

# Court of King's Bench of Alberta

**Citation: Ewashko v Hugo, 2025 ABKB 489**

**Date:** 20250822  
**Docket:** 1503 08334  
**Registry:** Edmonton

2025 ABKB 489 (CanLII)

Between:

**Julie Ewashko and Aidan Ewashko (an infant) by his Litigation Representative Julie Ewashko and His Majesty in right of the Province of Alberta**

Plaintiffs

- and -

**Wouter Hugo, Etienne Groenewald and Covenant Health Owning and Operating St. Mary's Hospital**

Defendants

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**Reasons for Judgment on Interest and Costs  
of the  
Honourable Justice Michael J. Lema**

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## **I. Introduction**

[1] Where parties agree on damages in a medical malpractice case including interest to the date of agreement (shortly before the start of the liability trial), but the trial is adjourned for almost three years, and liability is ultimately found (2025 ABKB 295), are the successful plaintiffs entitled to further interest i.e. from the date of the agreement to the date of judgment?

[2] Does the entitlement to further interest (if any) turn on responsibility for the adjournment? If so, who was responsible?

[3] With the agreement providing for “Schedule C” costs for the successful parties, can the successful plaintiffs claim such costs amplified by a multiplier? Or by reason of exceeded settlement offers?

[4] Is the plaintiffs’ disbursement for one of its experts excessive?

[5] I find that the defendants were responsible for the adjournment, that further prejudgment interest of \$1,013,954 is payable, that post-November-11-2021 costs are limited to Schedule C (no multiplier or settlement-offers-exceeded effect), and that the challenged disbursement is not excessive.

## II. Background

[6] The background is outlined in 2025 ABKB 295, where I found the defendant physicians jointly liable for the damages suffered by both plaintiffs.

[7] Following the trial, I was advised of the parties’ agreement on damages, the material terms of which are as follows:

The Plaintiffs ... and the Defendants ... have agreed to the quantification of damages which will be awarded in this Action should the Plaintiffs be successful in proving liability against one or more of the Defendant Physicians.

...

If one or more of the Defendant Physicians are found liable, following trial and any subsequent appeal, the Parties have agreed on a global amount of damages payable by the physician(s) found liable for all Plaintiffs and claimants ... and including pre-judgment interest and court costs and disbursements to November 11, 2021, in the amount of \$10 million (“the Global Damages”).

...

Should the Plaintiffs be successful at trial, Schedule C costs and table disbursements incurred by the Plaintiffs after November 11, 2021 shall be addressed by the Parties at the conclusion of the trial.

...

[8] On additional interest, the plaintiffs argue that silence in the agreement on interest after November 11, 2021 means that further prejudgment interest under the *Judgment Interest Act* – from that date to May 13, 2025 i.e. the date of the liability judgment – is available.

[9] Per the defendants, the express reference to interest “... to November 11, 2021” implies that no interest would be payable after that date i.e. regardless of any adjournment of the trial or (in theory) judgment being in reserve for whatever period.

## III. Interest legislation

[10] Here are the potentially applicable parts of the *Judgment Interest Act*:

**2(1)** Where a person obtains a judgment for the payment of money or a judgment that money is owing, **the court shall award interest in accordance with this Part from the date the cause of action arose to the date of the judgment.**

**(2) The court shall not award interest under this Part**

- (a) on that part of a judgment that represents pecuniary loss arising after the day of judgment and that is identified by the court;
- (b) on interest awarded under this Act;
- (c) on exemplary or punitive damages;
- (d) on an award of costs in the action;
- (e) on money, or interest on that money, borrowed by a party to pay for expenses that are claimed as special damages;
- (f) on an amount of money that is
  - (i) paid into court and accepted, or
  - (ii) contained in an offer of judgment or an offer to settle made and acceptedin accordance with the *Alberta Rules of Court* in satisfaction of a claim;
- (g) on a judgment that is given on consent, unless agreed to by the parties;
- (h) where there is an agreement between the parties respecting interest;**
  - (i) where the payment of pre-judgment interest is otherwise provided by law.

**(3) If it considers it just to do so having regard to changes in market interest rates, the circumstances of the case or the conduct of the action, the court may**

- (a) refuse to award interest under this Part,**
- (b) award interest under this Part at a rate higher or lower than the rate set out in this Part, or**
- (c) award interest under this Part for a period other than the period provided for in this Part.**

...

**4(1) Interest awarded under this Part on non-pecuniary damages shall be calculated at the rate of 4% per year.**

**(2) Interest awarded under this Part on pecuniary damages and in debt or other actions shall be calculated, for each year or part of a year included in the period in respect of which the interest is payable, at the prescribed rate applicable to that year. [emphasis added]**

**(3) Before the beginning of each year, the Lieutenant Governor in Council may, by regulation, prescribe the rate to be applied under subsection (2) for that year. ...**

[11] Here are the potentially applicable parts of the *Judgment Interest Regulation*, Alta Reg 215/2011:

1 For the purposes of section 4 of the *Judgment Interest Act*,

(cc) the interest rate from January 1, 2021 to December 31, 2021 is prescribed at 0.2% per year;

(dd) the interest rate from January 1, 2022 to December 31, 2022 is prescribed at 0.2% per year;

(ee) the interest rate from January 1, 2023 to December 31, 2023 is prescribed at 3.8% per year;

(ff) the interest rate from January 1, 2024 to December 31, 2024 is prescribed at 5.15% per year.

(gg) the interest rate from January 1, 2025 to December 31, 2025 is prescribed at 4.26% per year.

#### IV. Interest analysis

##### A. Test for gauging whether exhaustive agreement on interest reached

[12] I start with the test for gauging whether the parties agreed on the issue of post-November-11-2021 interest. Per *Matic v Waldner*, 2016 MBCA 60 (SCC leave denied – 2017 CanLII 1341):

**[t]he standard for determining whether an agreement, written or oral, has been reached, is whether an “objective reasonable bystander”, looking at all the material facts, would say so.** GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) describes the test as follows (at p 15):

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is **whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties’ intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.** As Fraser C.J.A. said in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.* [2003 ABCA 221 at para 9, 330 AR 353]:

the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, **where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of**

**that contract can be determined with a reasonable degree of certainty.** [emphasis added]  
[para 55] [bold emphasis added]

**B. “No agreement on prejudgment interest” cases**

[13] Next are cases exploring the significance of no agreement on prejudgment interest. Does that mean no such interest is payable? Or that *Judgment Interest Act* prejudgment interest applies?

[14] The weight of Alberta case law is that agreement silence on prejudgment interest does not mean no interest; it instead means *Judgment Interest Act* prejudgment interest.

[15] Here see *James H Meek Jr Trust v. San Juan Resources Inc.*, 2005 ABCA 448 (CanLII) (paras 51-61) (silence on interest in agreement resulted in interest payable per the *JIA*).

[16] See also *Dabbs v 1567877 Alberta Ltd*, 2013 ABQB 427 (Bensler J.) (paras 37-52 – in particular, paras 51 and 52):

**The Defendants argue that the *Judgment Interest Act*, *supra*, should not apply to Mr. Dabbs’ repayment because an agreement regarding interest had already been made between the parties as evidenced in the November 2 Agreement. Though “shareholders loan interest” was included in the that Agreement, there was effectively no agreement between the parties concerning interest at any time leading up to settlement and summary judgment. As such, s 2(2)(h) of the *Judgment Interest Act* does not preclude me from awarding interest pursuant to Part 1 of the Act, or from exercising my discretion to award interest at a different amount. Given the uncertainty surrounding interest throughout the dealings of the parties I decline to award interest at 12%, or another rate that I deem appropriate in these circumstances, as suggested by Mr. Dabbs through *Poon Estate*, *supra*. Interest should be awarded in the manner set out in the *Judgment Interest Act*.**

**Mr. Dabbs shall receive interest at the appropriate rate as set out in the *Judgment Interest Regulation*, Alta Reg 215/2011, pursuant to s 4 of the *Judgment Interest Act*.** [paras 51 and 52] [bold and italics emphasis added]

[17] And *Freyberg v. Fletcher Challenge Oil and Gas Inc*, 2007 ABQB 353 (Kent J.):

Lady Freyberg’s case can be distinguished from *Bank of America Canada v. Mutual Trust Co*. Although the lease has terminated and no longer governs the parties, **a review of the lease shows that it did not contain an interest provision in the event of a failure to make royalty payments. In fact, the lease is silent with respect to the payment of interest on damages of any kind.** As such, I do not find that any party liable to pay damages either “agreed, knew, or should have known” that the money now claimed by Lady Freyberg would be calculated using compound interest.

