Court of King's Bench of Alberta

Citation: McDonald v Sproule Management GP Limited, 2023 ABKB 587

Date: 20231017
Docket: 1601 08624
Registry: Calgary

Between:

Kevin McDonald

Plaintiff

- and -

Sproule Management GP Limited

Defendant

Reasons for Judgment
of the
Honourable Justice M.A. Marion

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I. Introduction

[1] The Plaintiff, Kevin McDonald (**McDonald**) applies (**Application**) for summary judgment against the Defendant, Sproule Management GP Limited (**Sproule**), in respect of his claim for wrongful dismissal. McDonald seeks judgment in the amount of $985,799 compensation for lack of reasonable notice and $489,696 in damages for the manner of termination and costs. McDonald asserts there is no merit to, or genuine issue requiring a trial respecting, Sproule's just cause defence, and that the damages are supported by the uncontradicted evidence. In the alternative, McDonald seeks directions from the court for the scheduling of a summary trial in the event the court finds that an assessment of damages is not feasible on the record before the court.

[2] Sproule argues that McDonald's claim is not suitable for summary judgment because there are material facts in dispute that involve credibility issues and the weighing of evidence. Sproule asserts that it had just cause both at the time of the termination and based on after-acquired cause. Sproule's position is that, if the court determines McDonald was dismissed without cause, a further hearing is required in connection with the issue of damages. However, it also argues that a notice

period of one-month per year of service is appropriate in the circumstances. Sproule advises that if summary judgment is not granted it expects to bring an application to have the action dismissed for delay.

[3] This Application addresses when the issues of just cause, determination of a reasonable notice period, assessment of damages, and claims of bad faith, are appropriately determined summarily in a wrongful dismissal case, and whether they can be determined in this case.

[4] For the reasons set out below, I find that there is no merit to Sproule's defence and there are no genuine issues requiring a trial. I further find that McDonald was wrongfully dismissed, was entitled to an 18-month notice period, and is entitled to damages and judgment in the amount of $379,312.68, plus pre and post judgment interest. McDonald has not proven damages for bad faith or that his bad faith claim has merit.

II. Procedural Background

[5] On June 29, 2016, McDonald filed his Statement of Claim alleging, among other things, that his employment was terminated without cause "without any severance" on February 11, 2016. The Statement of Claim seeks (1) a declaration that he was wrongfully terminated without cause; (2) judgment for his base salary, benefits and other incentives to which he was entitled during a claimed 24-month notice period, plus out-of-pocket expenses incurred to mitigate his damages in seeking alternative employment; (3) judgment in an additional amount of three month's base salary in respect of Sproule's bad faith conduct toward McDonald; (4) pre-judgment interest pursuant to the *Judgment Interest Act*, RSA 2000 c J-1; and (5) costs.

[6] On July 28, 2016, McDonald noted Sproule in default. On August 10, 2016, McDonald filed an application for the determination of damages pursuant to rule 3.37 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*). That application did not proceed and, on August 18, 2016, Sproule filed its Statement of Defence (**Defence**).

[7] Sproule's Defence alleges just cause, and pleads at least 23 specific particulars supporting its cause position. It asserts Sproule paid McDonald all amounts due to him. In the alternative, Sproule denies a 24-month notice period is appropriate and pleads an approximate 12-month period of notice would be appropriate (less mitigating income). Sproule specifically denies the allegations that Sproule terminated McDonald in bad faith or was dishonest or high-handed.

[8] The parties exchanged Affidavits of Records within 6 months of the action commencing.

[9] On January 13, 2017, McDonald served Sproule with a comprehensive Notice to Admit Facts seeking Sproule's admission on 195 separate paragraphs. On February 1, 2017, Sproule filed its Reply to Notice to Admit Facts, which objected to the Notice and provided only three substantive responses. Sproule's response asserted that the Notice to Admit Facts was not served properly, was improper for various reasons, and that Sproule did not have time to review it. Sproule indicated it would reassess and re-address the Notice to Admit Facts after the questioning process, but there is no indication that it did so. McDonald suggested in argument that Sproule should be deemed to have admitted all the facts set out in the Notice to Admit Facts. I decline to take that approach. Sproule provided its denials and objections under rule 6.37. If McDonald felt that Sproule's responses were insufficient he could have applied to have Sproule provide further

information regarding its response: ***MacKenzie v Estate of Michael Gregory***, 2022 ABQB 521. Instead, McDonald chose to press on with his summary judgment application. In these circumstances, Sproule's response to the Notice to Admit Facts is better dealt with as a matter of costs at the conclusion of this action.

[10] On July 28, 2017, McDonald filed an application for summary judgment. In support, McDonald filed a July 28, 2017 affidavit (**McDonald Affidavit**).

[11] A dispute arose between the parties as to whether Sproule was entitled to conduct questioning for discovery under Part 5 of the *Rules* before the summary judgment application was heard. A Master held that Sproule could not do so, and this was upheld by Justice Neufeld on March 7, 2018. Sproule appealed and the Court of Appeal dismissed the appeal: ***McDonald v Sproule Management GP Limited***, 2018 ABCA 295. Sproule was not allowed to conduct a questioning for discovery.

[12] Instead, in 2019, Sproule conducted an extensive questioning on the McDonald Affidavit over three days which produced a 504-page transcript (**Transcript**), excluding exhibits and responses to undertakings.

[13] Sproule filed six responding affidavits in June 2019 and one in July 2022 (**Sproule Affidavits**). The 2022 affidavit provided, among other things, that one of Sproule's affiants, Harry Helwerda (**Helwerda**) died in June 2022 and is no longer available to provide evidence.

[14] On March 8, 2022, through his new counsel, McDonald filed the Application. On May 5, 2022, the Application was directed to a special application.

[15] Both parties filed written briefs of argument and I heard the Application on March 16, 2023. Sproule did not file any cross-application. At my request, the parties provided me supplemental written submissions on the question of what records are appropriately filed as part of a transcript of a questioning on an affidavit pursuant to rule 6.7(b).

III. The Record

[16] The sufficiency of the record is critical in a summary judgment application: ***Hryniak v Mauldin***, 2014 SCC 7 and ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49.

[17] In this case, the record consists of:

(a) the McDonald Affidavit;

(b) the 504-page Transcript of the questioning on the McDonald Affidavit. There is an issue between the parties as to what must be filed as part of the "transcript" pursuant to rule 6.7, which I address later in these Reasons. Sproule did not conduct any questioning on McDonald's undertaking responses;

(c) the Sproule Affidavits, namely:

(i) an affidavit of the chair of Sproule's board of directors (**Board**) at the time of the termination, Lowy Gunnewiek (**Gunnewiek**). By the time he swore his affidavit, Gunnewiek was no longer affiliated with Sproule;

(ii) an affidavit of Sproule's President and a director at the time of the Termination, Helwerda. Helwerda reviewed the McDonald Affidavit and the Transcript before he swore his affidavit. By the time he swore his affidavit, he had been retired from Sproule since June 2016;

(iii) an affidavit of Sproule's Senior Vice President, Corporate & Legal and Corporate Secretary at the time of the Termination, Mark Van de Veen (**Van de Veen**). Van de Veen continued to work for Sproule at the time of his affidavit;

(iv) an affidavit of Sproule's Executive Vice President, and director, at the time of the Termination, Douglas Carsted (**Carsted**). Carsted reviewed the McDonald Affidavit, the Transcript, and the Helwerda Affidavit before he swore his affidavit. By the time he swore his affidavit, Carsted had been retired from Sproule since June 2017;

(v) an affidavit of a consultant engaged by Sproule in 2014 and 2015, Valerie Cade (**Cade**). At the time she swore her affidavit, Cade had no role with Sproule;

(vi) an affidavit of a consultant engaged by Sproule to assist with McDonald's termination, Tony McGrath (**McGrath**). McGrath had no role with Sproule at the time he swore his affidavit; and

(vii) a Van de Veen July 2022 affidavit.

[18] Even though the July 2022 Van de Veen affidavit discloses that Sproule produced "265 separate documents filling three separate four inch binders", none of the Sproule witnesses appended records to their affidavits other than two short documents exhibited to Cade's affidavit.

[19] McDonald argues that the Sproule Affidavits are of limited use because they include hearsay, conclusory or self-serving statements, or legal conclusions or opinion. I address the evidentiary principles associated with this Application later in these Reasons.

A. The McDonald Transcript and Rule 6.7

[20] An issue arose in argument as to what constitutes the "transcript" that must be filed pursuant to rule 6.7. Given the importance of the record in summary judgment applications, a clear interpretation of what exactly must be filed is necessary.

[21] Sproule filed the court-reporter-generated transcript of the questioning on the McDonald Affidavit but did not include with it the exhibits that were marked during the questioning, other records put to McDonald in the questioning but not marked as exhibits, or McDonald's responses to undertakings (or attached records) given during the questioning. I inquired of the parties'

positions as to which, if any, of these documents should be considered part of and filed with the court-reporter-generated transcript. At my request, they provided supplemental written submissions. There is no judicial consideration or universally adopted practice or position as to what constitutes the transcript in Part 6, Division 1, of the *Rules*.

[22] Rule 6.7 provides that a person who makes an affidavit in support of, or in response or reply to, an application may be questioned under oath on the affidavit by a person adverse in interest, and that the "transcript of the questioning must be filed by the questioning party". Rule 6.20(5) provides that the questioning party must arrange for the questioning to be recorded and to file the transcript unless the court otherwise orders. Rule 6.11(b) provides that a court may consider a transcript of questioning under Part 6 of the *Rules* in deciding an application. "Transcript" is not defined in the *Rules*.

[23] Rule 6.20 governs the form of questioning and transcript under Part 6 of the *Rules*. Rule 6.20(3) provides:

> (3) The questions and answers must be recorded word for word by a person qualified to do so
>
> (a) by a method that is capable of producing a written transcript, and
>
> (b) in a manner agreed on by the parties or directed by the Court.

[24] A person "qualified" to "record and transcribe oral questioning under this Part" includes an official court reporter, an examiner under the *Alberta Rules of Court* (AR 390/68) or a shorthand writer sworn to record the questioning: rule 6.20. An official court reporter is obligated to honestly and accurately transcribe, and keep in safe custody of, the record of any proceeding or questioning taken by them, and to deliver a copy of the transcript as required by the *Rules*: rule 13.46.

1. Exhibits Marked During the Questioning are Part of the Transcript

[25] Sproule and McDonald agree that exhibits marked in a questioning on an affidavit should be filed along with the transcript in the ordinary course and Sproule did so after oral argument.

[26] Part 6, Division 1 of the *Rules* is silent as to whether exhibits marked by the official court reporter during questioning on an affidavit under rule 6.7 are part of the transcript. However, rules governing other questioning are clear. Rule 5.26(3) expressly provides that exhibits produced at discovery questioning under Part 5 of the *Rules* should be incorporated in or attached to the transcript or produced at the trial of the action without a notice to produce, unless otherwise agreed by the parties or ordered by the court. Rule 5.32 expressly contemplates that exhibits can be part of a transcript. Further, rule 6.23 contemplates that exhibits are to be included with the transcript upon return to the clerk of the court when evidence is authorized to be taken outside of Alberta (including in respect of an application).

[27] There is no principled reason why exhibits should form part of a transcript for some types of questioning and not others, and I do not interpret its express inclusion in some rules as intending to exclude them from other rules. In my view, marked exhibits form an integral part of the transcript and the principles from rules 5.26(3) and 5.32 apply, by analogy pursuant to 1.7(2), to

questioning under Part 6. Accordingly, I interpret the rules to mean that, absent agreement of all parties or other court order, the questioning party must file with the questioning transcript any marked exhibits (whether numbered or lettered exhibits for identification).

2. Documents Referenced but Not Marked as Exhibits are Not Part of the Transcript Unless the Parties Agree

[28] The parties also agree that documents that are referenced in a questioning on an affidavit under rule 6.7, but which are not marked as exhibits, do not form part of the transcript and should not be filed with the transcript. However, Sproule suggests that, while the court does not have jurisdiction to compel inclusion of those documents with the transcript, the court could strongly suggest that the documents be included failing which the court may draw an adverse inference.

[29] In my view, documents referenced in a questioning on an affidavit, but not marked as exhibits, do not form part of the transcript unless otherwise agreed by the parties or ordered by the court. I am aware of no legal or evidentiary principle that requires a party putting a record to a witness to invariably mark it as an exhibit even if it has been disclosed in an affidavit of records. There may be instances where it should be marked as an exhibit and would therefore become part of the transcript, however, no such instance was argued on the facts before me.

[30] I do not agree with Sproule that it is the court's role to comb through transcripts for records referenced that are not marked as exhibits and to then threaten to draw an adverse inference if they are not filed. It is up to the parties and their counsel to decide how to create the record for the court, including whether to mark a record as an exhibit. If there are disputes about whether a specific record ought to be marked as an exhibit, the court can resolve those disputes.

[31] Parties should be aware that, if documents referenced in a questioning are not marked as exhibits, it may affect the comprehensibility, usefulness or probative value of the questioning evidence in respect of those records. In a summary judgment application, knowledge of the existence of a record that is not before the court may affect the court's view about whether the record is sufficient to fairly resolve the dispute summarily. And, of course, if the records or their contents are not otherwise put into evidence, the court has discretion to draw an adverse inference as part of the fact-finding process, to be determined with reference to all of the evidence and pursuant to well-established principles: ***Benhaim v St-Germain***, 2016 SCC 48 at para 52; ***Baker v Weyerhaeuser Company Limited***, 2022 ABCA 83 at para 36; ***Chateauvert v Chateauvert***, 2018 ABQB 2 at paras 182, 192-93, 204; ***Howard v Sandau***, 2008 ABQB 34 at paras 39 and 44; ***Stikeman Elliott LLP v 2083878 Alberta Ltd***, 2019 ABCA 274 at paras 87-88 (Slatter JA in dissent); ***Potash Corporation of Saskatchewan Inc v HB Construction Company Ltd***, 2022 NBCA 39 at para 302; ***R v AM***, 2022 ONCA 154 at para 34; ***Singh v Reddy***, 2019 BCCA 79 at paras 1,9, 10.

[32] Parties are encouraged to reach agreement as to whether records disclosed in an affidavit of records and put to a witness in questioning become part of the questioning transcript even if not marked as an exhibit. This is a common practice as a matter of expediency and efficiency, which will often be consistent with rule 1.2. Any such agreements should be put on the record to avoid misunderstandings or disputes and should expressly reference the parties' agreement that those records are to be treated as exhibits to, or otherwise part of, the transcript. In those circumstances,

those referenced records should be filed with the transcript unless the parties otherwise agree that they are not necessary.

