In the Court of Appeal of Alberta

Citation: Anglin v Resler, 2024 ABCA 113

Date: 20240405
Docket: 2203-0154AC;
2203-0110AC
Registry: Edmonton

Between:

Joseph V. Anglin

Appellant
(Plaintiff)

- and -

Glen L. Resler, in his capacity as a Chief Electoral Officer, His Majesty the King In Right of Alberta, Pieter Broere, Rick Pankiw and Richard Roe

Respondents
(Defendants)

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Thomas W. Wakeling
The Honourable Justice Alice Woolley

Memorandum of Judgment of the Honourable Justice Slatter and the Honourable Justice Woolley

Memorandum of Judgment of the Honourable Justice Wakeling Concurring in the Result

Appeal from the Orders by
The Honourable Justice J.J. Gill
Dated the 13th day of May, 2022
Filed on the 26th day of May, 2022; and
Dated the 26th day of May, 2022
Filed on the 17th day of June, 2022

Appeal from the Order by
The Honourable Justice M.J. Lema
Dated the 11th day of July, 2022
Filed on the 12th day of August, 2022
(2022 ABQB 477; Docket: 1703 06642)

Memorandum of Judgment

The Majority:

[1] The appellant appeals two decisions. The first is an unreported procedural decision by the case management judge that set the stage for an application brought by the respondent to strike out the appellant's claim. The second is the subsequent order of another chambers judge that did strike out the claim: ***Anglin v Resler***, 2022 ABQB 477.

Facts

[2] The appellant was an incumbent Member of the Legislative Assembly, but he was defeated when he ran for re-election in the 2015 Alberta provincial election.

[3] During the election the respondent Chief Electoral Officer, acting on certain complaints, removed at least 25 of the appellant's re-election signs on the basis that they did not comply with the applicable guidelines:

(a) the signs initially identified the appellant as the "MLA" whereas the respondent and the Clerk of the Legislative Assembly took the position that he was not entitled to so identify himself after the election was called, and

(b) the required sponsorship information on the signs was not of the prescribed size.

The appellant alleges that all 2,000 of his signs were removed, possibly by third parties (including the other defendants) whom he alleges were acting on the direction of the respondent. The appellant also alleges that he was not given a reasonable time to correct his signs before they were removed.

[4] The appellant attempted to modify his signs to bring them into compliance. The respondent did not impose a sanction on the appellant for describing himself as an MLA, but the respondent did sanction him for a breach of the guidelines on sponsorship information. The appellant appealed that sanction under s. 153.3(1) of the *Election Act*, RSA 2000, c. E-1, but his appeal was dismissed: ***Anglin v Alberta (Chief Electoral Officer)***, 2017 ABQB 595. The appeal judge found that the guidelines were binding in law, and nothing that the respondent had done was unreasonable or unlawful. His further appeal was dismissed: ***Anglin v Alberta (Chief Electoral Officer)***, 2018 ABCA 296, leave to appeal refused [2019] 2 SCR vi.

[5] The respondent also appointed an investigator when a list of electors traceable to the appellant was found by a member of the public in surplus office equipment. Upon receipt of the investigator's report, the respondent sanctioned the appellant for failing to take reasonable steps to protect the list of electors. The appellant appealed. The appeal judge found that the respondent had not made any reviewable error of fact, or any reviewable error in concluding that the appellant had not taken reasonable care of the list of electors, and that there was no reasonable apprehension

of bias. However, the appeal judge found that the respondent failed to proceed in a fair manner, because the appellant had not been provided with a copy of the investigator's report: ***Anglin v Alberta (Chief Electoral Officer)***, 2020 ABQB 131, 2021 ABQB 353. The matter was remitted back to the respondent for reconsideration and the penalty was rescinded. No further appeal was filed, and the respondent has made no further attempt to impose a sanction.

The Claim

[6] In April 2017 the appellant commenced an action against the respondent and others. The statement of claim, as amended in 2022[1], makes a number of allegations against the respondent, including:

> 6. During the 2015 election Resler, or agents or employees acting on his behalf and on his authority:
>
> > (i) required Anglin to cover over the letters "M.L.A." on signs reading "Re-Elect Joe Anglin M.L.A." when there was no law that prevented these letters being used;
> >
> > (ii) required Anglin to cover over sponsorship information on signs with the same information of a larger size, when there was no law requiring the sponsorship information to be of a larger size;
> >
> > (iii) commented to the media that Anglin's signs were illegal;
> >
> > (iv) worked with individuals who were supporting candidates that were opposed to Anglin;
> >
> > (v) authorized or allowed these individuals, or other individuals, to remove Anglin's signs contrary to the law;
> >
> > (vi) authorized or allowed these individuals, or other individuals, to damage Anglin's signs, contrary to the law; and
> >
> > (vii) singled out Anglin's signs, which were legal, when many other candidates had signs that did not comply with the Election Act.

The claim alleges that the defendants took these actions in pursuit of a common goal to deny the appellant a fair chance to win the election. The respondent is alleged to have exercised "public

[1] While the statement of claim was originally issued before the proceedings challenging the sanctions imposed by the respondent, it was amended in 2022 after those proceedings were largely completed.

powers for an improper or ulterior motive, knowing that it was likely to cause harm to Anglin and his chance of re-election".

[7] Another branch of the claim alleges that the respondent improperly investigated and sanctioned the respondent:

> 11. Subsequent to the 2015 election Resler, without reasonable and probable cause or for a purpose other than that of carrying the law into effect, instigated a series of investigations and prosecutions into Anglin regarding alleged breaches of the *Election Act*. These included an investigation and prosecution:
>
> (i) into Anglin's use of the letters "M.L.A." during the election;
>
> (ii) into Anglin's sponsorship information during the election;
>
> (iii) into Anglin's use or misuse of a List of Electors.

The claim alleges that the respondent investigated and prosecuted the appellant "to the point of conviction" for breaches of the sponsorship guidelines and for failing to safeguard the list of electors. It alleges that the respondent "knew or should have known that there were no factual or legal basis to undertake these investigations and prosecutions or he had a subjective and reckless indifference" thereto, and that the respondent should have known that these actions would injure the appellant.

[8] As a remedy, the statement of claim claims damages for the signs taken or destroyed, the time spent replacing signs, and for the loss of a chance of being re-elected, including general and punitive damages.

[9] The respondent resisted the claim, and in particular relied on provisions of the *Election Act*. Section 134(5) authorizes the Chief Electoral Officer to remove non-compliant signs:

> (5) If an advertisement is not in compliance with this section, the Chief Electoral Officer may cause it to be removed or discontinued, and in the case of an advertisement displayed on a sign, poster or other similar format neither the Chief Electoral Officer nor any person acting under the Chief Electoral Officer's instructions is liable for trespass or damage resulting from or occasioned by the removal.

Section 5.1 provides a general immunity when the Chief Electoral Officer acts in good faith:

> 5.1(1) No proceedings lie against the Chief Electoral Officer … for anything done, or omitted to be done, in good faith in the exercise or performance or the intended exercise or performance of a power, duty or function under this Act, the *Election*

> *Finances and Contributions Disclosure Act*, the *Alberta Senate Election Act*, the *Citizen Initiative Act* or the *Recall Act*.

While a defence was not filed, the respondent denied the factual allegations.

[10] In March 2018 the respondent brought an application to strike the claim for failure to disclose a cause of action, or because it was an abuse of process, and in the alternative he sought summary judgment. Due to the various collateral proceedings between the parties, this application was not heard until June 15, 2022. The decision made on that day striking the claim is the subject of appeal 2203-0154AC.

[11] In anticipation of the applications to strike and for summary judgment, the parties had appeared before the case management judge for advice and directions on the evidence that could be introduced, filing deadlines, the need for further affidavits, and the right to cross-examine. The respondent brought an application:

(a) confirming he could rely on certain documents without having to file an affidavit attaching those documents. Those were primarily court and other public documents: see *infra*, para. 25.

(b) confirming he could rely on an affidavit he had sworn on April 28, 2017 in one of the appeals from the sanctions he had imposed, and

(c) for an order that no further affidavits could be filed.

The appellant brought a cross-application for:

(d) an order confirming his ability to cross-examine the respondent on the affidavit he had sworn on April 28, 2017 in one of the sanction appeals,

(e) an order that the respondent could only rely on the further tendered public documents if they were attached to an affidavit, and that the appellant could cross-examine on that affidavit,

(f) a direction that the application for summary judgment could not proceed until the respondent had filed his affidavit of records, and the appellant had an opportunity to cross-examine him on that affidavit, and

(g) directions for filing additional evidence and briefs.

The procedural application before the case management judge was heard on May 11, 2022, only one month before the scheduled chambers application to strike the pleadings.

The Procedural Directions of the Case Management Judge

[12] The case management judge gave directions:

(a) The respondent could rely on the additional public documents without having to attach them to an affidavit. These documents were relevant to the issues of abuse of process and collateral attack. Documents filed in the court's records could be admitted without the need for an affidavit.

(b) The respondent's application to rely on public documents included only extracts from the returns that had been filed (under R. 3.2(5), Form 5, R. 3.20, and s. 153.3(6) of the *Election Act*) in the appeals from the sanctions the respondent had imposed. The case management judge, however, concluded on his own motion that the entire certified records would be helpful to the chambers judge hearing the applications, and directed that the entire certified records be filed.

(c) The respondent could rely on his affidavit of April 28, 2017 and the appellant was not entitled to cross-examine him on that affidavit, or otherwise.

(d) While ***Honourable Patrick Burns Memorial Trust (Trustee of) v P Burns Resources Ltd***, 2015 ABCA 390, 26 Alta LR (6th) 1, 612 AR 63 confirms that there is a discretion to require an affidavit of records before a summary judgment application, that was not appropriate in this case given the issues to be addressed on the applications. The extensive litigation that had already taken place had produced a substantial evidentiary record.

(e) No further affidavits were to be filed.

(f) A schedule was set for the filing of supplemental briefs.

[13] The appellant applied for a reconsideration of the entirety of this decision, on the basis that the case management judge had misapprehended the evidence and the nature of the claim. Further, the case management judge's decision to include the entire certified records of the sanction appeals meant that unexpectedly there were "hundreds of pages of unsworn evidence" now on the table.

[14] In addition, the appellant argued there was no justification for the order that no further evidence could be filed, which had the effect of precluding the appellant from filing an affidavit setting out the opinion of a proposed expert witness: 2022 ABQB 477 at para. 99.[2] The case

[2] Although the case management judge assumed that the chambers judge would have the final say on the evidence that could be relied on, the chambers judge concluded that he had "no discretion to rule otherwise": 2022 ABQB 477 at para. 100. While there were obvious reasons for the chambers judge to respect the directions of the case management judge, it was an error to conclude that he had no residual discretion in the matter.

management judge declined to reconsider his decision. Appeal 2203-0110AC presently before this Court arises from the case management judge's procedural directions.

The Application to Strike

[15] The applications to strike and for summary judgment were heard by a chambers judge, resulting in the decision reported as ***Anglin v Resler***, 2022 ABQB 477, now challenged in appeal 2203-0154AC. The chambers judge struck the entire claim as against the respondent for failure to disclose a reasonable cause of action, or as an abuse of process. He therefore did not have to deal with the summary judgment application.

[16] The main justification for striking the claim was said to be that it was a collateral attack on the validity of the 2015 election. The chambers judge concluded that the essence of the appellant's claim was that the 2015 election had been conducted in an unfair manner, leading to the appellant's loss of his seat. The chambers judge concluded that the only way to challenge the outcome of an election was by use of the controverted elections procedures in the *Election Act*: reasons at paras. 18-20, 43-44. On that basis, any claim arising from the respondent's pre-election misconduct was flawed.

[17] The claim also alleged post-election misconduct, including malicious prosecution and misuse of public office. With respect to these claims:

(a) The suggestion that there may have been a complete absence of sponsorship information on some of the appellant's election signs was a "non-event" because the respondent never took any steps in that respect: reasons at paras. 51-53, 76.

(b) The objection to the appellant describing himself as an "MLA" on his signs was also a non-event, because the respondent never took any steps in that respect either: reasons at paras. 55-56, 76.

(c) The allegation that the sponsorship information on the appellant's election signs was not in compliance with the respondent's guidelines did not support a cause of action. These guidelines had been found to be legally binding in the appellant's appeal of the sanction imposed. Those proceedings also confirmed that the appellant was in breach of the guidelines. Since the respondent was correct about the non-compliance of the signs with the guidelines, there was no basis for an action in damages: reasons at para. 66.

(d) With respect to the allegation that the appellant had failed to protect the list of electors, the respondent's conduct also did not support any reasonable claim. While the sanction in question had been set aside as a result of a failure to disclose the investigator's report, the appeal judge had merely directed the respondent to reconsider the sanction. She had not said that the respondent was wrong. The

reviewing judge concluded that the under-disclosure occurred in the overall context of good faith discharge of the respondent's duties, with no capriciousness or malfeasance occurring: reasons at para. 81.

(e) The impositions of administrative sanctions were not "prosecutions" or "convictions" and so could not support a claim for malicious prosecution: reasons at para. 83.

(f) The allegations that the respondent was exercising his powers for an improper purpose or with an ulterior motive were merely bald allegations that did not support a reasonable claim. To the extent that they were alleged to have occurred prior to the election, they were part of the collateral attack on the outcome of the election: reasons at paras. 86-87.

(g) In any event, the respondent was entitled to immunity for his actions: reasons at para. 88.

In summary, the chambers judge considered that for a combination of these reasons the entire action was an abuse of process: reasons at para. 92. In the alternative, the statement of claim did not disclose a reasonable cause of action: reasons at para. 93. In the further alternative, any claims of bad faith were inadequately pleaded, and foreclosed by the respondent's statutory immunity: reasons at para. 94.

Procedural Issues

[18] Appeal 2203-0110AC from the procedural directions of the case management judge raises the following issues:

(a) the right to cross-examine,

(b) the introduction of public documents in evidence,

(c) the need to file an affidavit of records,

(d) foreclosing further evidence on the applications.

The Right to Cross-Examine

[19] The central complaint of the appellant is that he was denied the opportunity to cross-examine the respondent. As will be seen, the appellant had no objection to the introduction of the evidence tendered by the respondent, he merely wanted the opportunity to cross-examine the respondent.

[20] The respondent wanted to rely on an affidavit he had sworn on April 28, 2017 in one of the sanction appeals. The appellant had no objection to the respondent doing so, as long as he could cross-examine. He also wanted the respondent to file his affidavit of records, partly to give him an opportunity to cross-examine the respondent.

[21] The appellant's attempts to force the respondent to file an affidavit, thereby triggering the right to cross-examine, overlooked a more obvious remedy. Rule 6.8 enables the examination under oath of any witness for the purpose of obtaining a transcript for use in an application. All the appellant had to do was to issue a notice to the respondent to attend for that purpose. Absent an abuse of process or a specific rule to the contrary (e.g. R. 3.21), there is no objection to examining an opposing party under this rule. A party in a civil action has no right to "stand silent": ***Guillevin International Co v Barry (cob Corvettes)***, 2022 ABCA 144 at para. 35, 43 Alta LR (7th) 222; ***Wawanesa Mutual Insurance Co v Schneider***, 1995 ABCA 419 at paras. 13-14, 34 Alta LR (3d) 1, 174 AR 304; ***Ferguson v Cairns*** (1959), 21 DLR (2d) 659, 30 WWR 276 (Alta SC, App Div).

[22] Further, while the right to cross-examine on an affidavit is not absolute, that right should not be denied unless there is a principled basis for doing so, or the cross-examination would be pointless: ***The Point on the Bow Development Ltd v William Kelly & Sons Plumbing Contractors Ltd***, 2004 ABCA 53 at para. 7, 25 Alta LR (4th) 220, 346 AR 171. On this record, there was no valid justification given for denying the appellant the right to cross-examine the respondent on his affidavit of April 28, 2017.

[23] The case management judge was obviously influenced by the short period of time that remained before the scheduled chambers application. That, however, was a result of the parties booking the chambers date before they were ready to proceed. If the lack of readiness meant that the chambers date was lost, that was an unfortunate consequence, but it did not justify undermining the procedural rights of the parties. While there had admittedly been some unexplained delay in prosecuting the action, preventing the filing of additional evidence merely to save the chambers date was not a proportionate response.

[24] The provision of the order preventing the appellant from cross-examining the respondent on his affidavit should accordingly be set aside.

Introducing Public Documents in Evidence

[25] The respondent applied for confirmation that he could rely on certain documents in the application to strike and the application for summary judgment:

(a) the originating applications that were the commencement documents in the sanction appeals, filed under R. 3.2(5) and Form 5.

(b) Prior decisions and orders of the Court of Queen's Bench, the Court of Appeal, and the Supreme Court of Canada in the collateral litigation that had taken place.

(c) Extracts from the certified records in the sanction appeals, filed under R. 3.20 and s. 153.3(6) of the *Election Act*. The extracts identified were the respondent's notices of "intention to make an adverse finding against you", and his subsequent decisions imposing those sanctions.

(d) The respondent's affidavit of April 28, 2017 filed in one of the sanction appeals.

(e) The respondent's *Report of the Chief Electoral Officer* on the 2015 provincial election.

(f) The Legislative Assembly of Alberta's *Dissolution Guidelines*.

As noted, the case management judge confirmed that the respondent could rely on all of these documents, and on his own motion he also directed that the entirety of the certified records filed in the sanction appeals be provided to the chambers judge.

[26] The appellant acknowledged that all of the information tendered by the respondent was relevant and material. The appellant merely wanted them attached to an affidavit, so that he could cross-examine the respondent. While some of the material (such as the pleadings in the sanction appeals, and the prior decisions of the courts) is not commonly seen as "evidence", in this case these documents were relevant and material to the issues of abuse of process, *res judicata*, issue estoppel, and collateral attack: ***British Columbia (Attorney General) v Malik***, 2011 SCC 18 at para. 37, [2011] 1 SCR 657.

[27] Rule 6.11 specifies the evidence that can be relied on in an application:

> 6.11(1) When making a decision about an application the Court may consider only the following evidence:
>
> (a) affidavit evidence, including an affidavit by an expert;
>
> (b) a transcript of questioning under this Part;
>
> (c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;
>
> (d) an admissible record disclosed in an affidavit of records under rule 5.6;
>
> (e) anything permitted by any other rule or by an enactment;

> (f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;
>
> (g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

This rule is widely worded and would likely permit the consideration of any evidence that is relevant and material.

[28] Rule 6.11(f) permitting "evidence taken in any other action" is frequently used to place on the record of one action an affidavit that was sworn in another action. This avoids the necessity of having the affidavit reprinted and re-sworn. The requirement of notice precludes any possibility of surprise. This rule specifically authorized the respondent to rely on his affidavit of April 28, 2017 filed in one of the sanction appeals.

[29] The court can take notice of certified copies of its own records: R. 13.29(3). That would include the originating applications filed in the sanction appeals, and the prior decisions of the various courts: ***Malik*** at para. 38; ***Wong v Giannacopoulos***, 2011 ABCA 277 at para. 6, 515 AR 58. These documents fall under R. 6.11(e) as being admissible under another common law rule. The respondent's "notices of intention" and his subsequent sanction decisions are also admissible as documents that are the foundation of those originating applications.

[30] Certified copies of the *Report of the Chief Electoral Officer* and the *Dissolution Guidelines* are public documents that can be introduced under s. 33 of the *Alberta Evidence Act*, RSA 2000, c. A-18 and R. 6.11(e) without further proof of the signature or official capacity of the person who produced them.

[31] Admitting the entirety of the certified record filed on a judicial review application, or proceedings such as the sanction appeals, is more problematic. As the appellant pointed out, those documents contain hundreds of pages of unsworn and hearsay evidence, and were admitted sight unseen. Even if they could be introduced under R. 6.11(f) as having been filed in another action they would be of little probative value.

[32] However, even though the respondent was entitled to introduce all of the documents he tendered, that is only part of the answer. Neither R. 6.11 nor the *Alberta Evidence Act* have the effect of changing the nature of the evidence introduced or enhancing its credibility and reliability. These documents can be introduced as being true copies, but they are not necessarily evidence of the truth of their contents, or conclusive evidence of anything: ***Malik*** at paras. 35, 39, 50-51. If a litigant wishes to rely on the truth of any of the contents of the public documents, that content must generally be proven by affidavit or another recognized method.

[33] It also follows that while the respondent was entitled to rely on his affidavit of April 28, 2017, doing so did not displace the appellant's right to cross-examine on that affidavit. It also did not enhance the reliability, credibility, or admissibility of any information contained in the affidavit. Any hearsay in it remains hearsay.

[34] Likewise, the originating applications, prior court decisions, and the sanction decisions of the respondent are only evidence of what was said or done. It does not necessarily follow that everything recited in those documents or decisions, beyond the actual decision or outcome, is true, complete or accurate.

[35] Further, the *Report of the Chief Electoral Officer* and the *Dissolution Guidelines* are merely evidence of the opinions or positions of the authors of those documents at the time of their publication. For example, the fact that the *Dissolution Guidelines* opine that an incumbent Member of the Legislature is not entitled to use the title "MLA" after the election is called is not in itself proof of the legal or factual validity of that opinion.

[36] In summary, there was no reviewable error in allowing the respondent to rely on the documents he tendered without attaching them to an affidavit. Those documents, however, are not necessarily evidence of the truth of their contents, but are merely recognized as true copies. On the other hand, the decision of the case management judge allowing the entirety of the certified records to be introduced should be set aside. That relief was not requested, and there is no indication of the contents of those records, or whether that content is admissible evidence, or whether it is relevant and material.

The Affidavit of Records

[37] The appellant sought an order requiring the respondent to file his affidavit of records before the hearing of the applications to strike and for summary judgment. The respondent's affidavit of records was admittedly long overdue, but the main objective of the appellant was to find a method to cross-examine the respondent. There is no indication that records exist which would have an impact on the application to strike the pleadings.

[38] An affidavit of records is a routine requirement in civil litigation, but a responding party cannot insist on the filing of an affidavit of records before the hearing of an application to strike, or an application for summary judgment: ***Wenzel Downhole Tools Ltd v National Oilwell Varco, Inc,*** 2010 ABCA 381 at para. 8; ***Leeson v Lim***, 2003 ABQB 913 at paras. 17-19. Requiring the moving party to exhaust all of the pretrial discovery procedures before applying for summary judgment would not make any such judgment very "summary". As ***Burns Memorial Trust*** shows, there are situations where the court can require an affidavit of records before an application for summary judgment is heard, but that is primarily where all of the documents are under the control of one of the parties: ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 at para. 40, 86 Alta LR (6th) 240.

[39] Whether to require an affidavit of records before an application for summary judgment is a discretionary decision which is entitled to deference on appeal: ***Masterfeeds Inc v Vonesch***, 2021 ABCA 331 at para. 2; ***McDonald v Sproule Management GP Ltd***, 2018 ABCA 295 at para. 1. The appellant has not shown any reviewable error in the decision of the case management judge to dismiss this portion of his application.

Foreclosing Further Evidence on the Applications

[40] The case management judge, undoubtedly mindful of the impending chambers application, precluded the filing of any further evidence. Case management judges obviously have a mandate, as set out in R. 4.13, to "promote and ensure the fair and efficient conduct and resolution of the action", as well as the responsible use of court resources. In this case the parties had several years to assemble their evidence, and there was some unexplained delay. However, the respondent's applications should not have been scheduled until the parties were satisfied that all the necessary evidence was filed, and all pre-application proceedings were completed. An order preventing the filing of further evidence is not unusual, but care must be taken not to impede the truth finding function of the court. As noted, in this case the order precluded the appellant from establishing the admissibility of an affidavit of an expert that he had obtained, although it had not been tendered in a timely way, and no notice that expert evidence was proposed had been provided. However, as the application for summary judgment must be returned for hearing, this issue does not affect the outcome of these appeals.

Summary

[41] In summary, appeal 2203-0110AC is allowed in part. The portions of the order allowing the respondent to rely on the tendered documentary evidence is confirmed, although the extension of that relief to the entire contents of the certified records of the sanction proceedings is set aside. That documentary evidence is not, however, necessarily evidence of the truth of the contents of the documents. The direction that the respondent could rely on his affidavit of April 28, 2017 is confirmed, but the portion of the order exempting him from cross-examination is set aside. The appellant may cross-examine the respondent under R. 6.7 or 6.8. The respondent is not obliged to file his affidavit of records prior to the hearing of the applications. The direction that no further evidence can be filed prior to the hearing of the applications is set aside. The parties should obviously ensure that the record is complete before rescheduling the hearing of the summary judgment application.

The Striking of the Claim

[42] Appeal 2203-0154AC is from the decision reported as ***Anglin v Resler***, 2022 ABQB 477, which struck out the appellant's claim. This appeal raises the following issues:

(a) the basis for striking out a claim,

(b) collateral attack of the outcome of the 2015 election,

(c) malicious prosecution,

(d) misfeasance in public office, and

(e) trespass to chattels.