...

**... The appropriate interest rate is ... that prescribed by the *Judgment Interest Act*.**  
[paras 188 and 190] [emphasis added]

[18] And *Ridge Rock Construction Ltd. v. Beckmyer Builder Ltd.*, 2006 ABQB 850 (Hughes J. as she then was):

**As I have found** the second agreement rescinded the first agreement and **the second agreement is silent as to interest, I find Ridge Rock** has not established it is entitled to interest at 2% per month. Rather, it **is entitled to interest pursuant to the *Judgment Interest Act*, RSA 2000, c. J-1.** [para 47] [emphasis added]

[19] And *Morrison Petroleums v. Phoenix Can Oil* (1997), 1997 CanLII 24596 (Moshansky J.):

In my view the question of the entitlement of the operator here to charge interest in the terms of Clause 106 is clouded by the **less than satisfactory evidence as to proof of delivery of notice of such intention and the vagueness of the provisions relied upon by the plaintiff.** Because the plaintiff was the author of the Participation Agreement any doubt as to the meaning of its provisions ought to be resolved against it. I therefore conclude that there should be **no interest award under Clause 106 of the PASC 1988 Accounting Procedure. However, the plaintiff should logically be entitled to interest pursuant to the provisions of the Judgment Interest Act with respect to the net judgment recovered by it,** to be calculated from January 2, 1991. ... [para 352] [emphasis added]

[20] And *Deer Valley Shopping Centre Ltd v. Sniderman Radio Sales & Services Ltd*, 1989 CanLII 3185 (AB KB) (McBain J.):

Mr. Groh, for the defendant, **contends that if I decide that s. 13.04 of the Sniderman lease is unenforceable, the plaintiff is nonetheless unable to obtain interest pursuant to the *Judgment Interest Act*, c. J-0.5, statutes of Alberta.**

That Act provides:

2(1) Where a person obtains a judgment for the payment of money or a judgment that money is owing, the court shall award interest in accordance with this Part from the date the cause of action arose to the date of the judgment.

(2) The court shall not award interest under this Part ...

(h) where there is an agreement between the parties respecting interest...

And so Mr. Groh argues that as the court is required by s. 2(2)(h) of the Act not to award interest "where there is an agreement between the parties respecting interest", none can here be awarded as there was such an agreement. Where there is such an agreement, as contained in the Sniderman lease, even where the court has held that such agreement is unenforceable no interest under the Judgment Interest Act is to be awarded.

I think otherwise. **The obvious intention of the Act is to avoid a double assessment of interest, one agreed to by the parties in their agreement in addition to interest as provided for in the Act. As I have decided that s. 13.04 of the Sniderman lease is not enforceable, it appears to me that the intent of**

**the Act to award interest under it must be observed. A successful plaintiff is to have interest under the Act in the percentage set for the periods of time by the Lieutenant Governor in Council by regulations. There will be no compounding effect because the agreement is not enforceable.** The plaintiff shall have interest pursuant to the Act. [paras 146-149] [emphasis added]

[21] In other words, no agreement as to prejudgment interest meant *JIA* interest, not no interest.

[22] Same in *Delcor Painting & Flooring Ltd v 20/20 Properties Inc*, 2009 ABQB 670 (Manderscheid J.):

The Plaintiff claims interest on any damages awarded at the rate of two percent per month from October 1, 2004 to the date of judgment. In this respect, the Contract contains an interest provision in paragraph 3.1, which provides the following:

If the Owner fails to make the payments to the contractor as they become due, or pursuant to any award by arbitration or by a court, interest at the rate of 2% per month, including earned interest, shall also become due and payable until payment. Such interest shall be calculated and added to any unpaid amounts monthly.

**Interestingly, the Contract is silent on the interest payable by the Defendants with respect to any loss or damages incurred by the Plaintiff as a result of a breach or repudiation of the Contract by the Defendants.** In my mind, by the very wording of paragraph 3.1, any interest payable under the Contract must be in reference to a failure by the Defendants to make the required payments under the Contract. The fact that the wording “pursuant to any award by arbitration or by a court” immediately follows the wording which references a failure by the Defendants to make the required payments indicates that the parties agreed that if the Defendants failed to make the payments under the Contract, and such failure to pay resulted in an award by arbitration or by a court, then the interest as specified in paragraph 3.1 would be payable. **Paragraph 3.1 does not provide that interest in the amount stipulated in the Contract will apply to any award by a court for damages incurred by the Plaintiff as result of a breach or repudiation of the Contract by the Defendants. Accordingly, the Plaintiff is entitled to interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1., on its damages in the amount of \$219,006.48 from October 1, 2004 to the date of judgment.** [paras 50 and 51] [emphasis added]

[23] And in *Costain Ltd. v. Falcon Developments Ltd*, 1991 CanLII 5953 (AB KB), featuring circumstances very similar to the present case. Medhurst J. directed *JIA* prejudgment interest for a period not “interest addressed” by the parties:

There is provision for awarding interest under the *Judgment Interest Act* on moneys owing from the date the cause of action arose to the date of the judgment. It was argued on behalf of the defendants that no award should be made under this Act as s. 2(2)(h) states that:

(2) The court shall not award interest under this Part

(h) where there is an agreement between the parties respecting interest.

**The parties did make an agreement respecting interest but only up to the closing date, December 22, 1983. There was no agreement made for payment of interest after that date.**

**In my view the court can award interest under this Act from April 1, 1984, which is the date the Act came into force.**

Section 8 of the Act provides that the court may allow interest under s. 15 of the *Judicature Act*, R.S.A. 1980, c. J-1, if the cause of the action arose before April 1, 1984. In an article entitled "Statement of Interest in Contracts Generally," published in (1984), 22 *Alta. L. Rev.*, E. Mirth states at p. 142:

**Where there is no stipulation as to the rate of interest after maturity of an obligation payable on a specified date interest may nonetheless be allowed if there is no equitable ground for withholding it; if the Judicature Act is applied, it is payable at the rate stipulated for prior to maturity.**

The only equitable ground for refusing to allow interest might be for laches on the part of the plaintiff in prosecuting the action. However, on consideration of all the circumstances, I believe both parties are equally to blame for the long delay in proceeding with the action.

Accordingly, I believe that in this action for specific performance where the plaintiff states that it is ready and willing to complete the sale then **the balance owing under the agreement should include an award for interest.**

...

Tab 3 of Ex. 39 is a **calculation of interest owing based on the *Judgment Interest Act***. [paras 44-49 and 51] [emphasis added]

[24] And *Ranger v. Triovest Realty Advisors*, 2024 ONSC 6593 (Henderson J), materially identical to the present case:

On May 4, 2020, the parties agreed to settle the plaintiff's damages at "\$65,000 plus costs and disbursements" but the parties did not specify a breakdown of this figure. I accept that the plaintiff's damages at that time included prejudgment interest from the date on which the statement of claim was issued to the date of the settlement. Therefore, I find that the plaintiff is not entitled to any prejudgment interest on this amount prior to the date of the settlement.

**I further find that, as of May 4, 2020, neither the plaintiff nor the defendants put their minds to the issue of the plaintiff's right to prejudgment interest on the settlement figure from the date of the settlement to the date of the judgment.**

**I do not accept the defendants' position that the settlement agreement in May 2020 resolved any claim that the plaintiff may have for prejudgment interest from the settlement date until some distant future date on which the**

**defendants would be required to pay the funds to the plaintiff, if the court so ordered.**

My trial decision confirms that the defendants are liable to the plaintiff, and therefore the plaintiff is entitled to her damages, which includes general damages, special damages, and interest. **In my view, it would be extremely unfair to the plaintiff if I were to find that the plaintiff was not entitled to any prejudgment interest after the date of the settlement considering that the plaintiff has still not received payment of any of the settlement amount more than four years after the agreement was reached. To make such a finding in the circumstances would encourage the defendants to withhold payment of the settlement funds for as long as possible, knowing that as each day passes, the true value of the plaintiff's claim would be diminished.**

Accordingly, I find that the plaintiff is entitled to prejudgment interest at the rate of five percent per year on the sum of \$65,000 from May 4, 2020 to May 2, 2024. I calculate this prejudgment interest to be \$3,250 per year or \$8.90 per day. This amounts to prejudgment interest totaling \$12,976.20 as of May 2, 2024, the date of judgment. [paras 12-16] [emphasis added]

[25] And *Moore Holdings Limited v Drover*, 2020 NLSC 11 (Handrigan J.):

Moore Holdings relies on section 3 (2) (h) of this province's *Judgment Interest Act*. It reads: "The court shall not award interest (h) where there is an agreement between the parties respecting interest...". Moore Holdings claims that the mortgage contract is an "agreement between the parties" to pay the contractual rate of interest of 15%. Mr. Drover points out correctly that he drew the mortgage between Moore Holdings and CBS Land Development, with Mr. Clarke, as guarantor; and that he is not a party to the contract. Thus, there is **no agreement between him and Moore Holdings to pay the contractual rate of interest**. Mr. Drover is right.