3. Undertaking Responses are Part of the Transcript, but Documents Produced with the Undertaking Responses Are Part of the Transcript Only if an Integral Part of the Substantive Answer

[33] The parties disagree as to whether responses to undertakings given in a questioning on an affidavit under rule 6.7 are part of, or should be filed with, the transcript. Neither party produced any jurisprudence on this issue.

[34] Undertakings are only specifically contemplated in the context of questioning for discovery under Part 5 of the *Rules*. Those rules may provide some guidance on how to approach the issue under rule 6.7.

[35] Rule 5.30 provides:

> Undertakings
>
> 5.30(1) If, during questioning, a person answering questions
>
> (a) does not know the answer to a question but would have known the answer if the person had reasonably prepared for questioning, or if as a corporate representative the person had reasonably informed himself or herself, or
>
> (b) has under the person's control a relevant and material record that is not privileged,
>
> the person must undertake to inform himself or herself and provide an answer, or produce the record, within a reasonable time.
>
> (2) After the undertaking has been discharged, the person who gave the undertaking may be questioned on the answer given or record provided.

[36] Rule 5.30 is an extension of the discovery process: ***Alderson v Wawanesa Life Insurance Company***, 2020 ABCA 243 at para 16.

[37] Rule 5.31 provides that, in certain circumstances, a party may use (or read-in) the evidence of the other party in a transcript of questioning under rules 5.17 or 5.18. Part 5 of the *Rules* does not specifically address whether undertaking answers form part of the transcript of questioning. There is an issue whether undertaking answers must be questioned upon under rule 5.30(2) (and presumably marked as an exhibit to the questioning) in order for them to become part of the Part 5 questioning transcript. In ***Signalta Resources Limited v Canadian Natural Resources Limited***, 2021 ABQB 867, at para 20, Justice Sidnell noted that undertakings "are part of the questioning which is given under oath" and that "allowing read-ins from testimony or responses to undertakings at trial contributes to trial efficiency and at the same time maintains the reliable evidence safeguard by requiring such evidence to be given under oath".

[38] I agree with Justice Sidnell that undertaking requests are part of the questioning. In my view, the answers are also part of the questioning which are responded to later but nonetheless still subject to the oath. While rule 5.30(2) provides a mechanism to allow questioning on the undertaking answers (which could allow them to be marked as an exhibit), in my view it is not *necessary* to do that in order to have the undertaking answers form part of the transcript so they may be read-in at trial. Undertaking answers are part of the transcript of questioning under Part 5 of the *Rules* whether or not they are questioned upon because they form the belated answers to the questions that the witness was not able to answer at the time. In my view, while rule 5.30(2) is an important mechanism to explore, test, challenge or clarify the undertaking answers, it would be inefficient and impractical to require the questioning party to have the witness reattend for questioning in every case so that the answers could be marked as an exhibit.

[39] As noted, there is no provision like rule 5.30 in Part 6 of the *Rules*. It is well-established that undertaking requests may be appropriate in limited circumstances in a questioning on an affidavit, including where the deponent relied on documents or information in making the affidavit, or where the undertakings relate to an important issue in the application and it would not be too onerous to respond: ***Kostic v Scott Venturo Rudakoff***, 2022 ABQB 188 at paras 24 and 25(h); ***Edmonton v Gosine***, 2020 ABQB 546 at para 17; ***Rieger v Plains Midstream Canada ULC***, 2019 ABQB 666 at para 7; ***Dow Chemical Canada Inc v Shell Chemicals Canada Ltd***, 2008 ABQB 671 at para 5. Of course, it is also always open to a party to agree to provide requested undertakings (for example, to streamline the litigation process).

[40] In my view, even if rule 5.30 does not technically apply to questioning under Part 6 of the *Rules*, it applies by analogy pursuant to rule 1.7(2), as modified by the jurisprudence noted above that restricts its use in questioning on an affidavit. Further, I see no principled basis to differentiate between Part 5 questioning or Part 6 questioning when determining what forms part of the transcript.

[41] Accordingly, I find that, unless otherwise agreed or ordered by the court, undertaking answers form part of the transcript to a questioning on an affidavit pursuant to rule 6.7 and should be filed with the transcript. Records produced as part of the undertaking answers should be filed as part of the transcript where they form an integral part of a substantive factual answer to the question asked, but do not need to be filed where they are only produced in response to an undertaking request to produce records. This latter exclusion avoids filing of potentially large bundles of records produced in response to a procedural undertaking request to *do something*, namely producing documents, as opposed to a substantive undertaking request to answer a factual question. If the questioning party wishes to have such procedurally produced records part of the evidentiary record, they should conduct a follow-up questioning on the undertaking answers and associated records.

[42] Concern has been expressed about the practice that undertaking answers are often produced with the assistance of third parties, or counsel, and that parties may use the undertaking answer as a trojan horse to include additional information or to couch the answer in strategically crafted language. Those concerns can be addressed by applying to have the superfluous, inappropriate or non-responsive undertaking answer struck from the record, by arguing that the non-responsive or irrelevant portions of the answer should be given little or no weight, or by questioning on them.

Parties are encouraged to discuss and reach agreement on the contents of the transcript to be filed pursuant to rule 6.7 wherever possible.

[43] In this case, McDonald's counsel provided me a letter dated July 30, 2019 which included the portions of the undertaking answers and associated records on which McDonald relies. At my request, the full undertakings and produced records were provided to me pending my decision on whether they needed to be filed. Sproule's counsel is directed to file McDonald's undertaking responses as part of the McDonald transcript. With respect to the records produced as part of the undertaking answers, only the records associated with Undertakings #4 and #8 are integral to the answer to a substantive factual question that was asked and should be included with the filed transcript.

[44] In this application, I have only considered the undertaking answers (all of them) and the records provided in respect of undertakings #4 and #8.

IV. Issues

[45] The issues in the Application are:

(a) Is there no defence to McDonald's wrongful dismissal claim and no genuine issue requiring a trial in respect of that claim? In particular:

(i) Has McDonald met his threshold burden to show no defence and no genuine issue for trial?

(ii) Has Sproule met its burden to establish to establish a genuine issue for trial?

(iii) Is it possible to summarily resolve McDonald's claim and, if so, is the court prepared to exercise its judicial discretion to do so?

(b) If necessary, is it possible or appropriate to summarily determine damages?

(c) What is an appropriate order in this case?

V. Analysis

[46] Rules 7.3(1)(a) and 7.3(1)(c) together provide that a plaintiff may apply for summary judgment in respect of all or part of a claim where there is no defence to a claim or part of it, or where the only real issue is the amount to be awarded.

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

[48] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to

apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: ***Hryniak*** at para 49; ***Weir-Jones*** at para 21.

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

> [47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> (b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[50] The court has a duty to take a "hard look" at the merits of the claim or defence on a summary judgment application: ***Weir-Jones*** at para 44.

A. Is there No Defence to McDonald's Wrongful Dismissal Claim and No Genuine Issue Requiring a Trial in respect of the Claim or Defence?

[51] At common law, an employer has a right to terminate an employment contract without cause, subject to an implied term of the contract which imposes a duty on the employer to provide reasonable notice; if reasonable notice is not provided, the employee is entitled to damages for breach of contract: ***Matthews v Ocean Nutrition Canada Ltd***, 2020 SCC 26 at paras 38 and 43; ***Honda Canada Inc v Keays***, 2008 SCC 39 at para 50 [***Keays***].

[52] McDonald asserts that Sproule breached his employment contract by failing to give him reasonable notice of the termination of his employment and is entitled to damages in lieu of notice.

[53] Sproule's primary defence is that it had just cause to terminate McDonald's employment and it therefore was not obligated to provide him reasonable notice.

1. Has McDonald Discharged his Threshold Burden?

[54] A plaintiff applicant for summary judgment has the initial burden to provide the factual elements of its case (that is, the facts on which it relies), on a balance of probabilities, that there is no defence, and that there is no genuine issue requiring a trial: ***Weir-Jones*** at paras 31-35 and 47(b); ***Giustini v Workman***, 2021 ABCA 65 at paras 22- 24; ***P & C Lawfirm Management Inc v Sabourin***, 2020 ABCA 449 at paras 38-39; ***Hannam*** at paras 145-151.

[55] In the context of a wrongful dismissal claim, the summary judgment analysis must recognize that the allocation of the civil burden is more complicated, with the plaintiff having the burden to show their employment was terminated, the defendant having the burden to establish just cause or lack of mitigation, and the plaintiff having the burden to prove condonation of misconduct by the employer: ***Haack v Secure Energy (Drilling Services) Inc***, 2021 ABQB 82 at para 110; ***Rudichuk v Genesis Land Development Corp***, 2019 ABQB 133 [***Rudichuk QB***] at paras 37-40, affirmed 2020 ABCA 42 [***Rudichuk CA***].

[56] Accordingly, it will usually be sufficient for a wrongful dismissal summary judgment plaintiff-applicant to meet its initial threshold to establish that there is no genuine issue respecting the terms of their employment contract and that they were dismissed without notice or payment in lieu of notice: ***Rudichuk QB***, at paras 37-40. The plaintiff-applicant does not need *disprove* positive defences for which the defendant has the onus of proof, such as a just cause defence or failure to mitigate defence: ***JBuck and Sons Inc v Resource Land Fund V, LP***, 2023 ABKB 308 at paras 7, 8; ***Cicalese v SSMPG Integrating Services Inc***, 2020 ABQB 605 at paras 207-08. The identification of positive defences is one way that a defendant-respondent can meet its burden in resisting summary judgment: ***Weir-Jones*** at para 35.

[57] In my view it is also important that courts do not make the threshold burden and responding burden analysis overly-complicated or formalistic because, as pointed out by the Court of Appeal, the court's key considerations set out at paragraph 47 of ***Weir-Jones*** need not be followed sequentially or in any particular order, and the applicant will always have the ultimate burden to show that a claim or defence has no merit and there are no genuine issues requiring a trial: ***Weir-Jones*** at para 35 and 47.

[58] The McDonald Affidavit established that his employment with Sproule (or its related successor corporations) commenced in December 2003 and that he was terminated in February 2016 without notice and without payment in lieu of notice. Those undisputed facts are sufficient for McDonald to discharge his threshold burden. In any event, the McDonald Affidavit went further: it specifically provided positive evidence denying every Defence just cause allegation.

[59] McDonald met the ***Weir-Jones*** threshold burden and Sproule has the burden to establish a genuine issue requiring a trial.

2. Has Sproule Established that there is a Genuine Issue Requiring a Trial?

[60] To meet its evidentiary burden and resist summary judgment, Sproule must put its best foot forward and demonstrate from the record a positive defence or a genuine issue requiring a trial: ***Weir-Jones*** at paras 32, 35 and 47(c); ***Geophysical Service Incorporated v Plains Midstream Canada ULC***, 2023 ABCA 277 at para 14.

[61] Sproule alleges numerous facts supporting just cause, based on insubordination (and possibly disobedience), insolence, sub-standard performance, incompetence, and inability to perform.

[62] Sproule also asserts that there are genuine issues requiring a trial of its just cause defence because there are conflicts in the evidence and credibility issues.

a. The Legal Framework for Sproule's Just Cause Defence

[63] Terminating an employee for just cause has been referenced as the "capital punishment" of employment of law: ***Ross v IBM Canada Limited***, 2015 ABQB 563 at para 30. The onus is on the employer to prove just cause: ***Haack*** at para 110; ***Whitford v Agrium Inc***, 2006 ABQB 726 ***Whitford*** at para 30.

[64] A finding of misconduct does not, in and of itself, give rise to just cause for termination of employment - the employee's behaviour must be such that gave rise to the breakdown of the employment relationship so that the employment relationship could no longer viably subsist: ***Baker*** at para 28, citing ***McKinley v BC Tel***, 2001 SCC 38 (CanLII), [2001] 2 SCR 161 at paras 29, 48-49. The core question is whether the employee has engaged in sufficiently serious misconduct that is incompatible with the fundamental terms of, that strikes at the heart of, or is a repudiatory breach of, the employment relationship: ***Baker*** at para 28, citing ***Dowling v Ontario (Workplace Safety and Insurance Board)*** (2004), 2004 CanLII 43692 (ON CA), 192 OAC 126; ***Haack*** at para 409; ***Smith v Vauxhall Co-op Petroleum Limited***, 2017 ABQB 525 at para 12 [***Vauxhall***].

[65] The ***McKinley*** framework involves a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct: ***Baker*** at para 28; ***Dowling*** at para 49. It involves consideration of (1) the nature and extent of the misconduct; (2) the surrounding circumstances; and (3) whether dismissal is a proportional response: ***Baker*** at para 28.

[66] At the first step, an employer is entitled to rely on after-discovered wrongdoing: ***Baker*** at para 28; ***Lake Ontario Portland Cement Co v Groner***, 1961 CanLII 1 (SCC), [1961] SCR 553, at 563-64; ***Haack*** at para 414. However, the employer cannot rely on the employee's conduct *after* the termination: ***Baker*** at para 28; ***Haack*** at para 415; ***Underhill v Shell Canada Limited***, 2020 ABQB 341 at para 48; ***Gillespie v 1200333 Alberta Ltd***, 2012 ABQB 105 at para 29.

[67] The second step considers the particular circumstances of the employee (including age, employment history, seniority, role and responsibilities) and the employer (including its type of business, relevant policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee): ***Baker*** at para 28.

[68] The third step, proportionality, is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship, which requires a consideration of the proved conduct, within the employment context, to determine whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship: ***Baker*** at para 28; ***Vauxhall*** at paras 119-20; ***Jegou v Canadian Natural Resources Limited***, 2021 ABQB 401 at para 255;

[69] Given the identity and self-worth individuals frequently derive from their employment, an effective balance must be struck between the severity of an employee's conduct and the sanction imposed: ***McKinley*** at 52-53. Except for the most serious circumstances, an employer should use progressive discipline or alternative sanctions before terminating an employee for misconduct: ***Mack v Universal Dental Laboratories***, 2020 ABQB 738 at para 101; ***Underhill*** at paras 100-01; ***OWL (Orphaned Wildlife) Rehabilitation Society v Day***, 2018 BCSC 1724 at para 144; ***Henson v Champion Feed Services Ltd***, 2005 ABQB 215 at paras 34, 56; ***Cumberland v Maritime College of Forest Technology***, 2023 NBKB 65 at para 69.

