

# Court of King’s Bench of Alberta

**Citation: Liberty Land Corporation v Kinnear, 2026 ABKB 248**

**Date:** 20260401  
**Docket:** 1201 10620  
**Registry:** Calgary

Between:

**Liberty Land Corporation**

Appellant/Plaintiff

- and -

**Kenneth Kinnear, Barry McCurdy, Mountain Aire Realty Ltd., and 1243867 Alberta Ltd.  
o/a Re/Max Mountain Aire**

Respondents/Defendants

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**Reasons for Decision  
of the  
Honourable Justice D.J. Reed**

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## I. Introduction

[1] This is an appeal of an Applications Judge’s decision granting summary dismissal of this action in favour of the Respondent Defendants Kenneth Kinnear (“**Kinnear**”), Barry McCurdy (“**McCurdy**”), Mountain Aire Realty Ltd., and 1243867 Alberta Ltd. o/a Re/Max Mountain Aire (“**Mountain Aire**”) (collectively “**Real Estate Defendants**”).

[2] The action, filed in 2012, relates to land transactions that took place in 2007. The Appellant, Liberty Land Corporation (“**Liberty**”), sued Kinnear and McCurdy, as well as their brokerage companies, alleging that Kinnear disclosed confidential information to members of the Statham family (the sellers of the lands in question). Liberty alleges that Kinnear disclosed the

maximum amount that Liberty was willing to pay per acre for two quarter sections of land near Olds, Alberta, among other things. The claim is based on alleged breaches of contract, fiduciary duty, loyalty, and confidentiality. Liberty states that it paid \$40,000 per acre for the lands when it could have purchased them from the Stathams for \$35,000 per acre.

[3] The parties agree that this lawsuit essentially hinges on what was said in a single conversation between certain members of the Statham family and Kinnear after he and the other Real Estate Defendants were hired by Liberty to be their agents. The only living member of the Statham family who was a part of that conversation (or has any real recollection of it) is Lyle Statham (“Lyle”). Lyle’s evidence has changed dramatically over time. Early information he provided to Liberty supported Liberty’s claim, and in fact seems to have been the impetus for it. Lyle subsequently resiled from his earlier position and has refuted it ever since.

[4] The Applications Judge found that the evidence of Kinnear established *prima facie* grounds for dismissal of the action. He had concerns with the nature and quality of the evidence Liberty placed before him to respond to the application. It contained layers of hearsay and double hearsay. There was no direct evidence from Lyle, and others involved. Based on the record before him, the Applications Judge found Liberty could not rely upon hearsay to raise a triable issue and dismissed the action, finding that no genuine issue existed for trial.

[5] Liberty has attempted to augment the record for this appeal by filing additional affidavits from its principals, an affidavit from Liberty’s former counsel who had interviewed Lyle and his mother in 2011, and conducting two examinations under Rule 6.8 of Lyle and his wife, as Lyle’s parents are now deceased.

[6] Among other issues, this appeal raises the question of the ability and scope of a responding party’s ability to rely upon hearsay in response to an application for summary judgment (dismissal), which Liberty seeks to do.

## II. Standard of Review

[7] The standard of review of an appeal from an Applications Judge is correctness: *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166 at para 30 [*Bahcheli*]; *Lesenko v Wild Rose Ready Mix Ltd*, 2024 ABKB 333 at paras 14-15 [*Lesenko*].

[8] New evidence presented on appeal necessarily requires a fresh assessment of the facts: *Bahcheli* at paras 17 and 30; *Gudzinski Estate v Allianz Global Risks US Insurance Co*, 2012 ABCA 5 at paras 21 and 24.

[9] The low threshold for the introduction of new evidence on appeal means that the true “appeal on the record” will be the exception rather than the rule: *Prestige Granite & Marble Inc v Maillot Homes Inc*, 2018 ABQB 1040 at paras 4-7 [*Prestige*]; *Steer v Chicago Title Insurance Company*, 2019 ABQB 318 at paras 6-10.

[10] I, like Justice Feasby in *Lesenko*, agree that where there is no new evidence on appeal, it is more accurate to describe the proceeding as a correctness review: para 15. However, I also use the term *de novo* to describe the current approach to appeals of Applications Judge decisions, especially where additional evidence is adduced: para 15.

[11] I also agree that the use of the term *de novo* for convenience instead of correctness review is appropriate given that as has happened on this appeal, new evidence may be adduced, and new

arguments may be made on appeals of Applications Judge decisions. I fully understand that in appeals where no new evidence is adduced or is not admitted, a correctness standard may be applied: *Lesenko* at paras 14-15, and the cases cited therein.

[12] No deference is owed to the decision of the Applications Judge. There is still a review of the decision and there remains a burden upon Liberty, as Appellant, to show that it was not correct, whether on the record, or considering the new evidence presented on this appeal: *Canuck v Yangarra*, 2022 ABQB 145 at para 36 [*Canuck*], citing *Remington Development Corporation v Enmax Power Corporation*, 2021 ABQB 261 at paras 27-28 [*Remington*].

[13] I also echo Justice Feasby's comments in *Lesenko* regarding the current state of the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*] and law surrounding the standard of review and admission of new evidence on appeals from Applications Judges.

[14] The parties, under the case law, are required to put their "best foot forward" in summary judgment/dismissal applications. However, the current procedural pathways that exist in Alberta law create a situation where parties often do not do that at the Applications Judge's stage. They put one foot forward, but it is certainly not their best. Then, when matters do not go in their favour, they give the other foot a pedicure and put that before this Court on appeal. The result is that the Court is often not hearing the same case on appeal than that which was before the Applications Judge: see *Prestige* at paras 7-9.

[15] That is what has happened in this case. After losing at the Applications Judge's stage of the proceedings, Liberty generated hundreds of pages of evidence directly from witnesses. That record should have been put before the Applications Judge. It was not. Liberty lost, and then, over the course of several years, it has shored up its case. It presents a different record to this court to "take a mulligan", relying upon the *Rules* and law to do so.

[16] I do not say this to impugn Liberty's conduct. It is acting within the permissible bounds of the law.

[17] The application in question was filed January 27, 2021. The decision in the Court below was issued November 15, 2022. The appeal was filed November 23, 2022. The additional evidence was gathered throughout the course of 2023. For reasons that are unclear to me, the appeal was not heard until February 19, 2026. This Action has been stalled for over five years as a result. Even if it were to go to trial this year, the parties would be giving evidence about a conversation or conversations that took place nearly 20 years ago. This kind of delay has the real potential to hamstring the search for truth that lies at the core of the civil justice system. Had this matter not been sidetracked by these summary proceedings, a trial on the merits could likely have been heard years ago, just as Justice Marion noted in *Spady v Spady Estate*, 2022 ABQB 591 at para 4 [*Spady*].

[18] I, like Justice Feasby in *Lesenko*, respectfully suggest that it is time to reassess the *Rules* and the procedure governing the standard of review on appeals from Applications Judges, as well as the admission of new evidence on such appeals, to the extent possible, to address the issues that continue to affect this process.

### III. Issues

[19] This appeal raises the following issues:

- (a) Should the new evidence offered by Liberty be admitted?
- (b) Is Liberty entitled to rely upon hearsay evidence to try to show a triable issue, and if so, to what degree?
- (c) On the whole of the admissible record, is the decision of the Applications Judge correct, or is there a genuine issue requiring a trial?

#### IV. Summary of Outcome

[20] I have reviewed the entirety of the record before the court. For the reasons set out in this Decision, the appeal is allowed, and the decision of the Applications Judge is set aside.

#### V. Evidence Before the Applications Judge

[21] The evidentiary record before the Applications Judge consisted of an Affidavit sworn by Kinnear and filed January 27, 2021, along with questioning and related evidence that took place on that affidavit. McCurdy did not, and has not, provided any evidence on the record to date.

[22] Liberty's evidence came from its corporate representative, Mr. Seann Spence ("**Spence**") who provided a reply affidavit filed May 13, 2021, and the questioning and related evidence thereon. There were layers of hearsay in the Spence evidence, which ultimately was one of the reasons the Applications Judge dismissed the action.

[23] In May of 2007, Kinnear was working as an agent for Mountain Aire. He indicated that in May of 2007, Spence and Braeden Criddle ("**Criddle**"), the other principal of Liberty, approached McCurdy, expressing interest in purchasing specific properties in the Olds area.

[24] Liberty was interested in acquiring properties that were expected at that time to be annexed by Olds. A town meeting took place on June 5 or 7, 2007, confirming the properties to be annexed. Two of those properties were properties owned by the Stathams. Lyle and Loretta Statham ("**Loretta**") owned NW 30-32-1-W5th ("**Northwest Quarter**") and Lyle's parents, Leslie and Jean Statham ("**Leslie**" and "**Jean**"), owned NE 30-32-1-W5th ("**Northeast Quarter**") (collectively "**Lands**").

[25] Spence, in his affidavit, provides some hearsay evidence about instructions to McCurdy and Kinnear regarding an offer that was to be made to the Stathams prior to the town meeting for \$30,000.00 per acre. This offer was never made and is not overly germane to the matters in issue, save for context.

[26] Kinnear's evidence was that Liberty was interested in purchasing the Lands, as were other developers in the area at the time. Kinnear took steps, after Liberty had indicated such interest via Spence and Criddle, to contact the Stathams and determine if they were interested in selling.

[27] Kinnear's affidavit appends an email from McCurdy to Spence dated June 12, 2007 ("**McCurdy Email**"). While that email is hearsay, Kinnear indicates in his sworn evidence that the McCurdy Email assisted him in refreshing his memory and recalling that, on June 12, 2007, he contacted Lyle and was informed by Lyle that:

- (a) Lyle had been approached by several other developers about purchasing the Lands following the annexation meeting;

- (b) Lyle was not interested in listing his property and did not wish to pay realtor fees;
- (c) In Lyle's view, the Lands were currently worth approximately \$40,000 per acre, but he believed they would be worth as much as \$60,000 per acre in the next few years and was considering holding off; and
- (d) If Lyle did sell the Lands, he wanted to retain 50 acres, together with his home on the NW Quarter, and he wanted his parents to be able to continue living on the NE Quarter for five to ten years, if they wished.

[28] Of course, Kinnear's refreshed memory of what he was told by Lyle is also hearsay if relied upon for the truth of its contents, but not for the fact the statements were made. The same goes for other evidence of conversations I summarize below.

[29] Kinnear's evidence is that he did not have a strong recollection of this discussion but was able to recall it after reviewing McCurdy's email. He indicates that the email was an accurate summary of his discussion with Lyle, except for a mix-up in the quarter sections, which he corrects.

[30] In cross-examination on this point, Kinnear reaffirmed his evidence that, as of June 12, 2007, his recollection of Lyle's view was that the Lands were worth \$40,000 per acre. He also stated that Liberty subsequently sold the Lands for \$60,000 per acre within a few months, which, in his view, confirmed that Lyle's assessment had ultimately proved correct.

[31] Spence, in his evidence, confirms he received the McCurdy Email on or about June 12, 2007.

[32] A further discussion occurred on June 18, 2007 between Kinnear and the Stathams, during which Kinnear was informed that the Stathams were not interested in listing the Lands with them but were open to receiving offers.

[33] As a result, the Real Estate Defendants then worked with Liberty to draft two offers to Purchase to deliver to the Stathams. Those offers were:

- (a) Contract number 503657, being an offer to purchase the NW Quarter, less 50 acres, from Lyle for a price of \$35,000.00 per acre. The total offer was \$3,850,000.00 ("**NW Offer**"); and
- (b) Contract number 494956, being an offer to purchase the full NE Quarter from Leslie and Jean for a price of \$35,000.00 per acre. The total offer was \$5,600,000.00 ("**NE Offer**").

[34] Spence's evidence is that he and Criddle met with McCurdy and Kinnear on June 15, 2007 to prepare the offers. According to Spence, they informed him that the offers needed to be aggressive and that the Stathams felt their property was worth \$60,000 per acre at that time.

[35] According to Spence, the Stathams received a notice of annexation from Olds on June 22, 2007.