Section 3 (3) of the *Act* allows this Court to order interest other than the default amount calculated in section 4 of the *Act*, "[w]here it is proven to the satisfaction of the court that it is just to do so having regard to the circumstances...". I hear nothing here that justifies exercising my discretion under section 3(3).

Accordingly, **I resort to the dictate in section 3(1) of the Act and order Michael Drover to pay interest to Moore Holdings on \$3,155,000 "calculated in accordance with this Act"**, from April 15, 2015 to December 6, 2016.

Counsel suggest that I can leave its calculation to them; and I will, although they have leave apply if they cannot agree on the amount. [paras 37 and 38] [emphasis added]

[26] And finally *Jasmine Construction Ltd v Adam*, 2010 BCSC 1507 (Masuhara J.)

According to s. 1(1) of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, the court is obligated to add court-ordered interest to a pecuniary judgment, subject to certain exceptions.

- 1) Subject to section 2, a court **must** add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid

at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order. [Emphasis added]

The relevant exceptions from Section 2 are as follows:

**The court must not award interest under section 1...**

**(b) if there is an agreement about interest between the parties,...**

**(d) if the creditor waives in writing the right to an award of interest,...**

The purpose of the *Court Order Interest Act* is to pay the creditor interest on monies “withheld” by the debtor: *Crown Zellerbach Canada Ltd. v. British Columbia*, [1979] B.C.J. No. 1513 (C.A.). **Unless a person falls within the exceptions, the court is obligated to make an award of interest.**

According to *Hardwoods Specialty Products LP v. Rite Style Manufacturing Ltd.*, 2006 BCCA 139, [2006] B.C.J. No. 537 (C.A.), **there must be a factual basis for inferring an “agreement to pay interest”.**

On the facts, I cannot find that this situation falls within any of the relevant exceptions to an award of interest.

**In order to fit within the exception, the Settlement must contain a clear agreement regarding interest or the plaintiff must have waived, in writing, its right to an award of interest. There was no such agreement. The Settlement is silent on interest. The result is that, on the one hand, the court *must* award interest, and on the other hand, there is no “agreement about interest” to supersede that award.**

Furthermore, one cannot imply that the plaintiff expressly waived his right to an award of interest entirely. **The wording “full and final settlement” does not expressly address the issue of pre-judgment interest so as to constitute a waiver.**

Also, it would be in line with the purposes of the *Court Order Interest Act* to order the plaintiff some pre-judgment interest. They have been out of pocket \$44,183.81 since December 27, 2004. [paras 14-21] [emphasis added]

### **C. Application of those principles here**

[27] Applying the objective bystander test and the guidance of the “no agreement on prejudgment interest” cases, I find for the plaintiffs, allowing prejudgment interest after November 11, 2021, for these reasons.

[28] If the parties had intended that no further interest be payable after November 11, 2021, they would not have said that interest was agreed “to [that date].” (On this aspect, the punctuation of the key sentence of the global damages agreement shows that the phrase “to November 11, 2021” applies to both prejudgment interest and court costs and disbursements. Here is the key segment: “ ... the Parties have agreed on a global amount of damages ... *including pre-judgment interest and courts costs and disbursements to November 11, 2021*, in

the amount of \$10 million ...” (emphasis added). The absence of a comma after “interest” signals that both elements (interest and costs) are linked to or modified by the date element.)

[29] Instead, they would have stated that all interest (or at least all prejudgment interest) was included in the global figure i.e. with no “as of” or “to” date e.g. “including all prejudgment interest.” Or said that “no further prejudgment interest shall be payable.” Or otherwise indicated that no further interest was contemplated.

[30] Instead, the agreement (as seen above) covered interest up to the noted date but was silent as to interest thereafter. Nothing in the agreement signals that the parties intended the reference to “interest ... to November 11, 2021” to be a cap on prejudgment interest.

[31] I find that the “to [date]” element signals the opposite i.e. “we have agreed on interest up to November 11, 2021; we have not agreed or addressed interest afterwards.”

[32] In other words, agreeing that a global settlement includes interest to a specific date implicitly leaves open the issue of interest after that date.

[33] This is particularly so given the scale of the agreed-on damages, interest, and costs here i.e. \$10 million. Is it likely that the plaintiffs or any rational claimant would have agreed to no further interest after that date, on such a sum, regardless of how long it would take to obtain the trial judgment e.g. regardless of adjournments and for how long and regardless of the time the judgment was on reserve?

[34] If the defendants truly intended a cap on prejudgment interest regardless of the timing of the trial judgment, they should (at minimum) have suggested clear language to that effect e.g. as suggested above.

[35] The apparently different treatment of costs and interests here is not such an indication i.e. it does not mean that interest was capped at the “as of” date i.e. in contradistinction to the express reservation as to trial costs after that date.

[36] Without knowing with precision what further litigation steps remained (e.g. whether any further pre- or mid-trial applications were necessary) or even how long the trial would run, the parties reasonably agreed that costs after November 11, 2021 would be addressed by the trial judge i.e. once the litigation steps and how long they took were known.

[37] However, with interest, the mechanics of calculation are those provided by the *Judgment Interest Act* i.e. the default position, per ss 2(2) (above), that prejudgment interest is payable.

[38] I find that an agreement on prejudgment interest to an identified date and silence as to further prejudgment interest is the equivalent, for the “after” period, of complete silence on interest as explored in the above cases i.e. absent any indication that the parties intended the agreed-on interest to be a cap on further prejudgment interest.

[39] I find no such (capping) intention here.

[40] By way of contrast, another species of cases concern agreements expressly providing an interest rate for the prejudgment period. Alberta decisions here have uniformly interpreted para 2(2)(h) *JIA* as giving precedence to the agreed-on rate i.e. over the default *JIA* rate.

[41] Dario J. explained this in *Strand v Strand*, 2014 ABQB 754:

... had the Plaintiff made out the breach of contract claim for the loaned amounts, the 10% interest owing would be an outstanding debt and should be subject to some form of interest. **What section 2(2) [(h)] is structured to prevent is a court awarding judgment interest at the judgment interest rate when the parties have agreed to a different amount.** As the interest accrued forms part of the outstanding debt, it too is subject to interest and **since the parties have agreed on the 10% rate, that is the rate chargeable against the outstanding interest (rather than the judgment interest amount statutorily set).** In this way, by charging 10% interest on the accrued interest amount, it would honor the 10% rate agreed to by the parties as well as honor the prohibition in section 2.2(h) of the *Judgment Interest Act*. [para 188] [emphasis added]

[42] See also *Brennenstuhl (Estate) v. Trynchy*, 2008 ABQB 256 (Graesser J):

In my view, **the *Judgment Interest Act* has no application to prejudgment interest in this case. Interest is provided for under the provisions of the lease option agreement.** I have found that agreement is valid and enforceable. I have no general discretion to disallow interest which has been contractually provided for. **Interest in this case is dealt with under s. 2(2)(h) of the Act, which provides that the Act has no application to interest that has been validly contracted for.** As a result, s. 2(3) of the *Judgment Interest Act* cannot apply, as the award of interest here is not under the Act.

...

As a result, Mr. Prylowski is entitled to rent until February 15, 2008. Mr. Prylowski is entitled to simple **interest on rental arrears at 16 percent per annum until the date of judgment.** [paras 36 and 38] [emphasis added]

[43] And *Alberta Permit Pro v. Booth*, 2007 ABQB 562 (Read J.) (para 146) affd 2009 ABCA 246 and *Bidell Equipment LP v Caliber Midstream GP LLC*, 2019 ABQB 296 (Hunt McDonald J.) (paras 162-163) affd 2020 ABCA 478 (SCC leave denied 2021 CanLII 52016).