[70] As discussed below, in the application of the ***McKinley*** framework over time, certain principles have developed to further guide or refine the contextual analysis in respect of different types of employee misconduct.

i. Incompetence or Inability to Perform

[71] Summary dismissal based on incompetence requires more than employer dissatisfaction with the work, or that the employee was careless or indifferent: ***Bogden v Purolator Courier Ltd***, 1996 CanLII 10572, 182 AR 216 (QB) at para 59; ***Haack*** at para 419.

[72] Where an employer alleges cause for incompetence, the employer must show: (1) the level of job performance that it required and that the level required was communicated to the employee; (2) the employer gave suitable instruction to enable the employee to meet the standard; (3) the employee did not meet or was incapable of meeting the standard, for reasons that were within the employee's control; and (4) there had been a warning to the employee that failure to meet the standard would result in his dismissal: ***Haack*** at paras 418-419; ***Whitford*** at paras 35-37; ***Mitran v Guarantee RV Centre Inc***, 1999 ABQB 276 at para 94.

[73] If specific instances of incompetence are insufficient to justify cause on their own, the employer may allege cumulative cause. In those instances, the employer must prove that: (1) the employee was given express and clear warnings about his performance; (2) the employee was

given a reasonable opportunity to improve their performance after the warning was issued; (3) notwithstanding the foregoing, the employee failed to improve their performance; and (4) the cumulative failings "would prejudice the proper conduct of the employer's business": ***Lowery v Calgary (City of)***, 2002 ABCA 237 at para 3; ***Motta v Davis Wire Industries Ltd***, 2019 ABQB 899 at para 41; ***Rutkowski v Edmonton Transit Mix & Supply Co Ltd***, 2007 ABQB 277 at para 92; ***Whitford*** at para 38.

ii. Insubordination and Insolence

[74] Wilful disobedience, insubordination and insolence are sometimes equated, used-interchangeably, conflated or considered together; the label attached to the category of misconduct informs but does not override the contextual determination which is always based on the ***McKinley*** framework: ***Thomas v Saskatchewan Indian Gaming Authority Inc***, 2021 SKCA 164 at para 25, cited with approval in ***Baker*** at para 29; ***Henry v Foxco***, 2004 NBCA 22 at para 13.

[75] Wilful disobedience has been held to involve the wilful defiance of an employee of lawful, reasonable and clear orders or instructions of a superior, or refusal to carry out well-known and necessary policies or procedures, that effectively repudiates the essential condition of the employment relationship that employees must obey their employer's instructions: ***Motta*** at para 107; ***Karmel v Calgary Jewish Academy***, 2015 ABQB 731 at para 16; ***Wilson v KP Manufacturers (Calgary) Ltd***, 1998 CanLII 18141, 225 AR 205 (QB) at paras 10-11; ***Beaudoin v Agriculture Financial Services Corporation***, 2018 ABQB 627 at para 47.

[76] Insubordination has been described more broadly as any refusal to follow instructions, and any other conduct that constitutes a challenge to persons in authority or their policies: ***Hoffert v Golder Associates Ltd***, 2017 ABQB 341 at paras 91, 117.

[77] The court must assess all relevant circumstances to determine if wilful disobedience or insubordination justifies summary dismissal: ***Motta*** at paras 14-16; ***Hoffert*** at para 90; ***Amos v Alberta***, 1995 CanLII 9287, 166 AR 146 (QB) at paras 42-44.

[78] Insolence towards the employer is treated similarly to insubordination, although it engages slightly different considerations: ***Motta*** at para 54; ***Henry*** at para 34. Insolence has been defined as the use of "insulting, abusive, threatening or unreasonably violent words": ***Partridge v Botony Dental Corporation***, 2015 ONSC 343 at para 32 affirmed 2015 ONCA 836; as "haughty and contemptuous or brutal behaviour or language": ***Mellquist v Lake of the Rivers (Rural Municipality)***, 1987 CanLII 4951, 62 Sask R 165 (QB) at para 21; or as "derisive, contemptuous or abusive language or conduct directed by an employer at his/her employer": ***Bennett v Cunningham,*** 2011 ONSC 28 at para 15. In this case, Sproule pleads that McDonald was belligerent ("inclined to or exhibiting assertiveness, hostility, or combativeness"; "waging war": *Merriam-Webster Dictionary*, online: Merriam-Webster.com https://www.merriam-webster.com/dictionary/belligerent) and bellicose ("favoured or inclined to start quarrels or wars": *Merriam-Webster Dictionary*, online: Merriam-Webster.com https://www.merriam-webster.com/dictionary/bellicose). In my view those allegations involve similar considerations as insolence.

[79] Insolence can justify summary dismissal of an employee if: (1) the employee and superior are no longer capable of maintaining a working relationship; (2) the incident undermined the supervisor's credibility in the workplace and, relatively, their ability to supervise effectively; or (3) that because of the incident, the employer suffered a material financial loss, a loss of reputation or its business interests were seriously prejudiced: ***Motta*** at para 53; ***Henry*** at para 111. Context and proportionality govern, including where strong exchanges have been a tolerable part of the culture of the workplace: ***Motta*** at para 54; ***Dawson v Bridge Brand Food Services Ltd***, 2007 ABQB 15 at para 39.

iii. Employer Condonation

[80] Even if misconduct is proven, an employee may argue that an employer has condoned the employee's conduct and therefore cannot rely on it to terminate for cause. The employee has the onus to prove condonation: ***Haack*** at para 423; ***Vauxhall*** at para 130; ***Cicalese v Saipem Canada Inc***, 2018 ABQB 835 at para 36.

[81] When an employer becomes aware of the misconduct sufficient to justify dismissal, the employer may elect to dismiss the employee or may overlook the fault: ***Foerderer v Nova Chemicals Corporation***, 2007 ABQB 349 at para 124; ***Acumen Law Corporation v Ojanen***, 2019 BCSC 1352 at para 35, affirmed 2021 BCCA 189. If the employer knowingly accepts misconduct, it constitutes condonation and the employer is generally prohibited from relying upon such behavior as grounds for dismissal: ***Mitran*** at para 102, citing ***Hardie v Trans-Canada Resources Ltd*** (1977), 1976 CanLII 1102, 2 AR 289 (CA).

[82] Condonation can be inferred from the circumstances of the case and the omissions or commissions of the employer: ***Cicalese v Saipem*** at para 38; ***Mitran*** at para 102; ***Foerder*** at para 125.

[83] Condonation may result by omission if the employer fails to warn an employee within a reasonable time that the behaviour is unacceptable, or if the employer allows the employee to continue in his or her position for a considerable period of time: ***Cicalese v Saipem*** at para 37; ***Vauxhall*** at para 129; ***Foerder*** at para 125; ***Mitran*** at paras 100, 102; ***Clarke v Syncrude Canada Ltd***, 2013 ABQB 252 at para 46.

[84] Condonation may also result from the employer's positive conduct, for example by giving the employee a promotion, raise or positive performance reviews: ***Bogden*** at para 60; ***Mitran*** at para 102; ***Barnard v Testori***, 2000 PESCTD 43, 194 Nfld & PEIR 119 at para 58; ***Meaney v Agnes Pratt Home***, 1989 CanLII 4847, 74 Nfld & PEIR 18 at para 35; ***Lambe v Irving Oil Ltd***, 2002 CanLII 22789, 219 Nfld & PEIR 183 at para 109.

[85] However, the court is entitled to take the cumulative effect of an employee's record into account when determining whether dismissal is justified: ***Poliquin v Devon Canada Corporation***, 2009 ABCA 216 at para 73. The cumulative impact of a number of instances of unacceptable conduct may justify dismissal, even where some of those earlier instances were condoned, because condonation is subject to an implied condition of future good conduct: ***Mack*** at para 96, citing ***Chambers v Omni Insurance Brokers***, 2002 CanLII 44952 (ONCA), [2002] OJ No 2063 (QL) at para 45; ***Mitran*** at para 103 (and cases cited therein).

b. Evidentiary Principles and Tools in Summary Judgment

[86] The Sproule Affidavits raise numerous facts that dispute McDonald's evidence and, on their face, create credibility issues between McDonald and the Sproule witnesses. Those affidavits provide some detailed and direct factual background of some matters, but they also include numerous undocumented or unsupported bald assertions, conclusory statements, vague references, personal opinions, and hearsay (including hearsay from other Sproule affiants).

[87] The traditional understanding, that a dispute about a material fact disqualifies an action from the summary judgment process, is no longer valid: ***Hannam*** at para 147. Summary judgment is not limited to cases where the facts are not in dispute: ***Hannam*** para 147; ***Weir-Jones*** at para 21. A summary judgment court should not be reluctant to make material fact findings, but before it does so it should ask if it constitutes a genuine issue requiring a trial: ***Hannam*** at paras 148-149. As noted in ***Weir-Jones*** at para 47(a), the court does this by asking: "[h]aving regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?"

[88] In my view, in order to honour the guiding principles set out by the Supreme Court of Canada and Alberta Court of Appeal, including supporting the public policy of improved access to justice, summary judgment courts must distill the record to remove, disregard or give little weight to inadmissible, inappropriate or unhelpful evidence to get to the core of the matter and determine whether there are any "genuine" issues requiring a trial (as opposed to a party's views, positions, arguments, allegations, speculation, conjecture, interpretation, opinions, beliefs, hopes or desires). As stated by the Ontario Court of Appeal in ***Kawartha-Haliburton Children's Aid Society v MW***, 2019 ONCA 316 at para 80, courts "must conduct a careful screening of the evidence to eliminate inadmissible evidence. The court should not give weight to evidence on a summary judgment motion that would be inadmissible at trial."

[89] If, after screening, there remains a dispute on material facts, or one depending on issues of credibility, it is a marker that there may be genuine issues regarding a trial: ***Hannam*** at para 149; ***Weir-Jones*** at paras 35 and 38.

[90] It is helpful to summarize some of these screening principles, together with other evidentiary principles that guide courts in assessing a summary judgment application.

[91] First, with respect to applicant affidavits, they should generally be based on personal knowledge: rule 13.18(3): ***Magnuson Estate***, 2023 ABKB 305 at paras 35-38; ***Consolidated Civil Enforcement Inc v Shipalesky***, 2022 ABKB 718 at para 30; ***Moore v Wetaskawin Friends and Horizons Training***, 2022 ABKB 617 at para 34; ***Van Grinsven v Kortbeek***, 2022 ABQB 138 at para 32; ***Malkhassian Estate v Scotia Life Insurance Company***, 2020 ABQB 173 at para 40; ***From Estate***, 2019 ABQB 988 at para 103; ***Clark Builders and Stantec Consulting Ltd v GO Community Centre***, 2019 ABQB 706 at para 40; ***DD v Calgary Counselling Centre***, 2017 ABQB 95 at para 44; ***Attila Dogan Construction v AMEC Americas Limited***, 2015 ABQB 120 at para 52 affirmed 2015 ABCA 406.

[92] However, there is some flexibility in the application of rule 13.18(3) in the context of summary judgment applications – sometimes evidence not based on personal knowledge can be

admitted. For example, courts may be more flexible where the applicant is a corporation or estate, where there are no people left with personal knowledge, or where the evidence would be admissible at trial as an exception to hearsay: ***Magnuson Estate*** at para 38; ***Moore*** at paras 35 and 38-40; ***Spady v Spady Estate***, 2022 ABQB 591 at para 56; ***Barry v Industrial Alliance Insurance and Financial Services Inc (IAF)***, 2022 ABQB 265 at para 53; ***Pure Environmental Waste Management Ltd v Lonquist Field Service (Canada), ULC***, 2022 ABQB 30 at para 47; ***Saito v Lester Estate***, 2021 ABCA 179 at paras 11-12; ***County of Vulcan v Genesis Reciprocal Insurance Exchange***, 2020 ABQB 93 at paras 70-71; ***Goodswimmer v Canada (Attorney General)***, 2017 ABCA 365, leave to appeal ref'd [2018] SCCA No 1 at para 33; ***Klein v Wolbeck***, 2016 ABQB 28 at para 15; ***Attila Dogan*** at paras 64-75; ***Murphy v Cahill***, 2012 ABQB 793 at paras 26-30.

[93] Second, with respect to respondent affidavits, they may include hearsay evidence based on information and belief, provided the source of the information is disclosed: rules 13.18(1)(b) and 13.18(2); ***Magnuson Estate*** at para 42; ***Van Grinsven*** at para 32; ***Malkhassian Estate*** at para 40; ***From Estate*** at para 103; ***DD*** at para 43; ***Clark Builders*** at para 40; ***Murphy v Cahill*** at para 26.

[94] However, admission of the evidence is not necessarily enough - just because hearsay can be included in respondent affidavits does not mean it will or should be accepted by the court or given weight: ***Malkhassian Estate*** at para 41; ***McDonald v Brookfield Asset Management Inc***, 2016 ABCA 375 at para 18, leave to appeal to SCC refused 37438 (1 June 2017) [***Brookfield***]; ***ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)***, 2019 ABQB 653 at paras 21 and 58; ***Murphy Oil Company Ltd v Predator Corporation Ltd***, 2006 ABCA 69 at paras 38-40. For example, respondent hearsay evidence may not be accepted or given weight in respect of the substantive issues to be decided on the summary judgment application, unless the hearsay evidence can be brought within an exception to the hearsay rule such that it would be admissible at trial: ***Magnuson Estate*** at para 39; ***Moore*** at para 37; ***Barry*** at paras 57-59; ***County of Vulcan*** at paras 76-77; ***ANC Timber*** at para 58. Hearsay may also possibly be admissible if the respondent can "justify some expansion of the rules governing admissibility" in the context of the summary judgment application, for example, if the opposing party had a fair chance to challenge the hearsay evidence: ***JBuck*** at paras 47-50 (relying on ***Drummond v Cadillac Fairview***, 2019 ONCA 447 at para 24).

[95] Third, hearsay evidence in questioning on affidavits is presumptively inadmissible: ***Fitzpatrick v The College of Physical Therapists of Alberta***, 2020 ABCA 164 at para 22; ***ANC Timber***, at para 60; ***Mitchell v Pytel***, 2021 ABQB 403 at para 23.