The Basis for Striking Out a Claim

[43] The test for striking a claim under R. 3.68 is well established. On a motion to strike, the pleadings are read generously to allow for the development and assertion of novel claims: ***R. v Imperial Tobacco Canada Ltd***., 2011 SCC 42 at para. 21, [2011] 3 SCR 45. In order to strike the pleading it must be plain and obvious that it does not disclose a valid claim: ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24 at para. 20, [2011] 2 SCR 261. An application to strike is not an assessment of the merits of the claim, and if the claim is properly pleaded it should not be struck even if it appears to be "dubious": ***Elder Advocates*** at para. 95.

[44] If a claim is challenged as not disclosing a reasonable claim under R. 3.68(2)(b), then under R. 3.68(3) no evidence is admissible.[3] The facts as pleaded are taken as being provable, and the claim is assessed for its legal sufficiency. Challenges under the other subrules in R. 3.68(2), for example for abuse of process, might be supported by relevant and material evidence.

[45] There are limits to the principle that on a motion to strike the pleaded facts are taken as being true. Bald assertions of misconduct (such as malice, fraud, deceit, "absence of honest belief", bad faith, misfeasance in public office, etc.) will not be accepted as being true without reasonable particulars of the allegations: ***Gay v Alberta (Workers' Compensation Board)***, 2023 ABCA 351 at para. 12; ***Clark v Hunka***, 2017 ABCA 346 at paras. 31-32, 19 CPC (8th) 38; ***Walton International Group Inc v Rockyview (Municipal District No. 44)***, 2007 ABCA 21 at para. 12, 32 MPLR (4th) 55; ***G.H. v Alcock***, 2013 ABCA 24 at para. 58.

[46] A relevant factor on an application to strike is therefore whether the pleadings are in proper form. If the statement of claim is irregular because it did not plead specifics, a possible remedy is to order particulars, not strike the claim: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***,

[3] Evidence is necessary for an application for summary judgment. While the chambers judge did not summarily dismiss the action, he did make some reference to the evidence. For example, he concluded that there was no evidence of who removed all the appellant's signs: reasons at para. 85. That level of factual analysis could not be used to strike the claim for failure to disclose a reasonable cause of action, although evidence could be used if the claim was an abuse of process or inadequately pleaded.

2021 ABCA 16 at para. 74, 20 Alta LR (7th) 23. However, if particulars would not cure the irregularity, it is appropriate to strike the claim without giving an opportunity to amend.

[47] A pleading is required to plead the essential facts, and need not necessarily name a specific cause of action: R. 13.6(2)(a); ***Wi-Lan Inc v St Paul Guarantee Insurance Co***, 2005 ABCA 352 at para. 8, 53 Alta LR (4th) 247, 380 AR 256; ***Fullowka v Whitford***, [1997] NWTR 1 at para. 39, 147 DLR (4th) 531 (CA). However, the facts as pleaded by the appellant appear to engage the causes of action of malicious prosecution, misfeasance in public office, and trespass to chattels (the election signs). The statement of claim does not challenge the constitutionality of the *Election Act* or any of the guidelines issued by the Chief Electoral Officer.

Collateral Attack of the Outcome of the 2015 Election

[48] The main basis on which the claim was struck was that it was a collateral attack on the 2015 election, and the only method for attacking the outcome of an election was through the controverted election provisions of the *Election Act*. This may be a correct statement of the law of elections, but it mischaracterizes the nature of the appellant's claim. The appellant does not seek to challenge the outcome of the election; his claim is in fact based on the assumption that the outcome of that election is unimpeachable.

[49] The basis of the appellant's claim is that he lost the chance to win the 2015 election because of the misconduct of the respondent. A loss of chance claim of this type does not depend on the plaintiff setting aside the underlying decision that marked the frustration of his opportunities.

[50] This argument was resolved by the Supreme Court of Canada in ***Canada (Attorney General) v TeleZone Inc,*** 2010 SCC 62, [2010] 3 SCR 585. TeleZone was one of the unsuccessful applicants for a licence to provide personal communication services. When the licences were given to other applicants, TeleZone commenced an action for damages, arguing that the process had not been conducted in accordance with the reasonable expectations of the applicants. The Attorney General applied to strike the claim, arguing that it was a collateral attack on the decision granting the licences to others. It argued that this type of claim could not be brought unless the plaintiff first brought a judicial review application to set aside the decision granting the licences.

[51] The Supreme Court of Canada rejected this argument:

> 63 I do not think the Attorney General's collateral attack argument can succeed on this appeal for three reasons. . . .
>
> 64 Secondly, TeleZone is not seeking to "avoid the consequences of [the ministerial] order issued against it" (*Garland* [*v Consumers' Gas Co*., 2004 SCC 25, [2004] 1 SCR 629], at para. 72). On the contrary, the ministerial order and the financial losses allegedly consequent on that order constitute the foundation of the

damages claim. This was the result in *Garland* itself, where Iacobucci J. held for the Court:

> Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply. . . .
>
> 79 TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was not done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself. (emphasis added)

The appellant's claim is directly analogous to the claim launched by TeleZone. The claims of both the appellant and TeleZone were based on the loss of an opportunity or chance to obtain a particular benefit.

[52] The appellant's claim is premised on the finality of the outcome of the 2015 election. His argument is that the election is over and final, he lost, but he was deprived of the chance he had to win that election as a result of the misconduct of the respondent. As held in ***TeleZone***, he is not required to bring an application setting aside the result of the election to pursue this claim. Whether this could only be done through the controverted election procedures is therefore irrelevant.

Malicious Prosecution

[53] The essential elements of this tort are set out in ***Miazga v Kvello Estate***, 2009 SCC 51 at para. 3, [2009] 3 SCR 339. The plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect.

[54] One impediment to the claims as pleaded is that they allege the respondent pursued the appellant "to the point of conviction". If that was so, the proceedings obviously were not resolved

in favour of the appellant, thereby admitting the absence of one of the essential elements of the tort.

[55] The chambers judge struck these claims partly on the basis that the imposition of administrative penalties did not amount to a "prosecution" or "conviction" that could support this tort: reasons at para. 83. It is not obvious why that is so, and in any event the claim should not for that reason have been struck out as not disclosing a cause of action: ***Bahadar v Real Estate Council of Alberta***, 2021 ABQB 395 at paras. 29-31, 26 Alta LR (7th) 340. As noted, on an application to strike the pleadings are read generously to allow the evolution of the common law. Given that the law is unclear the claims of malicious prosecution should not have been struck for this reason.

[56] All of these claims of malicious prosecution, however, were properly struck out as an abuse of process by application of the doctrines of issue estoppel and *res judicata*.

[57] As noted by the chambers judge, the complaints about the complete absence of sponsorship information on the appellant's signs, and about his use of the designation "MLA" were, with respect to a claim for malicious prosecution, "non-events": *supra,* paras. 17(a) and (b). While the complete absence of sponsorship information was cited in one of the respondent's allegations, it was not pursued. The mere initiation of an investigation following receipt of a complaint is not sufficient to establish the tort of malicious prosecution. At best, these allegations might amount to some circumstantial evidence of some aspect of the claim of misfeasance in public office. There is no indication in the pleadings to support an inference that the respondent did not deal with these complaints about the appellant's signs in good faith.

[58] The prosecution relating to the non-compliance of the appellant's signs with the respondent's guidelines resulted in a confirmation of the penalty imposed. The guidelines were confirmed to be binding, and the appellant's signs were non-compliant. As the chambers judge noted, the dismissal of the appellant's appeals from this sanction created an issue estoppel over any underlying issues. This prosecution was not resolved in favour of the appellant, the outcome is *res judicata*, and no claim of malicious prosecution can be maintained. Further, it would be an abuse of process to allow a collateral claim to be launched against the respondent based on the bare allegation that the sanctions were imposed for some collateral purpose. Bald allegations of that nature in the pleadings are not sufficient to disclose a reasonable claim.

[59] The outcome of the prosecution of the appellant for failure to protect the list of electors is less definitive. The matter was referred back to the respondent for reconsideration as a result of the failure to disclose the investigator's report. No further action has been taken by the respondent to this point. However, the appeal judge made findings of fact relating to this prosecution, including that the respondent had not made any reviewable error in concluding that the appellant had not taken reasonable care of the list of electors, and that there was no reasonable apprehension of bias: *supra,* para. 17(d). It follows that it was not unreasonable for the respondent to act on the investigator's report, even if that report could ultimately be shown to be flawed. As the appeal judge found in ***Anglin v Alberta (Chief Electoral Officer)***, 2020 ABQB 131 at para. 82: ". . . it is

my view that a reasonable and informed person would conclude, as I have done upon reviewing the Record, that the CEO conducted a thorough and balanced investigation in difficult circumstances, and conducted himself in a consistently professional manner despite repeated incivility and provocations". These findings create an issue estoppel, and place the conduct of the respondent within the immunity provided by s. 5.1 of the *Act*. Issue estoppel extends to any issue that should reasonably have been raised in the other proceedings, and if the prosecution was launched for ulterior motives that should have been raised in the appeal. This portion of the claim for malicious prosecution was also properly struck.

[60] Given the outcome of the two prosecutions, there is also an issue estoppel with respect to the allegations that there was no factual or legal basis for the respondent to undertake these investigations and prosecutions: see *supra*, para. 7. Attempting to reformulate these prosecutions as an aspect of misfeasance in public office would be an abuse of process.

[61] In summary, the portions of the amended statement of claim alleging malicious prosecution were properly struck. That would include paragraphs 6(ii), 11, 12, 13, 14, 15, and the second paragraph numbered 16.

Misfeasance in Public Office

[62] The other main allegations in the statement of claim are of misfeasance in public office.

[63] The elements of misfeasance in a public office are summarized in ***Odhavji Estate v Woodhouse***, 2003 SCC 69 at paras. 22-23, [2003] 3 SCR 263. The tort is not directed at mere maladministration or negligence by a public officer, and is said to manifest itself in two ways. Category A involves conduct by the public official that is specifically intended to injure a person. Category B involves a public officer who acts with knowledge both that (i) she or he has no power to do the act complained of and (ii) that the act is likely to injure the plaintiff. A deliberate unlawful act is the focal point of the inquiry; the unlawful conduct must have been deliberate and the public officer must have been aware that the unlawful conduct was likely to harm the plaintiff: ***Odhavji Estate*** at paras. 22-25.

[64] The claim as pleaded by the appellant seems to engage both branches of the test. The allegations include that the respondent conspired with others in a deliberate attempt to defeat the appellant in the election, which would fall under Category A. The pleading also implies that the respondent intentionally engaged in activities to deprive the appellant of the opportunity to win the election, which he knew was beyond the mandate of the Chief Electoral Officer, and accordingly falls into category B.

[65] This claim must be measured in its statutory context. As noted, s. 134(5) the *Election Act* specifically authorizes the Chief Electoral Officer to remove non-compliant signs. Section 5.1 provides him with a general indemnity over anything done in good faith in the exercise of his powers under the *Act*. In short, to get around s. 5.1 all of the pleaded claims must rely on an absence

of good faith. Conduct that meets the ***Odhavji Estate*** test would generally overcome the barrier that no action can be maintained against the Chief Electoral Officer if he acted in good faith: ***Gay*** at para. 40; ***Wolfert v Shuchuk***, 2003 ABCA 109 at para. 3, 15 Alta LR (4th) 5.

[66] In analysing the appellant's allegations of misfeasance in public office, no relevant distinction exists between the respondent's pre-election conduct and post-election conduct.

[67] There are various elements of the amended statement of claim that contain facts that could meet the ***Odhavji Estate*** test for misfeasance in public office. It is alleged that the respondent worked with other individuals, including the other defendants, who were opposed to the appellant's reelection. The respondent is alleged to have authorized other individuals to remove or damage the appellant's signs. It is alleged that the respondent "singled out" the appellant and intended "to create an unfair advantage for Anglin's opponents and to deny him a fair election".

[68] As the chambers judge pointed out, some of the allegations are merely conclusory, and lack the type of particulars that are generally required for a claim of misfeasance in public office: ***Ernst v Alberta Energy Regulator***, 2017 SCC 1 para. 57, [2017] 1 SCR 3. For example, there are no particulars of the pleaded underlying agreement to undermine the appellant's chances for re-election. It is broadly asserted, without details, that the respondent exercised his public powers for an improper or ulterior motive, knowing this was likely to cause the appellant harm.

[69] However, in this case the respondent moved for summary judgment without requiring further particulars. That is perhaps because of the extensive particulars that are contained in the lengthy affidavits that the appellant has filed in these proceedings. On the other hand, the appellant opposed the applications, without apparently requesting in the alternative the opportunity to amend. While the chambers judge mentioned the paucity of particulars, that was not the fundamental reason he struck the claim. In the circumstances, nothing need be said at the appellate level about particulars. The appellant might, at the appropriate time, seek to amend his pleadings once the issues are clarified.

Trespass to Chattels

[70] The allegations that the appellant's signs were damaged or removed, even after they had been rendered compliant with the respondent's directives, would support a claim for trespass to chattels, at least against the other defendants. As against the respondent, this claim is likely subsumed within the claim for misfeasance in public office. In order to find the respondent liable, the appellant would have to get around the immunity provided in s. 5.1 for acts done in good faith, and the express power given to the respondent in s. 134(5) to remove non-compliant signs. As noted, it has been conclusively demonstrated that some of the signs were at one time non-compliant: *supra*, para. 58. In other words, as against the respondent the claim of trespass to chattels will likely only succeed as one particular of the misfeasance in public office claim under the ***Odhavji Estate*** test. The pleading of trespass, however, can be maintained on that basis.

Summary

[71] In summary, appeal 2203-0154AC is allowed in part. The claim is reinstated, excepting for the allegations of malicious prosecution set out *supra*, para. 61.

Costs in the Trial Court

[72] The case management judge did not deal with the costs of the initial procedural application he heard, but he did award costs to the respondent of the unsuccessful reconsideration application. However, the chambers judge concluded that the case management judge's silence on costs of the procedural steps meant that costs went to the successful party, and once the entire action was struck, he could deal with the costs of the interlocutory proceedings before the case management judge.

[73] The appellant's main objective before the case management judge was to obtain an opportunity to cross-examine the respondent before the applications were heard. While his success on appeal has partly been on a ground he did not argue (R. 6.8), the respondent unreasonably resisted the appellant's attempts to cross-examine him. A public official who brings an application to summarily dismiss a claim for misfeasance in public office should expect to be cross-examined, and generally should not attempt to stand silent. Given that an appeal could not have been prosecuted without losing the chambers date, the application for reconsideration was a good faith attempt to avoid the applications proceeding on a flawed record. The appellant, being largely successful on the procedural issues, is entitled to the costs of the procedural application and the reconsideration application before the case management judge, assessed on Column 5, plus reasonable disbursements and GST.

[74] The chambers judge awarded costs of the application to strike to the respondent on the basis that he had been fully successful: ***Anglin v Resler***, 2022 ABKB 631. He concluded that the offer of a consent dismissal without costs resulted in a doubling of the costs after that point. As a result of the appeal, the respondent has only been partly successful on the application to strike, and he has not bettered the offer he made. The summary judgment application remains outstanding. Given the divided success, and the fact that the application proceeded on a flawed record, neither party should be awarded costs of the application to strike heard by the chambers judge.

Conclusion

[75] In conclusion, appeal 2203-0110AC is allowed in part, as set out *supra*, para. 41. Appeal 2203-0154AC is allowed in part as set out *supra*, para. 71. The summary judgment application is remitted to the trial court for adjudication once the record has been perfected.

[76] The costs awards in the trial court are varied as set out *supra*, paras. 73-74.

[77] Costs of the two appeals are governed by R. 14.88 and the accompanying Information note. If the parties are unable to agree on costs, they may address the issue in writing, as directed by the Case Management Officer.

[78] The parties' attention is drawn to R. 14.90(1)(a), which provides that a party is not entitled to costs or disbursements respecting a document which does not comply with the rules. The appellant's Extracts of Key Evidence are deficient in several respects. First of all, the Extracts were not confined to those records required to resolve the appeal, but rather included a great deal of unnecessary documentation: see ***V.L.M. v Dominey Estate***, 2023 ABCA 261 at para. 45. Secondly, the table of contents did not comply with R. 14.29(a) which requires a description of each separate document. Merely describing a document as, e.g., "exhibit 'C'" defeats the purpose of having a table of contents, because the reader must turn to each document to find out what it is.

Appeal heard on November 30, 2023

Memorandum filed at Edmonton, Alberta
this 5th day of April, 2024

Slatter J.A.

Authorized to sign: Woolley J.A.

Wakeling, J.A. (concurring):

I. Introduction

[79] In 2017 Joseph V. Anglin commenced an action against Glen L. Resler in his capacity as the Chief Electoral Officer of Alberta[4] claiming that the Chief Electoral Officer committed tortious acts that caused him damages.[5]

[80] On July 11, 2022 Justice Lema struck out the claim in its entirety.[6] He held that it disclosed no reasonable claim – a contravention of rule 3.68(2)(b) of the *Alberta Rules of Court*[7] – and constituted an abuse of process – a contravention of rule 3.68(2)(d).[8]

[81] Mr. Anglin appeals the striking-out order[9] and an earlier procedural order of the case management judge identifying the evidence the Chief Electoral Officer could rely on in support of his application for a striking-out order on the ground the claim was an abuse of process and for summary judgment under rule 7.3(1)(b) of the *Alberta Rules of Court*.[10]

[82] I allow the appeal against the striking-out order and some parts of the case management judge's procedural order.

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[4] *Election Act*, R.S.A. 2000, c. E-1, s. 4.

[5] Appeal Record (Court of Appeal File Number 2203-0154AC) 3-14.

[6] Id. 93-94.

[7] Alta. Reg. 124/2010.

[8] *Anglin v. Resler*, 2022 ABQB 477, ¶¶ 92-93.

[9] Appeal Record (Court of Appeal File Number 2203-0154AC) 95.

[10] Id. 66.

II. Questions Presented

A. Key Facts

[83] Mr. Anglin was an independent candidate in the May 5, 2015 Alberta general election for the Rimbey-Rocky Mountain House-Sundre electoral division.[11] The Wildrose Party candidate won the election.[12] Mr. Anglin finished fourth.[13]

[84] Mr. Anglin did not invoke the controverted elections part of the *Election Act*[14] to contest the validity of the election.[15]

[85] Members of the public filed a number of complaints about the election signs Mr. Anglin used during the May 5, 2015 election campaign.[16]

[86] The Chief Electoral Officer, in response to a complaint that Mr. Anglin's election signs failed to disclose necessary sponsorship information,[17] removed the offending signs[18] and, after the election, issued to Mr. Anglin a $250 administrative penalty.[19]

[87] The Chief Electoral Officer also investigated the manner in which Mr. Anglin handled a list of electors. He found that Mr. Anglin did not take proper care of the list of electors – a contravention of section 19.1 of the *Election Act* – and issued a $500 administrative penalty to him.[20]

[88] Mr. Anglin appealed the two administrative penalties to the Court of Queen's Bench.[21]

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[11] *Anglin v. Resler*, 2022 ABQB 477, ¶ 1.

[12] Report of the Chief Electoral Officer on the Provincial General Election May 5, 2015, at 70. Respondent's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 8.

[13] Id.

[14] R.S.A. 2000, c. E-1, Part 7.

[15] *Anglin v. Resler*, 2022 ABQB 477, ¶¶ 7 & 21-22.

[16] Id. ¶¶ 54-55 & 57.

[17] *Election Act*, R.S.A. 2000, c. E-1, s. 134.

[18] *Anglin v. Resler*, 2022 ABQB 477, ¶ 58. See *Election Act*, R.S.A. 2000, c. E-1, s. 134(5).

[19] *Anglin v. Resler*, 2022 ABQB 477, ¶ 83.

[20] Id. ¶ 67.

[21] *Anglin v. Chief Electoral Officer*, 2017 ABQB 595 & *Anglin v. Chief Electoral Officer*, 2020 ABQB 131.

[89] Justice Clackson, the appeal judge, dismissed the appeal against the $250 administrative penalty.[22] The Court of Appeal affirmed Justice Clackson's decision.[23]

[90] Mr. Anglin's appeal against the $500 administrative penalty succeeded.[24] Justice Ross, the appeal judge, held that the Chief Electoral Officer should have disclosed the investigator's report to Mr. Anglin[25] and directed the Chief Electoral Officer to reconsider this decision.[26] She also rescinded the $500 administrative penalty.[27]

[91] The Chief Electoral Officer has not taken any other action on this matter.

[92] On April 6, 2017 Mr. Anglin commenced an action against Glen L. Resler in his capacity as the Chief Electoral Officer and others.[28] He alleged that the Chief Electoral Officer engaged in tortious activities[29] during and after the 2015 election that adversely affected him. His claim does not identify the torts.[30] Mr. Anglin claimed $400,000 "for the loss of a chance of being re-elected", $800,000 for general damages, and $1,000,000 for punitive or exemplary damages.[31]

[93] The claim identifies the Chief Electoral Officer as the state actor whose conduct Mr. Anglin contests and describes in detail the acts that he claims amount to tortious acts.[32]

[94] On March 1, 2018 the Chief Electoral Officer applied for an order under rule 3.68 of the *Alberta Rules of Court*[33] striking out the statement of claim. He argued that Mr. Anglin's statement

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[22] *Anglin v. Chief Electoral Officer*, 2017 ABQB 595, ¶ 27.

[23] *Anglin v. Chief Electoral Officer*, 2018 ABCA 296, ¶ 11.

[24] *Anglin v. Chief Electoral Officer*, 2020 ABQB 131, ¶ 89.

[25] Id. ¶ 73.

[26] Id. ¶ 89.

[27] *Anglin v. Chief Electoral Officer*, 2021 ABQB 353, ¶ 28.

[28] Statement of Claim filed April 6, 2017 and Amended Statement of Claim filed June 22, 2022. Appeal Record (Court of Appeal File Number 2203-0154AC) 3-14.

[29] Id. ¶ 3 ("The Crown in right of Alberta is vicariously liable for the tortious actions of the Chief Electoral Officer").

[30] Rule 13.6(2) of the *Alberta Rules of Court*, Alta. Reg. 124/2010 does not oblige a plaintiff to identify the cause of action that serves as the legal basis for the claim.

[31] Amended Statement of Claim, ¶¶ 18-20. Appeal Record (Court of Appeal File Number 2203-0154AC) 13.

[32] Id. ¶¶ 6-9, 11 & 13-15. Appeal Record (Court of Appeal File Number 2203-0154AC) 9.

[33] Alta. Reg. 124/2010.

of claim discloses no reasonable claim[34] or constitutes an abuse of process.[35] The application, in the alternative, sought an order under rule 7.3(1) granting summary judgment on the ground that there is no merit to the claim.

[95] This application was not heard until June 15, 2022.

[96] Both parties appeared before Justice Gill, the case management judge, on May 11, 2022.

[97] The Chief Electoral officer sought a declaration about the evidence he could rely on at the June 15, 2022 hearing.[36]

[98] Mr. Anglin sought an order directing the Chief Electoral Officer to serve an affidavit of records, allowing him to cross-examine the Chief Electoral Officer on his April 28, 2017 affidavit and declaring that any evidence the Chief Electoral Officer relied on be introduced as part of an affidavit and that Mr. Anglin be allowed to cross-examine on the affidavit.[37]

[99] Justice Gill declared that the Chief Electoral Officer could rely on the material that was related to the appeals Mr. Anglin filed against his orders and the various court decisions dismissing Mr. Anglin's appeals, an affidavit of the Chief Electoral Officer filed April 28, 2017 in Court of Queen's Bench action 1603-14130 – Mr. Anglin's appeal under section 153.3(1) of the *Election Act*[38] against the Chief Electoral Officer's $250 administrative penalty for noncompliant election signs – and documents published by the Legislative Assembly of Alberta.[39] Justice Gill also declared that the Chief Electoral Officer did not have to file an affidavit to which those documents would be attached as exhibits or serve an affidavit of records.[40] The case management judge also prohibited either party from filing any affidavit evidence after May 13, 2022.[41] In addition, Justice

[34] Id. r. 3.68(2)(b).

[35] Id. r. 3.68(2)(d).

[36] Application for direction by Glen L. Resler in his capacity as Chief Electoral Officer, ¶ 1. Appeal Record (Court of Appeal Filed Number 2203-0154AC) 19-20.

[37] Application by Joseph Anglin filed April 29, 2022, ¶¶ 1-2 & 4. Appeal Record (Court of Appeal Filed Number 2203-0154AC) 15-16.

[38] R.S.A. 2000, c. E-1.

[39] Order pronounced May 13, 2022 and filed May 26, 2022. Appeal Record (Court of Appeal File Number 2203-0154AC) 60.

[40] Id.

[41] Id.

Gill denied Mr. Anglin the right to cross-examine the Chief Electoral Officer on his April 28, 2017 affidavit.[42]

[100] On July 11, 2022 Justice Lema concluded that the claim was an abuse of process[43] and struck it "in its entirety".[44]

[101] The chambers judge also held that Mr. Anglin's claim "discloses no reasonable cause of action as against the ... [Chief Electoral Officer], gauged against the backdrop of the various proceedings taken by the ... [Chief Electoral Officer] against Anglin"[45].