[44] The parties here did not agree to an actual, and different, post-November-11-2021 prejudgment interest rate.

[45] But neither did they agree to no prejudgment interest after that date.

[46] The defendants did not point to any case where the “agreement otherwise” under para 2(2)(h) *JIA* was that no prejudgment interest was payable.

[47] In theory, if parties so agreed, the agreement would presumably trump the default *JIA* position.

[48] As explained above, the defendants have failed to show such an agreement here.

[49] With no agreement on a different prejudgment rate and no agreement that no prejudgment interest is payable after November 11, 2021, we are instead in the silence zone when it comes to prejudgment interest after that date, meaning that, as reflected in the no-agreement cases above, the default *JIA* position -- i.e. interest under that Act -- applies.

#### D. Denial or reduction of interest for plaintiff delay

[50] The defendants argue that, in any case, the plaintiffs were responsible for the adjournment and the resulting delay and so should be deprived of prejudgment interest over that span.

[51] The plaintiffs deny responsibility for the adjournment and delay and, in any case, that any deprivation of interest is warranted.

[52] As noted above, the *JIA* contemplates interest denial in some circumstances:

2(3) If it considers it just to do so having regard to changes in market interest rates, the circumstances of the case or the conduct of the action, the court may

(a) refuse to award interest under this Part,

(b) award interest under this Part at a rate higher or lower than the rate set out in this Part, or

(c) award interest under this Part for a period other than the period provided for in this Part.

[53] Delay by a party may result in interest denial or reduction. Per *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2019 ABCA 276:

The Master granted a procedural order, as is contemplated by R. 4.31(1)(a) following an unsuccessful application to dismiss for delay. Such an order should routinely be made. In addition, **there are other remedies for delay available to the trial judge. The trial judge might possibly deny the plaintiff interest for some of the periods of delay:** *Judgment Interest Act*, RSA 2000, c. J-1, s. 2(3); *Baud Corporation, NV v Brook*, 1979 CanLII 197 (SCC), [1979] 1 SCR 677 at pp. 679-80; *Rayani v Yule & Company (Hong Kong) Limited*, 1996 ABCA 35 at paras. 27-9, 36 Alta LR (3d) 217, 178 AR 231. Any award of costs could also be moderated in the appropriate case. Those issues are left for the trial judge.

[54] In *Rayani* (cited above), the Court of Appeal elaborated:

The trial judge held that **the injured plaintiff had delayed in prosecuting his lawsuit. Therefore the trial judge denied two years' worth of pre-judgment interest**, rather than trying to calculate precise periods with precise interest rates. There is no doubt that **he had the power to disallow some of the interest:** see the *Judgment Interest Act* s. 2(3).

However, the plaintiff argues for full interest because the defendant Yule (or its liability insurer) had the use of the money throughout and could earn interest on it. There is some weight in that argument, but to my mind other countervailing factors outweigh it.

In the first place, **the policy of s. 2(3) is obviously to encourage promptness, and (if need be) to penalize delay by denying interest. In the second place, the plaintiff has no right to treat the defendant as its compulsory banker.** A torts claim should not be treated like a savings account, idly drawing interest as long as the holder of it wishes.

The third factor is practicality. **If the damages in question here were millions of dollars, then it might be worth doing more exact accounting.** The plaintiff could lead evidence about the rates of interest which each of the parties (plaintiff and defendant or defendant's insurer) could have earned and did earn on its money (or paid on its bank loans) month by month through the whole period. One could then compare those amounts to the varying pre-judgment interest rates (pecuniary and non-pecuniary) allowed by regulation under the *Judgment Interest Act*. The plaintiff might even lead evidence of inflation, and the rate of "real" interest. A trial judge could then see if anybody had made a profit out of this whole exercise and, if so, for what period. He could then hear detailed evidence on the delays month by month through the whole lawsuit, and decide whose fault each piece of delay was. Then the judge could calculate a net figure attributable to the delay period.

**Aside from some indications of delay, we do not begin to have such evidence here.** The interest questioned is a very few thousand dollars. Retrying that issue to lead that evidence would be grossly uneconomical. The cure would be worse than the disease, even fatal. Neither counsel sought a retrial of any kind.

I am firmly of the opinion that the trial judge did the only practical thing which he could on this record. **I would not disturb his denial of two years' interest.**  
[paras 27-32] [emphasis added]

[55] I note that some appellate courts have declined to reduce prejudgment interest for plaintiff delay: see, for example, the survey of ONCA decisions by Sanderson J. in *Waxman v Waxman (Trustee of)*, 2003 CanLII 32906 (ONSC) (paras 7-10) and her summary of their guidance:

In principle, prejudgment interest is payable because a successful party (judgment creditor) has been kept out of money owed to him from the date the cause of action arose or notice was given. The judgment debtor has had the use of that money and theoretically should have been able to earn interest on it in the interim. Delays in themselves should generally not result in reductions of prejudgment interest to which judgment creditors would otherwise be entitled. [para 11]

[56] To the same effect see also *Young v Dawe*, 1998 CanLII 18089 (NLCA) (paras 62-79).

[57] These cases make a strong argument for declining to use interest denial or reduction as a litigation-management tool.

[58] Regardless, our Court of Appeal has (as noted above) found otherwise.

[59] And this Court has exercised its interest-reduction power in cases of plaintiff delay: see, for example, *321665 Alberta Ltd v ExxonMobil Canada Ltd*, 2012 ABQB 76 (Belzil J.) (paras 15-28 including a helpful catalogue of relevant factors in para 24) (appeal allowed on other grounds – 2013 ABCA 221) and *Jones v Gerosa*, 2016 ABQB 614 (Graesser J.) (paras 64-88 including a helpful catalogue of Alberta cases on interest reduction in paras 73-77).

[60] Accordingly, I turn to examining whether the plaintiffs were responsible for the three-year adjournment here and, if so, whether they should be denied, or entitled only to reduced, interest over that period as a result.

### E. Responsibility for adjournment

[61] The background is outlined in detail by Schutz JA in *Ewashko v Hugo*, 2022 ABCA 110 (key aspects on delay responsibility in added bold):

The underlying litigation involves an infant child. It is alleged that at the time of the infant's birth in Camrose, Alberta in 2013, catastrophic and permanent injuries were caused by the medical negligence of Drs Groenewald and Hugo, defendants.

The plaintiffs retained two experts to opine on the attending doctors' respective standards of care: Dr Guilfoyle, a family physician with obstetrics experience, having practised in rural Ontario, and Dr Cowal, an obstetrician/gynecologist practising in Toronto, Ontario.

In response, the defendants retained Dr Quinlan, a family physician with obstetrics experience practising in Canmore, Alberta, to comment on defendant Dr Groenewald's standard of care and rebut Dr Guilfoyle's opinion; and Dr Cano, an obstetrician/gynecologist practising in Grande Prairie, Alberta, to comment on the standard of care of defendant Dr Hugo and rebut the opinion of Dr Cowal.

The applicants assert the specific practice locations of their experts were carefully considered, given that the expert must be able to comment on a doctor's standard of care in light of the resources available at the particular practice location in question.

**Dr Guilfoyle authored a primary expert report, dated September 28, 2018, and two surrebuttal expert reports authored in January and May 2021, rebutting each of the reports of Dr Quinlan and Dr Cano, all provided well before the commencement of the trial on November 15, 2021.**

**The applicants sent Notices of Objection on November 13 and 14, 2021 under Rule 5.36, regarding Dr Guilfoyle's primary report and his obstetrician/gynecologist surrebuttal report and advised of their intention "to seek parameters regarding the scope of Dr Guilfoyle's testimony, based on the requirement that it be within his expertise". Rule 5.36 provides:**

Objection to expert's report

5.36(1) A party who receives an expert's report must notify the party serving the report of

(a) any objection to the admissibility of the expert's report that the party receiving the report intends to raise at trial, and

(b) the reasons for the objection.

**(2) No objection to the admissibility of an expert's report is permitted at trial unless**

**(a) reasonable notice of the objection was given to the other party, or**

(b) the Court permits the objection to be made.

The applicants contended that despite filing Notices of Objection, notice under Rule 5.36 was not required to challenge or object to the qualifications of the plaintiffs' experts.