[96] Fourth, bald, conclusory, argumentative or self-serving statements, personal opinion, allegations, speculation, conjecture or assertions made in affidavits or questioning transcripts, in the absence of detailed facts and supporting evidence, should be given little or no weight and cannot establish a genuine issue requiring a trial: ***Fitzpatrick*** at para 23; ***Wetaskiwin Animal Clinic Ltd v Hartley***, 2021 ABQB 144 at para 41; ***Murray v Ford Motor Company of Canada***, 2020 ABQB 729 at para 103; ***Rudichuk QB*** at paras 16-17 and 21; ***Clark Builders*** at para 157; ***County of Vulcan*** at para 81; ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 46; ***ANC Timber*** at paras 32 and 98; ***Goodswimmer*** at paras 38-45; ***Malhotra v 1743134 Alberta Ltd***, 2017 ABQB 34 at para 32; ***Shefsky v California Gold Mining Inc***, 2016 ABCA 103 at para 113; ***Brookfield*** at para 18; ***Rau v Edmonton (City)***, 2015 ABCA 5 at para 19; ***R Floden Services Ltd v Solomon***, 2015 ABQB 450 at para 23; ***Guarantee Co of North America v Gordon Capital Corp***, 1999

CanLII 664 (SCC), [1999] 3 SCR 423 at para 31; ***Attila Dogan*** at para 52; ***Minex Minerals Ltd v Walker***, 2019 ABQB 460 at para 148; ***Pyrrha Design Inc v Plum and Posey Inc***, 2016 ABCA 12 at para 22; ***Kudzin v APM Construction Services Inc***, 2023 ABKB 425 at para 121; ***Spady*** at para 57.

[97] Fifth, the court will assume that each party has put their best foot forward and presented all the relevant evidence for the application: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para 19 [***Lameman***]; ***Weir-Jones*** at para 37; ***Bilg v Unifund Assurance Company***, 2015 ABQB 779 at paras 29, 59; ***Milavsky v Milavsky***, 2011 ABCA 231 at para 16; ***Beier v Proper Cat Construction Ltd***, 2013 ABQB 351 at paras 67, 70; ***Mraiche Investment Corporation v McLennan Ross LLP***, 2012 ABCA 95 at para 5; ***Grivicic v Alberta Health Services (Tom Baker Cancer Centre)***, 2015 ABQB 811 at para 12; ***Axcess Mortgage Fund Ltd v 1177620 Alberta Ltd***, 2018 ABQB 626 at paras 42, 43; ***Van Grinsven*** at paras 60, 108; ***Amik Oilfield Equipment & Rentals Ltd v Beaumont Energy Inc***, 2018 ABCA 88 at para 8; ***Pyrrha Design*** at paras 23, 26; ***Merritt v Tigercat Industries***, 2016 ONSC 1214 at para 28; ***Tagg Industries v Rieder***, 2018 ONSC 5727 at para 11.

[98] Thus, while a party is not required to question on affidavits, and while the court is not bound to accept evidence that has not been the subject of cross-examination, a party's failing to question on admissible evidence runs the risk that the evidence will effectively be unchallenged or uncontradicted for the purposes of the application, which may detract from the strength of the other party's case: ***Spady*** at para 67; ***R v Hobbs***, 2020 ABCA 156 at para 25; ***1216808 Alberta Ltd (Prairie Bailiff Services) v Devtex Ltd***, 2014 ABCA 386 at para 33; ***Sticks and Stones Communications Inc v Hole's Greenhouses & Gardens Ltd***, 2015 ABQB 774 at paras 58-61; ***CWB Maxium Financial Inc v 2026998 Alberta Ltd***, 2021 ABQB 137 at paras 73-77; ***Drummond***, at para 24.

[99] Similarly, a respondent to a summary judgment application chooses what evidence it wishes to adduce and is not obligated to file a response affidavit or to address every point of evidence of the applicant: ***Weir-Jones*** at para 35; ***Kudzin*** at para 174. However, a respondent that fails to respond to or address admissible evidence in their responding evidence runs the risk that the court will infer that the responding party does not have contradictory evidence and the applicant evidence will be accepted as unchallenged or uncontradicted.

[100] Sixth, even if there remain conflicts in the evidence after these principles are applied, this does not necessarily end the inquiry. Courts have tools to assist their assessment of whether conflicting evidence raises a genuine issue requiring trial. For example, courts may, in appropriate cases:

(a) find that the conflict is not really factual but rather a conflict of the litigants' opinions or positions: ***Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta***, 2015 ABCA 101 at para 81, leave denied, 2015 CanLII 52181 (SCC);

(b) draw inferences based on admitted facts, undisputed evidence, the conduct of the parties, and corroborating evidence (such as documents with objective reliability): ***Goodswimmer*** at para 39; ***Weir-Jones*** at paras 21, 38 and 63; ***Rudichuk QB*** at para 31; ***Malhotra*** at para 31; ***Guarantee Co*** at para 30; ***Lameman*** at para 11. Inferences

must be reasonable, and they must be based on proven facts, and in considering whether to draw the invited inference the trier of fact must also consider other reasonable or plausible theories "based on logic and experience", not speculation: ***Lameman*** at para 11; ***Guarantee Co*** at para 30; ***Haack*** at para 112; ***R v Villaroman***, 2016 SCC 33 at para 23; ***Axcess Mortgage*** at paras 173, 188; ***Sticks and Stones*** at para 32;

(c) resolve issues based on the portions of the affidavits that are not in dispute, where appropriate, including because the conflicting evidence is not on an essential element of the claim or defence or not material to the outcome: ***Sandhu*** at para 81; ***Minex*** at para 147; ***Seymour Resources Ltd v Hofer***, 2004 ABQB 303 at para 20; ***Lydian Properties Inc v Chambers***, 2009 ABCA 21 at para 22-23; ***Malhotra*** at para 31;

(d) balance the weight and perceived reliability of evidence because it is inconsistent with the balance of the record or the litigation history: ***Goodswimmer*** at para 40; ***Shefsky*** at para 113; ***Dagher v Glenn***, 2016 ABCA 38 at paras 30-32; and

(e) assume as true the relevant facts asserted by the party opposing summary judgment and determine whether the law permits judgment on those facts, including because those assumed facts do not support that party's claim or defence: ***Weir-Jones*** at para 38; ***Arndt v Banerji***, 2018 ABCA 176 at para 36(b); ***Goodswimmer*** at para 40; ***Sherwood Steel v Odyssey Construction***, 2014 ABCA 320 at para 8; ***776826 Alberta Ltd v Ostrowercha***, 2015 ABCA 49 at para 10; ***Third Eye Capital Corporation v Tobber***, 2022 ABQB 536 at para 5; ***O'Mhaoinigh v United Safety International Ltd***, 2020 ABQB 672 at para 14; ***Lydian Properties*** at paras 2, 22-23.

[101] In the context of wrongful dismissal cases, courts[1] have used these evidentiary principles and tools in the context of the ***McKinley*** framework and have granted wrongful dismissal plaintiff-applicants summary judgment, even in the face of just cause defences, where:

(a) the employer did not provide evidence of particulars of the alleged just cause: ***Kubersky v Pomeroy (Pomeroy Group)***, 2021 ABQB 173 (Master) (***Kubersky-Master***) at para 43 affirmed in ***Kubersky v Pomeroy Hospitality Ltd***, 2021 CarswellAlta 3387 (***Kubersky-Justice***) at paras 21-22); ***Hinke v Thermal Energy***, 2011 ONSC 5345 13-22; ***Merritt*** at para 26;

(b) if the employer's alleged conduct is accurate or assumed as accurate, the employer failed to provide or document a required warning or condoned the conduct: ***Bomford v Wayden Transportation Systems Inc***, 2010 BCSC 1506 at paras 6-7; ***Duxbury v Crook***, 2018 SKQB 353 at para 26 affirmed 2020 SKCA 43 at para 6; ***Seykora v Rural Municipality of Lake Lenore #399***, 2019 SKQB 225 at para 9; ***Jasnoch v Provincial Plating Ltd***, 2000 SKQB 44 at para 18; ***Grant v Electra Sign***

[1] Some of these cases involve jurisdictions where courts have additional specific evidentiary powers in summary judgment applications that are not specifically present in the Alberta *Rules*, however, in many of the cases I have noted the courts did not rely on those specific powers.

Ltd, 2016 MBQB 131 at paras 45-47, affirmed 2018 MBCA 5; ***Volpé v Province of NB***, 2017 NBQB 109 at paras 41-42; 59; ***Tagg Industries*** at para 27; and

(c) if the employer's alleged conduct is accurate or assumed to be accurate, it is not conduct that would support summary dismissal of the employee: ***Carr v Fama Holdings Ltd***, 1989 CanLII 240, 63 DLR (4th) 25 (BCCA) at 8-9; ***Caudle v Louisville***, 1999 SKQB 276 at paras 19-21; ***Grant v Electra*** at para 48; ***Sinnathamby v The Chesterfield Shop Limited,*** 2016 ONSC 6966 at paras 112-13; ***Tagg*** at para 29; ***Cuconato v Parker Auto Care Ltd***, 2018 ONSC 2803 at paras 23, 25 ;***Volpé*** at para 65 ***Johar v Best Buy Canada***, 2016 ONSC 5287 at para 24.

[102] I now turn to the record in this case.

c. The Evidentiary Record for Sproule's Just Cause Defence

[103] I have screened the affidavit evidence and Transcript pursuant to the principles noted above, to disregard inadmissible or inappropriate evidence. Even after doing so, credibility issues and significant evidentiary conflicts remain on numerous matters, including McDonald's alleged conduct and performance.

[104] In these circumstances, to determine whether there is a genuine issue requiring trial, I must disregard McDonald's evidence where there are disputed material facts and assume Sproule's evidence is correct. Further, given the credibility issues, and given that McDonald did not question on the Sproule Affidavits, I disregard McDonald's evidence on any contentious material facts even where Sproule's witnesses did not specifically address them. Effectively, to determine whether there is a genuine issue requiring trial, I must assume Sproule's best case and only consider Sproule's admissions in the Defence, agreed facts, McDonald's unchallenged evidence on non-contentious matters, McDonald's admissions against his interest from his questioning, and Sproule's evidence on disputed material facts.

[105] A summary of such admissions and evidence is set out below (recognizing that McDonald disputes much of the following):

(a) in the early 1980s, McDonald obtained his commerce degree and became a chartered accountant. He worked with accounting firms until he joined Sproule as its Controller in December 2003. In 2010, his title changed to Chief Financial Officer (**CFO**). There is no evidence that Sproule had any written job descriptions for McDonald's roles. There is no evidence of any issues with McDonald's conduct or performance prior to 2014;

(b) in September 2014, a Sproule employee complained to Sproule's President, Helwerda, alleging harassment and bullying by one of McDonald's direct reports (**Paulson**). Sproule retained Cade to conduct an initial investigation of all HR/Administration Staff. Cade confirmed Paulson's serious bullying to Helwerda, Carsted and Van De Veen. She did not interview McDonald but reported that staff noted McDonald did not address the reported bullying and was defensive, dismissive, and controlling;

(c) McDonald was not involved in the investigation. Helwerda, Carsted and Van de Veen met with McDonald to discuss Cade's report (**October 2014 Meeting**). McDonald denied being approached about the bullying. McDonald became angry, disagreed with and would not discuss Cade's findings, was against terminating Paulson for cause, expressed unwillingness to support Cade's recommendations, called Helwerda, Carsted and Van de Veen "stupid", said that they did not understand how women interacted, that he had more experience with respect to these issues, and proposed that he should conduct an interview of all of the staff in order to come up with a solution to the problem complained of;

(d) Sproule decided that McDonald should also be terminated based on his conduct at the October 2014 Meeting, but he was not because the next day he apologized for his behaviour and confirmed his support for terminating Paulson. McDonald was advised at the time he was being given a second chance with the hope his behaviour would change. McDonald undertook to change his behaviour going forward. Paulson was terminated for cause on October 31, 2014. McDonald's father died within two weeks of Paulson's termination;

(e) in 2014, McDonald was asked to prepare financial statements for Sproule's subsidiaries (**Financial Statement Request**), which he had not satisfactorily completed by June 2015. There is no direct or detailed evidence that Sproule specifically raised this issue with McDonald or warned him about it;

(f) in a November 2014 with the Board and its audit committee to discuss Sproule's share structure, McDonald was very dismissive of the Board and audit committee's ability to understand some complicated calculations. There is no direct or detailed evidence that Sproule specifically raised this issue with McDonald or warned him about it;

(g) McDonald was not the lead on some business modelling and share valuation modelling work Sproule conducted from mid April 2014 to April 2015, as part of Sproule's efforts to grow its international consulting business. Gunnewiek, as Chair of the Board, was of the view that this illustrated McDonald's inability to perform at the CFO level, but there is no direct or detailed evidence that Sproule specifically raised this issue with McDonald or warned him about it (other than possibly at his June 2015 performance review (**Performance Review**));

(h) in 2015, the executive group was concerned about McDonald's attitude and behaviour because some of them had been informed that McDonald had continued to express, to Sproule staff including insubordinates, his disagreement with the decision to terminate Paulson. At least partly because of McDonald's conduct, in May 2015 Sproule retained Cade to survey staff and conduct group staff training (**May 2015 Training**). McDonald was reluctant to participate but did so at Helwerda's insistence, but in Cade's view he was closed, dismissive, sarcastic, displayed apparent defiance, and left her the impression he was not willing to lead as an executive. She reported to Sproule management that McDonald had an attitude challenge;

(i) in June 2015, Helwerda conducted McDonald's annual Performance Review. Helwerda rated McDonald's overall job performance as "above average", but also provided specific feedback: (1) he would like McDonald to be more engaged in meetings/seminars so that he does not portray himself as being disinterested, non-supportive and not a team player; (2) McDonald did not command the respect of his peers; (3) as a member of the executive, he needed to be unified on all executive decisions (with specific reference to the Paulson termination); (4) McDonald's sarcastic remarks to direct reports are not well received; and (5) McDonald needs "to be of [sic] a CFO rather than a lead accountant"; McDonald "does the basics and I need him to be more innovative". McDonald disagreed with all the comments and refused to sign the performance appraisal. There is no evidence that McDonald was given a warning that if any of the feedback items from the Performance Review were not addressed, or that if he did not sign the Performance Review, McDonald's employment was at risk of termination;

(j) in October 2015, Gunnewiek asked McDonald to prepare a summary of Sproule's insurance coverage and to conduct a gap analysis (**Insurance Request**). When Gunnewiek followed up in January 2016, McDonald responded that the insurance was adequate and that McDonald was too busy to provide a summary. There is no direct or detailed evidence that Sproule raised this issue with McDonald or warned him about it;

(k) at a Board meeting (**October 2015 Board Meeting**): (1) in response to a question about a project deliverable that was outstanding, McDonald stated that Gunnewiek was deliberately trying to embarrass McDonald; (2) McDonald was unable to answer several questions that required follow up and became defensive; and (3) when presenting the 2015 audited financial statements, McDonald highlighted the increased expense of the independent directors (including Gunnewiek) but did not provide a report (**KPMG Review**) that praised the Board and management;