[102] Justice Lema did not determine the summary judgment application.

B. Issues

[103] Did Justice Gill err in allowing the Chief Electoral Officer to submit material as evidence without filing a supporting affidavit? Does either the common law or statutory provisions, or both, support all or parts of this order?

[104] Did Justice Gill err in prohibiting either party from filing any affidavit evidence after the date of his order and denying Mr. Anglin the right to cross-examine the Chief Electoral Officer on his April 28, 2017 affidavit?

[105] Does Mr. Anglin's amended statement of claim fail to disclose a "reasonable claim", a contravention of rule 3.68(2)(b) of the *Alberta Rules of Court*?[46]

[106] Did Justice Lema err in concluding that Mr. Anglin's statement of claim constitutes an abuse of process, a contravention of rule 3.68(2)(d) of the *Alberta Rules of Court*?

[107] Did Justice Lema err in concluding that Mr. Anglin's amended statement of claim is a collateral attack on the validity of the May 5, 2015 Alberta general election or any decision made by Justices Clackson and Ross in their capacity as appeal judges under the *Election Act*?[47]

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[42] Id.

[43] *Anglin v. Resler*, 2022 ABQB 477, ¶ 92.

[44] Order pronounced July 11, 2022 and filed August 12, 2022. Appeal Record (Court of Appeal File Number 2203-0154AC) 94.

[45] *Anglin v. Resler*, 2022 ABQB 477, ¶ 93.

[46] Alta. Reg. 124/2010.

[47] R.S.A. 2000, c. E-1.

[108] Did either or both of Justices Clackson and Ross determine whether the Chief Electoral Officer had the state of mind that constitutes an essential element of the torts of misfeasance in a public office or malicious prosecution?

[109] Did Justice Lema err in striking out Mr. Anglin's claim?

III. Brief Answers

[110] The common law, the *Alberta Rules of Court*,[48] and the *Alberta Evidence Act*[49] justify Justice Gill's orders identifying the documents the Chief Electoral Officer may rely on.

[111] But Justice Gill committed two errors. First, the case management judge should have allowed Mr. Anglin time to file any affidavit evidence he thought necessary – perhaps within a couple of weeks. This was the first time the Court of Queen's Bench was asked to construct a schedule for the June 15, 2022 hearing. A nonmoving party in a summary judgment application must put its best foot forward.[50] This does not preclude the Chief Electoral Officer from contesting the admissibility of all or a part of any affidavit Mr. Anglin files. Second, the case management judge should have granted Mr. Anglin the right to cross-examine the Chief Electoral Officer on his April 28, 2017 affidavit filed in response to Mr. Anglin's originating application – perhaps within a couple of weeks. In the absence of a compelling reason that justifies denying Mr. Anglin the right to cross-examine the Chief Electoral Officer, Mr. Anglin had the right to cross-examine him.[51] The passage of time does not deprive a party of this right.

[112] Justice Lema erred in striking Mr. Anglin's claim on the ground that it disclosed no reasonable cause of action – a violation of rule 3.68(2)(b) of the *Alberta Rules of Court*. While the statement of claim was deficient in some respects, the chambers judge should have granted permission to amend.

[113] Justice Lema also erred in characterizing Mr. Anglin's claim as an abuse of process – a contravention of rule 3.68(2)(d). Mr. Anglin's claim is not a collateral attack on the validity of the May 5, 2015 election in which he was a candidate. Mr. Anglin does not contest the validity of the May 5, 2015 election. To the contrary, he relies on the validity of the May 5, 2015 election to buttress his damages claim. A fair reading of Mr. Anglin's claim supports only one conclusion –

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[48] Alta. Reg. 124/2010.

[49] R.S.A. 2000, c. A-18.

[50] *Canada v. Lameman*, 2008 SCC 14, ¶ 11; [2008] 1 S.C.R. 372, 378 ("Each side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried").

[51] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 3.13(1)(b). See also r. 6.7.

Mr. Anglin alleges that the Chief Electoral Officer acted in a tortious manner by removing his election signs and issuing two administrative penalties to him.

[114] Mr. Anglin's amended statement of claim is not a collateral attack on decisions made by Justices Clackson and Ross in their capacity as appeal judges under the *Election Act*.[52]

[115] Neither Justices Clackson nor Ross considered whether the Chief Electoral Officer performed public acts that he knew were unlawful and with the intent to injure Mr. Anglin. This issue was not before them. Justice Ross dismissed the reasonable apprehension of bias challenge – an objective inquiry – into post-election decisions the Chief Electoral Officer made about a complaint against Mr. Anglin that he did not take reasonable steps to protect a list of electors. This is a completely different issue from that presented by the tort claims based on misfeasance in a public office and malicious prosecution.

[116] I would set aside Justice Lema's order striking out Mr. Anglin's claim and the part of Justice Gill's order prohibiting the introduction of any affidavit evidence after May 13, 2022 and denying Mr. Anglin the right to cross-examine the Chief Electoral Officer on his April 28, 2017 affidavit.

[117] The Chief Electoral Officer is entitled to pursue his application for summary judgment. Both parties are free to appear before Justice Gill, as the case management judge, or, if Justice Gill is no longer the case management judge, some other judge, to secure a timetable for the filing of evidence that each side may rely on at the summary judgment hearing.

IV. Statement of Facts

A. Complaints Against Mr. Anglin Under the *Election Act*[53]

[118] In the 2012 Alberta general election the electors of the Rimbey-Rocky Mountain House-Sundre electoral division elected Mr. Anglin to sit in the Legislative Assembly of Alberta. He sat in the legislature as a member of the Wildrose Party until sometime in November 2014. After that he sat as an independent member.

[119] Mr. Anglin ran as an independent candidate in the same electoral district in the May 5, 2015 provincial general election.[54]

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[52] R.S.A. 2000, c. E-1.

[53] R.S.A. 2000, c. E-1.

[54] *Anglin v. Resler*, 2022 ABQB 477, ¶ 1.

[120] Members of the public filed a number of complaints with the Chief Electoral Officer about election signs Mr. Anglin used during the May 5, 2015 election campaign.[55]

1. M.L.A. Complaints

[121] Some complaints alleged that Mr. Anglin improperly described himself as an "MLA".

[122] The Chief Electoral Officer forwarded these complaints to the Clerk of the Legislative Assembly.[56]

[123] The Clerk directed Mr. Anglin to "refrain from producing any advertising or in any way promoting ... [himself] as 'MLA' as … the designation cannot be used once the Legislature is dissolved as it was by Proclamation issued April 7, 2015".[57]

[124] Mr. Anglin informed the Clerk that he had complied with that direction.[58]

2. Sponsorship Complaints

[125] Some complaints alleged that Mr. Anglin's election signs failed to disclose the sponsor of the signs or did so improperly.[59]

[126] The Chief Electoral Officer caused the removal of the offending signs before May 5, 2015.[60]

[127] The Wildrose Party won the seat.[61]

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[55] Letter from the Chief Electoral Officer to Joe Anglin dated March 22, 2016. Respondent's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 30.

[56] Affidavit of Glen Resler filed April 28, 2017, ¶ 14 in action number 1603-14130. Respondent's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 46 & Factum of the Respondent filed in Court of Appeal File Number 2203-0154AC, ¶ 9.

[57] Letter from the Clerk of the Legislative Assembly to Joe Anglin dated April 20, 2015. Respondents' Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 118.

[58] Appellant's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 236.

[59] *Anglin v. Chief Electoral Officer*, 2017 ABQB 595, ¶ 10.

[60] Id.

[61] Report of the Chief Electoral Officer on the Provincial General Election May 5, 2015, 70. Respondent's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 8.

[128] On July 15, 2016 the Chief Electoral Officer imposed an administrative penalty of $250 against Mr. Anglin for his noncompliant election signs.[62]

[129] Mr. Anglin appealed the administrative penalty to the Court of Queen's Bench.[63]

[130] In his originating application filed August 9, 2016, Mr. Anglin alleged bias, abuse of process, and other errors.[64]

[131] On April 21, 2017 Mr. Anglin filed an affidavit sworn the same day in support of his originating application.[65]

[132] On April 28, 2017 the Chief Electoral Officer swore and filed a response affidavit. Part of it reads as follows:[66]

> 8. At no time did I work with members of any political party in authorizing Mr. Anglin's signs to be removed. I did authorize staff for Elections Alberta to do so.
>
> …
>
> 14. I did not require Mr. Anglin to cover over the letters 'MLA' in his signs. I did commence an investigation into his use of that acronym, but I ceased that investigation in March 2016.

[133] Neither party cross-examined the adverse party on his affidavit.[67]

[134] As a result of a last-minute agreement between counsel,[68] the appeal, heard May 16, 2017, dealt with neither the bias or abuse of process allegations. It considered only whether the Chief

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[62] *Anglin v. Chief Electoral Officer*, 2017 ABQB 595, ¶ 12. See July 15, 2016 letter from the Chief Electoral Officer to Joe Anglin. Respondent's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 39.

[63] *Anglin v. Chief Electoral Officer*, 2017 ABQB 595, ¶ 5. This was Court of Queen's Bench action number 1603-14130. See *Election Act*, R.S.A. 2000, c. E-1, s. 153.3(1).

[64] *Anglin v. Chief of Electoral Officer*, 2017 ABQB 595, ¶ 6.

[65] Affidavit of Joseph Anglin sworn September 17, 2019. Appellant's Extracts of Key Evidence 142.

[66] Affidavit of Glen Resler filed April 28, 2017, ¶¶ 8 & 14 in action number 1603-14130. Respondent's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 42.

[67] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 3.13(1)(a).

[68] Transcript of Proceedings taken in the Court of Queen's Bench of Alberta May 16, 2017. Respondent's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 60:18-35 & 61:15-62:8.

Electoral Officer's Guidelines were law and, if so, whether the Guidelines prohibited sponsorship information below a certain font size and provided for a penalty if it did.[69]

[135] Justice Clackson heard the appeal.[70]

[136] Counsel did not rely on the two affidavits at the May 16, 2017 hearing.

[137] On October 5, 2017 Justice Clackson dismissed the appeal.[71] The appeal judge held that the guidelines the Chief Electoral Officer adopted were enforceable.[72]

[138] Mr. Anglin appealed Justice Clackson's order dismissing his appeal to the Court of Appeal.[73]

[139] On September 14, 2018 the Court of Appeal dismissed Mr. Anglin's appeal.[74]

3. List-of-Electors Complaint

[140] A member of the public discovered a list of electors for the Rimbey-Rocky Mountain House-Sundre constituency in a filing cabinet he had purchased as government surplus.[75] The list of electors was in a box addressed to Mr. Anglin at his Sundre constituency office.

[141] The Chief Electoral Officer learned of this. He subsequently informed Mr. Anglin that he was investigating this incident.[76] He appointed an investigator to submit a report.[77]

[142] On January 31, 2017 the Chief Electoral Officer notified Mr. Anglin that he found Mr. Anglin had failed to take all reasonable steps to protect a list of electors from loss or unauthorized

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[69] Id.

[70] *Anglin v. Chief Electoral Officer*, 2017 ABQB 595.

[71] Id. ¶ 27.

[72] Id. ¶ 23.

[73] *Anglin v. Chief Electoral Officer*, 2018 ABCA 296, ¶ 1.

[74] Id. ¶ 11.

[75] *Anglin v. Chief Electoral Officer*, 2020 ABQB 131, ¶ 4.

[76] *Election Act*, R.S.A. 2000, c. E-1, s. 153.09(1).

[77] *Anglin v. Chief Electoral Officer*, 2020 ABQB 131, ¶¶ 5 & 6.

use – a breach of section 19.1(1) of the *Election Act*[78] – and imposed an administrative penalty of $500.[79]

[143] Mr. Anglin appealed[80] this decision to the Court of Queen's Bench.[81]

[144] Justice Ross heard the appeal.

[145] The appeal judge rejected Mr. Anglin's submission that the Chief Electoral Officer's fact-finding was a product of a palpable and overriding error[82] and that he had misinterpreted the governing *Election Act* provision.[83] But the appeal judge did accept Mr. Anglin's argument that the Chief Electoral Officer was obliged to disclose to Mr. Anglin the report of the investigator the Chief Electoral Officer appointed:[84] "In the circumstances of this case, Anglin should have been provided with the investigator's report. The report [after appropriate redactions] ... had to include the summaries of the interviews relied on by the ... [Chief Electoral Officer] in coming to his decision".

[146] Justice Ross rejected Mr. Anglin's argument that the Chief Electoral Officer was biased against him because the Chief Electoral Officer initiated and conducted the investigation and made the final decisions. The appeal judge held that the *Election Act*[85] obliged the Chief Electoral Officer to undertake these functions. The failure of the Chief Electoral Officer to disclose the investigator's report was not the product of animosity towards Mr. Anglin[86]: "There was no precedent determining what disclosure should be provided; the ... [Chief Electoral Officer's] approach of providing information in a Notice of Intended Findings was in my view a good faith effort to comply with his obligations".

[147] The appeal judge directed the Chief Electoral Officer to reconsider his decision.[87]

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[78] R.S.A. 2000, c. E-1.

[79] *Anglin v. Chief Electoral Officer*, 2020 ABQB 131, ¶ 10.

[80] *Election Act*, R.S.A. 2000, c. E-1, s. 153.3(1).

[81] *Anglin v. Chief Electoral Officer*, 2020 ABQB 131, ¶ 2. This is Court of Queen's Bench action number 1703-03014.

[82] Id. ¶ 40.

[83] Id. ¶ 50.

[84] Id. ¶ 73.

[85] R.S.A. 2000, c. E-1.

[86] *Anglin v. Chief Electoral Officer*, 2020 ABQB 131, ¶¶ 80 & 82.

[87] Id. ¶ 89.

[148] In a subsequent decision Justice Ross rescinded the $500 administrative penalty.[88]

B. Mr. Anglin's Action Against the Chief Electoral Officer

[149] On April 6, 2017 Mr. Anglin commenced an action against Glen L. Resler in his capacity as the Chief Electoral Officer and others.[89] He alleged that the Chief Electoral Officer engaged in tortious activities both before and after the May 5, 2015 election that caused him damages.

[150] The important segments of the amended statement of claim follow:[90]

> 3. The Crown in right of Alberta is vicariously liable *for the tortious actions* of the Chief Electoral Officer.
>
> …
>
> 6. During the 2015 election Resler, or agents or employees acting on his behalf and on his authority:
>
> (i) required Anglin to cover over the letters "M.L.A." on signs reading "Re-Elect Joe Anglin M.L.A." when there was no law that prevented these letters being used;
>
> (ii) required Anglin to cover over sponsorship information on signs with the same information of a larger size, when there was no law requiring the sponsorship information to be of a larger size;
>
> (iii) commented to the media that Anglin's signs were illegal;
>
> (iv) worked with individuals who were supporting candidates that were opposed to Anglin;
>
> (v) authorized or allowed these individuals, or other individuals, to remove Anglin's signs contrary to the law;

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[88] *Anglin v. Chief Electoral Officer*, 2021 ABQB 353, ¶ 28.

[89] Statement of Claim filed April 6, 2017 & Amended Statement of Claim filed June 22, 2022. Appeal Record (Court of Appeal File Number 2203-0154AC) 3-14.

[90] Id. 10, 11 & 12 (emphasis added).

(vi) authorized or allowed these individuals, or other individuals, to damage Anglin's signs, contrary to the law; and

(vii) singled out Anglin's signs, which were legal, when many other candidates had signs that did not comply with the *Election Act*.

7. In undertaking these actions, Resler worked together with Broere, Pankiw and Roe in a common goal. Broere, Pankiw and Roe's intention was to create an unfair advantage for Anglin's opponents and to deny him a fair election and his chance of re-election.

8. In undertaking these actions, and in assisting Broere, Pankiw and Roe, Resler *exercised public powers for an improper or ulterior motive, knowing that it was likely to cause harm to Anglin and his chances of being re-elected.*

…

11. Subsequent to the 2015 election Resler, without reasonable and probable cause or for a purpose other than that of carrying the law into effect, instigated a series of investigations and prosecutions into Anglin regarding alleged breaches of the *Election Act*. These included an investigation and prosecution:

(i) into Anglin's use of the letters "M.L.A." during the election;

(ii) into Anglin's sponsorship information during the election;

(iii) into Anglin [sic] use or misuse of a List of Electors.

…

13. Resler investigated and prosecuted Anglin to the point of conviction for a breach of section 134 of the *Election Act* with regard to the sponsorship information:

(i) for failing to have his sponsorship information in a particular size, where there was no law imposing this requirement;

(ii) for failing to put sponsorship information on some signs, where there was no evidence to support this finding; and,

(iii) for failing to put a telephone number contact in the sponsorship information, where there was no evidence to support this finding and where the finding was made without any opportunity for Anglin to defend himself;

14. Resler investigated and prosecuted Anglin to the point of conviction for a breach of section 19.1 of the *Election Act* for failing to "take all reasonable steps to protect the list and the information contained in it from loss and unauthorized use":

(i) where the List of Electors was neither lost or nor sustained unauthorized use;

(ii) where the decision that Anglin had not undertaken all reasonable steps was contrary to the evidence;

(iii) where Resler's interpretation of the word "reasonable" imposed an impossibly high and illegal requirement on Anglin;

15. *Resler knew or should have known that there were no factual or legal basis to undertake these investigations and prosecutions or he had a subjective and reckless indifference with respect to whether the factual or legal bases existed*. Resler knew or should have known that his actions would probably injure Anglin, or he was subjectively and recklessly indifferent with respect [to] the outcome of his actions.

[151] On March 1, 2018 the Chief Electoral officer applied for an order under rule 3.68 of the *Alberta Rules of Court*[91] striking out the statement of claim on the grounds that it discloses no reasonable claim or constitutes an abuse of process.[92] The same application also sought alternative relief – an order under rule 7.3(1) of the *Alberta Rules of Court* for summary judgment on the ground that there is no merit to the claim.[93]

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[91] Alta. Reg. 124/2010.

[92] Application by Glen L. Resler to strike out statement of claim or for summary dismissal. Appellant's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 662.

[93] Id.

[152] The initial return date of this application was March 16, 2018. It was adjourned several times[94] before the parties agreed to a June 15, 2022 hearing date.[95]

[153] On September 23, 2019 Mr. Anglin filed an affidavit sworn September 17, 2019 opposing the Chief Electoral Officer's summary judgment application.[96]

[154] On April 22, 2022 the Chief Electoral Officer applied to Justice Gill, the case management judge,[97] for directions with a return date of May 11, 2022.[98] He sought an order allowing him, in his June 15, 2022 special chambers application, to rely on the pleadings, orders and reasons for decision in Mr. Anglin's two *Election Act*[99] appeals challenging determinations of the Chief Electoral Officer and administrative penalties, some documents from the certified record of the proceedings submitted to the Court of Queen's Bench by the Chief Electoral Officer, his April 28, 2017 affidavit filed in Mr. Anglin's appeal against the Chief Electoral Officer's sponsorship administrative penalty, and other documents published by the Legislative Assembly of Alberta.[100]

[155] On April 29, 2022 Mr. Anglin filed an application.[101] He used the same May 11, 2022 return date as the Chief Electoral Officer selected in his April 22, 2022 application. Mr. Anglin sought an order requiring the Chief Electoral Officer to file an affidavit of records and allowing Mr. Anglin to cross-examine the Chief Electoral Officer on his April 28, 2017 affidavit and to question him before the special chambers judge heard the Chief Electoral Officer's striking-out application.[102] Mr. Anglin also sought an order requiring the Chief Electoral Officer to enter any

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[94] Factum of the Respondent filed in Court of Appeal File Number 2203-0154AC, ¶29 & Transcript of the Proceedings taken in the Court of Queen's Bench of Alberta on May 13, 2022 ("Resler applied to strike the statement of claim or for summary dismissal on March 1st, 2018. That application was rescheduled and then re-adjourned, and then adjourned, and as previously mentioned is now scheduled for June 15, 2022"). Appeal Record (Court of Appeal File Number 2203-0154AC) 46:38-40.

[95] *Anglin v. Resler*, 2022 ABCA 213, ¶ 1.

[96] Affidavit of Joseph Anglin sworn September 17, 2019. Appellant's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 142.

[97] On April 6, 2021 Associate Chief Justice Nielsen appointed Justice Gill as the case management judge. May 11, 2021 letter from Donald Bur to Justice Gill. Respondent's Extracts of Key Evidence (Court of Appeal File Number 2203-0110AC) 22.

[98] Application for direction by Glen L. Resler in his capacity as Chief Electoral Officer. Appeal Record (Court of Appeal File Number 2203-0154AC) 19.

[99] R.S.A. 2000, c. E-1, s. 153.3(1).

[100] Application for direction by Glen L. Resler in his capacity as Chief Electoral Officer. Appeal Record (Court of Appeal File Number 2203-0154AC) 20-21.

[101] Application by Joseph Anglin. Appeal Record (Court of Appeal File Number 2203-0154AC) 15.

[102] Id. 16.

evidence upon which he relied in the striking-out application through an affidavit and allowing him to cross-examine on that affidavit.[103]

[156] On April 29, 2022 Mr. Anglin filed his affidavit sworn April 28, 2022 supporting his application.[104]

[157] Justice Gill granted the orders the Chief Electoral Officer sought and declined to grant the orders Mr. Anglin requested.[105] The case management judge allowed the Chief Electoral Officer to rely on the evidence he identified in his May 13 order and declared that "[n]o further evidence is necessary".[106]

[158] On May 24, 2022 Mr. Anglin applied for reconsideration of Justice Gill's order.[107]

[159] On May 26, 2022 Justice Gill dismissed the reconsideration application.[108]

[160] On May 27, 2022 Mr. Anglin filed a notice of appeal against the two orders Justice Gill pronounced.[109]

[161] Justice Schutz dismissed Mr. Anglin's stay application of the case management judge's procedural orders.[110] She noted that "the case management judge left unfettered the discretion of the application judge as to whether a just and fair disposition could be made on the record".[111]

[162] Justice Lema heard the applications on June 15, 2022. He struck out Mr. Anglin's claim on the ground that it was an abuse of process:[112]

> [I]n part it would require the Court to inquire into the validity of an election, which can only be done under the controverted-elections provisions of the *Election Act*; and

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[103] Id.

[104] Appellant's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 34.

[105] Appeal Record (Court of Appeal File Number 2203-0154AC) 50:35-51:8. See order pronounced May 13, 2022 and filed May 26, 2022. Appeal Record (Court of Appeal File Number 2203-0154AC) 60.

[106] Appeal Record (Court of Appeal File Number 2203-0154AC) 51:8-9.

[107] Id. 27.

[108] Id. 64.

[109] Id. 66.

[110] *Anglin v. Chief Electoral Officer*, 2022 ABCA 213, ¶ 9.

[111] Id. ¶ 6.

[112] *Anglin v. Resler*, 2022 ABQB 477, ¶ 92.

> … [I]t seeks relief that is, in effect, duplicative of the size-of-sponsorship-information and electors'-list proceedings already concluded in [the] judicial-review realm, with Anglin effectively seeking to re-litigate those issues or, alternatively, recharacterize the findings and conclusions of Clackson J. and the Alberta Court of Appeal on the former front and of Ross J. on the latter.

[163] The chambers judge also held that

> the statement of claim discloses no reasonable cause of action as against the … [Chief Electoral Officer], gauged against the backdrop of the various proceedings taken by the … [Chief Electoral Officer] against Anglin, the abandonment of two of them (i.e. short of any administrative penalty being imposed or prosecution pursued), the successful outcome for the … [Chief Electoral Officer] in the size-of-sponsorship-information proceeding, and the good-faith characterization of the one identified shortcoming (under-disclosure) in the electors'-list proceeding.[113]

[164] On August 2, 2022 Mr. Anglin filed a notice of appeal against Justice Lema's order striking out his claim.[114]

V. Applicable Statutory and *Alberta Rules of Court* Provisions

A. *Election Act*

[165] The relevant parts of the *Election Act*[115] follow:

> 2(1) There shall be appointed pursuant to this Act a Chief Electoral Officer.
>
> (2) The Chief Electoral Officer is an officer of the Legislature.
>
> …
>
> 4(1) The Chief Electoral Officer shall
>
> > (a) provide guidance, direction and supervision respecting the conduct of all elections, enumerations and plebiscites under this Act, elections under the *Alberta Senate Election Act* and plebiscites and referendums under any other Act to which this Act applies;

[113] Id. ¶ 93.

[114] Appeal Record (Court of Appeal File Number 2203-0154AC) 95.

[115] R.S.A. 2000, c. E-1.

…

> (d) perform all duties assigned to the Chief Electoral Officer by this or any other Act.