[36] The NW Offer and the NE Offer were prepared by Mountain Aire and returned initialled by Spence and Criddle on June 24, 2007. They were in the name of Liberty's former numbered company name, 1330690 Alberta Ltd.

[37] On the same date, Liberty entered into a brokerage agreement with Mountain Aire (“**Brokerage Agreement**”). Kinnear acknowledges that the Real Estate Defendants were acting as agents on behalf of Liberty. Kinnear was to locate properties and negotiate with the sellers. McCurdy dealt with Spence and Criddle and prepared documentation.

[38] Mountain Aire and Liberty entered into a Buyer’s Commission Agreement on June 26, 2007. It appears this agreement was negotiated between June 21 and 26, 2007. That agreement, in part, sets a commission rate of \$75,000.00 per parcel (if they both sell). It also provides an undivided interest in the NE Quarter to the agents equal to one acre, regardless of whether both the NE Quarter and NW Quarter were sold or not. Added to this was a floating bonus equal to 5% of any savings between the purchase prices of \$35,000.00 and 40,000.00 per acre. I note that the effect of this agreement was to incentivize the Real Estate Defendants to get a better price for Liberty. Obtaining a sale at a higher price would not result in higher compensation for them.

[39] As noted, the heart of this lawsuit is the meeting which Kinnear says took place at the Mountain Aire office on June 26, 2007. (I pause here to note that the record currently before me suggests that Lyle’s evidence is that the meeting took place at his parents’ residence on June 27.)

[40] In attendance at this meeting were Kinnear, Lyle, Leslie, and Jean. The NE and NW Offers were presented to them. Kinnear’s evidence is that he made it clear to the Stathams that he was representing only Liberty and was not acting on their behalf. His evidence was that he presented the \$35,000 offer as a “great offer and a remarkable offer,” but the Stathams inquired whether they could obtain more. He explained that they could make a counteroffer, which would nullify the First NE and NW Offers. His evidence—which has never been directly challenged in cross-examination—was that he did not tell the Stathams that Spence and Criddle would accept a higher offer.

[41] Kinnear recalled that he also told the Stathams that he did not know anything about the buyer and that the offers were being made through a numbered company created a few days earlier. He did not know anything about the buyer’s funding and was not sure the buyer would proceed with the transaction.

[42] Kinnear expressly stated that at no point during this meeting did he disclose any confidential information. He did not tell the Stathams that Liberty would pay up to \$40,000 per acre, nor did he tell them that Liberty would allow them to rent the land for \$1 per year. He has not yet been directly challenged on this evidence in cross-examination.

[43] On June 28, 2007, Kinnear says the Stathams attended Mountain Aire’s office and told Kinnear they were making a counteroffer. (I note again that the evidence of Lyle now before me is that the counteroffer was made at his parents’ residence on June 27, then papered and executed at the Mountain Aire office on June 28) The counteroffers were as follows:

- (a) \$40,000.00 per acre for the full Northwest Quarter, for a revised total purchase price of \$6,400,000.00, plus rental terms of \$1.00 per year for not more than 10 years, and other terms, written by hand on the NW Offer (“**NW Counter**”); and
- (b) \$40,000.00 per acre for the Northeast Quarter, for a revised total purchase price of \$6,400,000.00, which still included the ability to rent the home on the land for up to five years for \$1.00 per year plus rental of the agricultural land for \$1.00 per year and other terms, written by hand on the NE Offer (“**NE Counter**”, collectively the “**Counteroffers**”).

[44] Again, Kinnear's evidence regarding this meeting is that at no time did he tell the Stathams that Liberty would pay as much as \$40,000 per acre, nor that Liberty would agree to the rental terms proposed. All terms of the NW and NE Counter were decided on by the Stathams. No confidential information was disclosed. Again, this evidence has not been challenged in cross-examination.

[45] Spence has no personal knowledge of these meetings and discussions, as he was not present. His affidavit evidence states: "The Statham[s] marked up the offers, including changing the purchase price to \$6.4 million from \$5.6 million (which reflected \$40,000 per acre rather than \$35,000)." In cross-examination, he confirmed that he was told the Stathams had countered at this amount.

[46] On the same day, Kinnear faxed the NW Counter and NE Counter to Spence and Criddle. He recalled recommending that Liberty not accept the terms of the counteroffers. His evidence is that he did not think rental terms were warranted at the per acre price being requested. Nonetheless, Spence and Criddle accepted the NW Counter and NE Counter. These Offers to Purchase were then reviewed by lawyers and redrafted by McCurdy in July 2007, with +1 being added to the contract numbers, thus becoming the "Final Offers". The contents of the Final Offers were not materially different from the NW Counter and NE Counter for the purposes of this action. They were executed by Spence and Criddle on July 18, 2007, and the Stathams on July 19, 2007.

[47] Customer Status Disclosure Agreements were entered into between Mountain Aire and Lyle and Loretta on July 19, 2007 and Leslie and Jean on July 12, 2007, which acknowledged that Mountain Aire was not acting on their behalf.

[48] After the sales closed, Lyle appears to have developed a business relationship with Spence and Criddle, as well as friendships with them.

[49] Some three years later, Spence received emails from Lyle further to a conversation they apparently had on September 20, 2010. Those emails were sent on September 21 and 22, 2010 ("**Lyle September 21 Email**" collectively, the "**Lyle 2010 Emails**"). The Lyle 2010 Emails suggest that:

- (a) On September 21, 2010, Lyle told Spence in part that:
  - (i) Kinnear told the Stathams that while the offer was for \$35,000.00, he thought Liberty would go to \$40,000.00;
  - (ii) He and his parents went to the Mountain Aire office "one time to sign something"; and
  - (iii) "At no time did we (my parents or myself) ever negotiate on price or conditions. We were amazed by the \$35 then \$40,000 offer and residency terms and were quite happy to take it as presented when this all started 3 years roughly ago. All our contact (which was almost nothing) was with Ken who was really easy to deal with. I can probably find some more details in my records at home with exact dates and details."
- (b) On September 22, 2010, after Spence asked "...what you guys would have taken on the property if we approached you directly?", Lyle responded in part that:

- (i) It was like “the whole world suddenly saw ‘For Sale’ written above our place in the sky,” and everything happened quickly; they had not really thought much about price beforehand;
- (ii) The first couple of offers received were for under \$20,000 per acre and were not entertained. The last offer prior to Liberty—but after they had spoken with Kinnear—was for \$27,500 per acre, and they assumed that offer would likely go as high as \$30,000 per acre;
- (iii) They had heard rumours the Miller place, near their land, had sold for \$40,000.00 per acre; and
- (iv) He provides what appears to be business advice to Spence about dealing with landowners directly on similar transactions in the future.

[50] In his affidavit, Spence did not disclose or address the September 22, 2010 email that forms part of the Lyle 2010 emails. He indicated in cross-examination that he “thought [the Lyle September 21 Email] was enough evidence to back my statement,” despite agreeing that the September 22, 2010 email related to the same general subject matter.

[51] Spence also provided double hearsay evidence in his first affidavit that on August 5 (he means August 2, this is a typographical error), 2011, Liberty’s former counsel, Murray Harris (“**Harris**”), attended the Stathams’ residence and took witness statements from Lyle and Jean (“**Lyle Harris Draft**” and “**Jean Harris Draft**”), which remained in draft form and were never signed.

[52] Spence’s evidence was that the Lyle and Jean Harris Drafts confirmed, to some degree, the information in the Lyle 2010 Emails. Spence confirmed in cross-examination that he had no personal knowledge at all of what was discussed at this meeting. He attached the Lyle and Jean Harris Drafts, as well as a memo to file prepared by Harris, to his affidavit.

[53] Some important points from the Lyle and Jean Harris Drafts are that:

- (a) They detail a meeting at Leslie and Jean Statham’s with Lyle present on June 27, 2007, and both state that it was Kinnear who raised the issue of \$40,000.00, stating to them on June 27, 2007 that “it looked like they would offer between \$35,000.00 and \$40,000.00 per acre”;
- (b) When they attended Mountain Aire’s offices on June 28, 2007, the price on the agreement was \$40,000.00 per acre. They did not make a counter proposal and did not make any offers to Liberty prior to this;
- (c) Kinnear suggested that they ask for provisions to stay on the land for five years for Leslie and Jean, ten years for Lyle and Loretta; continued residency was his idea; and
- (d) Lyle’s statement is that “[a]nother neighbor was rumoured to have sold property east of me at \$40,000.00 per acre several months before the offer to us”.

[54] Harris prepared a memorandum to file on August 5, 2011 (“**Harris Memo**”) which was appended to the Spence affidavit (and at that time thus hearsay). Pertinent points of that memorandum are:

- (a) Three versions of the statements were prepared during the meeting, and changed after input from Lyle and Jean, resulting in the Lyle and Jean Harris Drafts;
- (b) There was considerable discussion about whether they should sign the statements;
- (c) Lyle and Jean seemed amenable to giving statements;
- (d) Hearsay statements from Jean and Loretta regarding concerns about the community;
- (e) Hearsay statements from Lyle (which he did not recall making when examined) about whether Kinnear had insurance;
- (f) They acknowledged to Harris their statements were true and nothing was omitted to their knowledge; and
- (g) The same day, Lyle contacted Harris and asked for Word documents of the statements so he could make changes to them, advising he would attend a local lawyer's office to sign them. Harris interpreted this as Lyle seeking legal advice about whether to sign them.

[55] Lyle and Jean never signed the Lyle and Jean Harris Drafts. They retained and met with counsel about the statements. Jean refused to participate any further in the process. Lyle substantially redrafted his statement on August 15, 2011, materially changing the information in it. The redrafted statement was never finalized. It was sent by Lyle to Harris, and Lyle directed Harris to delete the first statement. This evidence was all hearsay or double hearsay before the Applications Judge as neither Lyle, Jean nor Harris provided evidence at that time.

[56] On cross-examination, Spence testified that he had a telephone call with Lyle on August 16, 2011, during which he took notes. Spence's notes indicate that Lyle agreed to look in his files to find the \$35,000 offer (the NW Offer/NE Offer). They had another telephone call on August 17, 2011. Spence agreed that his notes recorded that Lyle had located the \$35,000 per acre offer, and that Lyle told him he no longer thought Kinnear had raised the issue of \$40,000; perhaps it had been the Stathams. Spence had not reviewed these notes at the time he prepared his affidavit. He indicated that, in his view, Lyle changed his account out of concern about what people in Olds would think of him, and because Lyle's lawyer at the time had told him he could be sued for slander based on what was contained in the draft statements prepared by Harris and the Lyle 2010 emails.

[57] During Spence's cross-examination, correspondence between Lyle and Harris was put to him regarding Lyle's redrafting of his witness statement and the reasons for doing so—matters in which Spence was not involved.

## **VI. Decision Below**

[58] In brief oral reasons, the Applications Judge noted that Kinnear's evidence was clear that he did not share any confidential information with the Stathams during his meetings with them. He was not cross-examined on this evidence. The Court was satisfied that Kinnear's evidence was sufficient to establish a case for summary dismissal.

[59] The Court noted that Liberty relied on hearsay evidence, some of which constituted double hearsay. Interviews had been conducted by Harris with members of the Statham family,

yet no affidavit evidence was before the Court as to what Harris heard or what he was told by the Stathams in the creation of the Lyle and Jean Harris Drafts.

[60] The Court also found that it could not see, on the evidence before it, a path by which the plaintiffs could adduce admissible evidence at trial regarding what was said in the meetings in a manner that supported their case. This conclusion appears to have been premised on a finding that the case law concerning hearsay, and its use by either party on a summary judgment or summary dismissal application, had evolved toward the exclusion of such evidence on summary judgment applications. No further analysis was provided, and no cases were cited.

[61] The Applications Judge found that Harris' evidence, as it existed on the record before the Court, was "weak at best," and that Lyle's evidence was "evolving," in that he had provided one version that appeared to support the Real Estate Defendants' position more than Liberty's (being his evidence after receiving the Lyle Harris Draft). The Applications Judge found that, when the crux of the matter is what was said at the meetings in question, it was incumbent upon Liberty to present "real hard evidence that it intends to introduce at trial in order to evaluate whether there is an issue of merit for trial," which the Court found had not been done.