(l) at a Board meeting (likely the October 2015 Board Meeting), in response to questions, McDonald told Gunnewiek or the Board something along the lines of "you mind your business and I will mind my business". Also at a Board meeting, McDonald stated "I don't want to be here" with his arms crossed and an unhappy demeanour. There is no direct or specific evidence Sproule raised these specific comments or behaviour or warned McDonald about them. There is no evidence that McDonald ever failed to attend a Board meeting he was required to attend;

(m) at the November 2015 annual general meeting (**AGM**) of Sproule's employee shareholders, McDonald presented the audited financial statements, but failed to present or circulate the KPMG Review. However, there is no direct or specific evidence that he was asked or authorized to provide the KPMG Review to shareholders. There is no specific evidence Sproule raised this issue with McDonald or warned him about it;

(n) in addition to the Financial Statement Request and the Insurance Request, Gunnewiek provided evidence of his concerns over McDonald's inability or refusal

to prepare, provide or explain financial reporting information, including financial forecasting, business modelling, Class D share reporting, shareholder capital calculation, share structure, and his inability to explain financial matters at Board meetings. There is also evidence of concerns about McDonald's failure to implement, update or use appropriate financial systems, including in relation to online banking, cheque deposits and cash management. Gunnewiek's conclusion was that McDonald was set in his ways, was resistant to change, and lacked operational transparency such that Gunnewiek considered McDonald to be a high risk to Sproule's sustainable operations. Other than as might be included in the Performance Review feedback, there is no specific evidence Gunnewiek or Sproule specifically raised these performance issues and concerns with McDonald or warned him about them;

(o) Gunnewiek spoke to McDonald about the necessity of ensuring that the accounting department would continue to function if something were to happen to McDonald (**Succession Protocol**). McDonald was encouraged and directed to create a Succession Protocol, but it was not prepared by the date of his termination. There is no evidence as to when this request was made, when it was requested to be completed, or of any warning of the consequences if it was not completed;

(p) at the November 2015 AGM, Sproule announced a corporate reorganization (**Reorganization**). Prior to the AGM, Helwerda explained the new structure to McDonald and the reasons for it, including Helwerda's concerns that McDonald was not performing the role of CFO. Helwerda explained that McDonald's title was changing to Controller and he would now be reporting to Van de Veen as Senior Vice President of Corporate Services and Legal. McDonald was disappointed and refused to acknowledge the criticism, asserted he was performing his role, and that the change of title was constructive dismissal.[2] McDonald refused to accept Van De Veen as his direct supervisor and was not prepared to change. McDonald was advised that he was required to acknowledge the new structure and report accordingly;

(q) Sproule had a bonus policy. Bonuses were at the discretion of Sproule's executive and according to Sproule's financial position. The policy described that the bonus "will reflect the Executive's assessment of each individual during the past fiscal year" in the areas of "contribution, management, marketing and attitude." The bonuses were determined by the Board after the audit following the end of the fiscal year and McDonald would receive a list of the bonuses. Therefore, sometime in fall 2015, the Board approved a FY2015 bonus for McDonald of $93,570 (38% of his salary). McDonald's questioning evidence was that this was likely determined in December 2015, but Sproule's witnesses provided no evidence of the precise date the bonus was declared or announced. The FY2015 bonus was less than his bonuses for FY2013 ($197,681.64) and FY2014 ($253,055.07). There is no evidence that

[2] McDonald's Statement of Claim does not plead or allege that he was constructively dismissed.

McDonald was provided any reasons for why he was given a FY2015 bonus or why it had decreased from previous years;

(r) on December 8, 2015, Van de Veen met with McDonald (**December 2015 Meeting**) to discuss his role and their interaction moving forward. McDonald advised Van de Veen that Van de Veen's involvement would not be welcome, and that McDonald had been successfully managing his team for many years. McDonald also advised that Helwerda had told McDonald that Van de Veen's position was just a box that needed to be filled to validate the new structure. McDonald's view was that his continued employment was predicated on his own version of how the new structure would work and his reporting relationship remaining the same. Van de Veen advised McDonald that "it would be good to rethink his attitude going forward" (**December Advice**);

(s) following the December 2015 Meeting, McDonald stayed on as Controller. There is no evidence as to whether or how McDonald's roles and responsibilities changed with the title change. Sproule admits in its Defence that, at McDonald's insistence, as Controller, McDonald continued to meet with Helwerda on a weekly basis to provide him with an update on any significant accounting matters. After the December 2015 Meeting, there is no specific evidence of McDonald failing to meet with or report to Van de Veen, or of Sproule specifically raising, or warning McDonald about, a failure to recognize the Reorganization;

(t) in 2015, without obtaining advance authorization, and unbeknownst to management and the Board, McDonald engaged KPMG to work on a Sproule shareholder tax savings project (**Tax Savings Project**) and incurred $50,000 without Board approval. The Tax Savings Project was presented at the December Board 2015 meeting and McDonald endorsed its recommendations. The Board did not approve the recommendations. There is no evidence of McDonald's spending authority or whether the Tax Savings Project fell outside the scope of his duties. There is no direct or specific evidence of Sproule specifically raising, or warning McDonald about, his conduct with respect to the Tax Savings Project;

(u) in addition to the specifics noted above, there is generalized evidence that McDonald's behaviour in Board meetings starting in about October 2015 became increasingly belligerent, combative, disrespectful, indifferent, despondent, disconnected, disruptive, critical of management, and non-responsive, and was deteriorating over the fall 2015. Van de Veen was told and believed that both Helwerda and Gunnewiek were going to speak to McDonald about his conduct at Board meetings, but neither of them provided any specific evidence of doing so until Helwerda met with McDonald in January 2016 (described below). There is no evidence that Sproule specifically raised, or warned McDonald about, his conduct at Board meetings between the time of the Performance Review and Sproule's January 2016 board meeting (**January 2016 Board Meeting**)

(v) at the January 19, 2016, Board Meeting, McDonald acted with "intransigent and insubordinate behaviour through his mood and body language". No other specifics

were provided about McDonald's behaviour at that meeting, but McDonald did not deny that he crossed his arms, scowled and was negative at that meeting, or that he was followed up with after the meeting;

(w) Helwerda followed up with McDonald on January 20, 2016 (**January 20 Meeting**) to find out why McDonald behaved the way he did and to suggest that his behaviour would not be accepted. McDonald told Helwerda that McDonald did not want to attend Board meetings and he feared being embarrassed by Gunnewiek;

(x) at the January 20 Meeting, Helwerda stated the following (**January Advice**):

> I also informed Mr. McDonald .... that I could possibly be stepping down from the President's role sooner than he may have anticipated (although no formal announcement had been made) and that the current Chairman of the Board, [Gunnewiek], could possibly become the next President and CEO. I advised McDonald that in his own best interest it was important for him to change his attitude and his insubordinate behaviour and begin acting in a more professional manner especially in his interactions with [Gunnewiek]...

(y) there is no evidence of McDonald's conduct between the January 20 Meeting and his February termination about three weeks later. For example, there is no evidence as to whether he ever attended another Board meeting or had any further dealings with Board members;

(z) on February 10, 2016, the Board unanimously agreed to terminate McDonald. The Board considered whether to terminate McDonald for cause and, for a variety of reasons, decided to terminate him for cause;

(aa) on February 11, 2016, McDonald was terminated. He met with Gunnewiek, Helwerda, Carsted and Sproule's Chief Operating Officer. He was either requested or provided the opportunity to resign and was presented paperwork for his resignation. He did not resign and was terminated for cause. There is no evidence that the reasons for his termination were explained at the meeting, or in the termination letter he was later provided on February 16, 2016;

(bb) after the termination meeting, the Sproule executives left and McGrath met with McDonald. McDonald made inappropriate and threatening comments toward Sproule and Helwerda in particular, which caused Sproule to contact the police. McDonald spoke to other Sproule directors or employees as he was leaving or on the street after he left, and told them about a study he had made about the lack of net financial contribution of Sproule's executives; and

(cc) after McDonald's termination, Sproule reviewed its accounting practices to make the accounting group more efficient and identified and immediately implemented improvements. Sproule also retained an independent consultant to review Sproule's

> financial records including its share structure and share payments to ensure all monies were properly accounted for and to support Sproule's new VP Finance in understanding Sproule's complicated financial structure and accounting processes.

[106] I now turn to apply the ***McKinley*** proportionality framework using these facts to see if Sproule's just cause defence raises any genuine issues for trial.

d. In Light of the Record, Does Sproule's Just Cause Defence Raise Genuine Issues Requiring a Trial?

i. The Nature and Extent of the Misconduct

[107] The undisputed and assumed record illustrates two broad problems with McDonald's conduct: first, deteriorating performance and incompetence and, second, an attitude problem.

[108] With respect to his performance and competence, there were concerns about whether he was able or willing to perform the CFO role. Although he did not have a written job description to compare his performance to, these concerns were sufficiently present to warrant mention in his Performance Review and, based on Sproule's evidence, the performance concerns grew over the latter half of 2015. At the same time, McDonald continued to attend Board meetings and make his presentations. Further, by at least May 2015 concerns existed over his ability to be a senior executive, leader, and manager, and this was specifically raised in his Performance Review. Taken alone, and accepting Sproule's evidence, McDonald's deteriorating performance and competence was becoming increasingly serious. The undisputed and assumed record is sufficient for me to find that McDonald objectively displayed poor performance and some incompetence in his role as CFO.

[109] An issue with McDonald's attitude first appears in the record in October 2014 with his reaction to being told about Cade's conclusions that Paulson was bullying McDonald's staff – this issue was flagged by Cade, and then addressed in part in McDonald's June 2015 Performance Review. Based on Sproule's evidence, McDonald did not accept the feedback and his attitude became worse, particularly in his dealings with his direct supervisors and the Board. As noted in the Sproule witnesses' robust list of problematic adjectives describing his conduct, McDonald became difficult and disrespectful, and at the same time indifferent or non-responsive about his role in the fall of 2015. The undisputed and assumed record is sufficient for me to find that McDonald's pre-termination conduct was, at least at times, insolent and insubordinate as defined in the case authorities noted earlier.

ii. The Surrounding Circumstances

[110] This part of the analysis requires the Court to look at the situation from both the employee and the employer's perspective.

[111] From McDonald's perspective, he had been an important member of Sproule's executive team for a long time. Until 2014, there is no evidence of any issues with his performance and, in fact, he had been receiving significant discretionary bonuses leading up to his termination. He was disappointed by the Reorganization, had expressed concerns to Helwerda about being afraid that

Gunnewiek would embarrass him at Board meetings, and did not want to attend Board meetings but continued to do so.

[112] From Sproule's perspective, McDonald was a senior financial executive that they were concerned had ignored or facilitated unacceptable bullying. He reacted poorly to that information and did not initially or consistently support the decision to terminate Paulson. There was concern that he was undermining that decision with subordinates or otherwise criticizing management decisions. At the same time, his performance was deteriorating or sub-standard and he seemed unable to perform at the CFO level that Sproule desired. Concerns surfaced about his lack of transparency. His attitude was an ongoing problem. Sproule changed his title to Controller to reflect what it believed was a better fit with his performance, which disappointed McDonald and did not improve his attitude –his attitude, insolence, and insubordination got worse and culminated in the January 2016 Board Meeting.

[113] Based on the legal framework discussed earlier, the direct or indirect communication by the employer to the employee about the employee's misconduct is also a critical component of the surrounding circumstances in the ***McKinley*** framework. Accepting Sproule's evidence and interpreting the record most favourably to Sproule, the record displays serious shortcomings in Sproule's communication and conduct toward to McDonald:

(a) McDonald's response to Cade's report about Paulson was sufficiently serious that Sproule was going to terminate him, but gave him a second chance after he apologized. His attitude worsened through the fall and into May 2015 with the May 2015 Training, and there were some markers about his performance as CFO. However, the Performance Review, as the only documented review of his performance in the record, objectively sent him the message that he was performing above average and only gave him feedback on some matters he needed to improve on. The Performance Review: (1) effectively condoned (or further condoned) his behaviour and performance except as specifically otherwise mentioned; (2) was not clear in some instances about what level of job performance was being suggested or required, or what exactly he needed to improve; (3) was not a warning that the failure to meet a standard or improve his performance would or could result in his dismissal. McDonald's performance was further condoned and approved by issuing him a significant financial bonus for FY2015 later in 2015;

(b) from July to November 2015, there is increasing evidence of dissatisfaction at Sproule and its Board (and Gunnewiek in particular) about McDonald's performance as CFO. Yet there is no documented, direct, or specific evidence of Sproule advising McDonald specifically what he needed to do to improve, or warning him about his performance as CFO as instances of non-performance or incompetence arose (or at all);

(c) in the Reorganization, Sproule objectively sent the message that McDonald's employment was confirmed, but in a new role with less responsibility or seniority. Sproule did not take that opportunity to reset Sproule's expectations or to document McDonald's job responsibilities. Further, there is no documented, direct, or specific evidence that the title change was accompanied by a warning that his employment

was in jeopardy if he did not perform in the new role. Rather, the Reorganization objectively recalibrated his job to match his performance. There is no evidence that McDonald did not meet the Controller job requirements or that his performance after the title change was unsatisfactory or incompetent (aside from attitude issues) or that he was unable to perform the undocumented Controller duties;

(d) while the FY2015 bonus was for the period ending June 2015, the declaration of a significant discretionary bonus in the fall of 2015 was objectively, and most likely, further condonation and approval of McDonald's performance in the areas of "contribution, management, marketing and attitude" as per Sproule's bonus policy;

(e) with respect to McDonald's attitudinal issues, insolence, or insubordination, from the Performance Review to the December 2015 Meeting, there is no documented, direct or specific evidence that Sproule or its Board raised their concerns about his behaviour with him when the issues arose or gave him any warnings. On the record, Sproule condoned his behaviour for months. Van de Veen's December Advice that it would be good for McDonald to rethink his attitude going forward was vague, was not a clear warning that his employment was in jeopardy, and it was objectively in the context of McDonald's response to the Reorganization and the new reporting structure at Sproule, not his dealings with the Board or other attitudinal concerns. Gunnewiek does not testify to giving McDonald any warnings or reprimands during this period. Carsted's conclusory statement that McDonald was given a "very stern warning" is not attributed to any person or timeframe and is not supported by other evidence. Helwerda's conclusory statement to McDonald having been "made aware on several occasions" as to McDonald's need to change his attitude and behaviour is also not specific and only points to the particulars elsewhere in his affidavit. Nowhere in Helwerda's affidavit does he discuss making McDonald aware of a need to change his attitude or behaviour between the Performance Review and the January Advice;

(f) McDonald's behaviour at the January 2016 Board Meeting, alone or in the cumulative context, was serious enough to warrant immediate employer action. And Sproule intervened by having Helwerda speak to him the next day;

(g) Helwerda's January Advice is critical to the surrounding circumstances of the termination, and is problematic for Sproule's just cause defence for several reasons;

    (i) the January Advice was not a clear warning that his employment was in jeopardy. The reference that it was in McDonald's best interest to "begin acting" differently, to change his attitude and insubordinate behaviour, did not clearly state what the consequences of failing to do so were. Further, it did not make it clear whether Helwerda was only referring to conduct from the January 2016 Board Meeting or other earlier conduct as well;

    (ii) the January Advice, viewed objectively, actually *confirmed* McDonald's employment. By implying that McDonald *may* be at risk *if* Gunnewiek became President, the corollary implication is that he was *not* at risk of

being terminated if Gunnewiek did not become President. Put another way, this would have objectively suggested to McDonald that, at that time, McDonald's relationship with Sproule had not reached the point where the relationship could not carry on, but it *might* in the future *if* Gunnewiek became President. This also would have objectively suggested to McDonald that the issue was not necessarily McDonald's attitude or ongoing relationship with Sproule, but with Gunnewiek personally; and

(iii) even accepting that the January Advice was a clear warning that put McDonald's employment was at risk if he did not change his ways, McDonald was terminated three weeks later and Sproule did not adduce evidence about McDonald's conduct from the January 20 Meeting until his termination, or whether he was even given a chance to improve his attitude with the Board.