…

(2) The Chief Electoral Officer shall from time to time

> (a) provide the public with information about the election process, the democratic right to vote, the right to be a candidate and, generally, about the operation of this Act, the *Election Finances and Contributions Disclosure Act* and any other Act to which this Act applies,

…

5.1(1) No proceedings lie against the Chief Electoral Officer … for anything done, or omitted to be done, in good faith in the exercise or performance or the intended exercise or performance of a power, duty or function under this Act, the *Election Finances and Contributions Disclosure Act*, the *Alberta Senate Election Act*, the *Citizen Initiative Act* or the *Recall Act*.

….

19.1(1) A person or registered political party to whom a copy of a list of electors has been furnished under this Act shall take all reasonable steps to protect the list and the information contained in it from loss and unauthorized use.

….

134(2) A registered candidate … must ensure that advertisements sponsored by the registered candidate … comply with the following in accordance with the guidelines of the Chief Electoral Officer:

> (a) the advertisement must include the sponsor's name and contact information and must indicate whether the sponsor authorizes the advertisement;

…

(3) The Chief Electoral Officer shall establish guidelines respecting the requirements referred to in subsection (2).

…

(5) If an advertisement is not in compliance with this section, the Chief Electoral Officer may cause it to be removed or discontinued, and in the case of an advertisement displayed on a sign, poster or other similar format neither the Chief Electoral Officer nor any person acting under the Chief Electoral Officer's instructions is liable for trespass or damage resulting from or occasioned by the removal.

B. *Alberta Evidence Act*

[166] Sections 32 and 42(1) of the *Alberta Evidence Act*[116] are set out below:

32 Notwithstanding anything in this Act, every Act or regulation of Alberta or of Canada and every proclamation and every order made or issued by the Governor General or the Governor General in Council or by the Lieutenant Governor or the Lieutenant Governor in Council, and every publication of them in the Canada Gazette or The Alberta Gazette, shall be judicially noticed.

…

42(1) All courts, judges, justices, applications judges, clerks of court, commissioners and other officers acting judicially shall take judicial notice of the signature of any judge of a court of Canada or of Alberta or of any other province or territory in Canada when the signature is appended or attached to a decree, order, certificate, affidavit or judicial or official document.

C. *Alberta Rules of Court*

[167] Parts of rules 3.13(1), 3.68, 6.11(1), 7.3, 8.17(3), and 13.6 of the *Alberta Rules of Court*[117] are set out below:

3.13(1) The following persons may be questioned by a party adverse in interest:

…

(b) a person who makes an affidavit in response [to an originating application] … .

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[116] R.S.A. 2000, c. A-18.

[117] Alta. Reg. 124/2010.

…

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

(a) that all or any part of a claim … be struck out;

…

(2) The conditions for the order are one or more of the following:

…

(b) a commencement document or pleading discloses no reasonable claim or defence to a claim;

…

(d) a commencement document or pleading constitutes an abuse of process;

…

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

….

6.11(1) When making a decision about an application the Court may consider only the following evidence:

(a) affidavit evidence, including an affidavit by an expert;

…

(e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence … .

…

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

…

(b) there is no merit to a claim or part of it … .

…

(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

…

8.17 (3) Evidence taken in any other action may be presented at trial but only if the party proposing to submit the evidence gives each of the other parties written notice of that party's intention 5 days or more before the trial is scheduled to start and obtains the Court's permission to submit the evidence.

….

13.6(1) A pleading must be

(a) succinct … .

(2) A pleading must state any of the following matters that are relevant:

(a) the facts on which a party relies, but not the evidence by which the facts are to be proved;

…

(c) the remedy claimed, including

(i) the type of damages claimed,

(ii) to the extent known, the amount of general and special damages claimed, or if either or both are not known, an estimate of the amount or the total amount that will be claimed … .

(3) A pleading must also include a statement of any matter on which a party intends to rely that may take another party by surprise, including, without limitation, any of the following matters:

…

(d) fraud;

…

(f) malice or ill will;

…

(r) a provision of an enactment.

…

13.7 A pleading must give particulars of any of the following matters that are included in the pleading:

…

(b) fraud;

(c) misrepresentation;

…

(f) defamation.

VI. Analysis

A. Mr. Anglin's Claim Against the Chief Electoral Officer Is Not an Abuse of Process Under Rule 3.68(2)(d) of the *Alberta Rules of Court*

1. The Fundamental Features of an Abuse of Process

[168] Rule 3.68 of the *Alberta Rules of Court*[118] expressly authorizes a court to strike out "all or any part of a claim"[119] if it "constitutes an abuse of process".[120]

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[118] Alta. Reg. 124/2010.

[119] Id. r. 3.68(1)(a).

[120] Id. r. 3.68(2)(d).

[169] Courts also "have an inherent ... discretion to prevent an abuse of the court's process".[121]

[170] A civil proceeding is an abuse of process if it contravenes a fundamental civil procedure principle – the prosecution of the contested proceeding undermines the doctrine of finality and the legitimacy of tribunal determinations, will expend judicial resources without any corresponding public benefit, will waste private resources for no sound reason, deprive other litigants of timely access to a hearing, offends the reasonable expectations of the community, or introduces the prospect of inconsistent judicial outcomes that jeopardizes the integrity of the administration of justice.[122]

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[121] *City of Toronto v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, ¶ 35; [2003] 3 S.C.R. 77, 101 per Arbour, J. See *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529, 536 (H.L. 1981) per Lord Diplock ("this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied … . It would … be most unwise … to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty … to exercise this salutary power") & *Canam Enterprises Inc. v. Coles*, 51 O.R. 3d 481, 494-95 (C.A. 2000) per Goudge, J.A. ("The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel … . One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined").

[122] *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, ¶ 28; [2013] 2 S.C.R. 125, 141-42 per Cromwell & Karakatsanis, JJ. ("Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation") & id. at ¶ 73, [2013] 2 S.C.R. at 155 per LeBel & Abella, JJ. ("Litigation must come to an end, in the interests of the litigants themselves, the justice system and our society. The finality of litigation is a fundamental principle assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel advances this principle. It seeks to protect the reasonable expectation of litigants that they are able to rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding"); *City of Toronto v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, ¶ 37; [2003] 3 S.C.R. 77, 103 per Arbour, J. ("Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice"); *New Brunswick Railway v. British and French Trust Corp*., [1939] A.C. 1, 19-20 (H.L. 1938) per Lord Maughan, L.C. ("The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them"); *Lockyer v. Ferryman*, [1877] 2 A.C. 519, 530 (H.L.) per Lord Blackburn ("The object of the rule of *res judicata* is always put upon two grounds – the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the

[171] The courts have constructed a number of doctrines to prevent abuses of process and protect fundamental civil procedure principles.[123]

a. *Res Judicata* Doctrine

[172] The doctrine of *res judicata*, a Latin term meaning "a thing adjudicated",[124] is one of the oldest.[125]

[173] *Res judicata* "has two distinct forms: issue estoppel and cause of action estoppel".[126]

i. Issue Estoppel

[174] Issue estoppel exists if a question presented in a proceeding has been decided in a prior proceeding conducted by a tribunal of competent jurisdiction and between the same parties or their privies and was fundamental to the ultimate disposition of the first proceeding.[127] For example, if

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individual, that he should be vexed twice for the same cause") & *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971) per White, J. ("The cases and authorities discussed above connect erosion of the mutuality requirement to the goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases. The courts have often discarded the rule while commenting on crowded dockets and long delays preceding trial. Authorities differ on whether the public interest in efficient judicial administration is a sufficient ground in and of itself for abandoning mutuality, but it is clear that more than crowded dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue. … In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources").

[123] *The Queen v. Boudreault*, 2018 SCC 58, ¶ 105; [2018] 3 S.C.R. 599, 648 per Martin, J. ("the doctrine of *res judicata* … [is] one of the pillars of the rule of law in Canadian society").

[124] Black's Law Dictionary 1567 (11th ed. B. Garner ed. in chief 2019).

[125] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, ¶ 20; [2001] 2 S.C.R. 460, 474 per Binnie, J. ("One of the oldest is the doctrine estoppel *per rem judicatem*").

[126] D. Lange, The Doctrine of Res Judicata in Canada 1 (5th ed. 2021). See K. Handley, Spencer Bower and Handley: Res Judicata 2 (5th ed. 2019) ("A *res judicata* estoppel may be: (a) a cause of action estoppel; or (b) an issue estoppel").

[127] *City of Toronto v. Canadian Union of Public Employees*, 2003 SCC 63, ¶ 23; [2003] 3 S.C.R. 77, 95 per Arbour, J. ("For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same"); *Condominium Corp. No. 0828219 v. Carrington Holdings Ltd.*, 2023 ABCA 222, ¶ 9; 484 D.L.R. 4th 686, 693 ("For issue estoppel to be successfully invoked, the issue must be the same as the one decided in the prior judicial decision, the prior judicial decision must have been final, and the parties to both proceedings must be the same, or their privies"); *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, 935 (H.L. 1966) per Lord Guest ("The requirements for issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decisions or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies") & *Southern Pacific Railroad v. United States*, 168 U.S. 1, 48-49 (1897) per Harlan, J. ("a

P sued D, a former employee of P, for defamation and the trial judge dismissed the action on the basis that D was not the author of the admittedly defamatory statement, P could not, in a subsequent wrongful dismissal action D brought against him, allege that he had cause to dismiss D because D was the author of the defamatory statement the subject of the first action. Issue estoppel applies notwithstanding the two proceedings present different causes of action.[128]

ii. Cause of Action Estoppel

[175] Cause of action estoppel precludes a plaintiff from advancing the same cause of action based on the same facts in two separate proceedings against the same defendant.[129] Suppose P sues D for defamation. D published in its newspaper an article that the local rugby club asked P to resign as its president because he had misappropriated some of the club's property. This was not true. P had indeed resigned. But it was because he had recently become a father and no longer had time to serve as the club president. All rugby club members and most of the community knew this

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right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified"). See K. Handley, Spencer Bower and Handley: Res Judicata 107 (5th ed. 2019) ("A decision will create an issue estoppel if it determined an issue in a cause of action as an essential step in the reasoning. Issues estoppel applies to fundamental issues determined in an earlier proceeding which formed the basis of the judgment") & Zuckerman on Australian Civil Procedure 1014 (A. Zuckerman general ed. 2018) ("issue estoppel holds that parties to legal proceedings are bound by the court's findings on discrete issues that were essential to the final resolution of the proceedings in which the finding was made. Accordingly, if in order to dispose of the dispute the court has determined particular essential issues of fact or law (such as whether an alleged event occurred or the meaning of a contractual term), the parties will not be allowed to advance arguments that are inconsistent with those findings in any later proceedings between themselves, even if such later proceedings are concerned with an entirely different cause of action").

[128] *Southern Pacific Railroad v. United States*, 168 U.S. 1, 48 (1897) per Harlan, J. ("[issue estoppel applies] even if the second suit is for a different cause of action").

[129] *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, 254 (1974) per Dickson, J. ("'cause of action estoppel' … precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction") & *Bjarnarson v. Manitoba*, 38 D.L.R. 4th 32, 33-34 (Man. Q.B. 1987) per Hewak, C.J. ("The Supreme Court of Canada in ... [*Town of Grandview*] identified four criteria that must be present before the doctrine of cause of action estoppel would apply: 1. There must be a final decision of a court of competent jurisdiction in the prior action; 2. The parties to the subsequent action must have been parties to or in privy with the parties to the prior action ...; 3. The cause of action in the prior action must not be separate and distinct, and 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence"). See Zuckerman on Australian Civil Procedure 1014 (A. Zuckerman general ed. 2018) ("Cause of action estoppel ... provides that once a cause of action has been adjudicated, the parties to the proceedings are estopped from disputing the judgment disposing of the cause in any subsequent proceedings to which they are also parties. Cause of action estoppel is connected with the idea that a cause of action merges with the judgment given in the proceedings, so that no cause is left to pursue thereafter").

was not true. The court awarded P nominal damages in a consent judgment.[130] P later commenced a second action against D seeking additional damages for embarrassment the defamation caused his family. P has a problem.[131] Cause of action estoppel applies not only to questions decided by a court in a previous proceeding but any claim that could have been discovered by the exercise of due diligence.[132] Cause of action estoppel, unlike issue estoppel, may apply to questions a court has never answered.

[176] A court has a discretion not to apply the issue estoppel and cause of action estoppel doctrines if to do so would be clearly unjust.[133] Needless to say, a decision not to apply these doctrines forces the community and the parties to endure the adverse effects the doctrines were designed to eliminate. The likelihood a court would decline to apply these doctrines is extremely

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[130] *Kinch v. Walcott*, [1929] A.C. 482, 493 (P.C.) (Barbados) per Lord Blanesburgh ("their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal"); K. Handley, Spencer Bower and Handley: Res Judicata 20 (5th ed. 2019) ("A judgment (or order) by consent is a *res judicata*. … Judgments, orders and awards by consent are as efficacious as those pronounced after a contest in creating cause of action estoppels and merging the cause of action sued on") & Zuckerman on Australian Civil Procedure 1035 (A. Zuckerman gen. ed. 2018) ("A consent judgment can give rise to cause of action estoppel just as does any other judgment. … A consent judgment can also give rise to issue estoppel, but 'only in respect of the fundamental issue or issues which were clearly determined by the judgment'").

[131] See *Lake Manitoba Estates Ltd. v. Communities Economic Development Fund*, [1984] 3 W.W.R. 695, 697 (Man. Q.B.), aff'd, [1985] 1 W.W.R. 36 (Man. C.A.) per Wilson, J. ("The plaintiff should always claim in the one action every kind of relief to which he is entitled, say, damages, an injunction, a declaration, appointment of a receiver or other remedy, and will not be allowed to bring a second action against the same defendant on the same cause of action in order to obtain relief he might have obtained in the first action") & *Serrao v. Noel*, 15 Q.B.D. 549, 559 (C.A. 1885) per Bowen, L.J. ("The principle is, that where there is one cause of action, damages must be assessed once for all").

[132] *Henderson v. Henderson*, 67 Eng. Rep. 313, 319 (Ch. 1843) per Wigram,V.C. ("where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time") & *Port of Melbourne Authority v. Anshun Pty Ltd.*, [1981] HCA 45, ¶ 37; 147 C.L.R. 589, 602 per Gibbs, C.J. & Mason & Aickin, JJ. ("there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding").

[133] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, ¶ 67; [2001] 2 S.C.R. 460, 494 per Binnie, J. ("The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case").

low if both proceedings were court proceedings.[134] The likelihood these doctrines may not be applied increases slightly if the decision maker was a statutory delegate.[135]

b. Collateral Attack Doctrine

[177] A determination made by a tribunal of competent jurisdiction is conclusive and binding on the parties unless it is set aside on appeal or as a result of another procedure the law allows.[136] A party cannot question in a subsequent proceeding the validity of a tribunal's order made in a prior proceeding in which the challenger had every opportunity to contest the challenged order with the goal of being relieved of the consequences that logically are linked to the order. The collateral attack doctrine condemns this practice.[137]

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[134] D. Lange, The Doctrine of Res Judicata in Canada 241 (5th ed. 2021) ("Courts in Canada have regularly maintained that, in a court-to[-]court context, issue estoppel and cause of action estoppel should apply"). See *City of Calgary v. Alberta Human Rights and Citizenship Commission*, 2011 ABCA 65, ¶ 30; 331 D.L.R. 4th 715, 732 ("Once ... [the] three preconditions are met, the principles are engaged, although the court has a residual discretion whether to apply the doctrines in the particular case. The doctrines are most frequently invoked where the prior decision is a decision of a court. However, a prior decision of an administrative tribunal can also raise an issue estoppel ..., but ... the discretion not to apply the doctrine is wider ... . In this case the prior decisions in question are decisions of the Court of Queen's Bench and the Court of Appeal, so the discretion not to apply these doctrines is narrow").

[135] E.g., *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19; [2013] 2 S.C.R. 125.

[136] *The Queen v. Wilson*, [1983] 2 S.C.R. 594, 599-600 per McIntyre, J. ("It has long been a *fundamental* rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled ... that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence") (emphasis added).

[137] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, ¶ 20; [2001] 2 S.C.R. 460, 474 per Binnie, J. ("Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it") & *Demeter v. British Pacific Life Ins. Co.*, 48 O.R. 2d 266, 268 (C.A. 1984) per MacKinnon, A.C.J. ("the use of a civil action to initiate a collateral attack on a final decision of a criminal court of competent jurisdiction in an attempt to relitigate an issue already tried, is an abuse of the process of the court"). See D. Lange, The Doctrine of Res Judicata in Canada 11 (5th ed. 2021) ("Collateral attack bars a second proceeding when a party, bound by an order, seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum") & Zuckerman on Australian Civil Procedure 1039 (A. Zuckerman gen. ed. 2018) ("A specific category of abuse of process is the collateral attack on a previous judgment. A collateral attack occurs where a party seeks to challenge or call into question a previous judgment, not through an appeal, but through subsequent litigation. Collateral attacks are not permitted because they undermine the public interest in the finality of litigation, and the public interest in judgments being treated as conclusive and incontrovertible").

[178] The Supreme Court of Canada applied the collateral attack doctrine in *The Queen v. Consolidated Maybrun Mines Ltd*.[138] A mining company ignored an order a statutory delegate issued under Ontario's *Environmental Protection Act* to perform stipulated acts to remedy problems at the company's abandoned mine. The company neither complied with the order nor appealed the order to the Environmental Appeal Board. The ministry did what the mining company failed to do – cleaned up and secured the abandoned mine site – and charged the mining company with failure to comply with the order the statutory delegate issued to it. In defending the regulatory charge, the mining company challenged the validity of the order that it chose to disregard.[139] This was an impermissible collateral attack on the statutory delegate's order. The mining company's time for challenging the order expired when the window for an appeal to the Environmental Appeal Board closed.

c. Abuse of Process by Relitigation Doctrine

[179] The detriments associated with relitigation are just as troubling, even if not captured by the cause of action estoppel, issue estoppel, or collateral attack doctrines. Recognizing this incontrovertible fact, the law has formulated the doctrine of abuse of process against relitigation.[140]

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[138] [1998] 1 S.C.R. 706.

[139] Id. 736.

[140] E.g., *City of Toronto v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63; [2003] 3 S.C.R. 77 (the Court declared a grievance contesting the lawfulness of the employer's decision to terminate a union employee who a criminal court had convicted of sexual assault was an abuse of process); *City of Calgary v. Alberta Human Rights Comm'n*, 2011 ABCA 65, ¶ 41; 331 D.L.R. 4th 715, 736 ("the core issues between the complainants, the Local and the City have been decided [by judicial review] and it would amount to an abuse of process for the Human Rights Panel to reconsider them"); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.) per Wakeling, J.A. (the Court invoked the abuse of process doctrine and struck out the defendant's statement of defence claiming that she discharged her duties as the pilot of the plane on which the plaintiff was a passenger and her third party claim against another passenger on the ground that a jury in another action commenced by another passenger had concluded that the pilot was wholly responsible for the plane crash: "there would be great difficulty in thinking that courts would permit a rule to evolve by which in negligence cases involving a claim and counterclaim the defendant could be permitted to challenge the previous trial finding out of the same occurrence but as plaintiff by counterclaim he would be precluded from doing so on the basis of abuse of process"); *Hunter v. Chief Constable of West Midlands Police*, [1982] A.C. 529 (H.L. 1981) (the House of Lords upheld an order striking out the plaintiff's statement of claim alleging that the defendant police officers assaulted him while he was in custody on the ground that this question had been already determined against him during his murder trial); *House of Spring Gardens Ltd. v. Waite*, [1990] 2 All E.R. 990, 1000 (C.A.) per Stuart-Smith, L.J. ("The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court, it having been tried and determined by Egan, J. in Ireland. In my judgment it would not; indeed, I think it would be a travesty of justice. Not only would the plaintiffs be required to relitigate matters which have twice been extensively investigated and decided in their favour in the natural forum [Ireland], but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves. … Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause"); *Demeter v. British Pacific Life Ins. Co*., 150 D.L.R. 3d 249, 267 (Ont. H.C. 1983), aff'd, 48 O.R. 2d 266 (C.A. 1984) per Osler, J. ("[i]n view of

It is invoked when it would be unjust to countenance litigation that would undermine the integrity of earlier proceedings.[141]

[180] The Supreme Court of Canada applied this doctrine in *City of Toronto v. Canadian Union of Public Employees*.[142] After a criminal court convicted an employee of the City of Toronto of sexual assault, the victim of which was a child the offender worked with while the employee was on duty,[143] the City dismissed the offender for cause.[144] The offender's union filed a grievance contesting the existence of cause.[145] The arbitrator reinstated the offender.[146] He concluded that the City did not prove that the offender committed a sexual assault. The Divisional Court quashed the award.[147] The Court of Appeal for Ontario dismissed the union's appeal.[148] And the Supreme Court of Canada also dismissed the appeal.

[181] The Supreme Court concluded that the doctrines of cause of action and issue estoppel did not apply because the parties to the criminal proceedings – the Crown and the offender – were not the same as the parties to the arbitration process – the union and the City. Nor, said the Court, did

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the solemn verdict of the jury [convicting the applicant of the murder of his wife] … and the identity of the issue before the jury with the issue in the present actions, it would be an affront to one's sense of justice and would be regarded as an outrage by the reasonable layman to let these actions go forward. In the exercise of the court's inherent jurisdiction they will each be dismissed with costs") & *Bjarnarson v. Manitoba*, 38 D.L.R. 4th 32, 39 (Man. Q.B. 1987) per Hewak, C.J. (The Court struck out a portion of the defendant's statement of defence denying its construction of a waterway was negligent when the defendant's negligence had been established in an earlier case as the cause of flooding of an area within which the plaintiff owned land: "In these times of aviation or common carrier disasters, chemical waste spills, or pharmaceutical accidents, when it is tragically quite common to have multiple litigants with the same cause of action against the same defendant, and where a determination of a common issue impacts equally upon those litigants, the law as well as the litigants would be well served by such a fair and sensible legal doctrine. A doctrine that would not only tend to bring a finality to at least a portion of the litigation, but also would assist in protecting litigants from the additional costs they otherwise would incur if they were required to relitigate issues already decided").

[141] Zuckerman on Australian Civil Procedure 1016 (A. Zuckerman general ed. 2018) ("the general doctrine of abuse of process … is used … where it would be unjust to present litigation even though the case does not fall under cause of action estoppel, issue estoppel, or Anchun estoppel. The abuse of process jurisdiction is … left flexible in order to enable the court to reach the conclusion that justice and public policy dictate in the particular circumstances of the case").

[142] 2003 SCC 63; [2003] 3 S.C.R. 77.

[143] 187 D.L.R. 4th 323, 326.

[144] Id. 327.

[145] Id.

[146] Id. 328.

[147] 187 D.L.R. 4th 323.

[148] 55 O.R. 3d 541.

the collateral attack doctrine apply.[149] The grievance sought the offender's reinstatement as a City employee. It did not seek the reversal of the criminal conviction. The arbitrator, of course, could not grant as a remedy anything that would affect the validity of the conviction of the offender.[150] Nonetheless, the Supreme Court, fully aware that the grievance succeeded only because the arbitrator ruled that the City did not prove that the offender committed the sexual assault, refused to condone a process that produced a result inconsistent with the criminal conviction – a troubling scenario:[151] "[T]he facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted". A legal system that would force the City to reinstate a convicted sex offender and allow an arbitrator to ignore a criminal conviction would not have, and would not deserve, the support and respect of reasonable and informed members of the public.[152]

[182] The abuse of process by relitigation doctrine covers situations not captured by cause of action or issue estoppel.[153]

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[149] 2003 SCC 63, ¶ 34; [2003] 3 S.C.R. 77, 101 per Arbour, J. ("in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct").

[150] 187 D.L.R. 4th 323, 328 (The arbitrator stated that he "made it clear to the parties that … [he had] no jurisdiction to make a determination about wrongful conviction").

[151] 2003 SCC 63, ¶ 56; [2003] 3 S.C.R. 77, 111 per Arbour, J.

[152] Id. at ¶ 57; [2003] 3 S.C.R. at 112 ("As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise").

[153] *City of Toronto v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, ¶ 38; [2003] 3 S.C.R. 77, 103 per Arbour, J. ("the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints"). See *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21, 26 (Sask. C.A. 1986) per Wakeling, J.A. (abuse of process is "a broader" concept than *res judicata*) & *House of Spring Gardens v. Waite*, [1990] 2 All E.R. 990, 1000 (C.A.) per Stuart-Smith, L.J. ("abuse of process ... is untrammelled by the technicalities of estoppel").

2. Mr. Anglin's Claim Is Not a Collateral Attack on the Validity of the May 5, 2015 Alberta General Election

[183] Justice Lema invoked the collateral attack doctrine.[154] He concluded that Mr. Anglin's claim "would require the Court to inquire into the validity of an election, which can only be done under the controverted-elections provisions of the *Election Act*".[155]

[184] I disagree.