[62] In the result, the action was dismissed.

[63] I note that the Applications Judge raised a concern about Kinnear seeking to have the Stathams list the Lands with Mountain Aire but ultimately found that nothing turned on this point for the purposes of the action. I agree and note that the evidence shows these requests were made by Kinnear after they had started working with Liberty but before he entered into the Brokerage Agreement with Liberty.

## VII. New Evidence and the Amplified Record on this Appeal

### A. The Law Regarding New or Additional Evidence

[64] After the Applications Judge dismissed this action, Liberty appealed. After appealing, Liberty also filed further evidence from:

- (a) Spence, via an affidavit filed April 3, 2023 ("**Spence Supplemental Affidavit**");
- (b) Criddle, via an affidavit filed April 3, 2023; and
- (c) Harris via an affidavit filed March 20, 2023.

[65] Harris was questioned on his Affidavit, and was represented by counsel for that, who did not appear on the application. Liberty also questioned Lyle and Loretta pursuant to Rule 6.8 of the *Rules*. They were each represented by counsel who did not appear on the application.

[66] Liberty seeks to rely upon the additional evidence gathered in this appeal.

[67] The Real Estate Defendants do not strenuously contest Liberty's ability to do so. This is because the threshold for admitting new evidence on an appeal from an Applications Judge is low. Rule 6.14(3) requires that it be considered "relevant and material": *Rudichuk v Genesis Land Development Corp*, 2019 ABQB 133 at para 13 [*Rudichuk*], aff'd on other grounds, 2020 ABCA 42.

[68] I agree with Justice Marion's statement in *Spady* at para 37, where he found that new evidence is "relevant and material" for the purposes of Rule 6.14(3) where it might reasonably be expected to significantly help determine one or more of the issues raised on the appeal.

[69] This is a very lax test, and lack of due diligence does not form part of the test: *Boyd v Cook*, 2013 ABCA 266 at para 5. As noted in *Rudichuk* at para 15, citing other authority from this Court, the test is applied very broadly, tending towards admission rather than exclusion, and any concerns as to reliability can be dealt with as an issue of weight, not admissibility: see also *BSI Build Inc v Diep*, 2025 ABKB 739 at para 30 [*BSI Build*], cited recently in *2357596 Alberta Ltd v Antoniuk*, 2026 ABKB 81 at paras 4-5.

[70] I will summarize the evidence presented. I find, after a thorough review, that it is relevant and material to this appeal. As a result, it meets the low threshold of admissibility for the application.

[71] However, parts of the evidence are rife with hearsay. The finding of admissibility for the purposes of the application should be contrasted with my findings regarding the hearsay contained in that evidence and whether it can be relied upon by Liberty to support its appeal and to create a triable issue or issues. These are separate inquiries.

### **B. The Additional Evidence**

[72] Spence appears, in the Spence Supplemental Affidavit, to have recalled more detail about the events that occurred in 2007 than he had in 2021. Most of that detail is hearsay, and much of it is self-serving. He describes discussions that occurred in May 2007 with McCurdy and appends emails from McCurdy suggesting that listings were being discussed around May 17, 2007. I note that all this purported evidence from Spence regarding what McCurdy said or did is hearsay. While it forms part of the overall narrative of the case, it is also only tangentially relevant in that it does not in itself create any triable issue.

[73] As regards the Lands and the transactions relating to them, the Spence Supplemental Affidavit adds little. It also provides self-serving hearsay evidence that appears to the Court to be an attempt to bolster Liberty's position. The clear purpose of this self-serving hearsay is to try to create some form of conflict between the evidence of Kinnear and Lyle, and to raise potential credibility issues regarding McCurdy that are not relevant to the key issue in this lawsuit—namely, whether Kinnear disclosed confidential information of Liberty to the Stathams regarding Liberty's preparedness to accept \$40,000 per acre for the Lands, and whether the rental arrangements ultimately proposed would have been acceptable to Liberty.

[74] Spence then goes on to provide further hearsay evidence about conversations he had with Lyle in 2010. The Spence Supplemental Affidavit was sworn after Lyle was examined on February 16 and March 16, 2023. Spence's evidence largely focuses on the Lyle September 2010 emails and his interactions with Harris, culminating in the Lyle Harris Draft and the Jean Harris Draft.

[75] Among other things, Spence, in the Spence Supplemental Affidavit:

- (a) Provides hearsay detail of the September 20, 2010 telephone conversation with Lyle (the precursor to the Lyle September 21 Email), suggesting that Lyle told him that Kinnear had said Liberty would go as high as \$40,000 per acre, as well as telling him about the rental proposal ultimately made in the NW and NE Counters (I note this is, in fact, double hearsay, and that such a proposition has never been put to Kinnear in cross-examination);

- (b) Provides hearsay detail of a follow-up September 22, 2010 telephone conversation with Lyle, suggesting that Lyle indicated that \$30,000 per acre would have been an attractive offer;
- (c) Denies having sought business advice from Lyle;
- (d) Refers to a September 28, 2010 email—without exhibiting it, although it was put into evidence in cross-examinations—in which he says Lyle asked how the issues with the Real Estate Defendants had gone;
- (e) Indicates that, in 2011, he advised Lyle that Liberty would be proceeding with a lawsuit against the Real Estate Defendants and that Lyle agreed to give a statement to Harris;
- (f) Provides self-serving hearsay indicating that Lyle was concerned about his family’s reputation in the community and about assisting outsiders in litigation against local families;
- (g) States that after further discussion with Lyle, he provided Lyle’s contact information to Harris, who met with Jean, Lyle, and Loretta on August 2, 2011;
- (h) States that following this meeting, on August 16, 2011, he had a call with Lyle, during which Lyle suggested that he had concerns about court, that the Stathams did not want the matter to go to court because they were worried about what the town would think of them, and that Lyle was going to look for the \$35,000 offer (the NW Offer); and
- (i) Provides additional self-serving hearsay regarding a follow-up call on August 17, 2011 with Lyle, again raising concerns about reputation and offering double hearsay that Kinnear had raised the issue of land leasing and that the Stathams should ask to stay on the property.

[76] The Spence Supplemental Affidavit is, to a large degree, simply repetitive of his earlier evidence, and where it is not repetitive, it is replete with self-serving hearsay and double hearsay. To be frank, but for the lax test for the admission of evidence on appeals from an Applications Judge, I would not have admitted it. The balance of this evidence appears to be a less-than-transparent attempt to bolster Liberty’s position and to create additional conflict on the record with the evidence of Lyle.

[77] Criddle, in his affidavit, is in many respects simply confirmatory of Spence’s evidence. He confirms that the Lands were of interest to them by mid-2007, which is why they sought out the Real Estate Defendants. He also provides evidence relating to some of his dealings with McCurdy (some of which contains hearsay), in particular:

- (a) They had discussions with McCurdy regarding a price range of \$30,000–\$40,000 per acre (which contains hearsay about discussions with McCurdy);
- (b) That on June 5, 2007, he sent an email to McCurdy regarding an intention to make an offer for the Lands at \$30,000 per acre, but on the following day, McCurdy responded by email that he would monitor the annexation of the Lands and decide what offer to put forward;
- (c) That Spence had forwarded him the June 12, 2007 email from McCurdy;

- (d) That Kinnear met with him and Spence on June 15, 2007, and Kinnear confirmed he had a personal relationship with the Stathams, and he understood the Stathams were difficult people to deal with;
- (e) That Kinnear told them \$30,000.00 was no longer an option and they indicated \$35,000.00 per acre would be written up;
- (f) That he and Spence would have preferred not to start at \$35,000.00 per acre but felt pressure from the Real Estate Defendants to start there;
- (g) That he seems to have expressed anger and frustration at the NE and NW Counters but still accepted them;
- (h) Criddle provides a number self serving statements as to his state of mind and about conversations with Spence that Spence never mentions;
- (i) He does the same with respect to Spence's interactions with Lyle in 2010, again with no corroboration from Spence as to what apparently transpired in conversations between Spence and Criddle; and
- (j) Criddle points to his February 14, 2011 email where in response to his statement to Lyle that "if Remax didn't screw us on the purchase of your land u [sic] would already be paid in full", Lyle apparently wrote "[a]nd I do appreciate the money you are paying to me because of Remax..."

[78] Criddle's evidence, like Spence's Supplemental Affidavit, adds little of value. Neither Spence nor Criddle were cross examined on these affidavits.

[79] Harris, as noted, filed an affidavit for this appeal and was questioned on that affidavit. At the time in question, he was one of the lawyers at McLennan Ross in Calgary acting for Liberty. The lead lawyer on the file was Don Dear, QC. Harris indicates that he was directed to contact Lyle and arrange to interview him in late July 2011.

[80] Harris indicated that on August 2, 2011, he drove to Olds with Ashley Diamond ("**Diamond**"), a legal assistant. In cross-examination, he confirmed that Diamond was not a stenographer, despite having described her as such in his memorandum to file. She was an information technology assistant. He brought her along to help set up a computer and printer for use at the meeting and to ensure internet connectivity. She was not a court reporter, nor was she trained to take down testimony.

[81] They met with Lyle, Loretta, and Jean at Lyle and Loretta's home. Harris says he interviewed Lyle and Loretta during the meeting. He could not recall whether he had brought any documents with him. Diamond drafted statements of what they said, and Harris also did some of the typing. Those statements were presented to the witnesses, who requested changes. Harris could not remember which portions of the statements were typed by Diamond and which were typed by him. No transcript was taken, and no audio or video recording was made. All participants were in the same room when the statements were taken and typed.

[82] Harris stated in cross-examination that he could not clearly remember much of the conversation that took place that day and instead relied on his "style at the time" to describe how the meeting would have proceeded. He did, however, recall sitting at the computer and receiving input from Lyle and Jean about how they wanted certain phrases to be stated, and about accuracy. His evidence was that this was an interactive process.

[83] Harris indicated that the statements were prepared with the intention of accurately describing what Lyle and Jean could say if they were later called to testify. When challenged on the “boilerplate” nature of many of the statements in the Lyle Harris Draft and the Jean Harris Draft, he responded that he had never claimed they were verbatim transcripts. There is, in fact, significant identical wording used and overlap between the two statements.

[84] Harris testified that, to his recollection, more than one version of each statement was prepared during the meeting, with revisions and input from Lyle and Jean at each stage. He could not recall what those revisions were, and earlier versions were not retained. Through this process, Harris believed that the Draft Lyle and Jean Statements were representative of what they had said.

[85] Loretta declined to give a statement as, in Harris’ words, she was “only involved in one of the original meetings for the sale of the properties.” Harris says that Lyle and Jean asked for some time to discuss the statements among themselves, and, to the best of his recollection, “the statements presented to Lyle and Jean Statham were an accurate summary of what they had represented to me verbally.” Harris’ affidavit also contains several hearsay statements about what Jean told him, including that they would not be signing the statements that day, that they would be seeking legal advice, and that they were concerned because “they had to live here.” In cross-examination, Harris confirmed that Lyle and Jean indicated they were going to obtain legal advice before signing any statements. Jean is deceased.

[86] Later that day, Lyle emailed Harris, asking for Word copies, indicating he wanted to make changes to them. The statements appear to have been emailed by Harris’ assistant, in Word, to Lyle on August 3, 2011.

[87] The Lyle and Jean Harris Drafts do not refer to any meeting on June 26, 2007. Instead, they outline a meeting at Jean and Leslie’s house on June 27, and suggest a scenario whereby there appears to have been no first offer presented on the 27<sup>th</sup>, but a discussion about pricing whereby confidential information was disclosed, then a meeting to sign offers on the 28<sup>th</sup> at Mountain Aire’s offices. I note this is entirely inconsistent with Kinnear’s direct evidence.

[88] The main issue here is that Lyle and Jean never formally agreed to the Lyle and Jean Harris Drafts. They did not sign them. They refused to. They took them away to obtain advice. Lyle redrafted his; Jean declined to participate further.