**On the second day of trial, the plaintiffs sought to qualify Dr Guilfoyle to give opinion evidence in the areas of obstetrical care, including prenatal management, management of delivery, fetal surveillance including heart monitoring, and in determining the need for and performance of Caesarean section ("C-section") deliveries. The applicants objected.**

*The qualifications and adjournment rulings*

After extensive submissions, the trial Judge ruled Dr Guilfoyle was qualified to offer opinion evidence on all matters proposed, except on "the need for and performance of caesarean sections, generally or in relation to emergency and stat C-sections". **He found that Dr Guilfoyle had insufficient training and experience in the latter and was otherwise unqualified to offer an opinion "on the standard of care of an obstetrician/gynecologist, on C-sections or delivery risk management."** He went on to find:

As to the plaintiff[s'] objection to the late notice by the defendants that they would challenge the admissibility of Dr Guilfoyle's opinions, I am not moved.

Qualifications are always in issue until they are not and that only occurs on concession. That said, however, I do think that **notice that a party's expert will be challenged at trial should be given well in advance of trial, simply as a matter of good practice.**

**Doing so allows the party producing the witness time to pursue alternative witnesses or secure a rebuttal or surrebuttal report from an alternate source. It allows the parties to prepare well in advance of trial to deal with the issue.**

**It ensures that the trial is not belatedly adjourned or prolonged and it is in keeping with the modern notion of having trials where all the parties are fully informed.** And that is my decision.

After being granted time to consider their options, **plaintiffs' counsel sought an adjournment**, stating "it's an essential part of our case that we have Dr Guilfoyle or someone who would meet the qualifications to provide opinion evidence in relation to what we call the obstetrical care in the context of a rural facility", and particularly as Dr Cowal had not prepared a response to the defendants' expert Dr Cano. They ultimately expressed fear that they would lose the trial should the court be unable to hear evidence on these issues, given the nature of the case.

**The applicants objected to the adjournment on several bases**, including that they had retained experts to respond to the plaintiffs' specific experts and their reports. They further argued that the plaintiffs otherwise knew that "Dr Guilfoyle worked 500 kilometers away from any obstetrician, could not have ever

encountered or discussed the same type of situation as occurred for Dr Groenewald or for Dr Hugo, where there's an obstetrician on call that's able to do C-sections. So the fact that they are saying now. . . we have to get somebody to fill in that blank, what's the blank? What was the unknown there?" The applicants expressed doubts about the true reason for the adjournment request and noted the financial strain on them in trial costs.

**Despite expressing concern related to a mid-trial adjournment and under circumstances that "one might say had to be foreseeable in the preparation of this matter for trial", the trial judge granted a *sine die* adjournment of the trial.**

The defendant applicants now **apply for permission to appeal alleging the trial judge erred in law in granting a mid-trial adjournment to allow the plaintiffs to seek another expert.** They contend that the *sine die* adjournment was unreasonably granted, and otherwise "has significant and complex implications on the trial and its resumption". [paras 3-15] [emphasis added]

[62] Schutz JA granted leave to appeal (paras 20-32).

[63] Before the appeal was argued, the trial judge recused himself from continuing with the adjourned trial.

[64] At the appeal hearing, the Court of Appeal held that the recusal rendered moot the propriety of the adjournment and whether the plaintiffs could provide additional or different expert evidence. Per the Court:

The appellants appeal to this Court with permission from a ruling of a trial judge to grant an adjournment of the trial following the judge's ruling respecting the partial qualification of a proposed expert witness. **After the grant of the adjournment the trial judge recused himself from further involvement with the case. The effect of doing so was tantamount to directing a mistrial.**

Against the backdrop of this case, but not limited to it, the appellants seek opinions from this Court related to the proper approach to notice about, and qualification of, expert witnesses. Counsel urge that those arguments are not moot and that the practice as to expert evidence would benefit from such opinions.

**The effective mistrial in this case removes all rulings made within the trial and puts the case in a pristine state. If there come to be consequential issues of trial unfairness raised at the new trial, those matters will be fully aired out in front of the new trial judge.**

For this Court to venture opinions about future issues would be, at least, premature and foundationally speculative. For this Court to venture opinions based exclusively on the existing record of the aborted trial – particularly in the expanded fashion counsel suggest – would be to give opinions that are now completely untethered from the new trial that will commence in the future before a different trial judge since **the recused trial judge's rulings are no longer binding or even applicable to the litigation between the parties.**

We decline to comment on the merits of the arguments as to notice about, and qualification of, expert witnesses. We also decline to comment on the issue of costs. The appeal is dismissed. [paras 1-5] [emphasis added]

[65] The defendants hold the plaintiffs responsible for the adjournment and resulting delay. Per them, the genesis of both was the plaintiff's selection of Dr. Guilfoyle to provide expert evidence on (among other subjects) the performance of Caesarean sections i.e. the subject on which Clackson J. declined to qualify him, leading the plaintiffs to ask for the adjournment, which was granted.

[66] Per the plaintiffs, the defendants are responsible for the adjournment and resulting delay, having failed to provide reasonable notice of their objection to Dr. Guilfoyle as an expert on all proposed subjects.

[67] Here I reproduce Rule 5.36:

(1) A party who receives an expert's report must notify the party serving the report of

- (a) any objection to the admissibility of the expert's report that the party receiving the report intends to raise at trial, and
- (b) the reasons for the objection.

(2) No objection to the admissibility of an expert's report is permitted at trial unless

- (a) reasonable notice of the objection was given to the other party, or
- (b) the Court permits the objection to be made.

[68] What is the purpose of requiring reasonable notice?

[69] Pentelechuk J. (as she then was) answered this question in *1469753 Alberta Ltd (Royal Services) v Luxen*, 2015 ABQB 282:

... counsel's objections are answered by her failure to have served a notice of her objection in accordance with *Rule 5.36*. That *Rule* indicates that no objection regarding the admissibility of an Expert's Report is permitted at trial unless reasonable notice of the objection is given to the other party or the Court permits the objection to be made. **This Rule, along with Rule 5.35 obliging service of the Expert's Report in advance of trial, is to prevent surprise and unnecessary adjournments.** The necessity of serving a notice of objection includes an objection based on inadequate qualifications of the expert, as an expert's qualification is a prerequisite to admissibility: *Pausch v Vancouver Coastal Health Authority*, 2014 BCSC 2036.

The Court retains an overriding discretion to admit opinion evidence even if the *Rule* is not followed. In my view however, it would be inappropriate to allow the objection in this instance. Royal Services was at liberty to call an expert, but chose not to. **In remaining silent and waiting until trial to raise issues regarding Mr. Olsen's proposed qualifications and the admissibility of his opinion, Royal Services deprived the Luxens of an opportunity to address the**

**perceived shortcomings in Mr. Olsen’s evidence and no doubt caught them by surprise with the objection. This is procedurally unfair and contrary to the spirit and intent of the *Alberta Rules of Court*.** [paras 59 and 60] [emphasis added]

[70] See also *Geophysical Service Inc v Encana Corp*, 2016 ABQB 230 (Eidsvik J.) *affd* 2017 ABCA 125; SCC leave denied 2017 CanLII 80435: “... it is better practice to make [an objection to an expert’s qualifications] in advance. If the objection had been upheld in this case, it could have led to an adjournment of the trial to allow the Defendant to seek other rebuttal expert evidence, which would have been very unfortunate” (para 21 of QB decision).

[71] In *Wade v Baxter*, 2001 ABQB 812, Slatter J. (as he then was) understood the former rule (R 218.14) the same way: “One consistent theme of R 218.1 is that objections to the experts or their reports should be made in a timely manner and before the actual trial; objections are not to be raised at trial for the first time. This theme can be seen in R 218.1(3) and R 218.14” (para 74).

[72] See also *Pushee v Roland*, 2003 BCSC 149 (Burnyeat J.): “... it is incumbent upon the Court to require reasonable notice of objections [to expert reports] to be made in order that the need for adjournments is diminished, ..., that just, speedy and inexpensive determinations of proceedings on the merits can be encouraged, and that trials by ambush can be eliminated ...” (para 13).

[73] See also *Trans North Turbo Air Ltd v North 60 Petro Ltd*, 2002 YKSC 32 (Veale J.) (“The notice period in these circumstances from April 22 to May 2 [2002] **was not a reasonable notice period to allow Trans North Air to rectify the objections to their expert evidence**” (para 5(1)).