[185] Nothing in Mr. Anglin's amended statement of claim supports the notion that he contests the validity of the May 5, 2015 Alberta general election or makes any claim which would otherwise require a court to inquire into the validity of the May 5, 2015 election. Mr. Anglin does not seek a declaration voiding and setting aside the election.[156]

[186] Just the opposite is the case. Mr. Anglin relies on the fact that he lost the May 5, 2015 election to buttress his damage claim against the Chief Electoral Officer.[157]

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[154] *Anglin v. Chief Electoral Officer*, 2022 ABQB 477, ¶¶ 15 & 92 ("15. Here I adopt and endorse the [Chief Electoral Officer's] submissions on this point. .... The claim is an abuse of process for two reasons: a. if [Mr. Anglin] wished to challenge the fairness of the 2015 Election, his recourse was to file a petition to void the election pursuant to Part 7 of the *Election Act*. ... b. It is an abuse of process for [Mr. Anglin] to seek to do indirectly that which he is proscribed from doing directly – challenging an election process outside the statutorily mandated process. This is in substance a *collateral attack* on the final election result. ... It is an abuse of process for an election candidate to attempt to circumvent the statutory process in place for challenging the fairness of an election by bringing a private action against the ... [Chief Electoral Officer]. .... 92. Anglin's statement of claim amounts to an abuse of process since: 1. in part it would require the Court to inquire into the validity of an election, which can only be done under the controverted-elections provisions of the *Election Act*; and 2. in part it seeks relief that is, in effect, duplicative of the size-of-sponsorship-information and electors'-list proceedings already concluded in [the] judicial-review realm, with Anglin effectively seeking to re-litigate those issues or, alternatively, recharacterize the findings and conclusions of Clackson J. and the Alberta Court of Appeal on the former front and of Ross J. on the latter") (emphasis added).

[155] Id.

[156] *Election Act*, R.S.A. 2000, c. E-1, Part 7.

[157] See *Canada v. TeleZone Inc.*, 2010 SCC 62, ¶ 79; [2010] 3 S.C.R. 585, 624-25 per Binnie, J. ("TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. *On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss*. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was *not* done") (emphasis added).

[187] A fair reading of Mr. Anglin's claim discloses an unequivocal assertion that Mr. Resler committed tortious acts in his capacity as the Chief Electoral Officer that harmed the plaintiff.[158] While Mr. Anglin's claim does not expressly describe the tort as misfeasance in a public office or malicious prosecution, it is reasonable to characterize the facts he asserts in his claim as advancing these torts. The claim expressly states that the Chief Electoral Officer "exercised public powers for an improper or ulterior motive"[159] and that "Resler knew ... that he had no power to undertake these actions or he had a subjective and reckless indifference with respect to whether he had the power to undertake these actions".[160] In addition, the claim stipulates the acts Mr. Anglin asserts support his claim and identifies the damages he has suffered.

[188] Mr. Anglin's action is a tort claim for misfeasance in a public office and malicious prosecution.[161] It is not a collateral attack on the validity of the May 5, 2015 Alberta general election.

3. Mr. Anglin's Claim Is Not a Collateral Attack on Any Decision Made by Justices Clackson and Ross in Their Capacity as Appeal Judges Under the *Election Act*

[189] Ms. Elhatton-Lake, counsel for the Chief Electoral Officer, argued that "[t]he Appellant seeks to relitigate issues considered and decided by this Court and the Court of King's Bench".[162]

[190] I cannot accept this argument.

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[158] See *Scheuer v. Rhodes*, 416 U.S. 232, 235 (1974) per Burger, C.J. ("In essence, the defendants [the Governor of Ohio, the Adjutant General of the Ohio National Guard, members of the Ohio National Guard, and the president of Kent State University] are alleged to have 'intentionally, recklessly, willfully and wantonly' caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. Both complaints allege that the action was taken 'under color of state law' and that it deprived the decedents of their lives and rights without due process of law. Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office").

[159] Amended statement of claim, ¶ 8. Appeal Record (Court of Appeal File Number 2203-0154AC) 11.

[160] Id. ¶ 9.

[161] Mr. Anglin also claims that Mr. Resler wrongly took or destroyed his election signs. Amended statement of claim, ¶ 16(i). Appeal Record (Court of Appeal File Number 2203-0154AC) 12-13. This is the tort of conversion. L. Klar, K.C. & C. Jeffries, Tort Law 117 (6th ed. 2017) ("A conversion is the positive and intentional interference with legal possession or the right to immediate possession. … [M]istake as to the legal or factual consequences of one's conduct is not a defence if the physical consequences were intended").

[162] Factum of the Respondent filed in Court of Appeal File Number 2203-0154AC at 24.

[191] Neither Justice Clackson nor Justice Ross, when hearing appeals under the *Election Act*, determined whether the Chief Electoral Officer performed public acts with the knowledge he was acting unlawfully. This issue was not before them.

[192] As a result, Mr. Anglin's allegation in his amended statement of claim that the Chief Electoral Officer performed public acts with the knowledge he was acting unlawfully and with an intent to injure Mr. Anglin does not run afoul of the collateral attack doctrine.

[193] An essential element of the tort of misfeasance in a public office is that a public actor performed the act complained about knowing that his or her performance of it was unlawful.[163]

[194] A plaintiff cannot succeed in an allegation that the defendant maliciously prosecuted the plaintiff unless the plaintiff proves on a balance of probabilities that the defendant was "motivated by malice or a primary purpose other than that of carrying the law into effect".[164]

[195] Justice Clackson did not determine the Chief Electoral Officer's state of mind when he heard Mr. Anglin's appeal against the $250 administrative penalty for displaying election signs that did not comply with the sponsorship rule.[165] The appeal judge dismissed Mr. Anglin's appeal because the guidelines the Chief Electoral Officer adopted were enforceable.[166]

[196] Justice Ross was the appeal judge who heard Mr. Anglin's complaint against the $500 administrative penalty the Chief Electoral Officer imposed on account of Mr. Anglin's failure to take all reasonable steps to protect a list of electors from loss or unauthorized use.[167]

[197] Justice Ross never determined the actual state of the Chief Electoral Officer's mind when he performed the public acts about which Mr. Anglin complains in his amended statement of claim. It was not an issue she had to decide.

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[163] L. Klar & C. Jeffries, Tort Law 409 (7th ed. 2023) ("The requirements of the tort [of misfeasance in a public officer] are as follows: (a) the actor must be a public official; (b) the public official must have engaged in unlawful conduct in his or her capacity as a public officer; and the wrongdoing must be intentional").

[164] *Mazga v. Estate of Kwello*, 2009 SCC 51, ¶ 3; [2009] 3 S.C.R. 339, 346-47 per Charon, J. ("To succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect").

[165] *Anglin v. Chief Electoral Officer*, 2017 ABQB 595, ¶¶ 15 & 21 ("The issue is whether the Chief Electoral Officer acted appropriately concluding that Anglin had violated the *Statute*. That question involves interpreting the *Election Act*. **...** The argument is that noncompliance with the guideline does not amount to non-compliance with the *Act*. .... Put another way, Anglin argues that the guidelines do not have the force of law").

[166] Id. ¶¶ 23-24.

[167] *Anglin v. Chief Electoral Officer*, 2020 ABQB 131, ¶ 2.

[198] Justice Ross had a completely different issue before her – "would a reasonable, right-minded and properly informed person, adopting a realistic and practical perspective, conclude on a balance of probabilities, that the adjudicator was not impartial".[168] The following passage from Justice Ross's judgment confirms this:[169] "No reasonable and informed observer would consider that the … [Chief Electoral Officer] was biased because he was performing exactly the functions and duties imposed on him by the *Act*."

[199] I am aware of only a few common law cases[170] in which a judge has held that an adjudicator was *actually*[171] biased.

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[168] *Cartwright v. Rocky View County Subdivision and Development Appeal Board*, 2020 ABCA 408, ¶ 59; 11 M.P.L.R. 6th 163, 188 per Wakeling, J.A. See also *The Queen v. Mulvihill*, [2009] 1 All E.R. 436, 441 (C.A. 1989) per Brooke, J. ("The question, therefore, which we have to decide is whether a reasonable and fair-minded person sitting in the Central Criminal Court during that four-week trial and knowing that the judge held 1,650 shares in one of the banks for which the appellant was said to have robbed, would have a reasonable suspicion that a fair trial was not possible").

[169] *Anglin v. Chief Electoral Officer*, 2020 ABQB 131, ¶ 79.

[170] Goudkamp, "Facing Up to Actual Bias", 27 Civ. Just. Q. 32, 32 (2008) ("A notable feature of the rapidly growing corpus of law on bias is that while cases involving apparent and presumed bias are in great supply, cases in which actual bias is alleged let alone proved are rare. This is largely due to the fact that, unlike the other species of bias, actual bias requires proof of partiality. This is very difficult to establish. But even when, exceptionally, a litigant has good prospects of proving that a judge is in fact biased, a submission of actual bias is seldom made. Instead, litigants tend to take their stand on the rule against apparent bias"). See *The Queen v. Abdulkadir*, 2020 ABCA 214, ¶¶ 12 & 29; 391 C.C.C. 3d 482, 490 & 492 per Wakeling, J.A. ("The Crown argues that the trial judge was actually biased ... . Both sides are entitled to an impartial adjudicator. The Crown did not have one"); *Texaco Inc. v. Federal Trade Comm'n*, 336 F. 2d 754, 760 (D. Col. Cir. 1964) per Miller, J. ("Before turning to the question whether the [Federal Trade Commission's] order ... was supported by the record, we consider the propriety of Chairman Dixon's participation in that decision. ... His Denver speech, made before the matter was submitted to the Commission but while it was before the examiner, plainly reveals that he had already concluded that Texaco and Goodrich were violating the Act, and that he would protect the petroleum retailers from such abuses"), vacated on other grounds, 381 U.S. 739 (1965) & *Leighton v. Henderson*, 414 S.W. 2d 419, 419, 420 & 421 (Tenn. Sup. Ct. 1967) per Burnett, C.J. ("Prior to the hearing of this petition in Lawrence County, the trial judge made certain statements, and as a result of which the Warden moved that the trial judge recuse himself ... . … When the question came up as to when this petition for habeas corpus should be heard in a colloquy between counsel ... and the court, the court among other things said, 'I don't care what proof is in the record, if the Governor doesn't pardon this man, I am going to grant the petition ...'. .... The trial judge in the instant case, after expressing himself as he did here and after having the motion of the State for him to recuse himself, did not take advantage of any of these opportunities but went on and heard this trial. In doing so it is the unanimous opinion of this Court that he erred, and it is for this reason, and this alone, that this case must be reversed and remanded").

[171] *In re Medicaments and Related Classes of Goods (No 2)*, [2001] 1 W.L.R. 700, 711 (C.A.) per Lord Phillips, M.R. ("The decided cases draw a distinction between 'actual bias' and 'apparent bias'. The phrase 'actual bias' has not been used with great precision and has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party. … Findings of actual bias on the part of a judge are rare") & *Davidson v. Scottish Ministers (No. 2)*, [2004] UKHL 34, ¶¶ 6-7 per Lord Bingham ("a judge will be disqualified from hearing a case (whether sitting

[200] Two primary reasons account for the paucity of such cases.

[201] First, the existence of the apprehension of bias standard – an objective assessment[172] – provides the court with a protocol that promotes and preserves the goal of judicial impartiality.[173] No other standard is needed to accomplish this critical goal.

[202] Second, the existence of an objective standard relieves the court of the need to make a difficult and often damning declaration that the judge was actually biased.[174] The likelihood a party

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alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since 'bias' suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment. Very few reported cases concern actual bias").

[172] *The Queen v. R.D.S.*, [1997] 3 S.C.R. 484, 530 & 534 per Cory, J. ("When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias ... . It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. .... [J]udges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined"); *Porter v. Magill*, [2002] 2 A.C. 357, 494 (H.L. 2001) per Lord Hope ("The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"); *Johnson v. Johnson*, [2000] HCA 48, ¶¶ 11-12; 201 C.L.R. 488, 493 per Gleeson, C.J. & Gaudron, McHugh, Gummow & Hayne, JJ. ("the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias ... is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. ... The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues"); Judiciary Hong Kong Special Administrative Region, Guide to Judicial Conduct 12 (October 2004) ("The perception of impartiality is measured by the standard of a reasonable, fair-minded and well-informed person") & *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 & 883-84 (2009) per Kennedy, J. ("Under our precedents, there are objective standards that require recusal when 'the probability of actual bias on the part of the judges or decision maker is too high to be constitutionally tolerable'. .... The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. ... The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review ... . In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. ... In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented'").

[173] *Wewaykum Indian Band v. Canada*, 2003 SCC 45, ¶ 57; [2003] 2 S.C.R. 259, 287-88 ("public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so").

[174] *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) per Kennedy, J. ("the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present") & *The Queen v. Curragh, Inc.*,

alleging bias can establish the facts needed to meet the objective bias test – reasonable apprehension of bias – is much higher than the likelihood it can establish the facts needed to meet the subjective bias test – actual bias.[175] Counsel frequently go out of their way to expressly state that they are not asserting actual bias on the part of the adjudicator.[176] The same is true of judges – they make it clear they are not assessing actual partiality.[177]

[1997] 1 S.C.R. 537, 542 per La Forest & Cory, JJ. ("The ... Crown alleges that prior to making the order staying the proceedings, the actions and words of the trial judge revealed actual bias. Although that may be correct, it is not necessary to consider the issue since it is clear that they certainly created a reasonable apprehension of bias").

[175] A party asking a judge to recuse him or herself does not have the right to cross-examine the judge or access any of the other discovery protocols normally available to litigants. Royal Commission, Trade Union Governance and Corruption, Reasons for Ruling on Disqualification Applications 59-60 (August 31, 2015) per Heydon, J. ("In an adjudication to disqualify for apprehended bias, there is no basis upon which a judge can be cross-examined or any form of documentary disclosure, such as by discovery, subpoena or notice to produce can be sought") & *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd*., [2000] Q.B. 451, 472 (C.A. 1999) ("The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind"). See Goudkamp, "Facing Up to Actual Bias", 27 Civ. Just. Q. 32, 34 (2008) ("Why are litigants loath to argue that the rule against actual bias has been breached when they have an evidential foundation for doing so? One explanation for this tendency is that, unless the evidence of actual bias is extraordinarily persuasive, it is significantly easier to demonstrate that the appearance of bias has been created. In order to make out a breach of the rule against actual bias a litigant must prove partiality. To do this a litigant must convince the court to infer from the judge's behaviour that he closed his mind to the evidence and the argument").

[176] E.g., *L/3 Communications/Spar Aerospace Ltd. v. Int'l Ass'n of Machinists and Aerospace Workers, Northgate Lodge 1579*, 142 L.A.C. 4th 1, 16 (Wakeling, Q.C. 2005) ("Spar has not asked me to disqualify myself because anything I have said or done during the course of these proceedings caused it to conclude that my personal ability to fairly decide any issue which is covered by my reservation of jurisdictions has been impaired. There is no allegation of actual bias") & *The Queen v. Bow Street Magistrate,* [2000] 1 A.C. 119, 129 & 139 (H.L. 1999) per Lord Browne-Wilkinson ("It is important to stress that Senator Pinochet makes no allegation of *actual* bias against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being done") & per Lord Goff ("It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradited, nor is it dependant on any bias or apparent bias on his past. Any suggestion of bias on his part was, of course, disclaimed by those representing Senator Pinochet").

[177] *Dimes v. Proprietors of Grand Junction Canal*, 10 Eng. Rep. 301, 315 (H.L. 1852) per Lord Campbell ("No one can suppose that Lord Cottonham could be, in the remotest degree, influenced by the interest that he had in this concern; but … it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred"); *Re JRL, ex p. CJL*, [1986] HCA 39, ¶ 5; 161 C.L.R. 342, 352 per Mason, J. ("It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party"); *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) per Kennedy, J. ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'"); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825 (1986) per Burger, C.J. ("We conclude that Justice Embry's participation in this case violated appellant's due process rights ... . We make clear that we are not required to decide whether in fact, Justice Embry was influenced [by the facts that he was a plaintiff in two suits against insurance companies raising the same issues as was before him as a judge of the Supreme

[203] It is also noteworthy that Justice Ross heard an appeal against the $500 administrative penalty imposed on Mr. Anglin because of a finding he failed to take all reasonable steps to protect a list of electors from loss or unauthorized use. These are post-election issues. Mr. Anglin complains about many preelection acts that he asserts evidence a tortious state of mind.

[204] To summarize, neither of the judges hearing Mr. Anglin's appeals under the *Election Act*[178] determined the Chief Electoral Officer's actual state of mind when he performed the public acts about which Mr. Anglin complains. This was not an issue that a reasonable-apprehension-of-bias complaint presents for adjudication.

4. Mr. Anglin's Claim Is Not Captured by the Issue Estoppel or Cause of Action Estoppel Doctrines

[205] Given that I am satisfied the questions presented by Mr. Anglin's appeals under the *Election Act*[179] heard by Justices Clackson and Ross are not the same as those presented in Mr. Anglin's amended statement of claim, I conclude that the issue estoppel doctrine does not capture Mr. Anglin's claim. The existence of the same question in two proceedings is an essential element of the issue estoppel doctrine.[180]

[206] I am also firmly of the view that Mr. Anglin has not advanced the same cause of action in his two *Election Act* appeals and his amended statement of claim, an essential element of cause of action estoppel.[181] In his appeals, he challenged the two administrative penalties issued to him. The torts of misfeasance in a public office and malicious prosecution advance completely different legal claims.

Court of Alabama], but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true'") & *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009) per Kennedy, J. ("based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias").

[178] R.S.A. 2000, c. E-1.

[179] R.S.A. 2000, c. E-1.

[180] *City of Toronto v. Canadian Union of Public Employees*, 2003 SCC 63, ¶ 23; [2003] 3 S.C.R. 77, 95 per Arbour, J. ("For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the *same* as the one decided in the prior decision") (emphasis added).

[181] *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, 254 (1974) per Dickson, J. ("'cause of action estoppel' precludes a person from bringing an action against another when that *same* cause of action has been determined in earlier proceedings, by a court of competent jurisdiction") (emphasis added).

[207] I note that Ms. Elhatton-Lake did not specifically raise the issue estoppel and cause of action estoppel doctrines.[182]

B. Mr. Anglin's Statement of Claim Against the Chief Electoral Officer Discloses a Reasonable Claim

1. The Essential Substantive Features of a Statement of Claim

[208] The *Alberta Rules of Court*[183] set out the essential substantive[184] and technical features[185] of a statement of claim.

[209] I will review only the substantive features.

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[182] The Chief Electoral Officer has not filed a statement of defence. It follows that the Chief Electoral Officer has not pleaded the issue estoppel doctrine. See *Cooper v. Molsons Bank*, 26 S.C.R. 611, 620 (1896) per Strong, C.J. ("Under the system of pleading introduced by the Judicative Act, it has been decided that *res judicata* as a defence, or as a reply to a counterclaim, must be specially pleaded") & *Baxter v. Derkasz (No. 2)*, [1929] 2 D.L.R. 443, 448 (Sask. C.A.) per McKay, J.A. ("The rule of estoppel by *res judicata* being a rule of evidence … cannot be raised unless it is specially pleaded in the defence … . [T]he defendant R. Derkasz, not having pleaded this defence …, cannot raise it in any way against the plaintiff herein"). The Chief Electoral's Officer application to strike relies on "abuse of process" generally. Extracts of Key Evidence of the Appellant 663. See also Transcript of the Proceedings taken in the Court of Queen's Bench of Alberta on June 15, 2022 ("Ms. Elhatton-Lake: … Mr. Resler seeks to strike the claim on four bases really. First, that these are an abuse of process, as the statement of claim is duplicative of the appeals of the administrative penalties. …. Now, abuse of process is a broad concept. It includes collateral attack and engages the inherent power of the Court to prevent misuses of its procedure in a way that would bring the administration of justice into disrepute"). Appeal Record (Court of Appeal File Number 2203-0154AC) 169:5-7 & 22-24.

[183] Alta. Reg. 124/2010, Part 13, Division 3.

[184] Id. rr. 13.6-13.8.

[185] E.g., id. rr. 3.25(a) ("A statement of claim must (a) be in Form 10"), 13.6(1)(b) ("A pleading must be … divided into consecutively numbered paragraphs, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer") & 13.13(2) ("Whether or not a form is prescribed, each document must begin with the following: (a) the name of the Court; (b) the name of the judicial centre; (c) the names of the parties as determined by subrules (3) and (4); (d) the action number; (e) the nature of the document; (f) an address for service of documents; (g) the name, address and contact information of the party or lawyer of record who prepared the document; (h) once filed, the date the document was filed; (i) anything required by these rules to be included").

[210] First, the statement of claim "must state ... the facts on which a party relies".[186] These may be referred to as "material facts".[187] A claim must allege facts[188] that meet all the elements of a cause of action.[189]

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[186] Id. r. 13.6(2)(a). See *The Queen v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, ¶ 22; [2011] 3 S.C.R. 45, 68 per McLachlin, C.J. ("It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. ... The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated") & L. Abrams & K. McGuinness, Canadian Civil Procedure Law 737 & 738 (2d ed. 2010) ("The statement of claim contains a factual narrative of the events that took place and concludes with a prayer for relief, in which the plaintiff states the relief that he or she wishes the court to grant. .... Modern Canadian rules of pleading adopt a 'material fact pleading' approach to pleading, under which each party is required to plead all material facts relied on in support of his or her claim").

[187] *Bruce v. Oldhams Press, Ltd.*, [1936] 1 All E.R. 287, 294 (C.A.) per Scott, L.J. ("The word 'material' means necessary for the purpose of formulating a complete cause of action"). See Black's Law Dictionary 93 (11th ed. B. Garner ed. in chief 2019) ("material allegation. (18c) In a pleading, an assertion that is essential to a claim, charge or defense <a material allegation in a battery case is harmful or offensive contact with a person>") & Garner's Dictionary of Legal Language 766 (3d ed. 2011) ("relevant; material. A *material* fact is one so clearly connected to the point under consideration that it is indispensable to a proper assessment") (emphasis in original).

[188] *Mancuso v. Minister of National Health and Welfare*, 2015 FCA 227, ¶¶ 16 & 19 per Rennie, J.A. ("It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. ... The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability"); *Tchenguiz v. Grant Thornton UK LLP*, [2015] EWHC 405, ¶ 1 (Comm.) per Leggatt, J. ("Statements of case must be concise. They must plead only *material* facts, meaning those necessary for the purpose of formulating a cause of action"); Zuckerman on Civil Procedure 329 (4th ed. 2021 J. Wells general ed.) ("In its statement of case, a party needs to state all the *material* facts pertinent to their case. Where a claimant has not pleaded a fact necessary to establish a particular cause of action, the court has no jurisdiction to give judgment on that basis") (emphasis added) & 1 Civil Procedure 2017, at 569 (U.K.) ("The claimant should state all the facts necessary for the purpose of formulating a complete cause of action"). Some statements of claim do not disclose a cause of action. See *Alberta Teachers' Ass'n v. Buffalo Trail Public Schools Regional Div. No. 28*, 2022 ABCA 13, ¶ 24 per Wakeling, J.A. ("Suppose P files a statement of claim alleging that D cheers for the Nashville Predators in breach of his common law duty to cheer for his hometown National Hockey League team... . ... D applies for an order dismissing P's action on the ground that it discloses no cause of action"); *Wall v. Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255, ¶ 84; 404 D.L.R. 4th 48, 82 per Wakeling, J.A. ("suppose ... a person is unhappy that ... she was not invited to her cousin's ... wedding. She invited her cousin to her two children's weddings and believes that her cousin should reciprocate. The inconsiderate cousin has hurt her feelings. No court will entertain the aggrieved cousin's claim. She does not allege that her cousin is in breach of any agreement to invite each other to their children's weddings. Hurt feelings are not a legal interest that the unhappy family member can complain about") & *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548 (2007) per Souter, J. ("Liability under §1 of the Sherman Act ... requires a 'contract, combination …, or conspiracy, in restraint of trade or commerce'. The question in this putative class action is whether a §1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed").

[189] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, ¶ 54; [2001] 2 S.C.R. 460, 489 per Binnie, J. ("A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove,

[211] This criterion does not oblige the plaintiff to identify the cause of action that serves as the legal foundation for the claim.[190] But a plaintiff may do so. No rule prohibits the identification of a cause of action. Naming the cause of action in a statement of claim is the best practice.[191]

[212] The requirement to assert material facts that disclose a cause of action means that a plaintiff must do more than assert a cause of action. For example, it is not enough for a plaintiff to claim that the defendant has defamed the plaintiff.[192] "A plaintiff bringing a claim for defamation must plead the specific words alleged to be defamatory, that the defamatory words were of and concerning the plaintiff, what the words were meant and understood to mean, the fact that they were published to one or more third parties, the identity of the third party or parties and that damages have been suffered".[193]

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if disputed, in order to support his or her right to the judgment of the court ... . Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success") & *Letang v. Cooper*, [1964] 2 All E.R. 929, 934 (C.A.) per Diplock, L.J. ("A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person. ... If A., by failing to exercise reasonable care, inflicts direct personal injury upon B., those facts constitute a cause of action on the part of B. against A."). See B. Garner, Garner's Dictionary of Legal Usage 142 (3d ed. 2011) ("Cause of action = (1) a group of operative facts, such as a harmful act, giving rise to one or more rights of action; or (2) a legal claim. Writers on civil procedure prefer that the term be confined to sense 1").

