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JUDICIAL CENTRE	CALGARY
PLAINTIFFS	**APEX NUTRI-SOLUTIONS INC., 2175551 ALBERTA LTD., STEVEN HERBERT, DAVID HERBERT, MURRAY HERBERT AND CAROLYN HERBERT**
DEFENDANT/PLAINTIFF BY COUNTERCLAIM	**ATB FINANCIAL**
DEFENDANTS BY COUNTERCLAIM	**APEX NUTRI-SOLUTIONS INC., 2175551 ALBERTA LTD., DAVID HERBERT, MURRAY HERBERT AND CAROLYN HERBERT**
DOCUMENT	**BRIEF OF ATB FINANCIAL**
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BENCH BRIEF OF ATB FINANCIAL
REGARDING SUMMARY JUDGMENT AND THE
APPOINTMENT OF A RECEIVER

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I. INTRODUCTION

1. This Brief is submitted by ATB Financial ("**ATB**") in support of an amended application filed by ATB for various relief.

2. The essence of the amended application is threefold. ATB firstly seeks summary judgment in respect of its ordinary loan facilities; secondly, ATB seeks summary dismissal of the Defendants' lawsuit, which alleges ATB intentionally put them out of business and seeks damages; and, thirdly, ATB seeks appointment of a receiver of certain collateral, and an interim receiver of other collateral, as there is no viable alternative for ATB to recover any of its indebtedness.

3. Ancillary to the foregoing, ATB seeks: i) to lift a stay of proceedings, as one of the Plaintiffs suing ATB is a guarantor and is also subject of a consumer proposal process (in which ATB was not named nor compromised); ii) approval to file an Amended Counterclaim, for the purpose of adding in the formerly stayed guarantor; and iii) security for costs, as these Plaintiffs' principal business is non-operational, ATB's collateral is fire-damaged, and the claims being made against ATB are of little or no merit.

II. FACTS

a. The Parties

4. The Plaintiffs, having commenced a lawsuit against ATB for damages and seeking injunction, are Apex Nutri-Solutions Inc. ("**Apex**"), 2175551 Alberta Ltd. ("**217 AB**", and collectively with Apex, the "**Debtor Companies**"), Steven Herbert ("**Steven**", who is presently the subject of a Consumer Proposal), David Herbert ("**David**"), Murray Herbert ("**Murray**") and Carolyn Herbert ("**Carolyn**", collectively with Steven, David and Murray, being the "**Personal Guarantors**").

5. The Debtor Companies are borrowers of ATB under certain credit facilities, and have cross-guaranteed the ATB indebtedness. The Personal Guarantors have provided guarantees of the indebtedness of the Debtor Companies. Those documents are all in order and set out in Affidavit No. 1 of Rehman Mulji, sworn January 6, 2025 (the "**Mulji Affidavit No. 1**").

6. ATB filed a Statement of Defence to the Plaintiffs' claim, and concurrently filed a Counterclaim against the Debtor Companies and Personal Guarantors (all together, the "**Debtors**"), with exception of Steven, who is the subject of a stay of proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 ("**BIA**"), as a result of the earlier filing of his Consumer Proposal.

7. ATB's Counterclaim seeks judgment for its loan indebtedness, which is particularized in the Mulji Affidavit No. 1.

8. Except where otherwise stated, factual information referenced herein is cited to the Mulji Affidavit No. 1.

b. Background to the Claims

9. The Debtors carry on two farming operations. Apex owns lands upon which it was producing agricultural products (e.g., oils, animal feed and broiler chickens). The Herberts own lands upon which they are or were operating a grain farm.

10. The Apex farm operation was acquired by the Herberts in 2019. The Herberts incorporated 217 AB for the purpose of acquiring the Apex shares from the former owners, the Boeses.

11. Apex carried on business as a farming operation, with four distinct production activities: i) canola crushing; ii) extrusion to make a feed product; iii) roasting to make a feed product; and iv) raising broiler chickens.

12. ATB granted loans to 217 AB and Apex, for purpose of completing the acquisition and continuing the existing business. This included term loans and a revolving line of credit ("**RLOC**"). The RLOC was provided to Apex on a margined basis, dependent on fluctuating volume of inventory and accounts receivable.

13. The ATB loans were secured by a mortgage provided by Apex upon the lands from which it operated (approx. 21 acres, near Edburg, hereafter, the "**Apex Lands**"), and general security agreements ("**GSAs**") from Apex and 217 AB. The loans were supported by guarantees from each Debtor Corporation to the other, and from the Personal Guarantors. The Personal Guarantors are all resident in Alberta and signed the necessary guarantee acknowledgment certificates.

14. As security for their guarantee indebtedness, Murray and Carolyn provided additional mortgage security to ATB, charging three quarter sections of land upon which they carry on a grain farming operation (the "**Herbert Lands**").

15. As of January 2, 2024, the indebtedness of Apex, 217 AB, and the Personal Guarantors, inclusive of accrued interest (but not inclusive of all costs, including full indemnity for legal costs, hereafter, the "**Indebtedness**"), is as follows:

Apex	Term Loan 766 - *******3700 Outstanding Balance $626,959.84 Interest $67,835.37 **TOTAL as of January 2, 2025 $694,795.21** Per Diem $102.20 Term Loan 766 - *******1800 Outstanding Balance $1,737,580.70 Interest $180,630.25 **TOTAL as of January 2, 2025 $1,918,210.95** Per Diem $307.05 Term Loan 766 - *******8500 Outstanding Balance $244,350.96 Interest $25,775.73 **TOTAL as of January 2, 2025 $270,126.69** Per Diem $43.18 Revolving Line of Credit Loan 766 - *******1500 Outstanding Balance $178,841.30 Interest $3,686.46 **TOTAL as of January 2, 2025 $182,527.76** Per Diem $36.50
217 AB	Commercial Term Loan 766 - 35652871600 Outstanding Balance $381,268.94 Interest $40,512.09 **TOTAL as of January 2, 2025 $421,781.03** Per Diem $62.15

David Herbert	For his guarantees of Apex and 217 AB, a total of $1,687,708.19
Murray Herbert	For his guarantees of Apex and 217 AB, a total of $1,687,708.19
Carolyn Herbert	For her guarantees of Apex and 217 AB, a total of $1,687,708.19

16. Demands were issued in respect of the Indebtedness, along with BIA section 244 enforcement notices and Notices of Intent under the *Farm Debt Mediation Act*, SC 1997, c-21 ("**FDMA**"). The Indebtedness is accordingly accelerated and fully due and outstanding, with exception of Steven, against whom demand was not made, in light of the stay in place from his Consumer Proposal.

17. There is a detailed chronology to this matter, set out in the Mulji Affidavit No. 1, the Affidavits of Murray Herbert[1] and Steven Herbert[2], and cross-examination transcripts for those affidavits of Murray[3] and Steven[4]. Mr. Mulji has also been cross-examined in this matter[5]. A summary, of relevant points in the chronology, is as follows, with capitalized terms having the meaning given in the Mulji Affidavit No. 1, unless otherwise defined:

    (a) in March, 2019, ATB established the initial financing for Apex under its First Credit Agreement;

    (b) in June, 2019, 217 AB completed the Apex acquisition and the Herberts took over the business from the Boeses;

    (c) by March, 2020, Apex was in default of its financial covenants, upon closing its first fiscal year. Apex revenues were down approximately 20% compared to previous ownership, likely due to the Herberts ceasing a part of the operation (distribution of soy meal) carried on by the previous owners, and having higher quota costs for their broiler chickens;

    (d) ATB tolerated this initial default, on representations from Apex that it was negotiating better agreements with Cargill, as a major counterparty, and exploring alternatives to improve profitability;

    (e) in late 2020, Apex suffered a boiler failure, due to corrosion resulting from a pH imbalance, which resulted in temporary shut-down, loss of operating revenue, and a significant capital cost as insurance would not cover the replacement;

    (f) ATB continued to support Apex, including by approval in 2021 of additional financing, upon Apex's request, to move an additional home structure onto the Apex lands;

[1] Affidavit of Murray Herbert, sworn September 13, 2024 and filed October 9, 2024.

[2] Affidavit of Steven Herbert, sworn May 27, 2024 and filed October 9, 2024.

[3] Cross-examination of Murray Herbert, dated November 19, 2024 ("**Murray Transcript**").

[4] Cross-examination of Steven Herbert, dated November 19, 2024 ("**Steven Transcript**").

[5] Cross-examination of Rehman Mulji, dated January 21, 2025 ("**Mulji Transcript**").

(g) after March of 2021, Apex was in default of its financial covenants for its second consecutive year;

(h) in November 2021, the parties entered into the Second Credit Agreement, amending the margining formula, and reserving ATB's rights in respect of the ongoing covenant default;

(i) the Second Credit Agreement contained a clerical error in the margining formula – it added back lienable payables into the margin, rather than subtracting those amounts – this was clearly a typographical mistake, as Steven confirmed in cross-examination[6];

(j) the error was quickly corrected (62 days later), by all parties executing the Third Credit Agreement;

(k) the Third Credit Agreement also approved a bulge to the RLOC, which had been requested by Apex, to provide additional temporary liquidity to assist with various external pressures:

    (i) throughout the fall of 2021, Apex had been dealing with various seasonal pressures, including drought, poor quality of canola, and unfavourable commodity pricing;

    (ii) additionally, Apex had negotiated a new agreement with Cargill, and was committed to delivering certain volumes of a higher-quality product;

    (iii) Apex overstocked at times that it was able to obtain good feedstock at reasonable pricing, but at the same time had accumulating payables and receivables;

    (iv) this impacted working capital and resulted in its request to ATB for additional, liquidity support, by way of the temporary bulge to the RLOC;

(l) the temporary bulge was given by ATB in January of 2022, in the Third Credit Agreement, on a temporary basis, with a review date set in July of 2022;

(m) unfortunately, Apex suffered a fire loss in March, 2022, resulting in major damage to building and equipment, and the ceasing of operations of two of its business lines – extrusion and roasting;

(n) Apex commenced an insurance claim with Co-operators, and started to receive business interruption insurance payments;

(o) despite the material disruption to Apex's business and balance sheet, ATB continued to support Apex at that time;

(p) in July, 2022, Co-operators advised Apex it would not renew its existing business operating insurance, which was due to expire by August, 2022;

[6] Steven Transcript, at pages 55-56.

(q) Apex negotiated an initial extension to its existing insurance coverage and began to seek alternatives, then negotiated subsequent further extensions, as it tried to source an alternate insurance provider;

(r) by August, 2022, Apex was in breach of its reporting covenants, and was continuing with only partial operations;

(s) Apex was additionally liquidating inventory, as it continued to sit on excess feedstock;

(t) in or around October, 2022, ATB agreed to reduce Apex's loan service obligations, accepting "interest only" payments, to assist Apex with its cash flow;

(u) the parties signed a Credit Amending Agreement on October 24, 2022, wherein ATB reduced the payment requirements and Apex provided to ATB a number of covenants, as well as a general release;

(v) Apex additionally advised it would be discontinuing certain of its prior operations (extrusion and roasting) and would be seeking to undertake a new crushing operation, with hopefully better margins;

(w) by March, 2023, Apex exhausted its business interruption payments from Co-operators, and finalized a lump-sum settlement for the property damage;

(x) Apex directed Co-operators to send the insurance proceeds to ATB[7];

(y) ATB agreed to allow Apex to make requests for expenditures, whereby ATB would readvance monies to Apex, from the insurance proceeds, for approved expenditures relating to rebuilding the damaged collateral;

(z) this arrangement was expressly agreed to by Apex under various documentation, including the Credit Amending Agreement, the Apex Mortgage and the Apex GSA;

(aa) following deposit with ATB, Apex requested approval of certain capital expenditures from the collateral proceeds, some of which ATB granted and agreed to fund, principally for acquisition of construction materials and a down payment on a new piece of equipment;

(bb) ATB advised Apex that, if it was going to rebuild the facility and restore its operation, the building would need to be properly constructed, including with adequate engineering specifications, confirmation it would be built by qualified professionals, and would be up to code;

(cc) ATB further advised the building would need to be appraised, and Apex would need to engage a financial advisor, to assist with its reporting and profitability issues;

(dd) Apex advised ATB that it had acquired some raw materials and was intending to employ former farm employees to undertake the construction work, which ATB advised was not agreeable;

[7] Steven Transcript, at p18, lines 22-24.

(ee) in July, 2023, Apex was advised by its insurer that no further extensions to its operating insurance would be provided;

(ff) Apex terminated all non-shareholder employees and advised ATB that it had ceased operations;

(gg) ATB issued demands at that point, along with the statutory notices under the BIA and FDMA;

(hh) after demands, ATB advised it would not continue to support the feeding of the broiler chickens, beyond the last remaining flock present upon the Apex Lands – that is, ATB would provide further credit support for the existing chickens, on an invoice-approval basis (to ensure those chickens could be fed and finished), but would not support any new, subsequent chicken cycles;

(ii) in August, 2023, Apex, 217 AB, Murray and Carolyn filed for FMDA protection, subsequently extending that through to December 2023;

(jj) no solution for the Indebtedness was resolved through FDMA, and in January, 2024, the Plaintiffs sued ATB, alleging ATB had caused all of their losses;

(kk) ATB defended, filed its Counterclaim, and seeks repayment of its indebtedness.

c. Summary of Present Arguments

18. The crux of the Plaintiffs' argument is that, with more of ATB's money, the Plaintiffs could have saved, restored and continued their business.

19. The Plaintiffs allege that ATB not only failed to extend enough credit, but did so without lawful right, and without the Plaintiffs' consent and awareness.

20. The Affidavits of Murray and Steven go so far as to allege ATB intentionally forced the Debtor Companies out of business.

21. The Plaintiffs allege ATB had a fiduciary obligation to the Debtors, and failed to meet the appropriate standard of conduct of fiduciary in the circumstances.

22. They allege damages were incurred as a result of ATB's conduct, particularly the failure of the Apex business was driven by ATB.

23. None of that is true.

24. The fact is Apex ceased operations, of its own volition, due to inability to obtain affordable operating insurance after a sustained period of non-viability.

25. Apex was impacted by a variety of external factors, including catastrophic events. ATB acted in good faith to support the borrowers over an extended risk period, and also acted prudently throughout, to manage its increasing exposure.

26. Respectfully, the Plaintiffs' arguments fail completely in the face of the law and evidence. It is appropriate their claims be dismissed and ATB be permitted to proceed summarily to recover what it can.

27. Moreover, whereas the Plaintiffs seek injunctive relief, there is no possible benefit to be obtained from a stay and preservation of *status quo*. Apex is inoperable. ATB faces a significant shortfall upon realization of its remaining collateral. There is no question ATB will need to extend its enforcement to the Guarantees.

28. The Debtors have already exhausted a thrice-extended FDMA stay. Additional time, to hold *status quo* under injunction, will not cause Apex to be insurable nor profitable. In the circumstances, delay will only continue to erode value, which will increase ATB's losses.

29. It is respectfully submitted the relief sought is just and convenient, fit for the circumstances, reasonable, well within ATB's rights, and measured appropriately. There is no appropriate alternative resolution, other than what ATB proposes.

III. ISSUES

30. To concisely summarize ATB's position on the issues at hand:

(a) ATB is entitled to a receivership under its security, and the same should be granted in the circumstances.

(b) ATB's proposed amendment of its Counterclaim, to lift the BIA stay against Steven and add him as a Defendant, is reasonable and necessary for ATB to proceed with its enforcement.

(c) ATB should be granted summary judgment, as its loan documentation, including all security and guarantees, is valid and enforceable as against all of the Defendants.

(d) ATB should be granted summary dismissal of the Plaintiffs' claim, for lack of merit.

(e) The Plaintiffs should be denied any injunction, for failing to meet the applicable test.

(f) The Plaintiffs should be required to pay security for costs into Court, in the event their claim is not dismissed, and they intend to continue with their litigation.

IV. LAW AND ARGUMENT

a. Receivership Should be Ordered

31. It is submitted that an Order appointing BDO Canada Limited, as interim receiver of the property and undertaking of Apex, and receiver of the property and undertaking of 217 AB and the Herbert Lands, is just and convenient.

32. Importantly, ATB has the right to appoint a receiver, set out in various clauses within its security documentation.

33. Section 243 of the BIA and section 13(2) of the *Judicature Act*, RSA 2000, c J-2 (among other legislation) vest in this Honourable Court the authority to appoint a receiver where it is just and convenient to do so.

34. In *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co* ["***Paragon***"], Justice Romaine described factors that may be considered in determining whether it is just or convenient to appoint a receiver[8]:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

(h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties;

[8] *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430, at para 27 – **TAB 1**

(p) the goal of facilitating the duties of the receiver.

Bennett, Frank, Bennett on Receiverships, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

35. The Court in *Paragon* stated, where the security documentation gives to the lender the right of appointment of a receiver, the "extraordinary nature of the remedy sought is less essential to the inquiry".[9]

36. *Paragon* was recently referred to by this Honourable Court in *ATB Financial v Mayfield Investments Ltd* ["***Mayfield***"][10], in context of a debtor seeking to stay a receivership order. Justice Marion observed the *Paragon* factors are not only relevant to consideration of appointment of a receiver, but also to the tripartite test in cases where an applicant seeks to stay the appointment, or effect of a prior appointment, of a receiver.[11]

37. Applying the *Paragon* factors, to the case at bar, with consideration being given to *Mayfield*, and particularly to the utility of a receivership at this juncture, rather than an injunction, it must be noted:

(a) ATB has the right, under its security agreements with Apex, 217 AB and the Herberts, to have a receiver appointed.

(b) Receivership is less extraordinary, where it is expressly contracted for with the responding parties.

(c) There is significant risk to ATB in recovering its indebtedness. It's collateral has been sitting in a damaged state for almost three years. Only a portion of proceeds from that collateral remain held and recoverable.

(d) Apex has ceased operations. It has no meaningful cash flow and there is no identifiable means by which it would repay ATB.

(e) Apex cannot get insurance for its operations. Even if rebuilt, through some novel source of capital and a period of injunction, it has no ability to resume its operations.

(f) Absent insurance, there is risk of preservation and protection of collateral. ATB has no visibility on whether its collateral is presently winterized or is subject to ongoing deterioration in its present state.

(g) Should Apex be continuing to raise broiler chickens, it has no access to working capital and no organic cash flow, so cannot ensure support for existing flocks.

(h) The Mulji Affidavit No. 1 explains that the broiler chicken operation was either neutral to cash flow or operating at a loss. If Apex is continuing this aspect of its operation, it can only do so by eroding equity from other sources, to fund the operating loss.

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[9] *Paragon*, at para 28.

[10] *ATB Financial v. Mayfield Investments Ltd*, 2024 ABKB 635, 2024 CarswellAlta 2744 – **TAB 2**

[11] *Mayfield*, at para 65.

38. Where *Paragon* refers to the balance of convenience, it is submitted this lies clearly in favour of ATB, for factors already described – ATB's collateral is damaged; Apex laid off its staff; Apex ceased operations, has no capital and is not insurable.

39. Additionally, the Debtors have had almost three years, since the fire loss and partial shutdown, to resolve an alternative. The Debtors have not refinanced, despite alleging equity is available in the Herbert Lands. There has been effectively no progress, in respect of the repayment of ATB, only ongoing, material deterioration.

40. The Debtors' position has been, and continues to be, that ATB must have granted them more money. At ATB's risk, they would have pursued a speculative new venture, undertaking a new crushing operation, with hopefully better margins. Alternatively, the Debtors plead that ATB prevented them from restoring their old business, through adequate credit advancements.

41. In either scenario, the premise is that ATB had some obligation to fund the Debtors through their calamities and speculation.

42. The fact is ATB always observed all of its lending obligations under its credit agreements. ATB always acted as a prudent lender in the circumstances. ATB extended far more leeway to these borrowers, in the manner of tolerance and ongoing support over a long period, than it needed to.

43. In a receivership or interim receivership, the receiver may borrow, and ATB may choose to extend further funds under a Receiver's Certificate. Such funds would ensure the receiver is able to carry out its mandate effectively. The risk assessment of a lender, in the scenario of funding a receiver and promoting realization, is obviously different from a lender considering the committal of funds into a ceased and failed operation, for speculation by management that it can be transformed or restored.

44. In a receivership, preservation of assets is also assured, and ceasing of erosion of equity. The receiver would take steps to preserve value, before resolving a court-supervised sale strategy. This is ultimately for the benefit of all stakeholders, including the Debtors.

45. A receiver, once appointed by the Court, is not the secured creditor's agent, but is a Court officer and a representative of all interests. The receiver must seek Court approval in advance of any material sale. This ensures protection of the rights of the Debtors, throughout, by ensuring the receiver's process is provident and transparent.

b. Bifurcation of the Receivership Processes

46. ATB's initial application in this matter was for appointment of a receiver over the property and undertaking of Apex, 217 AB and the Herbert Lands. In discussions with the proposed receiver, BDO Canada Limited, and on the basis of ATB's lack of present understanding of the state of Apex, its assets and operations, ATB has determined a bifurcation of the receivership process, between receivership and interim receivership, is appropriate.

47. Specifically, ATB seeks appointment of a receiver over everything other than Apex. ATB seeks appointment of an interim receiver, in respect of Apex, so that it may get a better understanding of what is the current circumstance of that company, and particularly the chicken operation. This is an equitable and commercially reasonable approach, at this time, as it allows ATB to independently

assess the condition of the Apex collateral and operations, and particularly to understand the scope of risk that a receiver may undertake.

48. Concurrently, it allows ATB to progress a professional sale process in respect of the Herbert Lands. There is no possibility ATB will be fully repaid without recourse to the Guarantees[12], and, seasonally, the present time is ideal for commencing a sale process for farm lands, before the frost lifts and seeding must begin.

49. Importantly, as interim receiverships have a statutory initial term of 30 days, this also ensures ATB will have to return to Court within a short time, seeking either an extension of the interim receivership or a conversion to receivership, as may be appropriate for Apex. This ensures the Court, ATB and the stakeholders will have the near-term benefit of an interim receiver's independent assessment and report, informing as to next steps.

c. <u>There is No Basis for Injunctive Relief</u>

50. On the basis of the foregoing, and following the statements of Justice Marion in *Mayfield*, concerning the interrelatedness of the test for injunction and the test for receivership, it follows that injunction is not appropriate in this case.

51. As a starting point, it has to be asked, what could an injunction possibly accomplish? And how will that outweigh the prejudice of the same? An injunction will not make these operations profitable; it will not improve cash flow or generate capital to operate; an injunction will not make the business viable or insurable at a reasonable rate.

52. There is a distinction between interim injunction and interlocutory injunction. To the extent the Plaintiffs were or are seeking both the distinction should be noted. This was described by Justice D.B. Nixon, as follows:[13]

> When considering the relief requested, it is important to understand the distinctions between interim and interlocutory injunctions. These distinctions were discussed in Buckley Insurance.
>
> An interim injunction is often considered by a Court after a relatively brief argument and is typically granted only for a short time period: *Buckley Insurance* at para 51. That time period is often specified and may be used to allow the parties (and the Court) to further consider matters.
>
> An interlocutory injunction is usually considered by a Court after a more thorough argument and is typically granted for a longer period than an interim injunction: *Buckley Insurance* at para 52.
>
> While both interim and interlocutory injunctions are a pre-trial forms of relief, the interlocutory relief often stays in place until there is a trial or the action is otherwise concluded: *Buckley Insurance* at paras 51-52.
>
> The decision to grant interlocutory and interim injunctions is typically determined by reference to the tripartite test. The elements of the tripartite

[12] See Responses to Undertakings of Reham Mulji ("**Mulji Responses to Undertakings**"), including the appraisal of the Apex Lands, showing an anticipated shortfall as against ATB's indebtedness.

[13] *Muslim Counsel of Calgary v. Mourra*, 2018 ABQB 118, at paras 57-61 – **TAB 3**

> test are: (1) that the applicant demonstrate a strong prima facie case that it will succeed at trial; (2) that the applicant demonstrate that irreparable harm will result if the relief is not granted; and (3) that the applicant show that the balance of convenience favours granting the injunction: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at 334, (1994), 111 D.L.R. (4th) 385 (S.C.C.) [**RJR-MacDonald Inc**].

53. In *Condominium Corporation No. 042 5177 v Kuzio*, 2019 ABQB 814, the Court stated[14]:

> An interim injunction is a tool of equity designed to prevent injustice. The overarching perspective of a court requested to grant an interim injunction must be, as Justice Veit observed in *Enviro Trace Ltd. v. Sheichuk*, 2014 ABQB 381 (Alta. Q.B.) at para 28, whether granting the injunction is "fair and equitable." Further, and again as Justice Veit observed in *Enviro Trace* at para 28, the tripartite test "is a useful particularization of the factors inherent in an assessment of whether it is fair and equitable to issue an interlocutory injunction in a particular set of circumstances."

54. As such, in addition to the test in *RJR-MacDonald Inc*, the Court is required to consider whether it is just and equitable on the facts for an interim or interlocutory injunction to issue.

55. In *Allarco Entertainment 2008 Inc v Staples Canada ULC*, 2021 ABQB 340 ("***Allarco***"), the Court adopted an expanded version of the *RJR-MacDonald Inc* test, described by Sharpe JA in his authoritative text, *Injunctions and Specific Performance*, as follows:[15]

> The parties agreed on the familiar test for an interlocutory injunction. Here is the test as expressed by Sharpe JA in his authoritative text:
>
> > 1. has the plaintiff presented a case which is *not frivolous or vexatious* but which presents a serious case to be tried?
> >
> > 2. will *damages* provide the plaintiff with an adequate remedy? If so, no injunction should be granted. If not,
> >
> > 3. would the plaintiff's *undertaking in damages provide adequate compensation* to the defendant, should he or she succeed at trial, for loss sustained because of the interlocutory injunction? If yes, there is a strong case for an interlocutory injunction.
> >
> > 4. where there is doubt as to the adequacy of the respective remedies in damages, the case turns on the *balance of convenience*.
> >
> > 5. at this final stage, weight may be placed on the court's prediction of ultimate success [but only where one side of the case is clearly stronger] [*Injunctions and Specific Performance* — Loose-leaf Edition (current to November 2019), Thomson Reuters, para 2.130 at pp 2-18 and 2.18.1].

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[14] *Condominium Corporation No. 042 5177 v Kuzio*, 2019 ABQB 814, at para 13 – **TAB 4**

[15] *Allarco Entertainment 2008 Inc v Staples Canada ULC*, 2021 ABQB 340, at para 25 – **TAB 5**

56. Applying the test, as formulated, the first question is whether the Plaintiffs' claim is frivolous or vexatious, or presents a serious claim to be tried.

d. The Plaintiffs' Claims are Frivolous and Vexatious

57. With respect, the Plaintiffs' claim lacks merit. The allegations derive from two general sources of complaint. On one hand, the Plaintiffs take issue with how ATB managed the insurance proceeds that arose from its damaged collateral. If the Plaintiffs had unfettered access to those proceeds, they allege they would have either restored their old business, or pursued a new one.

58. Additionally, the Plaintiffs allege ATB's margining was unclear, causing frustration.

59. Beyond that, the Plaintiffs' allegations, such as "reduction of the credit facilities, without notice", "unilateral alteration of the contract between Apex and ATB", breach of fiduciary obligations, and acting in bad faith, are lacking evidentiary basis and wholly unsupportable.

60. Regarding the insurance proceeds, the Plaintiffs suggest a trust was created, for the benefit of the Plaintiffs or Apex, of which ATB was acting as trustee. They allege ATB breached its fiduciary duties as trustee, and is liable for damages.

61. This argument fails for a number of reasons.

62. Courts have consistently held that the relationship between a financial institution, as lender, and its customer, is a commercial relationship in the nature of debtor and creditor.[16]

63. Divergence from the settled law will only occur where there is a "special relationship" or "exceptional circumstances". In this case, there are neither. ATB acted at all times in keeping with its express loan covenants, under its credit agreements and security. There was nothing special or exceptional about those contracted arrangements. Everything was always done commercially, as between borrower and lender, at arms' length.

64. The express covenants authorizing and informing ATB's actions are multi-fold[17]:

(a) Under ATB's mortgage security, charging the Apex Lands, clause 5(d) discusses proceeds from insurance claims. That clause authorized ATB to restrict and manage any capital expenditures that may be made from proceeds of insurance, arising from any property that is the subject of ATB's security.

(b) Clause 7(e) of the Apex Mortgage restricts the borrower from making any alterations or additions to, or changing the present use of, the Apex Lands, without ATB consent.

(c) Under its general security agreement, charging the property of Apex, clause 4 authorizes ATB to request and receive delivery of any money and to retain possession of the same.

(d) Clause 6(g) of the GSA provides ATB authorization to obtain direct payment of any insurance proceeds, including in respect of real property.

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[16] *Farm Credit Canada v. Pacific Rockyview Enterprises Inc*, 2020 ABQB 357, 2020 CarswellAlta 1051

[17] Mulji Responses to Undertakings, particularly undertaking #5.

(e) Clause 6(k) states the borrower and ATB may agree to positive and negative covenants, including in respect of capital expenditures, from time to time, and the borrower will perform and observe all such covenants and restrictions to the same extent and effect as if set forth in the general security agreement.

65. All of this makes commercial sense. Any lender would want to receive its proceeds of any damaged collateral, and manage the further disbursement of the same.

66. In addition to the above clear provisions in ATB's security, the Debtors signed the Credit Extension Agreement, after the fire loss had occurred. The Credit Extension Agreement expressly states there would be: "No capital expenditure without the Bank's prior written consent."

67. ATB was obviously within its rights to ask for, hold and manage the proceeds. It's collateral had been damaged and the underlying business had ceased a substantial portion of its operations. ATB advised the Debtors it would work with them, but gave commercially reasonable specifications for how ATB's funds could be used going forward.

68. At the time the settlement amount was negotiated and finalized by the Debtors with Co-operators, the Debtors directed Co-operators to deposit the funds with ATB. ATB had requested the Debtors' do that. It was a voluntary disposition by the Debtors, affirming their agreement with the commercial terms that ATB had set out (and affirming, in any case, the covenants already in place under the mortgage, GSA and loan agreements).

69. The Debtors thereafter participated in the arrangement, making requests for funds, some of which ATB approved, further affirming the arrangement.

70. It must be noted, a lender is entitled, and in fact obligated by its own stakeholders, to act reasonably and prudently in best protection of its economic interests. The Supreme Court confirmed, in *Bhasin v Hrynew*, 2014 SCC 71, the "legitimate pursuit of economic self-interest" aligns with the principal of good faith in contractual dealings.[18]

71. Viewing the foregoing, in the context of a claim for injunctive relief, it is evident the Plaintiffs' claims, that ATB acted in breach of fiduciary duty, in bad faith, or frankly in any manner other than in keeping with its contractual rights and obligations, is both frivolous and vexatious. ATB acted in keeping with its contractual rights, under multiple loan and security agreements.

72. Moreover, if a trust is asserted, the Plaintiffs must demonstrate three certainties. Certainty of subject may be evident (in that the insurance proceeds were identifiable), but the other certainties cannot be proven.

73. In respect of certainty of object, the Plaintiffs will argue it was their money; ATB argues it belonged to ATB. The fact is the monies were paid into trust as a result of the terms of the credit agreements, mortgage, general security agreement and Credit Extension Agreement. Each of those indicates those are ATB's funds. To the extent ATB was willing to advance or readvance those funds, was then up to ATB.

[18] *Bhasin v Hrynew*, 2014 SCC 71, at para 70 – **TAB 6**

74. Certainty of intent is equally disputed. The Plaintiffs will argue the monies were paid into the ATB account, for the purpose of ATB holding it in trust for their benefit. ATB argues the funds were paid to ATB as a result of the clear contractual terms of its various agreements.

75. The agreements do not purport to create a trust for the Debtors, they function to reasonably protect ATB in the event of loss.

76. If the Plaintiffs intended something contrary to, or in breach of, their loan agreements and security, that undermines the creation of a trust. ATB could not have been made into a trustee, by carrying out the terms of its facility documents, when the facility documents themselves have no room for contemplation of ATB as a trustee.

77. In summary, the Plaintiffs have no basis for complaint, in respect of how ATB addressed the fire loss, the insurance proceeds, and the approval process for expenditures that followed. ATB acted in accordance with its contractual rights and legal rights at all times.

78. It is submitted the same logic and finding applies in respect of the Plaintiffs' complaint about margining.

79. ATB extended credit on the basis of a margined operating line. This is a very standard commercial arrangement where the borrower has fluctuating inventory and accounts receivable.

80. Amendments were made to the margining formula, but only ever under fully executed amended credit agreements. There was never any amendment made without notice or a fully signed agreement.

81. At the time the Debtors requested additional margin, ATB provided that liquidity support. ATB was acting in good faith, despite the noted risk of prevailing environmental factors, counterparty pricing pressures (principally from Cargill), and the distress placed upon the business from the fire loss.

82. Unfortunately, the Apex business was declining from the start, reflected in sharply falling revenues and immediate covenant defaults. After the fire loss, the plan to rebuild was lacking proper specification and professional support (absent construction consulting, engineering and skilled labour). The suggested plan to pivot to a new operation was purely speculative, set out in the Plaintiffs' internally prepared, draft worksheets, and lacking demonstration for how its forecasts would be reliable.

83. In addition, regardless of all of that, ATB was under no legal or equitable obligation to lend and further increase its exposure, particularly on unreasonable terms.

84. This is all to respectfully say, the Plaintiffs' claims are frivolous and vexatious.

e. <u>Applying the Balance of the Test for Injunctive Relief</u>

85. Returning to the test for interlocutory injunction, set out by this Court in *Allarco*, and looking at the remainder of factors, after the first element:

> 1. Has the plaintiff presented a case which is not frivolous or vexatious but which presents a serious case to be tried?

> 2. Will damages provide the plaintiff with an adequate remedy? If so, no injunction should be granted.
>
> 3. If not, would the plaintiff's undertaking in damages provide adequate compensation to the defendant, should he or she succeed at trial, for loss sustained because of the interlocutory injunction? If yes, there is a strong case for an interlocutory injunction.
>
> 4. Where there is doubt as to the adequacy of the respective remedies in damages, the case turns on the balance of convenience.
>
> 5. At this final stage, weight may be placed on the court's prediction of ultimate success, but only where one side of the case is clearly stronger.

86. It is submitted that, should the Plaintiffs be successful, damages is sufficient. That is expressly what they are seeking. They additionally seek to be relieved of their burden of ATB's debt. Compounded, this is simply a large monetary sum.

87. Alternatively, if the Plaintiffs claims cannot be adequately compensated in damages, part 3 of the test asks if the Plaintiffs' undertaking in damages will provide adequate compensation to ATB, should ATB ultimately succeed at trial.

88. The answer to that is no. The Plaintiffs' undertaking to compensate ATB has no value. The business is inoperative and the Defendants have pleaded impecuniosity. Steven Herbert is the subject of a Consumer Proposal. Murray Herbert, in cross-examination, confirmed he has no ability to support his undertaking to post security for damages, in support of his application for injunctive relief[19]:

> Q. If you look at paragraph 48, it indicates that you've agreed and you undertake to post any security for damages relating to the application for an injunction, which I understand is the application scheduled for next week. And in what -- on what basis are you going to be able to post security for damages given the financial picture that you've described to me?
>
> A. I don't know, sir. I -- these are desperate times.

89. Turning to point 4, the question is what is the balance of convenience. The above analysis, regarding receivership and the nature of the Plaintiffs' claims, being frivolous and vexatious, informs the balance of convenience.

90. Notably, no delay in monetization, at this point, will benefit anyone. There is no going concern, no reasonable possibility that a going concern can be restored, insured and profitable, and no alternative solution that would not have already been resolved though the FDMA process and 18 months that have followed demands being issued.

91. Turning to point 5, it is respectfully submitted the court's prediction of ultimate success should lie with ATB. The loan facility documentation is properly executed and speaks for itself. By contrast, the Plaintiffs must prove ATB acted, not as a prudent lender, but in an extraordinary capacity, so as to make itself a fiduciary. The Plaintiffs must then show ATB failed in that duty. The Plaintiffs must then further prove damages (that is, show the business was not only viable and profitable,

[19] Transcript of cross-examination of Murray Herbert, dated November 19, 2024 ("**Murray Transcript**"), at p24, line 25 to p25, line 8.

but could somehow have been returned to an operational status). The Plaintiffs must then show those damages, resulting from their business failure, were caused by ATB, and not by other sources.

92. The ultimate loss of the Apex business is not only a loss for Apex and its stakeholders, but a significant loss for ATB, as well. The loss of the business was the result of prevailing factors and calamity, not the actions of ATB. To the extent ATB declined to extend further credit, to finance the proposals and rescue efforts suggested by the Plaintiffs, is not a cause of the actual losses the Plaintiffs had already incurred.

93. Respectfully, the Plaintiffs' application for injunctive relief must fail.

f. The Test for Summary Judgment

94. ATB has proven its indebtedness. ATB has not caused any of the Debtors' losses. This Brief sets out the appropriateness of receivership and the lack of basis for injunctive relief, all of which is informative as to summary dismissal of the Plaintiffs' claims and summary judgment in favour of ATB.

95. Summary judgment is available under Rules 7.2 and 7.3 of the *Alberta Rules of Court*. Rule 7.2 provides Rules for evidence, including sufficiency of affidavits and admissions contained in pleadings. Rule 7.3 allows a party to apply for summary judgment on all or part of a claim if there is no merit to the claim (in cases where the applicant is defending) or no defence to a claim (in cases where the applicant is seeking judgment).

96. Summary judgment is appropriate where there is no genuine issue requiring a trial, as the judge is able to reach a fair and just determination on the merits. This is possible where the process allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result.[20]

97. Summary judgment adjudication is "very easy to access". A summary judgment adjudicator can make contested findings of fact on a balance of probabilities, when it is fair and just to do so. The test is not so high so that it becomes unachievable; it does not require that the trial outcome would be obvious.[21]

98. The Alberta Court of Appeal has summarized the relevant factors to take into account on a summary judgment application[22]:

    (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

[20] *Hryniak v Mauldin*, 2014 SCC 7, at para 49 – **TAB 7**

[21] *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343, at para 171 – **TAB 8**

[22] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, at para 47 – **TAB 9**

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 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) 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.

g. Summary Judgment Should be Granted in Favour of ATB

99. Starting with the Debtors' contractual indebtedness to ATB, it is submitted there is no contest there. The loan documentation, security, and guarantees are set out in the Mulji Affidavit No. 1.

100. Mr Mulji was cross-examined on that Affidavit, revealing no issues with the validity and enforceability of the documentation.[23]

101. The Plaintiffs describe and admit the loan documentation and guarantees in the Statement of Claim.[24]

102. The indebtedness is similarly beyond dispute. The amount of current obligations is set out in the Mulji Affidavit No. 1. The Credit Agreements state that the Lender's statement of indebtedness is accepted by the borrowers as being correct, absent "manifest error" (see clause 12(e) of the First Credit Agreement). The Plaintiffs have shown no error at all, let alone manifest error, in respect of the amounts that are claimed.

103. The Debtors argue they ought to be relieved of their obligations to ATB, largely on the basis of equitable principles, resting on ATB's alleged bad faith and misconduct. It is submitted the evidence here fails to demonstrate misconduct by ATB, at all, let alone to the degree suggested by the Debtors, so as to vitiate ATB's otherwise proven loan indebtedness.

104. In respect of the Debtors' claim for damages, that rests on the same foundation as their defence. The assertion is that ATB was the cause of their business failure, or otherwise failed to finance their recovery efforts. It is submitted that does not demonstrate a reasonable case, nor any triable issue.

105. ATB did not cause Apex to have poor margins, liquidity challenges, negative environmental impacts, consecutive destructive events, and ultimately no ability to operate for lack of insurance.

106. To the extent ATB withheld funds, it was entitled not to extend that credit. ATB acted at all times in keeping with its loan covenants, and in a commercially reasonable manner.

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[23] See, generally, the Mulji Transcript.

[24] E.g., see paras 1-9 of the Statement of Claim.

107. Importantly, the Debtors cannot prove any damages. They cannot show any connection between ATB and the loss of the Apex enterprise. Apex cannot operate, because it cannot obtain affordable insurance. It cannot obtain insurance, because it has a long history of significant claims.

108. The Defendants plead, "Apex has suffered a loss of value as an ongoing concern in an amount totaling 6 million dollars"[25], but nothing that ATB has done or could do has had any impact on their insurability, and therefore Apex's ultimate inability to operate.

109. It is respectfully submitted this matter is appropriate for summary disposition, in favour of ATB.

h. Security for Costs Ought to be Ordered

110. Security for costs may be ordered under Rule 4.22 of the *Alberta Rules of Court*, in cases where it is "just and reasonable in the circumstances"[26], taking into consideration the enumerated factors:

> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

111. The interpretation and application of the rules for security for costs must take into consideration the Foundational Rules under Part 1 of the *Alberta Rules of Court*.[27] These include, generally and specifically, facilitating efficiency, credibility and fairness in court proceedings.

112. From the Alberta Court of Appeal in *Kaushal v Kaushal*, 2020 ABCA 340[28], other considerations which inform the test for security for costs are:

(a) a security for costs order is discretionary and balances the reasonable expectations of the parties with their rights in order to arrive at a just and reasonable outcome;

(b) the onus rests with the applicant to establish that the factors in rule 4.22 are met;

(c) a failure to pay costs awarded in previous trial court processes, along with a demonstrated inability to pay costs if an appeal is unsuccessful, will be sufficient to grant a security for costs order in most cases; and

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[25] Statement of Claim, at para 35.

[26] *Stepanik v Timmons*, 2021 ABQB 287 ["***Stepanik***"], at para 28 – **TAB 10**

[27] *Stepanik*, at para 29.

[28] *Kaushal v Kaushal*, 2020 ABCA 340, at para 30 – **TAB 11**.

(d) access to justice does not equate to access to civil processes without fear of costs consequences.

113. Concerns regarding a party's ability to pay costs, coupled with "modest prospects" of success, have been found sufficient to justify security for costs.[29] The "merits of the action" is expressly a consideration, under Rule 4.22.

114. The purpose of an order for security for costs is to control and curtail people from commencing litigation and pursuing another party in the court system in a frivolous and wasteful manner.[30]

115. To date, ATB's legal costs are $97,604.35, plus ongoing amounts for work in progress. ATB anticipates incurring another $250,000, should this matter proceed through to trial.

116. ATB seeks $350,000 to be paid into Court as security for its costs, supported by the following facts:

(a) Apex is insolvent, has ceased operations, has materially damaged assets and liquidation value below the estimate of what ATB is owed;[31]

(b) 217 AB has no assets, to ATB's knowledge, other than the Apex shares, which are valueless;

(c) Steven Herbert is liable to ATB for more than $1.5 million, before costs are factored in, and he has previously filed a Consumer Proposal (though excluded ATB from any compromise);

(d) Murray and Carolyn Herbert are jointly liable to ATB for more than $1.5 million, before costs are factored in, and have already pledged their primary asset (3 quarters of farm land) as security for that indebtedness to ATB;

(e) Murray Herbert confirmed in examination, he does not know how he would be able to pay any security for his undertaking to pay damages, despite making that undertaking plainly in his affidavit[32]; and

(f) David Herbert is liable to ATB for more than $1.5 million, before costs are factored in, and ATB has no information to suggest he has assets sufficient to meet this principal obligation, plus a significant costs award.

117. These Plaintiffs have commenced a very large lawsuit against ATB, but have no ability to pay a costs award, in the event ATB is successful.

118. ATB submits its success is reasonable to project, based on the merits of these claims.

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[29] See, *Aski Construction Ltd v Markos*, 2017 CarswellAlta 1845 (Alta CA), at para 8 – **TAB 12**; *Skolney v Nisha,* 2018 ABCA 78, at para 15 – **TAB 13**; *Matty v Rammasoot*, 2013 ABCA 170 – **TAB 14**; *Abou Shaaban v Baljak*, 2024 ABCA 282; at para 17 – **TAB 15**

[30] *Stepanik*, at para 37.

[31] Mulji Responses to Undertakings, undertaking #11.

[32] Murray Transcript, at p24, line 25 to p25, line 8.

119. ATB will be relying on the realization of its collateral, to repay its indebtedness and the costs of the proposed receiver. ATB anticipates a large shortfall, based on the state of Apex's business and assets.

120. ATB accordingly has zero expectation that any of these debtors will be in a position to pay for ATB's additional costs for its litigation defence.

V. CONCLUSION

121. In view of the foregoing, ATB should be granted judgment for its loan indebtedness.

122. ATB should be granted its choice of remedy, wherein ATB requests an order for receivership of the Herbert Lands and 217 AB, and interim receivership of Apex.

123. Within 30 days, ATB would need to return to the Court for either extension or conversion of the interim receivership. The Debtors will of course have notice and opportunity to respond in the course of the proceeding.

124. It is submitted there is no reasonable alternative to the foregoing. It is submitted the merits of the application, and the underlying claim and Counterclaim, lie clearly in favour of ATB.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF FEBRUARY, 2025.

DENTONS CANADA LLP, counsel for ATB Financial

Per: _____
Derek Pontin

TABLE OF AUTHORITIES

TAB	AUTHORITY
CASES	
1.	*Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430
2.	*ATB Financial v. Mayfield Investments Ltd,* 2024 ABKB 635, 2024 CarswellAlta 2744
3.	*Muslim Counsel of Calgary v. Mourra*, 2018 ABQB 118
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5.	*Allarco Entertainment 2008 Inc v Staples Canada ULC*, 2021 ABQB 340
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7.	*Hryniak v Mauldin,* 2014 SCC 7
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9.	*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49
10.	*Stepanik v Timmons,* 2021 ABQB 287
11.	*Kaushal v Kaushal,* 2020 ABCA 340
12.	*Aski Construction Ltd v Markos,* 2017 CarswellAlta 1845 (Alta CA)
13.	*Skolney v Nisha,* 2018 ABCA 78
14.	*Matty v Rammasoot,* 2013 ABCA 170
15.	*Abou Shaaban v Baljak,* 2024 ABCA 282

TAB 1

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles

Headnote

Receivers --- Appointment — General
Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.

Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court*[1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario[2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*.[3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re*[4] where it was concluded that the court's discretion to grant such orders should only be exercised

in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate[5] and that such consequences would have irreparable harm.[6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re*[7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*,[8] the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms*[9] with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment ex parte and without notice to take over one's property, or property which is prima facie his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property prima facie his and hand the same over to another on an ex parte claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re*,[10] Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act*[11] or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available."[12] Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne[*]

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RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 17 Alta. L.R. (3d) 23, 150 A.R. 93, [1994] 5 W.W.R. 337, 1994 CarswellAlta 34 (Alta. Q.B.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 1997 CarswellAlta 235, 196 A.R. 241, 141 W.A.C. 241, [1997] 6 W.W.R. 715, 47 C.B.R. (3d) 1 (Alta. C.A.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1997), 224 N.R. 397 (note), 216 A.R. 392 (note), 175 W.A.C. 392 (note) (S.C.C.) — referred to

Schacher v. National Bailiff Services, 1999 CarswellAlta 32 (Alta. Q.B.) — referred to

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc., 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 244 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 387 — considered

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company (”MTAC”) and 586335 British Columbia Ltd. (”586335”), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

> a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;
>
> b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;
>
> c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;
>
> d) an assignment of mortgage-backed debentures;
>
> e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;
>
> f) $250,000 to be held in trust by Paragon's counsel; and
>
> g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there

was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is

> authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a

cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

> a) that there is a serious issue to be tried on appeal;
>
> b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and
>
> c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

12 Para. 20.

* Associate in the Insolvency and Restructuring Group of Torys LLP. The author wishes to thank Sean Keating, student-at-law, for his invaluable research assistance in the preparation of this annotation.