[74] The converse situation arose in *Lovelock v 0459478 BC Ltd*, 2025 BCSC 362, where Jones J. found notice of expert-evidence objections

... in sufficient time [that] the plaintiff could have sought an amended report from the expert. **That is precisely why the Rules are framed the way that they are. An expert report must be served well in advance of trial, and the opposing party is required to respond with any objections in a timely manner. The court simply cannot countenance the application [by the plaintiff for leave to provide patch-up evidence] where the defendants have complied with the Rules and put the plaintiff on notice of their detailed objections to the Expert Report.** [para 108]

[75] In his (unreported) decision on the adjournment (reproduced in part of Schutz JA’s leave decision (cited above)), Clackson J. held:

. . . It’s concerning, obviously, that we are in the middle of a trial and the trial that was scheduled to go for a number of weeks and even with adjournments or even with settlements, this trial [is] still going to consume a number of days of court time.

That said, the court is in a position where that time is not wasted and can be used elsewhere so there’s no reason in that respect to not to consider the adjournment request.

More concerning is the way in which the request is made. In circumstances which on one view, one might say had to be foreseeable in the preparation of this matter for trial.

However, **although I don't consider notification – timely notification of an intent to challenge the qualifications of an expert witness necessitated by the rules, I do consider it to be a better practice.**

And ultimately, it seems to me that the risk identified by the plaintiffs, although I certainly can't judge whether it's something that is reasonable or not because I haven't heard any evidence, and so I don't even know in my own mind, is one that were I in their position, I think I would want to address, *just to be certain that I haven't lost my case on something I can shore up.*

And ultimately, the prejudice suffered here apart from the continuing, I guess, cloud this litigation represents for all parties is one that can be addressed in costs, if at the end of the day, the presiding trial judge is of a mind that some [order] in costs specifically is needed in relation to the adjournment that occurred *and the sequelae that ensue as a result.* [Emphasis added]

[76] While Clackson J. observed that the prospect of a successful objection to scope of Dr. Guilfoyle's proposed evidence was foreseeable, he obviously found the short notice to be more significant. Otherwise, he would not have granted the adjournment.

[77] Sidnell J. faced a similar issue in *Baldock Estate v Abou Reslan*, 2023 ABKB 149 where, after finding an expert unqualified to provide proposed evidence, she declined an adjournment sought by the plaintiffs to fill the expert-evidence gap.

[78] In that case, the defendants gave six weeks' notice of their objection. Sidnell J. did not expressly rule on the adequacy (or otherwise) of that notice, emphasizing that, regardless of the objection timing, the court must still rule on the experts' qualifications: para 60.

[79] The key here is that Clackson J. implicitly found inadequate notice of the defendants' objections and that the plaintiffs should be given a chance to find and submit replacement expert evidence.

[80] And, as discussed above, the Court of Appeal declined to weigh in on the propriety of the adjournment, with Clackson J.'s recusal making the issue moot.

[81] The defendants had all of Dr. Guilfoyle's reports six months before the scheduled trial date (one of them three years before).

[82] They gave two days' notice of their objections.

[83] That is plainly inadequate notice, when (per *Lexun*), the purpose of requiring reasonable notice is to prevent surprise and reduce the need for unnecessary adjournments. For more examples of inadequate notice, see *Axis Real Estate Investment Corp v Fort Saskatchewan (City)*, 2021 ABQB 763 (Germain J.) (paras 9 and 20) (five working days before trial) and *Stewart Estate v TAQA North Ltd*, 2012 ABQB 87 (Romaine J.) (para 9) (day before trial for one objection and three weeks into trial for another).

[84] The defendants offered no explanation for raising their objections so late.

[85] They may have planned, with their timing, to send a torpedo into the plaintiff's case, by knocking out one of their experts or at least limiting the scope of his testimony *and* convincing the trial judge to press on with the trial i.e. not give the plaintiffs a chance to patch up their case.

[86] From one standpoint, it might be said that the root cause of the adjournment was the plaintiffs' decision to select Dr. Guilfoyle as an expert on certain issues i.e. those for which he was found to be not qualified.

[87] However, given the noted purposes of R 5.36 and the (minimum) six months' notice of his proposed opinions, the operative cause of the adjournment was the defendants' decision to hold off objecting until the eve of the trial.

[88] If they had provided more notice, the plaintiffs could have considered whether new or additional expert evidence was necessary.

[89] If they had so concluded, they may have been able to do so without requiring the trial to be adjourned.

[90] If they had decided to press on with their existing experts, it is virtually certain that they would not have been granted an adjournment if the defendants had renewed their objections at the trial and succeeded in eclipsing the scope of Dr. Guilfoyle's evidence (as occurred).

[91] The crucial factor is that, by objecting only on the eve of trial, the defendants precluded the chance of retaining the original trial dates, whether because the plaintiffs obtained new or additional evidence in time or they elected to proceed with their existing evidence (and would have had to live with that decision, with no realistic prospect of an adjournment in that scenario).

[92] Park J. examined the same question in *Signalta Resources Ltd v Dominion Exploration Ltd*, 2007 ABQB 636 (affd 2008 ABCA 437 without discussion of the point), featuring the materially identical predecessor to R 5.36 (R 218.14):

In closing argument **Dominion responded that Signalta's objection under Rule 218.14(2) was not reasonable notice as Dominion received the objection by a fax letter on September 12, 2005. That receipt was 8 days before the trial commenced. Further Dominion noted Signalta had possession of Dominion's expert reports for 50 days prior to issuing the notice of objection on September 12, 2005.** In turn Signalta responded that Dominion did not raise lack of reasonable notice at any time from September 12, 2005 until Dominion raise it in closing argument. In addition Signalta noted Dominion under Rule 218.14 provided notice of objection to Signalta's expert reports on September 14, 2005.

In my view lack of reasonable notice of such an objection is not driven by a sole consideration of the date of the receipt of the objection which is within an absolute number of days prior to the trial commencement. Further it is not driven by the party, whose expert report has been objected to by the adverse party, in turn being required to advise the objecting party that the objection was not given with reasonable notice. In addition a consideration of a lack of reasonable notice is not driven by the party, whose expert report has been the subject of an objection under the Rule, in turn under Rule 218.14 objecting to the adverse party's expert report at a time closer to the trial than the initial objection was received on its own expert report.

Rather it is my view **reasonable notice under this Rule should be driven by an individual consideration of each party’s objection based upon a separate review of the factual circumstances and the nature of the expert evidence to which the objection is based. This review should ascertain whether timing of the notice of objection was sufficiently late such that it would visit significant prejudice upon the party whose expert report was the subject of the objection.**

**In the case at bar I do not find any prejudice being visited upon Dominion by the timing of Signalta’s objection of September 12, 2005 to Dominion. As a consequence I find the 8 day notice of Signalta’s objection to Dominion was reasonable in all of the factual circumstances and in respect to the nature of the expert evidence to which objection was taken.** [paras 193-196] [emphasis added]

[93] Using Park J.’s approach, I find potential prejudice here i.e. deprivation of a chance (implicitly required by R 5.36) to address perceived shortfalls in the plaintiffs’ expert evidence and preserve the original trial dates i.e. making the adjournment here necessary, justifiable, and, fundamentally, the responsibility of the defendants.

[94] The defendants did not argue, or at least with any material force, that the plaintiffs were otherwise responsible for the 3.5-year delay.

[95] For all these reasons, I find that the defendants were wholly responsible for the adjournment and the resulting delay and, accordingly, no plaintiffs’-conduct or plaintiffs’-related-circumstances reasons exist to deny them interest for the delay period under ss 2(3) *JIA*.

[96] The questions become interest on what part(s) of the \$10,000,000 agreed-on amount and at what rate.

#### **F. Interest-warranting amount and appropriate rate**

[97] The plaintiffs note that, under the *JIA* (paras 2(2)(b) and (d)), interest shall not be awarded on “interest awarded under this Act” and “an award of costs in the action”, respectively.

[98] As noted, the global damages agreement expressly addressed “damages” and “pre-judgment interest and court costs and disbursements to November 11, 2021”, setting a global figure of \$10,000,000 for these noted elements.

[99] The plaintiffs propose no interest on estimated interest and costs to November 11, 2021:

The Plaintiffs submit that for the purpose of calculating interest and costs, the Court should assume that of the \$10,000,000 in agreed damages, approximately \$400,000 represents costs and \$150,000 represents interest primarily on general damages and past cost of care [footnote 11 – Based on 5 times Column 5 [of Schedule C], GST and Disbursements]. Therefore, the Plaintiffs are seeking interest on the remaining \$9,450,000. [Plaintiffs’ costs and interest main brief, para 27]

[100] They did not explain the interest estimate e.g. state what (even estimated) figures were used for general damages and past cost or care or the applicable (or assumed) interest rate.