[89] In his affidavit, Harris appends the Harris Memo, and the Lyle and Jean Harris Drafts. He also further provides hearsay evidence about a call with Lyle and Lyle’s lawyer “some days or weeks later,” during which Harris was apparently told that Lyle would not be signing the statement as presented because he was afraid he might be sued for defamation by Kinnear or McCurdy.

[90] On August 17, 2011, Lyle emailed Harris indicating that Jean refused to sign her statement and would not be participating. He also attached a substantially revised version of the Lyle Harris Draft, dated August 15, 2011 (the “**Lyle Redraft**”), which significantly altered the contents of the original Lyle Draft Statement. The Lyle Redraft was created after Lyle and Jean had consulted a lawyer. Lyle indicated that he had re-typed his statement to put it into his own words and to “remove any inaccuracies or unnecessary information.” He expressly asked Harris to “[d]isregard and delete the previous statements which you typed up.”

[91] Material changes in the Lyle Redraft include:

- (a) That upon review, he and Jean found several unimportant or inaccurate comments, after which they consulted with a lawyer;
- (b) As a result of advice he received, he decided to retype his statement “sticking to only facts I remember clearly”;
- (c) Jean did not wish to make a statement;
- (d) On June 27, 2007, Kinnear met with Lyle and his parents at his parents’ home, and presented the \$35,000.00 offer. “Somehow a counteroffer price of \$40,000.00 was suggested.”
- (e) When they attended on June 28, 2007 at Mountain Aire’s offices to sign documentation, they put the lease rental conditions into the documents, which Kinnear indicated he was not sure the buyers would accept;
- (f) They knew that Kinnear and Mountain Aire were contracted to Liberty and were being paid by them; and
- (g) They did not believe the deal would go through at the time.

[92] Lyle’s testimony in examination in this proceeding was that: the \$40,000 counter and the conditions relating to rental and residency were not Kinnear’s ideas. Rather, Kinnear had warned them that the rental conditions could jeopardize the deal, and the Stathams decided to take that risk. Lyle also consistently repeated that the source of their counteroffer was their understanding at the time that the Millers had received \$40,000 per acre for their land.

[93] When asked about the refinement in the Lyle Redraft which states “[S]omehow a counteroffer price of \$40,000.00 was suggested”, versus the new detail in his testimony, Lyle indicated that at that point he had not dug out the offers and documentation. He later did so, and that appears to have refreshed his memory.

[94] However, Lyle was directed to a phone call that Lyle apparently had with Spence on August 17, 2011. Lyle had no apparent recollection of the conversation at all, rendering Spence’s evidence of the call hearsay. Spence’s handwritten notes of the call were put in evidence through Spence. The notes suggest that Lyle had reviewed the \$35,000.00 offer when he issued the Lyle Redraft and said he was uncertain who had raised the \$40,000.00 counter. Lyle did not recall telling Spence he was concerned about being sued for slander by Kinnear and McCurdy after meeting with his lawyer. He also did not recall reviewing documents around this time.

[95] Harris interpreted the Lyle Redraft as Lyle changing his mind about the testimony he was willing to give. Harris also indicated in cross-examination that, in his view, Lyle and Jean were willing to sign the Lyle and Jean Draft Statements after they had been typed, until they stepped aside to speak privately—a conversation he could partially overhear—after which they decided they did not want to sign. He could not recall ever asking Lyle whether he would sign the Lyle Redraft. Lyle did not recall speaking to Harris afterwards.

[96] Harris also conceded in cross-examination that while he was counsel for Liberty, during questioning of Spence on February 8, 2018, he stated on the record in response to an undertaking request that:

MR. HARRIS:

Mr. Statham has never made

a statement that he would agree with. He has not produced a statement on his own, and any documents that have been put in front of him were created by counsel during the course of litigation, and he has not agreed with them.

[97] Harris clarified in cross-examination that, with respect to his earlier statement about Lyle not producing a statement on his own, he could not recall whether he said this because he had forgotten that Lyle had sent his own statement, or whether he had been referring to a signed statement from Lyle.

[98] In his testimony, Lyle confirmed that both Leslie and Jean are deceased. He first met Kinnear through his employment at Olds College when Kinnear brought farm equipment to be overhauled by Lyle's students in or around 2006. He indicated that they were not friends and that their relationship was simply cordial. He was aware that both McCurdy and Kinnear were realtors before the land transactions in question.

[99] Lyle indicated that the genesis of the Lyle 2010 Emails was that Spence and Criddle had asked him what could be done better going into their next projects. He described the emails as a quick summary of what had gone well and what he would suggest they do in the future. He stated that he did not know that Liberty intended to use the Lyle 2010 Emails in a lawsuit. Lyle recounted an in-person meeting with Kinnear after the lawsuit was commenced and how the Lyle 2010 Emails had apparently been the foundation for it.

[100] In questioning, he repeatedly insisted that the Lyle 2010 Emails were done spur-of-the-moment, without consulting any documentation, to assist Spence and Criddle on a go-forward basis. He indicated that the inaccuracies in the Lyle 2010 Emails included:

- (a) The offer for \$35,000.00 per acre was in fact the first offer made by Liberty so that was not accurate in the emails; and
- (b) The statement that Kinnear thought Liberty would go to \$40,000.00 per acre was not accurate. It was he who told Kinnear they wanted \$40,000.00 per acre, which is the price Marie Miller (the neighbor earlier mentioned in these reasons) had obtained for their land across the road. The Miller lands had sold approximately a year prior. They are right on the edge of housing in Olds, just like the Lands.

[101] Lyle stated that he learned of this purchase price for the Miller lands prior to Kinnear approaching him with any offers related to his property. According to Lyle, this knowledge led them to counteroffer at \$40,000.00 per acre. He acknowledged that this evidence was inconsistent with the Lyle 2010 Emails, in particular the Lyle September 21 Email. He held his ground that the content of these emails reflected off-the-cuff business advice, notwithstanding that there appears to be no business advice in the Lyle September 21 Email. Throughout his testimony, he maintained that Kinnear did not disclose Liberty's "top dollar" figure, that they countered at \$40,000.00 per acre, and that this figure was based on what Miller had received for

her land. He had no recollection of any post-2010 communications with Spence or Criddle in which Liberty's "top dollar" figure was identified as \$40,000.00.

[102] He acknowledged that he was part of an email chain with Spence dated September 28, 2011, one week after the Lyle 2010 Emails, where he asks Spence "[h]ow did the issue with RE/MAX/Barry go after my letter to you?" He agreed this was a reference to the Lyle September 21 Email.

[103] Lyle conceded that what he wrote in the Lyle September 21 Email emails amounted to a breach of Kinnear's confidentiality obligations to his client, yet he remained focused on his view that he was never told the Lyle 2010 Emails would be used for legal purposes. He reiterated that the emails were intended as a "casual summary" and "not thought out."

[104] Lyle indicated that Spence had spoken with him on the phone, or an email, about Harris visiting the Stathams to take statements. Harris then called him to book the meeting. That was the first time he had spoken to Harris. He knew Spence and Criddle were considering legal action at this time.

[105] Lyle stated that when they met with Harris, the Stathams were "green as grass" regarding legal matters. He did not recall reviewing any documents in advance of the meeting to refresh his memory, nor did he recall speaking to Kinnear between the time the meeting was arranged and when it occurred. He confirmed that Diamond was doing the typing, and that neither he nor his mother took notes. Lyle recalled that Harris asked questions, which they answered, but some of the written answers appeared to him to be putting words in their mouths, with which they did not agree. He agreed that multiple versions were created that day because he and Jean continued to request changes to statements they believed were inaccurate. He stated that by the end of the meeting, they were still not comfortable with the Lyle and Jean Draft Statements, did not sign them, and sought legal advice instead.

[106] Lyle did not recall saying to Harris that he believed his draft was true and accurate to the best of his recollection. They felt the statements were not fully accurate as presented. He indicated that as the meeting progressed, they lost confidence that Harris was being transparent with them because he was representing Liberty. Lyle did not recall telling Harris they would sign the statements; in his view, had they intended to sign them, they would not have retained a lawyer.

[107] Lyle agreed that after the Lands were sold, he, Spence, and Criddle became friends and worked together on a housing project in Calgary from approximately 2011 to 2015. That friendship deteriorated in late 2016 or early 2017. Lyle took legal action against Liberty, Spence, and Criddle due to mortgage interest not being paid, and he acknowledged filing two lawsuits in Alberta. There may also have been a lawsuit in Saskatchewan in 2017. Lyle further admitted that he contacted the Alberta Securities Commission, the RCMP, the Real Estate Council of Alberta, and the Saskatchewan FCAA regarding Liberty, Spence, and Criddle. He also testified that Spence had commenced two additional lawsuits against him in the 12-month period before his examination, including one in Saskatchewan that was later discontinued. Lyle agreed that he had recommended to others involved with Liberty, Spence, and Criddle that they contact the appropriate regulators.

[108] Loretta's evidence on questioning simply confirmed that she had no real knowledge of what had occurred at any material time relating to the sale of the Lands. She indicated she is of

limited education and has health issues, and as a result leaves all financial and business matters to Lyle. She recalled having to sign some documents but had no specifics to offer.

[109] What Loretta did recall quite clearly is that the Lyle and Jean Harris Drafts were “all a bunch of BS”, indicating that to her memory, what Harris had written did not reflect anything that he was being told, which is why they refused to sign them.

## VIII. Arguments of the Parties

### A. Liberty

[110] Liberty argues that Applications Judge Farrington erred in granting summary dismissal because the record before him did not permit a fair or just determination of the central factual dispute in this action—namely, whether Kinnear, while acting as Liberty’s agent, disclosed confidential pricing information to the sellers and encouraged them to counter at a higher price.

[111] Liberty submits that the action turns entirely on credibility assessments of Lyle and Kinnear, the only living participants to the critical meetings in 2007. It says the conversations are highly contested and cannot be resolved on affidavit evidence.

[112] The Appellant asserts that the central factual dispute, being whether Kinnear advised the Stathams that Liberty “would probably pay \$40,000 per acre,” or whether the sellers raised that figure independently, cannot be resolved summarily. The evidence from Lyle, Jean (through hearsay), and Kinnear is inconsistent, evolving, and in some cases contradictory.

[113] Liberty argues that Lyle’s evidence has changed significantly over time, progressing from clear statements in 2010–2011 attributing the \$40,000 figure to Kinnear, to his most recent sworn testimony expressing certainty that he himself raised it. It submits this shift raises acute credibility issues suitable only for trial.

[114] It contends that the substantial new evidence before the Court, canvassed above, cures the hearsay concerns that underpinned the Applications Judge’s earlier decision and materially alters the evidentiary record.

[115] Liberty argues that Jean’s hearsay evidence, though subject to a reliability assessment at trial, remains relevant. Her death satisfies the necessity requirement, and the conflicting accounts between Lyle and Harris regarding her statement further illustrate that admissibility cannot be determined summarily.

[116] Liberty further argues that the Applications Judge erred in treating Jean’s hearsay statement as inadmissible without conducting a principled-exception analysis and in failing to recognize that any such analysis belongs at trial.

[117] It also highlights inconsistencies in Loretta’s evidence, particularly regarding whether she signed documents and attended meetings. It submits that this too reinforces the need for *viva voce* evidence.

[118] It also submits that Criddle and Spence’s evidence corroborates the allegation that Kinnear disclosed confidential information, including that Liberty might pay \$40,000 per acre and might agree to a \$1.00 rental term, none of which had been authorized.

[119] Liberty argues that the Respondents' own evidence is internally inconsistent, including Kinnear's contradictory statements about whether he or the sellers provided certain information regarding comparable sales and buyer interest.

[120] Cumulatively, Liberty contends that the evidence reveals a "classic he-said/she-said" conflict on core issues of breach of fiduciary duty, rendering the matter wholly unsuitable for summary judgment under established principles.

[121] It submits that given the volume of conflicting evidence, credibility assessments are unavoidable, and the factual foundation is far from "incontrovertible", making dismissal improper.