End of Document

TAB 2

2024 ABKB 635, 2024 CarswellAlta 2744, [2024] A.W.L.D. 4765

2024 ABKB 635
Alberta Court of King's Bench

ATB Financial v. Mayfield Investments Ltd

2024 CarswellAlta 2744, 2024 ABKB 635, [2024] A.W.L.D. 4765

ATB Financial (Plaintiff) and Mayfield Investments Ltd., Howard Pechet, Chalmers Investment Corp. Ltd., Mayfield Homes Ltd., and Pechet 2018 Family Winery Trust by its trustee and litigation representative Jason Pechet (Defendants)

M.A. Marion J.

Heard: October 28, 2024
Judgment: October 30, 2024
Docket: Edmonton 2403-12343

Counsel: Chuck Russell, K.C., Jared Lane, for Mayfield Investments Ltd.
Pantelis Kyriakakis, Nathan Stewart, for ATB Financial
Darren Bieganek, K.C., for Howard Pechet
Kelly Bourassa, for Ernst & Young Inc. in its capacity as court-appointed receiver of Mayfield Investments Ltd.
Susy Trace, for Agriculture Financial Services Corporation
David Archibold, for Camrose Regional Exhibition & Agricultural Society
Terry Czechowskyj, K.C., for Albert Stark

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
V Bankruptcy and receiving orders

Headnote

Bankruptcy and insolvency --- Bankruptcy and receiving orders
M Inc. was in financial distress and in default of its financial obligations to A Inc. — M Inc. and A Inc. entered into consent receivership order — M Inc. failed to meet obligations in forbearance agreement which caused A Inc. to file lender's certificate — M Inc. brought application to stay effects of consent receivership order and lender's certificate — Application dismissed — M Inc. did not establish that it was in position to imminently and unconditionally pay or redeem its indebtedness to A Inc. — Consent receivership order was final receivership order granted with M Inc.'s consent and agreement, including conditions upon which receivership would be activated — M Inc. failed to establish irreparable harm as it could not show immediate loss or devaluation of its assets, its ability to continue operations, or refinancing plan — Stay was terminated and receiver was already pursuing its mandate, which meant that reversing this process had potential to cause confusion and unintended consequences.

Table of Authorities

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Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABCA 406, 2015 CarswellAlta 2342, 609 A.R. 313, 656 W.A.C. 313, 52 C.L.R. (4th) 17 (Alta. C.A.) — referred to

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. (2020), 2020 ONSC 3659, 2020 CarswellOnt 8665, 81 C.B.R. (6th) 283 (Ont. S.C.J.) — distinguished

Chegancas v. Lukezic (2011), 2011 CarswellOnt 10873, 2011 CarswellOnt 10874, *(*sub nom. *Royal Bank of Canada v. Lukezic)* 429 N.R. 391 (note), *(*sub nom. *Royal Bank of Canada v. Lukezic)* 294 O.A.C. 398 (note) (S.C.C.) — referred to

Douglas Channel LNG Assets Partnership v. DCEP Gas Management Ltd. (2013), 2013 BCSC 2358, 2013 CarswellBC 3990 (B.C. S.C.) — referred to

HML Contracting Ltd v. Pinder (2022), 2022 ABCA 185, 2022 CarswellAlta 1240, 47 Alta. L.R. (7th) 263 (Alta. C.A.) — referred to

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — referred to

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 ABQB 430, 2002 CarswellAlta 1531, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — considered

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Royal Bank v. Walker Hall Winery Ltd. (2010), 2010 ONSC 4236, 2010 CarswellOnt 6025 (Ont. S.C.J. [Commercial List]) — referred to

Servus Credit Union Ltd. v. Proform Management Inc. (2020), 2020 ABQB 316, 2020 CarswellAlta 903, 12 P.P.S.A.C. (4th) 120, 18 Alta. L.R. (7th) 277 (Alta. Q.B.) — considered

Stephenson v. Romspen Investment Corporation (2020), 2020 ABCA 316, 2020 CarswellAlta 1641 (Alta. C.A.) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

Wiebe v. Weinrich Contracting Ltd. (2021), 2021 ABCA 242, 2021 CarswellAlta 1576, 90 C.B.R. (6th) 1 (Alta. C.A.) — considered

1499925 Alberta Ltd. v. NB Developments Ltd. (2023), 2023 ABKB 114, 2023 CarswellAlta 493, 61 Alta. L.R. (7th) 459 (Alta. K.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 243 — considered

s. 244 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — considered

s. 17(1) — considered

s. 17(4) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 1.4(2)(h) — considered

Proceeding: Motion/Application to Stay.

APPLICATION by defendant to stay effects of consent receivership order and lender's certificate.

***M.A. Marion J.*:**

Reasons for Decision

I. Introduction

1 The applicant, Mayfield Investments Ltd (**Mayfield**), applies (**Application**) to stay the effects of a consent receivership order granted September 6, 2024 (filed September 10, 2024) (**Consent Receivership Order**) and an October 24, 2024 certificate (**Lender's Certificate**) filed by ATB Financial (**ATB**), until November 30, 2024[1] or, alternatively, until after Mayfield's application under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*) (*CCAA* Application) is decided. ATB opposes the Application.

II. Background

2 Mayfield, either in its own capacity or through several subsidiaries or other entities, holds direct or indirect interests in a portfolio of commercial real estate properties and businesses in Alberta, including among others the Camrose Resort and Casino, the Medicine Hat Lodge and the Stage West Dinner Theatre. Some of the assets underlying its interests are regulated by Alberta Gaming, Liquor and Cannabis Commission (**AGLC**). Mayfield indirectly employs in the range of greater than 450 people.

3 Mayfield has been in financial distress and in default of its financial obligations to ATB since March 2021. It continues to be insolvent, although Mayfield argues it is on the eve of solvency.

4 Mayfield and its personal guarantor, Howard Pechet (together the **Credit Parties**), entered into credit facilities with ATB; their obligations are secured by various security agreements.

5 Following initial default in March 2021, the Credit Parties and ATB entered into an Initial Forbearance Agreement dated June 29, 2022. There were further defaults, and, among other things, the parties executed a First Forbearance Amending Agreement dated August 31, 2022, a Second Forbearance Amending Agreement dated December 16, 2022, and a Third Forbearance Amending Agreement dated March 22, 2023.

6 On August 29, 2023, ATB demanded repayment of the Credit Parties' indebtedness.

7 On December 12, 2023, ATB delivered a demand letter and corresponding Notices of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*). ATB demanded repayment of Mayfield's indebtedness, plus all accrued and accruing interest, standby fees, costs, prepayment fees, and expenses.

8 The parties negotiated. On February 5, 2024, the parties entered into a further forbearance agreement (**Amended and Restated Forbearance Agreement**).

9 Following that, the Credit Parties engaged in a sales process that failed to generate any proposal sufficient to repay the indebtedness to ATB.

10 Mayfield also committed further "Forbearance Defaults" as defined under the Amended and Restated Forbearance Agreement. On April 15, 2024, ATB issued a "Forbearance Notice of Default and Reservation of Rights Letter" to the Credit Parties. Mayfield then committed further Forbearance Defaults.

11 As of June 14, 2024, the Credit Parties were indebted to ATB for more than $38 million. Further, the "Forbearance Period", as defined in the Amended and Restated Forbearance Agreement, had expired.

12 On June 25, 2024, ATB applied to appoint a receiver and manager (**Receivership Application**). The Receivership Application was scheduled to be heard by the Court on July 4, 2024; however, this was adjourned because the parties entered into another agreement dated effective July 4, 2024 (**First A&R Forbearance Amending Agreement**), which amended the Amended and Restated Forbearance Agreement.

13 The Credit Parties defaulted under the First A&R Forbearance Amending Agreement. On August 16, 2024, ATB delivered a "Notice of Defaults, Terminating Events, and Reservation of Rights" letter to the Credit Parties.

14 On August 29, 2024, Mayfield filed the *CCAA* Application.

15 On August 30, 2024, the Forbearance Period under the First A&R Forbearance Amending Agreement expired.

16 On September 4, 2024, at the Credit Parties' request, the parties entered into further negotiations about a potential further extension of the Forbearance Period.

17 On September 6, 2024, immediately before the Court was to hear the Receivership Application and the *CCAA* Application, the parties entered into a Second Forbearance Amending Agreement dated effective August 30, 2024 (**Second A&R Forbearance Amending Agreement**).

18 The Second A&R Forbearance Amending Agreement contemplated that the parties would consent to the entry of the Consent Receivership Order on September 6, 2024, but that the activation of the receivership under the Consent Receivership Order would be stayed until the earlier of certain conditions (as set out below).

19 On September 6, 2024, Justice Lema granted the Consent Receivership Order and adjourned the *CCAA* Application *sine die*. The *CCAA* Application has never been brought back before the Court.

20 Paragraph 3 of the Consent Receivership Order provides for the stay (**Stay**) of the Consent Receivership Order, to be effective until the earlier of:

> [. . .] (i) October 31, 2024, or such date as may be amended or extended by the written agreement of the Lender and the Debtor, in their sole discretion; or, (ii) the date on which the Lender files a certificate, substantially in the form attached as Schedule "B" hereto (the "**Lender's Certificate**"), certifying that a Forbearance Default (excluding and in addition to the Current Forbearance Default Events) has occurred. Upon the filing of the Lender's Certificate, the Stay shall, without further action by any person or further Court order, be terminated, effective immediately, and all provisions of this Order shall immediately take effect, including, without limitation, the appointment of the Receiver pursuant to paragraph 2 hereof. [. . .]

21 The Amended and Restated Forbearance Agreement, as amended by the Second A&R Forbearance Amending Agreement, required (among other things) the Credit Parties to deliver an unconditional commitment letter from Canadian Western Bank (**CWB**) in a form acceptable to ATB (**CWB Commitment Letter**), by October 15, 2024. The Credit Parties did not do so. This is not in dispute. These defaults, along with others, constituted "Forbearance Defaults" under the Second A&R Forbearance Amending Agreement which entitled ATB to file a Lender's Certificate. ATB did not file a Lender's Certificate initially, to allow the Credit Parties more time to cure the defaults and, in particular, to obtain the CWB Commitment Letter.

22 By October 19, 2024, Mayfield had not delivered the CWB Commitment Letter and has still not done so. Several Forbearance Defaults continued, and continue now, to be uncured.

23 On October 23, 2024, Mayfield filed its application seeking to stay "the effects of the Consent Receivership Order", returnable on October 28, 2024. The application is supported by an affidavit of Mayfield's then President, Jason Pechet (**Pechet**).

24 On October 24, 2024, ATB filed the Lender's Certificate. As of that date, the aggregate indebtedness owed to ATB was more than $38.8 million.

25 On October 28, 2024, the Receiver filed its First Report. It summarizes the Receiver's activities since the Lender's Certificate was filed on October 24, 2024, which included, among other things:

(a) attending at the Medicine Hat Lodge, the Camrose Resort and Casino and Mayfield's head office;

(b) meeting with Mayfield's Vice President of Operations, general managers and employees;

(c) inspecting some of the properties and identifying operational and maintenance requirements and capital deficiencies;

(d) meeting with representatives of AGLC;

(e) obtaining and reviewing Mayfield financial information;

(f) working on operational procedures;

(g) reviewing insurance;

(h) communicating with employees about the receivership and the Receiver's intentions. On October 25, 2024, the Receiver provided a letter to all Mayfield employees outlining the details of the receivership and the Receiver's intention to, among other things, continue operating Mayfield's business without interpretation, to maintain the employment of all current Mayfield employees and to determine the most appropriate sales strategy for Mayfield's assets (which could include selling Mayfield as a going concern);

(i) putting restrictions on fund outflow and reviewing cash flow forecasts;

(j) maintaining an onsite presence at the Medicine Hat Lodge and Camrose Resort and Casino since October 24, 2024; and

(k) terminating the employment of Mayfield's President, Pechet, effective on October 24, 2024.

26 On October 25, 2024, ATB provided the Court its response materials to the Mayfield application, including an October 24, 2024 affidavit of ATB's Director, Risk Advisory & Management.

27 On October 25, 2024, legal counsel amended Mayfield's application and brief of argument and provided a supplemental Pechet affidavit.

28 On October 28, 2024, the Receiver filed its First Report and ATB filed additional materials. I heard the Application

and briefly reserved my decision.

III. Issues

29 Mayfield argues that it is not just and convenient to decide on or continue Mayfield's receivership (including where debtor refinancing is imminent), that the Court has the power to stay the effects of the Consent Receivership Order and the Lender's Certificate (including staying the actions of the Receiver even after the granting of the Consent Receivership Order and the filing of the Lender's Certificate), and that Mayfield meets the tripartite test for a stay (either until November 30, 2024 or until its *CCAA* Application is heard).

30 ATB argues that the question of whether it is just and convenient to appoint the Receiver has already been decided by Justice Lema when he granted the Consent Receivership Order, and that the Credit Parties are estopped from arguing that the Consent Receivership Order should be stayed. ATB notes that no appeal or application to set aside or vary the Consent Receivership Order has been filed, and in any event any application to set aside or vary the order would be unsuccessful. ATB argues that the test to stay the Consent Receivership Order is not met in any event.

31 In argument, I posed the question to Mayfield's counsel whether anyone other than the Receiver had standing to continue Mayfield's initial application or to file the amended Application, given the terms of the Consent Receivership Order and following the delivery of the Lender's Certificate. Paragraphs 2, 4 (and, in particular, 4(j)), 8, 9 and 10 of the Consent Receivership Order were discussed or considered. Ultimately, since no party (including the Receiver) objected to Mayfield's standing to continue the amended Application, but rather argued it on the merits, I have proceeded on the basis Mayfield has standing to continue the Application.

32 Accordingly, based on the materials provided and the parties' submissions, the issues on this Application are:

(a) What is the effect of the Consent Receivership Order and the Lender's Certificate?

(b) Is Mayfield estopped from arguing that the Consent Receivership Order should be stayed?

(c) Should the Consent Receivership Order be stayed?

IV. Analysis

A. The Effect of the Consent Receivership Order and the Lender's Certificate

33 As noted above, paragraph 3 of the Consent Receivership Order provides that, upon the filing of the Lender's Certificate, the Stay shall "without further action by any person or further Court order, be terminated, effective immediately, and all provisions of this Order shall immediately take effect, including, without limitation, the appointment of the Receiver".

34 Mayfield does not dispute that ATB was entitled to file the Lender's Certificate or that the Lender's Certificate was validly filed based on Mayfield's Forbearance Defaults. Accordingly, since October 24, 2024, the Consent Receivership Order's terms have been activated. Since that date, the Receiver has been and is the receiver over Mayfield's property and the stay of proceedings against Mayfield has been and is in place.

35 Therefore, I agree with ATB that the question of whether it is "just and convenient" to appoint a receiver under section 243 of the *BIA* or section 13(2) of the *Judicature Act*, RSA 2000 c J-2 has been overtaken. The Consent Receivership Order provided a clear and simple mechanism to terminate the Stay under paragraph 3 of the Consent Receivership Order, and those provisions have been engaged and implemented. Put another way, whether it is just and convenient to appoint a receiver was decided by this Court on September 6, 2024 based on the agreement and consent of ATB and Mayfield.

36 The issue, then, is not whether the Stay under paragraph 3 of the Consent Receivership Order should be *extended*, as it was originally articulated by Mayfield. That Stay has ended on its own terms and cannot be extended. The issue is whether

the Consent Receivership Order, looking at the situation now, should be stayed after its terms have been active for only a few days.

B. Mayfield is Not Estopped from Arguing that the Consent Receivership Order Should be Stayed

37 ATB argues that Mayfield's Application is subject to issue estoppel, relying on ***Toronto (City) v CUPE*, Local 79, 2003 SCC 63** at para 23:

> 23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.).

38 In my view, the argument that issue estoppel applies fails on the first ground. The issue is not precisely the same on this Application as it was on the day the Consent Receivership Order was presented to the Court and granted. On September 6, 2024, the issue was whether it was just and convenient to appoint a receiver over Mayfield's property at that time, coupled with the Stay on certain conditions. There is new evidence before the Court that was not before the Court on September 6, 2024. The issue now, as I alluded to above, is whether the Consent Receivership Order, now activated through an agreed and court-ordered process, should be stayed.

39 Accordingly, I find that Mayfield was not legally barred by issue estoppel from bringing the Application. This finding is consistent with the Court's jurisdiction to consider an application for stay of receivership proceedings "at any stage of the proceeding" pursuant to section 17(1) of the *Judicature Act*. That determination is made at the time of the application based on the then prevailing circumstances.

40 However, to be clear, the finding that issue estoppel does not apply does not mean Mayfield can ignore its previous consent to the Consent Receivership Order and its effects. Negotiated forbearance agreements, including the use of consent orders, are an important part of insolvency practice. Commercial certainty for all stakeholders dictates that parties should expect that courts will hold them to their bargains, absent further agreement or circumstances that would make it appropriate to nullify or remove the order (including, for example, and without limitation, for matters such as fraud or misrepresentation): ***Servus Credit Union Ltd v Proform Management Inc*, 2020 ABQB 316** at paras 42-50, 60; ***Royal Bank of Canada v Walker Hall Winery Ltd*, 2010 ONSC 4236** at paras 36-48, aff'd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC). There is no application to set aside or vary the Consent Receivership Order based on fraud or misrepresentation, or on any other basis. The relief sought is a stay.

41 Mayfield's consent to the Consent Receivership Order will be considered within the applicable legal framework as to whether the Consent Receivership Order should be stayed.

C. The Consent Receivership Order is Not Stayed

42 Mayfield argues that the Court's authority to order a stay extends to the ability to order a stay of the actions of a receiver/manager well into an extant receivership, relying on ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 3659** at paras 44-54 and 77. I agree with ATB that ***BCIMC*** is wholly distinguishable and does not assist Mayfield's position. ***BCIMC*** did not involve a stay of a receivership, but rather the Court's refusal to approve a receiver-proposed Sale and Investor Solicitation Process for a condominium project where the debtor was in the position to immediately, and without conditions, pay out the indebtedness of the secured creditor. The Court gave the debtor an opportunity to pay out the secured debt, the receivership debt and interest within 72 hours instead of approving the sale. In this case, as noted further below, Mayfield has not established that it is in a position to imminently and unconditionally pay or redeem its indebtedness to ATB.

43 However, a proceeding or judgment can be stayed under rule 1.4(2)(h) and sections 17(1) and (4) of the *Judicature Act*

pending trial, pending other processes in the action, or in favour of different proceedings which may overlap with the existing proceedings: see, for example, ***1499925 Alberta Ltd v NB Developments Ltd*, 2023 ABKB 114** at paras 96-100 and 108-109 (and cases cited therein).

44 The parties agree that the applicable test for a stay in this proceeding is the tripartite test. It has been described in ***Stephenson v Romspen Investment Corporation*, 2020 ABCA 316** at para 13:

> [13] The well-known tripartite test for a stay pending appeal is set out in ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, 334, 111 DLR (4th) 385, following ***Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd***, 1987 CanLII 79 (SCC), [1987] 1 SCR 110, 38 DLR (4th) 321. The applicant has the burden of showing that: (i) there is a serious question to be tried, or an arguable issue that is not frivolous or vexatious; (ii) there will be irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay.

45 See also ***HML Contracting Ltd v Pinder*, 2022 ABCA 185** at paras 18-19.

46 Even where the tripartite test is not met, the Court may have a residual discretion to grant a stay "where the interests of justice so require": ***HML Contracting*** at para 19; ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited*, 2015 ABCA 406** at para 33; ***Stephenson*** at paras 14, 17 and 37.

1. Serious Question or Arguable Issue

47 I agree with ATB that Mayfield has not raised a serious question or arguable issue with respect to a stay in this action, as it pertains to the Consent Receivership Order, *per se*. The Consent Receivership Order was a final receivership order (subject to the usual comeback provision) granted with Mayfield's consent and agreement, including the conditions upon which the receivership would be activated. By consenting to its terms, Mayfield is in much the same position as the debtors in ***Servus***, as described by Justice Lema at paras 50-56:

> [50] By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus's enforcement options (which included applying for a receiver), and that the appointment of a receiver was warranted i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus's debt.
>
> [51] The debtors effectively surrendered, on a contingent basis: "If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order."
>
> [52] I note here that, since at least the making of the first forbearance agreement (which, as noted, featured the debtors signing the CRO), the debtors have been represented by their current and very capable counsel.
>
> [53] It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not "just or convenient" in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not accomplished the one thing that could stave off enforcement action: clearing Servus's debt in full.
>
> [54] Then followed the Interim Monitoring Period, during which Servus consented to being stayed from enforcement, but the debtors' defaults, and Servus's associated enforcement rights, remained the same at its expiry.
>
> [55] Servus has not agreed to any further forbearance or stay period. The consequence that it could seek the receivership order in such circumstances is precisely what the debtors agreed to.
>
> [56] Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed

further below.

48 In fact, Mayfield is in an even more difficult position than the debtor in ***Servus***, as the Consent Receivership Order has already been granted. In ***Servus***, the Court still had to consider whether granting the receivership order on consent was just and convenient. Here, the Consent Receivership Order is already activated, the Receiver has been appointed and has already commenced its work.

49 The Consent Receivership Order has not been appealed. There is no application to vary it pursuant to the comeback provision in paragraph 34 of the order. As noted above, there is no suggestion it was procured by fraud or misrepresentation or is otherwise tainted.

50 However, Mayfield also relies on the existence of its *CCAA* Application. It argues that the receivership should be stayed to allow Mayfield to pursue protection under the *CCAA* which it argues is preferable to a receivership. Mayfield relies on several cases by which it argues courts consider several criteria when faced with competing applications for the implementation of a receivership and proceedings under the *CCAA*: ***Pacific Shores Resort & Spa Ltd (Re), , 2011 BCSC 1775***; ***Douglas Channel LNG Assets Partnership v DCEP Gas Management Ltd, , 2013 BCSC 2358***; ***Century Services Inc v Canada (Attorney General), , 2010 SCC 60***. Mayfield argues this establishes a serious question or arguable issue.

51 ATB argues that Mayfield should have raised its argument about the *CCAA* Application at the time the Consent Receivership Order was granted. The transcript of the attendance before Justice Lema is not before me. What is before me is that both matters were before Justice Lema, the Consent Receivership Order was granted, and the *CCAA* Application (which is not addressed in any material way in the Consent Receivership Order) was adjourned *sine die*. The fact the *CCAA* Application was adjourned *sine die*, rather than dismissed, suggests that it was contemplated as a possibility that it could be brought back on.

52 I have considered Mayfield's arguments and am satisfied that the pre-existing *CCAA* Application sufficiently meets the low threshold of a serious question or arguable issue in the context of an application to stay the Consent Receivership Order. Whether Mayfield is barred from raising the *CCAA* Application for failing to raise this issue before Justice Lema also raises a serious question or arguable issue that would have to be addressed, if necessary, on a more complete record of what happened on September 6, 2024. I make no findings in that regard.

53 I raised with Mayfield's counsel the practical question of exactly how the stay would implement what Mayfield appears to seek, namely maintaining control of the management of Mayfield's assets pending the *CCAA* Application (and pending a hoped-for CWB refinancing) given that the Receiver has already been appointed. Stays in this context typically pause proceedings and operate prospectively, not retroactively. Arguably, a prospective stay of the Consent Receivership Order would simply postpone further activity by the Receiver but would not necessarily reverse the effect of the Consent Receivership Order and give possession and control of Mayfield's property back to Mayfield's directors. What Mayfield really seeks is a stay of the Consent Receivership Order that is retroactive back to before October 24, 2024 when the Receiver's appointment was activated by the filing of the Lender's Certificate. Effectively, it seeks an unwinding of events since October 24, 2024.

54 Counsel provided me no authority that would support a retroactive stay of proceedings. However, the Court of Appeal has noted that the jurisdiction to grant retroactive stays (at least in *CCAA* proceedings) is a novel issue. For example, in ***Wiebe v Weinrich Contracting Ltd, , 2021 ABCA 242***, the Court of Appeal, at para 20, a single Justice of the Court stated:

> [20] As previously recognized by this Court, stays in insolvency proceedings are very common, and "the ability of a case management judge to grant retroactive stays is of significance to the practice": 2019 ABCA 323 at para 17. This question was not answered in the first appeal, which was determined on the basis of procedural fairness. Therein, however, the Court noted: "Whether a supervising judge in *CCAA* proceedings has the jurisdiction to grant a retroactive stay of proceedings regarding third party claims is a novel issue yet to be considered by a Canadian commercial court: 2020 ABCA 396 at para 42.

55 In the circumstances, I proceed on the basis that Mayfield has raised a serious question or arguable issue about whether

the Consent Receivership Order should be stayed until November 30, 2024 to allow it to pursue the *CCAA* Application (and associated refinancing), and also about whether the Court could potentially implement a stay on such conditions to allow Mayfield's directors to pursue that application during the stay period.

2. Irreparable Harm

56 Mayfield argues that it will suffer irreparable harm if a stay is not granted because its assets will "likely be irreversibly disposed of, with little recourse". It also argues that receivership will decrease the value of Mayfield's business and assets, and that the opportunity cost of seizing and likely dissolving Mayfield's assets "when it is so close to a possible Court-sanctioned *CCAA* proceeding is impossible to calculate".

57 I agree with ATB that Mayfield has failed to establish irreparable harm, for several reasons, including but not limited to:

(a) the alleged immediate irreversible loss or devaluation of Mayfield assets is not established. The Receiver has taken steps to work with AGLC to ensure a smooth transition and has been granted a temporary casino facility licence for the Camrose Casino and Resort until January 22, 2025. Further, the Receiver's First Report has indicated the Receiver's intentions to continue operating Mayfield's business without interruption and to determine the most appropriate sales strategy which could include selling Mayfield as a going concern;

(b) the ability of Mayfield to continue operations for the benefit of its employees and charities with which it works, and to maintain Mayfield's present asset values, pending refinancing or a *CCAA* Application, has not been established. The Receiver's opinion is that cash levels, of at least some of the businesses, are insufficient to maintain business operations and meet critical expenditures, and has been advised by Mayfield's Vice President of Operations that Mayfield was forecast to have insufficient funds, without a cash injection, to operate beyond November 1, 2024. Mayfield has not established on a balance of probabilities that Mayfield's past or potential future sales of assets, or possible further infusions of capital from the Pechet family or others, are sufficient for ongoing operations or to address capital deficiencies or repairs already identified by the Receiver;

(c) Mayfield does not have a concrete refinancing plan in place. Mayfield has been advising ATB (since June 2024) and the Court (since at least August 2024), that a CWB refinancing is forthcoming or imminent. The evidence now before the Court illustrates that CWB has not yet provided credit approval (let alone executed a CWB Commitment Letter), and Mayfield's 2023 financial statements are still being prepared or, at best, have only very recently been provided to CWB;

(d) it is not clear that an unconditional repayment of the indebtedness to ATB would be possible upon a CWB refinancing, even if it occurs. The CWB refinancing appears now to contemplate funding of $30 million instead of $35 million[2], and it is not clear that a $4.125 million deposit relating to the transfer of the Camrose Casino Corporation casino facility licence is imminently releasable. Further, Mayfield argued that getting the CWB Commitment Letter during the proposed stay would help Mayfield to "better negotiate with ATB"; it did not argue that the CWB Commitment Letter *would* allow Mayfield to expeditiously and unconditionally pay out the ATB indebtedness; and

(e) Mayfield is not "so close to a possible Court-sanctioned *CCAA* proceeding" as it asserts. It has not taken any steps to bring the *CCAA* Application back before the Court.

58 Mayfield's stay application fails on the irreparable harm element of the tripartite test.

3. Balance of Convenience

59 Mayfield's application also fails on the balance of convenience element of the test.

60 ATB has agreed to forbear on enforcement of its security for many months. Based on the understanding, among other things, that a CWB Commitment Letter was imminent, ATB agreed to further forbear for a short time, by agreeing to the terms of the Consent Receivership Order. It was entitled to file the Lender's Certificate and crystallize the benefits of its

bargain with Mayfield. The CWB Commitment Letter has still not arrived almost two months later, Mayfield remains in default, and there are further Forbearance Defaults. ATB has lost confidence that the CWB Commitment Letter is forthcoming. The indebtedness to ATB is significant and ATB is the primary secured creditor with assets at risk. A subordinate secured creditor supports ATB's position on the Application. No stakeholder other than Mayfield, through its directors/shareholders, voiced opposition the continuation of the receivership.

61 Again, critically, Mayfield agreed to the terms of the Consent Receivership Order and the clear terms that the receivership would be activated upon the filing of a Lender's Certificate. Mayfield took the benefit of the bargain and, in its Application, seeks to resile from it. While I have held that Mayfield is not legally barred by issue estoppel to make the Application, Mayfield attempts to effectively unwind its consent and agreement, which was relied on by Mayfield and the Court, and it seeks to do so mere days after the consequences of its consent and agreement are brought to bear. While not technically attempting to relitigate precisely the same issue, as a practical matter it is doing just that because it has not (in my view) established a favourable material change in its circumstances since the Consent Receivership Order was granted. These are significant factors against Mayfield's position when considering the balance of convenience. As noted above, parties must expect courts to enforce their bargains, and I am satisfied it is appropriate to do so in this case.

62 Finally, the Stay has been terminated, the Receiver has already been appointed and activated, and the Receiver has been diligently pursuing its mandate since October 24, 2024. It has already communicated with employees about the receivership, terminated Mayfield's President, taken possession and control of Mayfield's assets, and started working on financial and interim borrowing plans. ATB argues that the egg cannot be unscrambled now. I find that, while the egg may not be fully scrambled at this point, it has been cracked and is already bubbling on the griddle. It would be inconvenient, and may cause confusion and unintended consequences, to try to put the egg back together by granting the relief Mayfield seeks.

63 In all the circumstances, the balance of convenience does not support a stay of the Consent Receivership Order.

4. Conclusion re Tripartite Test

64 Mayfield has failed to establish the elements of the tripartite test.

65 I note that both parties also referred to ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430** at para 27, which outlines factors a court may consider in determining whether it is appropriate to appoint a receiver. Although not technically applicable in this case because the Receiver has already been appointed, I found many of the ***Paragon*** factors relevant to the application of the tripartite test for a stay in this receivership context. I considered the ***Paragon*** factors and find that, to the extent they could be applicable in this situation, they support my conclusion not to grant the requested stay.

5. No Exercise of Any Residual Discretion

66 In the event I have residual discretion to grant a stay notwithstanding that Mayfield has failed to establish the elements of the tripartite test, on the basis that "the interests of justice so require", I find that the interests of justice do not support granting a stay and I would decline to do so in this case, including for the reasons noted above.

V. Conclusion

67 Mayfield's Application is dismissed.

Application dismissed.

Footnotes

1 The Application originally requested a stay until February 1, 2025, but in oral argument counsel amended the request to November 30, 2024.

[2] Pechtel advised the Court during argument that a $35 million CWB refinancing was still available but may be necessary. This was not in his affidavit. It would not have changed my decision even if were accepted as evidence.

End of Document

TAB 3

2018 ABQB 118, 2018 CarswellAlta 617, [2018] A.W.L.D. 1700, 290 A.C.W.S. (3d) 614

2018 ABQB 118
Alberta Court of Queen's Bench

Muslim Counsel of Calgary v. Mourra

2018 CarswellAlta 617, 2018 ABQB 118, [2018] A.W.L.D. 1700, 290 A.C.W.S. (3d) 614

Muslim Counsel of Calgary, Muslim Community Foundation of Calgary, and Muslim Association of Calgary (Applicants) and Mahmoud Mourra and Mohammed Al-Kurdi (Respondents)

D.B. Nixon J.

Heard: June 2, 2017; June 14, 2017; June 15, 2017
Judgment: March 28, 2018
Docket: Calgary 1601-17314

Counsel: Beamer Comfort, Michael Selnes, for Applicants
Thomas Kent, for Respondents

Subject: Churches and Religious Institutions; Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.d Permanent injunctions
II.2.d.ii Miscellaneous

Headnote

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Permanent injunctions — Miscellaneous
Restraining order — Three related religious organizations included not-for-profit council that owned and operated places of worship, community facilities, and centres of Islamic education and that was guiding body for other two organizations — Member of council regularly worshipped at facilities operated by council, contributed financially to council, and had his children attend school operated by council — Member became involved in dispute with council's board of directors concerning governance and operation of council — Member participated in campaign against council and was involved in several confrontations with council employees, resulting in revocation of his membership — Organizations brought application for one-year restraining order against member and obtained interim restraining order (IRO) — Application granted — Permanent order was made extending terms of IRO to June 2, 2018, which was one year after date that hearing commenced — It was in interests of justice to grant permanent order against member, notwithstanding religious context — Member had engaged in pattern of disruptive behaviour directed at council and its directors, including kicking one director at annual general meeting — Member's conduct was unacceptable in our society, and Canadian Charter of Rights and Freedoms did not govern rights between individual and private organization — It was particularly bothersome that member continued to believe his behaviour was justified because of alleged insults against him, and he even violated IRO by remaining in coffee shop after learning director was there — Given member's testimony concerning alleged insults, it was inferred that member would be inclined to continue his disruptive conduct in future absent judicial intervention.

Table of Authorities

Cases considered by *D.B. Nixon J.*:

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R. 7.3 — considered

APPLICATION by religious organizations for one-year restraining order against member.

***D.B. Nixon J.*:**

I. Introduction

1 This application deals with the review of an interim common law injunction (the "*Interim Restraining Order*"). The Interim Restraining Order was granted on February 6, 2017 and continued until this decision was issued.

2 The Muslim Council[1] of Calgary, Muslim Community Foundation of Calgary, and Muslim Association of Calgary (collectively, the "*Applicants*") seek a restraining order against Mr. Mahmoud Mourra, who is a Respondent. The Applicants filed a Statement of Claim and an Application on the same day seeking this relief.

3 The portion of this Application relating to Mr. Mohammed Al-Kurdi was dealt with in a separate hearing. The decision of this Court concerning Mr. Al-Kurdi was appealed: see *Muslim Counsel of Calgary v. Al-Kurdi*, 2017 ABCA 297 (Alta. C.A.).

4 The Alberta Court of Appeal allowed the appeal in the *Al-Kurdi* case, and granted a permanent restraining order against Mr. Al-Kurdi. That order stipulated that it would remain in effect until January 17, 2018. Notwithstanding that sunset date, the judgment roll described the grant as being a "permanent restraining order".

5 During argument, the Applicants in this case stated that they seek a permanent restraining order against Mr. Mourra. For the reasons outlined below, this application is granted. A permanent restraining order will be issued against Mr. Mourra and that order will remain in effect until June 2, 2018.

II. Background

6 The Muslim Council of Calgary (the "*MCC*") is a not-for-profit organization established under the *Societies Act*, RSA 2000, c S-14. It is the guiding body for both the Muslim Community Foundation of Calgary and the Muslim Association of Calgary.

7 The MCC owns and operates several places of worship, community facilities, and centres of Islamic education in Calgary, Alberta. However, the MCC facilities are not the sole place for Islamic worship in Calgary.

8 Mr. Mourra is a former member of the MCC. Prior the Interim Restraining Order being issued, Mr. Mourra regularly worshiped at facilities operated by the MCC. He also contributed financially to the MCC, and his children attended a school operated by the MCC. His children still attend a MCC school.

9 Mr. Mourra has been involved for some time in a dispute with the board of directors of the MCC. The dispute concerns the governance and operation of the organization.

10 As part of this dispute, Mr. Mourra has participated in a campaign against the MCC. He has also been involved in several confrontations with MCC employees. Those confrontations include the following incidents.

11 On July 17, 2016, Mr. Mourra was involved in a confrontation with MCC employees while attending an MCC-operated prayer hall in NW Calgary. At the time, the prayer hall was doubling as a polling station for city-wide elections of the MCC.

12 The MCC claims that Mr. Mourra was at the prayer hall to disrupt the election. Mr. Mourra insists he was only at the prayer hall to pray, but that a MCC employee began video recording him and his friends without provocation.

13 Later in July 2016, Mr. Mourra was involved in a confrontation while attending a prayer ceremony at a MCC-operated facility. In his own affidavit, Mr. Mourra states that he (and others) voiced concerns regarding a replacement imam who was leading the prayers. Mr. Moura insists he was at the facility solely to pray, and only voiced concerns when the regular imam who usually led prayers was replaced by an unknown individual. Mr. Mourra also denies intimidating anyone.

14 On August 21, 2016, Mr. Mourra was involved in another confrontation at the annual general meeting for the MCC (the "*AGM*"). Exactly what transpired during the AGM is disputed. What is clear, however, is that the AGM descended into a chaotic melee following questionable conduct by the MCC's board of directors.

15 After the AGM was adjourned under controversial circumstances, many individuals in the attending audience rushed forward towards the MCC directors who had been officiating the meeting. The MCC argues that Mr. Mourra was part of the crowd that rushed forward, which was initially denied by Mr. Mourra.

16 In the ensuing chaos, some of the MCC directors were attacked by members of the crowd. One of the individuals attacked was Mansour Shouman ("*Director Shouman*").

17 Director Shouman was assaulted during this altercation. He alleges that Mr. Mourra initiated a physical confrontation by kicking him, which Mr. Mourra initially denied.

18 On August 29, 2016, the MCC board of directors voted to revoke Mr. Mourra's membership in the MCC. His membership was revoked because of his alleged involvement in the AGM melee. The MCC board also revoked the membership of other members at the same time.

19 On December 22, 2016, the MCC filed an application seeking a restraining order against Mr. Mourra.

20 On December 28, 2016, Mr. Mourra was served with a Notice of Trespass by the MCC. That notice permanently bars him from all MCC property.

21 On February 6, 2017, Marriott J. granted the Interim Restraining Order against Mr. Mourra, which prevents him from:

1. contacting any MCC director;

2. coming within 100 metres of any MCC director or within 200 metres of any director's residence;

3. coming within 200 metres of any MCC meeting; and

4. coming within 100 metres of any MCC facility.

22 The Interim Restraining Order included certain exceptions. Those exceptions permitted Mr. Mourra to drop off and pick up his children from their MCC-operated school, and allowed him to participate in off-site school field trips.

23 The Interim Restraining Order set out certain procedural aspects for a hearing in June 2017 in the Court of Queen's Bench of Alberta. In particular, the Interim Restraining Order was explicit that the Court would determine whether the

replacement order should be an interim or permanent order.

24 On April 13, 2017, Mr. Mourra was arrested following an incident at a Starbucks coffeehouse in NE Calgary. Director Shouman sat for several hours at the Starbucks located in an area where Mr. Mourra was known to frequent. Mr. Mourra subsequently entered the Starbucks with some friends and ordered coffee.

25 After sitting down to drink his coffee at the NE Calgary Starbucks, Mr. Mourra noticed that Director Shouman was also present. Despite this, and knowing that the terms of the Interim Restraining Order prevented him from being within 100 metres of Director Shouman, Mr. Mourra chose to remain at the Starbucks. As a result, Director Shouman notified the police. The police attended the Starbucks and Mr. Mourra was arrested.

26 In June 2017, I heard this Application concerning the requested injunction. The hearing occurred over three separate days (albeit not full days); the first day being June 2, 2017 (collectively, the "*June 2017 Hearings*").

27 The format of the June 2017 Hearings was set by the parties. The direct evidence was provided to the Court in affidavit form. The cross-examination and re-direct of the witnesses was provided to the Court in *viva voce* form.

28 During oral argument, the MCC stated that it was seeking a permanent order for a period of one year (the "*Permanent Restraining Order*"). The MCC also stated that the proposed terms for the Permanent Restraining Order should track those of the Interim Restraining Order.

III. Issues

29 Has the MCC satisfied the legal test to obtain the Permanent Restraining Order against Mr. Mourra?

30 An overlapping issue is whether I should issue any order at all. If I do issue an order, the next question is whether I should grant either an interim injunction or the requested Permanent Restraining Order.

IV. Analysis

A. Positions of the Parties

31 The MCC argues that a Permanent Restraining Order is justified because Mr. Mourra has an established pattern of harassing behaviour. The position of the MCC is based on the premise that Mr. Mourra disrupted prayer services, kicked Director Shouman during the AGM, and generally interfered with the operations of the MCC.

32 In cross-examination, Mr. Mourra testified that he was justified in his actions because he had been insulted. Indeed, he further testified that the actual cause of these disturbances was the person who insulted him in the first instance.

33 Mr. Mourra further argued that a Permanent Restraining Order is not appropriate in these circumstances. His position is based on the assertion that the MCC has neither demonstrated a reasonably held legitimate fear for its members' safety nor come to the Court with "clean hands."

34 Alternatively, Mr. Mourra argues that, at worst, another interim restraining order would be appropriate until this matter goes to a trial. In the further alternative, he argues that any such order should be mutually applicable against both himself and the MCC.

35 Mr. Mourra's "clean hands" argument stems from the belief that the MCC is attempting to silence him because of his political opposition to its current board of directors. Mr. Mourra opposes any restraining order because of the affect that it will have on his children, who attend an MCC-operated school, as well as on his ability to practice his religion. He wants to attend MCC-operated religious facilities.

36 In considering the nature of this Application, I note that the remedy sought under both the Statement of Claim and the

Application is virtually identical. Both of those documents seek a restraining order against Mr. Mourra, requesting that he not be allowed within a certain distance of the MCC board members, their places of residence, and the various MCC facilities. The order sought also would restrain Mr. Mourra from contacting the MCC board of directors either directly or indirectly.

B. The Remedy Sought — Interim or Permanent Injunction

37 Before I can deal with the substantive issue, I need to determine the legal path to be followed in this case. The Applicants are seeking a permanent injunction. In contrast, the Respondent argues that an injunction, if any, should be interim (albeit, I think they mean interlocutory).

38 The irony of this procedural point is that an interlocutory injunction would typically be in place until a trial was heard and a decision made. Given the current backlog within the Court, that trial likely would not be scheduled until the fall of 2018 (or later), and the decision would be issued after that event.

39 In contrast, the Applicants have stated that the Permanent Restraining Order sought is to have a sunset date of June 2, 2018. The form of the order sought by the Applicants is permanent, presumably because it will result in a determination on a final basis, both in respect of this Application and the corresponding Statement of Claim.

40 Mr. Mourra further argues that a permanent injunction is not appropriate in these circumstances because the Court only has limited evidence at this juncture. He also asserts that a full-blown trial might find that the chaos at the AGM was the fault of the MCC board.

41 Given the circumstances of this case, I will consider the merits of a permanent injunction first. I will consider the merits of an interim injunction only if I decide not to grant a permanent injunction. With that said, I will touch on both interim and interlocutory injunctions below where the context warrants additional comment.

C. Does this Court Have The Jurisdiction to Grant A Permanent Injunction in this Case?

42 I can only grant a permanent injunction if there is an underlying proceeding and there is appropriate evidence before the Court. These prerequisites are a matter of substance: *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125 (Ont. C.A.) at para 101 [*Buckley Insurance*].

43 A proceeding creates the legal framework within which the Court can consider matters. Within that procedural framework, the issues are defined and the evidence is presented.

44 The nature of the proceeding delineates the scope of the evidence that comes before the Court. The evidence presented by the parties and accepted by the Court determines the type of relief that may be granted. Different levels of evidence are required for each of a permanent, interlocutory, or interim injunction.

45 In this case, a Statement of Claim and an Application have been filed. That establishes the prerequisite proceeding.

46 The hearing before me was by way of the Application. In the Notice of Application, the Applicants referenced section 7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*], and the *Judicature Act*, RSA 2000, c J-2, as authority for the Court to grant a permanent injunction.

47 Rule 7.3 is the rule for summary judgment, which applies “in respect of all or part of a claim.” “Claim” is defined to include a matter where a plaintiff seeks a remedy. That being the case, the Application falls within the scope of Rule 7.3.

48 It is necessary to address these alleged foundations because of the implications that would flow from a permanent injunction. In particular, if a permanent injunction is granted under the Application, it will be a final order. If that occurs, the underlying Statement of Claim in this action would be moot because the remedy sought is the same in both documents.

49 With this background in mind, I turn to consider the jurisdictional arguments that the Applicants put to the Court. I

consider, first, Rule 7.3 and, second, the *Judicature Act*.

50 Concerning the Applicants' request under Rule 7.3, I am cognizant of the recent cultural shift to broaden the availability of summary judgment to promote timely and affordable access to the justice system: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para 2; *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at paras 13-15; and *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120 (Alta. Q.B.) at paras 50-52, aff'd 2015 ABCA 406 (Alta. C.A.). Given that both parties presented their evidence and had an opportunity to cross-examine, this is an appropriate case to dispose of the matter summarily on the existing record.

51 Concerning the *Judicature Act*, a number of provisions of that statute are a codification of this Court's inherent jurisdiction and authority to grant equitable relief: *P. (R.) v. V. (R.)*, 2012 ABQB 353 (Alta. Q.B.) at para 20 [*P (R)*]. The relevant provisions in this case are sections 8 and 16(1)(c) of the *Judicature Act*.

52 Given that this is a case where it would be appropriate to dispose of the matter summarily on the existing record, and also noting the powers granted by the *Judicature Act*, I find that this Court has the necessary legal foundation to consider the possible grant of a permanent injunction. Whether a permanent injunction will be granted depends on the facts and circumstances of this case, and how I balance the rights of all parties.

D. Legal Test for Common Law Injunctive Relief

53 A superior court has broad discretion to grant a common law restraining order. This broad discretion exists because a restraining order is a form of injunctive relief: see sections 8 and 16(1)(c) of the *Judicature Act*.

54 The entitlement of this court to grant injunctive relief is based on its inherent jurisdiction and is not limited by the common law. A superior court essentially has the discretion to grant a restraining order whenever it is in the interests of justice to do so. This jurisdiction is confirmed in section 8 of the *Judicature Act*.

55 While a superior court has the jurisdiction to grant injunctive relief, it is a burdensome and serious task: *Liu v. Hamptons Golf Course Ltd.*, 2017 ABCA 303 (Alta. C.A.) at para 24 [*Liu*]. The evidence must always be considered carefully. It should only be granted when necessary, and the particulars of the injunctive relief granted must be crafted carefully to ensure a proper balancing of the respective interests of the parties: *Buckley Insurance* at para 86.

56 For context, I review the prerequisites for both an interim and interlocutory injunction in comparison to those of a permanent injunction. I also comment on the nature of these injunctions because there is often confusion as to their respective scopes: see *Buckley Insurance*. This confusion is particularly apparent in the context of permanent injunctions and a related temporal question. For example, a permanent injunction does not mean indefinite.

1. Interim and Interlocutory Injunctions

57 When considering the relief requested, it is important to understand the distinctions between interim and interlocutory injunctions. These distinctions were discussed in *Buckley Insurance*.

58 An interim injunction is often considered by a Court after a relatively brief argument and is typically granted only for a short time period: *Buckley Insurance* at para 51. That time period is often specified and may be used to allow the parties (and the Court) to further consider matters.

59 An interlocutory injunction is usually considered by a Court after a more thorough argument and is typically granted for a longer period than an interim injunction: *Buckley Insurance* at para 52.

60 While both interim and interlocutory injunctions are a pre-trial forms of relief, the interlocutory relief often stays in place until there is a trial or the action is otherwise concluded: *Buckley Insurance* at paras 51-52.

61 The decision to grant interlocutory and interim injunctions is typically determined by reference to the tripartite test.

The elements of the tripartite test are: (1) that the applicant demonstrate a strong *prima facie* case that it will succeed at trial; (2) that the applicant demonstrate that irreparable harm will result if the relief is not granted; and (3) that the applicant show that the balance of convenience favours granting the injunction: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at 334, (1994), 111 D.L.R. (4th) 385 (S.C.C.) [*RJR-MacDonald Inc*].