[114] Sproule relied on McDonald's conduct after he was terminated to support just cause, but this does not form part of the surrounding circumstances to his termination.

iii. Was Dismissal a Proportionate Response?

[115] Based on the undisputed and assumed record, the termination was not a proportionate response to McDonald's conduct, for the reasons set out below.

[116] McDonald's performance and conduct were certainly becoming serious, but over that same period he was sent positive messages about his performance, given feedback of things to work on, issued a significant bonus, redesignated as Controller, and later told it would be a good idea to change his attitude. After his inappropriate conduct at the January 2016 Board Meeting, he was not terminated, but then was immediately warned to "begin acting" differently and that, at some undescribed point in the future, his employment *might* be at risk if Gunnewiek became President and McDonald did not improve his relationship with Gunnewiek.

[117] In all the circumstances, I find that, on this undisputed and assumed record, termination was not a proportionate response to either his performance issues or his attitudinal issues, whether taken alone or considered together.

[118] With respect to his performance, the new Controller role had only begun in late 2015 and, if there were issues, a proportionate response would require a description of expectations, which expectations were not being met, and then facilitating his improvement, including providing him time to address the feedback and improve. I find that Sproule's evidence of what it discovered about McDonald's performance following his termination, even if fully accepted and assumed to have existed at the date of termination, does not materially change this conclusion.

[119] With respect to his insolent or insubordinate behaviour, the January Advice confirms matters had not yet reached the level of seriousness such that his employment as Controller could no longer viably subsist, that his conduct was not reconcilable with sustaining the employment relationship, or that the relationship had broken down or was destroyed. Sproule chose *not* to terminate him but instead gave him a vague reconfirmation of his employment with, at best, a conditional warning about Gunnewiek. Then, about three weeks later the Board decided to

terminate him without providing any reasons to him, in the absence of any new evidence of misconduct, and without giving him a reasonable opportunity to address the concerns raised in the January Advice, including improving his relationship with Gunnewiek. A proportionate response following the January 2016 Board Meeting required something less than termination, including a clear warning, an indication of expectations, confirmation that his employment was at risk if he did not address expectations or concerns, and an opportunity to adjust his attitude. That was not done.

[120] Accordingly, I find that, even assuming Sproule's evidence and interpreting it most favourably to Sproule, there is no merit to its just cause defence and, therefore, Sproule has not established a genuine issue requiring a trial.

e. Is it Possible to Summarily Resolve McDonald's Claim and, if so, is the Court prepared to Exercise its Judicial Discretion to do so?

[121] For expediency, and given my earlier analysis, I have considered together the first and last of the considerations outlined in paragraph 47 of ***Weir-Jones***.

[122] I have found that McDonald discharged his threshold burden, and Sproule has not discharged its burden to establish a genuine issue for trial on its just cause defence. However, as a check on the process, I consider whether it is possible and appropriate to fairly resolve McDonald's claim against Sproule summarily. I am mindful that one the key considerations is procedural fairness: ***Hannam*** at para 161.

[123] Given the nature and presentation of the evidence, this has been a complex application to review. However, a voluminous or complex record does not necessarily mean summary disposition is inappropriate. Courts have been encouraged to make findings of fact and resolve cases summarily where appropriate to do so.

[124] I have been alive to the conflicts in the evidence and the potential fact-finding difficulties and credibility issues that they can cause, which can be markers that summary judgment is not appropriate: ***Weir-Jones*** at para 38. However, I have determined that resolving the conflicts, or whether McDonald or the Sproule witnesses are more honest or reliable, is not necessary to resolve the claim or the just cause defence.

[125] There will be little utility, and significant delay and expense, requiring this matter to proceed to trial. The amount at issue is undoubtedly significant for the parties, but the claim is already 7 years old. The parties have expended significant resources on this action (already going to the Court of Appeal on a procedural issue) and on this Application. Trial litigation costs will be significant. Sproule is properly concerned about failing memories, loss of evidence and availability of witnesses that are no longer in its control.

[126] Further, Helwerda's death means that there is unlikely to be a better record at trial in respect of any of his one-on-one conversations with McDonald, including in respect of the Performance Review and the critical January 20 Meeting in which Helwerda gave the January Advice.

[127] I am satisfied that Sproule has had a fair process and opportunity both to know the case against it, to comprehensively test McDonald's case in a 500+ page Transcript, and to put its best foot forward to adduce response evidence to attempt to establish a genuine issue requiring a trial.

[128] Accordingly, it is possible and appropriate to exercise my discretion to resolve McDonald's claim summarily. For the reasons above, I find that Sproule did not have just cause to terminate McDonald without notice and McDonald is entitled to damages.

B. Is it Possible and Appropriate to Determine Damages Summarily?

[129] As McDonald was wrongfully dismissed, and there was no contractual limitation on notice, he was entitled to reasonable notice or payment of damages in lieu of notice: ***Matthews*** at para 38 and 43; ***Keays*** at para 50. The remedy for breach of the implied term to provide reasonable notice is an award of damages based on the period of notice which should have been given, with the damages representing "what the employee would have earned in this period": ***Matthews*** at para 49; ***Wallace v United Grain Growers Ltd***, 1997 CanLII 332 (SCC), [1997] 3 SCR 701 at paras 65-67; ***Carroll v ATCO Electric Ltd***, 2018 ABCA 146 at para 18.

[130] Sproule argues that, if the court decides McDonald was dismissed without cause, "a further hearing will be required in connection with the issue of damages" but does not say why or whether that meant a trial. McDonald's application was for summary judgment, including damages, and Sproule was obligated to put its best foot forward to establish a genuine issue requiring trial in respect of damages: ***Geophysical Service Incorporated*** at para 14.

[131] I address below four main areas in considering whether it is possible and appropriate to summarily resolve damages, or whether there are genuine issues requiring a trial: (1) determination of the notice period; (2) Sproule's mitigation defence; (3) calculation of McDonald's damages for wrongful dismissal and (4) McDonald's claim to additional damages for Sproule's alleged bad faith conduct.

1. Is it Possible and Appropriate to Summarily Determine the Notice Period?

a. The Nature of the Implied Term Requiring Reasonable Notice

[132] As noted earlier, the common law implies a term of the employment contract to provide reasonable notice, failing which the employee is entitled to damages: ***Matthews*** at paras 38 and 43; ***Keays*** at para 50. That is, the common law "implies a term of reasonable notice, or pay in lieu": ***Styles v Alberta Investment Management Corporation***, 2017 ABCA 1 at para 34.

[133] The purpose of the implied term of reasonable notice is to enable the terminated employee to obtain other employment: ***Lavallee v Siksika Nation***, 2011 ABQB 49 at para 116, citing ***Bramble v Medis Health & Pharmaceutical Services Inc***, 1999 CanLII 13124 (NBCA), 2014 NBR (2d) 111 at para 57 (NBCA); ***Steinebach v Clean Energy Compression Corp***, 2016 BCCA 112 at paras 15-17; ***Sumner v PCL Constructors Inc***, 2010 ABQB 536 at para 12. Therefore, at its heart, the period of reasonable notice attempts to estimate, as of the date of termination, the time period it will take the employee to find commensurate employment: ***Alberta Computers.com Inc v Thibert***, 2021 ABCA 213 at para 60; ***Humphrey v Mene Inc***, 2022 ONCA 531 at para 48.

[134] The calculation of reasonable notice is *not* a calculation of damages, but rather is a question of interpretation and determination of the implied term of contractual notice required: ***Carroll*** at para 17; ***Baker*** at para 25. This means it is a question of mixed fact and law governed by the Supreme Court of Canada's approach to contractual interpretation in ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 50: ***Carroll*** at para 17.

[135] The determination of the reasonable notice period is highly fact dependent: ***Carroll*** at paras 20-21 and 40. Courts continue to generally apply a non-exhaustive list of factors, including the character of the employment, length of service, age, availability of similar alternative employment, having regard to the employees experience, training and qualifications: ***Alberta Computers.com*** at para 60; ***Wallace*** at paras 81-82, citing ***Bardal v Globe & Mail Ltd***, 1960 CanLII 294 (ONSC), (1960), 24 DLR (2d) 140 (Ont HC); ***Keays*** at paras 25, 28-32.

b. Is Determining the Reasonable Notice Period Appropriate for Summary Judgment Generally?

[136] In Alberta, there are conflicting authorities as to whether it is appropriate for courts to determine the reasonable notice period in a summary judgment application. In ***Coffey v Nine Energy Canada Inc***, 2018 ABQB 898, a Justice of our court held it was not appropriate for courts to determine the notice period in a summary judgment application because the determination of the notice period involves the weighing of evidence and the determination of a question of fact. This aspect of ***Coffey*** has not yet been expressly interpreted by another Justice of this Court or the Court of Appeal, however it has been described as leaving the law in an unsatisfactory state from an Applications Judge's perspective: ***Kubersky-Master*** at para 3.

[137] I do not follow ***Coffey*** for several reasons.

[138] First, ***Coffey*** was decided before ***Weir-Jones***, ***Hannam*** and other Court of Appeal decisions that have clarified the Alberta framework and principles in determining summary judgment. Accordingly, I am not compelled to follow ***Coffey*** by principles of horizontal *stare decisis*: ***R v Sullivan***, 2022 SCC 19 at paras 73-75. In my view, an interpretation that effectively eliminates wrongful dismissal from summary judgment is out-of-step with those decisions, and is inconsistent with and undermines the policy behind increased access to justice and use of summary judgment in the ***Weir-Jones*** and ***Hryniak*** mandated culture-shift.

[139] Second, ***Coffey*** appears to have proceeded on the basis that the issue of determining the notice period is solely a question of fact. While determining the notice period is undoubtedly a factually intensive exercise, the Court of Appeal, both before and after ***Coffey***, has confirmed the notice period is a question of legal entitlement akin to contract interpretation and is a question of mixed fact and law. In any event, the Court of Appeal since ***Coffey*** has confirmed that courts can make findings on contested material facts in a summary judgment application: ***Hannam*** at paras 147-148.

[140] Third, ***Coffey*** is out of step with earlier Master-level summary judgment jurisprudence in Alberta post-***Hryniak***: ***Rajotte v National Bank Financial Inc***, 2017 ABQB 697 at para 42; ***Eberle v Sunhills Mining Limited Partnership***, 2018 ABQB 389 at paras 3-5; ***Engelhardt v Sunhills Mining Limited Partnership***, 2018 ABQB 383; ***Toole v Northern Blizzard Resources Inc***, 2017

ABQB 760 at para 9; ***Nixdorf v Broadstreet Properties Ltd***, 2017 ABQB 132; ***Nutting v Franklin Templeton Investments Corp***, 2016 ABQB 669; ***Harper v Lafarge Canada Inc***, 2016 ABQB 586; ***O'Donnell v Soldan Fence and Metals (2009) Ltd***, 2015 ABQB 764, paras 16, 23 . Further, since ***Coffey***, Justice deWit (as he then was) determined a notice period summarily, although he did not specifically address ***Coffey***: ***Kubersky-Justice***.

[141] Courts in other jurisdictions have also consistently confirmed that the notice period can be determined in a summary judgment process: see, for example: ***Arnone v Best Theratronics Ltd***, 2015 ONCA 63; ***Asgari v 975866 Ontario Ltd***, 2015 ONSC 7508; ***Johar***; ***Merritt***; ***Sinnathamby***; ***Groves v UTS Consultants Inc***, 2019 ONSC 5605; ***Total Credit Recovery Ltd v Martin et al***, 2020 NBCA 8; ***Beatty v Best Theratronics Ltd***, 2014 ONSC 3376 affirmed 2015 ONCA 247. Notwithstanding that these courts have specific powers in their rules that we do not have in Alberta, I see no principled basis for a different categorical rule in Alberta that prohibits summary determination of reasonable notice periods.

[142] There is no reason why determination of the notice period should be treated differently than any other issue in a summary judgment application. If there are no genuine issues requiring a trial, for example where the record permits the court to make factual findings about the relevant factors in determining the notice period, there is no need for a trial to determine the notice period.

c. Is Summary Determination of the Reasonable Notice Period Appropriate in this Case?

[143] In this case, neither party argued that there were any factors in addition to the ***Bardal*** factors that were material in this case. In my view, there is sufficient undisputed evidence about the character of McDonald's employment, length of service, age, availability of similar alternative employment, and McDonald's experience, training and qualifications to permit the court to make factual findings and a fair and just determination of the reasonable notice period.

d. McDonald's Reasonable Notice Period

[144] At the time of his Termination, McDonald was 56-years-old and had been a chartered accountant since 1983. He had been with Sproule (or its corporate predecessors) for 12 years, first as Controller until 2010 and then CFO until late 2015 when his title changed back to Controller. He was part of Sproule's executive team in a position of seniority with responsibilities related to the accounting, finance, and human resource functions.

[145] The question of the availability of similar, alternative employment is to be assessed prospectively at the time of dismissal: ***Rice v Shell Global Solutions Canada Inc,*** 2019 ABQB 977 at para 96, citing ***Bahrami v AGS Flexitallic Inc***, 2015 ABQB 536. However, the court may also consider the plaintiff's job search as evidence of the availability of alternate employment: ***Bahrami*** at para 36.