[122] Liberty contends that only a full trial, with live testimony from Kinnear, the Stathams (except Jean), Spence, Criddle, and Harris, can resolve the conflicting accounts and allow the Court to weigh credibility and reliability properly.

[123] The parties present diametrically opposed accounts of who raised the prospect that Liberty would pay \$40,000 per acre. Liberty relies on the earlier hearsay statements from Lyle and Jean indicating Kinnear raised it, whereas Kinnear consistently denies disclosing such information.

[124] Liberty argues that the evidence of Lyle, Loretta, Kinnear, Harris, Spence, and Criddle presents multiple internal inconsistencies and contradictions on key points, rendering credibility a central issue that cannot be resolved summarily.

[125] A summary of Liberty's alleged evidentiary conflicts is below:

- (a) Kinnear's denial versus Lyle's accounts:
  - (i) Kinnear denies ever disclosing confidential information or suggesting Liberty would accept \$40,000 per acre. In contrast, Lyle's earlier emails and draft statements, and Jean's draft statement as recorded by Harris, attribute the \$40,000 figure to Kinnear;
  - (ii) Kinnear gave contradictory evidence on whether he or Lyle had stated that multiple developers were interested in the area;
  - (iii) In 2010 and in the 2011 Harris interview, Lyle stated Kinnear suggested \$40,000;
  - (iv) Days later in 2011, after consulting counsel, Lyle became "unsure" who raised it;
  - (v) In a 2023 questioning, Lyle asserted confidently that he, not Kinnear, raised \$40,000 based on a neighbour's sale;
  - (vi) Later in the litigation, Lyle claimed the \$40,000 figure came from a neighbouring sale. Liberty says this explanation is absent from all earlier statements, drafts, or his revisions (which is true but not completely absent from the record);
  - (vii) Jean's draft statement and Lyle's draft statements indicate Kinnear suggested a \$1.00 rental term. Kinnear denies ever doing so. Criddle and Spence's evidence tends to support the former account; and

- (viii) Liberty argues these changes raise significant credibility concerns.
- (b) Harris' contemporaneous notes versus Lyle's later revisions:
  - (i) Harris' evidence is that both Lyle and Jean clearly attributed the \$40,000 figure to Kinnear during the 2011 meeting. Lyle later provided a materially different version to Harris and ultimately repudiated his earlier account entirely.
- (c) Jean's hearsay evidence versus Lyle's later position:
  - (i) Jean's unsigned statement supports the view that Kinnear suggested Liberty "would offer between \$35,000 and \$40,000" per acre. Lyle's later testimony contradicts this, despite earlier consistency with Jean's account.
- (d) Loretta's inconsistencies:
  - (i) Loretta initially stated she was not involved in meetings with Kinnear and signed nothing except a dower release. Under questioning, she conceded she must have signed the purchase contract and addendum, implying she attended meetings she previously denied attending.
- (e) Criddle's evidence versus Kinnear's account:
  - (i) Criddle states Kinnear pressured Liberty to begin at \$35,000 per acre, that Liberty never authorized disclosure of a \$40,000 ceiling, and that he learned Kinnear told the Stathams \$40,000 would be required—contradicting Kinnear's denial of any such statements.
- (f) Spence's account versus Kinnear's denial:
  - (i) Spence testifies that Kinnear told him the Stathams would not accept less than \$40,000 per acre and that renting the land back for \$1.00 was also required—suggesting Kinnear communicated these points to the sellers. This conflicts directly with Kinnear's denial that he conveyed any such information.

[126] At the heart of this Appeal is the scope of use of hearsay in summary judgment applications, requiring me to analyze recent decisions of this Court. Liberty argues that the hearsay before the Court, in particular the evidence of Lyle and Jean, is admissible in the application, and as a result the extant credibility issues require a trial.

[127] The Respondents argue that the law is such that the hearsay on the record before me cannot be relied upon by Liberty in this application to create a triable issue. In response to the Respondents, Liberty argues that the Respondents' position on hearsay admissibility is overly narrow and would improperly exclude prior inconsistent statements of Lyle that are central to the dispute.

[128] Liberty contends that excluding these statements—despite Lyle having given four inconsistent accounts—would offend basic fairness because the individual at the centre of the factual dispute would escape *viva voce* testing before the trier of fact. It also argues that when the declarant is available for cross-examination, this strongly supports threshold reliability and justifies admission of prior inconsistent statements.

[129] Liberty emphasizes that the trial judge should not be hamstrung by an overly formulaic hearsay analysis at the summary judgment stage, particularly when the disputed evidence is central to assessing credibility and is capable of being tested at trial. It underscores that threshold reliability does not require certainty and must not usurp the trier of fact's role in assessing ultimate reliability at trial. The Respondents' approach improperly conflates the two.

[130] Liberty submits that the hearsay at issue is reliable, necessary, and minimally dangerous; that summary determination is inappropriate; and that the application for summary dismissal should be reversed.

### **B. The Real Estate Defendants**

[131] The Real Estate Defendants contend that there is no genuine conflict in the direct evidence on the central factual issue: whether Kinnear disclosed confidential information, including the alleged \$40,000 figure, to the Stathams during the June 2007 meetings.

[132] They argue that Kinnear and Lyle are the only remaining witnesses with direct knowledge of the June 2007 discussions, as Jean and Leslie are deceased and Loretta has no recall of any specificity. Both Kinnear and Lyle, in sworn evidence, consistently deny that any confidential information was disclosed.

[133] The Respondents submit that Liberty's asserted "conflicts" arise entirely from hearsay sources, being the Lyle 2010 Emails and the Lyle and Jean Harris Drafts, which Lyle has since repudiated, and which therefore cannot create a genuine evidentiary dispute.

[134] With respect to the Lyle 2010 Emails, the Real Estate Defendants highlight that Lyle expressly testified that the email was drafted "off the cuff," without documentation, years after the events, and contains factual errors inconsistent with the contemporaneous record.

[135] The Respondents further emphasize that the Lyle 2010 Emails contain demonstrably inaccurate assertions, including that the Stathams "never negotiated" on price, and that the deal was originally drafted as a single half-section sale—both inconsistent with undisputed documents, including the contracts signed by the parties.

[136] The Respondents argue that the Lyle and Jean Harris Drafts were never adopted, signed, or verified by Lyle or Jean, were drafted by counsel in counsel's own words, and contain identical phrasing across both statements, raising doubts about their provenance.

[137] They note that Lyle has repeatedly, in detailed questioning, stated that the Lyle and Jean Harris Drafts contain "serious inaccuracies," were not in his words, and were never accepted by him.

[138] The Respondents point out that the Lyle Redraft, sent only 15 days after the Harris meeting, expressly rejects the Lyle and Jean Harris Drafts, acknowledges memory limitations, and removes the allegation that Kinnear suggested the \$40,000 figure.

[139] They highlight that Lyle instructed Harris to "disregard and delete" the Lyle and Jean Harris Drafts, which, in their view, eliminates any basis for treating those documents as reliable contradictory evidence.

[140] The Real Estate Defendants further contend that Liberty's failure to preserve evidence, including failing to secure Jean's direct evidence before her passing, means any purported conflict arising from her unsigned draft statement cannot be weighed.

[141] The Respondents argue that the Harris Memo and other secondary hearsay (such as Spence’s telephone conversation notes and Criddle’s recollections) merely restate or bootstrap the unreliable earlier statements and cannot create genuine conflicts where the primary declarant (Lyle) has since repudiated them.

[142] They assert that the only evidence contradicting Kinnear’s sworn account is hearsay that the declarant himself rejects, such that any perceived conflict collapses once the hearsay is assessed for reliability.

[143] The Respondents emphasize that Lyle’s consistent, sworn testimony in 2023, over two lengthy days of questioning, confirms that Kinnear did not disclose confidential information. They say this testimony resolves any earlier confusion and extinguishes any suggestion of a live factual dispute.

[144] The Real Estate Defendants argue that even if the Lyle 2010 Emails or the Lyle and Jean Harris Drafts were admissible, they are not sufficiently reliable to outweigh the consistent sworn evidence of Kinnear and Lyle and therefore cannot generate a credible conflict requiring trial.

[145] The crux of their argument is that the proffered hearsay is inadmissible, and as a result, the Respondents maintain that there is no genuine evidence of conflict on the material point in this case, which is whether Kinnear disclosed confidential information to the Stathams in June of 2007.

[146] On their view, Liberty’s case relies solely on discredited and inadmissible hearsay, whereas the admissible evidence establishes a single, consistent account.

## **IX. Law**

### **A. General Law on Summary Judgment/Dismissal**

[147] The summary dismissal portion of the application in the Court below was brought pursuant to Rule 7.3(1)(b). The party moving for summary determination, in this case the Real Estate Defendants, bore the burden of proving there was no genuine issue requiring a trial: *Clearbakk Energy Services Inc v Sunshine Oilsands Ltd*, 2023 ABCA 96 at para 5.

[148] The Court of Appeal in *Eberle v Terroco Drilling Ltd*, 2022 ABCA 8 at paras 9-10 summarized the test for summary judgment succinctly as follows:

[9] Rules 7.2 to 7.4 of the *Alberta Rules of Court*, Alta Reg 124/2010 govern summary judgment. These rules provide that a party may apply for summary judgment in respect of all or part of a claim if there is no defence to the claim, no merit to the claim, or the only real issue is the amount to be awarded.

[10] This Court recently described the key principles for summary judgment dismissal in *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 at para 69, leave to appeal to SCC ref’d [2021] SCCA No 79 as follows:

Summary dismissal is appropriate where the record is sufficiently certain to resolve the dispute on a summary basis, or, in other words, there is no genuine issue requiring a trial. The moving party must establish on a balance of probabilities that there is “no merit” to the claim; the resisting party must put its best foot forward and

demonstrate a genuine issue requiring a trial. In the end, the presiding judge must be left with sufficient confidence that the state of the record permits a fair summary disposition: *Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49 at para. 47, 86 Alta LR (6th) 240.

[149] The Respondents bore the onus in the Court below. They had to prove on a balance of probabilities that there is no genuine issue requiring a trial. Having done so, the Appellant, on the other hand, needed to demonstrate that the record, facts or law preclude a fair disposition and that the moving party has failed to establish there is no genuine issue requiring a trial.

[150] Who then, bears the burden on this appeal, where new evidence has been admitted, and the record is amplified? As noted above, new evidence presented on appeal requires a fresh assessment of the facts.

[151] There was some suggestion by the Real Estate Defendants that it is not clear who bears the onus on an appeal where new evidence is admitted, relying upon *Terrigno v Fox*, 2023 ABKB 89 at paras 45-47 [*Terrigno*]. *Terrigno* addressed the fact that in *HOOP Realty Inc v Emery Jamieson LLP*, 2020 ABCA 159 at paras 38-41, the Court of Appeal did not address who bears the burden on an appeal where new evidence is adduced. That case dealt with a scenario where no new evidence was led on the appeal. In that case, the Court of Appeal found that where an appeal from a master's decision to a chambers judge involves the same record and the same submissions, it is not an error for a chambers judge to summarily describe his or her analysis and conclusions with reference to the master's decision if he or she otherwise finds that it was correct in fact and law.

[152] With respect, there is guidance in the law on this issue. In this case, with an amplified record before me, I may exercise any discretion afresh and substitute my views for those of the Applications Judge if that is required: *Kaup v Landrex Hunter Ridge Inc*, 2023 ABKB 542 at para 31, 87, 88; see also *BSI Build* at paras 25, 45.

[153] As I noted above, the burden remains on the Appellant to show that, after considering the new evidence (or otherwise) the decision of the Applications Judge is not correct: *Canuck* at para 36, citing *Remington* at paras 27-28.