2. Permanent Injunction

62 Permanent injunctions are typically considered by a Court after a thorough argument. A prerequisite to any permanent injunction is that the Court has before it an appropriate amount of evidence. This evidentiary requirement is important because a permanent injunction is granted after a final adjudication of rights: *Buckley Insurance* at para 56; see also *Bruderheim Community Church v. Board of Elders*, 2018 ABQB 90 (Alta. Q.B.) at para 57. As noted above, "permanent" does not necessarily mean indefinite.

63 Given this context, the entire scope of the legal rights of both parties are relevant when a permanent injunction is being considered. That broad context informs the Court, and is the foundation on which it will decide whether to grant an equitable remedy that would equate to a final adjudication: see *P. (R.)* at paras 22-25. The decision to grant a permanent injunction does not involve a balancing of interests in the fashion that is required when considering an interim or interlocutory injunction: *Liu* at para 18.

64 A number of factors are relevant to the determination as to whether a permanent injunction should be issued in a circumstance where the applicant is seeking the freedom to remain unfettered by harassment, intimidation, threats, or violent conduct. Those factors are outlined in *P. (R.)* at para 24. In that case, the Court accepted the general principles listed in *Qureshi v. Gooch*, 2005 BCSC 1584 (B.C. S.C.) [*Qureshi*], which was a breach of contract case.

65 The instructive comments in *Qureshi* at paras 28-29 are as follows:

> The issuance of a permanent injunction is a discretionary order. In determining whether it is appropriate to grant a permanent injunction the court looks at the nature of the rights that the injunction is sought to protect and the surrounding circumstances, and attempts to balance the equities between the parties.
>
> In determining whether it is appropriate to order a permanent injunction courts have considered a number of factors including:
>
> 1. whether an enforceable right and a threat/violation of that right exists;
>
> 2. whether the applicant will suffer demonstrable harm;
>
> 3. the hardship that would be caused to the defendant if a permanent injunction was granted compared to the hardship that would be caused to a plaintiff if he/she had to resort only to an award of damages;
>
> 4. the conduct of the parties; and
>
> 5. the effectiveness of an injunction. [citations omitted]

66 The Court in *P. (R.)* was cognizant of the fact that *Qureshi* involved a breach of contract. Notwithstanding that recognition, the Court in *P. (R.)* made the following comment:

> In my opinion, within the context of a no-contact restraining order these factors lead to a more specific standard: has the applicant established that the respondent poses a legitimate risk of harm to the applicant, a person under the applicant's care or the applicant's property as a result of the respondent's harassing, intimidating, molesting, threatening or violent behaviour?

67 The test for a permanent injunction as outlined in *Qureshi* and commented on in *P. (R.)* remains broadly accurate today. However, I would add two modifications to the criteria, which also should be met as prerequisites to the granting of a permanent order.

68 The first modification concerns what needs to be established from a safety perspective. This is a shift from the older jurisprudence that has been enunciated in a number cases over the last few years.

69 The second modification concerns the nature of the evidence that needs to exist to support a permanent order. This modification is undoubtedly implicit in the current law. I am simply making it explicit.

70 Concerning the first modification, there is no longer a general requirement for an applicant to demonstrate an objective fear for their safety before a common law restraining order can be granted. While older jurisprudence required that prerequisite, more recent jurisprudence has lowered the threshold: *Boychuk v. Boychuk*, 2017 ABQB 428 (Alta. Q.B.) at paras 50-52 [*Boychuk*]; see also *C. (A.T.) v. S. (N.)*, 2014 ABQB 132 (Alta. Q.B.) at para 18.

71 Whether the lower threshold should apply to emergency protection orders ("*EPOs*") that are issued under a statutory regime, such as the *Protection Against Family Violence Act*, RSA 2000 c P-27, is not a question that I will deal with in this case. I will only note that perhaps the higher threshold is appropriate for EPOs because they are granted at an entry level and on a without notice basis.

72 Given the lower threshold in the recent jurisprudence, an applicant for a permanent order need only demonstrate that there is a legitimate risk that the respondent's harassing, intimidating, molesting, or threatening behaviour will continue. To emphasize this point, impugned behaviour need only be disruptive; it is not a requirement that it be violent: see also *Tran v. Armstrong*, 2015 ABQB 343 (Alta. Q.B.) at paras 16-17 [*Tran*].

73 While I am sympathetic to the arguments advanced by Mr. Mourra concerning the assertion that there must be a threat of violence, we are in a new era. As stated above, the Courts are moving to a lower threshold in certain cases.

74 With that context in mind, I further note that a superior court has the jurisdiction to grant injunctions to effect justice. This jurisdiction exists even when there is no underlying threat of violence: *Tran* at para 16.

75 This broad discretion to grant a common law restraining order is reiterated by the Court in *Wakeel v. Moustafa*, 2016 ABQB 475 (Alta. Q.B.) at para 9. It is also acknowledged in *Boychuk* at paras 8 and 33. While *Boychuk* involved a domestic dispute, the principles articulated in that case have broad application.

76 Concerning the second modification, there must be sufficient evidence before the Court to support the permanent injunction. This is critical because the permanent injunction will determine the application and the underlying action on a *final* basis.

77 In summary, there are circumstances where this Court will take steps to deter inappropriate conduct by issuing a permanent injunction; even where there is no reasonable fear of violence (measured objectively). Where the evidence and context justifies the action, this Court will exercise its inherent jurisdiction to protect a person from harassment. That harassment need not rise to the level of creating a fear for one's safety. It only needs to be disruptive: *Boychuk* at para 44.

78 Building on the existing jurisprudence and the modifications mentioned above, the factors to be considered in determining whether a permanent injunction should be granted are as follows:

1. Is there sufficient evidence to support a permanent injunction? In considering this question, it is important to note that a permanent injunction can only be granted if there has been a final adjudication: *Buckley Insurance* at para 80.

2. Does the applicant have an enforceable right?

3. Has the applicant demonstrated a legitimate risk that the respondent will continue the impugned behaviour? In considering this question, the impugned behaviour need only be disruptive.

4. Would a permanent injunction impose a hardship on the respondent that is disproportionate to the hardship that would occur under an interim injunction, an interlocutory injunction, or a damage award?

5. Does the conduct of the respondent justify a permanent injunction?

6. Would the proposed permanent injunction be effective in the circumstances?

E. Applying the Common Law Test for a Permanent Injunction

79 I apply the above factors to this case, but restate them so that they are relevant to its context.

1. Is There Sufficient Evidence to Support a Permanent Injunction?

80 This hearing concerns the conduct of Mr. Mourra at a meeting that was intended to be an AGM of the MCC. The Court commenced hearing this matter on the scheduled date. The Court heard further *viva voce* evidence on two subsequent dates.

81 The parties agreed as to how the evidence would be presented to the Court. The direct evidence was presented in affidavit form. The affiants were then subject to cross-examination and re-direct in *viva voce* form.

82 Given the time that the Court allocated to this hearing, as well as the evidence that resulted from the cross-examinations and re-directs in *viva voce* form, I find that there is sufficient evidence to support a permanent injunction.

2. Do the Applicants Have an Enforceable Right?

83 The MCC facilities are situated on real property, which the MCC either owns or controls. As such, the MCC has the right to use that real property for lawful purposes, and to bar individuals from trespassing on to its real property.

84 The right to exclude certain individuals from the real property was formalized by the Applicants when the Notice of Trespass was issued to Mr. Mourra. Further, the Applicants have a responsibility to protect their staff and directors.

85 Given these property rights and safety obligations, I find that the Applicants have sufficient enforceable rights to support a permanent injunction.

3. Have the Applicants Demonstrated that there is a Legitimate Risk that Mr. Mourra Will Continue His Disruptive Behaviour?

86 It is clear from Mr. Mourra's testimony that he believes his conduct was justified and, consequently, that he is in the right.

87 The parties disagree on the extent of Mr. Mourra's actions and the characterization of his intentions. The MCC has sought to paint Mr. Mourra as a violent malcontent who resorts to force and intimidation when he does not get his way. Meanwhile, Mr. Mourra has attempted to present himself as a persecuted political dissident who is being targeted for his attempts to reform the MCC.

88 I find that the credibility of Mr. Mourra was damaged by his minimization of his bad behaviour. His credibility was further damaged when he resisted an admission that he had initiated the attack on Director Shouman during the AGM. He maintained this stubborn resistance concerning his assault on Director Shouman, notwithstanding clear video evidence to the contrary.

89 Despite some conflicts in the direct evidence, several facts became clear on cross-examination and re-direct. First, Mr.

Mourra admitted to directly confronting MCC employees on several occasions when he felt wronged. Second, Mr. Mourra admitted to participating in the chaos at the AGM and kicking Director Shouman. Third, Mr. Mourra testified that he believes his actions were justifiable retribution because of the insults directed against him. Fourth, Mr. Mourra admitted that he remained in the Starbucks while Director Shouman was present, despite the knowledge that he was in breach of the Interim Restraining Order. Given the evidence before me, I find that Mr. Mourra was part of the crowd that rushed forward at the AGM, and that he initiated a physical confrontation with Director Shouman by kicking him.

90 The actions of Mr. Mourra referred to above are not acceptable. Since Mr. Mourra feels his behaviour is appropriate, only the Court's intervention can dissuade him from continuing such disruptions.

91 Given his past conduct and his testimony that his actions were justified, I find that there is a high likelihood that Mr. Mourra will continue his campaign to oppose and confront the MCC and its directors in the future.

92 In making this finding I acknowledge that, by itself, Mr. Mourra's conduct to oppose and challenge the MCC does not warrant a permanent injunction. Mr. Mourra is free to pursue his political opposition to the MCC, if he so desires. However, he may not do so using over-assertive and disruptive methods, as he has in the past. It is particularly bothersome that Mr. Mourra continues to feel that his actions are justified.

93 It is not acceptable for Mr. Mourra to interrupt MCC prayer ceremonies just because he disagrees with the imam leading the prayer. Based on his own affidavit evidence, I find that Mr. Mourra did interrupt the relevant prayer ceremony. It is not acceptable for Mr. Mourra to disrupt the MCC's AGM and kick Director Shouman, even if the MCC and Director Shouman conduct themselves in a manner that is subject to question. Based on my own observations of the video in evidence, I find that Mr. Mourra did disrupt the AGM and assaulted Director Shouman. Nor is it acceptable for Mr. Mourra to decide to unilaterally ignore the Interim Restraining Order and remain at that Starbucks despite Director Shouman's presence.

94 Regardless of whether Director Shouman was in Starbucks for nefarious purposes, he had a legal right to be there. Mr. Mourra did not have such a legal right, and should have left immediately.

95 In short, there is no place in our society for Mr. Mourra's disruptive and sometimes overly assertive outbursts. It would be a disservice to allow such outbursts to continue.

96 Given the evidence in this case, I find that Mr. Mourra is likely to continue to disrupt the operations of the MCC in the future, and to continue his harassment of its directors. A cooling-off period without contact between the parties may assist in tempering Mr. Mourra. That finding supports the granting of a permanent injunction against Mr. Mourra until June 2, 2018.

4. Would a Permanent Injunction Impose a Hardship on Mr. Mourra that is Disproportionate to an Interim Injunction?

97 I am cognizant of the claims of Mr. Mourra that a Permanent Restraining Order will impose a hardship on him. I have considered that matter carefully. I am not persuaded by his argument that the hardship created by a permanent injunction makes it the type of sanction that is inappropriate in the circumstances.

98 The conditions of the Interim Restraining Order already take into consideration the fact that Mr. Mourra's children attend an MCC-operated school. By all accounts, these existing conditions have not caused any insurmountable problems.

99 I also note that the Applicants stated that the permanent injunction they seek is to have a sunset date of June 2, 2018. The Court has the jurisdiction to set a sunset date. A permanent injunction is named as such because it is a final order, not because it lasts forever: see *Black's Law Dictionary* (10th ed, 2014).

100 The Applicants further stated that the purpose of the permanent injunction is simply to provide a cooling off period for Mr. Mourra. As an aside, if the Court issued an interim injunction, the Applicants would have to satisfy the tripartite test: see *RJR-MacDonald Inc*. That is a lower threshold than the test for a permanent injunction.

101 In this case, if an interim (or interlocutory) injunction was granted, I would be inclined to have it apply until a determination was made at trial. Any such trial likely would not be scheduled until late fall of 2018, and the decision would

be issued after that hearing. That being the case, the interim injunction in this case likely would apply for a period that is longer than the sunset date requested by the Applicants in respect of the permanent injunction sought.

102 Given the above analysis, I find that this question concerning hardship leans in favour of a permanent injunction. Indeed, in the circumstances of this case, a permanent injunction is likely a better result for all parties for two reasons. First, the requested permanent injunction would have a June 2, 2018 sunset date, which is likely a better temporal result than at interlocutory injunction might provide. Second, a permanent injunction would render the existing Statement of Claim moot because the same remedy was being sought in that pleading.

103 To ensure the conditions of the permanent injunction are not too much of a burden on Mr. Mourra, I direct that the clauses track the accommodations which already exist in the Interim Restraining Order.

5. Does the Conduct of Mr. Mourra Justify a Permanent Injunction?

104 Mr. Mourra has had repeated confrontations with MCC employees and directors. He also has had a confrontation with a new imam, apparently because he was unknown to Mr. Mourra.

105 Mr. Mourra justifies his behaviour by saying that he was insulted. I disagree with the basis for his justification. As stated above, there is no place in our society for such conduct.

106 Given the circumstances, I find that the conduct of Mr. Mourra justifies a permanent injunction. This finding is further supported by the fact that the permanent injunction requested in this case has a sunset date.

6. Will the Proposed Permanent Injunction be Effective in Respect of Mr. Mourra?

107 I direct that the terms of any permanent injunction mirror the procedural terms that were included in the Interim Restraining Order. That interim order included a police enforcement clause.

108 Based on the inclusion of the police enforcement clause, I infer that the proposed permanent injunction will be effective against Mr. Mourra. This inference supports a permanent injunction in respect of Mr. Mourra.

F. Religious Considerations and Other Reflections

109 Before deciding this Application, I also considered the arguments advanced by Mr. Mourra concerning his religious rights. Specifically, in his opening statement, he argued that an injunction would block him from practising his religion.

110 After deliberating on this issue, I conclude that a permanent injunction is appropriate in these circumstances notwithstanding the religious context. My reasons for this conclusion are fivefold.

111 First, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, governs rights between an individual and the Crown. It does not govern rights between an individual and a private organization. Accordingly, the *Charter* does not assist Mr. Mourra in these circumstances.

112 Second, this dispute between Mr. Mourra and the MCC is outside of the scope of the *Charter*. That constitutional document only grants an individual the freedom of religion. It does not grant an individual a right to practice his or her religion at a particular location. Specifically, it does not grant an individual any right to enter private property for the purpose of practicing their chosen religious beliefs. The MCC's real property is private property.

113 Third, during argument, Mr. Mourra conceded that there were other locations within the City of Calgary which he could attend to practice his religion. The other locations include premises which are neither owned nor operated by MCC.

114 Fourth, the fundamental issue in this application has nothing to do with religion. The real issue concerns the conduct

of Mr. Mourra at meetings, as well as his interactions with certain members of the MCC community.

115 Fifth, regardless of any permanent injunction, the Notice of Trespass issued by the MCC will bar Mr. Mourra from participating in religious services that occur on real property owned by the MCC. Given that the subject premises are private property, the issuance of the Notice of Trespass is a course of action to which the MCC is entitled.

116 In summary, I recognize that Mr. Mourra has connections to the MCC religious community, and that he has missed a number of religious functions as a result of the Interim Restraining Order. I also recognize that a permanent injunction will continue to inconvenience him in that respect.

117 While a permanent injunction may be inconvenient for Mr. Mourra, he will have to make due. I state this because I am not persuaded by his claims that the hardship created by a permanent injunction makes the relief requested by the Applicants inappropriate in the circumstance. Mr. Mourra's conduct has been inappropriate and he will have to learn that such behaviour has consequences. In this regard, I reiterate that I do not accept Mr. Mourra's assertions that his conduct was justified because he had been insulted.

118 As I directed above, the conditions of a permanent injunction must take into consideration the fact that Mr. Mourra's children attend an MCC-operated school. By all accounts, these existing conditions have not caused any insurmountable problems. That said, the permanent injunction must be worded cautiously and it must also be capable of clear interpretation: *Liu* at para 24.

119 Notwithstanding my findings above, I recognize that Mr. Mourra is not the villain that the MCC is attempting to create. There has been questionable conduct by the MCC as well, which does not have clean hands. However, when I balance all of the evidence, as well as my concerns for the safety of the MCC staff and directors (and their exposure to disruptive conduct), I still come to the conclusion that Mr. Mourra's behaviour warrants legal sanction in the form of a permanent injunction.

120 As a final comment, Mr. Mourra raised the prospect of a mutual restraining order against both himself and the MCC. I did not explore this alternative because the Applicants stated that they have no interest in considering a mutual restraining order. Further, a mutual restraining order was not included in the pleadings before me.

V. Conclusion and Summary

121 In summary, I find that the MCC has satisfied the legal test necessary to grant the Permanent Restraining Order against Mr. Mourra. I make this finding because Mr. Mourra has engaged in a pattern of disruptive behaviour directed at the MCC and its directors. His conduct is unacceptable in our society.

122 I am particularly bothered that Mr. Mourra continues to believe his behaviour is justified because of alleged insults against him. Given his testimony concerning the alleged insults, I infer that Mr. Mourra would be inclined to continue his disruptive conduct in the future absent judicial intervention.

123 Given the above, it is in the interests of justice to grant the Permanent Restraining Order against Mr. Mourra. I direct that order to have a sunset date of June 2, 2018, and that it have terms that are analogous to the Interim Restraining Order.

VI. Costs

124 The parties may speak to costs if they cannot come to an agreement.

Application granted.

Footnotes

[1] Spelled as "Counsel" in the Style of Cause, but the Court used the word "Council" in the judgment.

End of Document

TAB 4

KeyCite treatment

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): Ware v. Airbnb, Inc. | 2024 BCSC 2240, 2024 CarswellBC 3666 | (B.C. S.C., Dec 11, 2024)

2019 ABQB 814
Alberta Court of Queen's Bench

Condominium Corporation No. 042 5177 v. Kuzio

2019 CarswellAlta 2244, 2019 ABQB 814, [2019] A.W.L.D. 4577, [2019] A.W.L.D. 4578, 312 A.C.W.S. (3d) 616, 8 R.P.R. (6th) 214

Condominium Corporation No. 042 5177 (Applicant) and Drew Kuzio, James Knull, Jonah Porter, 2131497 Alberta Ltd, and Dr. Tan Lin (Respondents)

W.N. Renke J.

Heard: September 16, October 17, 2019
Judgment: October 21, 2019
Docket: Edmonton 1903-15696

Counsel: Erin M. Berney, for Applicant
Keltie L. Lambert, for Respondents

Subject: Civil Practice and Procedure; Property

Related Abridgment Classifications

Real property
XI Condominiums and strata
XI.12 Remedies
XI.12.b Injunctions

Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.i Threshold test
II.2.c.i.D Miscellaneous

Headnote

Remedies --- Injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Miscellaneous
Condominium corporation alleged that unit owners listed their respective units on short-term accommodation websites, they permitted members of public to occupy units for fees (customers), and that conduct violated by-laws — Corporation brought application for interim injunction restraining unit owners from offering short-term accommodation in their units pending disposition of matter at Special Chambers hearing — Application granted — There were serious issues to be tried respecting

interpretation and application of by-laws and s. 32(5) of Condominium Property Act — Corporation had strong argument that unit owners violated s. 6.01.2 of by-laws regarding commercial use of units, that customers were not tenants within meaning of s. 6.01.1 of by-laws and thus violated that section, that unit owners' arrangements with customers resulted in licences (not leases), and that s. 32(5) of Act did not invalidate pertinent by-laws — Corporation's case for unit owners being in violation of valid by-laws was strong and it was likely to prevail in subsequent proceedings — Corporation failed to establish significant bad conduct by customers exceeding conduct of unit owners and tenants (loud parties, parking issues); failed to quantify any claim related to customers concerning wear and tear, increased insurance premiums, or reduction of property values; and there was no basis for attributing any specific amount of $30,000 new security system cost to customer-related issues — However, there was real risk that short-term occupants would pay less regard to noise and dumping garbage and have less regard for security — Corporation suffered irreparable harm because of unit owners' violation of by-laws, and added to this was harm occasioned by additional risk posed by short-term occupants to community, and evidence of two loud, large, late parties at one unit — Unit owners would face pecuniary loss if injunction were granted, not irreparable harm; they had ample notice that they were violating by-laws and that they would have to stop listing their units for short-term accommodations — Unit owners were causing irreparable harm to condominium community.

Real property --- Condominiums — Remedies
Condominium corporation alleged that unit owners listed their respective units on short-term accommodation websites, they permitted members of public to occupy units for fees (customers), and that conduct violated by-laws — Corporation brought application for interim injunction restraining unit owners from offering short-term accommodation in their units pending disposition of matter at Special Chambers hearing — Application granted — There were serious issues to be tried respecting interpretation and application of by-laws and s. 32(5) of Condominium Property Act — Corporation had strong argument that unit owners violated s. 6.01.2 of by-laws regarding commercial use of units, that customers were not tenants within meaning of s. 6.01.1 of by-laws and thus violated that section, that unit owners' arrangements with customers resulted in licences (not leases), and that s. 32(5) of Act did not invalidate pertinent by-laws — Corporation's case for unit owners being in violation of valid by-laws was strong and it was likely to prevail in subsequent proceedings — Corporation failed to establish significant bad conduct by customers exceeding conduct of unit owners and tenants (loud parties, parking issues); failed to quantify any claim related to customers concerning wear and tear, increased insurance premiums, or reduction of property values; and there was no basis for attributing any specific amount of $30,000 new security system cost to customer-related issues — However, there was real risk that short-term occupants would pay less regard to noise and dumping garbage and have less regard for security — Corporation suffered irreparable harm because of unit owners' violation of by-laws, and added to this was harm occasioned by additional risk posed by short-term occupants to community, and evidence of two loud, large, late parties at one unit — Unit owners would face pecuniary loss if injunction were granted, not irreparable harm; they had ample notice that they were violating by-laws and that they would have to stop listing their units for short-term accommodations — Unit owners were causing irreparable harm to condominium community.

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Generally — referred to

s. 5(3) — considered

s. 32(2) — considered

s. 32(5) — considered

s. 32(6) — considered

s. 32(7) — considered

s. 37(1) — considered

s. 53 — referred to

s. 53(1) — considered

ss. 54-56 — referred to

s. 67 — considered

s. 67(1)(a) "improper conduct" (i) — considered

s. 67(1)(b) "interested party" — considered

s. 67(2) — referred to

s. 67(2)(b) — considered

s. 67(2)(c) — considered

s. 67(2)(f) — considered

s. 67(3) — considered

Interpretation Act, R.S.A. 2000, c. I-8
s. 1(1)(c) "regulation" (i) — considered

s. 10 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 13.18 — considered

Words and phrases considered:

by-laws

. . . By-laws are a type of regulation . . .

democracy

Democracy does not mean doing what one pleases, just because it may not physically harm others.

interim injunction

An interim injunction is a tool of equity designed to prevent injustice.

marketplace

A marketplace is a commercial environment.

owner of a unit in a condominium

An owner of a unit in a condominium is not an isolated freeholder. She, he, or it is part of democratically organized community, bound by statute, regulation, and contract.

APPLICATION by condominium corporation for interim injunction restraining unit owners from offering short-term accommodation in their units pending disposition of matter at Special Chambers hearing.

W.N. Renke J. **(orally):**

1 Condominium Corporation No 042 5177 (the Corporation) has applied for an interim injunction against Drew Kuzio, James Knull, Jonah Porter, 2131497 Alberta Ltd and Dr. Tan Lin (the Respondents) to restrain the Respondents from offering short-term accommodations in their units, pending the disposition by the presiding Justice of the matters set for a Special Chambers Hearing on February 21, 2020. The application came before me in Civil Chambers on September 16, 2019. The application was adjourned to October 17, 2019 for hearing.

Background

2 The Corporation was created by the registration of condominium plan 042 5177 with the North Alberta Land Titles Office, pursuant to the provisions of the *Condominium Property Act* (the Act). The units and common property described by the plan shall be referred to as the Condominium Property. The premises are located in downtown Edmonton.

3 Each of the Respondents, except Dr. Lin, is a registered owner of a unit in the Condominium Property, as specified in paras 4-6 of the Originating Application. Dr. Lin is the sole director and shareholder of 2131497 Alberta Ltd, a unit owner.

4 Bylaws respecting the Condominium Property have been duly passed by the Corporation and registered with the Land Titles Office (the Bylaws). Under s. 32(2) of the Act, "[t]he owners of the units and anyone in possession of a unit are bound by the bylaws," including, then, the Respondents.

5 Section 2.01.1 of the Bylaws confirms that the Corporation, the Board of Directors elected under the bylaws (the Board), and Owners of units must observe and obey the Bylaws and Rules established by the Board.

6 Two sections of the Bylaws are at the foundation of the Corporation's application, s. 6.01.1 and 6.01.2:

> 6.01.1 Each Unit shall only be occupied as a one-family residence by the Owner of the Unit, the Owner's family and guests, or a Tenant of the Owner, and the Tenant's family and guests, and for the purposes of these By-laws:
>
> a. "guests" are to be construed as individuals visiting or residing with the Owner or the Tenant;
>
> b. "one family residence" means a residence occupied or intended to be occupied as residence (sic) by one family along (sic) and continuing one kitchen (sic) and in which no Roomer or Boarder is allowed;
>
> c. "Boarder" means a person to whom room and board is regularly supplied for consideration; and
>
> d. "Roomer" is a person to whom a room is regularly supplied for consideration.
>
> 6.01.2 No Unit shall be used in whole or in part for any commercial or professional purpose involving the attendance of the public at such Unit ... except as otherwise authorized by the Board in writing, which approval may be arbitrarily withheld and if given, by withdrawn (sic) at any time on Thirty (30) days notice.

7 Under the Bylaws, certain units may be used for commercial purposes: see definition of Unit, s. 1.02.2(r)(i). The Respondents' units are not designated for commercial use.

8 The Corporation has alleged that the Respondents have listed their respective units on short-term accommodation websites such as AirBnB and HomeAway, and that they have permitted members of the public to occupy their respective units on a short-term basis for fees. The Respondents do not deny these claims.

9 The Corporation claims that the Respondents' conduct violates the Bylaws, particularly ss. 6.01.1 and .2. The Respondents deny that their conduct violates these or any other provisions of the Bylaws. Further, if offering and permitting short-term accommodation in their units for fees does violate the Bylaws, particularly ss. 6.01.1 and .2, these bylaws are invalid under s. 32(5) of the Act. Subsection 32(5) provides that

> (5) No bylaw operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

10 The Respondents contend that the accommodations that they provide are a form of leasing of the units or a form of "other dealing" with the units contemplated by s. 32(5). Subsection 32(5) precludes bylaws from prohibiting or restricting unit leases or other dealings with units. The Corporation responds in turn that the type of accommodations provided by the Respondents do not amount to leases or rentals or other dealings within the meaning of s. 32(5).

11 I am called on to decide whether, on the record before me, the Corporation is entitled to an interim injunction against the Respondents, pending the decision of the Justice hearing the Special Chambers application.

Test for an Interim Injunction

12 The parties agree that the test governing the granting of the interim injunction is the "tripartite test" recently reviewed by Justice Topolniski in *ANC Timber Ltd. v. Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653 (Alta. Q.B.) at para 38:

> [38] For the purposes of the injunction/stay, the evidence must relate to the three components of the test enunciated in *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334: a "serious issue" to be tried (for a prohibitive injunction) or "strong prima facie case" (for a mandatory injunction), irreparable harm, and weighing the balance of convenience.

See also *Alberta Union of Provincial Employees v. Alberta*, 2019 ABCA 320 (Alta. C.A.) at para 6; *360Ads Inc v. Okotoks (Town)*, 2018 ABCA 319 (Alta. C.A.) at para 5.

13 An interim injunction is a tool of equity designed to prevent injustice. The overarching perspective of a court requested to grant an interim injunction must be, as Justice Veit observed in *Enviro Trace Ltd. v. Sheichuk*, 2014 ABQB 381 (Alta. Q.B.) at para 28, whether granting the injunction is "fair and equitable." Further, and again as Justice Veit observed in *Enviro Trace* at para 28, the tripartite test "is a useful particularization of the factors inherent in an assessment of whether it is fair and equitable to issue an interlocutory injunction in a particular set of circumstances."

14 Similar comments are found in *Henderson v. Quinn*, 2019 NSSC 190 (N.S. S.C.), Arnold J at para 44:

> [44] The test ought not be applied mechanically. In *Saint Mary's University v. Atlantic University Sport*, 2017 NSSC 294, Associate Chief Justice Smith adopted the following passage from *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada Limited, Looseleaf, updated to 2018):
>
> > [48] In *Injunctions and Specific Performance* ... Sharpe J. warns against taking too formalistic an approach when dealing with an injunction motion, stating at 2.600 to 2.630:
> >
> > Although reference has been made throughout the discussion to the *American Cyanamid* formula, it now

> seems clear that neither it nor its adoption by the Supreme Court of Canada should be applied mechanically. As already noted, there has been a significant retreat from the assertion that consideration of the merits should never play an important role. The seeming rigidity of the remaining items in the formula is also regrettable, and the direction given by *Cyanamid* and *RJR-MacDonald* should be seen as guidelines rather than firm rules. The terms "irreparable harm", "status quo" and "balance of convenience" do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another. The Manitoba Court of Appeal has quite properly held that "it is not necessary ... to follow the consecutive steps set out in the *American Cyanamid* judgment in an inflexible way; nor it is necessary to treat the relative strength of each party's case only as a last step in the process". A similar view was expressed by the Saskatchewan Court of Appeal:
>
> ... the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.
>
> Treating the checklist of factors as a "multi-requisite test" will often produce results which do not reflect the balance of risks and do not minimize the risk of non-compensable harm. As Lord Hoffman stated, a "box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction".
>
> The list of factors which the courts have developed — relative strength of the case, irreparable harm and balance of convenience - should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief. [Citations omitted]

15 Nonetheless, I will focus on the tripartite factors in turn.

I. Strength of the Corporation's Case

A. Serious Questions

16 The parties agree that there are serious issues or questions to be tried respecting the interpretation and application of the pertinent bylaws, the interpretation of s. 32(5) of the Act, and the validity of the pertinent bylaws in light of s. 32(5) of the Act.

17 The threshold for whether there is a "serious question" to be tried is low: *Alberta Union of Provincial Employees v. Alberta*, 2019 ABCA 320 (Alta. C.A.) at para 47; *360Ads* at para 7; *Fawcett v. College of Physicians and Surgeons of the Province of Alberta*, 2019 ABQB 788 (Alta. Q.B.), Little J at para 8; *Domo Gasoline Corp. v. St. Albert Trail Properties Inc.*, 2003 ABQB 649 (Alta. Q.B.), Lee J at para 41.

18 The Respondents submit that the Corporation's arguments meet this low threshold but only this low threshold. The Respondents deny that the Corporation has strong arguments, that it is likely to succeed in subsequent proceedings, or that it has established a *prima facie* case.

19 I must consider the strength of the Corporation's case, leaving the decision about which party's arguments shall actually prevail to the Special Chambers Justice.

B. Statutory Interpretation

20 The Act and the Bylaws must be interpreted. In *Geophysical Service Inc. v. EnCana Corp.*, 2017 ABCA 125 (Alta. C.A.) the Court of Appeal provided a concise and helpful account of the correct approach to statutory interpretation at para 77:

> [77] A succinct template for the correct approach is provided by the Supreme Court of Canada in *Rizzo v Rizzo Shoes Ltd, (Re)*, [1998] 1 SCR 27 at para 21:
>
> > Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
> >
> > > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament
> > >
> > > . . .

See also *Orphan Well Assn. v. Grant Thornton Ltd.*, 2017 ABCA 124 (Alta. C.A.) at para 192; *Rasouli (Litigation Guardian of) v. Sunnybrook Health Sciences Centre*, 2013 SCC 53 (S.C.C.) at para 32.

21 The Driedger approach is consistent with the direction provided by s. 10 of the *Interpretation Act*:

> 10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

22 I note that the Bylaws are a type of regulation, falling under s. 1(1)(c) of the *Interpretation Act*:

> (c) "regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation, bylaw or resolution enacted
>
> > (i) in the execution of a power conferred by or under the authority of an Act[.]

Statutory interpretation principles apply to the interpretation of the Bylaws. See *Condominium Corp. No. 0312235 v. Scott*, 2015 ABQB 171 (Alta. Q.B.), Ackerl J at para 41.

C. Bylaws s. 6.01.2

23 The Respondents' acknowledged conduct violates s. 6.01.2 of the Bylaws. I discern no viable argument to the contrary. Section 6.01.2 provides that

> No Unit shall be used in whole or in part for any commercial ... purpose involving the attendance of the public at such Unit ... except as otherwise authorized by the Board in writing ....

24 The Respondents have offered their accommodations for profit. The Respondents' purpose is commercial. The "public," in the sense of individuals who are not unit owners and who otherwise would have no business being on the Condominium Property, are "involved" in the Respondents' commercial scheme. The Board has not authorized the Respondents' commercial use of their units.

25 In her affidavit of July 30, 2019 (Hodgkinson Affidavit), Terry Hodgkinson, a member of the Board, Vice-President

and Secretary, and Parking Enforcement Officer for the Corporation, referred at para 9 to the Respondents advertising on websites to general public; having reservation systems, availability calendars, deposit and cancellation policies; accepting credit card payments; and charging service and cleaning fees. I agree that these are all hallmarks of commercial enterprises. See *Albrecht v. Condominium Corp. No. 0411156*, 2011 ABQB 53 (Alta. Q.B.), Brooker J at para 69.

26 I note that s. 1.1 of the AirBnB Terms of Service makes the commercial nature of the transactions it supports explicit:

> 1.1 The Airbnb Platform is an online marketplace that enables registered users (”Members”) and certain third parties who offer services (... “Hosts” and ... “Host Services”) to publish such Host Services on the Airbnb Platform (”Listings”) and to communicate and transact directly with Members that are seeking to book such Host Services (... “Guests”) ....

27 Hosts and Guests, in AirBnB terms, are interacting in a marketplace. A marketplace is a commercial environment.

28 I therefore conclude that the Corporation has a very strong argument that the Respondents have violated s. 6.01.2 of the Bylaws.

D. Bylaws s. 6.01.1

29 Section 6.01.1 provides that “[e]ach Unit shall only be occupied as a one-family residence by the Owner of the Unit, the Owner’s family and guests, or a Tenant of the Owner, and the Tenant’s family and guests ....”

30 In the following, I will refer to individuals who purchase short-term accommodations from the Respondents as Customers, as a neutral term.

1. Inapplicable Elements

31 Section 6.01.1 has a definition of “guests,” “individuals visiting or residing with the Owner or Tenant.” Customers are not “guests” within the meaning of s. 6.01.1(a). Customers are not “visiting ... with the Owner,” or “residing with the Owner.” The Owner is not in the unit with them during their occupation of the unit.

32 Paragraph 6.01.1(b) forbids providing accommodations to Roomers or Boarders, as defined in paragraphs 6.01.1(c) and (d), but both definitions concern room or room and board (respectively) “regularly supplied for consideration.” There is no evidence that Customers stay in the Respondents’ units “regularly.” Customers are not “Roomers” or “Boarders.”

33 The remaining important elements of s. 6.01.1 concern “[occupation] as a one-family residence,” and whether Customers are “Tenants.”

2. One-Family Residence

34 Under s. 6.01.1(b), “’one-family residence’ means a residence occupied or intended to be occupied as residence (*sic* - should be *a* residence) by one family along (*sic*).” I interpret the last word to be “alone.”

35 The Respondents do have an argument that Customers occupy units in the same manner as a family, that is, for “residential” purposes - even if that residence is for a brief period. See *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan*, [2001] O.J. No. 2785, 43 R.P.R. (3d) 78, 2001 CarswellOnt 2495 (Ont. S.C.J.), Molloy J at para 22. The definition of “Unit” in 1.02.2(r) of the Bylaws does refer to a unit being “intended to be occupied as a residential dwelling.”

36 The Corporation might point out that nothing in (e.g.) the listings by the Respondents confines occupancy to “families” as opposed to families or other aggregations of individuals. The number of “guests” is relevant only to the cost of the accommodations. That is, nothing in the arrangements with Customers entails that occupation by Customers would be

occupation "by one family."

37 Justice Beaudoin provides a useful discussion of the "family" issue in *Ottawa-Carleton Standard Condominium Corp. No. 961 v. Menzies*, 2016 ONSC 7699 (Ont. S.C.J.) at paras 47 - 52:

> [47] Article 3.1 of OCSCC 961's Declaration provides that its residential units are to be occupied "only for the purpose of a single family dwelling which includes a home office [...] and for no other purpose".
>
> [48] In the absence of a definition in the condominium documents of what constitutes a "single family", the courts have defined a "family" as a "social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group".
>
> [49] I accept the Applicant's argument that a "one family residence" is "a basic social unit which involves more than merely sharing short term temporary sleeping quarters and shared facilities on a rental basis" and that courts have ordered compliance and enforced single-family provisions.
>
> [50] Based on the evidence before me, there is no doubt that the Respondents, who have leased their unit, on a repeated short-term basis in a hotel-like operation, are in breach of the Declaration.
>
> [51] "Single family use" cannot be interpreted to include one's operation of a hotel-like business, with units being offered to complete strangers on the internet, on a repeated basis, for durations as short as a single night. Single family use is incompatible with the concepts of "check in" and "check out" times, "cancellation policies", "security deposits", "cleaning fees", instructions on what to do with dirty towels/sheets and it does not operate on credit card payments.
>
> [52] .... What has happened in this case is a commercial use of the unit. [footnotes omitted]

38 In my opinion, the stronger argument is that the booking practices of the Respondents do not lead exclusively to occupation of units as one-family residences and the Respondents are on this ground in violation of Bylaw 6.01.1. I accept in particular para 51 of Justice Beaudoin's reasons.

3. Tenant

39 Section 6.01.1 goes on to provide that the occupation as a "one-family residence" must be by the Owner, the Owner's family or guests, or a Tenant of the Owner, and the Tenant's family and guests.

40 A Customer is not the Owner. Neither is a Customer (necessarily) a member of the Owner's family. As indicated, a Customer is not a "guest" within the meaning of s. 6.01.1.

41 Even if Customers' occupation of a unit qualifies as occupation "as a one-family residence," is this occupation by a "Tenant of the Owner"?

42 In my opinion, the Corporation has a strong argument that Customers are not Tenants within the meaning of the Bylaws. Under s. 32(7) of the Act, the Act prevails over the Bylaws and therefore must be read with the Bylaws. The Act contains elaborate provisions respecting the rental of units (s. 53) and corporation remedies respecting tenants (ss. 54 -56). Because of the fleeting duration of Customers' stays, the remedial provisions of the Act could not practically apply respecting Customers' occupancy. Moreover, the evidence did not disclose that the Respondents complied with s. 53(1) (notice to the Corporation).

43 Further, s. 5.08.2 of the Bylaws provides that

> Every owner shall require his tenant, as a condition of the tenancy, to place and maintain a policy of insurance in either the Tenants Basic Form or the Tenants Comprehensive Form, together with Personal Liability coverage.

There was no evidence that this provision of the Bylaws was complied with.

44 The Corporation has rental policies set out in Exhibit F of the Affidavit of Donald McLaughlin, President of the Board of the Corporation. These policies require (*inter alia)* completion and submission of tenant forms and pet registration forms and payment of a security deposit. None of this is feasible for short-term occupants of units.

45 I therefore find that the Corporation has a very strong argument that Customers are not Tenants within the meaning of s. 6.01.1 and that, on this ground as well, the Respondents have violated s. 6.01.1.

4. Deference to the Board's Interpretation of the Bylaws

46 There is some authority to the effect that Board decisions should be treated with deference, as would a tribunal's decision in judicial review. See, e.g., *Condominium Plan No. 762 1302 v. Stebbing*, 2015 ABQB 219 (Alta. Q.B.), Ackerl J at para 30; *Maverick Equities Inc. v. Condominium Plan No. 942 2336*, 2010 ABQB 179 (Alta. Q.B.), Veit J at paras 48-50; *Condominium Plan No. 772 1806 v. Gobeil*, 2011 ABQB 318 (Alta. Q.B.), Smart M at para 10.

47 In judicial review, deference is (generally) owed to tribunal in the interpretation of the tribunal's home statute: see, e.g., *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.) at paras 53, 54; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.), Moldaver J at para 40 ("Judicial deference in such instances is itself a principle of modern statutory interpretation"); *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (S.C.C.) at para 22. If the judicial review analogy were pressed in the present circumstances, it might be argued that a court should extend deference to a condominium board's interpretation of its bylaws, if not the Act. I did not receive argument on this point and I have not considered this point in my approach to the Bylaws.

E. Subsection 32(5)

48 Even if the Corporation has strong, even overwhelming arguments that the arrangements between the Respondents and Customers violate the Bylaws, the Corporation could be found to have a strong case only if those Bylaw provisions were valid. The Corporation's case is only as strong as its case that the Bylaw provisions do not violate s. 32(5). As Justice Ackerl wrote in *Scott* at para 17, "[c]ondominium corporations cannot create mechanisms or schemes that run contrary to the Act and if they do so, such actions will be invalid as they are *ultra vires* to the condominium's authority ...." What is the strength of the Corporation's case on the issue of whether the pertinent bylaw provisions are *ultra vires* the Corporation, being precluded by s. 32(5)?

49 I shall bear in mind Justice Ackerl's reminder at para 27 of *Scott*:

> [27] In looking at what the legislature intended, it is imperative to remember that "[t]he legislature is presumed not to intend to abolish, limit, or otherwise interfere with the established common law or statutory rights, including property rights, in the absence of explicit statutory language that it intends to do so": *Hamilton (City) v Equitable Trust Co*, 2013 ONCA 143 at para 34, 114 O.R. (3d) 602. Moreover, in order for a court to conclude that a citizen's rights have been truncated or reduced, the legislature must do so expressly using express language in the statute: *Morguard Properties Ltd v Winnipeg (City)*, [1983] 2 SCR 493 (SCC), at p 509.

50 Subsection 32(5) reads as follows:

> (5) No bylaw operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

If the Bylaws had the effect of prohibiting or restricting "leases" or "dealings" with units as contemplated by s. 32(5), those bylaws would be ineffective.

1. Inapplicable Terms

51 Whatever may be the legal nature of the Respondents' arrangements with Customers, those arrangements do not involve the "devolution" of units. "Devolution" in the s. 32(5) context concerns "[t]he passing of property from one owner to another, which may occur on death or sale, as a gift, by operation of law, or in any other way:" *A Dictionary of Law*, 9th ed, Jonathan Law (ed) (Oxford University Press, 2018). The arrangements with Customers do not involve the passing or transmission of units to them.

52 Neither do the arrangements involve the "transfer" of any property rights in or to units or the "mortgage" of units.

53 The final clause relating to easements has no bearing on this litigation.

2. Lease

54 Are the arrangements with Customers at least arguably a form of short-term lease? Are the Customers short-term renters or (legally) short-term tenants, regardless of what the Bylaws might contemplate as constituting tenancy? What else could the arrangements between the Respondents and Customers be, but short-term tenancies?

55 The legal characterization of the arrangements alternative to tenancy is that the arrangements are a contractual licence. That is, Customers, by contract, are entitled to use the premises for a defined period but they do not acquire exclusive possessory rights to those premises, even for a that defined period. Customers have rights against the Respondents but otherwise do not have "*in rem*" rights against any and all other persons. In *Design Services Ltd. v. R.*, 2008 SCC 22 (S.C.C.) at para 39, Justice Rothstein quoted S. J. Hepburn, *Principles of Property Law* (2nd ed. 2001), at p. 21:

> In order to establish a proprietary interest it must be proven that the holder has an enforceable, *in rem* right to exclude the rest of the world; it is this right alone which distinguishes *in rem* rights from other enforceable legal rights. Contractual rights are not enforceable against the rest of the world; they are only enforceable against the parties to the contract and are therefore *in personam* in nature. Contracts which deal with land or personal property may confer similar rights of use and enjoyment; however, without the right to exclude, such rights will only be *in personam*.

(A classic discussion of the *in rem*/*in personam* distinction is found in W. N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," 26 *Yale LJ* 710 commencing (1916-1917) commencing at 712.)

56 In *Klewchuk v. Switzer*, 2003 ABCA 187 (Alta. C.A.) at para 41 the Court of Appeal wrote that

> [41] The hallmark of a lease is the granting of exclusive possession: *Street v. Mountford*, [1985] 2 All E.R. 289 (H.L.). A licence, on the other hand, does not create an interest in the property to which it relates. Rather, it conveys a privilege to use the property: *Baker and Baker v. Gee*, [1945] 3 W.W.R. 555 (Alta. S.C.A.D.).

57 Finally, Justice Martin, as she then was, wrote as follows in *Orphan Well Association* (dissenting) at para 131:

> [131] .... A licence, at its most basic, is the right to do that which would otherwise be illegal, or would amount to a trespass absent the licence. The common law recognizes three types of licences: (1) a "mere" or "bare" licence, which is unsupported by consideration and revocable; (2) a contractual licence, subject to contractual terms; and (3) a licence coupled with a grant of legal interest, such as a *profit à prendre*: Bruce Ziff, *Principles of Property Law*, 6th ed. at 318-321; see also Anne Warner La Forest, *Anger & Honsberger, Law of Real Property*, 3rd ed. at §16:40 ....

See also *Lauder Industries Inc v. Reid*, 2018 ABQB 568 (Alta. Q.B.), Graesser J at para 50.

58 What factors distinguish the creation of a lease as opposed to the creation of a licence to occupy? The question is one of law rather than of the labels the parties use. The decisive consideration is the intention of the parties as determined from the parties' agreement, whether that agreement is reduced to writing or inferred from circumstances: *Strata Plan VR 2213 v. Duncan*, 2010 BCPC 123 (B.C. Prov. Ct.), Yule PCJ at para 37.

59 The AirBnB Terms of Service are very clear that only a contractual relationship exists between a Host and a Guest. The following provisions are relevant:

> 1.2 .... When Members make or accept a booking, they are entering into a *contract* directly with each other.
>
> 8.1.2 Upon receipt of a booking confirmation from Airbnb, a *legally binding agreement* is formed between you and your Host .... [emphasis added]

60 The Terms of Service explicitly contemplate the establishment of a licence between the parties:

> 8.2.1 You understand that a confirmed booking of an Accommodation ("Accommodation Booking") is *a limited licence* granted to you by the Host *to enter, occupy, and use the Accommodation for the duration of your stay*, during which time *the Host (only where and to the extent permitted by applicable law) retains the right to re-enter the Accommodation,* in accordance with your agreement with the Host.
>
> 8.2.2 .... If you stay past the agreed upon checkout time without the Host's consent ("Overstay"), you no longer have a *licence* to stay in the Accommodation .... [emphasis added]

61 The nature of the occupancy of units by Customers, in my view, strongly supports the characterization of the arrangement with the Respondents as being a licence only. Customers occupy the premises only briefly. They do not take on the trappings of tenants under the Act or Bylaws. Their occupation is like that of a person who stays in a hotel room. Rather than understanding the relationship as being a very short lease, the relationship is better understood as being a very short stay in the functional equivalent of a very small hotel.

62 I find that the Corporation has a strong argument that the Respondents' arrangements with Customers result in licences, not leases.