[190] See *Wi-Lan Inc. v St. Paul Guarantee Ins. Co.*, 2005 ABCA 352, ¶ 8; [2006] 8 W.W.R. 458, 461, leave to appeal ref'd, [2005] S.C.C.A. No. 548 per Côté, J.A. ("Since the *Judicature Acts*, one pleads facts, not law. (See R. 104.) Names of causes of action do not matter; all that counts is what causes of action could be founded on the facts pleaded (were those facts proved at trial). These statements of claim plead the facts for a free-standing bailment, or negligent loss, or detinue"); *Tu v. Huang*, 2006 ABCA 263, ¶ 5 per Berger, J.A. ("A cause of action ... need not be pleaded provided that the factual situation pleaded discloses the cause of action"); *Bank of Noval Scotia v. Dunphy Leasing Enterprises Ltd*., 77 A.R. 181, 187 (C.A. 1987) per Prowse, J.A. ("According to rule 104, all facts material to a cause of actions must be pleaded. These facts must be sufficient to disclose a cause of action, but the cause of action itself need not be pleaded") & *Carr v. Formation Group Plc*, [2018] EWHC 3575, ¶ 29 (Ch.) per Morgan, J. ("if the endorsement on the writ or claim form sets out the essential elements of the claim, it is not necessary to go further and identify the legal basis for the claim by, for example, naming the cause of action"). See Zuckerman on Civil Procedure 205-06 (4th ed. 2021 J. Wells general ed.) ("The claim form ... does not need to name the cause of action provided that the essential elements of the claim are set out").

[191] I am aware of only two jurisdictions that require a statement of claim to identify the cause of action the plaintiff asserts supports the claim. *Civil Rules 2006*, r. 99(1)(a) (S. Austl.) ("A statement of claim (a) must state the name of each cause of action") & *Supreme Court Rules*, B.C. Reg. 168/2009, r. 3-1(2)(c) ("A notice of civil claim must ... set out a concise summary of the legal basis for the relief sought").

[192] *Gay v. Workers' Compensation Board*, 2023 ABCA 351, ¶ 36 ("The statement of claim pleads that the Board caused injury by 'Tarnishing the reputation of Mr. Gay'. If this is an allegation of defamation, it is improperly pleaded. No particulars are provided as required when pleading such a claim") & *Croke v. Waterford Crystal Ltd.*, [2005] 2 I.R. 383, 387 (Sup. Ct. 2004) per Geoghegan, J. ("It is trite law that a cause of action merely mentioned by name in the prayer does not and cannot in any sense constitute the pleading of such cause of action").

[193] H. Winkler, "Libel and Slander" in 1 Bullen & Leake & Jacobs Canadian Precedents of Pleadings 668 (3d ed. 2017). See *Alberta Rules of Court*, 124/2010, r. 13.7(f) ("A pleading must give particulars of any of the following

[213] Second, a statement of claim must "include a statement of any matter on which a party intends to rely that may take another party by surprise".[194] Rule 13.6(3) lists eighteen such "matters" – breach of trust, fraud, malice or ill will, to name just a few.[195]

[214] Third, a statement of claim must "give particulars of ... [allegations of] (a) breach of trust; (b) fraud, (c) misrepresentation; (d) wilful default; (e) undue influence; (f) defamation".[196] Notably, malice or ill will is not on the list.

[215] Fourth, the plaintiff "must state ... the remedy claimed".[197] For example, a plaintiff may seek a declaration, damages, interest, or costs, or a combination of them.

[216] These are features that a statement of claim must display.

[217] Rule 13.8 also permits a statement of claim to "include ... a statement of a point of law, and if so, the facts that make the part of law applicable".[198] It does not mandate this.[199]

[218] A statement of claim that displays these basic features should disclose to the court and the adverse party or parties the fundamental nature of the plaintiff's complaint.[200] As a result, an

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matters that are included in the pleading: … (f) defamation") & *Defamation Act*, R.S.A. 2000, c. D-7, s. 3(1) ("In an action for defamation, the plaintiff may allege that the matter complained of was used in a defamatory sense, specifying the defamatory sense without alleging how the matter was used in that sense").

[194] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 13.6(3).

[195] Id.

[196] Id. See *Gay v. Workers' Compensation Board*, 2023 ABCA 351, ¶ 12 ("[B]ald assertions of misconduct (such as malice, fraud, deceit, "absence of honest belief", misfeasance in public office, etc.) will not be accepted as being true without reasonable particulars of the allegations").

[197] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 13.6(2)(c).

[198] Id. r. 13.8(1)(b).

[199] 2 W. Stevenson & J. Cote, Alberta Civil Procedure Handbook 2024, at 13.41 ("Usually it is not necessary to plead a point of law, but it is permissible to do so").

[200] *MTM Commercial Trust v. Statesman Riverside Quays Ltd*., 2022 ABCA 328, ¶ 29 per Slatter, J.A. ("The pleadings are designed to identify the core facts and key issues between the parties. They should contain sufficient particulars to identify the issues in dispute, to define and limit pretrial discovery, and to avoid surprise"); *Al Rawi v. Security Service*, [2010] EWCA Civ. 482, ¶ 18; [2010] 4 All E.R. 559, 565 per Lord Neuberger, M.R. ("a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments for trial"); *Philipps v. Phillipps*, 4 Q.B. Div. 127, 139 (C.A. 1878) per Cotton, L.J. ("it is absolutely essential that the pleading ... should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial"); *Banque Commerciale S.A., en Liquidation v. Akhil Holdings Ltd.*, 1990 HCA 11, ¶ 18; 169 C.L.R. 279, 286 per Mason, C.J. & Gaudron, J. ("The function of pleadings is to state with sufficient clarity the case that must be met. ... In this way, pleadings serve to ensure the

adverse party is given a reasonable opportunity to defend itself and a court is in a position to discharge its role – decide issues of relevancy and the applicability of the *res judicata* doctrine, for example.[201]

[219] The standards governing the minimum attributes of a statement of claim are not onerous and are easily met. A statement of claim need not be a first-class pleading to survive a challenge under rule 3.68(2)(b).[202] The fact that a court could improve it considerably is irrelevant.[203]

[220] The modest standard for a statement of claim means that the test a party invoking rule 3.68(2)(b) must meet – an allegation that a statement of claim discloses no cause of action – is very demanding:[204]

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basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision"); *Gould v. Mount Oxide Mines Ltd.*, 22 C.L.R. 490, 517 (Austl. H.C. 1916) per Isaacs & Rich, JJ. ("Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness"); *Hopper Group Ltd. v. Parker*, [1987] NZCA 205, p. 8; 1 P.R.N.Z. 363, 366 (C.A. 1987) per Bisson, J. ("One essential part of pleadings is to state precisely the basic facts on which the plaintiff relies so as to clearly define the issues which the plaintiff has to meet. If that is not done, it is difficult for a defendant to prepare for trial ... . Furthermore, if the case goes to trial without precise pleadings, much time can be wasted and a defendant might be taken by surprise when the real issue not previously stated clearly suddenly emerges"); Zuckerman on Australian Civil Procedure 297 (A. Zuckerman general ed. 2019) ("Given a critical function of pleadings is to enable the other party to know the case against it, and given how central this is to natural justice, the courts do not, and should not, tolerate pleadings that do not make the pleading party's case clear") & *High Court Rules 2016*, r. 5.26(b) (N.Z.) ("The statement of claim ... must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action").

[201] Sutherland, "Fact Pleading v. Notice Pleading: The Eternal Debate", 22 Loy. L. Rev. 47, 47 (1976) ("The issues must also be properly defined so that the foundations upon which the final judgment is based can later be examined and the doctrine of res judicata applied").

[202] *Seniuk v. Saskatchewan*, [1996] 2 W.W.R. 129, 137 (Sask. C.A. 1995) per Wakeling, J.A. ("I am aware that when pleadings as originally drafted are examined with the benefit of factums and the comments of skilled counsel, an appellate court is in a uniquely advantageous position to provide positive useful advice on the improvement of the relevant pleadings. What makes me somewhat reluctant to proceed with a detailed analysis of these pleadings is the realization the application before the chambers judge was not to seek help in the redrafting of the pleadings, but to see whether they disclosed a cause of action as drafted and that objective should remain the primary focus").

[203] *Gay v. Workers' Compensation Board*, 2023 ABCA 351, ¶ 14 ("it is not within the mandate of the chambers judge to redraft the plaintiff's pleadings") & *Croke v. Waterford Crystal Ltd.*, [2005] 2 I.R. 383, 401 (Sup. Ct. 2004) per Geoghegan, J. ("It would be wholly wrong for the court to attempt its own amendments. It is for the plaintiff to plead his case").

[204] *Klassen v. Canadian National Railway*, 2023 ABCA 150, ¶ 25; 482 D.L.R. 4th 302, 317. See also *The Queen v. Imperial Tobacco Canada*, 2011 SCC 42, ¶ 22; [2011] 3 S.C.R. 45, 68 per McLachlin, C.J. ("A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are

> In determining whether the pleadings disclose a cause of action, the court assumes that the facts pleaded are true, and only assesses whether a cause of action exists based on those facts. The test to be applied is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiff's pleaded claims disclose no reasonable cause of action … .

manifestly incapable of being proven ... . No evidence is admissible on such a motion"); *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, ¶ 4; [2011] 2 S.C.R. 261, 269 per McLachlin, C.J. ("The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action. If it is plain and obvious that the claim cannot succeed, it should be struck out"); *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc*., 2021 ABCA 16, ¶¶ 70 & 74; 457 D.L.R. 4th 1, 55 & 57, leave to appeal ref'd, [2021] S.C.C.A. No. 79 ("an application to strike out a pleading ... for failure to disclose a cause of action is dealt with based on the pleadings. The facts as pled are assumed to be true, and no evidence is permitted on the motion. A claim will ... only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action ... . If, on an initial reading, the pleading is capable of several interpretations, it should be given the interpretation that will support the pleading. Courts should not artificially read pleadings in a way that leads to a fatal deficiency"); *Seniuk v. Saskatchewan*, [1996] 2 W.W.R. 129, 131 per Bayda, C.J. ("The law is well settled that only the statement of claim ..., the particulars, if any, and any document referred to in the statement of claim, may be looked at to determine whether the statement of claim discloses a reasonable cause of action. The rule requires, as well, that the material facts in the statement of claim (but not allegations based on assumption and speculation) must be taken as true"); *Marsh v. Chief Constable of Lancashire Constabulary*, [2003] EWCA Civ 284, ¶ 2 per Potter, L.J. ("the court is obliged to treat the facts averred in the claim as true, notwithstanding that the difficulties of proof may be obvious"); *Swinney v. Chief Constable of Northumbria Police*, [1996] 3 All E.R. 449, 455; 1996 EWCA Civ J0322-2 per Hirst, L.J. ("The application to strike out was made under Order 18 rule 19 [of the Rules of the Supreme Court], on the footing that the case disclosed no reasonable cause of action. By virtue of Order 18, rule 19(2), no evidence is admissible on the application, and the only materials for consideration ... are the facts as pleaded in the statement of claim, on the assumption (which, of course, may or may not be borne out in the end) that they are true. Furthermore, it is ... an elementary principle that it is only appropriate to strike out if the defendant establishes beyond peradventure that the plaintiffs would be bound to fail at the trial should the case proceed. So long as the case is arguable, it must be allowed to go ahead"); *Attorney-General v. Prince*, [1998] 1 N.Z.L.R. 262, 267 per Richardson, P. ("A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even ... though they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possible succeed ...; the jurisdictions [to strike out] is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material ... . It is only where, on the facts alleged in the statement of claim ..., no private law claim of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage"); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) per Burger, C.J. ("it is well established that, in passing on a motion to dismiss ... for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader") & Zuckerman on Civil Procedure 426 (4th ed. 2021 J. Wells general ed.) ("for the purpose of striking out a statement of case the court is obliged to treat the facts averred as true, even if it thinks that they may be very difficult to provide"). See L. Abrams & K. McGuinness, Canadian Civil Procedure Law 767 (2d ed. 2010) ("Clearly, this approach imposes a stringent test that must be satisfied by any party seeking to strike out a claim").

[221] The likelihood the claim will ultimately succeed is not a criterion to be taken into account in deciding whether a statement of claim discloses a cause of action.[205] This is the case even if a court is satisfied that the likelihood a plaintiff will succeed is extremely low.[206]

[205] *Klassen v. Canadian National Railway*, 2023 ABCA 150, ¶ 25; 482 D.L.R. 4th 302, 317 ("This step in the procedure does not explore the factual merits of the claim, as long as it is accurately pleaded"); *Smith v. Fonterra Co-operative Group Ltd.*, [2024] NZSC 5, ¶ 84 per Williams & Kós, JJ. ("as was observed in *Couch*, a refusal to strike out a cause of action 'says little about its eventual merit'. That is to say, it is not a commentary on whether or not the claim will ultimately succeed") & *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) per Burger, C.J. ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test"). See L. Abrams & K. McGuinness, Canadian Civil Procedure Law 767 (2d ed. 2010) ("In considering a motion to strike out a pleading, it is not the court's function to try the issues but rather to decide if there are issues to be tried").

[206] *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 132; 315 C.C.C. 3d 337, 403-04 per Wakeling, J.A. ("In mathematical terms this may represent a range of certainty from .0001 to ten percent").

[222] These features match those adopted in other Canadian jurisdictions,[207] England and Wales,[208] Australia,[209] New Zealand,[210] Ireland,[211] and, for the most part, the United States.[212]

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[207] Every Canadian jurisdiction states that a commencement document must set out the material facts giving rise to a claim and the remedy sought. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, rr. 3-1(2) ("A notice of civil claim must ... (a) set out a concise statement of the *material facts* giving rise to the claim; (b)set out the relief sought by the plaintiff against each named defendant; (c) set out a concise summary of the legal basis for the relief sought") & 3-7 ("(17) It is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind of a person as a fact, without setting out the circumstances from which it is to be inferred. (18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading") (emphasis added); *Fletcher v. British Columbia*, 2013 BCSC 554, ¶ 28 per Master Muir ("in his pleadings the plaintiff must now commit to a cause of action and adequately inform the defendants of the legal foundation of the claim"); *Tiamzon v. Vandt*, 2020 BCCA 336, ¶ 24; 63 C.P.C. 8th 35, 42 per Saunders, J.A. ("The implications of R. 3-1(2)(c) were discussed by Master Muir in *Fletcher v. British Columbia* … . [I] agree with [what] she said"); *The King's Bench Rules*, rr. 13-8(1) ("Every pleading must … (c) contain only a statement in summary form of the *material facts* on which the party pleading relies for the party's claim …, but not the evidence by which the facts are to be proved"), 13-9(1) ("In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, full particulars must be stated in the pleading"); 13-10(3) ("It is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind as a fact without setting out the circumstances from which it is inferred") & 13-12(1) ("If a pleading contains a claim for a remedy, the pleading … must state the specific remedy claimed") (emphasis added) (Sask.); *King's Bench Rules*, Man. Reg. 553/88, rr. 25.06(1) ("Every pleading shall contain a concise statement of the *material facts* on which the party relies for a claim … but not the evidence by which those facts are to be proved"), 25.06(4) ("Where a party's claim … is founded on an Act or Regulation, the specific sections relied on shall be pleaded") & 25.06(11) ("Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars, but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred") (emphasis added); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 25.06 ("(1) Every pleading shall contain a concise statement of the *material facts* on which the party relies for the claim …, but not the evidence by which those facts are to be proved. … (8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. (9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified") (emphasis added); *Rules of Civil Procedure*, r. 25.06 ("(1) Every pleading shall contain a concise statement of the *material facts* on which the party relies for the claim ..., but not the evidence by which those facts are to be proved. … (8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. (9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified") (emphasis added) (P.E.I.); *Rules of Court*, N.B. Reg. 82-73, r. 27.06 ("(1) Every pleading shall contain a concise statement of the *material facts* on which the party pleading relies for his claim …, but not the evidence by which those facts are to be proved. … (9) Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars thereof; but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. (10) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified. ... (14) Where a party's cause of action … is founded on an Act, he shall plead the specific sections on which he relies") (emphasis added); *Civil Procedure Rules*, R. 38.02 ("(1) A party must, by the pleading the party files, provide notice to the other party of all claims ... to be raised by the party signing the pleading. (2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following: (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing; (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact. (3) *Material facts* must be pleaded, but the evidence

to prove a material fact must not be pleaded") & 38.03(3) ("A pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice") (emphasis added) (N.S.); *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, rr. 14.03 ("Every pleading shall contain a statement in a summary form of the *material facts* on which the party pleading relies for a claim ..., but not the evidence by which the facts are to be proved, and the statement shall be as brief as the nature of the case admits") & 14.11 ("Subject to rule 14.11(2), every pleading shall contain the necessary particulars of any claim ..., including (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and (b) where a party pleading alleges any condition of the mind of any person, including any disorder or disability of mind or any malice, or fraudulent intention, or other condition of mind except knowledge, particulars of the facts on which the party relies") (emphasis added); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, rr. 106 ("A pleading must contain only a statement in a summary form of the *material facts* on which the party pleading relies for his or her claim ..., as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits"), 115 ("Where it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of a person, it is sufficient to allege it as a fact without setting out the circumstances from which it is to be inferred") & 117 ("Where the party pleading relies on a misrepresentation, fraud, a breach of trust, wilful default or undue influence, particulars must be stated in the pleading") (emphasis added); *Rules of Court*, RR. 8 ("(2) A Statement of Claim shall be ... (c) be as brief as the nature of the case will permit and not plead conclusions of law unless the *material facts* supporting those conclusions are pleaded. (3) A statement of claim must state the specific relief which the plaintiff claims") & 20 ("(1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the *material facts* on which the party relies, but not the evidence by which the facts are to be proved. ... (12) Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence ... full particulars ... shall be stated in the pleading") (Yukon) (emphasis added) & *Federal Courts Rules*, SOR/98-106, rr. 174 ("Every pleading shall contain a concise statement of the *material facts* on which the party relies, but shall not include evidence by which those facts are to be proved") & 181(1) ("A pleading shall contain particulars of every allegation contained therein, including (a) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and (b) particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention") (emphasis added).

[208] *The Civil Procedure Rules 1998*, S.I. 1998/3132 (L. 17), rr. 3.4(2)(a) ("The court may strike out a statement of case if it appears to the court ... that the statement of case discloses no reasonable grounds for bringing ... the claim"), 7.4-(1) ("Particulars of a claim must – (a) be contained in or served with the claim form; or (b) subject to paragraph (2) be served on the defendant by the claimant within 14 days after service of the claim form"), 16.2(1) ("The claim form must – (a) contain a concise statement of the nature of the claim; (b) specify the remedy which the clamant seeks") & 16.4(1) ("Particulars of claim must include – (a) a concise statement of the facts on which the claimant relies"). See *Supreme Court of Judicature Act, 1875*, 38 & 39 Vict., c. 77, First. Sch., Order XIX, ¶ 4 ("Every pleading shall contain as concisely as may be a statement of the *material* facts on which the party pleading relies, but not the evidence by which they are to be proved") (emphasis added) & *Bruce v. Oldhams Press, Ltd*., [1936] 1 All E.R. 287, 294 (C.A.) per Scott, L.J. ("The cardinal provision in rule 4 is that the statement of claim must state the *material* facts. The word 'material' means necessary for the purpose of formulating a complete cause of action") (emphasis added). *The Civil Procedure Rules 1998* introduced the "claim form" and "particulars of a claim." "Broadly the claim form has replaced the High Court writ and Particulars of Claim have replaced the former Statement of Claim". 1 Civil Procedure 2017, at 424 (U.K.). See *Tchenguiz v. Grant Thornton UK LLP*, [2015] EWHC 405 (Comm.) per Leggatt, J. ("Statements of case must be concise. They must plead only *material* facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial") (emphasis added); Zuckerman on Civil Procedure 329& 413 (4th ed. 2021 J. Wells general ed.) ("In its statement of case, a party needs

to state all the *material* facts pertinent to their case. Where a claimant has not pleaded a fact necessary to establish a particular cause of action, the court has no jurisdiction to give judgment on that basis. .... The most straightforward case for striking out is a claim that on its face [the statement of case] fail to establish a recognizable cause of action") (emphasis added) & 1 Civil Procedure 2017, at 569 (U.K.) ("The claimant should state all the facts necessary for the purpose of formulating a complete cause of action").

[209] Every Australian jurisdiction states that a commencement document must set out the material facts giving rise to a claim and the remedy sought. *High Court Rules 2004*, r. 27.04 ("A Statement of Claim … (b) shall contain in a summary form a statement of all the *material facts* on which the plaintiff relies, but not the evidence by which those facts are to be proved; ... (d) shall contain the necessary particulars of any fact or matter pleaded, including ... (ii) particulars of any misrepresentation, fraud, breach of trust, wilful default, or like matter; and (e) shall state specifically the relief or remedy claimed") (emphasis added); *Federal Court Rules 2011*, r. 16.02(1) ("A pleading must ... (c) identify the issues that the party wants the Court to resolve; and (d) state the *material facts* on which a party relies that are necessary to give the opposing party fair notice of the case to be made against that party at trial, but not the evidence by which the material facts are to be proved; and ... (f) state the specific relief sought or claimed") (emphasis added); *Uniform Civil Procedure Rules 2005*, r. 14.7 ("Subject to this Part, Part 6 and Part 15, a party's pleading must contain only a summary of the *material facts* on which the party relies, and not the evidence by which those facts are to be proved") (N.S.W.) (emphasis added); *Supreme Court Rules 1987*, r. 13.02 ("(1) A pleading shall ... (a) contain in a summary form a statement of all the *material facts* on which the party relies but not the evidence by which those facts are to be proved; (b) where a claim... arises by or under an Act identify the specific provision relied on; and (c) state specifically the relief or remedy, if any, claimed. (2) A party may, by his pleading ... (a) raise a point of law; and (b) plead a conclusion of law if the material facts supporting the conclusion are pleaded") (emphasis added) (Northern Terr.); *Uniform Civil Procedure Rules 1999*, r. 149 ("(1) Each pleading must ... (b) contain a statement of all the *material facts* on which the party relies but not the evidence by which the facts are to be proved; and (c) state specifically any matter that if not stated specifically may take another party by surprise; and (d) subject to rule 156, state specifically any relief the party claims; and (e) if a claim ... under an Act is relied on – identify the specific provision under the Act. (2) In a pleading, a party may plead a conclusion of law or raise a point of law if the party also pleads the *material facts* in support") (emphasis added) (Qld.); *Civil Rules 2006*, 99(1) ("A statement of claim ... (a) must state the name of each cause of action; and (b) must state the basis of each cause of action (including reference to any statutory provision on which the plaintiff relies); and (c) must contain a short statement of the *material facts* and matters on which each cause of action is based; and (d) must state any remedy for which the plaintiff asks") (emphasis added) (S. Austl.); *Supreme Court Rules 2000*, rr. 227 ("(1) A pleading is to ... (b) contain only a statement of all the *material facts* in summary form on which the party relies but not the evidence by which those facts are to be proved. ... (3) Every pleading is to be expressed so as to give reasonably explicit notice to any other party of all grounds of action ... on which the party pleading intends to rely at the trial"), 229(1) ("A statement of claim and a counterclaim ... (a) are to state the specific relief claimed, whether singly or in the alternative") & 238 ("It is sufficient to allege malice, fraudulent intention, knowledge or other state of mind as a fact without setting out the circumstances from which it is to be inferred") (emphasis added) (Tas.); *Supreme Court (General Civil Procedure) Rules 2015*, S.R. No. 103/2015, rr. 13.02) ("Every pleading shall ... (a) contain in a summary form a statement of all the *material facts* on which the party relies, but not the evidence by which those facts are to be proved; (b) where any claim ... arises by or under any Act, identify the specific provision relied on; and (c) state specifically any relief or remedy claimed") & 13.10 ("(3) Without limiting paragraph (1), every pleading shall contain particulars of any ... (b) malice ... which is alleged") (emphasis added) (Vict.) & *Rules of the Supreme Court 1971*, Order 20, r. 8(1) ("Subject to the provisions of this rule, and rules 11, 12 and 13 every pleading must contain, and contain only, a statement in a summary form of the *material facts* on which the party pleading relies for his claim ... as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits") (emphasis added) (W. Austl.). See Thornburg & Cameron, "Defining Civil Disputes: Lessons from Two Jurisdictions", 35 Melb. U. L. Rev. 208, 215 (2011) ("In Australia, a modified version of the pleading system created by the *Judicature Act* is still

generally in force. Pleadings are intended to formulate the issues between the parties, to give notice of the case that will be put at trial and to bind the parties to those issues. Like English pleadings under the *Judicature Act*, the rules require parties to plead materials facts only, not evidence. Parties may ask the court (and they often do) to require an opponent to supplement pleadings with particulars to provide further details of the case to be made at trial").