#### **B. Other Applicable Principles in Summary Judgment**

[154] *McDonald v Sproule Management GP Limited*, 2023 ABKB 587 [*McDonald*] contains an extensively cited list of principles that can apply to summary judgment applications. I note the ones relevant to this case below:

- (a) The traditional understanding that a dispute about a material fact disqualifies an action from the summary judgment process is no longer valid. Summary judgment is not limited to cases where the facts are not in dispute. A summary judgment court should not be reluctant to make material fact findings, but before it does so, it should ask if it constitutes a genuine issue requiring a trial by applying the appropriate test: *McDonald* at para 87 and the authorities cited therein.
- (b) I also agree that summary judgment courts must distill the record to remove, disregard or give little weight to inadmissible, inappropriate or unhelpful evidence to get to the core of the matter and determine whether there are any "genuine" issues requiring a trial (as opposed to a party's views, positions, arguments,

allegations, speculation, conjecture, interpretation, opinions, beliefs, hopes or desires), and that if, after such screening, there remains a dispute on material facts, or one that depends upon issues of credibility, it is a marker of potential genuine issues requiring a trial: *McDonald*, at paras 88-89 and the authorities cited therein.

- (c) Hearsay evidence provided in questioning on affidavits is presumptively inadmissible: *McDonald* at para 96 and the authorities cited therein.
- (d) Bald, conclusory, argumentative or self-serving statements, personal opinion, allegations, speculation, conjecture or assertions made in affidavits or questioning transcripts, in the absence of detailed facts and supporting evidence, should be given little or no weight and cannot establish a genuine issue requiring a trial: *McDonald* at para 96 and the authorities cited therein.
- (e) The court will assume that each party has put their best foot forward and presented all the relevant evidence for the application. While a party is not required to question on affidavits, and while the Court is not bound to accept evidence that has not been tested by cross-examination, a party that fails to question on admissible evidence runs the risk that the evidence will be treated as effectively unchallenged or uncontradicted for the purposes of the application, which may weaken the other party's case: *McDonald* at paras 97-98.
- (f) Even if there remain conflicts in the evidence after these principles are applied, this does not necessarily end the inquiry. Courts have tools to assist their assessment of whether conflicting evidence raises a genuine issue requiring trial, which include:
  - (i) finding that the conflict is not factual but rather a conflict of the litigants' opinions or positions;
  - (ii) drawing inferences based on admitted facts, undisputed evidence, the conduct of the parties, and corroborating evidence (such as documents with objective reliability). Inferences must be reasonable, and they must be based on proven facts, and in considering whether to draw the invited inference the trier of fact must also consider other reasonable or plausible theories "based on logic and experience", not speculation;
  - (iii) resolving issues, where appropriate, based on the portions of the affidavits that are not in dispute, including where the conflicting evidence does not relate to an essential element of the claim or defence or is not material to the outcome;
  - (iv) balancing the weight and perceived reliability of evidence because it is inconsistent with the balance of the record or the litigation history; and
  - (v) assuming as true the relevant facts asserted by the party opposing summary judgment and determine whether the law permits judgment on those facts, including because those assumed facts do not support that party's claim or defence: *McDonald* at para 100.

### C. Hearsay in Summary Judgment/Dismissal Applications

[155] The parties went to significant effort addressing the hearsay evidence contained in both the record before the Applications Judge and the amplified record before me. That evidence was proffered by Liberty, the Respondent to the application.

[156] As a respondent, the Rule 13.18(3) does not apply to Liberty. That subrule states:

(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

[157] As noted, the Applications Judge, without citing any authority, concluded that the case law concerning hearsay, and its use by either party on a summary judgment or summary dismissal application, has evolved toward the exclusion of such evidence on summary judgment applications. With respect, I do not think that is an accurate statement of the law.

[158] Per Rule 13.18(3), applicant affidavits should generally be based upon personal knowledge: *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd*, 2023 ABKB 659 at para 30 [*H2 Canmore*], citing *McDonald* at para 91, which itself cites a legion of other case law.

[159] With respect to applicant hearsay evidence, there is some flexibility in the application of Rule 13.18(3) with respect to summary judgment applications. Sometimes, evidence not based on personal knowledge can be admitted. Courts can be more flexible where the applicant is a corporation or estate, where there are no people left with personal knowledge, or where the evidence would be admissible at trial as an exception to hearsay: *H2 Canmore* at para 30, citing *McDonald* paras 91-92, citing other authorities.

[160] Even if hearsay is permitted for an applicant, it should only be admitted if it would be admissible at trial, or if it meets the requirements for a principled exception to hearsay (when it meets the necessity and threshold reliability criteria): *H2 Canmore* at para 31.

[161] While there is consensus in the case law respecting applicants, there appears to be a competing approach in the law in this Court with respect to respondents in summary judgment or dismissal applications. Older cases (some pre-dating the current *Rules*, others pre-dating the current law on summary disposition) suggest a more free-ranging approach to the admissibility of hearsay by a respondent. More recent cases trend heavily in the direction of requiring the respondent to show that the proffered hearsay would be admissible at trial, thus treating the parties equally in this regard. However, there are still some recent authorities adopting the former approach.

[162] I have concluded that authorities that may stand for the more “free ranging” approach to the admission of hearsay evidence in summary judgment or dismissal applications ought not be followed. I adopt the approach taken in recent case law requiring a respondent to also show that the proffered hearsay would be admissible at trial, either under a known hearsay exception, the principled approach to the admission of hearsay evidence, or to otherwise show some expansion of the rules regarding admissibility is required in the circumstances of the case.

[163] The principled underpinning of my decision is based upon the fact that:

(a) Parties (applicant and respondent) are required to put their best foot forward in a summary judgment or dismissal application; and

- (b) Common sense dictates that when an action is permitted to proceed to trial because a respondent has relied on hearsay evidence in resisting a summary judgment application, the hearsay evidence must itself be admissible at trial, at least on a threshold basis. Otherwise, the Court would be sending a matter to trial, at significant cost, expense, and use of judicial resources, only for it to fail if the matter turns on what is inadmissible hearsay.

[164] The historical approach permitted respondents to oppose (and sometimes defeat) these dispositive applications using potentially inadmissible hearsay evidence. The extent to which such hearsay was accepted and given weight varied from case to case. After *Hryniak v Mauldin*, 2014 SCC 7 and *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, as I have noted, some judges of this Court have concluded that the old approach could not continue. They instead required respondents to put their best foot forward which, in the context of dispositive applications, meant relying only on evidence that would be admissible at trial.

[165] Although a few recent cases (which I discuss) continue to allow respondents to rely on inadmissible hearsay, most of them simply follow the earlier jurisprudence without engaging with *Hryniak* or *Weir-Jones*, or addressing the more recent line of cases that reject the old approach. I believe that the old approach must be abandoned because the requirement that a respondent to a summary judgment application put its best foot forward is incompatible with reliance on evidence that would be inadmissible at trial.

[166] Recent decisions of our Court find that a party responding to a summary disposition application can rely on hearsay only if the statements meet the standard of admissibility that is applied at trial. In other words, it must be asked whether the statements fit within the traditional exceptions to the rule against hearsay or meet the criteria for admissibility – necessity and reliability – pursuant to the principled approach to hearsay: *McDonald*, para 94; *JBuck and Sons Inc v Resource Land Fund V, LP*, 2023 ABKB 308 at para 45 [*JBuck*]; *Barry v Industrial Alliance Insurance and Financial Services Inc (IAF)*, 2022 ABQB 265 at paras 51-59 [*Barry*]; *County of Vulcan v Genesis Reciprocal Insurance Exchange*, 2020 ABQB 93 at paras 66-77 [*Vulcan*]; see also the recent decision of *Korniyenko v Ottenbreit et al*, 2025 ABKB 602 [*Korniyenko*] at paras 11-25, and the brief statement made in *Williamson v 715057 Alberta Ltd et al*, 2025 ABKB 257 at para 13.

[167] This may be subject to the exception that where the evidence does not meet the criteria for threshold admissibility at trial, the onus falls on the party proffering the evidence to justify some expansion of the rules governing admissibility in the context of the application (for example, if the opposing party had a fair chance to challenge the hearsay evidence): *JBuck* at paras 45-50 (relying upon *Drummond v Cadillac Fairview Corporation Limited*, 2019 ONCA 447 at para 24); cited with approval in *McDonald*, para 94. This approach to me seems consistent with the Court of Appeal's decisions relating to the application of Rule 13.18(3) to applicants in *Saito v Lester Estate*, 2021 ABCA 179 at para 12 and *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 leave to appeal ref'd [2018] SCCA No 1 at para 33 [*Goodswimmer*].

[168] I am conscious that where evidence objected to on hearsay grounds is not tendered for the truth of its contents, no hearsay issue arises: *R v Khelawon*, 2006 SCC 57 at para 35 [*Khelawon*], cited in *H2 Canmore* at para 32.

[169] I also note, as did Justice Feasby in *Barry* at para 58, that in *ANC Timber v Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653 [ANC] also at para 58, Justice Topolniski held that although Rule 13.18(1)(b) permits an affidavit to be sworn on information and belief, it “does not require the Court to accept hearsay evidence.” She further explained that “simply admitting such [hearsay] evidence without scrutiny on the basis of facial compliance with the Rule impairs the fundamental notion of a fair fact-finding process.” The solution, according to Topolniski J, was the same one arrived at in *Vulcan*, and adopted in *Barry* and *JBuck*. Namely, standard hearsay principles are applied to determine admissibility.

[170] Liberty relied upon other decisions of this court such as *Murphy v Cahill*, 2012 ABQB 793 [Murphy], and a decision of Master Robertson (as he then was) in *Cicalese v SSMPG Integrating Services Inc*, 2020 ABQB 605 [Cicalese] to try to argue that the above law is incorrect, and that a respondent to a summary judgment application is entitled to rely upon hearsay evidence without the restriction that it be otherwise admissible at trial. Alternatively, it argued that the hearsay it has put forward on the record is admissible and should be relied upon by the Court.

[171] Liberty appears to argue that even inadmissible hearsay should be considered for the purpose of establishing a triable issue on summary judgment. That position is not only inconsistent with the law set out above, but also with basic logic. It invites the question of why an action should be allowed to proceed to trial based on evidence that would be inadmissible at that very trial.

[172] In *Murphy*, the Court in discussing (at that time) the apparent bar on the use of hearsay by applicants in summary judgment applications, indicated at paragraphs 25 and 26 that:

[25] ...Rule 13.18 thus clearly states that only affidavits used in support of applications for final relief must be based on personal knowledge. This is, of course, a sensible rule: litigants should not be vulnerable to having their rights finally determined by evidence that would not be admissible at trial. Relying on inadmissible evidence is having no evidence at all; a litigant's rights cannot be finally determined without evidence.

[26] Rule 13.18 sensibly recognizes that the onus of establishing an entitlement to a decision that will finally determine the rights of the parties is on the person who is applying for such relief. The person who is opposing such relief can be given much more latitude in the quality of the evidence led on the motion. If the quality of the evidence is insufficient, because it is hearsay, that can be taken into account by the presiding judge.

[173] Of course, the obverse of what *Murphy* says at paragraph 25 is also true. A case that has no realistic prospect of succeeding at trial should not be permitted to limp into trial, only to fail on evidence that was never admissible in the first place. That concern appears to be reflected in the statements made in paragraph 26. In my view, the sufficiency and quality of the evidence require the reviewing court to test it in the manner set out in cases such as *JBuck*, *Barry*, and *Vulcan*.

[174] I also note that Justice Veit in *Murphy* presciently anticipated the way our Court would interpret Rule 13.18(3) as it relates to applicants. At paragraph 29 of that decision, she observed that “courts are likely to interpret rule 13.18 as saying that where a litigant is applying for relief

that may dispose of all or part of a claim, that litigant can only use in support affidavits containing either statements of fact within the knowledge of the deponent or statements containing hearsay evidence that would be admissible at trial for the truth of the content.”

[175] *Cicalese* distinguishes *Vulcan* and chooses to apply the decision by Justice Renke of this Court in *Clark Builders and Stantec Consulting Ltd v GO Community Centre*, 2019 ABQB 706 [Clark], also relied upon by Liberty. I note that Master Robertson appeared concerned that, as has occurred in this case, requiring a respondent to utilize Rule 6.8 to question non-party witnesses may begin to resemble the very trial the applicant says should not occur and the respondent says should occur.