3. Other Dealing

63 Subsection 32(5) precludes a bylaw from prohibiting or restricting not only devolution, transfer, lease, or mortgage of units, but also "other dealing" with units. Do short-term licences fall within "other dealing" in s. 32(5)?

64 The Respondents do have an argument that a licence relating to a unit is a "dealing" relating to a unit, and so is protected from bylaw interference under s. 32(5). The term "other dealing" is very broad. If that term were found alone in s. 32(5), its extension to the licencing of units would be difficult to resist.

65 However, the words "other dealing" do not exist alone in s. 32(5). These words follow a list of terms - devolution, transfer, lease, mortgage. As a matter of statutory interpretation, the broad words "other dealing" must be understood in light of the words that precede it. This is an example of the "limited class" or *ejusdem generis* maxim of interpretation.

(a) Limited Class Rule

66 Professor Ruth Sullivan writes as follows in *Sullivan on the Construction of Statutes*, 6th Ed at §8.64:

> **§8.64 The limited class rule (*ejusdem generis*)**. In *National Bank of Greece (Canada) v. Katsikonouris*, [[1990] 2 SCR 1029 at 1040] La Forest J. explained the limited class rule as follows:
>
> > Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it.
>
> The reasoning underlying this rule is explored in *Consumers' Association of Canada v. Canada (Postmaster General)*, [[1975] FCJ No 23 (CA)]. In that case the Consumers' Association sought to register its magazines as second-class mail. The issue was whether it was precluded from doing so by s. 11(1)(d)(i) of the *Post Office Act* which excluded

publications of "a fraternal, trade, professional *or other association* or a trade union, credit union, cooperative, or local church organization ..." author's emphasis]. In concluding that the Consumers' Association was not an "association" within the meaning of the provision, the court reasoned as follows:

> The rule of construction generally known as the "*ejusdem generis*" rule was cited by counsel for the Applicant as applicable to if not decisive in this case. This rule is designed to assist in ascertaining the true intention of Parliament and is often a thoroughly sound guide. Looking at all the terms in the paragraph which describe specific kinds of organization, all of which have meanings quite limited in scope, and particularly at the words "fraternal, trade, professional", we cannot think that Parliament meant, by simply adding the words "or other association", to bring every conceivable kind of association of human beings within the provisions of the paragraph. If that had been the intention of Parliament there would have been no need to spell out several specific kinds of associations. Words like "any kind of association whatever" would have been sufficient. Or, if it was thought desirable to name some specific associations, the addition of words like "or any other association, whether '*ejudsem generis*' with the foregoing or not" would have sufficed to make the intention clear.

As the Court clearly indicates, the inferences involved in applying the limited class rule are based on the assumption that legislatures do not use superfluous words; they express themselves as concisely as possible; and every word is there for a reason and has some work to do. [footnotes omitted]

67 Professor Sullivan identifies the "conditions precedent" for a limited class argument to be available, at §8.66:

> **§8.66 Conditions precedent for limited class argument.** For a limited class inference to arise several conditions must be present. First, there must be an identifiable class to which each item in the list of specific items belongs. Second, the class inferred from the list of specific items must be narrower in scope than the general words that follow the list. Finally, the class inferred from the list of specific items must have something, apart from those items, to apply to. Otherwise the general words would add nothing to the provision, contrary to the presumption against tautology. [footnote omitted]

68 I do bear in mind that the limited class rule is a guideline for interpretation, but not a legally-obligatory rule of interpretation. Professor Sullivan writes as follows at §8.82:

> **§8.82 Rebuttal.** The courts often caution that the limited class rule is not a rule of law. It is merely an application of the contextual principle, which may serve as a starting point for analysis but should not be considered conclusive.

(b) Identifiable Class

69 The first prerequisite for a limited class inference is that there be an identifiable class to which each item in the specific list belongs. In s. 32(5), the identifiable class to which each item in the list of specific transactions belongs is the class of dispositions of real property rights - the devolution of property, the transfer of property, the lease of property, the mortgage of property; and the last clause concerns property, the incorporeal hereditament that is an easement.

70 I note that s. 5(3) of the Act supports this real property-based interpretation:

> 5(3) After a certificate of title to a unit is issued pursuant to subsection (1), the unit comprised in it may devolve or be transferred, leased, mortgaged or otherwise dealt with in the same manner and form as land held under the *Land Titles Act* and the provisions of that Act apply to those dealings insofar as they do not conflict with this Act or the regulations.

(c) Class Narrower than the General Words

71 The second prerequisite for a limited class inference is that the class inferred from the specific list of items must be narrower than the general words that follow. In s. 32(5), the class of property transactions inferred from the general words is narrower than the words "other dealing."

(d) No Tautology

72 The third prerequisite for a limited class inference is that the list of transactions forming the limited class cannot be exhaustive. There must be some additional transactions that the words "other dealing" could refer to. In s. 32(5), the property transactions mentioned do not exhaust potential transactions involving *in rem* rights. Joint tenancy or tenancy in common might be created respecting a unit. A unit may be held in trust on behalf of beneficiaries. A charge or security interest other than a "mortgage" (e.g. a hypothecation or a builder's lien) might be imposed on the unit.

(e) Conclusion

73 In my opinion, the Corporation has a strong argument that the limited class rule applies and "other dealing" must be interpreted to refer to a real property transaction, not contractual arrangements that may have a bearing on the use of property. Hence, licencing arrangements are not included in "other dealing."

74 And hence, the Corporation has a strong argument that s. 32(5) does not invalidate the pertinent bylaws.

75 In my opinion, the Corporation's case for the Respondents being in violation of valid bylaws is strong. The Corporation is likely to prevail in subsequent proceedings.

II. Irreparable Harm

76 The Corporation has established a strong case showing that the Respondents have violated valid bylaws. The Respondents are likely to have violated a "negative covenant," prohibitions set out in the Bylaws. Some authority, stretching back to the 1878 decision in *Doherty v. Allman* [(1878), (1877-78) L.R. 3 App. Cas. 709 (U.K. H.L.)], supports the view that in such circumstances, the other two tripartite factors, irreparable harm and balance of convenience, concerning the effect on the Corporation were an injunction not granted and the effect on the Respondents if an injunction were granted, are of lesser significance: *Domo Gasoline* at paras 45, 51.

77 I shall not rely on this authority. The Corporation is seeking the extraordinary remedy of an interim injunction, coming before even a Special Chambers application (let alone trial), so all the equities should be considered to determine whether this remedy is appropriate. Justice Sharpe has suggested that the *Doherty v. Allman* principle "does not apply with the same force" to interlocutory injunctions. Pre-trial determinations are made without the advantage of full review of the facts and law: *Domo Gasoline* at paras 52, 54.

78 In any event, the failure to provide due consideration to the issues of harm and the balance of convenience would be an error: *364661 Alberta Ltd. v. 735608 Alberta Ltd.*, 2010 ABCA 6 (Alta. C.A.) at para 8; *101280222 Saskatchewan Ltd. v. Silver Star Salvage (1998) Ltd.*, 2019 SKCA 59 (Sask. C.A.) at para 36.

79 At this juncture, I will consider the risk of harm to the Corporation if the injunction were not granted. I will then consider the risk of harm to the Respondents if the injunction were granted and the balance of convenience.

A. Nature of Irreparable Harm

80 The Court of Appeal clarified the nature of irreparable harm in *May v. 1986855 Alberta Ltd*, 2018 ABCA 94 (Alta. C.A.) at paras 12-14:

> [12] .... The appellant submits that a plaintiff must prove only that the possible harm is "of such a nature that no fair and

> reasonable redress would be available after trial": *Lubicon Lake Band v Norcen Energy Resources Ltd.*, 1985 ABCA 12 at paras 31-32; [1985] 3 WWR 193; *Noise Solutions v Commercial Insulation Contracting*, 1998 ABCA 257 at para 6.
>
> [13] In his reasons, the chambers judge concluded that ... any harm that flowed from the construction of a multi-family dwelling would at most result in a diminution in the value of her property that was capable of being remedied by an award of money damages.
>
> [14] That conclusion does not consider whether a monetary award would amount to fair and reasonable compensation. This court has said that irreparable harm does not mean that the injury must be beyond the possibility of repair by money compensation. Rather, the test is whether "no fair and reasonable redress can be had in a court of law unless the injunction is granted and that its refusal would be a denial of justice": *Noise Solutions, supra*, at para 6. The question is adequacy of damages as compensation, not complete impossibility: *Maverick Equities Inc v The Owners: Condominium Plan no 942 2336*, 2008 ABCA 190 at para 10.

B. Harm Caused by Customers' Bad Conduct

81 Through the evidence of Ms. Hodgkinson, the Corporation introduced evidence of property damage, nuisance, and expense attributable to Customers. This included evidence concerning loud parties continuing into the early morning, persons parking in the wrong parking spots, increased garbage in common areas, and non-residents being permitted to enter into condominium areas. Ms. Hodgkinson deposed that the presence of Customers has resulted in increased wear and tear of Condominium Property, additional expenses for a more sophisticated security system, and increased insurance premiums.

82 Nonetheless, the Respondents contend that the Corporation has failed to establish irreparable harm. The Respondents advance four main arguments. First, Mr. Porter has provided evidence that he has been duly diligent in managing bookings of his unit, thereby reducing the risk of harm by his Customers. Second, if any harm is associated with Customers, the level of harm is no greater than the level of harm associated with unit owners and tenants. Third, there is circumstantial evidence of lack of harm. Fourth, the evidence of Ms. Hodgkinson fails to prove harm.

1. Due Diligence

83 In para 9 of his affidavit of September 13, 2019 (Porter Affidavit), Mr. Porter outlined ways in which he accepts bookings from prospective Customers. He requires a photograph, government-issued identification, a recommendation from "other short-term rental unit owners," information respecting the prospective use of the unit, contact information, a security deposit, and an agreement to abide by his "House Rules" for the unit. See also Exhibit A to his affidavit, an AirBnB listing.

84 There was also evidence that Mr. Porter has installed a decibel meter that provides him with notification if sound in the unit gets too loud. He has offered to install water usage monitoring equipment and power monitoring equipment, both for the purpose of reducing risks of flooding: Porter Affidavit at para 10.

85 Mr. Porter has, on the evidence, taken his responsibilities seriously, as he confirmed at para 10 of his affidavit. He has made an effort to reduce the risks that his Customers will cause any harm while occupying his unit.

86 I will set aside the issues of

- whether the agreement respecting the House Rules meets the Bylaw requirement in s. 2.03.1(h) that

> 2.03.1 An Owner shall ...
>
> h. comply with, and cause all Tenants, family, visitors and other occupants of the Unit, to comply with the By-laws, the Act, and regulations in force ....;

- the non-compliance with the insurance requirement under s. 5.08.2, and
- the inconsistency between the Rule respecting Water use and the House Rules about using the dishwasher on check out.

87 Mr. Porter has imposed some rules, but he is not - not being approved for short-term rentals - following the rental rules provided to him by the property manager for the Corporation and attached as Exhibit D to Mr. Porter's affidavit. Mr. Porter is following rules and managing risk but he is following his own rules.

88 Further, there is no evidence respecting the Customer-management practices of any Respondents besides Mr. Porter, save for the online listings exhibited to Mr. McLaughlin's affidavit.

89 In my opinion, Mr. Porter, alone of the Respondents, does have a reasonable argument that he has put measures in place to reduce the risks that Customers will cause some harm, although his rules run contrary to the Corporation's rules respecting (e.g.) water use. There is no argument, though, that Mr. Porter's measures put him in compliance with the Bylaws.

2. No Harm Beyond Baseline

90 The Corporation did not provide information about what the baseline number and nature of complaints had been, prior to the Respondents booking their units through online platforms. The evidence did not permit a conclusion about the extent, if any, by which conduct violative of condominium rules increased after online booking commenced. I keep in mind that any increase would be an association only and it would still be necessary to attribute conduct to online-booked units.

91 Ms. Hodgkinson deposed that two Respondent units were not made available for fire inspections. However, some 17 units, including units that were not (to anyone's knowledge) available for online booking, were not made available for fire inspections: Questioning on Affidavit of Ms. Hodgkinson (THQ) at 31.24-32.8; 32.15-22. Further, Mr. Porter deposed that 18 units were not made available for a mandatory plumbing inspection: Porter Affidavit at para 31.

92 In response to an undertaking from her Questioning on Affidavit, Ms. Hodgkinson produced some 98 pages of notes respecting parking infractions. My notes of submissions indicate that 198 infractions were recorded. Of this total number of infractions, 6 (only 6) were linked to the Respondents.

93 The Respondents pointed out that an affidavit could have been provided by the Corporation's property manager, who would be best placed to provide context about the nature and scope of various rule-infractions on the condominium premises. No such affidavit was provided.

94 I find that Customers were not causing more harm, harm at a higher rate, or more severe types of harm than any other occupants of the condominium.

3. Evidence of Lack of Harm

95 The Respondents pointed to evidence circumstantially supporting the inference that short-term accommodation online bookings did not cause harm to the Corporation or occupants of the condominium.

96 Mr. Porter deposed that he started booking his unit through AirBnB in July 2017. The Corporation did not approach him about his booking activities until over a year later, in September 2018. His bookings, then, do not appear to have raised any concerns with anyone during their first year.

97 Although it initially raised its concerns in September, 2018, the Corporation did not seek an interim injunction until September 2019. The Respondents contended that had their activities threatened harm, this matter would have made its way to court faster. However, the Corporation pointed out that it proceeded "incrementally" with the Respondents, as dictated by cases such as *Condominium Plan No. 822 2909 v. 837023 Alberta Ltd.*, 2010 ABQB 111 (Alta. Q.B.), Veit J at para 68. The

Board was seeking to resolve the dispute without the expense to all parties of litigation. In my view, the Corporation's forbearance and incremental approach to the dispute with the Respondents should not result in an adverse inference against it.

98 However, Mr. Porter's first-year short-term accommodation activities did not cause harm to the Corporation or to other unit owners or tenants.

4. Absence of Proved Harm

(a) Lack of Quantification

99 Ms. Hodgkinson deposed that the online-booking occupants resulted in additional expenses for the Corporation, including wear and tear and increased insurance premiums. Those claims were not substantiated by reference to supporting evidence. See THQ at 34.6-8.

100 Ms. Hodgkinson stated that the Board has installed a new security system that cost $30,000. That was not exclusively "to address your concerns with respect to AirBnB," but "that is part of our concern:" THQ 34.12-19. Ms. Hodgkinson explained that "We're inner city .... Lots of homeless, lots of drug addicts, lots of aimless intoxicated individuals ...:" THQ at 34.22-25.

101 Ms. Hodgkinson deposed that she was "concerned about the negative impact that these short-term commercial accommodations will have on my property value:" Hodgkinson Affidavit at para 25. She had not, though, made any inquiries respecting unit valuation with a realtor: THQ at 33.22-34.2.

102 I find that the Corporation has not quantified any claim related to Customers concerning wear and tear, increased insurance premiums, or reduction of property values; and that there was no basis for attributing any specific amount of the $30,000 new security system cost to Customer-related issues.

(b) Rule 13.18 and Hearsay

103 Paragraph 16 of Ms. Hodgkinson's affidavit refers to incidents linked to the Respondents' units. She repeats information received from other unit owners, concerning parking infractions and loud, large, and late-running parties. The units involved appear to be owned by the Respondents Kuzio and Knull.

104 The Respondents argued that the information reported by Ms. Hodgkinson should have no or little weight. The complainants did not provide affidavits. The complainants were not subject to cross-examination on their affidavits. The requirement to swear an affidavit and the prospect of having one's evidence tested may enhance the care taken to describe events and so enhance the reliability of what is reported.

105 Affidavits could have been provided by the complainants, or at least two of them since one has since moved to an unknown location: THQ at 25.15-17. In any event, this last complainant, after having spoken to Ms. Hodgkinson respecting the complaint, declined to be involved in any proceedings.

106 It is true that in an interim proceeding, one not resulting in a "final" order, an applicant is not precluded from relying on hearsay, that is information received from or recorded by third parties that would not be admissible through an exception to the hearsay inadmissibility rules. In my opinion, none of the information reported in paragraph 16 of Ms. Hodgkinson's affidavit was admissible through an exception to the hearsay rule, in particular, through the "principled exception" to the hearsay rule. See *R. v. Bradshaw*, 2017 SCC 35 (S.C.C.), Karakatsanis J at paras 19-32.

107 Rule 13.18 provides that

> 13.18(1) An affidavit may be sworn
>
> (a) on the basis of personal knowledge, or

> (b) on the basis of information known to the person swearing the affidavit and that person's belief.
>
> (2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.
>
> (3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

108 In *ANC Timber*, Justice Topolniski commented as follows at para 21:

> [21] Typically, affidavits must be sworn on the basis of personal information. However, the Rules of Court allow hearsay evidence on a motion for interim relief if it is accompanied by a statement providing the source of the evidence and the deponent's belief in its truth: Rule 13.18(1)(b) and 13.18(2). Notwithstanding this, the Court is not mandated to accept such evidence: *Silver Recovery Systems of Canada Ltd v WMJ Metals Ltd* (1989), 103 AR 252 (Master); ***Schaffhauser Kantonalbank v Chmiel***, 1988 ABCA 149.

In *Schaffhauser Kantonalbank v. Chmiel* [1988 CarswellAlta 546 (Alta. C.A.)], Justice Kerans wrote at para 6 that "As to the adequacy of the affidavit, it is true that an affidavit based on information and belief in an interlocutory proceeding is admissible but it is also true that, when it is based on hearsay, the Court may refuse to rely upon it."

109 A claim in an affidavit does not necessarily have any or any significant probative value, just because it is found in an affidavit. Claims in an affidavit do not necessarily establish a fact-in-issue to the requisite standard, in civil matters the balance of probabilities: see *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.) at paras 28 and 29. There must be reasons, though, for discounting the weight of sworn evidence provided in accordance with the Rules of Court.

110 I will address the most significant evidence, concerning the loud, large, late parties.

111 This was hearsay evidence and so has less probative value than affidavit evidence from a person who observed the events reported. The complainants did not provide the information on oath and were not subject to cross-examination. This lowers but does not nullify the probative value of the information. I note that procedural assurances of reliability, substitutes for contemporaneous testing of report, are not necessary conditions for the admissibility of hearsay: *R. v. Khelawon*, 2006 SCC 57 (S.C.C.), Charron J at paras 63, 66. Inherent reliability is a second route to the admissibility of hearsay. I bear in mind that the present focus is on probative value rather than admissibility. The admissibility rules, though, point to factors relevant to the assessment of probative value.

112 The evidence about the parties was not contradicted by other affidavit evidence.

113 Two of the complainants (paras 16(d) and (f)) approached Ms. Hodgkinson with their information. The 16(f) complainant did contact Ms. Hodgkinson "after the fact," but in relation to an unrelated issue; conversation led to the disclosure. Both complainants resided on the third floor of the condominium. Mr. Kuzio's unit was implicated in both reports. See THQ at 13.12-14; 17.6-17.

114 There was no suggestion that any of the complainants had any reason to fabricate or misstate their observations or that the "third floor" complainants were not reliable reporters.

115 The complainant who reported five or six parties over four months in 2018 involving Mr. Knull's eighth floor unit was approached by Ms. Hodgkinson when she was making investigations concerning short-term accommodation issues: THQ at 12.17-20. This complainant contacted Ms. Hodgkinson after their conversation and stated that she did not want her information used and she did not want to get involved: THQ at 24.12-14. She had a text conversation with Mr. Porter. She said "I will send you and her a statement saying everything I said to Terry on the phone was incorrect and I won't stand behind any of it:" Porter Affidavit at Exhibit B. A recanting witness's prior statement is sometimes admissible for the truth of its contents: see *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.). On this record, though, particularly given the comments to Mr.

Porter, it is safe to conclude that the probative value of this complainant's evidence is nullified.

116 Ms. Hodgkinson was a Vice-President of the Board and was making investigations respecting the online booking units. On the one hand, it was natural that she would engage in investigations with unit owners and tenants, and it would be natural for unit owners and tenants to talk to her about relevant concerns. On the other hand, it would be fair to conclude that Ms. Hodgkinson was not an independent and impartial investigator. She and the Board were opposed in interest to the Respondents. This reality is relevant to the assessment of her evidence. Ms. Hodgkinson, though, was cross-examined and there was no suggestion that she reported the complainants' comments inaccurately.

117 Based on the foregoing, I find that Ms. Hodgkinson's evidence respecting the third-floor parties had sufficient weight to permit me to find, and I do find, that the reported parties occurred in 2018.

118 Again, evidence concerning the incidence of noisy parties hosted by unit owners or tenants was not available.

5. Conclusion concerning Bad Conduct by Customers

119 For the most part, the Corporation has not established on a balance of probabilities any significant bad conduct by Customers, to any degree exceeding the conduct of unit owners and tenants, in the nature of loud parties continuing into the early morning and persons parking in the wrong parking spots. Neither has it established that the Customers' use of the premises has resulted in increased wear and tear of Condominium Property or increased insurance premiums or other expenses.

120 I find that loud, large, late parties were held in Mr. Kuzio's unit on two occasions in November 2018. I infer that the individuals involved were short-term occupants of this unit.

121 If the only basis for a finding of irreparable harm were substantiated acts of nuisance or property damage, the evidence would not support a finding of irreparable harm to the Corporation or, for that matter, irreparable harm to unit owners or tenants.

122 However, there are two additional bases for a finding of irreparable harm.

C. Risk of Harm

123 The determination of whether an interim injunction is warranted involves a balancing of risks to the applicant and the respondent. Risk is a relevant consideration in the interim injunction analysis.

124 It is true that short-term occupants of units have no property interest in the units. They are occupying someone else's property. Typically, people take better care of their own property than others' property. That observation, though, has greater implications for those who list their units online than for the Corporation or other unit holders.

125 But further, it is true that short-term occupants of units will not have to co-exist with other unit occupants for any prolonged period. Short-term occupants and unit owners and tenants will be and remain strangers. Simple civility should moderate conduct. Unfortunately, as anyone who stays in hotels frequently could attest, simple civility is not evenly distributed. Regardless, short-term occupants will not conduct themselves as neighbours. They would have no connection to the condominium as a community, as a place and as a place filled with people they know or are at least acquainted with. Customers' conduct would not be moderated by social influences of neighborhood. I saw nothing in the evidence showing that the Corporation had any effective means of deterring occupants' bad conduct directly (although listing unit holders could face (e.g.) fines).

126 Fortunately, on the evidence, the short-term occupants of this condominium have, to this point and for the most part, behaved well. Others may not even have known they were there, as with (it appears) Mr. Porter's customers in his first AirBnB year.

127 Nonetheless, I find that there is a real risk that short-term occupants, without connection to others or the place, will pay less regard to others in terms of, e.g., noise and dumping garbage; and will have less regard for security for the premises, letting in people who should not be let in: what's it to them?

128 Of course, there are bad neighbours. There was reference in Ms. Hodgkinson's cross-examination to a SWAT team attendance at the condominium for a regular unit owner or tenant.

129 But again, allowing short-term occupation of units entails an ongoing risk, arising with each booking, in addition to the risks arising from regular occupation. I emphasize that risk is real. We insure against it. We take steps to manage it.

D. Violation of the Social Contract

130 The most important harm suffered by the Corporation was evoked by Ms. Hodgkinson in para 26 of her affidavit:

> When I bought my unit in this building, the concept of short-term commercial accommodation outside of a hotel setting did not exist. I could not have contemplated a situation such as this. I did not agree to live in a hotel.

131 At para 27 she stated

> The units in this building are defined as "one-family residences" in the Bylaws. I bought my unit on that basis, and relied on this restriction. I expect to live in a building occupied by other single-family occupants, not a parade of itinerant travellers. I covenanted with the other owners in the building that I too will occupy my unit only as a "one-family residence."

132 The analysis of this type of harm has four elements.

1. Democratic Constraint

133 First, the distinctive nature of the constitution of social life in condominium communities must be recognized. An owner of a unit in a condominium is not an isolated freeholder. She, he, or it is part of democratically organized community, bound by statute, regulation, and contract. Different condominium communities establish different social environments for their members. If a person joins such a community, the rules constituting that community are accepted, until those rules are changed through democratic process or until the person sells the interest and leaves the community.

134 Thus, the BC Court of Appeal wrote as follows in *Strata Plan LMS 2768 v. Jordison*, 2013 BCCA 484 (B.C. C.A.) at para 25:

> [25] .... The competing private property interest which supports strict interpretation must, in my opinion, yield to the rights and duties of the collective as embodied in the bylaws and enforceable by court order. The old adage "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting. In *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010) at 366, the learned author, Bruce Ziff, writes:
>
> > Participation in condominium projects necessarily involves a surrender of some degree of proprietary independence. An owner is at the mercy of the rules enacted through the internal decision-making process. That is only logical. ... Likewise, uses that directly and adversely affect the physical enjoyment of neighbouring properties need to be regulated. These are problems that occur in all communities, and one of the attractions of the condominium lifestyle is that there can be a measure of control over the petty annoyances that often occur in urban habitats.

To similar effect, see *Condominium Corp. No. 0723447 v. Anders*, 2016 ABQB 656 (Alta. Q.B.), Schultz M at para 27.

2. Harm from Non-Conforming Use

135 The second element of the harm analysis is that this particular condominium community was a community of "one-family residences" with only a very few units specifically dedicated to commercial uses. Commercial short-term occupation arrangements, mediated through online platforms, are antithetical to the one family residence commitment. Ms. Hodgkinson identified the foundation of this condominium community and the inconsistency of the Respondents' commercial practices with that foundation.

136 At this point, the strength of the Corporation's case re-emerges. I have found that the Corporation's argument that the Respondents violated valid Bylaws was strong. In my opinion, it was clear that the views expressed by Ms. Hodgkinson and other members of the Board, including Mr. McLaughlin in communications with the Respondents, were correct. This is not an instance of rules supporting two or more competing but more-or-less equally reasonable interpretations.

137 What follows?

138 The reaction of Ms. Hodgkinson was justified. As she put it, she did not agree to live in a hotel. Her injury was her and other unit owners and tenants' exposure to commercial dealings, to the parade of travellers winding through the community. That injury is hard to quantify. It is an injury to quality of life; the injury is a disappointment of legitimate expectations. In my opinion, this is a type of injury falling within the Court of Appeal's *May* doctrine: the test is whether "no fair and reasonable redress can be had in a court of law unless the injunction is granted and that its refusal would be a denial of justice." In my opinion, no redress is adequate to address the Respondents' conduct other than an injunction.

139 Further harm was caused by the Respondents' continued violation of the clear rules of this condominium community. The Respondents, like other unit owners, were bound by the bylaws: Act, s. 32(2). Under s. 32(6),

> (6) The bylaws bind the corporation and the owners to the same extent as if the bylaws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the bylaws.

140 The Respondents' conduct was contrary to the local democracy of the condominium. Democracy does not mean doing what one pleases, just because it may not physically harm others. (See, in this regard, *R. v. Malmo-Levine*, 2003 SCC 74 (S.C.C.), Gonthier and Binnie JJ at paras 102-129, particularly paras 115-126.)

141 The Respondents were, through their disobedience, undermining respect for the rule of the special law that governed this community. This harm to the community is likewise not easily transmuted into a dollar value.

142 The harm suffered by the Corporation and unit owners and tenants and caused by the Respondents occurred even if there was no additional injury to Ms. Hodgkinson and other unit owners or tenants. Justice Lissaman wrote as follows at para 21 of *Metropolitan Toronto Condominium Corp. No. 850 v. Oikle*, [1994] O.J. No. 3055, 44 R.P.R. (2d) 55, 1994 CarswellOnt 763 (Ont. Gen. Div.):

> 21 *York Condominium Corp. No. 216 v. Borsodi* (1983), 42 O.R. (2d) 99 (Co. Ct.) is a particularly helpful case. It states the proposition that just because unit holders do not complain, does not mean that the Declaration and By-laws should not be upheld by the Court. The case involved a building which had an "adults only" tower where no children under the age of 14 were permitted to live. Two other towers were designated as family towers. The other unit holders had not complained but the condominium corporation wished to enforce the rules. A relevant passage of the judgment of Allen J. at p. 106:
>
> > In my view, the defendants' objection to the plaintiff's action is not strengthened by the absence of testimony to suggest that the defendants' child has in any way, by reason of conduct or behaviour, interfered with the rights of others. The child's very presence as a permanent resident in the defendants' unit places the defendants in a position of breach of the Declaration. And if the plaintiff did not seek to enforce the Declaration it too would be in breach of the Act.

3. Duty of the Corporation

143 The third element of the harm analysis is that, in light of the Respondents' violations of the Bylaws, the Corporation was obligated to respond. The Corporation is statutorily required to enforce the Bylaws: Act, s. 37(1).

4. Role of the Courts

144 The fourth element of the harm analysis is that, given the strength of the Corporation's interpretation of the Bylaws and the Act, the Court should assist the Corporation in enforcing the Bylaws.

145 In *Oikle*, Justice Lissaman wrote as follows at para 23:

> 23 The applicant also, in particular, relies on Mr. Justice Herold's decision in *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* (1989), 6 R.P.R. (2d) 217 (Ont. Dist. Ct.). This case supports the proposition that the Courts as part of policy should support the enforcement of the rules of a condominium. It is useful to quote Justice Herold's statement in the *Gifford* case which is as follows:
>
> > The major advantage of requiring compliance, on the other hand, appears to me to be that a message will be sent out by the board to the unit owners that the declaration and by-laws are in place for a good reason and they will be enforced, and a message will also be sent by the Court that where the board acts reasonably in carrying out its duty to enforce the by-laws and declaration the board will be supported by the Court ....
> >
> > A longer-term result of this position surely will be that people will only move into the building if they are prepared to live by the rules of the community which they are joining - if they are not they are perfectly free to join another community whose rules and regulations may be more in keeping with their particular individual needs, wishes or preferences ....

146 In *Condominium Plan No. 762 1302 v. Stebbing*, 2015 ABQB 219 (Alta. Q.B.), Justice Ackerl wrote as follows at para 31:

> [31] The Board cites *Devlin v Owners: Condominium Plan No 9612647*, 2002 ABQB 358, 318 AR 386 to illustrate that a condominium board's decisions are due deference. That decision at paras 2-3 also offers a second principle: the board has an obligation to enforce its bylaws:
>
> > 2 Condominium corporations are created to manage the assets of a condominium which is owned collectively by its unit holders. The condominium corporation incorporates a system whereby the majority rules and the unit holders may decide how they want their condominium to run subject to any restrictions contained in the condominium bylaws which are not contrary to the *Condominium Property Act*. It is trite law to say that once the rules have been established a unit owner is expected to abide by them and the condominium corporation is obliged to enforce them.
> >
> > 3 Bylaws are in place for a good reason and should be enforced, and a message will be sent by the Court that where the Board acts reasonably in carrying out its duty to enforce the bylaws and restrictive covenants, the Board will be supported by the Court, however when the bylaw and restrictive covenant are clearly prohibited under the *Condominium Property Act* then the Court will intervene. [Emphasis added by Ackerl J]

5. Section 67 and Harm

147 Finally on the issue of harm, I consider s. 67 to support the position that proof of harm beyond the violation of

Bylaws is not required to support a judicial remedy, including an interim injunction under s. 67(3).

148 The relevant provisions of s. 67 read as follows:

> 67(1) In this section,
>
> (a) "improper conduct" means
>
> (i) *non-compliance with this Act*, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an *owner*, ...
>
> (b) "interested party" means an owner, *a corporation*, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit. [emphasis added]
>
> (2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:
>
> . . .
>
> (b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;
>
> (c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;
>
> (f) give any other directions or make any other order that the Court considers appropriate in the circumstances.
>
> (3) The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court.

Note that "improper conduct" alone is the predicate to judicial relief under ss. (2) and (3).

E. Conclusion

149 I conclude that the Corporation has suffered irreparable harm because of the Respondents' violation of the Bylaws. Added to this harm is the harm occasioned by the additional risk posed by short-term occupants to the community, and the evidence of two instances of loud, large, late parties at an online-listed unit owned by one of the Respondents.

III. Balance of Convenience

A. Impact on the Respondents

150 An important aspect of the balance of convenience analysis is the assessment of the impact of an injunction on the Respondents. Would the Respondents suffer irreparable harm if an injunction were imposed?

151 Mr. Porter deposed as follows in his affidavit:

> 11. The short-term rentals through AirBnB and other similar websites in respect of the Unit have helped me cover the expenses associated with the Unit. I have been unable to find anyone to agree to a long-term rental of the Unit .... Without the ability to provide short-term rentals with the Unit, I will not be able to cover the expenses associated with it.
>
> 12. .... I currently have renters booked for my Unit up to November 7, 2019.
>
> 14. If I am forced to cancel any of my current bookings on AirBnB, I will be subject to fines from AirBnB. Further, if I have to cancel three or more of my current bookings my AirBnB account may be deactivated. If this occurs, this would

> not only prevent me from listing the Unit on AirBnB but it would also harm my host status at the other properties that I list on AirBnB and affect those listings as well.

AirBnB's cancellation policies are attached as Exhibit C to Mr. Porter's affidavit. I note that while the policies indicate that AirBnB "may" deactivate his account and "may" generally entails some discretion, the policies state that "[u]nless there are extenuating circumstances, there will be no exceptions to our updated cancellation policy."

152 Mr. Porter has known that he did not have Board approval for his commercial arrangements since late September 2018.

153 Mr. Porter persisted, though, deposing as follows at para 24 of his affidavit:

> 24. I believed that this decision by the Board was not in accordance with the bylaws. There is nothing in the bylaws which prohibits rentals of units. As such, I continued to list the Unit on AirBnB and other websites as a short-term rental.

154 In March 2019 he received a letter from the Board requesting him to undertake to cease to provide short-term rentals. He did not so undertake.

155 In late March the Board began to levy a fine of $200 per month because of his non-compliance.

156 Mr. Porter would face pecuniary loss were an injunction granted. He can be compensated in damages, should another Court find that an injunction preventing him from deriving revenue from his unit through short-term licencing arrangements is not warranted.

157 The injunction application did not come as a surprise to Mr. Porter. The conflict between Mr. Porter and the Board respecting his dealings with his unit have been escalating for over a year. He learned in late September 2018 that the Board would not consent to Mr. Porter's arrangements respecting his unit. He did not receive approval for his "short-term rentals."

158 As indicated above, in its dealings with the Respondents, the Board has employed an "incremental" method, and has sought to resolve issues without litigation: *Condominium Plan No. 822 2909* at para 68.

159 By implication, the other Respondents would face pecuniary loss were an injunction granted, not irreparable harm. Like Mr. Porter, they had ample notice that they were violating the Bylaws and that they would have to stop listing their units for short-term accommodations.

B. Other Aspects of the Balance of Convenience

160 The Corporation's case is strong. Irreparable harm is being caused by the Respondents to the condominium community. The Corporation is obligated to enforce the Bylaws violated by the Respondents. The Corporation gave Mr. Porter and the other Respondents ample notice that they were in violation of the Bylaws and ample opportunity to correct their course. The Respondents will not suffer irreparable harm if the injunction is found not to have been warranted. They have been conducting commercial activities and their losses should be quantifiable.

IV. Conclusion

161 I therefore grant an interim injunction against the Respondents, restraining them from using or offering short-term accommodations in their respective Units, until the disposition by the presiding Justice of the matters set for the Special Chambers Hearing on February 21, 2020.

V. Undertaking as to Damages

162 The Corporation has indicated that it will provide an undertaking in damages. This is appropriate. I refer to *Silver Star Salvage* at para 21, quoting Justice Sharpe:

> As Justice Robert Sharpe explains in *Injunctions and Specific Performance*, loose-leaf (Rel 27, Nov 2018) (Toronto: Thomson Reuters, 2017) at para 2.470, "[i]t is well established that, as a condition of obtaining an interlocutory injunction, the plaintiff must give an undertaking to pay to the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail in the ultimate result".

163 The Corporation shall provide an undertaking to compensate the Respondents in damages should an injunction not be continued by the Justice upon determination of the matters set for the Special Chambers application. The undertaking shall provide, subject to any further judicial directions, that the Corporation shall abide by any Order this Honourable Court may make as to damages if this Court shall hereafter be of the opinion that the Respondents have sustained any damages by reason of the injunction which ought to be paid by the Corporation.

VI. Costs

164 Costs shall be in the cause.

Application granted.

TAB 5

2021 ABQB 340
Alberta Court of Queen's Bench

Allarco Entertainment 2008 Inc v. Staples Canada ULC

2021 CarswellAlta 1057, 2021 ABQB 340, [2021] A.W.L.D. 4769, [2021] A.W.L.D. 4771, [2021] A.W.L.D. 4800, [2021] A.W.L.D. 4846

Allarco Entertainment 2008 Inc. (Plaintiff) and Staples Canada ULC, Best Buy Canada Ltd., London Drugs Limited, Canada Computes Inc., John Doe Customers 1 to 50,000 John Doe Suppliers 1 to 100 (Defendants)

M.J. Lema J.

Heard: March 2, 2021; March 3, 2021; March 4, 2021; March 5, 2021; March 19, 2021
Judgment: March 30, 2021
Docket: Edmonton 1903-24888

Counsel: K. William McKenzie, Krista McKenzie, Charles P. Russell, Q.C., for Plaintiff / Applicant, Allarco Entertainment 2008 Inc.
Jim Holloway, Megan Paterson, for Defendant / Respondent, Staples Canada LLC
Jonathan Columbo, Amrita V. Singh, for Defendant / Respondent, Best Buy Canada Ltd.
Christopher S. Wilson, James Jeffries-Chung, for Defendant / Respondent, London Drugs Limited
Ted A. Kalnins, Yuri Chumak, for Defendant / Respondent, Canada Computers Inc.

Subject: Civil Practice and Procedure; Evidence; Intellectual Property

Related Abridgment Classifications

Civil practice and procedure
III Parties
III.4 Standing

Civil practice and procedure
XXIV Costs
XXIV.10 Costs of particular proceedings
XXIV.10.e Interlocutory proceedings
XXIV.10.e.ii Motions and applications

Intellectual property
I Copyright
I.14 Remedies
I.14.a General principles

Remedies
II Injunctions
II.7 Injunctions in specific contexts
II.7.n Miscellaneous

Headnote

Remedies --- Injunctions — Injunctions in specific contexts — Miscellaneous

Broadcaster's request for interlocutory injunction relating to sale of specified TV set-top boxes.

Civil practice and procedure --- Parties — Standing

Civil practice and procedure --- Costs — Costs of particular proceedings — Interlocutory proceedings — Motions and applications

Intellectual property --- Copyright — Remedies — General principles

Table of Authorities

Cases considered by *M.J. Lema J.*:

Bell Canada v. 1326030 Ontario Inc. (2016), 2016 FC 612, 2016 CarswellNat 4944, 2016 CarswellNat 4945, 2016 CF 612 (F.C.) — considered

Bell Canada v. Lackman (2018), 2018 FCA 42, 2018 CAF 42, 2018 CarswellNat 377, 2018 CarswellNat 378, 158 C.P.R. (4th) 1, [2018] 4 F.C.R. 199 (F.C.A.) — considered

Bell Expressvu Limited Partnership v. Vidéotron S.E.N.C. (2015), 2015 CarswellQue 9607, 2015 CarswellQue 9608, [2015] 3 S.C.R. vi (note) (S.C.C.) — referred to

C.B.S. Songs Ltd. v. Amstrad Consumer Electronics PLC (1988), [1988] 1 A.C. 1013, [1988] 2 All E.R. 484 (U.K. H.L.) — considered

CCH Canadian Ltd. v. Law Society of Upper Canada (2004), 2004 SCC 13, 2004 CarswellNat 446, 2004 CarswellNat 447, 236 D.L.R. (4th) 395, 317 N.R. 107, 30 C.P.R. (4th) 1, [2004] 1 S.C.R. 339, 247 F.T.R. 318 (note), [2004] 3 F.C.R. 241 at 244, 2004 CSC 13 (S.C.C.) — considered

CHUM Ltd. v. Stempowicz (2003), 2003 FCT 800, 2003 CarswellNat 1969, 2003 CFPI 800, 2003 CarswellNat 3197, 27 C.P.R. (4th) 448, 236 F.T.R. 215 (Fed. T.D.) — considered

Close Up International Ltd. v. 1444943 Ontario Ltd. (2006), 2006 CarswellOnt 5797 (Ont. S.C.J.) — considered

Entral Group International Inc. v. 1438762 Ontario Inc. (2005), 2005 CarswellOnt 2141, 40 C.P.R. (4th) 410 (Ont. S.C.J.) — considered

PricewaterhouseCoopers Inc v. Perpetual Energy Inc (2021), 2021 ABCA 16, 2021 CarswellAlta 119, 86 C.B.R. (6th) 9, 20 Alta. L.R. (7th) 23, 14 B.L.R. (6th) 161, 457 D.L.R. (4th) 1 (Alta. C.A.) — considered

Spanski Enterprises Inc. v. IMB+ Records Inc. (2013), 2013 ONSC 5382, 2013 CarswellOnt 12610 (Ont. S.C.J.) — considered

Videotron, s.e.n.c. c. Bell ExpressVu, l.p. (2015), 2015 QCCA 422, 2015 CarswellQue 1731 (C.A. Que.) — referred to

Vidéotron ltée v. Bell Expressvu, l.p. (2012), 2012 QCCS 3492, 2012 CarswellQue 7560 (C.S. Que.) — considered

Wesley v. Bell Canada (2017), 2017 FCA 55, 2017 CarswellNat 850, 2017 CAF 55, 2017 CarswellNat 1491 (F.C.A.) — considered

Statutes considered:

Copyright Act, R.S.C. 1985, c. C-42
Generally — referred to

s. 41.23(2) [en. 2012, c. 20, s. 47] — referred to

s. 41.23(2)(c) [en. 2012, c. 20, s. 47] — referred to

APPLICATION by broadcaster for interlocutory injunction relating to sale of specified TV set-top boxes.

***M.J. Lema J.*:**

A. Introduction

1 A broadcaster seeks to block sales of certain TV set-top boxes by four major retailers. It sees the boxes as purely "piracy devices." It contends that some of the retailers' employees encouraged customers to use such boxes to access pirated programming and even guided them in the necessary steps. It seeks a further order that the retailers advise purchasers of these boxes of any injunction granted and caution them against using the boxes to access pirated content.

2 The retailers resist, arguing (among other things) that any such sales conduct was in response to a single "customer" (Allarco's undercover investigator) i.e. was not widespread or typical, was at odds with existing store policies, and in any case has not recurred in light of upgraded or reinforced policies. Beyond that, the retailers defend the continued sale of the impugned products, which they see as having legitimate uses.

3 The retailers also seek a stay of the main action until the copyright owner(s) are added.

4 I find no material evidence of encouragement and guidance or at least any causing harm to Allarco and, in any case, no evidence of any continuing such conduct or any material risk of it. I also find that the units in question have legitimate uses and that any post-purchase misuse by consumers cannot be blamed on the retailers.

5 Accordingly, I deny the broadcaster's request for an interlocutory injunction. I also stay the main action until the copyright owner(s) are added and award the retailers costs on a solicitor-and-client basis.

B. Standing and addition of copyright owner(s)

6 I start with standing. The retailers argue that Allarco has *no standing* to seek the requested relief or at least copyright-related relief, asserting:

1. Allarco is not the copyright holder for the two programs it used as proxies for its programming;

2. in any case, it did not show that it has any current rights to either program; and

3. in any case, it did not join the copyright holder(s) in these proceedings.

7 I will assume that Allarco, as some kind of licensee of the programs in question, has standing to seek the requested relief (at least for its own part i.e. leaving aside the position of the copyright owners — see below) and that its licenses are in good standing i.e. have not expired.

8 However, for the reasons below, I find that Allarco was *required to join the copyright holder(s) as parties* and that, until that happens, the *main action must be stayed*.

Obligation to add copyright owners

9 Paragraph 41.23(2)(c) of the *Copyright* Act) says that, subject to certain exceptions, the copyright owner "shall be made a party" to infringement proceedings.

10 The full provision reads:

> (2) If [copyright enforcement proceedings] **are taken by a person other than the copyright owner, the copyright owner shall be made a party to those proceedings**, except
>
> (a) in the case of proceedings taken under section 44.12, 44.2 or 44.4 [not relevant here];
>
> (b) in the case of *interlocutory proceedings*, unless the court is of the opinion that the *interests of justice require the copyright owner to be a party*; and
>
> (c) in *any other case* in which the court is of the opinion that the *interests of justice do not require the copyright owner to be a party*. [emphasis added]

"Interests of justice" case law

11 A handful of cases have examined this "interests of justice" element.

12 In *Close Up International Ltd v 1444943 Ontario Ltd*, 2006 CanLII 32925 (ONSC), Master Dash *dispensed with* the need to add the copyright owners as parties. He emphasized these factors:

> Firstly, CUI [licensee] is the exclusive owner of the copyright in Canada and the U.S. and is already a party. **Only CUI will benefit from the action by way of damages or other enforcement measures.** The Russian Companies **[copyright owners] have no real interest in the action or the relief claimed.**
>
> Secondly, the **proposed amended statements of claim** plead that **the Russian Companies are named as parties** . . .
>
> Thirdly, **none of the defences to the action relate to the copyright interest of the Russian Companies**.
>
> Fourthly, to keep them as plaintiffs will **add an unnecessary layer of complexity, uncertainty and cost to the action.** It will also result in added procedural motions. Although the Russian companies have pleaded that they are not participating, the **defendants have made it clear they wish to compel them to submit to examination for discovery**. I am advised that the Russian Companies will resist examination in Ontario and may resist examination in Russia as they are not participating.
>
> Fifthly, **neither the plaintiff nor the defendants have expressed a strong interest in keeping the Russian Companies as plaintiffs, nor have they urged me not to keep them.** Although the **defendants suggest the Russian Companies should have been added, it appears that this is solely for the purpose of discovery, which may not be granted**. . . . CUI, the copyright owner [actually exclusive licensee] is already a party. Although as the plaintiff suggests, the **Russians have an ownership interest** in the trademark that CUI is enforcing, **that interest can be adequately protected by CUI**.
>
> Finally, there is **no evidence that the Russian Companies desire or even consent to be added as plaintiffs**.
>
> **No compelling reason has been suggested to keep the Russian Companies in the action. I have determined that their addition as plaintiffs is not required in the interests as justice** and as a result the motion to add them as plaintiffs is refused. [paras 7 and 48-55] [emphasis added]

13 In *Entral Group International Inc v 1438762 Ontario Inc*, 2005 CanLII 18316 (ONSC), Master Hawkins applied the "interests of justice" test to stay the licensee's action, emphasizing the *potential otherwise for further infringement litigation by the copyright owners* and the *absence of hardship in adding the owners*:

> The moving defendants submit that **if this action is allowed to proceed in its current form without the Record**

> **Companies [copyright owners] being made parties** the moving defendants will be **exposed to further litigation** for alleged copyright infringement of some or all of the works the subject of this action brought by one or more of the Record Companies. . . .
>
> The nature of the relationships between the present plaintiffs and the Record Companies appears to be one to which the concept of privity of interest applies. However, at this stage of the litigation, with that relationship not fully known, **I cannot say for certain that a judge in future litigation brought by the Record Companies against the present defendants would apply the doctrine of issue estoppel against the Record Companies in that future litigation**. . . .
>
> The present plaintiffs submit that it is in the interests of justice to allow them to proceed with this action without adding the Record Companies as parties because **adding the Record Companies as parties will increase the expense involved in this litigation for the plaintiffs and delay its resolution.** This is particularly so, the plaintiffs say, because the Record Companies are based in Hong Kong. For example, examining the Record Companies for discovery will be significantly more expensive than if they were located in Ontario. Translators may be required.
>
> The **evidence for the plaintiffs does not go so far as to say that this added expense and delay will be so burdensome for the plaintiffs as to work a hardship**.
>
> In conclusion, taking into consideration the elements of **uncertainty and discretion surrounding the application of the doctrines of issue estoppel and cause of action estoppel and the lack of hardship, the plaintiffs have not discharged the onus of showing that it is in the interests of justice that the Record Companies not be added as parties to this action**. I therefore order that this **action be stayed** until such time as the Record Companies are added as parties to this action. [paras 9, 13, and 15-17] [emphasis added]

14 In *Spanski Enterprises, Inc v IMB+ Records Inc* 2013 ONSC 5382, Master McAfee addressed "interests of justice", focusing on the *copyright owners having endowed the licensees with full authority to represent their interests* and *unexplained delay by the defendants* in raising the para 41.23(2)(c) point:

> This is a motion brought by the defendants, IMB+ Records Inc. and International Media Broadcasting Corporation (collectively IMB). IMB seeks an order pursuant to section 106 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, **staying** the portion of this action brought pursuant to the *Copyright Act*, R.S.C., 1985, c.C-42 until such time as the **owners of the copyright in issue, Telewizja Polska S.A. (TVP) and Telewizja POLSAT S.A. (POLSAT) are either added as parties** to this action **or deliver their consent to be bound by any decision of the court** in this action **and provide authorization for the plaintiffs to be their representatives in this action**.
>
> The **onus is on the plaintiffs to show that it is in the interests of justice that the copyright owners are not added as parties** (*Entral Group International Inc. v. 1438762 Ontario Inc.*, [2005] O.J. No. 2140 (Master) at para 17).
>
> I am satisfied that the **interests of justice do not require the copyright owners to be parties**.
>
> SEI and TPC [apparent licensees] have the **authority**, and in the case of POLSAT the **contractual obligation, to represent the legal rights of both TVP and POLSAT [copyright owners] in accordance with the terms of the respective agreements**.