[146] Gunnewiek's unchallenged evidence was that from "mid-2014 onwards, Sproule was under considerable financial stress on account of the collapse in oil prices and associated reduction in demand for Sproule's services", and that its financial stress continued in the fall of 2015. There is no evidence that this had improved by February 2016 and Sproule did not declare bonuses for FY2016.

[147] The Court may take judicial notice of general trends in economic activity in this province: ***Westwood Community League v Swish One Infill General Partner Inc***, 2020 ABQB 299 at para 116; ***Thomas v Thomas***, 2014 ABQB 481 at para 69. In ***Rice***, another financial professional in the Calgary oil and gas industry was affected by the economic downturn when she was terminated in February 2017: ***Rice*** at para 94. I find that, at the time of dismissal, the oil and gas downturn in Calgary likely made it harder for McDonald to find employment. McDonald applied to at least 25 jobs in the two-year period from February 2016 to February 2018 and only had one job offer at a significantly lower salary.

[148] McDonald claims a 24-month notice period. Some authority suggests that 24 months is a "rough upper limit" that is typically reserved for senior or management employees: ***Molloy v EPCOR Utilities Inc***, 2015 ABQB 356 at para 282. I prefer to consider all the factors rather than formulaic rules but do consider 24 months as the very upper end of the potential range in this case.

[149] Sproule argues the notice period should be 12-13 months, which is loosely based on one month per year of service. This rule-of-thumb approach has fallen out of use and has been criticized or rejected by courts in Alberta and elsewhere for years: ***Lederhouse v Vermilion Energy Inc***, 2015 ABQB 387 at paras 15-17; ***Vauxhall*** at para 143; ***Manthadi v ASCO Manufacturing***, 2020 ONCA 485 at para 63, citing ***Minott v O'SHanter Development Co***, 1999 CanLII 3686, 168 DLR (4th) 270 (ONCA).

[150] Determination of the notice period is not formulaic, but resort to precedent may be helpful and is the usual practice of parties and courts: ***Hodgins v St John Council for Alberta***, 2008 ABCA 173 at para 7. Here, neither party provided the court any specific precedents to support their position. As part of putting a best foot forward, it is incumbent upon the parties to supply the court with jurisprudence supporting their proposed notice period. However, the failure to do so does not necessarily create a genuine issue requiring trial.

[151] In my view, ***Rice*** is a good starting point, because it involved a 53-year-old accounting professional in Calgary terminated one year after McDonald, although her position was less senior than McDonald's position, she was slightly younger, and she only had 8 years, seven months service. Justice Eamon noted that he had been presented with cases where individuals of similar age, years of service and roles as Rice were awarded notice in the range of 9 to 15 months; and other cases which suggested a lower range of 6 ½ to 11 months. Justice Eamon would have assessed her notice period at 15 months. Given McDonald's seniority, more advanced age, and longer service, ***Rice*** suggests McDonald's notice period should be more than 15 months.

[152] In ***Cordeau-Chatelain v Total E&P Canada Ltd***, 2021 ABQB 794, Justice Price relied on ***Rice*** and determined an 18-month notice period for a similar-aged management employee with a more unique role with the same years of service.

[153] In ***Stanley v Advertising Directory Solutions Inc***, 2014 BCSC 376, a 55-year-old certified general accountant with 15 years of service was entitled to a 19-month notice period. The court considered numerous precedents involving similar-aged professionals with similar years of service. One of those cases involved a 59-year-old controller with 18 years of service, who was provided 16 months notice: ***Crang v Delta Catalytic Constructors Ltd***, 1994 CanLII 2897, [1994]

BCJ No 323 (SC). Some of the other cases considered in ***Stanley*** are useful checks for the appropriate range in this case:

(a) ***Dunlap v British Columbia Hydro and Power Authority*** (1988), 1988 CanLII 3217 (BCCA), 32 BCLR (2d) 334 (61-year-old engineer with 10 years service: 20 months);

(b) ***Ansari v BC Hydro & Power Auth***, 1986 CanLII 1023, 2 BCLR (2d) 33 (SC) (50-year-old engineer with 19 years of service: 20 months excluding special factors);

(c) ***Perry v Gulf Minerals Canada Ltd***, [1985] OJ No 1041 (HCJ), 1985 CarswellOnt 3816 (56-year-old VP exploration with 12 years of service: 22 months[3]);

(d) ***Lyle v Aluminex Extrusions Ltd***, 1996 CanLII 2022 (BCSC), [1996] BCJ No 203 (SC)(QL) (62-year-old general manager with 15 years of service: 20 months);

(e) ***Tull v Norske Skog Canada***, 2004 BCSC 1098 (51-year-old mill manager with 13.5 years of service: 20 months);

(f) ***Brown v Black Clawson-Kennedy Ltd***, [1989] OJ No 2281 (Dist Ct), 1989 CarswellOnt 773 (54-year-old vice president with 17 years of service: 18 months);

(g) ***Brown v OK Builders Supplies Ltd***, [1985] BCJ No 397 (SC), 1985 CarswellBC 777 (53-year-old senior employee with 10 years of service: 12 months);

(h) ***Olesiejuk v Sutherland Hills Rest Home Ltd***, 2001 BCSC 1029 (63-year-old director of care with nursing background with 11 years of service: 12 months);

(i) ***Bening v Ebco Industries Ltd***, [1987] BCJ No 207 (SC), 1987 CarswellBC 1613 (63-year-old director of care with 11 years of service: 15 months); and

(j) ***Konop v Brazilian Canadian Coffee Co***, [2004] OJ No 2784 (HCJ), 2004 CarswellOnt 2696 (59-year-old vice president with 14 years of service: 16 months).

[154] I have also considered these other cases:

(a) in ***McKinley***, a 48-year-old chartered accountant with 17 years of service was entitled to a 22-month notice period;

(b) in ***Hrynkiw v Central City Brewers & Distillers Ltd***, 2020 BCSC 1640, the court assessed a reasonable notice period for a similarly aged financial professional to McDonald, but with only 6 years of service, and found a 12-month notice period. One of the cases the court considered, ***Kolaczynski v Benz Sewing Machines Ltd***, [2002] OJ No 1117, 2002 CarswellOnt 1178, involved a 59-year-old controller and

[3] This is the notice period referenced for this case in ***Stanley***. The court in Perry noted other cases ranging from 15 months to 24 months.

officer manager with 9.5 years of service who was entitled to a 15-month notice period; and

(c) in ***Wankling v Saskatchewan Urban Municipalities Association et al.***, 1989 CanLII 4625, 75 Sask R 252 (QB) the court held an 18-month notice period was appropriate for a 61-year-old executive director with 11.5 years of experience and accounting experience. In that case, the court also cited several other cases involving Saskatchewan "senior executives past middle age" which illustrated a notice period range of 12-18 months.

[155] In considering the relevant factors in this case, and these precedents, I conclude that McDonald was entitled to an 18-month notice period.

2. Is it Possible and Appropriate to Fairly Resolve Sproule's Mitigation Defence Summarily?

[156] McDonald did not find employment during his claimed two-year notice period. In the Defence, Sproule alleges that, because McDonald had advised Sproule that he could obtain a new job anytime, that Sproule "puts McDonald to the proof of his efforts to mitigate." Even if it is accepted for the sake of argument that McDonald made statements like this, it does not reverse the onus in the context of a mitigation defence.

[157] The employer bears a two-part onus of demonstrating that (1) an employee has failed to make reasonable efforts to find employment; and (2) comparatively similar employment could have been found: ***Evans v Teamsters Local Union No 31***, 2008 SCC 20 at para 30; ***Red Deer College v Michaels***, 1975 CanLII 15 (SCC), [1976] 2 SCR 324; ***Magnan v Brandt Tractor Ltd***, 2008 ABCA 345 at para 30; ***Christianson v North Hill News***, 1993 ABCA 232 at para 11; ***Cochrane v Western Energy Services Corp***, 2021 ABQB 808 at para 19; ***Schaufert v Calgary Co-Operative Association Limited***, 2021 ABQB 579 at paras 129-130.

[158] The plaintiff's efforts to find employment "will not be nicely weighed, particularly with hindsight" – all the plaintiff need do is to take objectively reasonable steps or make reasonable decisions, not the best possible steps or decisions: ***Christianson*** at para 11; ***Wisser v CEM International Management Consultants Ltd***, 2022 ABQB 414 at para 43. A plaintiff does not have to take risky or unsavoury steps and any gap in the evidence accrues to the plaintiff's benefit: ***Christianson*** at para 11.

[159] Sproule did not adduce any evidence on the second element of the two-part test, namely that McDonald could have found comparatively similar employment. In oral argument, Sproule suggested that the court could take judicial notice that employment as a controller is "almost always available." Judicial notice may be taken of facts that are either (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: ***R v Love***, 2022 ABCA 269 at para 43, citing ***R v Find***, 2001 SCC 32 at para 48.

[160] Sproule did not address either branch of the judicial notice test. With respect to the first branch, a cursory review of wrongful dismissal jurisprudence involving termination of controllers, or people in similar accounting roles, readily establishes that controllers do not "almost always"

have employment opportunities available but rather, like any other type of employment, job availability depends on a number of factors including, in Alberta, economic downturns in the oil and gas economy: see, for example: ***Fulmer v Nordstrong Equipment Limited***, 2017 ONSC 5529 at para 32; ***Crang***; ***Rice*** at paras 94, 99. I decline to take judicial notice as suggested by Sproule.

[161] In the questioning on his affidavit, McDonald disclosed that he had received a job offer as a director of finance for a not-for-profit but did not accept it because it was lower than his salary expectations. His preference was to replace his Sproule salary of $248,848 per year, but would have taken somewhat less for a not-for-profit, and his evidence was he needed at least $150,000 per year to live on. The offer was significantly lower than his expectations and, therefore, significantly lower than his Sproule salary. A plaintiff is not obligated to accept a significantly lower salary or rate of pay: ***Wisser*** at para 44; ***Forshaw v Aluminex Extrusions Ltd***, 1989 CanLII 234, 39 BCLR (2d) 140 (BCCA) at 6-7; ***Horvath v Nanaimo Credit Union***, 1998 CanLII 3917, 39 CCEL (2d) 148 (BCSC) at para 27; ***Sunderarajah v Metropolitan Toronto Condominium Corp No 748***, 2005 CanLII 5358, 46 CCEL (3d) 309 (Ont SCJ), leave to appeal refused, [2005] OJ No 2509 at paras 21-22. In any event, McDonald provided further information about his offer in his undertaking responses, and Sproule did not question McDonald further on the details of the offer.

[162] In his undertaking answers, McDonald produced copies of his *curriculum vitae* and documentation related to the 25 job applications he made during the period February 2016 to February 2018. Sproule did not question on McDonald's undertakings.

[163] I am aware of the requirement to consider credibility in the context of a wrongful dismissal mitigation defence: ***Christianson*** at para 12. As I have noted earlier McDonald's credibility is an issue in this case. However, even where credibility issues exist in relation to other issues, but there are no real credibility issues relevant to reasonable notice or mitigation, summary disposition can still be appropriate: ***Beatty v Best Theratronics Ltd***, 2015 ONCA 247 at para 15. In my view, determining whether McDonald's mitigation efforts were reasonable does not require findings about McDonald's credibility because Sproule did not establish a genuine issue for trial in relation to the second branch of its mitigation defence test which it had the onus to prove. Therefore, McDonald's credibility on mitigation does not need to be addressed to allow summary determination. Further, McDonald produced documentation of his mitigation efforts and Sproule chose not to question on them.

[164] Based on the foregoing, I find that Sproule did not raise any, and there are no, genuine issues requiring a trial respecting Sproule's mitigation defence and it is fair and appropriate to resolve it summarily. In the circumstances, the evidentiary gaps accrue to McDonald's benefit, Sproule has not discharged its onus to prove McDonald failed to reasonably mitigate, and McDonald reasonably mitigated his damages.

3. Is it Possible and Appropriate to Fairly Calculate McDonald's Damages Summarily?

[165] Although, as noted, Sproule argued another hearing was required on the question of damages, Sproule nonetheless made submissions on the calculation of damages and neither party pointed to any specific genuine issues requiring a trial in the calculation of McDonald's damages.

I find there are no genuine issues requiring a trial and that it is fair and appropriate to assess McDonald's damages summarily.

[166] The purpose of awarding damages in lieu of reasonable notice is to put the employee in the position they would have been in had they continued to work through to the end of the notice period: ***Matthews*** at para 59. The employee is entitled to damages based on all the elements of compensation they would have earned had they worked the period of notice: ***Wallace*** at para 66; ***Hunsley v Canadian Energy Services LP***, 2020 ABQB 724 at para 34; ***Belanger v Western Ventilation Products Ltd***, 2019 ABQB 571 at para 18.

a. Salary, Vacation Pay and Earned Days

[167] McDonald's $244,848 annual salary at the time of the Termination is not disputed. This equates to $20,404 per month and McDonald is entitled to damages of $367,272.

[168] McDonald claims loss of vacation pay and earned time off, which for a 24-month notice period he calculated to be $70,629.22. McDonald was entitled to 30 vacation days per year and could earn additional days off if he worked overtime. In questioning, he acknowledged Sproule rarely paid out vacation pay and that he would have taken his vacation rather than being paid for it had he been given proper notice. The Sproule compensation policy, and McDonald's evidence, also supports that he would not have been entitled to be paid out for his earned days off, and that he would have used those days in any event.

[169] In these circumstances, no additional damages are appropriate because they would constitute double-recovery: ***Watson v Schlumberger Canada Limited***, 2022 ABKB 646 at paras 145-46, citing ***Eberle*** at paras 18-24; ***Oostlander v Cervus Equipment Corporation***, 2022 ABQB 200 at paras 39-40; ***Bagby v Gustavson Drilling Co Ltd***, 1980 ABCA 227 (CanLII), [1980] CarswellAlta 373 at para 32.

b. Bonuses

[170] McDonald claims a loss of bonuses during his notice period. McDonald had a history of receiving them. McDonald claims $450,686.71 for lost bonuses during the notice period, which he arbitrarily calculated based on his FY2013 and FY2014 bonuses (but not his FY2015 bonus).

[171] McDonald is entitled to bonuses "he would have received" had Sproule not breached the implied term to provide him notice: ***Matthews*** at para 53. The test of whether a bonus is integral to the employee's compensation assists in answering the question of what the employee would have been paid during the reasonable notice period: ***Matthews*** at para 58. Bonuses that are integral to the employee's compensation are generally recoverable, and this can include discretionary bonuses: ***Matthews*** at paras 58-61; ***Paquette v TeraGo Networks Inc***, 2016 ONCA 618 at para 17; ***Schaufert*** at para 89; ***Mack*** at para 118; ***Geddes v Silvestri Holdings Inc***, 2014 ABQB 416 at para 83-84. The court must ask two questions: (1) would the employee have been entitled to the bonus as part of their compensation during the reasonable notice period? If so (2) do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right? (***Matthews*** at para 55). The second part of this test is not engaged here.