[210] While New Zealand's *High Court Rules* do not expressly stipulate that a commencement document must set out the material facts on which the plaintiff relies, the text employed in its governing rule makes it clear that a commencement document must set out the materials facts. *High Court Rules 2016*, rr. 5.26 ("The statement of claim … (a) must show the general nature of the plaintiff's claim to the relief sought; and (b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action"), 5.27 ("(1) The statement of claim must conclude by specifying the relief or remedy sought. (2) If the statement of claim includes 2 or more causes of action, it must specify separately the relief or remedy sought on each cause of action immediately after the pleading of that cause of action"), 5.28(1) ("A plaintiff may include several causes of action in the same statement of claim") & 15.1(1)(a) ("The court may strike out all or part of a pleading if it – ... discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading").

[211] *Superior Courts Rules*, Order 20, rr. 7 ("Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always be given, as the Court may think just, to the same extent as if it had been asked for") & 9 ("In every case in which the cause of action is a stated …, the same shall be alleged with particulars"). See *Irish Family Planning Ass'n v. Youth Defence*, [2004] 1 I.R. 374, 381 (Sup. Ct.) per Denham, J. ("The statement of claim should contain the *material* facts upon which the plaintiff relies to establish a cause of action") (emphasis added) & *IBB Internet Services Ltd. v. Motorola Ltd.*, [2011] IEHC 253; [2011] 2 I.L.R.M. 321 per Kelly, J. ("Odgers on Civil Court Action (24th Ed.) para. 801 states that: '*Material* facts must be alleged with certainty. The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision. If vague and general statements were allowed nothing would be defined; the issue would be 'enlarged', as it is called; and neither party would know, when the case came on for trial, what was the real point to be discussed and decided'. These principles apply with particular force in cases which are dealt with on the Commercial List. Vague, uncertain or confusing pleadings are anathema to the very objective for which the Commercial List was established, namely a speedy, efficient and just determination of commercial disputes") (emphasis added).

[212] *Federal Rules of Civil Procedure*, rr. 8 ("General Rules of Pleadings (a) Claim for Relief. A pleading that states a claim for relief must contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought ... . (d) Pleadings To Be Concise and Direct ... (1) In General. Each allegation must be simple, concise, and direct. No technical form is required"), 9 ("Pleading Special Matters ... (b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. ... (f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading") & 12(b)(6) ("How to Present Defences. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: ... (6) failure to state a claim upon which relief can be granted"). See *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) per Kennedy, J. ("Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief'. ... [T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. ... A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do'. ... Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.' ... To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' ... A claim has facial plausibility when the plaintiff pleads factual content that allows

the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. ... The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. ... Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.' ... Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548-49 (2007) per Souter, J. ("Liability under §1 of the Sherman Act ... requires a 'contract, combination ..., or conspiracy, in restraint of trade or commerce.' The question in this putative class action is whether a §1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed"); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F. 2d 1101, 1106 (7th Cir. 1984) per Eschbach, Cir. J. ("In practice, 'a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory'. ... This, in the context of a 12(b)(5) challenge, the question is whether, if we accept all the allegations – including those relating to purpose and interest – as true, the plaintiffs have successfully pleaded a contract, combination, or conspiracy in restraint of trade within the meaning of the Sherman Act. ... When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); *Davies v. Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Hawaii 1953) per McLaughlin, C.J. ("the requirements of Rule 8 are not met by a mere 'notice of disaffection to the opposite party'. ... This is the implication we find necessary from sub-section (2) of subparagraph (a) of Rule 8: 'a short and plain statement of the claim showing that the pleader is entitled to relief'. Apparently, the only practical way of making such a showing is to state the prima facie elements of the claim. ... These elements should be indicated by operative facts, in order that entitlement to relief can be *shown* by the complaint. ... [T]he purpose of Rule 8 [is] to relieve the pleader from the ... uncertainties of distinguishing in advance between evidentiary and ultimate facts, while still requiring, in a practical and sensible way, that he set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery. ... Therefore, if a pleader cannot allege defensibly and in good faith the existence of an essential element of his claim, it is difficult to see why this basic deficiency should not be exposed at the point of minimum expenditure of time and money by the parties and the court. Similarly, when the claim rests entirely upon a statute, it seems almost elementary that the defendant be entitled ... to demand sufficient informative facts from the complaint to show that the plaintiff, if his facts be true, is actually within the terms of the statute in making his claim") & J. Friedenthal, M. Kane, A. Miller & A. Steinman, Civil Procedure 267 (6th ed. 2021) ("In Twombly, the Court disavowed Conley's statement that 'a complaint must not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.' Twombly did not directly reject Conley's 'fair notice' standard; indeed, it quoted that language approvingly. Twombly did, however, require that the allegations in the complaint must allege facts showing that recovery was not merely 'conceivable' but that it was 'plausible'. The difference between these terms was illustrated by the situation in Twombly. There the plaintiffs brought an antitrust action against the major telephone companies in the United States arguing that each had established territorial areas for its exclusive operations and that none of those companies had made any effort to expand operations into another's territory. In so many words, it was alleged that the defendant companies had agreed among themselves to respect these territorial divisions, which would be a violation of federal antitrust laws. However, the Court noted that each of the companies might well have separately come to the conclusion that it would not be in its best interests to compete. Such parallel behaviour without agreement among the companies would not be a violation of the law. To state a claim the plaintiff had to provide some factual basis for finding an agreement. The Twombly plaintiffs' allegation that such an agreement existed was a mere 'conclusion', and their complaint lacked sufficient facts to suggest that an agreement among the defendants was not merely 'conceivable' but 'plausible'"). See also Furman, "The Myth of Notice Pleading", 42 Ariz. L. Rev. 987, 988 (2003) ("Notwithstanding its foundation in the Federal Rules and repeated Supreme Court imprimatur, notice pleading is a myth. From antitrust to environmental litigation, conspiracy to copyright, substance specific areas of the law are

[223] As a rule, a common law court that declares a pleading to be deficient is more likely to allow the nonmoving party to amend it than strike it.[213]

[224] In short, the common law world requires a statement of claim, or a similar commencement document, to assert material facts that disclose a cause of action.

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riddled with requirements of particularized fact-based pleading. To be sure, federal courts recite the mantra of notice pleading with amazing regularity. However, this rhetoric does not match the reality of federal pleading practice. Sometimes subtle, other times overt, federal courts in every circuit impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrines") & Marcus, "The Puzzling Persistence of Pleading Practice", 76 Tex. L. Rev. 1749, 1779 (1998) ("So pleading practice is likely to persist in the future, as it did in the past").

[213] *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*, 2021 ABCA 16, ¶¶ 74 & 75; 457 D.L.R. 4th 1, 57, leave to appeal ref'd, [2021] S.C.C.A. No. 79 ("a poorly drafted pleading should be amended, not struck out ... . If a pleading is deficient because it lacks particulars, the remedy is to order production of particulars, not to strike the claim"); *Seniuk v. Saskatchewan*, [1996] 2 W.W.R. 129, 136 per Bayda, C.J. ("The paragraph should be struck out but (give the hint of possible kernels of a reasonable cause of action) on the condition that the appellants will have leave to amend the statement of claim using appropriate language to clearly allege against Mr. Mitchell in his personal capacity having committed the tort of inducing a breach of a particular contract or contracts and should they be so advised, the tort of misfeasance in public office, giving much particulars of each tort as they deem proper at this stage of the proceedings. They will exercise their right to amend within fifteen days from the date hereof"); *Gay v. Workers' Compensation Board*, 2023 ABCA 351, ¶ 47 ("If a claim is irregular because it lacks particulars, one remedy is to grant an opportunity to correct the pleadings, rather than striking the claim. The appellant should accordingly be given an opportunity to amend"); *AF v. Alberta*, 2014 ABQB 216, ¶ 64; 587 A.R. 165, 180 ("As with the misfeasance in public office claims discussed above, the Plaintiffs have 30 days from the date of this decision to put forward appropriate amendments to satisfy the requirements for properly pleading the alleged *Charter* violations") & L. Abrams & K. McGuinness, Canadian Civil Procedure Law 768 (2d ed. 2010) ("The court must assume that the facts pleaded in the proposed amendment (unless patently ridiculous or incapable of proof) are true, and the only question is whether they disclose a cause of action. Amendments are to be granted unless the claim is clearly impossible of success"). The law in England, Australia, and Ireland is comparable. See Zuckerman on Civil Procedure 413 (4th ed. 2021 J. Wells general ed.) ("where the court is mindful to strike out a statement of case, it will normally allow a party the opportunity to amend it to put the defect right"); *Law Debenture Trust Co. (Channel Islands) Ltd. v. Lexington Ins. Co.*, [2001] EWCA Civ 1673, ¶ 5 per Clarke, L.J. (the Court adopted as the proper law a passage from *Cobbold v. London Borough of Glennwich*, [1999] EWCA Civ 2074: "Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed"); *IBB Internet Services Ltd. v. Motorola Ltd.*, [2011] IEHC 253; [2011] 2 I.L.R.M. 321 per Kelly, J. ("I propose to give the plaintiffs a final opportunity to make the case which they wish and to do so in a form that can be readily understood. I will grant leave for the delivery of a re-amended Statement of Claim. That document must set out the case which the plaintiff wish to make and the facts which they propose to rely upon. ... [I]t must contain full particulars of all factual matters which will be relied upon as part of the plaintiff's case") & Zuckerman on Australian Civil Procedure 296 (A. Zuckerman general ed. 2018) ("If, for example, a plaintiff claims that the defendant was negligent, but neglects to plead any facts or circumstances establishing that the defendant owed the plaintiff a duty of care, the pleading is liable to be struck out for failing to disclose a cause of action. Common practice of the courts is usually to give parties a reasonable opportunity to amend their pleadings, subject to paying any wasted costs").

[225] While other pretrial mechanisms – discoveries, for example – may assist in defining the issues, it is beyond question that well-drafted pleadings[214] play the leading and indispensable role in defining the issues the court must decide and ensuring that the civil process gives adverse parties fair notice of the case against them. In Alberta, as elsewhere in the common law world, pleadings play a vital role in the dispute resolution process.[215]

2. Justice Lema Erred in Holding that Mr. Anglin's Claim Discloses No Reasonable Claim

[226] The Chief Electoral Officer, relying on rule 3.68(2)(b) of the *Alberta Rules of Court*,[216] asked the special chambers judge to strike out Mr. Anglin's claim on the ground that "it discloses no reasonable claim".

[227] Justice Lema concluded that "the statement of claim discloses no reasonable cause of action as against the ... [Chief Electoral Officer]"[217] and struck it out.

[228] Justice Lema should not have struck out Mr. Anglin's claim. It discloses at least two causes of action.

a. Misfeasance in a Public Office[218]

[229] Mr. Anglin asserts in his factum that the facts pleaded satisfy the essential elements of the tort of misfeasance in a public office.[219]

[230] He is correct.

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[214] *Laasch v. Turenne*, 2012 ABQB 566, ¶ 55 per Graesser, J. ("Pleadings ... require careful drafting. The wording in pleadings is key to many matters in the litigation, such as record production and questioning").

[215] *Farrell v. Secretary of State*, [1980] 1 All E.R. 166, 173 (H.L. 1979) per Lord Edmund-Davies ("It has become fashionable in these days to attach decreasing importance to pleadings … . But pleadings continue to play an essential part in civil actions … . [T]he primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it") & *AARC Society (Alberta Adolescent Recovery Centre) v. Canadian Broadcasting Corp*., 2019 ABCA 125, ¶ 55; 449 D.L.R. 4th 208, 233 per Wakeling, J.A. ("the goal of pleadings is to identify the issues that the action presents for judicial resolution").

[216] Alta. Reg. 124/2010.

[217] *Anglin v. Chief Electoral Officer*, 2022 ABQB 477, ¶ 93.

[218] This tort has also been referred to as "abuse of public office". L. Klar & C. Jefferies, Tort Law 383, n. 201 (7th ed. 2023).

[219] Appellant's Factum filed in Court of Appeal File Number 2203-0154AC, ¶ 67.

[231] There are five elements to the tort of misfeasance in a public office.[220] First, the defendant must be a public office holder. Second, the defendant public office holder must perform an act as a public office holder. Third, the public office holder defendant must have acted in a manner not authorized by the law. Fourth, the public office holder defendant must have known that his or her conduct was unlawful and that he or she performed the complained about act knowing that it was unlawful. Fifth, the public officer holder defendant must have known that his or her act was likely to harm the plaintiff.

[232] Paragraphs 2, 6, 11, 13, 14, and 15 of his amended statement of claim assert facts that meet the five criteria for misfeasance in a public office:[221]

> 2. Glen L. Resler … resides in Alberta. In December of 2013 Resler was appointed to the office of Chief Electoral Officer and at all material times he *occupied* that position and *exercised the powers* associated with the office.
>
> …
>
> 6. During the 2015 election Resler, or agents or employees acting on his behalf and on his authority:
>
> > (i) required Anglin to cover over the letters "M.L.A." on signs reading "Re-Elect Joe Anglin M.L.A." when there was no law that prevented these letters being used;
> >
> > (ii) required Anglin to cover over sponsorship information on signs with the same information of a larger size, when there was no law requiring the sponsorship information to be of a larger size;
> >
> > (iii) commented to the media that Anglin's signs were illegal;

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[220] *Odhavji v. Woodhouse*, [2003] 3 S.C.R. 263; *Three Rivers District Council v. Bank of England (No. 3)*, [2003] 2 A.C. 1 (H.L.); *Delamere v. Attorney-General*, [2010] NZHC 188 & *Northern Territory v. Mengel*, [1995] HCA 65; 185 C.L.R. 307. See L. Klar & C. Jefferies, Tort Law 409 (7th ed. 2023) ("The requirements of the tort [of misfeasance in a public office] are as follows: (a) the actor must be a public official; (b) the public official must have engaged in wrongful conduct in his or her capacity as a public officer; and (c) the wrongdoing must be intentional") & P. Osborne, The Law of Torts 225 (6th ed. 2020) ("Although the decision in *Odhavji* has generalized and extended the tort of misfeasance of public office it still requires proof of conscious wrongdoing of public officers. There is still no liability because an action is *ultra vires* the powers of the officer and good faith discretionary decisions can be made without the anxiety of possible tort liability"). See generally Aronson, "Misfeasance in Public Office: A Very Peculiar Tort", 35 Melb. U. L. Rev. 1, 2 (2011) ("Misfeasance in public office is a very peculiar tort. It is generally regarded as the common law's only truly public tort because the only people who can commit it are those holding public office, and the only occasion which it can be committed are those in which public office-holders misuse their public power").

[221] Appeal Record (Court of Appeal File Number 2203-0154AC) 10, 11 & 12 (emphasis added).

(iv) worked with individuals who were supporting candidates that were opposed to Anglin;

(v) authorized or allowed these individuals, or other individuals, to remove Anglin's signs contrary to the law;

(vi) authorized or allowed these individuals, or other individuals, to damage Anglin's signs, contrary to the law; and

(vii) singled out Anglin's signs, which were legal, when many other candidates had signs that did not comply with the *Election Act*.

…

11. Subsequent to the 2015 election Resler, *without reasonable and probable cause or for a purpose other than that of carrying the law into effect*, instigated a series of investigations and prosecutions into Anglin regarding alleged breaches of the *Election Act*. These included an investigation and prosecution:

(i) into Anglin's use of the letters "M.L.A." during the election;

(ii) into Anglin's sponsorship information during the election;

(iii) into Anglin use or misuse of a List of Electors.

…

13. Resler investigated and prosecuted Anglin to the point of conviction for a breach of section 134 of the *Election Act* with regard to the sponsorship information:

(i) for failing to have his sponsorship information in a particular size, where there was no law imposing this requirement;

(ii) for failing to put sponsorship information on some signs, where there was no evidence to support this finding; and,

(iii) for failing to put a telephone number contact in the sponsorship information, where there was no evidence to support this finding and where the finding was made without any opportunity for Anglin to defend himself;

14. Resler investigated and prosecuted Anglin to the point of conviction for a breach of section 19.1 of the *Election Act* for failing to "take all reasonable steps to protect the list and the information contained in it from loss and unauthorized use":

> (i) where the List of Electors was neither lost or nor sustained unauthorized use;
>
> (ii) where the decision that Anglin had not undertaken all reasonable steps was contrary to the evidence;
>
> (iii) where Resler's interpretation of the word "reasonable" imposed an impossibly high and illegal requirement on Anglin.
>
> 15. Resler *knew* … that there was no factual or legal basis to undertake these investigations and prosecutions … . Resler *knew* or should have known that his actions would probably injure Anglin … .

[233] No rule in Part 13, Division 3 of the *Alberta Rules of Court*[222] dictates that a statement of claim must provide particulars of knowledge. As a result, Mr. Anglin's amended statement of claim need only allege that the Chief Electoral Officer knew his conduct was unlawful and was likely to harm the plaintiff.[223]

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[222] Alta. Reg. 124/2010.

[223] See *The King's Bench Rules*, r. 13-10(3) ("It is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind as a fact without setting out the circumstances from which it is inferred") (Sask.); *Kings Bench Rules*, Man. Reg. 443/88, r. 25.06(11) ("Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars, but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred"); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 25.06(8) ("Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred"); *Rules of Civil Procedure*, r. 25.06(8) ("Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred") (P.E.I.); *Rules of Court*, N.B. Reg. 82-73, r. 27.06(9) ("Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars thereof; but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred"); *Civil Procedure Rules*, R. 38.03(3) ("A pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice") (N.S.); *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D., r. 14.11 ("Subject to rule 14.11(2), every pleading shall contain the necessary particulars of any claim ... including (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and (b) where a party pleading alleges any condition of the mind of any person, including any disorder or disability of mind or any malice, or fraudulent intention, or other condition of mind except knowledge, particulars of the facts on which the party relies"); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, rr. 115 ("Where it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of a person, it is sufficient to allege it as a fact without setting out the circumstances from which it is to be inferred") & 117 ("Where the party pleading relies on a misrepresentation, fraud, a breach of trust, wilful default or undue influence, particulars must be stated in the pleading"); *Rules of Court*, R. 20(12) ("Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence ... full particulars ... shall be stated in the pleading") (Yukon); *Federal Courts Rules*, SOR/98-106, r. 181(1) ("A pleading shall contain particulars of

[234] Section 5.1(1) of the *Election Act*[224] – the immunity provision – does not assist the Chief Electoral Officer in this analysis. This is because it is only engaged if the Chief Electoral Officer acted "in good faith in the exercise of performance . . . of a power, duty or function under the *Act*". Section 5.1(1) provides no immunity if the plaintiff establishes a tort an essential feature of which is the absence of good faith[225] on the part of the Chief Electoral Officer. The torts of misfeasance in a public office and malicious prosecution are such torts.

b. Malicious Prosecution

[235] Mr. Anglin asserts in his factum that "[t]he Statement of Claim ... includes a claim ... for malicious prosecution in respect of these *ex post facto* administrative charges".[226]

[236] The tort of malicious prosecution has four features:[227]

> To succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect.

[237] The fact that the Chief Electoral Officer did not initiate criminal proceedings against Mr. Anglin does not mean that Mr. Anglin's claim discloses no cause of action or reasonable claim. It may ultimately fail on this ground.[228] But I am not satisfied that the law is so clear that an action

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every allegation contained therein, including (a) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and (b) particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention") & *Supreme Court (General Civil Procedure) Rules 2015*, S.R. No. 103/2015, r. 13.10(3) ("Without limiting paragraph (1), every pleading shall contain particulars of any ... (b) malice ... which is alleged") (Vict.).

[224] R.S.A. 2000, c. E-1.

[225] The Chief Electoral Officer acknowledges this. Factum of the Respondent in Court of appeal Number 2203-0154AC, ¶ 61. See *Roncarelli v Duplessis*, [1959] S.C.R. 121, 142-43 per Rand, J. ("It was urged by Mr. Beaulieu that the respondent, as the incumbent of an office of state, so long as he was proceeding in 'good faith', was free to act in a matter of this kind virtually as he pleased. ... 'Good faith' in this context, applicable both to [Premier Duplessis] and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status").

[226] Appellant's Factum filed in Court of Appeal File Number 2203-0154AC, ¶ 5.

[227] *Miazga v. Estate of Kvello*, 2009 SCC 51, ¶ 3; [2009] 3 S.C.R. 339, 346-47 per Charron, J. See also *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 199 per Lamer, J. & 204 per McIntyre J. & *Proulx v. Quebec*, 2001 SCC 66, ¶ 9; [2001] 3 S.C.R. 9, 21 per Iacobucci & Binnie, JJ.

[228] See L. Klar & C. Jefferies, Tort Law 80 (7th ed. 2023) ("As noted by Fleming, extending the action to wrongful civil proceedings 'has encountered anything but enthusiastic response', despite the fact that there is nothing in history

complaining about a statutory administrative penalty, as opposed to criminal proceedings, is bound to fail.[229]

[238] There is, nonetheless, a problem with the amended statement of claim.

[239] Mr. Anglin does not assert the facts that would support the claim that all the prosecutions the Chief Electoral Officer initiated against Mr. Anglin and about which Mr. Anglin complains terminated in Mr. Anglin's favor.

[240] He asserts in paragraph 12 of his amended statement of claim that "[t]he investigation and prosecution into the use of the letters 'M.L.A.' was shown to be without merit".[230]

[241] But Mr. Anglin does not address the outcome of the sponsorship and the list-of-electors proceedings.

[242] It is obvious to me that Justice Ross's decision to rescind the $500 administrative penalty the Chief Electoral Officer imposed against Mr. Anglin for failing to take all reasonable steps to protect a list of electors from loss or unauthorized use,[231] along with the fact that the Chief Electoral Officer has taken no further action, provides strong support for the assertion that the list-of-electors prosecution terminated in Mr. Anglin's favor.

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nor any binding authority which confines the action to criminal proceedings. Canadian cases … have reflected this restrictive approach").

[229] W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2024, at 3-156 (2024) ("A novel claim ... which might reasonably succeed, even in a higher court, or as the law is developing, should not be struck out. ... There must be a reasonable prospect of success for it to stand"). See *Bahadar v. Real Estate Council of Alberta*, 2021 ABQB 395, ¶ 21; [2021] 10 W.W.R. 643, 654 per Dario, J. ("The Master found that the law on whether malicious prosecution could apply to a provincial self-regulating body was unresolved in Alberta and refused to strike Mr. Bahadar's claim on that basis. For the reasons that follow, I find the Master was correct in this determination"); *Willers v. Joyce*, [2016] UKSC 43, ¶¶ 1 & 57; [2018] A.C. 779, 787 & 806 per Lord Toulson ("This appeal raises the question whether the tort of malicious prosecution includes the prosecution of civil proceedings. .... All things considered, I do not regard the suggested countervailing considerations as sufficient to outweigh the argument that simple justice dictates that Mr Willers's claim for malicious prosecution should be sustainable in English law") & ¶ 60; [2018] A.C. at 807 per Lord Clarke ("The principal issue in this appeal is whether the tort of malicious prosecution includes the prosecution of civil proceedings. I would firmly answer that question in the affirmative") & *Stoffman v. Ontario Veterinary Ass'n*, 71 D.L.R. 4th 720, 722 & 725 (Ont. Div. Ct. 1990) per McRae, J. ("The question before ... us on the appeal is, may an action for malicious prosecution lie against a self-regulating professional association for disciplinary proceedings against one of its members? .... While not a criminal prosecution, this type of action in our own view, may be subject to an action or a suit for malicious prosecution").

[230] Amended Statement of Claim. Appeal Record (Court of Appeal File Number 2203-0154AC) 12.

[231] *Anglin v. Chief Electoral Officer*, 2021 ABQB 353, ¶ 28.

[243] I grant Mr. Anglin permission to amend his amended statement of claim[232] within forty-five days of the date of this judgment to allege that the list-of-electors complaint was resolved in his favor and record the facts that serve as the basis for this allegation.

[244] It is not apparent how Mr. Anglin could possibly claim that the sponsorship issue was resolved to his benefit. The record discloses that Justice Clackson dismissed Mr. Anglin's appeal and the Court of Appeal upheld Justice Clackson's judgment.[233] I fail to see how Mr. Anglin could assert any facts that would support the proposition this issue was ultimately resolved in Mr. Anglin's favor.[234] It makes no sense to grant Mr. Anglin permission to amend his pleadings to correct this deficiency.

[245] It is appropriate to strike paragraph 11(ii) of Mr. Anglin's amended statement of claim.

C. Parts of Justice Gill's Procedural Order Are Problematic and Must Be Set Aside

[246] On April 22, 2022 the Chief Electoral Officer applied for directions relating to the upcoming June 15, 2022 special chambers hearing.[235] The return date was May 11, 2022.