The TVP Agreement as amended provides:

> **TVP designates SEI as its representative in the Territory [North America and South America], authorized to prevent any violations and to protect TVP rights. Any legal action on behalf of TVP, in particular incurring costs, may be undertaken only by prior approval by TVP. TVP will provide appropriate support to SEI actions in this regard.**
>
> **TVP provided its prior approval** (Spanski affidavit, para 54 and exhibit "R").

The POLSAT Agreement provides:

> **[TPC] undertakes to ensure legal protection to the POLSAT2 program on the Territory [Canada] by way of undertaking and performing, at its expense, appropriate actions (including legal action) against person infringing on copyright and related rights of POLSAT**, particularly against entities illegally retransmitting the POLSAT program via the Internet and/or cable or telecommunications networks.
>
> Having regard to the above-noted provisions and the fact that TVP is aware of this litigation and has chosen not to participate, I am satisfied that there is **no reasonable prospect of future litigation for copyright infringement if the copyright owner is not added as a party**.
>
> There has been **delay in bringing this motion**. In *Entral*, the motion was brought relatively early in the proceedings. However, the within action was commenced over two and a half years ago. The defendants have been aware that the copyright owners are not parties since the outset. The defendants waited until March 20, 2013 to advise for the first time that they intended to bring a motion to challenge the plaintiffs' standing. The **affidavit evidence filed on behalf of IMB on this motion**, being an affidavit from a librarian at the law firm of counsel for IMB, **does not explain why IMB waited approximately two and a half years to bring this motion**.
>
> Pleadings are closed, affidavits of documents have been served and examinations for discovery have been conducted. The action is close to being set down for trial. **If the copyright owners are added at this stage, although IMB indicates that they do not wish to examine the copyright owners for discovery, delay will result from any motion to add parties, further pleadings and service on the copyright owners in Poland**. [motion dismissed] [paras 1 and 6-14] [emphasis added]

Parties' positions on "interests of justice" factor

15 Allarco did not address para 41.23(2)(c) in its brief or other materials.

16 The retailers addressed the provision in their common brief:

> . . . Allarco has **not joined, sought or obtained consent from the copyright owners** of the [two sample shows] at issue in this action **nor has it discharged the onus** of showing that it is in the **interests of justice that the copyright owners not be added** as parties to this action.
>
> Allarco purports to know who the copyright owners are and **deliberately failed to advise them or add them**. This is fatal to Allarco's claim since section 41.23(2) of the Copyright Act states that the copyright owners "shall be made a party."
>
> There is an exception in section 41.23(2)(b) relating to "**interlocutory proceedings**." That exception does not apply for at least two reasons. First, if the underlying action is non-compliant, the exception cannot make the action itself compliant. Second, even if the exception could apply, it is clearly in the "**interests of justice" for the copyright owners to be added in this case since only the copyright owners can provide this Court with direct evidence of whether Allarco was given an "assignment" or "grant" in the underlying copyrights**. Furthermore, Sony [an apparent copyright owner] can directly answer the question as to why it permits streaming from within Canada through its Crackle API, and its own position as to whether such streaming violates any rights of Allarco granted by Sony to Allarco. Moreover, these **proceedings seek much more than an interlocutory injunction, vis-à-vis the copyright claims, and Allarco has had ample time to notify and engage the copyright owners**.
>
> . . . [Allarco's CEO] admitted that Allarco had not approached some of these [actual or possible copyright owners] to determine whether they would be a plaintiff in this litigation or assist Allarco with its claims. Allarco has not discharged its burden [to show why the copyright owners should not be named parties] to this action. . . . [emphasis added]

17 During argument, Allarco's counsel responded:

> What [the retailers] are suggesting is that **we should have joined**, in respect of [Allarco's] four channels, which run 365

days a year, with thus with more than 30,000 copyrights involved, **30,000 copyright owners to come to this virtual hearing** . . . they don't want any part of it.

[The Court] can form the opinion that **it is in the "the interests of justice" that we do not want to hear all of them saying "we don't like piracy killing our businesses."**

Do we want 30,000 lawyers here? As well, **copyright infringement is not [Allarco's] only cause of action** . . . there are other causes of action, based on other unlawful acts, such as conspiracy. . . .

It is in the interests of justice to get on with this [i.e. the argument of the injunction application].

[The key is] protected content. Whether a copyright owner, or someone with exclusive rights, or someone with unexclusive rights, or even just a contractual right, [some kind of right] is needed to show [a given] program to the public. Before [a broadcaster] can sue, it only needs a lawful right.

We agree that **all 30,000 shows shown on Superchannel are owned by someone . . . we will not name them all.** It is in the interests of justice for [the Court] to [recognize] that they have all licensed rights to Superchannel.

Do we need all [30,000] of these copyright owners here? **[The retailers] say that they all need to be here,** but [the Court] has the power to say "in the interests of justice, we do not need them all here."

We would **only need to worry [about para 41.23(2)(c)] if we had only a copyright claim to go on**, but we have all sorts of unlawful acts that form part of the conspiracy. . . .

The injunction should go . . . it seems like we have exclusive rights here . . . we can [later] add the copyright owners . . . or send them a letter, if necessary.

It is in the **"interests of justice" to get on with this [application]** and not quibble about one point that can wait for trial.

[Concerning a certain case where it was alleged that **an American rights holder was shipping product into Canada over the protests of the Canadian rights holder], that is where the interests of justice would indicate you need the copyright [or other source-right] holder** involved.

18 Mr. Colombo, for Best Buy (and the other retailers), responded (in part):

We are **not talking about 30,000 copyright owners**. We are talking about the entities who have given exclusive licenses to Allarco . . . **only those programs . . . those two examples. Allarco did not explain why [it did not notify the copyright owners here]. [By definition], it cannot be a "burdensome" thing, when they offer no explanation**. [Allarco has actually] refused to tell us if they have notified the copyright owners about this.

The purpose of excluding interlocutory proceedings is to say (effectively): "If a plaintiff has to move quickly became of the nature of the alleged infringement, it should not have to join every party . . . that is the trade-off of the *Copyright Act*.

But **Allarco cannot just ignore the requirement that [the copyright owners] shall be made parties to the action itself.**

We do not know] whether the [copyright owners] authorized this proceeding and whether they will be bound by [it] or not.

If Allarco has non-exclusive rights, what does it do [about alleged infringement]? It has a contract [with the copyright owner]. It should oblige the copyright owner to police the [alleged infringement].That would be the proper avenue. ["Look at this infringement. Copyright owner, deal with this."]

[One key of including the copyright owner is that it allows] the defendants to see what rights were given by the copyright owner to the licensee.

> In short, Allarco needs to comply with para 41.23(2)(c): it has no contract with the actual copyright owner; we do not know what rights were given to Allarco (exclusive versus non-exclusive); **we do not know if Allarco even has the right to commence this proceeding with respect to copyright, as one or both of the contracts in question reserves rights to the licensor [i.e. copyright owner]**.
>
> Plus, we do not know if the copyright owners will be bound by the Court's decision. We do **not want a multiplicity of proceedings** (i.e. if the licensees sue and then the copyright owner sues); that is not fair to the defendants.
>
> Finally, there is **no evidence it would have been burdensome** to Allarco to add the copyright owners.
>
> Allarco has **known about this problem for at least a year**; they could have addressed it long ago, but did not.
>
> The [retailers] have a right to know whether they copyright owners consent to the bringing of this proceeding.

Application of "interests of justice" principles

19 Here are the key factors in this case:

• per the statute, the default position is *mandatory addition*;

• *Allarco had the onus* of showing why, in the "interests of justice", those parties are not necessary;

• Allarco did *not add* the copyright owners *or even notify them of the proceeding* or *provide any reasonable explanation* on either front;

• Allarco tried to argue impracticality ("30,000 parties, 30,000 lawyers), but it anchored its infringement action on *two shows*, meaning (with separate copyright owners) only *two parties* had to be added. It pointed to *non-copyright dimensions* of its claim, but that does not answer the "shall add" obligation for the copyright claim. Finally, it implied that the only purpose of adding the owners would be for them to appear and inevitably echo Allarco's piracy concerns. But as the cases show, "differential positions" is not the test;

• unlike in *Spanski Enterprises*, *no evidence* shows that the copyright owners *obliged or even authorized Allarco* to bring proceedings to defend copyright;

• given no evidence of notice to the copyright holders, we *do not know* if they *want to participate, do not want to participate, or are indifferent*;

• as in *Entral Group*, the retailers have a *legitimate concern about multiplicity of proceedings*, with the copyright owners *not currently parties, no evident delegation of their litigation rights* to the licensed party (here, Allarco), and *no evidence* of their *willingness (or otherwise) to be bound* by the outcome of these proceedings;

• unlike in *Close Up*, *no evidence* shows that *pleadings are being amended to add* the copyright owners;

• as for delay, we have the reverse of the *Spanski Enterprises* scenario: the retailers *raised this issue in a timely way*, yet Allarco did *nothing to address the point* (either adding the owners or explaining why not);

• *no evidence* shows that adding the owners would have been *impossible, impractical, or burdensome* for Allarco; and

• I reviewed the two confidential-evidence contracts: one of them is *silent on any allocation* (between the copyright owner and the licensee) *of litigation responsibilities*. The other contains very specific allocations of such responsibilities for "defensive" litigation i.e. suits *against* the copyright owner or licensee. It appears to be *silent on "offensive" litigation* i.e. proceedings with either of those parties as *plaintiffs, asserting copyright*. It does say that, absent expressly assigned rights, the copyright owner reserves all rights.

• It is at least arguable, given those contracts, that Allarco does not have the right to bring copyright-infringement

> proceedings. I make no ruling on the point, but this *uncertainty points to the value of adding the copyright owners here i.e. to eliminate any uncertainty about standing to enforce the copyrights.*

Conclusion on adding copyright owners

20 In these circumstances, I find that it is *not in the interests of justice to dispense* with adding the copyright owners as parties to the main action.

21 Accordingly, I impose a *stay on further steps by Allarco in the main litigation* i.e. pending the addition of the copyright owners as parties.

22 As for the current *interlocutory application*, and with interlocutory proceedings being an *exception* to the main "must be added" rule (unless the interests of justice require otherwise), and given my findings below, I find it is in the interests of justice to decide this application now i.e. not stay it until the copyright owner(s) are added.

23 The reasons are that I do not see what material evidence or arguments the copyright owner(s) could add to this injunction application, and I foresee no material risk that they will later bring the same or similar application on their own i.e. no material risk of multiplicity of proceedings.

24 Below is my analysis of the remaining issues.

C. Test for interlocutory injunction

25 The parties agreed on the familiar test for an interlocutory injunction. Here is the test as expressed by Sharpe JA in his authoritative text:

> 1. has the plaintiff presented a case which is *not frivolous or vexatious* but which presents a *serious case to be tried*?
>
> 2. will *damages* provide the plaintiff with an *adequate remedy*? If so, no injunction should be granted. If not,
>
> 3. would the plaintiff's *undertaking in damages provide adequate compensation* to the defendant, should he or she succeed at trial, for loss sustained because of the interlocutory injunction? If yes, there is a strong case for an interlocutory injunction.
>
> 4. where there is doubt as to the adequacy of the respective remedies in damages, the case turns on the *balance of convenience*.
>
> 5. at this final stage, weight may be placed on the court's prediction of ultimate success [but only where one side of the case is clearly stronger] [*Injunctions and Specific Performance* — Loose-leaf Edition (current to November 2019), Thomson Reuters, para 2.130 at pp 2-18 and 2.18.1].

D. Analysis

26 There is *no serious case* to be tried here.

27 Allarco's entire case for an injunction is built on assertions that the decline in its subscriber base and otherwise suboptimal performance has been *caused by* programming piracy of consumers using "pirate devices" sold by the retailers and that such damage will continue absent an injunction.

Allarco's arguments anchored on piracy occurring

28 That assertion is the through-line of Allarco's arguments, as seen in these selected excerpts from its main and reply briefs:

• "[Two of Allarco's TV series, used as proxies for its programming line-up] are examples of thousands of its copyrighted programs *which are being pirated using . . . Pirate Devices*" [and later] "[these shows] are examples of popular programming *which is being pirated*";

• "Examples of how [Allarco] is damaged by the use of Pirate Devices and internet piracy include the following: [its] programming *is being watched without permission and without compensation*";

• "The [retailers] know and intend that their customers will buy and *use the Pirate Devices to steal programming from [Allarco]*";

• " . . . *When Super Channel's programming is being accessed and viewed by anyone without its permission*, that is proof beyond any doubt that [certain electronic safeguards] *have been circumvented* contrary to section 41 of the *Copyright Act*";

• "[The retailers] have so far refused to disclose their information, knowledge or involvement in piracy and *how the [Allarco] programming is being stolen*";

• " . . . [Certain] testing focused on two of Super Channel's popular programs [shows #1 and #2], being examples of the *programs being pirated*";

• "[Certain streaming devices the retailers sell] are Pirate Devices — widely known to be designed and *used for piracy of copyright programming as broadcast by Super Channel* and others";

• " . . . [the retailers] obfuscated the extent of their involvement in the conspiracies which lead to *[Allarco's] programming being pirated*";

• " . . . [Allarco] has demonstrated [exclusive-rights infringement] with [shows #1 and #2], and those examples extrapolate to show that *all of Super Channel's programming is infringed in the same way*";

• "The actions of the [retailers] are intentional and *interfere with Super Channel's business* . . . " [above excerpts from main brief]; and

• " . . . the Pirate Devices previously sold over the years by each [retailer] *continue to steal copyright programming, including Super Channel programs*." [reply brief].

Allarco's piracy-assertion evidence

29 Allarco's deponents made many similar assertions:

• "These [show #1 and show #2] examples *will illustrate how the [retailers] are cheating Super Channel* . . . Where Super Channel would, in the ordinary course of business, earn income from subscribers, that legitimate model [of business] *is undermined and circumvented by the sale and use of the pirate devices by the [retailers]. As a result, Super Channel is effectively robbed of income*"; [affidavit of Don MacDonald sworn [date], para x] — complete for unattributed ones below]

• " . . . when I note that the pirate devices sold by the [retailers] *are being used to view [show #1] programming*, that means that it is being imported into Canada without permission . . . ";

• "The pirate devices *are depriving Super Channel of income each time that the users i.e. the [retailers] and their Customers view any of the programming that Super Channel offers*";

• " . . . The pirate devices *are being used to view these shows* [#1 and #2] and Super Channel is not being compensated";

• "The [Allarco] investigation evidence confirms that the *pirates are stealing [show #2] in that they are taking what belongs to Super Channel without permission . . .* ";

• [affidavit of Don Best sworn January 3, 2020, para 68];

> "I became the President and CEO of [Allarco] in June of 2017. At that time, it had become apparent that **Super Channel had lost many subscribers in a relatively short period. Subscription revenues were falling significantly and, most important, the rate of subscriber loss was increasing**. — The very reason that Super Channel filed for CCAA [protection] in May 2016 was that **our subscriber erosion was overwhelming**. — This was **strange to me because Super Channel was broadcasting a number of very successful and popular programs** including [list of shows] to name a few. Super Channel had the exclusive right to broadcast these in Canada along with many other popular high-quality programs where the company had paid the necessary substantial licensing fees. — I had been aware for some years that piracy of copyright content including TV shows and movies was a factor in the broadcasting and content creation industry, but **in light of Super Channel's and other investigations in the last two years, it is now apparent that the last six or seven years have seen a massive growth in content piracy** — fueled by the promotion and increasingly widespread availability of pirating technologies, and the promotion and normalization of a culture of stealing copyright content in Canada"; [affidavit of Don McDonald sworn April 3, 2020, paras 4-7];

• " . . . the *impact of content piracy and this new culture of stealing content has been devastating to Super Channel . . .* " [same affidavit, para 9]; and

• "*I formed the opinion* during the CCAA proceedings which [Allarco] went through between May 2016 and April 2018 *that these proceedings would not have been necessary if it were not for the sale or pirate devices to Canadians and the culture of copyright infringement* that developed and explored over the last 6 or so years. — With what we know today, it is reasonable to state that, *without content piracy, the past decade would have been very different and profitable for Super Channel*" [same affidavit, paras 11 and 12].

Allarco's (very limited) piracy evidence

30 Allarco pointed to *general-phenomenon evidence* about content piracy:

• "While the financial costs of content piracy to the Canadian Broadcast and Content Creation Industries would be less in terms of actual dollar value when compared to the USA, a 2019 US Chamber of Commerce *study estimates that copyright piracy costs the industry from 11% to 24% of gross revenues* [based on a "broad range of estimates" of the "extent to which piracy is assumed to displace legal purchases"]. It seems reasonable that the same would be true in Canada. . . . there is *much reason to believe* that Canada's relatively smaller industry would be *more vulnerable, hit harder and be less resilient* to copyright piracy than the huge American content creation and broadcasting industry"; and

• "[A 2019 Federal Court decision] showed that 'VaderStreams.ca' . . . had annual *gross revenues of CDN $1.72 billion dollars* servicing *8 million piracy customers* throughout Canada and the USA." [Further, based on Mr. Best's investigatory experience] "even *smaller commercial pirates and sellers of pirate devices can earn millions of dollars per year operating from garages, flea markets and small retail outlets* [e.g.] one small 'mom and pop' pirating operation north of Toronto, Ontario that has over four thousand clients, each paying about $200 a year for pirated content that includes thousands of channels, programs and movies [plus approx. $150 for a device].

31 Allarco effectively asks me to *infer*, from this (limited, imprecise and largely indirect) evidence, that it has suffered, and will continue to suffer, from content piracy.

Allarco acknowledging uncertainty about extent of piracy occurring

32 Allarco itself recognized its challenges in proving piracy and its effects on it. In its main brief (para 11), it stated (in part):

> The nature of internet piracy means it is virtually impossible to accurately identify and quantify **every instance of piracy where customers are watching [Allarco's] programming** without paying for it. There is no reliable data to accurately calculate losses to date or income that will be lost if the injunction is not granted. [emphasis added]

33 And later (para 165):

> [Allarco] is suffering ongoing and substantial damage to its core business of broadcasting programming to its subscribers. **Its losses are virtually impossible to calculate accurately**. . . . [emphasis added]

Allarco's onus to show causation

34 Allarco did not have to identify *"every instance"*, but it had to provide, at minimum, *some evidence* of an actual link between the retailers' activities and Allarco's claimed losses. It did not necessarily have to calculate its damages accurately, or at least completely, but it had to show it was suffering at least *some damage* because of the retailers' activities.

35 Fundamentally, Allarco had to show *causation* i.e. that the alleged impugned activities of the retailers — promotion and sale of set-top boxes for content piracy — have caused, and (if allowed to continue) will cause, the loss of actual and potential subscribers.

Allarco not proving adverse impacts from piracy

36 I am *not satisfied* that, compared to the kinds and extent of evidence of subscriber loss and overall business diminishment seen, for example, in *Videotron Ltee c Bell ExpressVu, lp*(2012 QCCS 3492 (reversed in part 2015 QCCA 422; SCC leave dismissed 2015 CanLII 66252) at paras 596-615 and paras 718-733), Allarco's evidence has proved *actual adverse impacts on its business from content piracy*. (See also the "studies and surveys" reference in *Chum Ltd. v Stempowicz* 2003 FCT 800 (Snider J.) -- part of paragraph beginning "Given the difficulty . . . ".)

37 However, below I will assume that it has indeed suffered such effects.

Allarco not proving any piracy via retailer-sold units

38 The question becomes: what are the *contributions to those effects, if any, from persons purchasing set-top boxes from the retailers*. Here Allarco introduced *no evidence* of:

- even one *current* Super Channel subscriber who *has decided to cancel or is considering cancelling* because he or she has purchased a set-top box from the retailers or is considering one (all aside from a material number of such subscribers);

- even one *former* Super Channel subscriber who *unsubscribed* after, and because of, purchasing from the retailers a set-top box used to *continue accessing Super Channel content* or other copyrighted or licensed content without authorization (all aside from a material number of such former subscribers);

- even one person who *would, or might, have subscribed* to Super Channel but for purchasing from the retailers a set-top box used to access Super Channel content or other protected content without authorization (all aside from a material number of such people); or

- for that matter, *any one consumer's actual use, in any fashion*, of a set-top box purchased from the retailers.

39 Accordingly, Allarco has not proved that *retailers-sold boxes* have been used to infringe any of its broadcast rights. As a result, its copyright and other remedial claims hinging on proving such a link fall flat.

40 However, below I will assume that some such boxes have been so used.

Contribution of retailers' activities to any infringement of Allarco's rights

41 The question then becomes: what were the *retailers' contributions, if any*, so such infringements?

"Promotion and encouragement of content piracy"

42 Allarco first points to evidence of some employees of each of the retailers *generally promoting and encouraging content piracy and specifically the sale of certain set-top boxes* capable, with relatively minor adjustments, of accessing copyrighted content without payment.

43 But Allarco's evidence here was *limited* to dealings by the retailers' employees with *one person* i.e. Mr. Best, its "investigative shopper", who travelled the country for over a year, posing as a customer interested in buying one of those boxes and in using it to access pirated content, and secretly recording his interactions. In other words, a person who, to all appearances, *was already disposed to content piracy*.

44 As the retailers put it in their common brief:

> Mr. Best went into [the retailers'] stores with a **plan** (i.e. to get employees to discuss **whether and how particular devices might be used for illicit activities**). In further of that, and to induce the conversations to generate the evidence he wanted, he often and **materially misled** those employees (e.g. told them his friends had purchased a device which allowed them to get unauthorized access to media content at that particular store).
>
> Mr. Best acknowledged in his cross-examination that he lied to these employees to enable the conversations he was trying to have and the admissions he was pursuing. He calls these lies a "pretext."
>
> In reviewing Mr. Best's surveillance evidence, it is clear that his **interactions** with employees fall into **three main categories**. First, there are those who told Mr. Best that his planned activities were **illegal**. Second, there are those who **did not know what he was talking about** and could not assist. Third, there are those who had **some personal knowledge of how streaming devices could be modified to gain access to media content, and tried to answer Mr. Best's leading questions**. In this latter category, most of those employees referenced resources that were available online (e.g. via Google searches or YouTube) or told him he would need to speak with his friends.
>
> Contrary to Mr. Best's assertions, virtually all of the employees indicated the **company could not assist with modifying any device.** A few said otherwise and, taken at its worst, these employees (who have no legal training) were only guilty of trying to assist a persistent customer . . . .
>
> . . . there is **not a single example in his evidence of any employee approaching him and promoting these products for those purposes**. . . . [emphasis added]

45 I adopt that synopsis as an accurate capture of these interactions.

46 Allarco provided *no evidence* of the retailers' employees' dealings with *any other customer*, let alone dealings about set-top boxes and their uses, let alone about the potential use of some of boxes (after post-purchase modification or programming) for pirating content, let alone about *any of their activities beyond dealings with him.*

47 I am *not able to infer*, from Mr. Best's performance pieces, anything about the wishes, preferences or conduct of *retailer customers generally* or about the actual or typical conduct of *retailer employees* in interactions with those customers.

His repeated "experiments" only demonstrated that *he* was sometimes able to get advice about how to use a set-top box, modified or programmed after purchase, to access pirated content.

48 The experiments tell me nothing about *how often customers ask for assistance with set-top boxes, what they typically ask about*, how often they ask for information about the *capacities of different set-top boxes*, how often they raise their *intended uses of such products* and, in such cases, *how often they disclose their intention to use them to access pirated content*.

49 Allarco tendered a report from a mathematician, attempting to show, via extrapolation from Mr. Best's store visits, the extent of "piracy fanning" by retailer employees. However, it does not assist here, for the reasons outlined by the retailers in their common brief (paras 123-128 and 265-270), which I adopt as correct.

50 The principal reason is that, with *no evidence about the frequency of Mr.-Best-like people attending the retailers' stores*, I cannot extrapolate, from his store visits, anything about the general extent of the phenomena he reported. As well, the *"simple binomial survey" principles she applied do not apply to Mr. Best's ad hoc investigative techniques* i.e. featuring shifting comments and questions in a given retail visit, depending on the responses of the store employee(s).

51 At most, I might infer that, *if* other customers *presented and behaved as Mr. Best did*, and again we have *no evidence to gauge how often that happened*, they likely received the *same, mixed-bag, responses* i.e. occasionally received advice about using a set-top box (again, modified or programmed after purchase) to access pirated content. (That is, *before the retailers reinforced or upgraded their staff training* — see further below.)

52 But that inference does not take Allarco very far.

53 First, as noted, there is no evidence about, and I am not able to infer anything about, the *extent* of Mr.-Best-like people visiting the retailers' store. Is this how every customer behaves? Every tenth customer? One in five hundred? Only Mr. Best himself? I have no way to tell.

54 More significantly, whatever the extent, Mr. Best's videos do *not prove* that the retailers promote and encourage a culture of piracy, and they *do not prove* that the retailers, through their employees' actions, *played any material role in any infringements of Allarco's broadcast rights.*

55 A Mr.-Best-like person arriving at a retailer store is, by definition, already:

- aware of the existence of pirated content;
- not troubled by the phenomenon of piracy;
- keen to find out how to access pirated content;
- willing to reach out to others for that information;
- willing to act on that desire for pirated content; and
- sufficiently resourced to satisfy that desire.

56 In other words, a *convert to the piracy phenomenon*.

57 I *cannot find*, based on the Best evidence here, or any other Allarco evidence, that any assistance offered by retailer employees to such persons *contributed, or contributes, in any material way*, to Allarco subscriber losses or other business difficulties.

58 Given the *wide array of options* for purchasing set-top boxes, of all types, across the *retail spectrum in Canada* (i.e. not just the retailers here), and given the mouse-click-away *torrent of information about set-top boxes and how to use them* (including how to configure them for various uses post-purchase), I cannot find that *any particular behaviour of retailer*

employees have materially affected the intentions or actions of Mr.-Best-like people: one way or another, such people are going to *find out about set-top boxes*, they are going to *buy the kind of set-top box they need*, and they are going to *use it as they see fit*.

59 In other words, it is the *Mr.-Best-like consumer's decisions* to (1) purchase a particular set-top-box; (2) modify or program it to access pirated content; and (3) use it to access such content, that really matters here.

60 *That is the material off-side conduct*, not any sale-of-box assistance provided by a retailer employee to a *person bent on such conduct*.

In any case, no more promotion or encouragement

61 In any case, after Allarco presented its investigative-shopper videos to the retailers, each of them took steps to *reaffirm, upgrade, expand, or otherwise improve their store policies* on respecting intellectual property rights and not engaging with customers who ask about circumventing those rights (for example, requiring employees involved in electronics sales to sign an acknowledgement of these policies and advising of disciplinary consequences).

62 See, for example, London Drugs' incremental training efforts (para 35 of its brief and the associated affidavit evidence at footnote 48), as well as Allarco's acknowledgement of no "piracy support or encouragement" by anyone at London Drugs after mid-2019.

63 Comparable incremental-training evidence was supplied by each of the retailers and not contradicted by Allarco.

64 Allarco presented *no evidence* that, after these developments, any breach of those policies has occurred at any of the retailers. If some of the retailers' employees were fanning the flames of copyright infringement via set-top boxes, that fanning has *apparently stopped.*

Conclusion on "piracy promotion and encouragement"

65 I conclude that Allarco has not proved that any of the retailers promoted or encouraged piracy, or at least in any material way, or in any case that any such activities produced any discernible impact on Allarco's subscriptions or business prospects generally.

66 In any case, no such activities are currently occurring, and Allarco produced no evidence showing any risk of them recurring.

Sale of certain units as contributing to Allarco's business difficulties

67 The focus then shifts from *no-longer-occurring promote-and-encourage activities* to the *very sale of the devices.*

68 Allarco argues that certain set-top boxes, featuring or including the "KODI" program, are *inherently offside*, conceived for a single (accessing pirated content) purpose, and should no longer be sold by the retailers.

69 I disagree.

KODI software application

70 I start with the Federal Court of Appeal's description of KODI in *Bell Canada v Lackman* 2018 FCA 42:

> KODI is a software application that can be installed on electronic devices and that **allows users to play various types of multimedia content** (video, music or pictures, for example). It can read both physical digital media (such as CDs,

> DVDs or Blu-ray) and digital files (such as MP3 or QuickTime). It is an "open source" software application, and is **available for download for free on the Internet. When used in conjunction with add-ons, the KODI media player can be used to access and stream multimedia content hosted on the Internet. These add-ons fall into two categories: non-infringing add-ons, which direct users towards legitimate websites, and infringing add-ons, which direct users towards copyrighted content where the user has no authorized access** . . . [para 4] [emphasis added]

71 In other words, KODI is a neutral application. I see it as a "finder", which can be used to find both legitimate and pirated content (and the latter only after adding certain add-ons).

Devices in question have legitimate uses

72 Most, if not all, of the units examined in this case featured pre-installed applications such as Netflix, YouTube, and Google Play i.e. were ready to access such applications "from go", if no subscription is required (e.g. YouTube), or once subscribed (e.g. Netflix).

73 Mr. Best and Allarco's expert (Dr. Eric Cole) asserted, incorrectly, that the devices had no legitimate uses.

Allarco's expert evidence on device use(s)

74 Dr. Cole's report was aimed in part at confirming Allarco's "no legitimate use" position, in his "Executive Summary of Findings", he first noted that "My findings are *presented in more detail in other sections* of my affidavit, this section is a *brief summary* of my findings" (para 11).

75 His *summary* included this on legitimate use:

> In my technical experience, the **designed purpose** of the pirate devices sold by the [retailers] is to **gain access to pirated content**. The [retailers'] pirate devices are **not a viable or cost-effective use of technology for any other purpose**. The **totality of the pirate devices' functionality further indicates their purpose**. The value of the pirate device is in their **ability to access pirated content and not in performing any other function**.

76 However, his report did *not return to this subject*, after 46 paragraphs of completely irrelevant-to-this-case observations, his report says only this:

> The **laboratory used** for analysis [by the Bests] is a **capable, specialized, and purpose-built assembly** of audio/video and computer modules for the purpose of capturing all possible inputs and outputs, including network and video.
>
> The **lab** produces **comprehensive investigative evidence** of the Pirate devices.
>
> The **lab environment** is **able to fully document and capture evidence** under a variety of common deployment scenarios and is **capable to perform repeatable experiments** in order to evaluate in a manner suitable for all makes and models. [essentially repeats the first paragraph]
>
> Across various test scenarios, usual to Offices and Homes where these devices are commonly connected, the **lab** was **able to test various procedure and equipment** demonstrating standardized testing outputs and careful data handling and post-examination practices.
>
> The **laboratory** was examined by me and I find **it captures** simultaneously and without modification or interference, **evidentiary streams** including a live feed of the laboratory work bench station and the physical devices while under review, video output of the pirate devices as seen on a connected TV, and the real-time and untouched Internet connectivity and network communications to and from.
>
> This led to **four separate captures** which are **Desktop Capture, HDMI Output, Webcam and Stills, and Network**

> **Packet Captures**, Collectively, these four testing outputs provide irrefutability of their temporal authenticity. The **integrity of the tests** [is] demonstrated through the uses of **checksums, serialization**, and are simultaneously collected and correlate activity.

77 This opinion is *not helpful*. The first five paragraphs of this excerpt are abstract, telling us only that this was a *good lab set-up*; the sixth (and only "results") paragraph tells us almost nothing:

> • none of these *"captures"* is exhibited or otherwise described. What is the *"This"* that led to them? *What* are the outputs that the expert refers to? *Where* are they? *When* were they prepared? By *whom? How*? (It may be that he is referring to material forming part of Mr. Best's evidence, but he does not say that or provide any reference points);
>
> • we are told that these outputs, whatever they are, "provide irrefutability of their temporal authenticity." Presumably that means that the time markers of this data, whatever it is, are accurate. What is the *basis* for offering the conclusion that these outputs are time-solid? What is the *significance* of that? What would it mean if the time markers were *not accurate*?
>
> • does the data provide "irrefutability" about *anything beyond time-marking*?
>
> • *what are "checksums"? What is "serialization"?* What checksums and serializations were *actually performed, by whom, where, when, and how? What* did they show, and *how did that show the integrity* of these tests, whatever they were?
>
> • *nothing* here, or elsewhere in the affidavit, offers *any illumination on the uses or functionality of the devices*, to assist in gauging their possible uses, the "viability" of such uses, and their "cost-effectiveness" i.e. *nothing to anchor the executive-summary assertions of no legitimate use*.

78 More generally, the "Executive Summary of Findings" is revealed as almost completely hollow, Aside from the first finding (para 12) about the "lab" being fine (the only thing actually anchored in his subsequent evidence, as noted above), *none of his other findings were supported in other evidence in his affidavit*, He says "I generally verified" this, "I successfully replicated and reproduced" that, "I re-tested" something else, and so on, but he does not follow the "summary assertion" with *any evidence* i.e. the actual details of what he claims to have done.

79 As well, the retailers raised legitimate concerns about Dr. Cole's *objectivity* here:

> Dr. Cole has a **history of working with Donald Best**. In emails between Dr. Cole and [Mr.] Best, with respect to retaining Dr. Cole for this case, [Mr.] Best tells Dr. Cole's assistant that this retainer does not relate to "my personal case that he previously assisted me with." Dr. Cole previously gave expert evidence in [certain litigation commenced by Mr. Best].
>
> [Allarco's counsel] **refused to allow Dr. Cole to answer any questions about his previous work with [Allarco], [Mr. Best], or [Allarco's counsel], There was thus no way to test objectivity or bias**. This in itself calls into question the admissibility of Dr. Cole's evidence.
>
> While conducting his review, Dr. Cole **worked directly with Patrick Best [Mr. Best's son], the investigator whose results he was retained to verify**, Dr. Cole also used Patrick Best's equipment to conduct his review, rather than bringing his own equipment.
>
> Before conducting any examination of new, unopened devices, [Dr Cole] watched "several videos until [he] felt comfortable that [he] had information, enough information and details to verify what was in Mr. Best's affidavit." Dr. Cole did **not conduct his own, independent tests,** He watched exactly what Patrick Best had done when starting up a number of devices, and then copied his steps.
>
> . . . with respect to the Expert Notes, Dr. Cole testified that at times, while he was working with the devices, Patrick Best **assumed the role of note-taker and in fact wrote some of the Expert Notes**.

> Dr. Cole could not recall on cross-examination **which parts of the Expert Notes were written by him and which parts were written by Patrick Best**, He did recall that the procedure outlined in the Expert Notes, which described the process for reviewing the devices, was drafted and inserted by Patrick Best. At times he refused to answer who typed certain parts of the Expert Notes.
>
> Dr. Cole **testified that he did not modify the Expert Notes after January 19, 2020, However, the Expert Notes contain notes that are date-stamped February 13, 2020, February 18, 2020, March 16, 2020 and March 17, 2020.** These notes were clearly typed after January 19, 2020, the date Dr. Cole admitted was the last time he modified the Expert Notes.
>
> **When questioned about [these] dates in the Expert Notes, Dr. Cole refused to answer whether Patrick Best had sent him the Expert Notes**. [emphasis added] [footnotes to evidence omitted]

80 An expert is expected to be helpful to the Court, He or she is also expected to be objective and transparent. This report raised more questions than it answered, and it did not answer, or shed any helpful light on, any issue in these proceedings.

81 I reject Dr. Cole's report as entirely unhelpful here, all aside from my concerns over his objectivity (echoing those of the retailers).

Mr. Best's evidence on device use(s)

82 On the use(s) of these devices, Mr. Best's stated:

> When I say 'pirate device' or 'pirating device', I mean "a device used by persons to access / view / listen to copyrighted content without payment to the copyright holder and/or licensee, and/or that is accessed / viewed / listened to in contravention of copyright conditions or without permission of the copyright owner."
>
> . . . The [retailers'] devices, right off the shelf, function to access pirated copyright content. **This is their intended and designed function. Once again, a pirate device is about the functionality and intended functionality of the device** — not its model number, colour or manufacturer.

83 Mr. Best there outlined his understanding of a piracy device *without reference to non-piracy uses of such devices*, whether in their original state or once add-ons are added on. And he offered his view that the "intended and designed function" of these devices is accessing pirated content, implicitly he asserts they have no other function.

84 But he provides *no evidence* of that, His entire exploration was aimed at showing how the set-top boxes can be used (whether on purchase or post-add-ons, which is reviewed below) to access pirated content.

85 His evidence has a *massive gap*, which I infer was intentional: *none of his testing efforts were aimed at gauging the full range of uses* of these products,

86 It is one thing to assert that these devices can access pirated content; it is another to say that they *can perform no other functions*.

87 Allarco argued that, despite Netflix and similar applications appearing in many of the equipment-test videos, they were "*false fronts*" i.e. non-functional applications. However, its testing did not actually show that. Allarco had the *onus*, which it did not discharge, to show that *apparently available* applications were non-functional.

88 Allarco's evidence here is *effectively meaningless without additional evidence (not provided) of the possible functions* of each device tested (e.g. to link up with Netflix after subscribing, to access YouTube, etc.) i.e. a full canvassing of the possible uses of every device.

89 On both "legitimate use" and "out of the box" capabilities of these devices (discussed next), I find the *retailers'*

overall testing evidence, coming from an *independent expert* (Joseph Pochron of Ernest & Young), whose training, experience and testing procedures were fully explained, is *inherently more reliable* than Allarco's testing evidence.

90 Mr. Best has no computer or applications testing background, Allarco's core testing was performed by his two (adult) sons, neither of them swore affidavits in these proceedings (precluding exploration of and cross-examination on their education, training, experience, testing equipment, testing, protocols, and otherwise), and some of their testing videos began after the devices in question had been removed from their packaging, leaving a "continuity gap."

91 On the "uses" point, I adopt as correct the retailers' submissions:

> The evidence tendered by [the retailers' expert] is clear that **Android TV devices can be used for legal purposes**. The same evidence comes from the representatives of each of the [retailers]. Their evidenced is uncontradicted. Indeed, Mr. Best **did not even try any of the obviously legitimate applications** on them, such as Netflix, Facebook, Chrome and other web browsers, Skype, Twitter, etc. . . .
>
> . . . Even [Allarco's expert] admitted that Android TV devices **could be used for legal purposes**, but according to him, there were better devices that could be used for those purposes. When asked what devices he was referring to, he could not name any.
>
> . . . As noted in *Bell Canada v Red Rhino* [2019 FC 1460]
>
> . . . Commercially available set-top boxes have **many legitimate or non-offending uses**. [emphasis added]

92 Legitimate uses were also recognized in *Bell Canada v 1326030 Ontario Inc (iTVBox.net)* 2016 FC 612 *(*affirmed 2017 FCA 55), where Tremblay-Lamber J. enjoined the sale of *pre-loaded* set-top boxes i.e. unit which *already contained one or more add-ons* aimed at accessing pirated content.

93 She distinguished between such (off-side) units and off-the-shelf units lacking such add-ons (which she saw as on-side):

> The Defendants are individuals and businesses which sell set-top boxes, electronic devices that can be connected to any standard television set in order to provide additional functionalities to that television, on which they have **previously installed and configured** a set of applications. This **distinguishes** the Defendants' **"pre-loaded" set-top boxes from those generally found in retail stores, which do not contain any pre-loaded applications, or contain only basic applications**, such that the user must actively seek out and install the applications he or she wishes to use. [paras 5] [emphasis added] [For a similar approach, see the FCA's decision in *Lackman* (cited above) at paras 20-22 and 27-34]

94 Allarco fails in trying to prove that these devices had only one (piracy purpose) use.

95 They also fail in trying to prove that any of these devices actually had a piracy use "right out of the box", as explored next.

No "right out of the box" piracy functionality

96 Mr. Best and Allarco's expert also asserted, incorrectly, that the devices in question could access pirated content "right out of the box, without modification."

97 Here are some of Mr. Best's assertions on this aspect:

> • "the vast majority of pirate devices that I purchased from the [retailers] -- as purchased new off the shelf — had a pre-installed program called 'KODI' that enabled me to view a large amount of pirated content *'off the shelf' without enhancement or modification to the device"*;

> • "I would simply take off the shrink wrap, open the cardboard box, connect the pirate device to the Internet and plug it in to power for the first time. *Within two or three minutes* I could select and view various pirated TV programs and movies . . . from the pre-existing Official KODI channels menu that is included by default with every KODI installation. The selection of channels was accomplished by simply doing 'mouse clicks' on the screen; and
>
> • "As presented in greater detail in the following sections of my affidavit and shown in video demonstrations attached as exhibits, simply by using the pre-existing Official KODI channels menu I was able to view pirated episodes of [certain copyrighted content] *within about three minutes after turning on the pirate devices for the first time*."

98 He made dozens of similar claims.

99 Allarco's expert's summary included these elements:

> I **verified and validated** the accuracy of the statements in Donald Best's affidavit that pirate devices, as purchased from [the retailers] — **'off the shelf', new, unused and unmodified** — access pirated copyright content . . . .
>
> I **verified and validated** the accuracy of the statements in Donald Best's affidavit that some pirate devices, as purchased from Best Buy — **'off the shelf', new, unused and unmodified** — access pirated copyright content . . . . [paras 16 and 17]

100 However, Dr. Cole's evidence suffers from the same defect here as that concerning "use": he makes an assertion in his executive summary, with *no evidence* backing it up.

101 In fact, the testing by *both sides* showed that *various steps, of various difficulty, and requiring various amounts of time, were required to find and add on whatever "add-on" programs were necessary to access pirated content.* Here I adopt, as correct, the evidence synopsis in the retailers' common brief (paras 86-96), effectively that *add-on programs were inevitably required* for piracy use of the devices i.e. *not a single one was "out of the box" piracy-functional.*

102 *None of the units sold by the retailers included such add-ons when purchased*. They either did not include KODI or included KODI without add-ons.

103 Whether add-ons could be added in three minutes or thirty, or with ten clicks or twenty, the point is that the units here were *not configured, as sold by the retailers, for immediate use as a pirating device.*

Potential mis-use of products having legitimate uses

104 The *potential* for pirating-purpose modifications of *legitimate-use products* should *not prevent their sale in the first place.* The judgment of the House of Lords in *CBS Songs Limited v Amstrad Consumer Electronics plc* [1988] AC 1013 is instructive here. It concerned an attempt to bar the sale of certain *tape-recording equipment*, used by some purchasers to record copyrighted content without consent.

105 CBS's first argument was that Amstrad (the manufacturer) "authorized" infringement. Per Lord Templeman:

> . . . twin-tape recorders, fast or slow, and single-tape recorders, in addition to their recording and playing functions, are capable of copying on to blank tape, directly or indirectly, records which are broadcast, records on discs and records on tape. Blank tapes are capable of being employed for recording or copying. **Copying may be lawful or unlawful**. Every tape recorder confers on the operator who acquires a blank tape the facility of copying: the double-speed tape twin-tape recorder provides a modern and efficient facility for continuous playing and continuous recording and for copying. No manufacturer and no machine confers on the purchaser authority to copy unlawfully. **The purchaser or other operator of the recorder determines whether he shall copy and what he shall copy. By selling the recorder Amstrad may facilitate copying in breach of copyright but do not authorize it. . . .**
>
> In the present case, **Amstrad did not sanction, approve or countenance an infringing use of their model** and I

> respectfully agree . . . that in the context of the Copyright Act an authorization means a grant or purported grant, which may be express or implied, of the right to do the act complained of. Amstrad conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy.
>
> . . . Amstrad have no control over the use of their models once they are sold. [emphasis added]

106 The House of Lords used similar reasoning to reject arguments of joint infringement (by the manufacturer and end user), incitement to commit a tort, criminal offence, and negligence.

107 Same here, and we are *one step more remote* from that scenario, with the Retailers acting merely as go-betweens i.e. standing between the device manufacturers (against whom Allarco has sought no relief) and consumers.

No control of consumers' use of devices

108 The retailers have no control over consumers' use of any devices purchased in their stores. This is akin to the copying-in-library scenario examined by the Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13:

> . . . a person does **not authorize [copyright] infringement** by authorizing the **mere use of equipment that could be used to infringe copyright**, Courts should **presume** that a **person who authorizes an activity does so only so far as it is in accordance with the law** . . . This presumption may be rebutted if it is shown that a **certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement**.
>
> . . . even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society **lacks sufficient control** over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement, The Law Society and Great Library patrons are not in a master-servant or employer-employee relationship such that the Law Society can be said to exercise control over the patrons who might commit infringement . . . Nor does the Law Society exercise control over which works the patrons choose to copy, the patron's purposes for copying or the photocopiers themselves. [paras 38 and 45] [emphasis added]

109 A retailer has *even less opportunity for control* of a purchaser's activities, which happen beyond the four walls of the retailers' stores i.e. out in the wider world.

110 Allarco's CEO acknowledged this lack of control (cross-examination excerpt at para 224 of the common brief).

Hosts of other legitimate-use products implicated by Allarco's position

111 I accept the retailers' evidence, which Allarco did not challenge, that, beyond set-top boxes, " . . . thousands of products sold by the [retailers] (and dozens of third parties) that connect to the Internet, such as *smart phones, tablets, computers, laptops, gaming consoles* (such as Sony PlayStation and Xbox), *and smart TVs* . . . can be modified and configured by end-users [i.e. post-purchase] to access [subscription-based content for free]."

112 This shows that the *problem here is not the product but some users of it*, whose post-purchase actions (as noted) the retailers do not and cannot control.

