaining permission to file the Proposed CIBC Trust Strike/Dismissal Application; however, it was not formally opposed by Kostic;
- (f) Kostic was successful in obtaining permission to file the Proposed CIBC Trust Action #2 Amendment Application over CIBC Trust's opposition, but was not represented by counsel with respect to that Fiat Request;
- (g) Piikani Nation was successful in obtaining permission to file the Proposed Service Validation Application, but Potts was also substantially successful in obtaining permission to file part of the Proposed Potts Application, giving rise to mixed success. Neither party is *prima facie* entitled to costs; and
- (h) CIBC Trust was successful in obtaining permission to file the Proposed CIBC Trust Discovery Application, Piikani Nation was successful in obtaining permission to file the Proposed Piikani Discovery Application, and Kostic was substantially successful in obtaining permission to file the Proposed Kostic Particulars/Discovery Application and the Proposed Kostic Records Application. In the circumstances, considering particulars and discovery issues globally there was mixed success and no party is *prima facie* entitled to costs. Costs related to these application are better addressed as part of those applications when the results of the applications are known. Accordingly, I defer costs related to these Fiat Requests until the hearing of those applications.

[211] I direct the following process for determining costs, in the event the parties cannot agree. Within 4 weeks of these Reasons, each party shall provide me and the other parties a written cost submission setting out their costs position. These submissions will be a maximum of 5 pages in letter format, single spaced (excluding authorities, offers, proposed bills of costs, or summaries of proposed reasonable costs actually incurred). Within 6 weeks of these Reasons, each party shall file and serve on the opposing party and submit to my office any response submission to the other parties' cost submission, to a maximum of 3 pages in letter format, single spaced (excluding authorities).

V. Conclusion

[212] I make the orders and directions noted above. The parties are directed to prepare forms of order in these actions reflecting my decisions. For those matters in which Kostic was not represented by counsel, the form of orders shall nonetheless be provided to her for her review and endorsement.

[213] There continue to be other Fiat Requests before me which are not addressed in these Reasons. Those will be decided in due course.

Dated at the City of Calgary, Alberta this 26th day of August, 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Robert J. Hawkes, KC
for Piikani Nation

Geoff Adair
for CIBC Trust Corporation and CIBC World Markets Inc

Shane B King
for Raymond James Ltd

William S. Klym
for Liliana Kostic for selected Fiat Requests

Liliana Kostic
Self-represented litigant

Janet Potts
Self-represented litigant