[247] A week later Mr. Anglin made a similar application with the same return date.[236]

[248] It must be remembered that Mr. Anglin, on September 23, 2019, had filed an affidavit he swore on September 17, 2019 opposing the Chief Electoral Officer's application to strike his claim.[237]

[249] The parties had agreed to a June 15, 2022 special chambers hearing date back in September 2021 [238] without any deadlines regarding the filing of affidavits, or other material, cross-examination on affidavits, and the filing of briefs. The absence of these milestones presented a

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[232] *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 3.62(1)(a), 3.65(1)(a) & 3.68(1)(b).

[233] *Anglin v. Chief Electoral Officer*, 2017 ABQB 595, ¶ 27, aff'd, 2018 ABCA 296, ¶ 11.

[234] I agree with Justice Lema's conclusion that Mr. Anglin did not prevail on the sponsorship matter. *Anglin v. Resler*, 2022 ABQB 477, ¶ 79. It follows that Mr. Anglin may not rely on the sponsorship matter to buttress his claim for malicious prosecution. I recognize that Mr. Anglin suggests "it is not entirely clear" that Justice Clackson's decision applies to his signs because his signs were not missing telephone numbers. Application for reconsideration filed May 24, 2022, ¶¶ 35-37. Appeal Record 33-34.

[235] Appeal Record (Court of Appeal File Number 2203-0154AC) 19.

[236] Id. 15.

[237] Appellant's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 142.

[238] *Anglin v. Resler*, 2022 ABCA 213, ¶ 1.

potential problem for each party – the late filing of affidavits or other evidence and a compromised ability to cross-examine the affiant.[239]

[250] Justice Gill allowed the Chief Electoral Officer to file as evidence Mr. Anglin's originating applications in his two *Election Act*[240] appeals, the orders and reasons of the courts in those appeals, the certified record in the two *Election Act* appeals, the April 28, 2017 affidavit of the Chief Electoral Officer in one of the appeals, and two documents published by the Legislative Assembly of Alberta.[241] The case management judge did not require the Chief Electoral Officer to file an affidavit to which the approved documents were attached as exhibits.[242] Justice Gill also closed the door to "any further affidavit evidence",[243] including the cross-examination of the Chief Electoral Officer on his April 28, 2017 affidavit.[244]

[251] Justice Gill made these directions fully appreciating that the special chambers judge was the ultimate adjudicator of the fairness and justness in proceeding with the summary judgment protocol on the existing record.[245]

[252] Justice Gill gave Mr. Anglin none of the relief he requested.[246]

[253] I do not disagree with the part of Justice Gill's order identifying the material the Chief Electoral Officer may rely on.

[254] Statutory provisions may facilitate the proof of facts.[247]

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[239] A party that "files materials just before hearings in order to deny an adversary the right to cross-examine the affiant" engages in litigation misconduct. *Pillar Resource Services Inc. v. PrimeWest Energy Inc.*, 2017 ABCA 19, ¶ 124; 96 C.P.C. 7th 1, 48 per Wakeling, J.A.

[240] R.S.A. 2000, c. E-1.

[241] Appeal Record (Court of Appeal File Number 2203-0154AC) 60.

[242] Id. 62.

[243] Id.

[244] Transcript of the Proceedings taken in the Court of Queen's Bench of Alberta on May 13, 2022. Appeal Record (Court of Appeal File Number 2203-0154AC) 52:10-11.

[245] Proceedings taken in the Court of Queen's Bench on May 13, 2022. Appeal Record (Court of Appeal File Number 2203-0154AC) 51 ("Although it's ultimately a decision of the judge hearing the applications, I'm satisfied that having regard to the record it will be possible for the motions judge on the striking and summary judgment applications to fairly resolve the dispute on a summary basis. No further evidence is necessary").

[246] Appeal Record (Court of Appeal File Number 2203-0154AC) 63.

[247] S. Lederman, M. Fuerst & H. Stewart, The Law of Evidence in Canada c. 19 (6th ed. 2022). E.g. *Business Corporations Act*, R.S.A. 2000, c B-9, s. 293(2) ("A certificate purporting to be signed by the Registrar and stating that a named extra-provincial corporation was or was not registered on a specified day or during a specified period, is

[255] Rule 6.11(1)(f) of the *Alberta Rules of Court*[248] expressly allows the Court "[w]hen making a decision about an application ... [to] consider evidence taken in any other action". The appeals Mr. Anglin filed against the two administrative penalties the Chief Electoral Officer imposed on him are actions.[249] This captures the materials in the Chief Electoral Officer's certified records and the Chief Electoral Officer's April 28, 2017 affidavit. These materials qualify as evidence.[250] It makes sense, in this case, to allow the Chief Electoral Officer to place before the special chambers judge the originating applications that made necessary the filing of the certified records, even if it is not "evidence taken in another action".[251] Rule 1.7(2) allows the Court to apply the rules "by analogy to any matter arising that is not dealt with in these rules".

admissible in evidence as proof, in the absence of evidence to the contrary, of the facts stated in it without proof of the Registrar's appointment or signature"); *Land Titles Act*, R.S.A. 2000, c. L-4, s. 56.4(5) ("The paper version of an application, instrument, plan, caveat or other document is admissible in a court for the purposes of proving the authenticity of a signature or other writing, mark or impression") & s. 201 ("A reproduction of an instrument or caveat … (b) that is certified by the Registrar as being an accurate reproduction of the instrument or caveat, is admissible in evidence in any court or proceeding in the same manner as if it were an original") & *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 32 ("Notwithstanding anything in this Act, every Act or regulation of Alberta or of Canada and every proclamation and every order made or issued by the Governor General or the Governor General in Council or by the Lieutenant Governor or the Lieutenant Governor in Council, and every publication of them in the Canada Gazette or The Alberta Gazette, shall be judicially noticed"). See 3 W. Stevenson & J. Côté, Civil Procedure Encyclopedia 44-3 (2003) ("The *usual* way of introducing evidence on a motion is by affidavit. It is also *common* to file certified copies of documents such as certificate of title, where a statute makes those admissible evidence") (emphasis added).

[248] Alta. Reg. 124/2010.

[249] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 3.2(1) ("An action may be started only by filing in the appropriate judicial centre … (a) a statement of claim by a plaintiff against a defendant, (b) an originating application by an originating applicant against a respondent, or (c) a notice of appeal, reference or other procedure or method specifically authorized or permitted by an enactment").

[250] "Evidence" is not a defined term in the *Alberta Rules of Court*, Alta. Reg. 124/2010. See Black's Law Dictionary 697-98 (11th ed. 2019) ("evidence, n. (14c) … 3 The collective mass of things, esp. testimony and exhibits, presented before a tribunal in a given dispute <the evidence will show that the defendant breached the contract >").

[251] Rule 13.29(3) states that a "certified copy of an original record is admissible in evidence to the same extent as the original". The crucial question is the admissibility of the original.

[256] I am also satisfied that the judicial notice doctrine[252] allows the special chambers judge to consider the orders and reasons[253] arising from appeals Mr. Anglin filed under section 153.3(1) of the *Election Act*.[254]

[257] Section 28 of the *Alberta Evidence Act*[255] also authorizes the Chief Electoral Officer to file the Report of the Chief Electoral Officer on the May 5, 2015 provincial general election and the March 2015 Legislative Assembly of Alberta Dissolution Guidelines. These are "public documents purporting to be printed by or under the authority of the ... government or of any legislative body within any of His Majesty's realms and territories".[256]

[258] Mr. Anglin did not object with vigor to this aspect of Justice Gill's order. His major complaint is being denied the right to cross-examine Mr. Resler.

[259] I agree with Justice Gill that these materials may be admitted as evidence without an accompanying affidavit.

[260] But I am troubled by the parts of the challenged procedural order that barred Mr. Anglin from filing any evidence after May 13, 2022 in opposition to the Chief Electoral Officer's summary

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[252] *The Queen v. Find,* 2001 SCC 32, ¶ 48; [2001] 1 S.C.R. 863, 886 per McLachlin, C.J. ("Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond a reasonable doubt") & *British Columbia v Malik*, 2011 SCC 18, ¶ 38; [2011] 1 S.C.R. 657, 679 per Binnie, J. (the *Rowbotham* judgment was properly put before the chambers judge. He was entitled to take judicial notice of prior decisions of the court"). See S. Lederman, M. Fuerst & H. Stewart, The Law of Evidence in Canada 1532 & 1540 (6th ed. 2022) ("Judicial notice is the acceptance by a court or a judicial tribunal, in a civil or criminal proceeding, without the requirement of proof of the particular fact or state of affairs. .... There are some facts which ... are indisputable and can be ascertained from sources to which it is proper for the judge to refer. These may include texts, dictionaries, almanacs and other reference works, previous case reports, certificates from various officials and statements from witnesses in the case").

[253] *Anglin v. Chief Electoral Officer*, 2017 ABQB 595, aff'd, 2018 ABCA 296, leave to appeal ref'd, [2018] S.C.C.A. No. 495, per Clackson, J.; *Anglin v. Chief Electoral Officer*, 2017 ABCA 404 per Veldhuis, J.A.; *Anglin v. Chief Electoral Officer*, 2018 ABCA 296, leave to appeal ref'd, [2018] S.C.C.A. No. 495; *Anglin v. Chief Electoral Officer*, 2020 ABQB 131, reconsideration all'd, 2021 ABQB 353 per Ross, J.; *Anglin v. Chief Electoral Officer*, 2021 ABQB 353 per Ross, J. & *Anglin v. Chief Electoral Officer*, 2021 ABQB 623 per Ross, J.

[254] R.S.A. 2000, c. E-1.

[255] *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 28 ("Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices of them and other public documents purporting to be printed by or under the authority of the Parliament of Great Britain and Northern Ireland or of the Imperial Government or by or under the authority of the government or of any legislative body within any of His Majesty's realms and territories shall be admitted in evidence to prove the contents of them").

[256] Id. Section 33 of the *Alberta Evidence Act* states, in effect, that a certified copy of the Chief Electoral Officer's report is receivable in evidence if "the original record could be received in evidence".

judgment application and from cross-examining the Chief Electoral Officer on his April 28, 2017 affidavit and relieved Mr. Resler of the obligation to serve an affidavit of records under rule 5.5(3).

[261] The first term of the order unacceptably abridged the party autonomy of Mr. Anglin. Mr. Anglin wanted to file an expert report and cross-examine the Chief Electoral Officer on his April 28, 2017 affidavit. This denied Mr. Anglin the opportunity to put his best foot forward in the summary judgment application.[257]

[262] Mr. Kurata, one of Mr. Anglin's appeal counsel, informed the Court that Mr. Anglin would have filed the expert report of Lorne Gibson dated April 15, 2021 had Justice Gill's order not precluded him from doing so.[258] This report expressed Mr. Gibson's "opinion on the information and evidence presented in the Affidavit of Joseph Anglin sworn September 17, 2019 and filed with the Court in this matter regarding the enforcement matters that have transpired between Alberta's Chief Electoral Officer ... and Mr. Anglin".[259]

[263] I fully appreciate that Mr. Anglin did not notify Justice Gill of the existence of Mr. Gibson's expert report at the May 11, 2022 hearing[260] – we were not told why – and that, as a result, the case management judge would not have appreciated the effect of his deadline order – Mr. Anglin could not file the Gibson expert report.

[264] Nonetheless, I am satisfied that the better course would have been for the case management judge to ask the parties if they wished to file any more evidence or give them a short period within which to do so, keeping in mind that some time would be needed for cross-examination if a party filed an affidavit in this period.

[265] I would leave the question of whether Mr. Resler must file an affidavit of records to the special chambers judge hearing the summary judgment application, should it proceed.

[266] I am not passing judgment on the validity of any objection the Chief Electoral Officer may make to the admissibility of the Gibson report or any objection Mr. Anglin may make to the

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[257] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd*., 2019 ABCA 49, ¶ 47; 442 D.L.R. 4th 9, 50 per Slatter, J.A. ("If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial").

[258] Factum of the Appellant filed in Court of Appeal File Number 2203-0154AC, ¶ 53.

[259] Unfiled Expert Report. Appellant's Extracts of Key Evidence (Court of Appeal File Number 2203-0154AC) 636.

[260] He did raise it in his application for reconsideration. Appeal Record 41. See also discussion before Justice Lema Transcript of the Proceedings taken in the Court of Queen's Bench of Alberta on June 15, 2022. Appeal Record (Court of Appeal File Number 2203-0154AC) 156:36-157:15.

reliability of material that the Chief Electoral Officer relies on.[261] These issues are best resolved by the special chambers judge.

[267] I fail to see any justification for an order that allows the Chief Electoral Officer to introduce into evidence his April 28, 2017 affidavit without, at the same time, allowing Mr. Anglin to cross-examine the Chief Electoral Officer.[262] Cross-examination plays a fundamental role in the fact-finding process and should be a part of the adjudicative process[263] in the absence of a compelling reason to support a contrary conclusion.[264] This one-sided order caused Mr. Anglin unacceptable litigation prejudice. The May 13, 2022 order must be amended to accord Mr. Anglin that right.

[268] Paragraph 3 of the May 13, 2022 order recorded the timelines for filing briefs. The parties will have to agree upon new deadlines.

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[261] Part 5, Division 2 of the *Alberta Rules of Court,* Alta. Reg. 124/2010, contains the protocols governing the admissibility of expert reports in *trials*. The summary judgment process is not a trial. *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 18; 442 D.L.R. 4th 9, 40 per Slatter, J.A. ("Summary disposition is a way of resolving disputes without a trial; a summary trial is a trial") (underlining in original); *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 87; 315 C.C.C. 3d 337, 380 per Wakeling, J. ("Summary judgment disposes of a suit before trial and summary trial after trial"); *Swain v. Hillman*, [2001] 1 All E.R. 91, 95 (C.A. 1999) per Lord Woolf, M.R. ("the proper disposal of an issue under [the summary judgment part] does not involve the judge conducting a mini trial"). But rule 1.7(2) provides that "[t]hese rules may be applied by analogy to any matter that is not dealt with in these rules". I am satisfied that both the moving and nonmoving parties in a summary judgment application must comply with Part 5, Division 2 of the *Alberta Rules of Court*. See *L.C. v. R.*, 2016 ABQB 512, ¶ 28 per Graesser, J. ("Rule [13.21] does not give documents any evidentiary value by simply attaching them to an affidavit without proof of the truth of their contents. Some things are evidence by themselves, such as statutes and public documents under the *Alberta Evidence Act*").

[262] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 3.13(1)(a).

[263] 5 J. Wigmore, Evidence in Trials at Common Law 32 (J. Chadbourn rev. 1974) ("For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. ... [I]t is beyond any doubt the greatest legal engine ever invented for the discovery of truth") & S. Lederman, M. Fuerst & H. Stewart, The Law of Evidence in Canada 1326 (6th ed. 2022) ("The oft-quoted words of Wigmore that cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth' indicate its great value in the conduct of litigation").

[264] *The Point on the Bow Development Ltd. v. William Kelly & Sons Plumbing Contractors Ltd.*, 2004 ABCA 53, ¶ 7; 346 A.R. 171, 174 ("The appellant's particular complaint is the case management judge's refusal to grant an adjournment to permit cross-examination on the affidavit filed in support of the respondent's contempt motion. Although R. 314(1) provides that any person who makes an affidavit may be cross-examined without order, the right to cross-examine is not absolute or unlimited ... . A request to cross-examine may be denied in instances where the examination would be totally frivolous or is only designed to forestall the proceedings ... . While certain facts may exist that would give a court the discretion to refuse the right to cross-examine on an affidavit, 'this discretion should be exercised sparingly and only in clearest of situations'").

[269] For these reasons, I would vary the order that Justice Gill pronounced May 13, 2022 and was filed May 26, 2022 by deleting paragraphs 3, 4 and 5 and inserting a term requiring the Chief Electoral Officer to make himself available for cross-examination on his April 28, 2017 affidavit if he does not withdraw his affidavit and declining to determine Mr. Anglin's application for an order directing Mr. Resler to file an affidavit of records.

D. The Summary Judgment Court Must Decide if It Is Fair and Just To Deny Mr. Anglin Access to More Stages of the Full Trial Process

[270] Justice Lema did not consider the Chief Electoral Officer's summary judgment application.

[271] The Chief Electoral Officer is free to pursue this application.

[272] The King's Bench judge who hears the summary judgment application must ensure that the abridged adjudicative model does not visit unfairness and injustice on the nonmoving party, a standard Justice Slatter emphasized in *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd*.:[265]

> Procedural and substantive fairness must always be a part of the summary disposition process. … The ultimate determination of whether summary disposition is appropriate is up to the chambers judge … . … [W][hether a summary disposition will be fair and just will often come down to whether the chambers judge has a sufficient measure of confidence in the factual record before the court.

[273] Summary judgment is not a dispute resolution protocol "that sacrifices procedural fairness in the pursuit of economical and expeditious resolution of disputes".[266]

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[265] 2019 ABCA 49, ¶ 46; 442 D.L.R. 4th 9, 49-50. See *Hannam v. Medicine Hat School District No. 76*, 2020 ABCA 343, ¶ 171; 454 D.L.R. 4th 202, 301, leave to appeal ref'd, [2020] S.C.C.A. No. 421 per Wakeling & Feehan, JJ.A. ("*Weir-Jones* allows the summary judgment adjudicator to make contested findings of fact … when it is fair and just to do so") & *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*, 2021 ABCA 16, ¶ 69 ("the presiding judge must be left with sufficient confidence that the state of the record permits a fair summary disposition").

[266] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd*., 2019 ABCA 49, ¶ 81; 442 D.L.R. 4th 9, 69 per Wakeling, J.A. See *Hryniak v. Mauldin*, 2014 SCC 7, ¶ 23; [2014] 1 S.C.R. 87, 98 per Karakatsanis, J. ("Our civil justice system is premised upon the value that the process of adjudication must be fair and just"); *Jacobs v. Booth's Distillery Co*., 85 L.T.R. 262, 262 (H.L. 1901) per Lord Halsbury, L.C. ("But I am bound to say that it startles me to think that in a case of this sort an order should be made the effect of which is that the defendant is not to be heard to make his defence. It appears to me that Order XIV. is perfectly inappropriate to the facts of this case"); *Swain v. Hillman*, [2001] 1 All E.R. 91, 95 (C.A. 1999) per Lord Woolf, M. R. ("Those are matters which will have to be considered carefully by the judge at trial. … It is a matter to be dealt with by the judge at a trial and not at a summary hearing. Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at trial") & *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) per Rehnquist, J. ("Summary judgment procedure is properly regarded not as a

[274] There may be cases that justify adjourning a summary judgment application until the moving party has filed a statement of defence and an affidavit of records and the nonmoving party has had an opportunity to question the moving party.[267] This may be so "if there is reason to believe that the moving party alone has access to the relevant information that directly relates to the merits of the dispute between the parties. The moving party may be seeking summary judgment to forestall discovery".[268]

disfavored procedural shortcut, but rather as an integral part of the Federal Rules [of Civil Procedure] as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action'").

[267] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd*., 2019 ABCA 49, ¶¶ 163 & 165; 442 D.L.R. 4th 9, 111-12 per Wakeling, J.A. ("As a general rule any application by the nonmoving summary judgment party to seek access to a part of the civil process that has not yet been utilized and has the effect of forestalling the adjudication of the summary judgment application should be dismissed. Such an application introduces delay and additional costs and undermines the purpose of the summary judgment protocol. .... But the value summary judgment represents in a modern civil procedure system – expeditious resolution of a dispute – does not justify abridgment of the civil process if the nonmoving summary judgment party can demonstrate that denying it access to a portion of the civil process would cause it unreasonable litigation prejudice"). See also *Hannam v. Medicine Hat School District No. 76*, 2020 ABCA 343, ¶ 57; 454 D.L.R. 4th 202, 242-43 per Wakeling & Feehan, JJ.A. ("A protocol that can be accessed early in the process and is easy to complete – costs the parties less – will increase the number of actions that are resolved by summary judgment and improve the case-closure ratio between summary judgment and conventional trial. Suppose a rule denied access to the summary judgment protocol until the parties have completed discovery. This might deter some litigants from applying for summary judgment").

[268] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 167; 442 D.L.R. 4th 9, 113 per Wakeling, JA. See also id. at ¶ 40, 442 D.L.R. 4th at 47-48 per Slatter, J.A. ("there can be occasions when the 'best foot forward' approach is not strictly applied. That may happen, for example, where one party effectively controls all of the records and evidence with respect to the claim ... . In those circumstances, the application for summary determination can be adjourned to permit some pre-trial discovery") & *P. Burns Resources Ltd. v. Royal Trust Co.*, 2015 ABCA 390, ¶¶ 8 & 9; 612 A.R. 63, 66-67 per Paperny, J.A. ("where the nature of the action is such that much of the evidence supporting the cause of action is likely to be in the sole possession of the defendants, the plaintiff is more likely to require access to disclosure of documents and questioning to be able to make full answers to any subsequent application for summary judgment. Whether document production and questioning should proceed prior to the hearing of a summary judgment application is a discretionary decision under the rules"). In *Roncarelli v. Duplessis*, [1959] S.C.R. 121 the Premier of Quebec instructed the Quebec Liquor Commission to cancel Mr. Roncarelli's liquor permit to punish him for being a bail surety for Jehovah's Witnesses. Mr. Roncarelli operated a first-class restaurant in downtown Montreal. A first-class restaurant could not function without a liquor permit. Mr. Roncarelli closed his restaurant. He sued Premier Duplessis for a civil wrong – misfeasance in public office. Suppose Premier Duplessis had moved for summary judgment before questioning. Had he done so and succeeded, Mr. Roncarelli would have had a much harder time proving that the Premier had instructed the Quebec Liquor Commission to cancel his liquor permit. See *Poorkid Investments v. Ontario*, 2022 ONSC 883, ¶ 23, rev'd, 2023 ONCA 172, leave to appeal ref'd, Supreme Court File No. 40733 (December 7, 2023) per Broad, J. ("The applicants point out that a main element of the tort of misfeasance in public office is bad faith, which can often only be found in internal communications within the possession and control of the Crown").

[275] A summary judgment process should not be adopted if it causes the nonmoving party unreasonable litigation prejudice.[269]

[276] Mr. Anglin complained before us that he has to oppose the Chief Electoral Officer's summary judgment application without having the opportunity to review an affidavit of records filed by the Chief Electoral Officer under rule 5.5(3) of the *Alberta Rules of Court* or question him under rule 5.17(1).

[277] In Mr. Anglin's application filed April 29, 2022 he asked for an order compelling the Chief Electoral Officer to file an affidavit of records and allowing Mr. Anglin to cross-examine the Chief Electoral Officer on the affidavit he swore April 28, 2017 in Court of Queen's Bench action 1603-14130.

[278] Mr. Anglin may be able to convince the summary judgment application judge that the summary judgment application should not be heard until Mr. Anglin has enjoyed the benefits of accessing more stages of the litigation process – requiring the Chief Electoral Officer to file a statement of defence and an affidavit of records and submit to questioning.[270]

VII. Conclusion

[279] I allow the appeal against the order pronounced July 11, 2022 and filed August 12, 2022 and set it aside. In addition, I grant Mr. Anglin permission to amend his statement of claim within forty-five days of the date of this judgment to record the orders Justice Ross made in Court of Queen's Bench action number 170-03014. I also order that paragraph 11(ii) of Mr. Anglin's amended statement of claim be struck out.

[280] I also allow, in part, the appeal against the order pronounced May 13, 2022 and filed May 26, 2022 by

a. deleting paragraphs 3, 4 and 5 of the order;

b. requiring Mr. Resler to make himself available within ninety days of the date of this judgment for cross-examination on his April 28, 2017 affidavit if he does not withdraw his April 28, 2017 affidavit;

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[269] *Can v. Calgary Police Service*, 2014 ABCA 322, n. 30; 315 C.C.C. 3d n. 30 per Wakeling, J.A. ("There may be some exceptional cases where it is appropriate to adjourn a summary judgment application to allow for questioning").

[270] E.g., *Wenzel Downhole Tools Ltd. v. National Oilwell Varco, Inc*., 2010 ABCA 381, ¶ 8 per Read, J. ("there is no general rule that disables a judge hearing a summary judgment application from ever adjourning a summary judgment application, nor any rule that requires a judge to hear and determine the application when it is first sought. On a summary judgment application, a court always retains the jurisdiction to adjourn the application where failure to do so could result in a failure of justice").

c. dismissing Mr. Anglin's application for a declaration that any evidence Mr. Resler relies on in support of his application to strike out Mr. Anglin's action be introduced as part of an affidavit and that Mr. Anglin be allowed to cross-examine on that affidavit; and

d. leaving for the Court of King's Bench special chambers judge hearing Mr. Resler's summary judgment application, should it proceed, whether Mr. Resler must serve an affidavit of records on Mr. Anglin, file a statement of defence, and submit to questioning before the hearing of Mr. Resler's summary judgment application.

[281] I acknowledge the able assistance of counsel.

Appeal heard on November 30, 2023

Memorandum filed at Edmonton, Alberta
this 5th day of April, 2024

Wakeling J.A.

Appearances:

V.M. Kurata
D.F. Bur
for the Appellant

K.E. Elhatton-Lake
for the Respondents