Other remedies not engaged by sale of the devices

113 The bulk of the preceding analysis addresses Allarco's core (copyright infringement) arguments.

114 As for the balance of its arguments, I adopt as correct the retailers' analyses (common brief, para 237)

> ***Conspiracy:*** [Allarco] has **neither pleaded nor provided any evidence whatsoever of any agreement among the [retailers]**: (a) with the predominant purpose of damaging the plaintiff; or (b) which involves an unlawful act directed to [Allarco] in circumstances where the [retailers] should know that damage to [Allarco] is likely to occur, and does occur. . . . Mr. Best admits he has **no knowledge of any agreements** among the [retailers].
>
> ***Criminal and public nuisance*** *claims*: There is no **proper pleading, let alone any evidence whatsoever** that the [retailers] has engaged in theft, criminal passing off, or public nuisance.
>
> ***Intentional interference with economic relations***: [Allarco] also asserts [this claim], which also is **not viable as pleaded**. The essential elements . . . are (a) an act against a third party (i.e. not [Allarco]); (b) employing unlawful means against that third party; and (c) intentionally causing the plaintiff harm. The gist of the tort is the intentional infliction of harm against a third party by unlawful means, which injures the plaintiff. Thus the unlawful act cannot be actionable by the plaintiff itself. Here, the **essential elements of that claim have not been pleaded, let alone supported by evidence**.
>
> ***Trademark claims***: The trademark claims all require that the [retailers] used [Allarco's] trademark in some way or otherwise made a misrepresentation likely to lead the public to believe there is some association between the [retailers' businesses] and Allarco's business. There is **no evidence whatsoever** of any of this. Moreover, [Allarco] has **no standing** to bring trademark infringement claims itself on behalf of third parties (who here are not even disclosed).
>
> ***Circumventing technological protection measures***: This statutory tort under s. 41.1 of the *Copyright Act* requires Allarco to establish that its technology, device or component is a TPM within the meaning of s. 41, including that it controls access to a work and restricts certain acts, and that the defendants circumvented it, offered a service to circumvent it, or offered a product designed or marketed to circumvent it. There is **no evidence** that Allarco uses any TPM for its broadcasts, and **no evidence** that any of the [retailers] (or the Android TV boxes they sold) circumvented any Allarco TPM. Even if the boxes are capable of obtaining a copy of content licensed to Allarco from another source, there is **no evidence** whatsoever that any copy was made by descrambling, decrypting or otherwise avoiding, bypassing, removing, deactivating or impa[i]ring any Allarco TPM. Obtaining a copy from another source, which Mr. Best and his sons did when they installed the add-ons to the Kodi software does not mean that any TPM was circumvented, let alone an Allarco TPM.

Conclusion on "serious case to be tried"

115 Allarco failed in its attempt to show that the retailers' selling activities were fanning the flames of piracy, or at least were doing so in any material way, or at least in any way linked to Allarco's subscription and overall business difficulties.

116 It also failed in its attempt to paint the devices in its sights as inherently objectionable.

117 Finally, Allarco raised no serious issue on any of its asserted causes of action, copyright-related or otherwise.

Irreparable harm and balance of convenience

118 In any case, as seen above, Allarco has not shown that any of its business difficulties to date have been caused by anything done by any of the retailers. Any forecasts of future difficulties at the hands of the retailers are *purely speculative*.

119 It did not show that, whatever losses it may suffer if no injunction is granted and one should have been, cannot be compensated via *monetary damages*.

120 Beyond that, its intended injunction is *unlikely to achieve its intended effect*. Allarco seeks an injunction against *these retailers only*. As the retailers put it:

> During cross-examination, Mr. McDonald admitted that Allarco has not sent any demand letters to the **manufacturers** of the so-called internet streaming devices mentioned in Mr. Best's affidavit, has not started litigation against them, and

> confirmed that he has not authorized either of these steps to be taken to date. He also confirmed that he has not authorized a demand letter to be sent to Bell Canada or The Source objecting to the sale of such devices, and has not authorized litigation against them.
>
> Mr. Best admitted during cross-examination that he **did not investigate whether alleged "pirate devices" were also being sold by others, such as Amazon, and he "didn't investigate a lot of places."**
>
> Even if an injunction were issued here, it would **not prevent the sale of these devices in the market.** If [Allarco] truly wanted to achieve that, it would have brought this application against the manufacturers and suppliers, not these four [retailers]. [not to mention the full retail spectrum] [emphasis added]

121 It is hard to see the *efficacy of a no-more-sales injunction against a subset of the retail marketplace.*

122 As well, Allarco has *delayed*. Its pace shows the absence of true urgency. Per the retailers (whose analysis I accept):

> Allarco retained Mr. Best in late **2017** to investigate the alleged "piracy" of its licensed content. Mr. Best's evidence was that **as early as March 2018**, he was going into the Defendants' retail stores and recording interactions with various employees. Mr. Best continued to make these recordings through **September 2019**, when Allarco initiated [a] Federal Court action against the [retailers]. In the interim, at least as early **as March 2019**, Allarco began writing to the [retailers] claiming that unidentified devices being sold in their respective stores were violating Allarco's alleged rights in television programming. During this correspondence, Allarco claimed to have video evidence to support its claims against the Defendants.
>
> Accordingly, **Allarco was in a position at least as early as March 2019, having been "investigating" and recording interactions in the [retailers'] stores *for at least one year,* to seek injunctive relief**. It chose not to do so, instead refusing to identify the devices at issue and ultimately starting Federal Court litigation in September 2019. Even then it did not file a motion for an injunction. . . . Allarco . . . abandoned [its Federal Court] action and started this action in December 2019. **Only then, at least *eighteen months* after it started gathering evidence, it sought to set down an injunction application** . . . [common brief, paras 171 and 172]

123 Allarco failed to adequately explain this delay or why it chose to embark, via Mr. Best, on its long secret-shopper mission, which could only ever have proved that a piracy-fan poseur could trick some of the retailers' employees into talking about piracy. In other words, as conceived, this mission could never have revealed anything generally about retailer activities in the set-top box market.

124 It is hard to conceive what incremental value Allarco derived from the repetition of Mr. Best's "experiment" for over a year, all aside from the value (or lack of value) in the very first experiment.

125 Allarco's slow-motion pace, on an ultimately fruitless mission, *disentitles it to any injunctive relief* i.e. all aside from any other factors here.

126 As for the *balance of convenience*, it is no contest. If the requested injunction is granted, the retailers will be blocked from selling these products with legitimate uses, their current or would-be customers will buy these devices at other retailers, and Allarco will be no further ahead.

127 If the injunction is not granted, the retailers will be able to continue selling these legitimate-use products i.e. seek their share of the overall market in these devices. Allarco will still have to contend with the piracy phenomenon, but it cannot lay that at the retailers' doors.

128 At the end of the day, it is virtually certain that the retailers will prevail in this litigation. Regardless of the legal banner unfurled (copyright, trademark, etc.), Allarco will be *unable to prove causation* i.e. any link between anything the retailers have done or do on the devices front and Allarco's subscription and overall business difficulties.

E. Conclusion

129 Allarco has not shown a serious case to be tried or that any of the other injunction factors favour it. Accordingly, I dismiss its request for the requested injunction.

130 I also dismiss its request for a mandatory (notice-to-previous-purchasers) injunction, which assumed the granting of the no-more-sales injunction.

F. Costs

131 The retailers are entitled to their costs of this application on a *solicitor-and-client* basis, for the reasons offered by the retailers (see below), which I adopt as an accurate capture of the applicable law and the described facts, which reveal this lawsuit as nothing more than an *off-target anti-piracy campaign*:

> In *Conway v Zinkhofer*, Kenny J. summarized the rules and factors related to awarding solicitor and client costs, pointing in particular to cases where a plaintiff has "done something to hinder, delay or **confuse the litigation**" or require a party to "prove facts that should have been admitted", or "**where there was no serious issue fact or law which required these lengthy, expensive proceedings",** or engaged in abuse of process, **allegations of improper and fraudulent conduct, defamation, threats, dishonesty and conspiracy**.
>
> In *Chutskoff Estate*, Michalyshyn J. identified eleven categories or "indicia" of **vexatious litigation**, which Rooke ACJ recognized and reclassified in *Unrau*, including, notably:
>
> > **Unsubstantiated allegations of conspiracy, fraud, and misconduct**, including:
> >
> > > Pleadings that are **"replete with extreme and unsubstantiated allegations, and often refer to far-flung conspiracies involving large numbers of individuals and institutions", "where the allegations may be unfounded in fact or merely speculative, but the language is vitriolic, offensive and defamatory"** . . .
>
> Here, Allarco's pleadings, affidavits and written argument (not to mention sworn testimony on cross-examination) are **replete with these types of allegations**, which are pleaded [not] to support a legitimate cause of action, but simply to **defame or seek to harm the reputation** of the Defendants. There are far too many examples to list here but the following extracts serve to highlight the point:
>
> > *Allarco's Statement of Claim dated December 6, 2019*
> >
> > > a) "Defendants are engaged in *bait and switch tactics that deceive, confuse or mislead* John Doe Customers to motivate them to purchase Pirate Devices" (para. 23)
> > >
> > > b) "Defendants .. have willfully created .. a culture of widespread copyright infringement through the use of Pirate Devices which is *tantamount to stealing*" (para 24)
> > >
> > > c) "This is *especially egregious because the 4Stores Defendants hold themselves out to be reputable, experienced, and trustworthy retailers* in Canada which are relied on by Canadians for honest advice and service." (para 25)
> > >
> > > d) "Defendants are *advertently contributing to the creation of a culture of widespread infringement and theft*." (para 26)
> > >
> > > e) "They are advising their Customers *how to avoid detection* of their pirating activities." (para 26)
> > >
> > > f) "Their actions are *high handed* . . . "(para 26)
> > >
> > > g) "The Defendants or two or more of them are *conspirators engaged in acts contrary to the*

Broadcasting Act, Copyright Act, Radio-Communications Act, Trademarks Act, Criminal Code, . . . " (para 50)

h) ''The Defendants or one or more of them are *counseling customers to steal. . . .* " (para 53)

i) "Defendants . . . *encourage a culture of dishonesty and theft ...* " (para. 57)

j) "The actions . . . of the 4Stores ... are *high handed and advertently misleading* in the pursuit of profit and unreasonably interfere with the public's interest in questions of *honesty, conscience and morality and preservations of Canadian Culture*" (para. 58)

Allarco's Injunction Brief dated January 29, 2021

k) "The 4Stores *know and intend that their customers will buy and use the Pirate Devices to steal programming* from the Plaintiff." (para 37)

l) ''They are *all part of a conspiracy to profit from illegal and unlawful activities.*" (para 37)

m) ''The Plaintiff's evidence demonstrates that the *Pirating Industry is a multi-billion-dollar endeavour of which the 4stores play a major leadership role* in promoting and supplying pirating technology and technical knowledge to Canadians. Further, the unrefuted evidence is that the copyright piracy industry is a conspiracy that creates the pirating equipment, software, ecosystem and terminology to enable copyright piracy while avoiding, as best as they can, criminal and/or civil liability." (para. 38)

n) "The 4Stores and their suppliers and customers are *all part of an unlawful means conspiracy . . .* " (para 84)

o) ''The Plaintiff also bases its claim on other serious questions including *secondary infringement of Copyright, inducing breach of copyright, willful blindness, recklessness, intentional torts, and unlawful means and conduct conspiracy where the unlawful acts include breaches of statutes as well as aiding, abetting, or counseling offences*." (para 164)

p) "In effect the 4Stores are *engaged in a ruse where each party in the conspiracy* denies responsibility while the customer steals the programming." (para 173)

q) " . . . the 4Stores in concert with *others involved in the conspiracy* obtain access to Super Channel's exclusive programming." (para 196)

Don McDonald's Affidavit

r) "As a result, Super Channel is effectively *robbed of income*." (para 10)

s) "The 4Stores . . . are engaged in *perpetrating and supporting this larceny*." (para 26)

t) "The *preaching by influential retailers in Canada that illegal behavior and stealing are acceptable and worthwhile endeavours and their encouragement that their Customers steal is shocking*." (para 27)

u) "These well-known, well-respected and supposedly reputable Canadian retailers are *counseling their customers to steal programming and showing them how to do it. . . .* " (para 30)

v) "The Defendants . . . are *actively promoting and encouraging a culture of dishonesty and theft* not only for their customers but also within their own business." (para 33)

w) " . . . the knowledge that they have been *promoting this type of theft* has been available to the 4Stores for a few years." (para 35)

> x) " . . . I did not observe that the behaviour of the 4Stores had changed and I did not receive any offers of co-operation or changes to their behavior. .. *no remedial measures appear to have been adopted by the 4Stores*." (para 37)
>
> y) "Because of the public profile and well-known status of the 4Stores defendants, their actions influence not only their own customers, but by extension any other persons who become aware of their actions and the behaviours they promote. The overall impact of this reckless behavior is broadly-based and deeply concerning: it *contributes to a culture undermining copyright and legitimizing infringement among ordinary Canadians*. This creates a snowball effect causing serious financial losses to Super Channel and others in the broadcasting and film industries." (para 40)

Donald Best's Affidavit

> z) " . . . the *consistency and degree of commonality between the 4Stores increasingly made me suspect that this was beyond coincidence*." (para 85)

aa) " . . . caused me to suspect that there were not just internal training and promotional programs within each 4Stores company - but that there were **coordinated high-level training and promotional programs directed to the 4Stores retail organizations and to their employees - probably by the pirate device manufacturers and I or wholesale distributors**." (para 87)

bb) " . . . I noticed that in the 4Stores, there is an **aura and culture of stealing pirating copyright content that was promoted and pushed** in each organization and store location." (para 91)

cc) " . . . 4Stores sales staff often revealed to me that **management had provided guidance about selling the pirate devices**." (para 97)

dd) "This makes me **wonder if in some of the 8 stores where I was unable to complete the visit, if 'nonlegitimate tv boxes' (pirate devices) were kept in the back room** but not offered to me." (paras 136 and 137)

ee) "In the context of recent revelations, news stories and US Senate Hearings into the activities of China using (and even secretly modifying during manufacture) consumer and other electronic devices to gather business and strategic intelligence - **the invasive and potentially malicious behaviours of 4Stores pirate devices become an even more critical concern**. This information is of such concern that I have chosen to protect the identity of persons involved in this aspect of the investigation pending further order of the court." (para 173)

ff) "It is a fair statement that there is a **Culture of Stealing Copyrighted Content in Canada that is growing, and that the 4Stores actively promote the culture and profit from it**." (para 167)

gg) " . . . this **Culture of Stealing is being deliberately propagated, promoted and normalized by various persons and businesses, including the 4Stores** ... " (para 207)

hh) "It is fair to say that the **4Stores together operate a coast to coast University of Stealing Copyrighted Content that instructs Canadians how to steal** - and sells them the pirate devices to do so." (para 372)

ii) "The harm to our Canadian culture and our economy continues as the 4Stores continue to sell pirate devices and promote a **Culture of Stealing** copyrighted content." (para 419)

jj) "The **selling and promotion of pirate devices to steal copyrighted content is endemic in each of the 4Stores**." (para 421)

Dr. Cole's affidavit, focused as it was on **irrelevant allegations [referred to earlier] about "malware" and Chinese "spying",** is an example both of evidence that **unnecessarily delayed and complicated t[le litigation** (per *Conway*, *supra* at para 15(3)) and **escalated the litigation** by adding issues and subjects that were not part of

the initial pleadings (per *Chutskoff*, *supra* at para 92(3)(b)(ii) and paras 109-111.

Allarco's counsel's conduct on cross-examinations also **unnecessarily delayed and complicated the litigation**. Mr., McKenzie's name appears over **1,000 times in the two day transcript of Mr. McDonald's cross-examination alone.** Counsel was explicitly warned that "it is, not your job to answer questions nor, more importantly, is it your job to frame the questions that are asked". He was provided with the decision of Master Funduk in *Canalta* during the cross-examination. He was repeatedly warned before and after being provided with that decision. In that decision, Master Funduk explained improper conduct during cross-examinations, including:

(a) **Interrupting to answer for the witness, give evidence or otherwise influence the witness' answer**;

• See, e.g., the interruptions at QQ. 28, 70, 98, 116, 123, 128, 129, 165, 172, 201, 204, 206, 208, 212, 213, 219, 234, 240, 245, 310, 326,330, 343, 373, 389, 414, 416, 437, 474-477, 491, 530, 562, 564, 570, 597, 606, 640, 677,680, 681, 748, 760,917, 925, 985, 993, 996, 1001, 1041, 1045, 1057, 1074, 1098, 1101, 1108, 1109, 1125, 1144, 1160, 1199, 1200, 1222, 1230, 1249, 1267, 1268, 1277, 1279, 1301, 1304, 1318, 1335, 1336, 1342, 1347, 1351, 1352, 1379, 1392

(b) **Interrupting to say "What does that mean?" or words to that effect**;

• See, e.g., the interruptions at Q. 220, 228-230, 265, 411, 413, 424, 475, 492, 496, 497, 611, 612, 801, 835, 848, 867, 961, 1025, 1140, 1142, 1157, 1158, 1162, 1225, 1234, 1306, 1365

(c) **Interrupting to say "Do you know?" or words to that effect**;

• See, e.g., the interruptions at QQ. 79, 202, 248-249, 256, 258, 485, 486, 570, 615, 616, 649, 659, 686, 819 ,824, 979, 1040, 1242, 1255, 1368

(d) **Interrupting to reframe a question or point out specific parts of a question to the witness**;

- See, e.g., the interruptions at Q. 43, 72, 124, 150, 180, 227, 387, 403, 490, A92, 500, 537, 546, 580, 596, 726, 836, 918, 981, 994, 1027, 1110, 1135, 1136, 1146, 1147, 1148, 1221, 1229, 1246, 1261, 1262, 1264, 1303, 1333, 1349, 1374, 1375, 1382 . . . . [common brief, paras 380-384]

132 On the test for solicitor-and-client costs, see also *PricewaterhouseCoopers Inc v Perpetual Energy Inc* 2021 ABCA 16:

> . . . There are some recognized situations when solicitor and client costs can be awarded, generally when there has been **reprehensible, scandalous or outrageous conduct** by a party: ***Young*** [[1993] 4 SCR 3] at p. 134. The misconduct alleged must arise from the **conduct of the litigation**; a distaste for the unsuccessful litigant, its pre-litigation conduct, or its cause of action is not sufficient: ***Luft v Taylor, Zinkhofer & Conway***, 2017 ABCA 228 at paras. 72-73, 53 Alta LR (6th) 44; ***Pillar Resource Services Inc v PrimeWest Energy Inc***, 2017 ABCA 19 at paras. 8-9, 153, 46 Alta LR (6th) 224. . . . [para 179]

133 As reflected in the above excerpts, the necessary elements are all present here.

134 Beyond the *Copyright-Act*-based stay of the main action imposed above, Allarco's action is stayed pending payment to each of the retailers of their solicitor-and-client-level costs of this application.

G. Security for costs

135 In light of the stays imposed above on the main litigation, I am *deferring further consideration* of the retailers' security-for-costs application, which was argued at the same time as Allarco's injunction application.

136 I invite further submissions from the retailers about the continued necessity of security for costs, to be sent, via letter to my assistant (maximum two pages per party), by May 7, 2021.

Application dismissed.

End of Document

TAB 6

KeyCite treatment

Most Negative Treatment: Distinguished

Most Recent Distinguished: Alderbridge Way GP Ltd. (Re) | 2024 BCSC 1433, 2024 CarswellBC 2280, 54 B.L.R. (6th) 239, 2024 A.C.W.S. 4516 | (B.C. S.C., Aug 7, 2024)

2014 SCC 71, 2014 CSC 71
Supreme Court of Canada

Bhasin v. Hrynew

2014 CarswellAlta 2046, 2014 CarswellAlta 2047, 2014 SCC 71, 2014 CSC 71, [2014] 11 W.W.R. 641, [2014] 3 S.C.R. 494, [2014] A.W.L.D. 4738, [2014] A.W.L.D. 4740, [2014] A.W.L.D. 4828, [2014] A.W.L.D. 4829, [2014] S.C.J. No. 71, 20 C.C.E.L. (4th) 1, 245 A.C.W.S. (3d) 832, 27 B.L.R. (5th) 1, 379 D.L.R. (4th) 385, 464 N.R. 254, 4 Alta. L.R. (6th) 219, 584 A.R. 6, 623 W.A.C. 6, J.E. 2014-1992

Harish Bhasin, carrying on business as Bhasin & Associates, Appellant and Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited), Respondents

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: February 12, 2014
Judgment: November 13, 2014
Docket: 35380

Proceedings: reversing in part *Bhasin v. Hrynew* (2013), [2013] 11 W.W.R. 459, 84 Alta. L.R. (5th) 68, 12 B.L.R. (5th) 175, 567 W.A.C. 28, 544 A.R. 28, 2013 CarswellAlta 822, 2013 ABCA 98, 362 D.L.R. (4th) 18, Jean Côté J.A., Marina Paperny J.A., R. Paul Belzil J. (Alta. C.A.); reversing *Bhasin v. Hrynew* (2011), [2012] 9 W.W.R. 728, 96 B.L.R. (4th) 73, 2011 ABQB 637, 2011 CarswellAlta 1905, A.B. Moen J. (Alta. Q.B.)

Counsel: Neil Finkelstein, Brandon Kain, John McCamus, Stephen Moreau, for Appellant
Eli S. Lederman, Jon Laxer, Constanza Pauchulo, for Respondents

Subject: Civil Practice and Procedure; Contracts; Torts

Related Abridgment Classifications

Contracts
IX Performance or breach
IX.3 Obligation to perform
IX.3.a Sufficiency of performance
IX.3.a.i Duty to perform in good faith

Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.h Miscellaneous

Torts

III Conspiracy
III.1 Elements
III.1.d Miscellaneous

Torts
X Interference with contractual relations and inducing breach of contract
X.1 Elements
X.1.b Interference or breach

Headnote

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contracts --- Remedies for breach — Damages — Miscellaneous
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.s enrolment directors — C Corp. outlined its plans to Commission and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge's assessment of damages was varied to $87,000 plus interest — C Corp. was liable for damages calculated on basis of what B's economic position would have been had C Corp. fulfilled its duty — While trial judge did not assess damages on that basis, given different findings in relation to liability, trial judge made findings that permitted current Court to do so — These findings permitted damages to be assessed on basis that if C Corp. had performed contract honestly, B would have been able to retain value of his business rather than see it, in effect, expropriated and turned over to H — It was clear from findings of trial judge and from record that value of business around time of non renewal was $87,000.

Torts --- Inducing breach of contract — Elements of tort
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment

directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Torts --- Conspiracy — Nature and elements of tort — Miscellaneous
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contrats --- Exécution ou défaut d'exécution — Obligation d'exécuter — Exécution acceptable — Obligation d'exécuter de bonne foi
Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Contrats --- Réparation du défaut — Dommages-intérêts — Divers

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial, chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt — Société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation — Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire — Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H — Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

Délits civils --- Incitation à violer un contrat — Éléments constitutifs du délit
Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Délits civils --- complot — Nature et éléments constitutifs du délit — Divers
Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un

préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

C Corp. was in the business of selling education savings plans to investors, through contracts with enrolment directors. B and H were enrolment directors, and were competitors. An enrolment director's agreement governed the relationship between C Corp. and B. C Corp. appointed H as the provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors. C Corp. outlined its plans to the Commission, and they included B working for H's agency. When B refused to allow H to audit his records, C Corp. threatened to terminate the agreement. C Corp. gave notice of non renewal under the agreement. At the expiry of the contract term, B lost value in his business in his assembled workforce. The majority of B's sales agents were successfully solicited by H's agency.

B's action against C Corp. and H was allowed. The trial judge found C Corp. was in breach of the implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy. The Court of Appeal allowed the appeal and dismissed B's action. B appealed.

Held: The appeal was allowed in part.

Per Cromwell J. (McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring): The appeal with respect to C Corp. was allowed, and the appeal with respect to H was dismissed. The trial judge's assessment of damages was varied to $87,000 plus interest. The objection to C Corp.'s conduct did not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith, namely a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations. Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

The trial judge did not make a reversible error by adjudicating the issue of good faith. C Corp. breached the agreement when it failed to act honestly with B in exercising the non renewal clause. The trial judge's findings amply supported the conclusion that C Corp. acted dishonestly with B throughout the period leading up to its exercise of the non renewal clause, both with respect to its own intentions and with respect to H's role as PTO. The caims against H were rightly dismissed. The Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

C Corp. was liable for damages calculated on the basis of what B's economic position would have been had C Corp. fulfilled its duty. While the trial judge did not assess damages on that basis, given the different findings in relation to liability, the trial judge made findings that permitted the current Court to do so. These findings permitted damages to be assessed on the basis that if C Corp. had performed the contract honestly, B would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to H. It was clear from the findings of the trial judge and from the record that the value of the business around the time of non renewal was $87,000.

La société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions. B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre. La relation entre la société C et B était régie par une entente relative au directeur des souscriptions. La société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs

mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C. La société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H. Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente. La société C a donné à B un préavis de non-renouvellement conformément à l'entente. À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise. La majorité de ses représentants des ventes ont été recrutés par l'agence de H.

L'action déposée par B à l'encontre de la société C et H a été accueillie. La juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil. La Cour d'appel a accueilli l'appel et a rejeté l'action de B. B a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli en partie.

Cromwell, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Le pourvoi relatif à la société C a été accueilli, le pourvoi relatif à H a été rejeté. L'appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt. Le reproche à l'égard de la conduite de la société C ne cadrait dans aucune des situations ou des relations à l'égard desquelles les obligations de bonne foi ont trouvé application. Il convient de reconnaître une nouvelle obligation en common law qui s'applique à tous les contrats en tant que manifestation du principe directeur général de bonne foi, soit une obligation d'exécution honnête qui oblige les parties à faire preuve d'honnêteté l'une envers l'autre dans le cadre de l'exécution de leurs obligations contractuelles. En vertu de cette nouvelle obligation générale d'honnêteté applicable à l'exécution des contrats, les parties ne doivent pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat.

La juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi. La société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement. Les motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP. Les demandes contre H ont été à juste titre rejetées. La Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

La société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation. Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire. Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H. Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

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Aleyn v. Belchier (1758), 28 E.R. 634, 1 Eden 132 (Eng. Ch.) — considered

Andrusiw v. Aetna Life Insurance Co. of Canada (2001), 289 A.R. 1, 2001 CarswellAlta 1506, 33 C.C.L.I. (3d) 238, [2002] I.L.R. I-4062, 33 C.C.L.I. (2d) 238 (Alta. Q.B.) — referred to

Atlantic Richfield Co. v. Razumic (1978), 390 A.2d 736, 480 Pa. 366 (U.S. Pa. S.C.) — referred to

Bank of America Canada v. Mutual Trust Co. (2002), 287 N.R. 171, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 159 O.A.C. 1, 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, [2002] 2 S.C.R. 601, 2002 CSC 43 (S.C.C.) — referred to

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Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp. (2013), 365 D.L.R. (4th) 15, 2013 ONCA 494, 4 C.B.R. (6th) 214, 17 B.L.R. (5th) 171, 2013 CarswellOnt 11271, *(*sub nom. *Barclays Bank plc v. Metcalfe & Mansfield Alternative Investments VII Corp.)* 308 O.A.C. 17 (Ont. C.A.) — referred to

Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997), 221 N.R. 1, 1997 CarswellNfld 207, 1997 CarswellNfld 208, 153 D.L.R. (4th) 385, 490 A.P.R. 269, [1997] 3 S.C.R. 1210, 48 C.C.L.I. (2d) 1, 37 B.L.R. (2d) 1, 158 Nfld. & P.E.I.R. 269, 40 C.C.L.T. (2d) 235, 1999 A.M.C. 108 (S.C.C.) — considered

Bram Enterprises Ltd. v. A.I. Enterprises Ltd. (2014), 2014 CarswellNB 17, 2014 CarswellNB 18, 2014 SCC 12, *(*sub nom. *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.)* [2014] 1 S.C.R. 177, 2014 CSC 12, 48 C.P.C. (7th) 227, 453 N.R. 273, 1079 A.P.R. 1, 416 N.B.R. (2d) 1, 366 D.L.R. (4th) 573, 7 C.C.L.T. (4th) 1, 21 B.L.R. (5th) 173 (S.C.C.) — referred to

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en général — referred to

art. 6 — referred to

art. 7 — referred to

art. 1375 — referred to

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Generally — referred to

Aricle 1-201(b)(20) "Good faith" — considered

Aricle 1-302(b) — considered

Article 1-304 — considered

APPEAL by plaintiff from judgment reported at *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), allowing appeal from decision by trial judge allowing plaintiff's action for damages.

POURVOI formé par la partie demanderesse à l'encontre d'un jugement publié à *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), ayant accueilli l'appel interjeté à l'encontre de la décision de la juge de première instance d'accueillir l'action en dommages-intérêts de la partie demanderesse.

Cromwell J. **(McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 The key issues on this appeal come down to two, straightforward questions: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result.

II. Facts and Judicial History

Overview and Issues

2 The appellant, Mr. Bhasin, through his business Bhasin & Associates, was an enrollment director for Canadian American Financial Corp. ("Can-Am") beginning in 1989. The relationship between Mr. Bhasin and Can-Am soured in 1999 and ultimately Can-Am decided not to renew the dealership agreement with him. The litigation leading to this appeal ensued.

3 Can-Am markets education savings plans ("ESPs") to investors through retail dealers, known as enrollment directors, such as Mr. Bhasin. It pays the enrollment directors compensation and bonuses for selling ESPs. The enrollment directors are in effect small business owners and the success of their businesses depends on them building a sales force. It took Mr. Bhasin approximately 10 years to build his sales force, but his business thrived and Can-Am gave him numerous awards and prizes recognizing him as one of their top enrollment directors in Canada: 2011 ABQB 637, 544 A.R. 28 (Alta. Q.B.), at paras. 51, 238 and 474.

4 An enrollment director's agreement that took effect in 1998 governed the relationship between Can-Am and Mr. Bhasin. (That Agreement replaced a previous agreement of an indefinite term that had governed their relationship since the outset in 1989.) The Agreement was a commercial dealership agreement, not a franchise agreement. There was no franchise

fee and it was not covered by the statutory duty of fair dealing such as that provided for in s. 7 of the *Franchises Act*, R.S.A. 2000, c. F-23.

5 That said, there were some features of the 1998 Agreement that are similar to provisions typically found in franchise agreements. Mr. Bhasin was obliged to sell Can-Am investment products exclusively and owed it a fiduciary duty. Can-Am owned the client lists, was responsible for branding and implemented central policies that applied to all enrollment directors: see cls. 4.1, 5.2, 5.3 and 4.7. Mr. Bhasin could not sell, transfer, or merge his operation without Can-Am's consent, which was not to be withheld unreasonably: see cls. 4.5 and 11.4.

6 The term of the contract was three years. Clauses 8.3 and 8.4 allowed termination on short notice for misconduct or other cause. Clause 3.3 — the provision at the centre of this case — provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

7 Mr. Hrynew, one of the respondents and another enrollment director, was a competitor of Mr. Bhasin and there was considerable animosity between them: trial reasons, at para. 461. The trial judge found, in effect, that Mr. Hrynew pressured Can-Am not to renew its Agreement with Mr. Bhasin and that Can-Am dealt dishonestly with Mr. Bhasin and ultimately gave in to that pressure.

8 When Mr. Hrynew moved his agency to Can-Am from one of its competitors many years before the events in question, Can-Am promised him that he would be given consideration for mergers that would take place and he in fact merged with other agencies in Calgary after joining Can-Am: trial reasons, at para. 238. He was in a strong position with Can-Am because he had the largest agency in Alberta and a good working relationship with the Alberta Securities Commission which regulated Can-Am's business: para. 284.

9 Mr. Hrynew wanted to capture Mr. Bhasin's lucrative niche market around which he had built his business: trial reasons, at para. 303. Mr. Hrynew personally approached Mr. Bhasin to propose a merger of their agencies on numerous occasions: para. 238. He also actively encouraged Can-Am to force the merger and made "veiled threats" that he would leave if no merger took place: para. 282; see also paras. 251 and 287. The trial judge found that the proposed "merger" was in effect a hostile takeover of Mr. Bhasin's agency by Mr. Hrynew: para. 240. Mr. Bhasin steadfastly refused to participate in such a merger: para. 247.

10 The Alberta Securities Commission raised concerns about compliance issues among Can-Am's enrollment directors. In late 1999, the Commission required Can-Am to appoint a single provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws: trial reasons, at paras. 149, 152 and 160. Can-Am appointed Mr. Hrynew to that position in September of that year. The role required him to conduct audits of Can-Am's enrollment directors. Mr. Bhasin and Mr. Hon, another enrollment director, objected to having Mr. Hrynew, a competitor, review their confidential business records: paras. 189-196.

11 Can-Am became worried that the Commission might revoke its licence and, in 1999 and 2000, it had many discussions with the Commission about compliance. During those discussions, it was clear that Can-Am was considering a restructuring of its agencies in Alberta that involved Mr. Bhasin. In June 2000, Can-Am outlined its plans to the Commission and they included Mr. Bhasin working for Mr. Hrynew's agency. The trial judge found that this plan had been formulated before June 2000: trial reasons, at para. 256. None of this was known by Mr. Bhasin: paras. 243-46.

12 In fact, Can-Am repeatedly misled Mr. Bhasin by telling him that Mr. Hrynew, as PTO, was under an obligation to treat the information confidentially and that the Commission had rejected a proposal to have an outside PTO, neither of which was true: trial reasons at para. 195. It also responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a "done deal": para. 247. When Mr. Bhasin continued to refuse to allow Mr. Hrynew to audit his records, Can-Am threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement: paras. 207-11.

13 At the expiry of the contract term, Mr. Bhasin lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by Mr. Hrynew's agency. Mr. Bhasin was obliged to take less remunerative work with one of Can-Am's competitors.

14 Mr. Bhasin sued Can-Am and Mr. Hrynew. Moen J. in the Alberta Court of Queen's Bench found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The court held that the corporate respondent was in breach of the implied term of good faith, Mr. Hrynew had intentionally induced breach of contract, and the respondents were liable for civil conspiracy.

15 The trial judge found that Can-Am acted dishonestly with Mr. Bhasin throughout the events leading up to the non-renewal: it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Mr. Hrynew to bring about a new corporate structure with Hrynew's being the main agency in Alberta. The trial judge also found that, had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency": para. 258.

16 The Alberta Court of Appeal allowed the respondents' appeal and dismissed Mr. Bhasin's lawsuit. The court found his pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause: *Bhasin v. Hrynew*, 2013 ABCA 98, 84 Alta. L.R. (5th) 68 (Alta. C.A.).

17 The appeal raises four issues:

(a) Did Mr. Bhasin properly plead breach of the duty of good faith?

(b) Did Can-Am owe Mr. Bhasin a duty of good faith? If so, did it breach that duty?

(c) Are the respondents liable for the torts of inducing breach of contract or civil conspiracy?

(d) If there was a breach, what is the appropriate measure of damages?

III. Analysis

A. Did Mr. Bhasin Properly Plead Breach of the Duty of Good Faith?

18 The Court of Appeal held that Mr. Bhasin had not properly pleaded the good faith issue and that the trial judge had therefore erred in considering it. Mr. Bhasin contests this conclusion, while the respondents support it. I agree with Mr. Bhasin.

19 The allegations in the statement of claim clearly put the questions of improper purpose and dishonesty in issue. These facts are sufficient to put Can-Am's good faith in issue. The question of whether this conduct amounted to a breach of the duty of good faith is a legal conclusion that did not need to be pleaded separately. The defendants did not move to strike the pleadings or seek particulars of the allegation of wrongful termination in the statement of claim. Good faith was a live issue that was fully canvassed in a lengthy trial: A.F., at paras. 92-94. Written submissions by both parties at trial referred to the good faith issue and even in his opening at trial, Mr. Bhasin's counsel raised the issue of good faith.

20 The trial judge held that any deficiency in the pleadings did not cause prejudice to the respondents: paras. 23 and 48. This is an assessment she was uniquely positioned to make and her conclusion ought to be treated with deference on appeal. The good faith issue was fully argued in and addressed by the Court of Appeal and has been fully argued on the merits in this Court.

21 In my view, the trial judge did not make a reversible error by adjudicating the issue of good faith and we should address the merits of that issue.

B. Did Can-Am Owe Mr. Bhasin a Duty of Good Faith?

(1) Decisions and Positions of the Parties

(a) Decisions

22 The trial judge accepted Mr. Bhasin's position that there was a duty of good faith in this case and that it had been breached. In brief, her reasoning was as follows.

23 First, the trial judge decided that the 1998 Agreement was a type of agreement which as a matter of law requires good faith performance. She recognized that the 1998 Agreement did not fall within any of the existing categories of contract, such as employment, insurance and franchise agreements, which have been held to require good faith performance. She concluded, however, that the Agreement was analogous to a franchise or employment contract, and so by analogy to these cases, she implied a term of good faith performance as a matter of law. The contract was not balanced from its inception and the relationship placed the enrollment director in a position of inherent and predictable vulnerability: paras. 67-86.

24 Second and in the alternative, the trial judge held that a term of good faith performance should be implied based on the intentions of the parties in order to give business efficacy to the agreement. She concluded that "[w]hen one considers the whole of the relationship ... it is clear that the parties had to operate in good faith and there was a requirement of fairness between them. In other words, good faith was necessary to give business efficacy to the whole 1998 Agreement": para. 101.

25 The 1998 Agreement contained an "entire agreement clause" stating that there were no "agreements, express, implied or statutory, other than expressly set out" in it: cl. 11.2. The trial judge held, however, that this clause did not preclude the implication of a duty of good faith. The parties, she reasoned, cannot rely on exclusion clauses to avoid contractual obligations where there is an imbalance of power and that courts refuse to let parties shelter under entire agreement clauses where it would be unjust or inequitable to do so: paras. 116-18.

26 Turning to the issue of breach, the trial judge found that Can-Am had breached the agreement, first by requiring Mr. Bhasin to submit to an audit by Mr. Hrynew and to provide the latter with access to his business records, and second by exercising the non-renewal clause in a dishonest and misleading manner and for an improper purpose. The non-renewal clause was not intended to permit Can-Am to force a merger of the Bhasin and Hrynew agencies, but that was the purpose for which Can-Am exercised this power: para. 261. The trial judge also found both respondents liable for unlawful means conspiracy and found Mr. Hrynew liable for inducing Can-Am's breach of its contract with Mr. Bhasin.

27 The Court of Appeal reversed and held that there had been no breach of contract. The duty of good faith in employment contracts could not be extended by analogy to other types of contract. In any event, the duty of good faith in the employment context is limited to the manner of termination and does not include reasons for non-renewal: C.A. reasons, at paras. 27 and 31. Nor was this a circumstance in which a term could be implied because it was so obvious it was not thought necessary to mention or was necessary to make the contract work: para. 32. Even if there were an implied duty of good faith in this case, the impugned conduct concerned the non-renewal of a contract, which occurs on expiry, unlike a termination clause: para. 31.

28 Moreover, the Court of Appeal held that a term cannot be implied where it goes against an express term of the contract. Here, the parties did not intend a perpetual contract, since they included a term allowing either party to unilaterally trigger its expiration prior to the end of each three-year term. The trial judge's approach was inconsistent with the non-renewal provision of the contract. The motive for triggering expiration was not restricted under the Agreement. The implication of a term of good faith also violated the entire agreement clause. The court held that the evidence of assurances given by Can-Am as to how the non-renewal power would be exercised fell afoul of the parol evidence rule and should not have been considered. Since the Court of Appeal held there was no breach of contract, the basis for the claims in unlawful means conspiracy and inducing breach of contract also disappeared.

(b) Positions of the Parties

29 Mr. Bhasin advances two related positions on appeal. His broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power

without regard for that objective: A.F., at para. 51. This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations. Mr. Bhasin contends that common law in Canada is increasingly isolated as other jurisdictions embrace a greater role for good faith in contract law: A.F., at paras. 27-32. The recognition of a general duty of good faith would constitute an incremental advance in the law, given the numerous specific situations that already give rise to a duty of good faith. Mr. Bhasin relies on the findings of the trial judge that the respondents improperly and dishonestly used its non-renewal right to compel Mr. Bhasin to merge with his competitor. Mr. Bhasin contends that the respondents had no legitimate business reason for not renewing the contract. He also says that the entire agreement clause should be construed narrowly, and that express language is needed for such a clause to derogate from a duty of good faith: A.F., at para. 83.

30 Mr. Bhasin's second position, emphasized in oral argument, is that the Court should at least recognize a duty of honest performance of contractual obligations: transcript, at pp. 8, 10 and 24. Mr. Bhasin relies on the trial judge's findings that Can-Am acted dishonestly towards Mr. Bhasin throughout the period leading up to the non-renewal. It repeatedly lied to him about the nature of the organizational changes required by the Alberta Securities Commission, the nature of the audits that were to be carried out by Mr. Hrynew, and was dishonest about its intention to force him out: trial reasons, at paras. 195, 221, 246-47 and 267.

31 Unsurprisingly, the respondents see things very differently. While they accept that good faith plays a role in Canadian contract law, they submit that this role is much more modest than Mr. Bhasin suggests. They say that such a duty arises only in certain classes of contract, such as employment contracts, and in contracts involving discretionary powers: R.F., at para. 52. In the employment context, the duty applies only to the manner in which a contract is terminated. The contract in this case was negotiated between commercial parties to whom the policy considerations underlying employment law doctrine do not apply. Mr. Bhasin is alleging a right to a perpetual, or at least indefinite, contract with the respondents. The contract in this case could not be said to be discretionary, because it provided simply that on six months notice either party could terminate the Agreement. The respondents submit that there is no ambiguity in the wording of the non-renewal clause of the contract and so there is no basis for implying other terms or for relying on extrinsic evidence of the parties' intentions. The entire agreement clause specifically precluded the implication of any terms other than the express terms of the contract.

(2) Analysis

(a) Overview

32 The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze": Ontario Law Reform Commission ("OLRC"), *Report on Amendment of the Law of Contract* (1987), at p. 169. This approach is out of step with the civil law of Quebec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties.

33 In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

34 In my view, taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

(b) Good Faith as a General Organizing Principle

(i) Background

35 The doctrine of good faith traces its history to Roman law and found acceptance in earlier English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634 (Eng. Ch.), at p. 138, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (Australia H.C.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113 (Eng. K.B.), "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith": p. 157. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162 (Eng. K.B.), at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts: see also *Herbert v. Mercantile Fire Insurance Co.* (1878), 43 U.C.Q.B. 384 (Ont. Q.B.); R. Powell, "Good Faith in Contracts" (1956), 9 Curr. Legal Probs. 16.

36 However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), at para. 1-039; W. P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commerical Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984), 125, at p. 148.

37 This Court has not examined whether there is a general duty of good faith contractual performance. However, there has been an active debate in other courts and among scholars for decades over whether there is, or should be, a general or "stand-alone" duty of good faith in the performance of contracts. Canadian courts have reached different conclusions on this point.

38 Some suggest that there is a general duty of good faith: *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (N.S. T.D.), aff'd on narrower grounds (1992), 112 N.S.R. (2d) 180 (N.S. C.A.); *McDonald's Restaurants of Canada Ltd. v. British Columbia* (1997), 29 B.C.L.R. (3d) 303 (B.C. C.A.), at para. 99; *Crawford v. New Brunswick (Agricultural Development Board)* (1997), 192 N.B.R. (2d) 68 (N.B. C.A.), at paras. 7-8. They see a broad role for good faith as an implied term in all contracts that establishes minimum standards of acceptable commercial behaviour. As Kelly J. put it in *Gateway Realty*, at para. 38:

> The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" — a conduct that is contrary to community standards of honesty, reasonableness or fairness.

39 Other courts are of the view that there exists no such general duty of good faith in all contracts: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.), at para. 54; *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (Alta. C.A.), at paras. 15-19, *per* Kerans J.A., *dubitante*; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15 (Ont. C.A.), at para. 131; see G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 338-46. The detractors of such a general duty of good faith have accepted a limited role for good faith in certain contexts but have held that it would create commercial uncertainty and undermine freedom of contract to recognize a general duty of good faith that would permit courts to interfere with the express terms of a contract.

40 This Court ought to develop the common law to keep in step with the "dynamic and evolving fabric of our society" where it can do so in an incremental fashion and where the ramifications of the development are "not incapable of assessment": *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 670; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), at para. 93; see also *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at

pp. 760-64; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 85; *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, 2002 SCC 8, [2002] 1 S.C.R. 156 (S.C.C.); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.); *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.), at para. 46. This is even more appropriate where, as here, what is contemplated is not the reversal of some settled rule, but a development directed to bringing greater certainty and coherence to a complex and troublesome area of the common law.

41 As I see it, the developments that I propose are desirable as a result of several considerations. First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States: see, e.g., Hall, at p. 347. While the developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and will bring the law closer to what reasonable commercial parties would expect it to be.

(ii) Survey of the Current State of the Common Law

42 Anglo-Canadian common law has developed a number of rules and doctrines that call upon the notion of good faith in contractual dealings; it is a concept that underlies many elements of modern contract law: S. M. Waddams, *The Law of Contracts* (2010), at para. 550; J. D. McCamus *The Law of Contracts* (2nd ed. 2012), at pp. 835-38; OLRC, at p. 165; Belobaba, at pp. 75-76; J. F. O'Connor, *Good Faith in English Law* (1990), at pp. 17-49; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev.* 433. The approach, not unfairly, has been characterized as developing "piecemeal solutions in response to demonstrated problems": *Interfoto Library Ltd. v. Stiletto Visual Programmes Ltd.* (1987), [1989] 1 Q.B. 433 (Eng. C.A.), at p. 439, *per* Bingham L.J. (as he then was). Thus we see, for example, that good faith notions have been applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships. It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability, and plays a role in interpreting and implying contractual terms. The difficulty with this "piecemeal" approach, however, is that it often fails to take a consistent or principled approach to similar problems. A brief review of the current landscape of good faith will show the extent to which this is the case.

43 Considerations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other: G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 329-30; E. Peden, "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005), 21 *J.C.L.* 226; Belobaba, at p. 86; S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 J.C.L. 55.

44 Good faith also plays a role in the law of implied terms, particularly with respect to terms implied by law. Terms implied by law redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), at p. 457, *per* McLachlin J.; see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), *per* McLachlin J., concurring. The implication of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions by filling in gaps in the written agreement of the parties: *Chitty on Contracts*, at para. 1-051. In *Mesa Operating*, the Alberta Court of Appeal implied a term that a power of pooling properties for the purpose of determining royalty payments be exercised reasonably. The court implied this term in order to give effect to the intentions of the parties rather than as a requirement of good faith, but Kerans J.A. stated that "[t]he rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith": para. 22. Many other examples may be found in Waddams, *The Law of Contracts*, at paras. 499-506.

45 Considerations of good faith are also apparent in contract interpretation: *Chitty on Contracts*, at para. 1-050; Hall, at p. 347. The primary object of contractual interpretation is of course to give effect to the intentions of the parties at the time of contract formation. However, considerations of good faith inform this process. Parties may generally be assumed to intend certain minimum standards of conduct. Further, as Lord Reid observed in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235 (U.K. H.L.), at p. 251, "[t]he more unreasonable the result the more unlikely it is that the parties can have intended it". As A. Swan and J. Adamski put it, the duty of good faith "is not an externally imposed requirement but

inheres in the parties' relation": *Canadian Contract Law* (3rd ed. 2012), at §§ 8.134 to 8.146.

46 Good faith also appears in numerous contexts in a more explicit form. The concept of "good faith" is used in hundreds of statutes across Canada, including statutory duties of good faith and fair dealing in franchise legislation and good faith bargaining in labour law: S. K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 *Can. Bar Rev.* 70, at p. 71.

47 There have been many attempts to bring a measure of coherence to this piecemeal accretion of appeals to good faith: see, among many others, McCamus, at pp. 835-68; S. K. O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007), 86 *Can. Bar. Rev.* 193, at pp. 196-204; Waddams, *The Law of Contracts*, at paras. 494-508; R. S. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 Va. L. Rev. 195; S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980), 94 *Harv. L. Rev.* 369. By way of example, Professor McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: (1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties (pp. 840-56; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43 (Ont. C.A.), at paras. 49-50).