[101] Concerning interest on the remaining \$9,450,000, the plaintiffs argue:

The Damages Agreement also does not specify the amount allocated to pecuniary versus non-pecuniary damages.

The Plaintiffs are seeking interest at the yearly non-compounded rate as set by the regulations from year to year under the Judgment Interest Act.

It is anticipated that the Defence will argue that the loss of earning capacity and cost of future care claims embedded in the Damages Agreement should not accrue interest as they are future awards.

This logic is flawed. The present value calculation of the loss of earning capacity in 2021 would be based on the level of 2021 wages; for example, assume the average income of trade school graduates in Alberta in 2021 was \$100,000. The present value calculation in 2021 would take the \$100,000 and multiply that based upon factors including the number of years of future lost income, inflation, and rates of investment return (“the multiplier”). The same process would be followed in 2025 but using 2025 average income. The increase in wages from 2021 to 2025 was 9.9% to \$109,900. [footnote 12: Affidavit of Theresa Reichert sworn on June 5, 2025 at para 5].

The present value calculation in 2021 in this example would be \$100,000 x the multiplier; in 2025, \$109,900 x the multiplier. Applying interest to the 2021 loss of income claim addresses this change in value.

For the future cost of care, the calculation in 2021 was based upon the cost of care of the care services required at that time. The cost of those same services has increased with inflation by 12.9%. [footnote 13: Affidavit of Theresa Reichert sworn on June 5, 2025 at para 5]

In short, the amount required to buy the same level of care for Aiden in the future would be 12.9% higher than the agreed damages. Applying interest to the agreed damages addresses this shortfall.

Further the Defendants have had the benefit of the \$10,000,000 from November 11, 2021 to today’s date. A prudent sophisticated party would have invested the funds at a rate of return exceeding that which the Plaintiffs are claiming. In her report [prepared using publicly available Canadian Medical Protective Association information], Theresa Reichert, Accountant, estimates that the CMPA’s accrued interest / saved cost of debt as follows

	Simple interest	Compound interest
Investment returns	\$1,152,963	\$1,150,480
Cost of debt	\$1,806,534	\$1,926,887
Prime lending rate	\$2,028,528	\$2,181,197
Judgment interest	\$1,094,030	\$1,132,248

The Plaintiffs seek interest from November 11, 2021, to May 13, 2025 [i.e. the date of the liability judgment] calculated at the yearly rate set out in the regulations on \$9,450,000 totalling \$1,013,954.

[102] In other words, the plaintiffs effectively propose to treat the \$9,450,000 balance as “pecuniary damages [or as an amount sought] in debt or other actions” i.e. under ss 4(2) *JIA* i.e. implicitly proposing that none of that balance constitutes non-pecuniary damages. (Re the latter, ss 4(1) *JIA* says: “Interest awarded under this Part on non-pecuniary damages shall be calculated at the rate of 4% per year.)

[103] Subsection 4(2) says that interest for “pecuniary damages and in debt or other actions shall be calculated, for each year or part of a year included in the period in respect of which the interest is payable, at the prescribed rate applicable to that year.”

[104] Here are the prescribed rates for 2021-2025, the days for which interest would be payable, and the resulting simple interest on \$9,450,000 from November 11, 2021 to May 13, 2025:

Year	Interest rate	Days	Interest
2021	0.2%	50	\$2,589
2022	0.2%	365	\$18,900
2023	3.8%	365	\$359,100
2024	5.15%	365	\$486,675
2025	4.26%	133	<u>\$146,690</u>
Total interest			\$1,013,954

[105] The defendants argue that prejudgment interest is not payable for any period after November 11, 2021.

[106] They note that “the Damages Agreement does not break down the amount allocated to costs or interest because it is all-inclusive” and that “interest ... is payable on general and special damages but no on future awards.”

[107] They did not offer any estimated or assumed amounts for any of these heads of damage. In oral argument at the interest-and-costs application, the defendants’ counsel asserted that the “bulk” of the damages here are future-focused e.g. future income loss and future costs of care. Per the defendants, “only minor interest, if any” is payable.

[108] The defendants did not offer any alternative submissions (i.e. assuming interest is payable) e.g. on the rate(s) that would apply to any interest-warranted categories and the actual, estimated, or assumed amounts in each category.

[109] Or any submissions on the plaintiffs’ collective estimate of \$450,000

[110] On the plaintiffs’ report by Ms. Reichert, the defendants said there is “no evidence” of any investment returns or interest costs incurred by the CMPA and that the CMPA is neither a party nor an insurer.

[111] I find for the plaintiffs on interest and award the claimed \$1,013,954 as prejudgment interest on \$9,450,000 from November 11, 2021 to May 13, 2025, for these reasons.

[112] First, the parties agreed to a global damages award without any breakdown among non-interest-bearing elements like interest and costs to that point, non-interest-bearing elements like future-focused heads of damage, non-pecuniary elements warranting statutory interest (4 per cent), and pecuniary or “debt or other action” interest warranting regulation interest (i.e. at the rates in the table immediately above).

[113] I presume that each side was satisfied that correct, or reasonable, or at least tolerable interest calculations were factored into the calculation of the \$10,000,000 global amount i.e. to November 11, 2021.

[114] By agreeing to a global amount of \$10,000,000 as of that date, I find that the parties effectively converted the dispute, before November 11, 2021, over various heads of damage and the appropriate recoveries for each head, to one over \$10,000,000. In other words, a dispute featuring intricacies over (in part) various heads of damages and the associated recoveries, with the attendant interest consequences became, as of November 11, 2021, a contest (recovery-wise) over \$10,000,000. In yet other words, the issues over what heads of damage were engaged, with what recoveries, and with what attendant interest results were crystallized by the agreement on \$10,000,000, with the focus thereafter on that singular amount.

[115] Which is or will be reflected in the formal order reflecting the liability judgment issued on May 13, 2025. I did not make any findings on heads of damage, applicable amounts, or interest or costs. Instead, I found liability, which (given the global damages agreement) triggered an obligation to pay the \$10,000,000 to the plaintiffs.

[116] Effectively, since November 11, 2021, the parties’ dispute (recovery-wise) was the narrow question of whether \$10,000,000 should or should not be paid to the plaintiffs, with entitlement turning on liability.

[117] Here I turn to the purposes of prejudgment interest, illuminated by the following decisions:

*Bozzo v. Giampaolo*, 2005 CanLII 17773 (ON CA)

... The purpose of prejudgment interest is to **compensate for loss of use of money**: [para 23]

*Henry v Zaitlen*, 2024 ONCA 614 (leave denied – 2025 CanLII 17285 (SCC))

... in *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.* (2004), 2004 CanLII 36051 (ON CA), 192 O.A.C. 24 (C.A.), at para. 120, this court emphasized the objective of the prejudgment interest scheme to “**encourage early settlements and the timely compromise of litigation**”. Relatedly, prejudgment interest also serves to **deprive “the wrongdoer of a windfall benefit he would otherwise receive”, namely, the use that the wrongdoer had of the money that should have been paid to the plaintiff**: *Apotex Inc.*, at para. 68, quoting M.A. Waldron, *The Law of Interest in Canada* (Scarborough: Carswell, 1992), at pp. 129-30. This is tied into the concept of compensation – as this court observed in *Irvington Holdings Ltd.*, at p. 487:

Interest should not be used as either a reward or a penalty, but **should reflect the value of money wrongfully withheld** from the

appellant from the date of its demand for payment of its injury to the date when the compensation due it was determined at trial.