[176] With respect, that is exactly what that rule is designed to address, and its use is consistent with the “best foot forward” requirement. In this case, Lyle, the Plaintiff’s key witness, is a non-party. Liberty requires his evidence to advance its case. Without it there will be no trial. To put its best foot forward, it was required to obtain and tender his evidence in response.

[177] With respect, if the reasoning in *Cicalese* endorses allowing actions to continue to trial based on evidence that could never be admitted at trial and permits respondents to a summary dismissal application to defer putting their best foot forward. Added to this are the concerns raised by Feasby J in *Barry*, one being that to find otherwise fails to give real “teeth” to the clear direction in the case law that respondents must also put their “best foot forward” when responding to a summary judgment or dismissal application: paras 58–59.

[178] *Clark* is a decision of Justice Renke of this Court. In that case, he relies upon the same cases he cites in his recent decision in *Norris v Norris*, 2024 ABKB 21 at para 64 [Norris] (also relied upon by Liberty) to support a finding that the defendant was entitled to rely upon hearsay evidence: para 40. *Norris* simply states that the no hearsay rule is not symmetrical (which is true) but then goes on to say, without qualification, that “the party responding to an application for final relief is entitled to rely on hearsay”, citing *Murphy* at para 25 along with *Court v Debaie*, 2012 ABQB 640 at para 33 [Court] and *DD v Calgary Counselling Centre*, 2017 ABQB 95 at para 43 [DD].

[179] *Court*, an early case after the adoption of the current *Rules*, provides no analysis on this point but relies upon *Murphy Oil Co v Predator Corp*, 2006 ABCA 69 at para 38 [Predator] and *Airco Aircraft Charters Ltd v Edmonton Regional Airports Authority*, 2010 ABQB 397 at para 26 [Airco].

[180] In *Predator*, the Court of Appeal confirmed the chambers judge’s decision that inadmissible hearsay could not be relied upon to establish merit in an alleged conspiracy claim. The Court stated that, while in some instances hearsay may satisfy the evidentiary burden on a responding party on a summary judgment application, and although hearsay may be admitted at the summary judgment stage, such admission is predicated on the expectation that the source of the evidence will be available at trial. When statements are made by unknown persons, that expectation does not exist: para 38.

[181] I do not read *Predator* as conclusively determining the issue before me. Further, to some degree, *Predator* is now historic in its approach. The law has evolved, and views that predate the current *Rules* and the modern law on summary judgment are not instructive in the present context. That approach is inconsistent with the current requirement that a party put its best foot forward in a summary judgment application. Further, if the source of the evidence is available at

trial, the evidence is not necessarily hearsay at trial. *Airco* is simply a restatement of what was said in *Predator*.

[182] *DD*'s hearsay analysis is set out at paras 41–43. It does not address the issue fully. It does not appear to consider the problem of allowing a respondent to defeat a summary judgment or dismissal application with evidence that would not be admissible at trial, meaning it would not be sufficient to dismiss the action at trial. Nor does it address the requirement that a respondent put its best foot forward.

[183] *Norris* does not add much to this analysis, and it does not address any recent authorities such as those canvassed in this decision.

[184] I note that Justice Feasby, in *Barry*, declined to follow *Clark* and *DD* for similar reasons: para 59. His reasoning for not doing so in that case would apply by analogy to *Norris*. While not expressly stated to be the case in *Korniyenko*, that appears to be the effect of that decision as well.

[185] I find the authorities such as *Cicalese*, *Clark* and *Norris* and the authorities they rely upon to be unpersuasive for the reasons set out above and decline to follow them. I find *Barry*, *JBuck*, *Vulcan*, and *ANC* and the authorities they rely upon more persuasive and accept and adopt them in these reasons. This conclusion is fortified by the reasoning in *Korniyenko*.

#### **D. Hearsay Law and Principles to be Applied in this Case**

[186] Having found that the state of the law requires Liberty, if it wishes to rely on hearsay evidence in this appeal to raise a triable issue, to establish:

- (a) that it would be admissible at trial under a known exception to the hearsay rule; or
- (b) that it would be admissible at trial under the principled approach; or
- (c) some expansion of the rules governing admissibility in the context of the application is justified.

[187] I will briefly summarize the principled approach to the law of hearsay as it applies to the evidence on this appeal. Where the parties have argued specific exceptions apply, I address those in my analysis.

[188] The defining features of hearsay evidence are the introduction of a statement to prove the truth of its contents and the lack of an opportunity to cross-examine the declarant: *Khelawon* at paras 35-36 and 56; *Korniyenko* at para 17. The purpose of the general exclusionary rule for hearsay evidence is to address “the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination”: *Khelawon* at para 35.

[189] The critical assessment for admitting hearsay evidence is predicated on it being necessary and reliable: *Khelawon* at para 49; *R v Khan*, [1990] 2 SCR 531; *R v Smith*, [1992] 2 SCR 915.

[190] Necessity arises from the court's truth-seeking function and seeking to avoid losing valuable evidence that may advance that function: *Khelawon* at para 49. Courts require the best evidence to be before them. This requirement recognizes the reality that this is not always possible. If the same quality of evidence is no longer available, hearsay becomes necessary.

[191] Threshold reliability can be met if there are adequate substitutes for traditional safeguards relied upon to test the hearsay evidence: *Khelawon* at para 63. It seeks to overcome dangers arising from hearsay evidence to preserve the integrity of the trial process itself: *Khelawon* at para 49. Inability to test or challenge the evidence with contemporaneous cross-examination is of central concern: *Khelawon* at para 58. The evidence must be sufficiently reliable to overcome hearsay dangers arising on the particular facts of the case.

[192] Threshold reliability can be established by showing there are adequate substitutes for testing truth and accuracy (procedural reliability) or there are sufficient circumstantial or evidentiary safeguards that the statement is inherently trustworthy (substantive reliability): *R v Bradshaw*, 2017 SCC 35 at para 27 [*Bradshaw*].

[193] Procedural reliability is established when there are adequate substitutes for testing the evidence. The substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement. While some such substitutes may include video recording, an oath, or a warning about the consequences of lying, which focus on procedural reliability when the statement was taken, safeguards imposed at trial, such as cross-examination of a recanting witness before the trier of fact may provide a satisfactory basis for testing the evidence: *Bradshaw* at para 28, and the cases cited therein.

[194] With respect to prior inconsistent statements, the availability of the declarant for cross-examination on the prior statements is key in assessing threshold procedural reliability. The trier of fact is in a much better position to assess the reliability of the evidence because the declarant is available to be cross-examined on his or her prior inconsistent statement. The admissibility inquiry into threshold reliability is not so focussed on the question whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be able to rationally evaluate the evidence: *Khelawon* at paras 75-76, discussing *R v B (KG)*, [1993] 1 SCR 740.

[195] Substantive reliability addresses circumstantial or evidentiary guarantees of trustworthiness. The court assesses the circumstances in which the statement was made, and whether there is evidence that corroborates or conflicts with the statement: *Bradshaw* at para 30.

[196] While not in issue in this appeal, even if it is admissible, hearsay can be excluded if its probative value is outweighed by its prejudicial effect. Again, prejudice can arise from the evidence potentially complicating, frustrating, or degrading the process, including adverse practical consequences like the undue consumption of time, unfair surprise, the creation of distracting side issues, and potential to confuse the trier of fact.

[197] As noted above, there are also several potential uses that evidence that might otherwise be hearsay can be put. If the evidence is not relied upon for the truth of its contents but for the fact the statements were made, then it is not hearsay. Further, the evidence can be used to test the credibility of a witness, as the maker of the statement, or otherwise. If the evidence is put to the alleged maker of the statement and they adopt it as their evidence, it is not hearsay: *Korniyenko* at paras 18 and 20 and the cases cited therein.

## X. Analysis

[198] The threshold issue raised by the Real Estate Defendants is admissibility of the hearsay evidence proffered by Liberty.

[199] The base of the arguments of the parties is this: the Real Estate Defendants say that all the key evidence that Liberty seeks to rely upon is inadmissible hearsay, Kinnear's statements are thus uncontradicted in any material fashion, and the appeal should fail.

[200] Liberty on the other hand seems to assume the evidence is admissible based upon the more relaxed approach taken in the case law I have discussed above. Primarily, it argues that there are real issues of credibility and reliability created by whether it is hearsay or not, and a trial is warranted.

[201] While I address the hearsay issues first, I have to say that after carefully assessing this case, I believe that while the hearsay problems loomed large before the Applications Judge, they are intertwined with, and somewhat eclipsed by the credibility issues created by the record before the Court on this appeal. The reason I say this is because this appeal ultimately turns on whether, with or without hearsay use of the impugned documents on the appeal, the credibility issues surrounding Lyle's evidence are sufficient to warrant a trial.

[202] After a fulsome analysis, I am unfortunately drawn to the inexorable conclusion that this case, no matter how flawed or weak, is not suitable for summary determination due to the critical credibility finding that must be made about Lyle's evidence.

#### **A. Hearsay Evidence and Admissibility on this Appeal**

[203] I will address each type of hearsay evidence that Liberty has adduced for this Appeal, as argued by the Real Estate Defendants. Some of it was before the Applications Judge. Some was not.

##### **a) The Lyle 2010 Emails**

[204] The Real Estate Defendants argue these emails are inadmissible hearsay. This of course is argued from the premise that Liberty seeks to use this evidence for the truth of its contents in this application. I am not certain that it needs to, but assume this for the sake of assessing the argument made by the Real Estate Defendants.

[205] Given Lyle's current evidence, the Lyle September 21 Email is a prior inconsistent statement, or put another way, a statement he has since recanted. If Liberty proposes to do more than use this email to impeach Lyle's credibility and seek to rely upon it for the truth of its contents, then it is presumptively inadmissible hearsay unless it is otherwise necessary and reliable.

[206] The Real Estate Defendants concede the requirement of necessity for this correspondence due to Lyle's evidence, in essence, recanting the statements. It is not that Lyle is unavailable or not compellable at trial. Here, the maker of the statement is available. He has been questioned under oath prior to this appeal and has not agreed with the truth of the contents of the Lyle September 21 Email.

[207] The Real Estate Defendants contend that the Lyle 2010 Emails, particularly the Lyle September 21 Email, are unreliable and thus inadmissible. Their arguments almost solely focus on substantive reliability. They note that the content of the Lyle September 21 Email suggest that it was drafted without reference to the transaction documents, three years after the relevant meetings.

[208] Liberty seems to sidestep the hearsay admissibility issue in its argument, arguing instead that "the discrepancies on this critical issue that forms the crux of the case warrants a full hearing

and summary dismissal is simply not appropriate. Kinnear and Lyle have diametrically opposed evidence until Lyle changed his story years later as the litigation continued.”

[209] The Lyle 2010 Emails, and particularly the Lyle September 21 Email, were drafted following a conversation Lyle had with Spence and Criddle. The September 21 Email seems to have been drafted prior to Lyle reviewing any documentation. He says as much in the email. His explanation that this was in response to business advice seems questionable in the circumstances. This was his first written statement since the transactions had taken place. He contemporaneously followed up with Spence on September 28, 2010, asking “...how did the issues with Remax/Barry go after my letter to you?” which he agreed in examination was a reference to the Lyle September 21 Email, and again on February 14, 2011 in response o Criddle saying “[i]f Remax didn’t screw us on the purchase of your land u [sic] would already be paid in full”, stating “[a]nd I do appreciate the money you are paying to me because of Remax...” This all occurred before he gave the Lyle Draft Harris Statement.

[210] The other evidence that supports the Lyle September 21 Email are the Draft Lyle and Jean Harris Statements, and the self serving hearsay evidence from Spence, the latter which I give little weight, as mentioned.

[211] The statements made in the Lyle September 21 Email may be less consistent with some other evidence on the record, including:

- (a) Prior to Liberty even making an offer, it appears that Kinnear and McCurdy had been informed that a neighbor of the Stathams had received \$40,000.00 an acre for their land, and that was what the Stathams wanted, and this evidence is more consistent with Lyle’s evidence that came later in these proceedings;
- (b) The timing and sequencing of the purchase documents themselves;
- (c) The fact that the Real Estate Defendants gained no additional commissions for getting Liberty to pay more money;
- (d) The NW Offer only included 110 acres and excluded 50 acres, but the agreement that was reached was for the full 160 acre section at \$40,000.00, meaning that it was not possible that the Stathams accepted the first offer as presented; and
- (e) The uncontradicted evidence of Kinnear is at odds with the contents of this email.