48 While these types of cases overlap to some extent, they provide a useful analytical tool to appreciate the current state of the law on the duty of good faith. They also reveal some of the lack of coherence in the current approach. It is often unclear whether a good faith obligation is being imposed as a matter of law, as a matter of implication or as a matter of interpretation. Professor McCamus notes:

> Although the line between the two types of implication is difficult to draw, it may be realistic to assume that implied duties of good faith are likely, on occasion at least, to slide into the category of legal incidents rather than mere presumed intentions. Certainly, it would be difficult to defend the implication of terms on each of the cases considered here on the basis of the traditional business efficiency or officious bystander test. In the control of contractual discretion cases, for example, it may be more realistic to suggest that the implied limitation on the exercise of the discretion is intended to give effect to the "reasonable expectations of the parties." [pp. 865-66]

49 The first type of situation (contracts requiring the cooperation of the parties to achieve the objects of the contract) is reflected in the jurisprudence of this Court. In *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 (S.C.C.), the parties to a real estate transaction failed to specify in the purchase-sale agreement which party was to be responsible for obtaining planning permission for a subdivision of the property. By law, the vendor was the only party capable of obtaining such permission. The Court held that the vendor was under an obligation to use reasonable efforts to secure the permission, or as Dickson J. put it, "[t]he vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale": p. 1084. It is not completely clear whether this duty was imposed as a matter of law or was implied based on the parties' intentions: see p. 1083; see also *Gateway Realty* and *CivicLife.com*.

50 *Mitsui & Co. (Canada) Ltd. v. Royal Bank*, [1995] 2 S.C.R. 187 (S.C.C.), is an example of the second type of situation (exercise of contractual discretion). The lease of a helicopter included an option to buy at the "reasonable fair market value of the helicopter as established by Lessor": para. 2. This Court held, at para. 34, that, "[c]learly, the lessor is not in a position, by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option." The Court did not discuss the basis for implying the term, but suggested that in the absence of a reasonableness requirement, the option would be a mere agreement to agree and thus would be unenforceable, which means that the implication of the term was necessary to give business efficacy to the agreement.

51 This Court's decision in *Freedman v. Mason*, [1958] S.C.R. 483 (S.C.C.), falls in the third type of situation in which a duty of good faith arises (where a contractual power is used to evade a contractual duty). In that case, the vendor in a real estate transaction regretted the bargain he had made. He then sought to repudiate the contract by failing to convey title in fee simple because he claimed his wife would not provide a bar of dower. The issue was whether he could take advantage of a clause permitting him to repudiate the transaction in the event that he was "unable or unwilling" to remove this defect in title even though he had made no efforts to do so by trying to obtain the bar of dower. Judson J. held that the clause did not

"enable a person to repudiate a contract for a cause which he himself has brought about" or permit "a capricious or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner": p. 487.

52 The jurisprudence is not always very clear about the source of the good faith obligations found in these cases. The categories of terms implied as a matter of law, terms implied as a matter of intention and terms arising as a matter of interpretation sometimes are blurred or even ignored, resulting in uncertainty and a lack of coherence at the level of principle.

53 Apart from these types of situations in which a duty of good faith arises, common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.

54 For example, this court confirmed that there is a duty of good faith in the employment context in *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.). Mr. Keays was diagnosed with chronic fatigue syndrome and was frequently absent from work. Honda grew concerned with the frequency of the absences. It ordered Mr. Keays to undergo an examination by a doctor chosen by the employer, required him to provide a doctor's note for any absences, and discouraged him from retaining outside counsel. The majority held that in all employment contracts there was an implied term of good faith governing the manner of termination. In particular, the employer should not engage in conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" when dismissing an employee: para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 98. Good faith in this context did not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce: *Wallace*, at para. 76.

55 This Court has also affirmed the duty of good faith which requires an insurer to deal with its insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim and to the decision whether or not to pay it: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.), at para. 63, citing *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29. The breach of this duty may support an award of punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.). This duty of good faith is also reciprocal: the insurer must not act in bad faith when dealing with a claim, which is typically made by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy (para. 83, citing *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Alta. Q.B.), at paras. 84-85, *per* Murray J.).

56 This Court has also recognized that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids: *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), at para. 88; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.); *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 58-59; A. C. McNeely, *Canadian Law of Competitive Bidding and Procurement* (2010), at pp. 245-54.

57 Developments in the United Kingdom and Australia point to enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine. Good faith in contract performance has received increasing prominence in English law, despite its "traditional ... hostility" to the concept: *Yam Seng Pte Ltd. v. International Trade Corp Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.), at para. 123, citing E. McKendrick, *Contract Law* (9th ed. 2011), at pp. 221-22; see also *Chitty on Contracts*, at para. 1-039. In *Yam Seng*, Leggatt J. held that a number of specific duties embodying good faith can be implied according to the presumed intentions of the parties according to the traditional approach for implying terms: para. 131. Leggatt J. identified a number of these implied duties, including honesty, fidelity to the parties' bargain, cooperation, and fair dealing: paras. 135-50. Leggatt J. stated that "[a] paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust": para. 135; see D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract'" (2014), 77 *Mod. L. Rev.* 475. The Court of Appeal considered the *Yam Seng* decision in *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (Eng. C.A.) (BAILII), where it confirmed that good faith was not a general principle of English law, but that it could be an implied term in certain categories of cases: paras. 105 and 150.

58 Australian courts have also moved towards a greater role for good faith in contract performance: *Cheshire and Fifoot's Law of Contract*, (9th Australian ed. 2008), at 10.43 to 10.47. The duty of good faith in its modern form was recognized by Priestley J.A. in *Renard Constructions (ME) Pty. Ltd. v. Canada (Minister of Public Works)* (1992), 26 N.S.W.L.R. 234 (New South Wales C.A.). There is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances. The duty of good faith can be implied as a matter of law or as a matter of fact, although the cases are not always clear on the basis on which the term is being implied. Australian courts have taken a broad view of what constitutes good faith: see, e.g., *Burger King Corp. v. Hungry Jacks 's Pty Ltd.*, [2001] NSWCA 187 (New South Wales C.A.) (AustLII). The law of good faith performance in Australia is still developing and remains unsettled: E. Peden, "Good faith in the performance of contract law" (2004), 42: 9 *L.S.J.* 64, at p. 64. However, it is clear that the duty of good faith requires adherence to standards of honest conduct: A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev.* 66, at p. 76; *Burger King*, at paras. 171 and 189.

(iii) The Way Forward

59 This selective survey supports the view that Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear: Belobaba; O'Byrne, "Good Faith in Contractual Performance", at p. 95; B. J. Reiter, "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev.* 705, at pp. 711-12. It also shows that in Canada, as well as in the United Kingdom and Australia, there is increasing attention to the notion of good faith, particularly in the area of contractual performance. Opponents of any general obligation of good faith prefer the traditional, organic development of solutions to address particular problems as they arise: see, e.g., M. G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385; D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435, at pp. 436 and 440. However, foreclosing some incremental development of the law at the level of principle would go beyond what prudent caution requires and evidence an almost "perverted pride" — to use Swan's term — in the law's failings.

60 Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24.

61 The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev.* 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev.* 55, at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law. & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev.* 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

62 I conclude from this review that enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations.

(iv) Towards an Organizing Principle of Good Faith

63 The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

64 As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229 (S.C.C.), at p. 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544 (S.C.C.), at para. 124; R. M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law* (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way.

65 The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

66 This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

67 This approach is consistent with that taken in the case of unjust enrichment. McLachlin J. (as she then was) outlined the approach in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at pp. 786 and 788:

> This case presents the Court with the difficult task of mediating between, if not resolving, the conflicting views of the proper scope of the doctrine of unjust enrichment. It is my conclusion that we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery ....
>
> . . . . .
>
> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

68 The flexible approach that was taken in *Peel* recognizes that "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain": p. 788. In that case, this Court further developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what I propose to do with regards to the organizing principle of good faith.

69 The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at § 1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

70 The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of

economic self-interest: *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

71 Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

(v) Should There Be a New Duty?

72 In my view, the objection to Can-Am's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. The relationship between Can-Am and Mr. Bhasin was not an employment or franchise relationship. Classifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation. After all, a party almost always has some amount of discretion in how to perform a contract. It would also be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.

73 In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

74 There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see *Mesa Operating*, at paras. 15-19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

75 Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it: see *CivicLife.com*, at para. 52.

76 It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties, because they are thought to interfere with freedom of contract: see *Gateway Realty*, *per* Kelly J.; O'Byrne, "Good Faith in Contractual Performance", at p. 95; Farnsworth, at 677-78. As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.

77 That said, I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in

some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements. The approach I outline here is similar in principle to that in § 1-302(b) of the U.C.C. (2012):

> The obligations of good faith, diligence, reasonableness and care ... may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.

78 Certainly, any modification of the duty of honest performance would need to be in express terms. A generically worded entire agreement clause such as cl. 11.2 of the Agreement does not indicate any intention of the parties to depart from the basic tenets of honest performance: see *GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd.*, [2003] FCA 50 (Australia C.A.) (AustLII), at para. 922, *per* Finn J.; see also O'Byrne, "Good Faith in Contractual Performance", at p. 96.

79 Two arguments are typically raised against an increased role for a duty of good faith in the law of contract: see Bridge, Clark, and Peden, "When Common Law Triumphs Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability". The first is that "good faith" is an inherently unclear concept that will permit *ad hoc* judicial moralism to undermine the certainty of commercial transactions. The second is that imposing a duty of good faith is inconsistent with the basic principle of freedom of contract. I do not have to decide here whether or not these points are valid in relation to a broad, generalized duty of good faith. However, they carry no weight in relation to adopting a rule of honest performance.

80 Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

81 Any interference by the duty of honest performance with freedom of contract is more theoretical than real. It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations.

82 Those who fear that this modest step would create uncertainty or impede freedom of contract may take comfort from experience of the civil law of Quebec and the common and statute law of many jurisdictions in the United States.

83 The *Civil Code of Québec* recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: see arts. 6, 7 and 1375. While this is not the place to expound in detail on good faith in the Quebec civil law, it is worth noting that good faith is seen as having two main aspects. The first is the subjective aspect, which is concerned with the state of mind of the actor, and addresses conduct that is, for example, malicious or intentional. The second is the objective aspect which is concerned with whether conduct is unacceptable according to the standards of reasonable people. As J.-L. Baudouin and P.-G. Jobin explain, [TRANSLATION] "a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of conduct that are generally accepted in society": *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 132. The notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract: *ibid.*, at para. 161; *Banque de Montréal c. Ng*, [1989] 2 S.C.R. 429 (S.C.C.), at p. 436.

84 In the United States, § 1-304 of the U.C.C. provides that "[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." The U.C.C. has been enacted by legislation in all 50 states. While the provisions of the U.C.C. apply only to commercial contracts, § 205 of the *Restatement (Second) of Contracts* (1981) provides for a general duty of good faith in all contracts. This provision of the *Restatement* has been followed by courts in the vast majority of states. The notion of "good faith" in the *Restatement* substantially followed the definition proposed by Robert Summers in an influential article, where he proposed that "good faith" is best understood as an "excluder" of various categories of bad faith conduct: p. 206; see § 205, comment a. The general definition of "good faith" in

the U.C.C. is also quite broad, encompassing honesty and adherence to "reasonable commercial standards": § 1-201(b)(20). This definition was originally limited to "honesty in fact", that is, a duty of honesty in performance, and was only later expanded: A. D. Miller and R. Perry, "Good Faith Performance" (2013), 98 *Iowa L. Rev.* 689, at pp. 719-20. Honesty in performance is also a key component of "good faith" under the *Restatement*: § 205, comments a and d.

85 Experience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability: see, e.g., J. Pineau, "La discrétion judiciaire a-t-elle fait des ravages en matière contractuelle?", in *La réforme du Code civil, cinq ans plus tard* (1998), 141. It is also worth noting that in both the United States and Quebec, judicial developments preceded legislative action in codifying good faith. In the United States, courts had recognized the existence of a general duty of good faith before the promulgation of the U.C.C.: see, e.g., *Kirke La Shelle Co. v. Armstrong Co.* (1933), 263 N.Y. 79 (U.S. N.Y. Ct. App. 1933). Similarly, though there was no express provision of "good faith" in the *Civil Code of Lower Canada*, the Court implied such a general duty from more specific provisions of the *Code*: see *Banque canadienne nationale c. Soucisse*, [1981] 2 S.C.R. 339 (S.C.C.); *Banque nationale du Canada c. Houle*, [1990] 3 S.C.R. 122 (S.C.C.); *Québec (Commission hydroélectrique) c. Banque de Montréal*, [1992] 2 S.C.R. 554 (S.C.C.). The duty of good faith was subsequently included in the revisions leading to the enactment of the *Civil Code of Québec*.

86 The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

87 This distinction explains the result reached by the court in *United Roasters Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (U.S. C.A. 4th Cir. 1981). The terminating party had decided in advance of the required notice period that it was going to terminate the contract. The court held that no disclosure of this intention was required other than what was stipulated in the notice requirement. The court stated:

> ... there is very little to be said in favor of a rule of law that good faith requires one possessing a right of termination to inform the other party promptly of any decision to exercise the right. A tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do. [pp. 989-90]

United Roasters makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract.

88 The duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel, but it is not subsumed by them. Unlike promissory estoppel and estoppel by representation, the contractual duty of honest performance does not require that the defendant intend that his or her representation be relied on and it is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.), at para. 5; *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.); Waddams, *The Law of Contracts*, at paras. 195-203; B. MacDougall, *Estoppel* (2012), at pp. 142-44. As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on and breach of it supports a claim for damages according to the contractual rather than the tortious measure: see, e.g., *Parna v. G. & S. Properties Ltd.* (1970), [1971] S.C.R. 306 (S.C.C.), cited with approval in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 19.

89 Mr. Bhasin, supported b many judicial and academic authorities, has argued for wholesale adoption of a more expansive duty of good faith in contrast to the modest, incremental change that I propose: A.F., at para. 51; Summers, at p. 206; Belobaba; *Gateway Realty*. In many of its manifestations, good faith requires more than honesty on the part of a contracting party. For example, in *Dynamic Transport*, this Court held that good faith in the context of that contract required

a party to take reasonable steps to obtain the planning permission that was a condition precedent to a sale of property. In other cases, the courts have required that discretionary powers not be exercised in a manner that is "capricious" or "arbitrary": *Mason, at p. 487*; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.), at p. 7. In other contexts, this Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts: *Wallace*, at para. 76.

90 It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr. Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para. 32. Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.

91 I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (U.S. N.J. Sup. Ct. 1972), aff'd, 07 A.2d 598 (U.S. N.J. Sup. Ct. 1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (U.S. Pa. S.C. 1978), at pp. 741-42. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F. Supp. 1173 (U.S. Dist. Ct. D. Mass. 1984), at p. 1184; *Pitney-Bowes Inc. v. Mestre* (1981), 517 F. Supp. 52 (U.S. Dist. Ct. S.D. Fla. 1981), cert. denied, 464 U.S. 893 (U.S. Sup. Ct. 1983).

92 I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.

93 A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

(3) Application

94 The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.

95 The immediate dispute in this case centred on the non-renewal clause contained in cl. 3.3 of the 1998 Agreement which Mr. Bhasin entered into in November 1998. It provided that the Agreement was for a three-year term and would be

automatically renewed unless one of the parties gave notice to the contrary at least six months before the end of the initial or any renewed term:

> 3.3 The term of this Agreement shall be for a period of three years from the date hereof (the "Initial Term") and thereafter shall be automatically renewed for successive three year periods (a "Renewal Term"), subject to earlier termination as provided for in section 8 hereof, unless either [Can-Am] or the Enrollment Director notifies the other in writing at least six months prior to expiry of the Initial Term or any Renewal Term that the notifying party desires expiry of the Agreement, in which event the Agreement shall expire at the end of such Initial Term or Renewal Term, as applicable.

96 The factual matrix in which the judge made her finding of dishonest performance is complicated and I will only outline it in very broad terms in order to put that finding in context. There were two main interrelated story lines.

97 The first concerns Mr. Hrynew's persistent attempts to take over Mr. Bhasin's market through a merger — in effect a takeover by him of Mr. Bhasin's agency. The second concerns the difficulties, beginning in early April 1999, that Can-Am was having with the Alberta Securities Commission, which regulated its business and its enrollment directors in Alberta. The Commission insisted that Can-Am appoint a full-time employee to be a PTO responsible for compliance with Alberta securities law. Can-Am ultimately appointed Mr. Hrynew, with the result that he would audit his competitor agencies, including Mr. Bhasin's, and therefore have access to their confidential business information. Mr. Bhasin's refusal to allow Mr. Hrynew access to this information led to the final confrontation with Can-Am and its giving notice of non-renewal in May 2001. Can-Am, for its part, wanted to force a merger of the Bhasin agency under the Hrynew agency, effectively giving Mr. Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

98 The trial judge concluded that Can-Am acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to Mr. Hrynew's role as PTO. Her detailed findings amply support this overall conclusion.

99 By early 2000, Can-Am was considering a significant reorganization of its activities in Alberta; by June of that year, it sent an organizational chart to the Commission showing that Mr. Bhasin's agency was to be merged under Mr. Hrynew's. But it had said nothing of this to Mr. Bhasin: trial reasons, at paras. 167-68. The trial judge found that these representations made by Can-Am to the Commission were clearly false if, as she concluded, they intended to refer to Mr. Bhasin: para. 246. She also found that Can-Am, by June 2000, was fearful that the Commission was going to pull its licence in Alberta and that it was prepared to do whatever it could to forestall that possibility. "However, it was not dealing honestly with [Mr.] Bhasin about the realities of the situation as [it] saw them": para. 246.

100 In August 2000, Mr. Bhasin first heard of Can-Am's merger plans for him during a meeting with Can-Am's regional vice-president. But when questioned about Can-Am's intentions with respect to the merger, the official "equivocated" and did not tell him the truth that from Can-Am's perspective this was a "done deal". The trial judge concluded that the official was "not honest with [Mr.] Bhasin" at that meeting: para. 247.

101 When Mr. Bhasin complained about Mr. Hrynew's conflict of interest in being both auditor and competitor, Can-Am in effect blamed the Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was not truthful. Can-Am failed to mention that it had proposed to appoint a non-resident of Alberta who was clearly not qualified according to the Commission's criteria or that it had decided to appoint Mr. Hrynew even though he did not meet the Commission's criteria either: trial reasons, at paras. 195 and 221. It also misrepresented — repeatedly — to Mr. Bhasin that Mr. Hrynew was bound by duties of confidentiality and segregation of activities in the course of an audit, when in fact there was no such requirement. Can-Am did not even finalize its PTO contract with Mr. Hrynew until March 2001 and, notwithstanding its assurances to Mr. Bhasin, it failed to include such a provision in the contract: paras. 190-221. As the trial judge found, Can-Am "could not possibly have missed this honestly in the PTO agreement, given that [Mr. Bhasin's] very protests about [Mr.] Hrynew's appointment as PTO were about confidentiality and segregation of activities": para. 221. The judge also found that Can-Am repeated these "lies" about Mr. Hrynew's supposed obligations of confidentiality even after the PTO agreement, without these protections, had been signed: para. 204.

102 Can-Am pushed on with the requirement that Mr. Hrynew audit Mr. Bhasin's agency as if it were required to do so by the Commission even though it had arranged to have one of its employees conduct the audit of Mr. Hrynew's agency: trial reasons, at para. 198.

103 As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause.

C. Liability for Civil Conspiracy and Inducing Breach of Contract

104 In light of this conclusion, I agree with the Court of Appeal's rejection of Mr. Bhasin's claims based on the torts of inducing breach of contract and unlawful means conspiracy.

105 The trial judge specifically found that Mr. Hrynew did not encourage Can-Am to act dishonestly in its dealings with Mr. Bhasin and that Can-Am's dishonest conduct was not fairly attributable to Mr. Hrynew: paras. 271 and 287. It follows that Mr. Hrynew did not induce Can-Am's breach of its contractual duty of honest performance.

106 The trial judge dismissed the claim for conspiracy to injure and there is no basis to interfere with that finding. However, the trial judge held the respondents liable for unlawful means conspiracy, with the unlawful means being the breach of contract and inducing breach of contract: para. 326. Because, in light of my conclusions, the only relevant breach of contract in this case is the breach of the duty of honest performance and there was no inducement of breach of contract, the only relevant unlawful means pertained to Can-Am alone and not Mr. Hrynew. Accordingly, there can be no liability for civil conspiracy: see *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427 (Ont. C.A.), at para. 43.

107 I therefore agree with the result reached by the Court of Appeal that there could be no liability for inducing breach of contract or unlawful means conspiracy: para. 36. It follows that the claims against Mr. Hrynew were rightly dismissed.

D. What Is the Appropriate Measure of Damages?

108 I have concluded that Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal. It is therefore liable for damages calculated on the basis of what Mr. Bhasin's economic position would have been had Can-Am fulfilled that duty. While the trial judge did not assess damages on that basis given her different findings in relation to liability, she made findings that permit this Court to do so.

109 The trial judge specifically held that but for Can-Am's dishonesty, Mr. Bhasin could have acted so as to "retain the value in his agency": paras. 258-59. In reaching this conclusion, the trial judge was well aware of the difficulties that Mr. Bhasin would have in selling his business given the "almost absolute controls" that Can-Am had on enrollment directors and that it owned the "book of business": para. 402. She also heard evidence and made findings about what the value of the business was, taking these limitations into account. These findings, in my view, permit us to assess damages on the basis that if Can-Am had performed the contract honestly, Mr. Bhasin would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew.

110 It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. The defendant's expert at trial valued Mr. Bhasin's business as of 2001 (the time of non-renewal) as approximately $87,000. While there is some confusion in the record about the date of evaluation and the relevance of discount rates, I am persuaded that the trial judge found that the business was worth $87,000 at the time that the Agreement expired and that she made this finding fully alive to the difficulties standing in the way of a sale of the business given the contractual arrangements between Can-Am and its enrollment directors: see, e.g., para. 451. In addition, we have had no suggestion in argument that this figure should be reassessed. In fact, the defendants, as appellants before the Court of Appeal, submitted to that court that if damages were payable, they should be assessed at the value of the business at the time of the expiry of the Agreement and noted that the trial judge had accepted the evidence of their expert witness, Mr. Bailey, that the value was $87,000.

111 I conclude therefore that Mr. Bhasin is entitled to damages in the amount of $87,000.

IV. Disposition

112 I would allow the appeal with respect to Can-Am and dismiss the appeal with respect to Mr. Hrynew. I would vary the trial judge's assessment of damages to $87,000 plus interest. Mr. Bhasin should have his costs throughout as against Can-Am. There should be no costs at any level in favour of or against Mr. Hrynew.

Appeal allowed in part.
Pourvoi accueilli en partie.

End of Document

TAB 7

KeyCite treatment

Most Negative Treatment: Distinguished

Most Recent Distinguished: CETIN v. PERCIVAL et al. | 2022 ONSC 2057, 2022 CarswellOnt 4361, 2022 A.C.W.S. 2960 | (Ont. S.C.J., Apr 4, 2022)

2014 SCC 7, 2014 CSC 7
Supreme Court of Canada

Hryniak v. Mauldin

2014 CarswellOnt 641, 2014 CarswellOnt 640, 2014 SCC 7, 2014 CSC 7, [2014] 1 S.C.R. 87, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7, 12 C.C.E.L. (4th) 1, 21 B.L.R. (5th) 248, 239 A.C.W.S. (3d) 896, 27 C.L.R. (4th) 1, 314 O.A.C. 1, 366 D.L.R. (4th) 641, 37 R.P.R. (5th) 1, 453 N.R. 51, 46 C.P.C. (7th) 217, 95 E.T.R. (3d) 1

Robert Hryniak, Appellant and Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith, Respondents and Ontario Trial Lawyers Association and Canadian Bar Association, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: March 26, 2013
Judgment: January 23, 2014
Docket: 34641

Proceedings: affirming *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.); affirming *Combined Air Mechanical Services Inc. v. Flesch* (2010), 71 B.L.R. (4th) 27, 2010 CarswellOnt 2026, 2010 ONSC 1729 (Ont. S.C.J.); affirming *Parker v. Casalese* (2010), 99 C.L.R. (3d) 1, 2010 ONSC 5636, 2010 CarswellOnt 7991 (Ont. Div. Ct.); affirming *Parker v. Casalese* (2010), 2010 CarswellOnt 4406, 268 O.A.C. 378 (Ont. S.C.J.); affirming *394 Lakeshore Oakville Holdings Inc. v. Misek* (2010), 98 R.P.R. (4th) 21, 2010 ONSC 6007, 2010 CarswellOnt 8323 (Ont. S.C.J.); reversing in part *Bruno Appliance & Furniture Inc. v. Cassels Brock & Blackwell LLP* (2010), 2010 ONSC 5490, 2010 CarswellOnt 8325 (Ont. S.C.J.)

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Paul R. Sweeny, David Sterns, for Intervener, Canadian Bar Association

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Employment; Labour; Property; Public; Torts; Family

Related Abridgment Classifications

Civil practice and procedure
XVIII Summary judgment
XVIII.1 General principles

Civil practice and procedure
XVIII Summary judgment
XVIII.10 Evidence on application
XVIII.10.a General principles

Headnote

Civil practice and procedure --- Summary judgment — General principles
Group of American investors, led by M, provided funds to Canadian "traders" — H was principal of company T that traded in bonds and debt instruments, and P was lawyer who acted for H, T and C who was principal of Panamanian investment company — Money wired by M group to law firm was pooled with other funds and transferred to T — T forwarded pooled funds to offshore bank, and money disappeared — M group joined another plaintiff in action for fraud against H, P and law firm, and motions for summary judgment were heard together — Motion judge used powers under new R. 20.04(2.1) of Rules of Civil Procedure to weigh evidence, evaluate credibility and draw inferences — Motion judge concluded trial was not required against H, and dismissed remainder of motion for summary judgment — H appealed, and Court of Appeal set out threshold test stating that "interest of justice" required that new powers be exercised only at trial, unless motion judge can achieve "full appreciation" of evidence and issues required to making dispositive findings on motion for summary judgment — Court found that, given factual complexity and voluminous record, action was type that generally required full trial, however, record supported that H had committed tort of civil fraud and dismissed his appeal — H appealed — Appeal dismissed — Summary judgment motion enhances access to justice as cheaper, faster alternative to full trial, and new R. 20 reflects recommendations for improving access to justice — New fact-finding powers in R. 20 can be exercised unless it is in interest of justice for them to be exercised only at trial — When judge is able to make necessary findings of fact, apply law to facts, and achieve just result in proportionate, expeditions and less expensive means, then there will be no genuine issue requiring trial — On summary judgment motion, evidence need not be equivalent to that at trial, but must be such that judge can fairly resolve dispute — While summary judgment must be granted where there is no genuine issue requiring trial, decision to use expanded fact-finding powers or call oral evidence is discretionary — In this case, motion judge made no palpable and overriding error in granting summary judgment as record was sufficient to make fair and just determination.

Civil practice and procedure --- Summary judgment — Evidence on application — General principles
Group of American investors, led by M, provided funds to Canadian "traders" — H was principal of company T that traded in bonds and debt instruments, and P was lawyer who acted for H, T and C who was principal of Panamanian investment company — Money wired by M group to law firm was pooled with other funds and transferred to T — T forwarded pooled funds to offshore bank, and money disappeared — M group joined another plaintiff in action for fraud against H, P and law firm, and motions for summary judgment were heard together — Motion judge used powers under new R. 20.04(2.1) of Rules of Civil Procedure to weigh evidence, evaluate credibility and draw inferences — Motion judge concluded trial was not required against H, and dismissed remainder of motion for summary judgment — H appealed, and Court of Appeal set out threshold test stating that "interest of justice" required that new powers be exercised only at trial, unless motion judge can achieve "full appreciation" of evidence and issues required to making dispositive findings on motion for summary judgment — Court found that, given factual complexity and voluminous record, action was type that generally required full trial, however, record supported that H had committed tort of civil fraud and dismissed appeal — H appealed — Appeal dismissed — Summary judgment motion enhances access to justice as cheaper, faster alternative to full trial, and new R. 20 reflects recommendations for improving access to justice — New fact-finding powers in R. 20 can be exercised unless it is in interest of justice for them to be exercised only at trial — When judge is able to make necessary findings of fact, apply law to facts, and achieve just result in proportionate, expeditions and less expensive means, then there will be no genuine issue requiring trial — On summary judgment motion, evidence need not be equivalent to that at trial, but must be such that judge can fairly resolve dispute — While summary judgment must be granted where there is no genuine issue requiring trial, decision to use expanded fact-finding powers or call oral evidence is discretionary — In this case, motion judge made no palpable and overriding error in granting summary judgment as record was sufficient to make fair and just determination.

Procédure civile --- Jugement sommaire — Principes généraux
Groupe d'investisseurs américains dirigés par M ont confié leur argent à des « courtiers » canadiens — H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance, et P était l'avocat de H, T et C, lequel était le dirigeant d'une société de placement panaméenne — Fonds transférés par le groupe M au cabinet d'avocats ont été mis en commun avec d'autres fonds puis transférés à T — T a viré les fonds à une banque étrangère, et l'argent a disparu — Groupe

M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats, et des requêtes en jugement sommaire ont été instruites ensemble — Juge saisi de la requête a exercé les pouvoirs prévus en vertu du nouvel art. 20.04(2.1) des Règles de procédure civile pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions — Juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H et a rejeté les autres points soulevés dans la requête — H a interjeté appel, et la Cour d'appel a énoncé un critère préliminaire affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire — Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux; toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H — Ce dernier a formé un pourvoi — Pourvoi rejeté — Requête en jugement sommaire améliore l'accès à la justice en tant que solution de rechange moins coûteuse et plus rapide à un procès formel, et la nouvelle R. 20 découle de recommandations visant à améliorer l'accès à la justice — Nouveaux pouvoirs en matière de recherche des faits prévus à la R. 20 peuvent être exercés, à moins qu'il ne soit dans l'intérêt de la justice qu'ils ne soient exercés que dans le cadre d'un procès — Lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'en arriver à un résultat juste en ayant recours à des moyens proportionnés, plus expéditifs et moins coûteux, alors il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès — Dans le cadre d'une requête en jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge puisse résoudre équitablement le litige — Bien qu'une requête en jugement sommaire doit être accueillie lorsqu'il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès, la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire — En l'espèce, le juge saisi de la requête n'a pas commis d'erreur manifeste et dominante en exerçant les pouvoirs pour accueillir la requête en jugement sommaire, étant donné que le dossier était suffisant pour permettre de rendre une décision juste.

Procédure civile --- Jugement sommaire — Preuve en instance — Principes généraux
Groupe d'investisseurs américains dirigés par M ont confié leur argent à des « courtiers » canadiens — H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance, et P était l'avocat de H, T et C, lequel était le dirigeant d'une société de placement panaméenne — Fonds transférés par le groupe M au cabinet d'avocats ont été mis en commun avec d'autres fonds puis transférés à T — T a viré les fonds à une banque étrangère, et l'argent a disparu — Groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats, et des requêtes en jugement sommaire ont été instruites ensemble — Juge saisi de la requête a exercé les pouvoirs prévus en vertu du nouvel art. 20.04(2.1) des Règles de procédure civile pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions — Juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H et a rejeté les autres points soulevés dans la requête — H a interjeté appel, et la Cour d'appel a énoncé un critère préliminaire affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire — Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux; toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H — Ce dernier a formé un pourvoi — Pourvoi rejeté — Requête en jugement sommaire améliore l'accès à la justice en tant que solution de rechange moins coûteuse et plus rapide à un procès formel, et la nouvelle R. 20 découle de recommandations visant à améliorer l'accès à la justice — Nouveaux pouvoirs en matière de recherche des faits prévus à la R. 20 peuvent être exercés, à moins qu'il ne soit dans l'intérêt de la justice qu'ils ne soient exercés que dans le cadre d'un procès — Lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'en arriver à un résultat juste en ayant recours à des moyens proportionnés, plus expéditifs et moins coûteux, alors il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès — Dans le cadre d'une requête en jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge puisse résoudre équitablement le litige — Bien qu'une requête en jugement sommaire doit être accueillie lorsqu'il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès, la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire — En l'espèce, le juge saisi de la requête n'a pas commis d'erreur manifeste et dominante en exerçant les pouvoirs pour accueillir la requête en jugement sommaire, étant donné que le dossier était suffisant pour permettre de rendre une décision juste.

In June 2001, members of a group of American investors led by M met with two principals of investments companies and a Canadian lawyer to discuss an investment opportunity. H was the principal of T, a company which traded in bonds and debt

instruments. C was the principal of F, a Panamanian investment company. P was the lawyer representing H, T and C. The M group wired US$1.2 million to the law firm, which was pooled with other funds and transferred to T. T then forwarded the pooled funds to an offshore bank, and the money then disappeared. H claimed that T's funds were stolen.

The M group joined another plaintiff in an action for civil fraud against H, P and the law firm, and brought a motion for summary judgment. The motion judge held that a trial was not required against H. The remainder of the motion was dismissed. H appealed, and this was the first occasion on which the Court of Appeal considered the new R. 20 of the Rules of Civil Procedure regarding summary judgment. The Court of Appeal set out a threshold test for when a judge could employ the new evidentiary powers under R. 20.04(2.1), stating that the "interest of justice" required that the new powers be exercised only at trial unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings. The Court found that, given the factual complexity and voluminous record, the action was the type for which a trial would generally be required, however, the record supported the finding that H had committed the tort of civil fraud and dismissed H's appeal. H appealed.

Held: The appeal was dismissed

Per Karakatsanis J. (McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring): Rule 20 was amended in 2010 following recommendations concerning improving access to justice. The reforms create a legitimate alternative to trials as a means for adjudicating and resolving legal disputes. The amendments changed the test for summary judgment from asking whether a case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial", demonstrating that a trial is not the default procedure. The new powers in the Rule permit motion judges to weigh evidence, evaluate credibility and draw reasonable inferences, as well as call oral evidence.

The Court of Appeal suggested that summary judgment would be most appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or where the record could be supplemented by oral evidence on discrete points. However, this is not a strict rule. There is no genuine issue requiring a trial when a judge can make necessary findings of fact, apply the law to the facts, and achieve a just result in proportionate, expeditious and less expensive means.

The evidence on a summary judgment motion must be such that the judge can fairly resolve the dispute, and the powers in R. 20.04(2.1) and 20.04(2.2) provide the motion judge with a valid manner of fact finding. The guidelines suggested by the Court of Appeal for calling oral evidence concerning small number of witnesses, the issue having significant impact, and the issue being narrow and discrete are useful, however these are not absolute rules. The power to call oral evidence should be employed when it allows the judge to reach a fair and just adjudication, and it is the proportionate course of action.

The first step on a motion for summary judgment under R. 20.04 is a determination of whether there is a genuine issue requiring trial based on the evidence without using the new fact-finding powers. If there appears to be a genuine issue requiring trial, the judge should then determine if the need for a trial can be avoided by using the new powers under R. 20.04(2.1) and 20.04(2.2). These powers can be used, provided that their use is not against the interest of justice. The powers are presumptively available, and the decision to use the fact-finding powers or to call oral evidence is discretionary.

The action underlying this motion for summary judgment was for civil fraud, which has four elements. First, a false representation. Second, some level of knowledge of the falsehood of the representation, whether through knowledge or recklessness. Third, the false representation caused the plaintiff to act. And finally, the plaintiff's actions resulted in a loss. The Court of Appeal agreed with the motion judge that the M group was induced to invest with H due to what H said at their meeting in 2001. The motion judge also found the requisite knowledge or recklessness as to the falsehood of the representation, and rejected the defence that the funds were stolen. There was also intention that the M group would act on H's false representations, and clearly there was loss by the M group. The motion judge properly concluded there was no issue requiring a trial, and made no palpable and overriding error in granting summary judgment. The motion judge did not err in exercising his fact-finding powers under R. 20.04(2.1) as the record was sufficient to make a fair and just determination.

En juin 2001, les membres d'un groupe d'investisseurs dirigés par M ont rencontré deux dirigeants de sociétés de placement de même qu'un avocat canadien dans le but de discuter d'une possibilité d'investissement. H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance. C était le dirigeant de F, une société de placement panaméenne. P était l'avocat de H, T et C. Le groupe M a transféré 1,2 million $US au cabinet d'avocats, où cette somme a été mise en commun avec d'autres fonds puis transférée à T. T a alors viré les fonds à une banque étrangère, et l'argent a disparu. Selon H, les fonds de T ont été dérobés.

Le groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats et ils ont présenté des requêtes en jugement sommaire. Le juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H. Les autres points soulevés dans la requête ont été rejetés. H a interjeté appel, et il s'agissait de la première fois que la Cour d'appel appliquait la nouvelle R. 20 des Règles de procédure civile à un jugement sommaire. La Cour d'appel a énoncé un critère préliminaire pour déterminer dans quelles circonstances un juge peut exercer les nouveaux pouvoirs en matière de preuve prévus à la R. 20.04(2.1) des Règles, affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives. La Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux. Toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H. Ce dernier a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Karakatsanis, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Cromwell, Wagner, JJ., souscrivant à son opinion) : La R. 20 a été modifiée en 2010 à la suite de recommandations visant à améliorer l'accès à la justice. Les réformes ont créé une solution de rechange légitime pour trancher et régler les litiges d'ordre juridique. Les modifications ont eu pour effet de modifier le critère applicable aux jugements sommaires en remplaçant la question de savoir si la cause ne « soulève pas de question litigieuse » par celle de savoir si la cause soulève une « véritable question litigieuse nécessitant la tenue d'une instruction », démontrant que la tenue d'un procès ne constitue pas la procédure par défaut. Les nouveaux pouvoirs prévus aux Règles permettent au juge saisi d'une requête d'apprécier la preuve, d'évaluer la crédibilité et de tirer des conclusions raisonnables et d'ordonner la présentation de témoignages oraux.

La Cour d'appel a laissé entendre qu'il est le plus souvent indiqué de rendre un jugement sommaire dans des affaires où les documents occupent une place prépondérante, où il y a peu de témoins et de questions de fait litigieuses, ou encore des affaires dans lesquelles il est possible de compléter le dossier en présentant des témoignages oraux sur des points distincts. Toutefois, il ne s'agit pas d'une règle stricte. Il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'arriver à un résultat juste de manière proportionnée, plus expéditive et moins coûteuse.

La preuve dans le cadre d'une requête en jugement sommaire doit être telle que le juge soit confiant de pouvoir résoudre équitablement le litige, et l'exercice des pouvoirs prévus à la R. 20.04(2.1) et 20.04(2.2) des Règles permet au juge saisi de la requête de procéder à une recherche des faits valable. Bien que les indications suggérées par la Cour d'appel lorsqu'il est possible d'entendre les témoignages oraux d'un nombre restreint de témoins, lorsque la question soulevée a une incidence importante et lorsque cette question est précise et distincte soient utiles, ces règles ne sont pas absolues. Le pouvoir d'ordonner des témoignages oraux devrait être exercé lorsqu'il permet au juge de rendre une décision juste et équitable sur le fond et que son exercice constitue la marche à suivre proportionnée.

La première étape à suivre dans le cadre d'une requête en jugement sommaire en vertu de la R. 20.04 est de décider, sans recourir aux nouveaux pouvoirs en matière de recherche des faits, s'il existe une véritable question litigieuse nécessitant la tenue d'un procès. S'il semble y avoir une véritable question nécessitant la tenue d'un procès, le juge devrait alors déterminer si l'exercice des nouveaux pouvoirs prévus à la R. 20.04(2.1) et (2.2) des Règles permettra d'éviter la tenue d'un procès. Le juge peut exercer ces pouvoirs à son gré, pourvu que leur exercice ne soit pas contraire à l'intérêt de la justice. Ces pouvoirs sont présumés être disponibles, et la décision d'exercer les pouvoirs en matière de recherche des faits ou d'ordonner des témoignages oraux est discrétionnaire.

C'était une action pour fraude civile qui était à l'origine de la présente requête en jugement sommaire. La fraude civile comporte quatre éléments : premièrement, une fausse déclaration du défendeur; deuxièmement, une certaine connaissance de la fausseté de la déclaration de la part du défendeur (connaissance ou insouciance); troisièmement, le fait que la fausse déclaration a amené le demandeur à agir; et quatrièmement, le fait que les actes du demandeur ont entraîné une perte. La Cour d'appel partageait l'avis du juge saisi de la requête que le groupe M avait été amené à investir avec H en raison des propos tenus par H lors de la réunion de 2001. Le juge saisi de la requête a également conclu à l'existence de la connaissance ou de l'insouciance requise quant à la fausseté de la déclaration et a rejeté la thèse invoquée en défense selon laquelle les fonds avaient été dérobés. Il y avait également l'intention de H que ses fausses déclarations incitent le groupe M à agir et, manifestement, le groupe M a subi une perte. Le juge saisi de la requête a eu raison de conclure qu'il n'y avait pas de

question litigieuse nécessitant la tenue d'un procès et n'a pas commis d'erreur manifeste et dominante en rendant un jugement sommaire. Le juge saisi de la requête n'a pas commis d'erreur en exerçant les pouvoirs en matière de recherche des faits que lui confère la R. 20.04(2.1) des Règles, étant donné que le dossier était suffisant pour permettre de rendre une décision juste et équitable.

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APPEAL by defendant from judgment reported at *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), affirming motion judge's decision to grant summary judgment in favour of plaintiff.

POURVOI formé par le défendeur à l'encontre d'un jugement publié à *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), ayant confirmé la décision du juge des requêtes de rendre un jugement sommaire en faveur du demandeur.

***Karakatsanis J.* (McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring):**

1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

3 Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (*Ontario Rules* or Rules) to increase access to justice. This appeal, and its companion, *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8 (S.C.C.), address the proper interpretation of the amended Rule 20 (summary judgment motion).

4 In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

6 As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

7 While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

I. Facts

8 More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital, which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

9 In June 2001, two members of the Mauldin Group met with Cranston, Peebles, and Hryniak, to discuss an investment opportunity.

10 At the end of June 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos's funds, including the funds contributed by the Mauldin Group, were stolen.

11 Beyond a small payment of US$9,600 in February 2002, the Mauldin Group lost its investment.

II. Judicial History

A. Ontario Superior Court of Justice, 2010 ONSC 5490 (Ont. S.C.J.)

12 The Mauldin Group joined with Bruno Appliance and Furniture, Inc. (the appellants in the companion appeal) in an action for civil fraud against Hryniak, Peebles and Cassels Brock. They brought motions for summary judgment, which were heard together.

13 In hearing the motions, the judge used his powers under the new Rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw inferences. He found that the Mauldin Group's money was disbursed by Cassels Brock to Hryniak's company, Tropos, but that there was no evidence to suggest that Tropos had ever set up a trading program. Contrary to the investment strategy that Hryniak had described to the investors, the Mauldin Group's money was placed in an account with the offshore New Savings Bank, and then disappeared. He rejected Hryniak's claim that members of the New Savings Bank

had stolen the Mauldin Group's money.

14 The motion judge concluded that a trial was not required against Hryniak. However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that claim involved factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial. Consequently, he also dismissed the motion for summary judgment against Cassels Brock, as those claims were based on the theory that the firm was vicariously liable for Peebles' conduct.

B. Court of Appeal for Ontario, 2011 ONCA 764, 108 O.R. (3d) 1 (Ont. C.A.)

15 The Court of Appeal simultaneously heard Hryniak's appeal of this matter, the companion *Bruno Appliance* appeal, and three other matters which are not before this Court. This was the first occasion on which the Court of Appeal considered the new Rule 20.

16 The Court of Appeal set out a threshold test for when a motion judge could employ the new evidentiary powers available under Rule 20.04(2.1) to grant summary judgment under Rule 20.04(2)(a). Under this test, the "interest of justice" requires that the new powers be exercised only at trial, unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings on a motion for summary judgment. The motion judge should assess whether the benefits of the trial process, including the opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand, are necessary to fully appreciate the evidence in the case.

17 The Court of Appeal suggested that cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record, are generally not fit for determination in this manner. Conversely, cases driven by documents, with few witnesses, and limited contentious factual issues are appropriate candidates for summary judgment.

18 The Court of Appeal advised motion judges to make use of the power to hear oral evidence, under Rule 20.04(2.2), to hear only from a limited number of witnesses on discrete issues that are determinative of the case.

19 The Court of Appeal concluded that, given its factual complexity and voluminous record, the Mauldin Group's action was the type of action for which a trial is generally required. There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross-claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

20 Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

III. Outline

21 In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

22 Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

IV. Analysis

A. Access to Civil Justice: A Necessary Culture Shift

23 This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

24 However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,[1] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

25 Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

26 In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

29 There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

30 The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **1.04** (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

31 Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes ... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311 (N.L. C.A.), at para. 53).

32 This culture shift requires judges to actively manage the legal process in line with the principle of proportionality.

While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

33 A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. Summary Judgment Motions

34 The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

35 Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

36 Rule 20 was amended in 2010, following the recommendations of the Osborne Report, to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.

37 Early summary judgment rules were quite limited in scope and were available only to plaintiffs with claims based on debt or liquidated damages, where no real defence existed.[5] Summary judgment existed to avoid the waste of a full trial in a clear case.

38 In 1985, the then new Rule 20 extended the availability of summary judgement to both plaintiffs and defendants and broadened the scope of cases that could be disposed of on such a motion. The rules were initially interpreted expansively, in line with the purposes of the rule changes.[6] However, appellate jurisprudence limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: "claims that have no chance of success [are] weeded out at an early stage".[7]

39 The Ontario Government commissioned former Ontario Associate Chief Justice Coulter Osborne Q.C., to consider reforms to make the Ontario civil justice system more accessible and affordable, leading to the report of the Civil Justice Reform Project (the Osborne Report). The Osborne Report concluded that few summary judgment motions were being brought and, if the summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed (p. 35). Among other things, it recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented (pp. 35-36).

40 The report also recommended the adoption of a summary trial procedure similar to that employed in British Columbia (p. 37). This particular recommendation was not adopted, and the legislature made the choice to maintain summary judgment as the accessible procedure.

41 Many of the Osborne Report's recommendations were taken up and implemented in 2010. As noted above, the amendments codify the proportionality principle and provide for efficient adjudication when a conventional trial is not required. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case.

42 Rule 20.04 now reads in part:[8]

> **20.04** . . .
>
> (2) [General] The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

43 The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

44 The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.[9]

45 These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

46 I will first consider when summary judgment can be granted on the basis that there is "no genuine issue requiring a trial" (Rule 20.04(2)(a)). Second, I will discuss when it is against the "interest of justice" for the new fact-finding powers in Rule 20.04(2.1) to be used on a summary judgment motion. Third, I will consider the power to call oral evidence and, finally, I will lay out the process to be followed on a motion for summary judgment.

(1) When is There no Genuine Issue Requiring a Trial?

47 Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

48 The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious

factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

49 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.

50 These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

51 Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

(2) The Interest of Justice

52 The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

53 To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself, "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

54 The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

55 The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

56 While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers — and the purpose of the amendments — would be frustrated.

57 On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and 20.04(2.2) can provide an equally valid, if less extensive, manner of fact finding.

58 This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full

trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

59 In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

60 The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

(3) The Power to Hear Oral Evidence

61 Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

62 The Court of Appeal suggested the motion judge should only exercise this power when

> (1) Oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) Any such issue is narrow and discrete — *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

This is useful guidance to ensure that the hearing of oral evidence does not become unmanageable; however, as the Court of Appeal recognized, these are not absolute rules.