The legislative policy underlying the statutory interest scheme seeks **fair compensation for a plaintiff having regard to all relevant circumstances**. The inclusion of the presumptive interest rates in ss. 127-128 of the CJA eschews mathematical precision “in the interest of consistency and certainty”: *Robert McAlpine Ltd. v. Byrne Glass Enterprises Ltd.*, [2001] O.J. No. 3208 (C.A.), at para. 5. ... [paras 28 and 29] [emphasis added]

*Jorna & Craig Inc. v. Chiasson*, 2020 NSCA 42

Pre-judgment interest is not a form of damages. This Court explained the “purpose and intent” of underlying pre-judgment interest legislation in *R. v. D.H.*, 1996 CanLII 5288 (NS CA), 1996 NSCA 121:

The following is from *Law of Damages*, Waddams, 3rd ed at p. 7-15:

"Where a defendant has injured the plaintiff and disputed the matter through lengthy litigation, **the defendant has done the plaintiff two wrongs: he has caused her personal injuries and has failed to make proper recompense.**" (underlining emphasis in original) [para 182 of *R v DH*]

And further at p. 7-15-16:

"Interest is not intended to serve as a form of damages. An award of damages compensates the plaintiff for personal injuries, while **an award of interest compensates her for the loss of the use of the money.**" (underlining emphasis in original)

The Legislature obviously considered these principles in drafting the pre-judgment interest legislation. Section 41(k)(ii) and (iii) of the *Judicature Act* provide that the Court has the **discretion to decline to award interest**, to reduce the rate of interest, or to reduce the period for which it is awarded, **if:**

"..... (ii) **the claimant has not during the whole of the pre-judgment period been deprived of the use of money** now being awarded, or

(iii) **the claimant has been responsible for undue delay in the litigation.**" [para 183 of *R v DH*] [full quotation is para 79 of *Jorna & Craig*] [bold emphasis added]

*Peters v. Great-West Life Assurance Company*, 2024 NSCA 21

Pre-judgment interest may be refused in circumstances that do not apply here. **The purpose of pre-judgment interest is to compensate the plaintiff for the loss of the use of the money that should have been paid when the cause of action arose.** [para 26]

[118] See also *Pedherney v Jensen*, 2008 ABQB 345 (Rooke J. as he then was) *affd* 2011 ABCA 9:

I believe that, **except in exceptional circumstances, interest should follow the event, because it is merely a recognition of the cost of money, not a cost of delay. The plaintiff is deprived of the damages when due and is entitled to interest from the time due, and the defendant wrongfully has the benefit of interest generating capital** during times when the defendant's negligence should have placed the plaintiff in receipt of those funds. As to delay here, it is clear that it took 11 years to get the matter to trial and it is clear that Pedherney had several lawyers, but it is also clear that throughout this period Counsel were trying to find out the causes of her complaints. **Absent evidence on which one can determine the fault for the 11 years in getting to trial, I am not prepared to reduce interest in general.**

Thus, **absent the mere fact of years of time to get to trial, which I do not [countenance], I find no conduct sufficient to cut-off interest in the circumstances of the case at Bar. There is no evidence upon which to find fault, and accordingly interest will "follow the event" to use litigation language**, based on the calculations which I have done in the Scott Schedule above. [paras 433-435] [emphasis added]

[119] Per the damages agreement, the defendants agreed that, if liability were established, the plaintiffs would be paid \$10,000,000.

[120] As explained above, the defendants' late objection to Dr. Guilfoyle was the effective cause of the delay from when the damage amount was acknowledged (November 11, 2021) to the restart of the trial (late October 2024).

[121] Neither party is responsible for the further delay from the end of the trial (mid-November 2024) to the release of the liability judgment (May 13, 2025).

[122] The defendants were (of course) entitled to dispute their liability to the plaintiffs.

[123] If they had acknowledged liability at the same time as the acknowledged damages, the plaintiffs would have received the \$10,000,000 on or around November 11, 2021.

[124] Answering the liability question required from that date until May 13, 2025.

[125] Accepting the described purposes of prejudgment interest, I see no reason why the plaintiffs should not receive pecuniary-damage-or-debt-action interest per the *JIA* i.e. why they should not be treated the same as any litigant deprived of an amount acknowledged as payable i.e. if and when liability was found.

[126] Especially when the defendants or whoever may be responsible for covering some or all of the damages amount has either had the use of the money over the last 3.5 years or been able to avoid interest charges, as the case may be. (Here, as noted, the defendants said no evidence showed the actual state of affairs on the defendants' (or their insure's) use of the money (if in hand) or borrowings (if not in hand). However, the plaintiffs' accountant prepared her calculations (see above) based on publicly available information i.e. working with the best evidence available to the plaintiffs, and the defendants elected to submit no evidence of their

own.) And I note that the interest approved here is less than the understood-by-plaintiffs investment returns or borrowing costs (as seen in the reproduced chart by Ms. Reichert above).

[127] As well, the defendants did not challenge the plaintiffs' carve-out of \$450,000 (i.e. as non-interest-bearing) or suggest (with detailed, or any, calculations) any further carve-out.

[128] More generally, the defendants did not offer an alternative position on interest i.e. on the assumption interest would be required for the 3.5-year-delay period or any part of it.

[129] I would have approved interest at the ss 4(2) *JIA* rates for the entire \$10,000,000 i.e. on the basis that the plaintiffs were deprived of the entire amount for the entire period. However, as noted, the plaintiffs were willing to carve out the noted \$550,000 and did not ask for any different approach in their written or oral submissions.

## V. Costs

[130] This aspect is simpler.

[131] As noted, the global damages agreement covered costs and disbursements to November 11, 2021. On costs and disbursements after that, the agreement said:

Should the Plaintiffs be successful at trial [which they were], Schedule C costs and taxable disbursements incurred by the Plaintiffs after November 11, 2021 shall be addressed by the Parties at the conclusion of the trial.

[132] The plaintiffs seek Schedule C costs on a 5x multiplier.

[133] The defendants urge no multiplier or, at most, a 2x multiplier.

[134] The answer is simple: the agreement said "Schedule C costs" i.e. with no reference to a multiplier.

[135] The agreement governs here: *Jordan v Biovail Corporation International*, 2003 ABQB 369 (Erb J.) (paras 14-17).

[136] The plaintiffs also seek increased costs owing to various settlement offers in amounts below \$10,000,000.

[137] Here too the agreement governs. It made no reference to increased fees for settlement offers exceeded or on any other basis.

[138] No evidence shows that the defendants agreed to amend or otherwise depart from that Schedule C position.

[139] I find that the plaintiffs could not, on their own, undercut that agreement i.e. could not, by making unilateral settlement offers, deprive the defendants of the agreed-on ceiling of Schedule C.

[140] I acknowledge cases such as *McNulty v Edmonton (City)*, 2011 ABQB 481 (Lee J.) finding that "agreement on damages ... is not a special reason sufficient for the Court to exercise discretion to deprive a successful plaintiff of the fruit of Rules 170 and 174 ...." However, the focus here is not on the Court's discretion; it is instead on the parties' (unvaried) agreement to cap the post-November-11-2021 costs at Schedule C levels.

[141] Accordingly, the plaintiffs are entitled to their Schedule C costs, under column 5 (clearly applicable, given the \$10,000,000 at issue) for steps taken after November 11, 2021 and their taxable disbursements since then. But no multiplier and no increase based on settlement offers made and exceeded.

[142] As I understand it, the defendants object to only one disbursement, namely, the expert fees of Dr. Barrett i.e. factoring out their arguments anchored in plaintiffs being responsible for the 2021 adjournment.

[143] On the Barrett fee, I first reject the defendants' argument based on duplication with fees to Dr. Stamp, accepting the plaintiffs' "collateral attack" argument (para 35 of reply brief).

[144] On the quantum of the Barrett fees, I find that the comparator set proposed by the defendants – limited to the plaintiffs' other ob-gyn expert and the defendant's ob-gyn expert – is too small for me to find that the Barrett fees are disproportionate, particularly given his acknowledged expertise and national (and international) standing.

[145] Accordingly, I approve the plaintiffs' disbursements as proposed.

#### **VI. Thrown-away costs**

[146] The plaintiffs sought such costs for the first trial. However, they did not offer any detailed submissions or evidence e.g. showing what efforts had effectively been thrown away by the adjournment and the associated fees and disbursements.

[147] Accordingly, I decline to award any thrown-away costs to the plaintiffs.

#### **VII. Conclusion**

[148] For these reasons, the plaintiffs are entitled to the noted \$1,013,954 in prejudgment interest, Schedule C (column 5) costs for the steps taken after November 11, 2021, and disbursements as claimed.

[149] If further directions are needed on those costs, I will provide them after receiving maximum-two-page submissions from each side.

[150] Given the divided success on the two principal issues here (prejudgment interest and costs), the parties shall bear their own costs of this interest-and-costs exercise.

[151] I thank all counsel for their helpful written and oral arguments.

Heard on the 27<sup>th</sup> day of June, 2025.

**Dated** at Edmonton, Alberta this 22<sup>nd</sup> day of August, 2025.

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**Michael J. Lema**  
**J.C.K.B.A.**

**Appearances:**

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