[172] Sproule's policy manual confirms the discretionary nature of its bonuses. It also provides that, to receive a bonus, the employee "must be employed by Sproule for the part of the fiscal year under consideration to the day bonus payments are issued." Van de Veen deposed that, due to cash constraints, Sproule did not declare any bonuses for FY2016, and declared very minimal bonuses in FY2017. The average FY2017 senior executive bonus was $10,000. McDonald chose not to question Van de Veen on this evidence, and it is therefore the undisputed and unchallenged evidence before the court.

[173] Accordingly, I find that McDonald would not likely have received a FY2016 bonus.

[174] With respect to the FY2017 bonus, I find he would have been allocated a bonus of approximately $10,000. McDonald did not question Van de Veen on his affidavit to establish that McDonald would likely have continued to be employed by Sproule on the day the FY2017 bonus payments were made (as required under the Sproule policy). McDonald's evidence is that the bonuses were historically determined after the completion of its audit which was in the fall following the June 30 year end. This means, the FY2017 bonus would have been declared and paid, at the earliest, sometime in fall 2017. Based on the 18-month notice period commencing February 2016, McDonald would have continued to be employed only until August 2017. I find it is likely that McDonald would not have been employed by Sproule when the FY2017 bonus was paid, and he would not have received the bonus.

[175] McDonald has not proven a claim to damages for lost bonuses.

c. Benefits

[176] Benefits which are part of an employee's compensation package must be considered in assessing wrongful dismissal damages: ***Bagby*** at para 29; ***Hunsley*** at para 38. An employee is entitled to benefits they "would have received" had the employer not breached the implied term to provide notice: ***Matthews*** at para 53. The court must ask two questions: (1) would the employee have been entitled to the benefits as part of their compensation during the reasonable notice period? If so (2) do the terms of the employment contract unambiguously take away or limit that common law right? (***Matthews*** at para 55). The second part of this test is not engaged here.

[177] In Alberta, the value of premiums the employer would have paid on insurance plans during the notice period can be compensable damages regardless of whether the employee incurs the cost of replacement coverage: ***Rahmath v Louisiana Land & Exploration***, 1989 ABCA 100, 97 AR 246 at para 5; ***Williams v Telecommunications Workers Union***, 2011 ABQB 314 at paras 99-104; ***Engelhardt*** at para 41; ***Bagby*** at paras 28-30; ***Hansen v Altus Energy Services Partnership***, 2010 ABQB 820 at para 61; ***Hunsley*** at paras 48-50. In some cases, courts will award the amount of the out-of-pocket expenses incurred for amounts that would have been covered by the employer-paid insurance: ***Watson*** at para 120; ***Hansen*** at para 61; ***Kosteckyj v Paramount Resources Ltd***, 2021 ABQB 225 at paras 60-62. Other factors may come into play where the employee obtains replacement coverage, but those issues are not relevant in this case: see, for example: ***Hunsley*** at paras 48-49.

[178] Other personal benefits that would have been paid during the notice period, potentially prorated to only reflect personal benefits (and to remove amounts paid to enable the employee to

perform their duties) are generally recoverable: ***Hunsley*** at para 37. The reasonable expenses of maintaining professional standing are a benefit to the employer but are also a personal benefit and interest to an employee: ***Hunsley*** at para 85, citing ***Orland v Essroc Canada Inc***, 1995 CarswellOnt 592, [1995] OJ NO 4056 (Gen Div) at para 33; ***Watson*** at para 124.

[179] Where benefits have not been proven with sufficient detail, courts sometimes apply an estimate of 10% of salary if it is reasonable: ***Alberta Computers.com Inc v Thibert***, 2019 ABQB 964 at para 145, affirmed 2021 ABCA 213.

[180] In this case, Sproule terminated McDonald's coverage under Sproule's benefits program effective February 2016. Sproule did not specifically challenge McDonald's claimed benefits amounts. Based on my review of the evidence, my findings of McDonald's entitlement to damages for lost benefits are:

(a) life insurance premiums of $93.44 per month, for a total of $1,681.92;

(b) accidental death and disability insurance of $10.15 per month, for a total of $182.70. There were no potential claim events under these plans during the notice period, so the potential complications arising out of the fact that McDonald did not replace this insurance coverage during the notice period do not arise;

(c) employment insurance refund return amounts of $9.68 per month, for a total of $174.27;

(d) best doctor's benefit of $19.95 per month, for a total of $359.10;

(e) with respect to health and dental plan benefits, McDonald has not proven the value of the premiums that Sproule would have paid during the notice period. However, he did provide evidence of out-of-pocket expenses he incurred during the notice period which would have been paid by insurance or through his Sproule health spending account. I find he is entitled to $3,399.08 for such expense during the 18-month notice period;

(f) with respect to CPA Alberta ($671 per year before GST) and CPA Canada ($380 per year before GST) annual membership dues, these amounts, appear to have been payable by end of May each year, which means that Sproule would have paid these amounts plus GST twice during the notice period, for a total of $2,207.10. I find that these are recoverable personal benefits. These amounts cover 24 months (or $91.96 per month), but only a prorated amount for the partial year is appropriate: ***Young v British Columbia (Hydro and Power Authority)***, 2002 BCSC 510 at paras 76-78. McDonald is entitled to $91.96 for 16 months (May 2016 to August 2018), or $1,471.36;

(g) with respect to payment for CPA Alberta mandatory professional development education costs in the amount of $1,848 per year, I find these are recoverable personal benefits paid by Sproule. The parties did not adduce evidence as to when exactly Sproule paid these amounts each year, and so this amount is prorated to $154 per month, for a total of $2,772;

(h) Financial Executive International Membership dues of $892.50 per year, I find these are recoverable personal benefits paid by Sproule. The parties did not adduce evidence as to when Sproule paid these amounts each year, and so this amount is prorated to $74.38 per month, for a total of $1,338.75; and

(i) health club membership costs of $36.75 per month, for at total of $661.50.

d. Mitigation Costs/Expenses

[181] An employee terminated without notice is entitled to mitigation expenses provided that the expenses flow from mitigation necessitated from the lack of notice, not from the termination itself, as the employer has the right to terminate on notice; however, courts are loathe to second-guess decisions made because of the urgency of being terminated without notice: ***Christianson*** at para 21; ***Smith v Mistras Canada, Inc***, 2015 ABQB 673 at para 81.

[182] McDonald claims $2,943.07 in mitigation expenses for his transit costs, a portion of his home internet costs, printing costs, meals, paper, and the costs of a new suit. In my view, McDonald has not established on a balance of probabilities that Sproule caused these costs by failing to provide him reasonable notice. McDonald used transit to travel to work, and the rest of the costs would likely have been incurred in his job search even if he had been given reasonable notice. There is insufficient evidence to find that any of McDonald's mitigation costs were due to the urgency of not being given notice.

e. Summary of Damages for Failure to Provide Reasonable Notice

[183] McDonald's damages for failure to provide reasonable notice are summarized below:

Item	Amount ($)
Salary	367,272.00
Life Insurance	1,681.92
AD&D Insurance	182.70
Employment Insurance	174.27
Best Doctor's Benefit	359.10
Health and Dental Expenses Paid	3,399.08
Professional Fees	1,471.36
Continuing Education Costs	2,772.00
FEIM Membership	1,338.75
Health Club Membership	661.50
Total	379,312.68

4. Is it Possible and Appropriate to Fairly Resolve McDonald's Bad Faith Damages Claim Summarily?

[184] McDonald seeks additional damages beyond the damages ordinarily arising out of a breach of the duty to provide reasonable notice.

[185] In ***Wallace***, the Supreme Court of Canada held that, generally, any award of damages beyond compensation for failure to give reasonable notice, for example for mental distress, had to be founded upon an independent actionable wrong: ***Wallace*** at para 73. The Court also refused to recognize a separate ability to sue in contract or tort for "bad faith discharge": ***Wallace*** at para 88. However, the Court held that employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, and that bad faith conduct in the manner of dismissal was another factor properly compensated for by an addition to the notice period (and therefore damages): ***Wallace*** at paras 88, 95. The Court said that in the course of dismissal employers ought to be candid, reasonable, honest and forthright and should not engage in conduct that is "unfair or in bad faith by being, for example, untruthful, misleading or unduly insensitive": ***Wallace*** at para 98.

[186] McDonald's Statement of Claim pleads additional damages calculated based on an additional 3-month notice period, based on ***Wallace***.

[187] In ***Keays***, the Supreme Court of Canada revisited claims for additional damages in the manner of termination. It eliminated the distinction between "true aggravated damages" and moral damages resulting from conduct in the manner of termination and said, at para 59:

> Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. **Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages**. [Emphasis added]

[188] ***Keays*** tightened the circumstances in which employees may be awarded additional damages for the manner of dismissal: ***Gerling v Camrose Regional Exhibition & Agricultural Society***, 2022 ABCA 210 at para 47.

[189] In ***Matthews***, the Supreme Court of Canada again addressed claims for additional damages due to bad faith in the wrongful dismissal context. The Court reconfirmed that a breach of contractual good faith claim rests on a wholly distinct contractual basis from that relating to the failure to provide reasonable notice: ***Matthews*** at para 83. It also recognized that the duty of honest performance (from ***Bhasin v Hrynew***, 2014 SCC 71), which means that parties must not lie to or otherwise knowingly mislead their counterparty about matters directly linked to the performance of the contract, applies to employment contracts: ***Matthews*** at para 40, citing ***Bhasin*** at para 33 and ***Potter v New Brunswick Legal Aid Services Commission***, 2015 SCC 10 at para 99. Further,

the Court reconfirmed that plaintiffs may assert a breach of the duty to exercise good faith in the manner of dismissal, as previously recognized and clarified in ***Wallace*** and ***Keays***, to support a claim for psychological damages, and that courts are entitled to examine a period of conduct that is not confined to the exact moment of the termination itself: ***Matthews*** at paras 40 and 81.

[190] ***Keays***, ***Matthews***, ***Bhasin***, and jurisprudence from our Court of Appeal, all confirm that the plaintiff must prove that the manner of dismissal or employer dishonesty caused the employee additional damages based on the principles of ***Hadley v Baxendale***: ***Keays*** at para 59; ***Matthews*** at paras 44, 88; ***Bhasin*** at para 54; ***Gerling*** at para 46. Additional damages must be grounded in "proof of actual damages resulting from the unfair or bad faith conduct" because they are not an automatic enhancement to wrongful dismissal damages: ***Elgert v Home Hardware Stores Limited***, 2011 ABCA 112 at paras 74-75; ***Merrill Lynch Canada Inc v Soost***, 2010 ABCA 251 at paras 16-18. They are not awarded for unproven allegations in pleadings (***Gerling*** at para 50) or for the normal distress and hurt feelings resulting from dismissal (***Keays*** at para 56). Where there is no evidence that the employee suffered mental distress as a result of the employer's misconduct, claims for additional damages will not be successful even if manner of dismissal is disproportionately severe: ***Gerling*** at para 46; ***Lavallee*** at paras 141-142.

[191] McDonald's Statement of Claim does not plead any additional damages caused by the manner of dismissal, which is fatal to his claim for additional damages. However, even if it is assumed he properly pleaded a claim for additional damages, he has not adduced any evidence that he suffered additional damages caused by the manner of dismissal. His evidence of his shock and disappointment having to deal with his termination instead of enjoying the family day long weekend is nothing more than the type of damage that any terminated employee suffers. He provided no medical evidence, any evidence that the manner of dismissal made it more difficult to find employment, or any other evidence warranting additional damages. He has not proven a right to additional damages on the balance of probabilities.

[192] In light of my findings, I need not consider or comment upon Sproule's conduct in the manner of dismissal.

[193] I am aware that ***Matthews*** has re-cast claims for additional damages as distinct breach of contract claims and not part of the damage calculation for the breach of the duty to provide reasonable notice as had been the case in ***Wallace***. I have decided to address McDonald's claim for additional damages based on how he pleaded them – as ***Wallace*** damages – and not a separate distinct breach of the employment contract.

[194] However, even if I were to consider his claim as a separate distinct breach of the employment contract, I would have found that McDonald failed to meet his threshold burden to establish his claim, based on the fact that McDonald has not proven any actual additional damages. In that event, in the context of his Application and the summary judgment granted on his main claim, I would have dismissed McDonald's application for summary judgment of this claim and would have summarily dismissed this distinct claim even though there was no cross-application for summary dismissal (based on the principles in ***Pyrrha Design*** at paras 18-28), rather than directing a trial of that claim alone. Both parties agreed in oral argument that if I found that McDonald's additional damages claim was not proven, it was not one that should be directed to

trial. Further, there is no genuine issue for trial given the lack of proof of additional damages caused by the manner of dismissal.

5. Conclusion re Damages

[195] Based on the foregoing, McDonald is granted judgment for wrongful dismissal in the amount of $379,312.68, plus pre-judgment interest calculated at the prescribed rates under the *Judgment Interest Act* from February 11, 2016, to the date of this decision, plus post-judgment interest to the date of payment.

VI. Conclusion

[196] McDonald's Application for summary judgment is granted. McDonald is declared to have been wrongfully dismissed without cause on February 11, 2016, and is granted judgment as noted above.

[197] In the event the parties are unable to reach agreement on costs arising out of this decision, the following process shall apply:

(a) within 30 days of this decision, McDonald shall file and serve on Sproule and submit to my office a written cost submission setting out his costs position;

(b) within 45 days of this decision, Sproule shall file and serve on McDonald and submit to my office a written costs submission setting out its costs position;

(c) each party's costs submission will be a maximum of 3 pages (excepting attachments, including authorities, draft proposed bill of costs, or reasonable and proper costs summary), single spaced in letter format, and shall provide:

(i) their position with respect to the factors set out in rule 10.33;

(ii) any formal offer under the Rules or other offer they wish considered;

(iii) a draft proposed bill of costs pursuant to Schedule C; and

(iv) a summary of their actual reasonable and proper costs that the party incurred in respect of the application and the action.

[198] If no submissions are received pursuant to this direction, there shall be no order as to costs.

Heard on the 16th day of March, 2023.
Dated at the City of Calgary, Alberta this 17th day of October, 2023.

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

Appearances:

C.M. Smith
for the Plaintiff

G. Stapon, K.C.
for the Defendant