[212] I use the term “may” consciously. It is also equally possible that the contents of the Lyle September 21 Email could dovetail into this factual record. To do so requires a credibility finding, which I discuss below.

[213] While there may not be sufficient markers of substantive threshold reliability present in this case, the Real Estate Defendants failed to fully appreciate and argue the impact of Lyle’s availability for examination on the September 21 Email on its admissibility due to adequate procedural safeguards being in place. Here, Liberty and the Real Estate Defendants can test Lyle’s evidence in the context of the entirety of the record and have done so for this appeal.

[214] Lyle does not deny writing the email. In fact, he admits that. He has, however, refused to adopt some of its contents as accurate, claiming he was mistaken at the time he wrote it, among other things.

[215] The availability of Lyle for examination on this application, and at trial, and his evidence given in that regard satisfies threshold procedural reliability, makes the Lyle September 21 Email admissible hearsay for the purposes of this appeal. I find that Liberty is entitled to rely upon the Lyle September 21 Email on this record to try to show a genuine issue for trial, given that the evidence is necessary, and threshold procedural reliability is met. Further, I find that even if I am wrong on this point, some expansion of the rules governing admissibility in the context of the application is justified on the particular facts of this case, such that Liberty may rely upon it for the purposes of resisting summary dismissal.

**b) The Lyle and Jean Harris Drafts**

[216] The Real Estate Defendants argue that these statements, prepared by Harris and Diamond, not having been adopted by Lyle and Jean, are inadmissible to the extent Liberty seeks to rely upon them for the truth of their contents in this application.

[217] They note that Harris was acting as Liberty's counsel at the time. There was no opportunity for contemporaneous cross-examination of Lyle or Jean, who is now deceased. They point out the boilerplate nature of the statements and the circumstances in which they were prepared to argue there are no circumstantial guarantees of trustworthiness. They also argue that the statements are inconsistent with the documentary record, pointing out factual errors in the statements.

[218] Liberty argues that the Harris Memo, and Harris' own recollections, support the trustworthiness and reliability of these statements, and that Lyle has been examined upon his statement in advance of this application.

[219] Again, the Real Estate Defendants appear to have underappreciated the impact of the threshold procedural reliability analysis in this case related to this evidence. I reach the same conclusion with respect to the Lyle Harris Draft as with the Lyle September 21 Email. Lyle has given sworn evidence for this application and has been cross examined on that statement. The evidence is necessary and threshold procedural reliability is met by having examined Lyle on the Lyle Harris Draft, sufficient for Liberty to be able to rely upon it in this appeal to show a triable issue. Again, even if I am wrong on this point, some expansion of the rules governing admissibility in the context of the application is justified on the facts of this case.

[220] The Jean Harris Draft stands on different footing. While Jean is deceased, potentially meeting the necessity requirement, this is a statement she never adopted at all while alive. There is no other reliable written statement she made while alive. The only evidence to support any adoption of it is hearsay evidence from Harris. There are insufficient procedural or substantive indicators of reliability that would permit Liberty to rely upon this statement in this appeal, and there is no reason to expand the rules governing admissibility in the context of this application, so I decline to permit Liberty to rely upon it to show a triable issue.

**c) The Evidence of Harris and the Harris Memo**

[221] Harris seems to have no personal contemporaneous recollection of his meeting with the Stathams to any great degree. He relied largely on the Lyle and Jean Draft Harris Statements and the Harris Memo in his evidence. Harris provided evidence and was cross examined. His direct evidence, including his impressions and observations are admissible for proof of the truth of their contents.

[222] Harris was acting for Liberty. His meeting with the Stathams occurred because of the contents of the Lyle September 21 Email. Lyle has not adopted any critical portions of the Lyle Draft Harris Statement and relies, to some degree, upon the Lyle Redraft (although his evidence has become more particular since he created that document). Jean never adopted her statement, and she is deceased. Harris' recorded recollections and memory are of some assistance as to what he believed at the time. Harris' direct evidence and his recorded observations and beliefs are direct, non hearsay evidence that Liberty is entitled to rely upon in this appeal.

[223] Harris' hearsay evidence, with respect to Jean cannot be relied upon for the same reasons given above in relation to her statement. His hearsay evidence regarding Lyle can be. It is necessary, and there are sufficient procedural safeguards of reliability in place (being that both Harris and Lyle were available for examination to test this evidence) to permit Liberty to rely upon it to try to show a triable issue in this case. I also note that there are non-hearsay uses of Harris' statements regarding what Lyle said and did in the meeting he had, in that some of the reliance could be for the fact that the statements were made, and not that they were (or are) true.

#### **d) The Spence and Criddle Hearsay Evidence**

[224] As I noted above, the hearsay contained in the Spence and Criddle evidence, at least as it relates to the key issues, is almost entirely self-serving, unsupported and contains bald statements, opinions, and conclusory statements. It appears to be an attempt to boot strap or create triable issues, and I give it no real weight as a result.

[225] This evidence is not really necessary. Even if it is, it is certainly not reliable. There do not exist sufficient procedural or substantive hallmarks of reliability of these statements sufficient for this evidence to be relied upon to show a triable issue in this appeal.

#### **B. Is there a Genuine Issue for Trial?**

[226] Hidden under the morass of hearsay argument proffered by the Real Estate Defendants is the real issue that I find requires a trial in this case: the intractable credibility issue surrounding Lyle's changing evidence, the reasons for that change, and whether it is open to a trier of fact to accept Liberty's theory of the case over that of the Real Estate Defendants after making the requisite credibility findings of all witnesses and a review of the documentary record.

[227] I say this even taking Kinnear's evidence at face value. While he was not cross examined for the purposes of the application before the Court below, his evidence is contradicted by the Lyle September 21 Email and the Lyle Harris Draft. There are also inconsistencies within his evidence and that of Lyle as to sequencing and timing of meetings and events. Harris' evidence adds to this factual matrix. There are issues of meetings with Kinnear and Lyle after these statements were made and after the lawsuit was commenced, and what was discussed in those meetings. There are issues of the falling out between Lyle, Spence and Criddle and the subsequent acrimony between them.

[228] The law is clear that where there is a conflict on a relevant point, and the conflict has not been resolved by cross-examination, and is not purely a self-serving, bald, unsupported statement, the matter must be referred to trial: *Goodswimmer* at paras 38-45; *Sticks and Stones Communications Inc v Hole's Greenhouses & Gardens Ltd*, 2015 ABQB 774 at para 32; *Attila Dogan Construction and Installation Co v AMEC Americas Ltd*, 2015 ABQB 120 at para 52; see also *1214777 Alberta Ltd v 480955 Alberta Ltd*, 2014 ABQB 301 (Master) at para 17; *Minex Minerals Ltd v Walker*, 2019 ABQB 460 (Master) at para 148.

[229] That is the case here with the evidence of Lyle. He has, as Liberty argued, changed his story (at least) three, if not four times in the last 16 years, each time refining it and adding more detail as more time passes from the events in question. There are multiple facts on the record to suggest why he may be motivated to have changed his story, and why his earlier versions of what happened in 2007 may be the truth. I cannot say, on this record, that this critical credibility issue is resolved in a manner that would permit me to decide this case by dismissing it. Nor is the evidence before me a self-serving, bald or unsupported statement. The determination of Lyle's credibility is critical to this case and requires a trial.

[230] I find this is so whether or not the Lyle September 21 Email and the Lyle Harris Draft are submitted for the truth of their contents (if not adopted by Lyle at trial, which seems unlikely) or used simply to test Lyle's credibility and argue he ought not be believed, and that he was telling the truth in 2010 and 2011, but is not telling the truth now.

[231] Liberty is entitled, at trial, to have the court review the entirety of the record, observe Lyle in court, and determine whether his explanations and evidence after the September 21 Email and the Lyle Harris Draft are credible or not, and if not, make findings of fact based upon this determination. These findings of fact will be made after assessing all admissible evidence, including but not limited to Kinnear's evidence, Harris' evidence, and the evidence of Spence and Criddle (and presumably McCurdy, who has not provided any evidence in this application), along with the admissible documentary record, to determine whether Liberty has proven its case on a balance of probabilities.

[232] While they may not have fully realized it, in their brief of argument, the Real Estate Defendants in substance advanced a credibility assessment that this Court cannot undertake in summary judgment on this record. They argue that "the most credible evidence is the direct evidence of Kinnear and Lyle Statham", and that even if the September 21 Email and the Lyle and Jean Harris Drafts are admissible, "on balance" they are not sufficient to overcome the direct evidence. They further argue that "even if the hearsay statements establish that Lyle Statham's direct evidence is not credible, this does nothing to impugn the credibility and reliability of Kinnear's direct evidence..." and that "Kinnear's direct evidence is clearly preferable to the [September 21 Email and the Lyle and Jean Harris Drafts]" which Lyle has recanted, and that Liberty has not actually provided any credible evidence that contradicts the evidence of Kinnear.

[233] The reality is that such arguments require the Court, on this application, to make a credibility finding with respect to Lyle (and, I would say, Kinnear and Harris).

[234] One unconventional feature of Liberty's case is that it relies almost entirely on Lyle, a third-party witness who has given prior inconsistent statements in the Lyle 2010 Emails and in the Lyle Draft Statement. He later recanted those statements and explained why, in his view, they were not true or accurate. Even if not used for a hearsay purpose, these prior statements could clearly be used either to seek to have him adopt them (which is unlikely based upon the current record), or to impeach his credibility at trial.

[235] It may also be that Liberty will be forced to have their "star" witness declared hostile and seek leave to cross examine him, requiring a ruling by the trial judge that Lyle is a hostile witness: *Schwartz Estate v Kwinter*, 2008 ABQB 435 at para 4; *Ferguson v Cairns*, 1959 CanLII 279 (ABCA) at 662.

[236] Liberty’s case is certainly not a “slam dunk”. It is fraught with difficulty. It faces a challenging set of circumstances to prove its case. Success is certainly not a foregone conclusion here. However, that is not the test for summary dismissal.

[237] Applying the appropriate test, on all the admissible evidence before the Court, I am not left with sufficient confidence that the state of the record permits a fair summary disposition of this case. I am not satisfied that there is no genuine issue for trial here. Put another way, I find that there is a genuine issue for trial, bound up in the changing evidence of Lyle, which requires credibility assessments not suited to summary disposition on a paper record.

[238] It is unfortunate that the parties spent so much time on this appeal rather than focusing their attention to getting this matter finally determined at a trial. However, that is the current permissible procedural reality in which this action exists, and a trial of this matter is now for another day.

## **XI. Conclusion**

[239] The appeal is allowed. The Applications Judge was incorrect in his statement of the law regarding hearsay evidence and its use in summary dismissal applications. Having properly assessed the evidentiary record with the appropriate legal principles, the substance of the decision of the Court below is not correct. Even in the face of Kinnear’s evidence for the Real Estate Defendants, I find that Liberty has shown a genuine issue for trial.

[240] The parties are directed to set this matter into Civil Appearance Court in Calgary to set a litigation plan (if one cannot be agreed upon) and seek leave to set this matter down for trial at the very earliest opportunity.

[241] Liberty is presumptively entitled to its costs (Rule 10.29) as the substantially successful party. If the parties are unable to agree on a quantum of costs and method of calculating same, they are hereby granted leave to file costs submissions, not to exceed five pages in length (not including authorities and any appendices), within 30 days of this decision, after which I will decide the quantum of costs.

[242] I thank the parties for their able submissions.

Heard on the 19<sup>th</sup> day of February, 2026.

**Dated** at the City of Calgary, Alberta this 1<sup>st</sup> day of April, 2026.

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**D.J. Reed**  
**J.C.K.B.A.**

**Appearances:**

Roger Baker  
for the Appellant/Plaintiff

Kevin Pedersen  
for the Respondents/Defendants