63 This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

64 Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

65 Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

(4) The Roadmap/Approach to a Motion for Summary Judgment

66 On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue

requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

67 Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

68 While summary judgment *must* be granted if there is no genuine issue requiring a trial,[10] the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary.[11] The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

C. Tools to Maximize the Efficiency of a Summary Judgment Motion

(1) Controlling the Scope of a Summary Judgment Motion

69 The *Ontario Rules* and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

70 The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

71 Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

72 I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

73 A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

(2) Salvaging a Failed Summary Judgment Motion

74 Failed, or even partially successful, summary judgment motions add — sometimes astronomically — to costs and delay. However, this risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction.

75 Rule 20.05(1) and (2) provides in part:

> **20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.
>
> (2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just ...

76 Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

77 These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent. In my view, the summary trial model would also be available further to the broad powers granted a judge under Rule 20.05(2).

78 Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout

> saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

79 While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.

D. Standard of Review

80 The Court of Appeal concluded that determining the appropriate test for summary judgment — whether there is a genuine issue requiring a trial — is a legal question, reviewable on a correctness standard, while any factual determinations made by the motions judge will attract deference.

81 In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned, absent palpable and overriding error, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 36.

82 Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding

powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.

83 Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

84 Of course, where the motion judge applies an incorrect principle of law, or errs with regard to a purely legal question, such as the elements that must be proved for the plaintiff to make out her cause of action, the decision will be reviewed on a correctness standard (*Housen v. Nikolaisen*, at para. 8).

E. Did the Motion Judge Err by Granting Summary Judgment?

85 The motion judge granted summary judgment in favour of the Mauldin Group. While the Court of Appeal found that the action should not have been decided by summary judgment, it nevertheless dismissed the appeal. Hryniak argues this constituted "prospective overruling" but, in light of my conclusion that the motion judge was entitled to proceed by summary judgment, I need not consider these submissions further. For the reasons that follow, I am satisfied that the motion judge did not err in granting summary judgment.

(1) The Tort of Civil Fraud

86 The action underlying this motion for summary judgment was one for civil fraud brought against Hryniak, Peebles, and Cassels Brock.

87 As discussed in the companion *Bruno Appliance* appeal, the tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

(2) Was There a Genuine Issue Requiring a Trial?

88 In granting summary judgment to the Mauldin Group against Hryniak, the motion judge did not explicitly address the correct test for civil fraud but, like the Court of Appeal, I am satisfied that his findings support that result.

89 The first element of civil fraud is a false representation by the defendant. The Court of Appeal agreed with the motion judge that "[u]nquestionably, the Mauldin group was induced to invest with Hryniak because of what Hryniak said to Fred Mauldin" at the meeting of June 19, 2001 (at para. 158), and this was not disputed in the appellant's factum.

90 The motion judge found the requisite knowledge or recklessness as to the falsehood of the representation, the second element of civil fraud, based on Hryniak's lack of effort to ensure that the funds would be properly invested and failure to verify that the eventual end-point of the funds, New Savings Bank, was secure. The motion judge also rejected the defence that the funds were stolen, noting Hryniak's feeble efforts to recover the funds, waiting some 15 months to report the apparent theft of US$10.2 million.

91 The motion judge also found an intention on the part of Hryniak that the Mauldin Group would act on his false representations, the third requirement of civil fraud. Hryniak secured a US$76,000 loan for Fred Mauldin and conducted a "test trade", actions which, in the motion judge's view, were "undertaken ... for the purpose of dissuading the Mauldin group from demanding the return of its investment" (para. 113). Moreover, the motion judge detailed Hryniak's central role in the web of deception that caused the Mauldin Group to invest its funds and that dissuaded them from seeking their return for some time after they had been stolen.

92 The final requirement of civil fraud, loss, is clearly present. The Mauldin Group invested US$1.2 million and, but for a small return of US$9,600 in February 2002, lost its investment.

93 The motion judge found no credible evidence to support Hryniak's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. He made no palpable and overriding error in granting summary judgment.

(3) Did the Interest of Justice Preclude the Motion Judge from Using his Powers Under Rule 20.04?

94 The motion judge did not err in exercising his fact-finding powers under Rule 20.04(2.1). He was prepared to sift through the detailed record, and was of the view that sufficient evidence had been presented on all relevant points to allow him to draw the inferences necessary to make dispositive findings under Rule 20. Further, while the amount involved is significant, the issues raised by Hryniak's defence were fairly straightforward. As the Court of Appeal noted, at root, the question turned on whether Hryniak had a legitimate trading program that went awry when the funds were stolen, or whether his program was a sham from the outset (para. 159). The plaintiffs are a group of elderly American investors and, at the return date of the motion, had been deprived of their funds for nearly a decade. The record was sufficient to make a fair and just determination and a timely resolution of the matter was called for. While the motion was complex and expensive, going to trial would have cost even more and taken even longer.

95 Despite the fact that the Mauldin group's claims against Peebles and Cassels Brock had to proceed to trial, there is little reason to believe that granting summary judgment against Hryniak would have a prejudicial impact on the trial of the remaining issues. While the extent of the other defendants' involvement in the fraud requires a trial, that matter is not predetermined by the conclusion that Hryniak clearly was *a* perpetrator of the fraud. The motion judge's findings speak specifically to Hryniak's involvement and neither rely upon, nor are inconsistent with, the liability of others. His findings were clearly supported by the evidence. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

V. Conclusion

96 Accordingly, I would dismiss the appeal, with costs to the respondents.

Appeal dismissed.
Pourvoi rejeté.

Appendix

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RULE 20 SUMMARY JUDGMENT

20.01 [Where Available] (1) [To Plaintiff] A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) [To Defendant] A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

20.02 [Evidence on Motion] (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party

may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

20.03 [Factums Required] (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked.

20.04 [Disposition of Motion] (1) [General] Revoked.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) [Only Genuine Issue Is Question Of Law] Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

(5) [Only Claim Is For An Accounting] Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

20.05 [Where A Trial Is Necessarry] (1) [Powers of Court] Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) [Directions And Terms] If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

(3) [Specified Facts] At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

(4) [Order re Affidavit Evidence] In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

(5) [Order re Experts, Costs] If an order is made under clause (2) (k), each party shall bear his or her own costs.

(6) [Failure To Comply With Order] Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

20.06 [Costs Sanctions For Improper Use Of Rule] The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

20.07 [Effect Of Summary Judgment] A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

20.08 [Stay Of Execution] Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

20.09 [Application To Counterclaims, Crossclaims And Third Party Claim] Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Footnotes

1 For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), or for cases involving certain minority rights (see the Language Rights Support Program).

2 In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top ten countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

3 This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); *Ontario Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312 (Alta. Q.B.), at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371 (N.S. S.C.), at para. 12.

4 Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 ff of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (C.S. Que.). Moreover, s. 165(4) of the Code provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

5 For a thorough review of the history of summary judgment in Ontario, see T. Walsh and L. Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2013* (2013), 419, at pp. 422-32.

6 *Ibid*., at p. 426; for example, see *Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242 (Ont. H.C.).

7 *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.), at para. 10.

8 The full text of Rule 20 is attached as an Appendix.

9 As fully canvassed by the Court of Appeal, the powers in Rule 20.04(2.1) were designed specifically to overrule a number of long-standing appellate decisions that had dramatically restricted the use of the rule; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (Ont. C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

10 Rule 20.04(2): "The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial ...".

11 Rule 20.04(2.1): "In determining ... whether there is a genuine issue requiring a trial ... if the determination is being made by a judge, the judge may exercise any of the following powers ... 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence." Rule 20.04(2.2): "A judge may ... order that oral evidence be presented ...".

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TAB 8

2020 ABCA 343
Alberta Court of Appeal

Hannam v. Medicine Hat School District No. 76

2020 CarswellAlta 1728, 2020 ABCA 343, [2020] A.W.L.D. 3081, [2020] A.W.L.D. 3174, 15 Alta. L.R. (7th) 213, 323 A.C.W.S. (3d) 45, 454 D.L.R. (4th) 202

Angelina Hannam and Her Majesty the Queen in Right of Alberta (Respondents / Plaintiff) and Medicine Hat School District No. 76 (Appellant / Defendant)

Brian O'Ferrall, Thomas W. Wakeling, Kevin Feehan JJ.A.

Heard: September 12, 2019
Judgment: September 25, 2020
Docket: Calgary Appeal 1901-0002-AC

Counsel: R.K. Fischer, for Respondents
N. Peermohamed, for Appellant

Subject: Civil Practice and Procedure; Property; Torts

Related Abridgment Classifications

Civil practice and procedure
XVIII Summary judgment
XVIII.5 Requirement to show no triable issue

Torts
XIX Specific forms of liability
XIX.2 Occupiers' liability
XIX.2.c Particular situations
XIX.2.c.vi Ice and snow

Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue
Plaintiff slipped, fell, and broke her ankle on school sidewalk on winter morning immediately after sidewalk had been sanded by custodian — Plaintiff commenced action against defendant school district in negligence and for breach of Occupiers' Liability Act — Master granted defendant's motion for summary judgment dismissing action finding that plaintiff's claim had no chance of succeeding — Chamber's judge granted plaintiff's appeal from summary dismissal finding that there were conflicting pieces of evidence and trial was necessary to resolve them, and that finding of no negligence on part of defendant was not simple, direct and straightforward — Defendant appealed — Appeal allowed — Summary judgment was appropriate if moving party had proved material facts on balance of probabilities and advanced law that justified its position — Outcome did not have to be obvious, but summary judgment could not be granted if application presented genuine issue requiring trial — Instead of asking whether he could decide facts on balance of probabilities, chambers judge considered whether ultimate disposition if there was trial was obvious, and concluded it was not — Had chambers judge applied correct standard, he would have summarily dismissed plaintiff's action as it was possible to resolve dispute fairly on summary basis, facts and law were not in dispute, and trial would not produce more complete factual record than already existed.

Torts --- Specific forms of liability — Occupiers' liability — Particular situations — Ice and snow
Plaintiff slipped, fell, and broke her ankle on school sidewalk on winter morning immediately after sidewalk had been sanded

by custodian — Plaintiff commenced action against defendant school district in negligence and for breach of Occupiers' Liability Act — Master granted defendant's motion for summary judgment dismissing action finding that plaintiff's claim had no chance of succeeding — Chamber's judge granted plaintiff's appeal from summary dismissal finding that there were conflicting pieces of evidence and trial was necessary to resolve them, and that finding of no negligence on part of defendant was not simple, direct and straightforward — Defendant appealed — Appeal allowed — Had chambers judge applied correct standard, he would have summarily dismissed plaintiff's action as it was possible to resolve dispute fairly on summary basis, facts and law were not in dispute, and trial would not produce more complete factual record than already existed — Defendant was not negligent and discharged its obligations under Act to take such care as in all circumstances was reasonable to see that plaintiff would be reasonably safe while using premises for purpose for which she was permitted to be there — There was nothing more defendant should have done to make sidewalk safer for plaintiff or other users — Plaintiff's case had no merit — Summary judgment dismissing action was appropriate remedy.

After reporting to work on a winter morning, the head custodian of an elementary school in the defendant school district checked the sidewalk to the school's main entrance and found it was not slippery. A couple of hours later, the sidewalk became slippery and, at the request of the principal, the custodian spread sand on the main-entrance sidewalks. Seconds after the custodian sanded the sidewalks, the plaintiff, who had just dropped her daughter off at school, slipped, fell and broke her ankle. The plaintiff commenced an action against the defendant alleging negligence and a breach of the Occupiers' Liability Act, R.S.A. 2000, c. O-4. The defendant applied for summary judgment. The master granted the application finding that the plaintiff's claim had no chance of succeeding. The plaintiff appealed to the Court of Queen's Bench. The chambers judged held that there were conflicting pieces of evidence and that a trial was needed to resolve them. He did not agree that a finding of no negligence on the part of the defendant was so simple, direct and straightforward. He also found a trial was necessary to test the credibility of the defendant's witnesses and to determine why the defendant's own policy was not followed. The defendant appealed to the Alberta Court of Appeal.

Held: The appeal was allowed.

Per Wakeling, Feehan JJ.A.: As articulated by this court in Weir-Jones Technical Services v. Purolater Courier Ltd., 2019 ABCA 49, summary judgment could be granted if the presiding judge was left with sufficient confidence in the record such that he or she was prepared to exercise the judicial discretion to summarily resolve the dispute. If the moving party had proved the material facts on a balance of probabilities and advanced the law that justified the party's position, summary judgment was appropriate. The outcome did not have to be obvious. Summary judgment could not be granted if the application presented a genuine issue requiring trial.

The chambers judge did not have the benefit of the Weir-Jones judgment when he rendered his decision and he did not apply the Weir-Jones standard. Instead of asking whether he could decide the facts on a balance of probabilities, he considered whether the ultimate disposition if there was a trial was obvious, and concluded it was not. Had the chambers judge applied the Weir-Jones standard, he would have summarily dismissed the plaintiff's action. It was possible to fairly resolve the dispute on a summary basis. The facts and the law were not in dispute. A trial would not produce a more complete factual record than already existed. The defendant was not negligent. It discharged it obligations under the Act to take such care as in all the circumstances of the case was reasonable to see that the plaintiff would be reasonably safe while using the premises for the purpose for which she was permitted to be there. There was nothing more the defendant should have done to make its sidewalk safer for the plaintiff or other sidewalk users. The plaintiff's case had no merit. Summary judgment dismissing the action was the appropriate remedy.

Per O'Ferrall J.A. (dissenting): This case was not a refusal to grant summary judgment to a defendant, but rather a refusal to summarily dismiss a claim. The judgment appealed from was not a final judgment, summary or otherwise, but rather a non-decision. Although appealable, such decisions did not comfortably lend themselves to appellate review because what was being reviewed was the trial judge's level of satisfaction as to whether, on a balance of probabilities, and on the basis of a limited record, there was any merit to a claim. It was not for this court to tell a trial judge he or she ought to have been persuaded, except in the clearest of cases. This court's jurisdiction to summarily dismiss a claim which had not been litigated and adjudicated ought to be limited to cases of patently obvious error. Appeals of refusals to grant a plaintiff summary judgment or to grant a defendant summary dismissal ought to be discouraged because they tend to be premature. As no determination had been made, there was no decision to review and typically a sparse record. An appellate court does not ordinarily assess the merits of a claim until the trial judge has completed his or her assessment. The standard of review of decisions dismissing summary judgment or summary dismissal must be very differential and the review should be limited to

assessing whether the chambers judge was unreasonable in concluding that the court required more evidence or more fulsome argument in order to reach a decision on the merits of the claim. The modern approach to summary judgment motions is intended to improve access to justice by empowering trial courts to adjudicate more cases through summary judgment motions, not by compelling them to do so when they find they are unable to make the necessary findings of fact without more evidence. It is also not intended to empower appellate courts to decide the merits of claims at first instance, which is what they were asked to do on appeals from dismissals of summary judgment applications or summary dismissal applications. Only after a trial judge has summarily dismissed a claim or granted summary judgment, can this court safely assess the merits of the claim which have been dismissed or allowed.

In this case, the question was whether the duty of care was breached, and that question engaged the issue of what standard of care was required to discharge the duty of care. That issue was not resolved. The chambers judge was unsure that the standard of care had been met by spreading sand because the school's policy required that the removal of snow and ice should be done by 8:00 a.m. and the school district's policy was that every effort should be made to remove snow and ice, not just sand it, and there was evidence that ice had been on the sidewalk for several days. The chambers judge also found there was conflicting evidence and an issue of whether photographs of the sidewalk, which were not taken on the day of the slip and fall, accurately reflected the state of the sidewalk at the time of the accident. The chambers judge was also of the view that a trial was required to test the credibility of the defendant's witnesses and to determine why the school district's policy was not followed. Having properly instructed himself, the chambers judge did not have sufficient confidence to summarily dismiss the plaintiff's claim. There was no basis on which this Court could allow an appeal of the chambers judge's confidence level.

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Generally — referred to

s. 437c(a)(1) — considered

s. 437c(c) — considered

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s. 9(3)(b) — referred to

Limitations Act, R.S.A. 2000, c. L-12
s. 3(1) — referred to

Occupiers' Liability Act, R.S.A. 2000, c. O-4
Generally — referred to

s. 5 — considered

Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict.), c. 67
Generally — referred to

s. 1 — considered

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Pt. 7 — referred to

Pt. 7, Div. 2 — referred to

Pt. 7, Div. 3 — referred to

R. 1.2(1) — considered

R. 1.2(2)(b) — considered

R. 4.5 — referred to

R. 4.5(1)(b) — considered

R. 4.6 — referred to

R. 7.1(1)(a) — considered

R. 7.1(3)(b) — considered

R. 7.1(3)(c) — considered

R. 7.1(3)(d) — considered

R. 7.2 — considered

R. 7.3 — considered

R. 7.3(1) — considered

R. 14.4(1) — considered

R. 14.5(1)(b) — considered

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Generally — referred to

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R. 159(1) — considered

R. 159(2) — considered

R. 159(3) — considered

R. 162 — considered

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R. 3212 — considered

R. 3212(a) — considered

R. 3212(b) — considered

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R. 13.04(1) — considered

R. 13.04(2) — considered

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R. 1.4(2) — considered

R. 24.2 — considered

R. 24.3 — considered

R. 24.3(1) — considered

R. 24.3(2) — considered

R. 24.4 — considered

R. 24.4(1)(b) — considered

R. 24.5 — considered

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R. 215(1) — considered

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R. 56 — considered

R. 56(a) — considered

R. 56(b) — considered

R. 56(c) — considered

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R. 12.2(1) — considered

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R. 20.03(1) — referred to

R. 20.03(2) — referred to

R. 20.03(2)(a) — considered

R. 20.03(2)(b) — considered

R. 20.03(2)(c) — considered

R. 20.07(1) — considered

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R. 7-5(1) — considered

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Generally — referred to

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R. 20 — considered

R. 20.04(2) — pursuant to

R. 20.04(2)(a) — considered

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

R. 20.06 — considered

R. 76.04(1) — considered

Rules of Civil Procedure, P.E.I. Rules
R. 20.04(1) — considered

Rules of Court, N.B. Reg. 82-73
R. 22.04(1) — considered

R. 22.04(1)-22.04(3) — referred to

R. 22.04(2) — considered

R. 22.04(2)(a) — considered

R. 22.04(2)(b) — considered

R. 22.04(2)(c) — considered

R. 22.04(3) — considered

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R. 18(6) — referred to

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O. 14, R. 1(1) — considered

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R. 176(2) — considered

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Order XIV, R. 1 — referred to

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R. 1 — referred to

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R. 17.01 — considered

R. 17A.03(1) [en. Nfld. Reg. 165/94] — considered

Supreme Court Civil Rules, B.C. Reg. 168/2009
R. 9-6(5)(a) — considered

Rules considered by *Brian O'Ferrall J.A.* (dissenting):

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Generally — referred to

R. 7.3(1)(a) — referred to

R. 7.3(1)(b) — referred to

Treaties considered by *Thomas W. Wakeling, Kevin Feehan JJ.A.*:

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222; E.T.S. no. 5
Article 6 ¶ 1 — considered

APPEAL by defendant from order dismissing its application for summary dismissal of plaintiff's claim.

***Thomas W. Wakeling, Kevin Feehan JJ.A.*:**

I. Introduction

1 *Hryniak v. Mauldin*[1] extols the benefits of summary judgment.[2] This is not the first time Canada's highest court or other leading appellate common law courts have expressly recognized the value summary judgment adds to the civil process. The Supreme Court of Canada did so five years earlier in*Canada (Attorney General) v. Lameman*.[3] The House of Lords,[4] in 1901, the English Court of Appeal,[5] in 2001, and the United States Supreme Court,[6] in 1986, have also recognized that summary judgment is an essential feature of a modern civil process.

2 After the release of *Hryniak* on January 29, 2014 three provinces amended their summary judgment rules to give summary judgment a new and expanded role.[7]

3 In the post *Hryniak* era, appeal courts Manitoba[8] and Nova Scotia[9] acknowledged the advantages a robust summary judgment rule offered but were satisfied *Hryniak* had no effect on the substantive content of their rules.

4 Panels of this Court expressed different opinions on *Hryniak*'s impact in Alberta. Some were convinced that the Supreme Court's strong endorsement of summary judgment compelled a new interpretation of the summary judgment test.[10] Others accorded *Hryniak* no or marginal attention.[11] They were influenced by the fact that the text of the summary judgment rule was exactly the same after January 24, 2014 as it was before January 24, 2014, as were the statutory and common law principles used to interpret legal text.[12]

5 A five-judge panel resolved the controversy. In *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*[13] the Court fashioned a new summary judgment rule that indisputably had much more bite than any of its predecessors. A court

under the new protocol may award summary judgment if the moving party establishes the facts in issue on a balance of probabilities, and demonstrates that there is no genuine issue requiring trial.[14] As a result, Alberta's summary judgment and summary trial protocols share important common features.

6 This appeal gives the Court an opportunity to assess the practical significance of *Weir-Jones*, evaluate its place in historical evolution of summary judgment, and suggest other possible protocols that may allow courts to increase the likelihood that more disputes will be resolved as soon as possible at the least expense without sacrificing the quality of the adjudication and the fairness of the proceeding.

II. Questions Presented

7 This is an appeal against a pre *Weir-Jones* Court of Queen's Bench order dismissing the Medicine Hat School District's application for summary dismissal of Angelina Hannam's slip-and-fall action against it.[15]

8 The Master concluded that the plaintiff had no chance of succeeding[16] and granted summary judgment dismissing the plaintiffs' claims.

9 The chambers judge held that there were "conflicting bits of evidence" and that a trial was needed to resolve them.[17] He stated that he could not "agree that a finding of no negligence on the part of the defendant is so simple, so direct, and so straightforward".[18]

10 What are the elements of summary judgment post *Weir-Jones*?

11 Has the Medicine Hat School District met the elements of the *Weir-Jones* test?

III. Brief Answers

12 The *Weir-Jones* standard sanctions summary judgment if "the presiding judge ... [is] left with sufficient confidence in the ... record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute".[19] More specifically, if the moving party has proved the material facts on a balance of probabilities and advances the law that vindicates the moving party's position, summary judgment is appropriate. The outcome does not have to be obvious.[20]

13 Summary judgment cannot be granted if the application presents "a genuine issue requiring a trial."[21]

14 This case is ideally suited for summary disposition.

15 It can be fairly resolved at this stage of the litigation.

16 There are no material facts in dispute. Counsel for the Medicine Hat School District conceded for the purpose of this application that the sidewalk was slippery before the school custodian sanded it. Ms. Hannam slipped and fell on a school sidewalk moments after the school custodian had sanded it. She was walking behind the school custodian while he was spreading sand.

17 The chambers judge did not apply the *Weir-Jones* standard. He, in essence, asked if the outcome was obvious.

18 If he had applied *Weir-Jones*, he would have summarily dismissed the plaintiff's action.

19 There is no genuine issue to be tried.

20 The Medicine Hat School District was not negligent. It discharged its obligations under the *Occupiers' Liability Act*[22] "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there".

21 There was nothing more the Medicine Hat School District should have done to make its sidewalk safe for visitors.

Alberta's winters present conditions that present risks to its inhabitants. Albertans can mitigate those risks but never eliminate them. Every Albertan knows this.

22 A summary disposition on this record is just and fair.

23 We allow the appeal and reinstate Master Robertson's order summarily dismissing the action of Ms. Hannam and Her Majesty the Queen in Right of Alberta.

IV. Statement of Facts

A. The Slip-and-Fall Incident

24 At 6:30 a.m. on January 17, 2013 the head custodian of the River Heights Elementary School in Medicine Hat reported for duty.

25 He first checked the condition of the sidewalk to the school's main entrance and concluded it was not slippery.

26 The sidewalks became slippery a couple of hours later.[23] This condition no doubt was attributable to the fact that the air temperature was around zero and warming up.[24]

27 At the request of the school's vice-principal, the school custodian spread sand on the main-entrance sidewalks.[25]

28 Seconds after the school custodian had sanded the sidewalks connecting the school's entrance and the adjacent city street, Ms. Hannam slipped, fell, and broke her right ankle.[26] This occurred at approximately 8:45 a.m.

29 Ms. Hannam had just dropped off her daughter who attended kindergarten at River Heights Elementary School.[27]

30 There was no evidence about the condition of the sidewalk that suggested the use of an ice chipper or ice melt would have improved the quality of the sidewalk surface for walkers.[28]

B. The Action

31 On January 15, 2015, just before the two-year limitation period under the *Limitations Act*[29] was about to expire, Ms. Hannam commenced an action against the Medicine Hat School District[30] alleging negligence and breach of the *Occupiers' Liability Act*.[31]

C. The Summary Dismissal Application

1. The Application

32 On September 5, 2017 the Medicine Hat School District applied for summary judgment.[32]

2. Master Robertson's Decision

33 Master Robertson granted the application:[33]

> At the end of the day, ... the law is focused on ... occupiers taking reasonable steps to make the premises safe. The case law is replete with comments about how occupiers are not insurers .... [T]he evidence is clear that ... [the custodian] had sanded, and that she slipped .... [T]he question is not whether it was impossible to slip given the amount of sand he put down, but whether what he was doing was reasonable.
>
> . . . . .
>
> I don't see any negligence here. I don't see any breach of the *Occupiers Liability Act*. ... I just don't see any evidence to justify a finding of negligence that warrants sending this case to trial. The ... essential question ... [is] whether there is anything really to send to trial, to the extent that there are conflicting bits of evidence here, it's not material, it would not

change the outcome of the trial ....

3. Justice Miller's Decision

34 Ms. Hannam appealed to the Court of Queen's Bench.[34]

35 Justice Miller, in reasons delivered December 7, 2018, allowed Ms. Hannam's appeal:[35]

> There is not clear evidence before me, nor was there before Master Robertson, that there was no negligence. The master ... makes reference to "conflicting bits of evidence" and that the photograph "doesn't suggest that this was actually icy."
>
> With respect, if there is conflicting bits of evidence, that is what I think a trial is designed to determine. ...
>
> . . . . .
>
> ... [I]n this case, I cannot agree that a finding of no negligence on the part of the defendant is so simple, so direct and so straightforward.
>
> . . . . .
>
> The solution, in my view, is to put that issue to trial to test the credibility of the defendant's witnesses and to determine why the defendant's own policy was not followed and allow a trial judge to determine if the defendant is in fact negligent.

4. Appeal to the Court of Appeal

36 The Medicine Hat School District appeals to this Court.[36]

V. Relevant Statutory Provisions

A. Alberta Rules of Court

1. Current Rules

37 Rules 7.2 and 7.3 of the *Alberta Rules of Court*[37] read as follows:

> 7.2 On application, the Court may at any time in an action give judgment or an order to which an applicant is entitled when
>
> (a) admissions of fact are made in a pleading or otherwise, or
>
> (b) the only evidence consists of records and an affidavit is sufficient to prove the authenticity of the records in which the evidence is contained.
>
> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is *no defence to a claim* or part of it;
>
> (b) there is *no merit* to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

(a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;

(b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;

(c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

2. Rules in Effect from June 19, 1986 to October 31, 2010

38 Rules 159 and 162 of the previous iteration of the *Alberta Rules of Court*,[38] in force before November 1, 2010, are as follows:

159(1) In any action in which a defence has been filed, the plaintiff may, on the ground that there is no defence to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for judgment on an affidavit made by him or some other person who can swear positively to the facts, verifying the claim or part of the claim and stating that in the deponent's belief there is no genuine issue to be tried or that the only genuine issue is as to amount.

(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.

. . . . .

(3) On hearing the motion, if the court is satisfied that *there is no genuine issue for trial* with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

. . . . .

162 At any stage of the proceedings the court may, upon application, give any judgment to which the applicant may be entitled when

(a) admissions of fact have been made on the pleadings or otherwise, or

(b) the only evidence consists of documents and such affidavits as are sufficient to prove their execution or identity.

3. Rules in Effect from January 1, 1969 to June 18, 1986

39 Rule 159 was in this form from January 1, 1969 to June 18, 1986:[39]

159.(1) In any action in which a defence has been filed the plaintiff may, on the grounds that there is no defence to a claim, or a particular part of a claim, or there is no defence to such a claim or part of a claim except as to amount, apply to the court for judgment on an affidavit made by him or some other person who can swear positively to the facts, verifying the claim or part of the claim, and stating that in his belief the defendant has no defence to that claim or part of the claim, or that the defence is to amount only.

(2) Upon the application, unless the defendant, by affidavit or otherwise, satisfies the court that he has a good defence on the merits, or that there ought, for some other reason, to be a trial of the claim or the part of the claim, the court may direct such judgment for the plaintiff as he may be entitled to.

B. Comparable Summary Judgment Provisions for England and Wales

40 Rule 24.2 of the *The Civil Procedure Rules 1998* is the counterpart summary judgment rule for England and Wales:[40]

> 24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if —
>
> (a) it considers that —
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other reason why the case or issue should be disposed of at a trial.
>
> 24.3(1) The court may give summary judgment against a claimant in any type of proceedings.
>
> (2) The court may give summary judgment against a defendant in any type of proceedings except —
>
> (a) proceedings for possession of residential premises ...; and
>
> (b) proceedings for an admiralty claim in rem.
>
> 24.4(1) A claimant may not apply for summary judgment until the defendant against whom the application is made has filed —
>
> (a) an acknowledgment of service; or
>
> (b) a defence,
>
> unless —
>
> (i) the court gives permission; or
>
> (ii) a practice direction provides otherwise.

C. Comparable American Summary Judgment Provisions

1. Federal Rules of Civil Procedure

41 Rule 56 of the *Federal Rules of Civil Procedure*[41] was in this form as of March 26, 1986. This is the date the United States Supreme Court released *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*,[42] the first of the three 1986 landmark summary judgment cases:

> **Rule 56. Summary Judgment**
>
> For the Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

> For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> Motion and Proceedings Therein. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to the interrogations, and admissions in file, together with the affidavits, if any, *show that there is no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law.
>
> Case Not Fully Adjudicated on Motion. If on motions under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.
>
> Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. ... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

42 The current version of Rule 56 is in this form:[43]

> **Rule 56 Summary Judgment**
>
> (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defence — or the part of each claim or defence — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is *no genuine dispute* as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.
>
> (b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

2. California

43 The relevant part of California's *Code of Civil Procedure*[44] is set out below:

> **Title 6 of the Pleadings in Civil Actions**
>
> ***Chapter 5. Summary Judgments and Motions for Judgment on the Pleadings***
>
> 437c. (a)(1) A party may move for summary judgment in an action or proceedings if it is contended that *the action has no merit or that there is no defense to the action or proceeding*. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court with or without notice and upon good cause shown, may direct.

. . . . .

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is *no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law*. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact.

3. New York

44 The important features of rule 3212 of New York's *Civil Practise Law and Rules*[45] follow:

Rule 3212. Motion for summary judgment

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined ....

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. *The affidavit shall ... show that there is no defense to the cause of action or that the cause of action or defense has no merit.* ... The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. ...

D. Occupiers' Liability Act

45 Section 5 of the *Occupiers' Liability Act*[46] states as follows:

An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.

VI. Analysis

A. Summary Judgment Is a Valuable Option in Modern Civil Procedure Systems

1. Conventional Trials Are Expensive and Plagued by Delay

46 The value[47] of summary judgment and summary trial as dispute resolution processes increases as the amount of time[48] that separates the commencement of actions and their final trial resolutions and the costs associated with conventional trials escalates.[49] Business dislikes uncertainty that litigation delay inevitably introduces.[50] Uncertainty undermines the reliability of transactions and imperils investment returns.[51] Most litigants crave predictability,[52] finality and abhor delay.[53] The financial and emotional costs of unresolved disputes may be debilitating.[54] Prolonged delays also undermine public confidence in the administration of justice[55] and encourage disputants to utilize private mechanisms to resolve their differences.[56] An 1885 American Bar Association report laments that "[a]lready we see arbitration committees in large departments of business supplanting the courts".[57]

47 This has been the case in England and the United States for a very long time.

48 It is certainly true in Alberta today and it has been for many years. Currently the amount of time that separates the date an action is commenced in Alberta and the date it is resolved by trial is trending upwards.[58] Until this trend is reversed, Alberta litigants will have a high interest in having access to a workable expedited dispute resolution procedure — summary judgment or summary trial. Or they will continue to take their commercial business elsewhere — private dispute resolution.

2. Alberta's Response to the Undue Delay and High Cost Associated with Conventional Trials

49 The *Alberta Rules of Court*[59] that came into force on November 1, 2010 contained features that Lord Griffiths probably had in mind when he asserted that the civil process required a major overhaul.[60]

50 The foundational rules collected in Part 1 exhort the court and litigants to search for a dispute resolution process that best suits the features of an action and that "facilitate the quickest means of resolving a claim at the least expense".[61]

51 Part 7 of the *Alberta Rules of Court*[62] gives the Court of Queen's Bench the tools needed to fairly resolve disputes that do not require the parties and the court to devote the time and the resources associated with resolution by a traditional trial.

52 In *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*,[63] this Court resolved a conflict between two schools of thought and identified the core elements of the summary judgment protocol.

53 To appreciate the full significance of this Court's new summary judgment protocol, it is necessary to sketch the historical path that summary judgment has followed in England, United States and the common law jurisdictions.

3. Criteria To Evaluate the Merits of a Summary Judgment Protocol

54 The utility of summary judgment is a function of how its components measure against five distinct elements.

55 The first element identifies who may apply for summary judgment. Rulemakers have three options — only the plaintiff,[64] only the defendant[65] or both.[66] If the rulemakers allow either the plaintiff or the defendant to apply for summary judgment, they maximize the likelihood summary judgment will be sought in appropriate cases.[67]

56 The second element is the population of the set of eligible actions. Set size impacts the effect summary judgment will have on any civil procedure system. The first summary judgment protocol was available only for actions enforcing bills of exchange or promissory notes.[68] A protocol that may be invoked regardless of the nature of the action obviously increases the potential impact summary judgment may have on the volume of actions that are ultimately resolved by resorting to the conventional trial stream.[69]

57 The third element records the procedure that an applicant must navigate to gain access to the summary judgment adjudication. A protocol that can be accessed early in the process[70] and is easy to complete — costs the parties less[71] — will increase the number of actions that are resolved by summary judgment and improve the case-closure ratio between summary judgment and conventional trial.[72] Suppose a rule denied access to the summary judgment protocol until the parties have completed discovery. This might deter some litigants from applying for summary judgment.[73]

58 The fourth element focuses on the necessary disparity between the strength of the moving and nonmoving parties' cases in order to grant summary judgment. Summary judgment is less likely to be invoked if the degree of disparity between the strength of the moving parties' position must be at its greatest — the nonmoving party has no chance of success.[74] For example, Judge Jerome Frank, of the Second Circuit Court of Appeals and an opponent of summary judgment,[75] favored the maximum degree of disparity: "We ... suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the *slightest doubt* as to the facts".[76] Some courts would grant summary judgment only if the disparity between the strength of the two parties' cases was so marked that the result was obvious.[77] If a rulemaker adjusts the tipping point so that the requisite degree of disparity is less, the number of actions resolved by the summary judgment methodology should go up.[78]

59 The fifth element measures access to an appeal court. May a party only appeal if summary judgment was granted? Or may a party also appeal if summary judgment was not granted? Obviously, a protocol that allows appeals against orders

granting summary judgment but not orders refusing summary judgment is a barrier undermining the utility of the summary judgment methodology.[79]

B. Historical Development of the Summary Judgment Process

1. Europe

60 The attraction of a civil process that is simpler and can be navigated in less time and at less expense than the ordinary mechanism for the resolution of civil disputes can be traced to Roman law and its middle ages progeny. Professor Millar of Northwestern University provides this historical account:[80]

> The term "summary" as applied to civil procedure had its origin in the *summatim cognoscere* of the Roman Law. In the late Middle Ages it was applied by the Italian jurists to that simplified and abbreviated form of procedure prescribed by the decretal *Saepe contingit* (1306) of Pope Clement V .... [T]he term summary became firmly established in Continental usage as applicable to ... [the procedure] which differed from the ordinary form only in its elements of simplicity and abridgement ....

2. England

61 In 1855, responding to pressure from English merchants,[81] Parliament passed the *Summary Procedure on Bills of Exchange Act, 1855*.[82] This enactment allowed the holders of negotiable instruments who had commenced an action against the defaulting promisor to apply for summary judgment.[83] Professor Sunderland, of the University of Michigan, in a 1926 article entitled "An American Appraisal of English Procedure",[84] expressed his admiration for this significant English contribution to civil procedure:

> Summary judgment procedure, in essence, is nothing but a process for the prompt collection of [uncontroverted] debts. ...
>
> The creditor issues a summons with a description of the debt endorsed upon it, files an affidavit of the truth of his claim and of his belief that there is no defense, and upon that showing, without pleadings and the aid of counsel, he may bring the debtor before a High Court master on four days' notice to show cause why a summary judgment should not be forthwith rendered against him. The burden is thus placed on the debtor to satisfy the master, by convincing proofs, that he ought to be given the right to litigate the claim. ... The masters want solid assurances and sham defences are ruthlessly rejected. Under the skillful hands of the masters these cases are disposed of very rapidly, five or ten minutes are usually enough. Very large judgments, running into thousands and even millions of dollars, are constantly being rendered in this summary way.

62 Within twenty years, Parliament substantially expanded the types of claims for which a plaintiff[85] could apply for summary judgment. In 1875, with the passage of the *Judicature Act, 1875*[86] and the introduction of the *Rules of Court*,[87] the plaintiffs seeking

> to recover a debt or liquidated demand in money payable by the defendant ... arising upon a contract ... as for instance, on a bill of exchange, promissory note, cheque or other simple contract debt or on a bond or contract under seal for the payment of a liquidated amount of money, or on a statute where the sum sought ... is a fixed sum of money ... or on a guaranty ... where the claim against the principal is in respect to such debt or liquidated demand, bill, cheque or note, or on a trust

was eligible to apply for summary judgment.

63 This innovation was well received.

64 Professor Sunderland reported data that confirms the popularity of the summary judgment innovation:[88]

> The immense value of the practice is indicated by its wide use. In the year 1924, for example, there were 6,773 summary judgments rendered by the masters of the King's Bench Division, as compared with 1,546 judgments entered by the judges after trial of issues. That means that by this device the trial dockets were relieved of 80 percent of the cases which would otherwise have come before the courts for formal trial, and that claimants in all these cases got their judgments in as many days as it would have required months through ordinary litigation in the courts.

65 A 1933 amendment to the *Rules of the Supreme Court, 1883*[89] dramatically expanded the class of plaintiffs for whom summary judgment was an option.[90]

66 The Solicitor's Journal described the 1933 amendment as "the most sweeping changes in practice yet attempted by those responsible for reforming High Court procedure".[91] It described the new rule this way:[92]

> By an amendment of Ord. 3, r. 6, the practice as to special endorsement of the writ of summons is extended to all actions in the King's Bench Division, except actions for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise, or actions in which fraud is alleged by the plaintiff.
>
> The effect of bringing all these actions within the scope of Ord. 14, r. 1 ... is almost revolutionary. In all King's Bench actions, except those mentioned alone, it will only be necessary for a plaintiff to swear that to the best of his knowledge and belief there is no defence to the action ... to bring the merits of the action under the consideration of the Master for him to decide whether there is a *bona fide* defence.

67 Defendants were precluded from invoking this procedure until April 26, 1999 when *The Civil Procedure Rules 1998*[93] came into force. Under previous regimes only the plaintiff could apply for summary judgment.[94] Rule 24.2 of *The Civil Procedure Rule 1998* authorizes the court to give summary judgment against a claimant or defendant if "the claimant has no real prospect of succeeding on the claim ... or ... [the] defendant has no real prospect of successfully defending the claim ... and ... there is no other reason why the case or issue should be disposed of at trial".

68 After the effective date of *The Civil Procedure Rules 1998*, the court could grant a defendant summary judgment against a plaintiff "in any type of proceedings".[95] There were still some limitations in place if a plaintiff was the applicant.[96]

69 English courts currently grant summary judgment if the outcome is obvious. Professor Zuckerman of Oxford University summarizes the applicable law: "English law has evolved a summary judgment procedure for enabling litigants with a clear and unanswerable case to obtain judgment without having to negotiate the normal procedural hurdles".[97]

70 This has been the English law since Parliament passed the *Summary Procedure on Bills of Exchange Act, 1855*.[98]

71 Judges have said so in cases from each of the nineteenth,[99] twentieth[100] and twenty-first[101] centuries.

72 England fares very well on the criteria used to measure the merits of a summary judgment protocol. Either a plaintiff or a defendant may apply for summary judgment.[102] There is no restriction on the type of action that may be the subject of a summary judgment application if the defendant is the applicant.[103] Some minor restrictions apply if the plaintiff is the applicant.[104] The summary judgment procedure is relatively easy to access. Unless the court grants permission to apply earlier, a plaintiff must wait until the defendant has filed an acknowledgment of service or a defence.[105] The procedural demands imposed on the parties are insignificant.[106] The standard is that the applicant's claim is so much stronger than the respondent's that the ultimate trial outcome is obvious.[107]

73 The early English experience with summary judgment greatly influenced American civil procedure reforms at both the state and federal levels.[108]

3. United States of America

74 By the end of the first quarter of the twentieth century, many American states had adopted the key features of the early

English summary judgment model — only the plaintiff could apply for summary judgment and the type of actions eligible for the process were limited.[109] For example, rule 113 of New York's *Rules of Civil Practice* came into force on October 1, 1921:

> Rule 113. Summary Judgment — When an answer is served in an action to recover a debt or liquidated demand arising,
>
> 1. on a contract, express or implied, sealed or not sealed; or
>
> 2. on a judgment for a stated sum;
>
> the answer may be struck out and judgment entered thereon on motion, and the affidavit of the plaintiff or any other person having knowledge of the facts, verifying the cause of action and stating the amount claimed, and his belief that there is no defence to the action; unless the defendant by affidavit, or other proof, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.

75 New York litigants embraced this new initiative.[110] In short order the rule was amended to expand the type of actions covered and to allow defendants, as well as plaintiffs, to apply for summary judgment.[111] This option was not available for defendants in any province for some time — British Columbia until 1977,[112] Ontario until 1985,[113] Alberta in 1986[114] — and in England until 1999.[115] New York, as far as we can tell, was the first jurisdiction in the common law world to do this.

76 In 1934, the same year Congress passed the *Rules Enabling Act*[116] and kickstarted the process[117] leading to the adoption on September 16, 1938 of the *Federal Rules of Civil Procedure*,[118] the New York Commission on the Administration of Justice recommended that summary judgment be available "in any action".[119]

77 The positive New York experience caused some academics and practitioners who participated in the process leading to the adoption of the *Federal Rules of Civil Procedure* to support a robust summary judgment protocol.[120] In a 1936 speech at the annual meeting of the American Bar Association, Martin Conboy, a senior member of the New York Bar, stated that

> [t]he purpose of summary judgment is to enable a party who has an *undeniable* cause of action or defence to be freed from the delays involved in sham claims or defenses presented by his adversary and from the expense and inconvenience of a trial. The effect of the [proposed] rule is to enable the Court to find in advance that there is no issue of fact which necessitates a trial.[121]

78 The proponents of a summary judgment rule with teeth carried the day.

79 Rule 56 of the *Federal Rules of Civil Procedure*,[122] in force effective September 16, 1938, "extended the applicability of ... [summary judgment] to all cases, including those arising in equity, and to all parties"[123] and allowed both plaintiffs and defendants to apply for summary judgment.

80 The key portion of the rule as originally enacted declared that "judgment shall be rendered forthwith if ... there is *no genuine issue as to any material fact* and the moving party is entitled to judgment as a matter of law".[124]

81 Most Canadian rules of court have adopted the "no genuine issue" concept as a determinant for summary judgment.[125]

82 The promise Rule 56's drafters saw in their work was not fulfilled in the close to fifty-year period following its effective date.[126] In 1984 Judge Schwarzer of the United States District Court for the Northern District of California offered this thoughtful explanation for its unfulfilled promise:[127]

> The summary judgment procedure under Rule 56 is plagued by confusion and uncertainty. It suffers from misuse by those lawyers who insist on making a motion in the face of obvious fact issues; from neglect by others who, fearful of judicial hostility to the procedure, refrain from moving even where summary judgment would be appropriate; and from the failure of trial and appellate courts to define clearly what is a genuine issue of material fact.
>
> . . . . .
>
> ... Rule 56 has frequently been misinterpreted and misapplied because the courts have failed to develop a principled analysis for summary judgment. ... Discussions of summary judgment generally consist of formalistic rhetoric and often reflect a hostility toward summary procedures, an inclination toward sparing application of the rule, and a commitment

> to resolve all doubts against the moving party.
>
> The chilling effect of this approach to summary judgment is reinforced by a perception that summary judgments suffer a disproportionately high rate of reversal. The reported decisions tend to present a distorted picture; cases in which the procedure is used properly and successfully are less likely to result in appeals and, if appealed, in reported opinions. This has contributed to the view that summary judgment is disfavored and therefore risky.
>
> This is a regrettable state of affairs, frustrating the intent of those who drafted Rule 56 and of the Supreme Court and Congress which adopted it to further the efficient and economical resolution of issues not requiring an evidentiary trial. It has particularly unfortunate consequences in this time of high litigation costs and heavily burdened court dockets. Public demand for greater efficiency and economy, which is served by early disposition of *baseless* claims and defenses, is insistent and well-founded and has led to widespread efforts to find alternative means of dispute resolution.

83 Much changed in 1986.

84 That year the Supreme Court released three judgments — *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*,[128] *Celotex Corp. v. Catrett*,[129] and *Anderson v. Liberty Lobby, Inc.*[130] — that reinvigorated Rule 56 and accorded summary judgment the role its drafters envisaged it would play — the removal from the litigation stream of actions the outcomes of which is not in doubt.

85 Chief Justice Rehnquist, in *Celotex Corp. v. Catrett*,[131] clearly stated that summary judgment is a sound procedural protocol: “The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action’”.

86 In *Celotex Corp. v. Catrett* the Supreme Court upheld a District Court order dismissing Ms. Catrett’s complaint against thirteen corporate defendants whose asbestos products, she alleged, caused her husband’s death.[132] Ms. Catrett, when answering interrogatories, was unable to state when and where her late husband had been exposed to Celotex’s asbestos products or identify any person who could testify that he had been. The District of Columbia Court of Appeals reversed,[133] holding that Celotex could not succeed unless it led evidence negating an essential element of the nonmoving party’s claim. It refused to allow Celotex to rely on Ms. Catrett’s interrogatory answers to buttress its case. The Court of Appeals’ position greatly impaired the utility of summary judgment. Chief Justice Rehnquist, writing for the majority, explained why the Supreme Court disagreed:[134]

> [T]he position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56(c), summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue to any material fact and that the moving party is entitled to a judgment as a matter of law”. In our view, the plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact”, since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.

87 The Supreme Court released its opinion in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*[135] three months before the landmark *Celotex* decision came out. *Matsushita Electric* presaged the new era *Celotex* was about to introduce.[136] The Supreme Court upheld the summary dismissal of a price-fixing action by American television manufacturers against their Japanese counterparts.[137] This was a bold move. The evidence was voluminous and required a solid understanding of the economics of price-fixing.[138] But this did not prevent the Supreme Court from concluding that on the evidence brought to its attention, no rational trier of fact could conclude that the alleged conspiracy existed.[139] In short, the Supreme Court held that the outcome was obvious — the nonmoving plaintiffs could not succeed.

88 *Anderson v. Liberty Lobby, Inc.*,[140] published the same day as *Celotex*, also emboldened federal courts responsible for applying Rule 56 to grant the moving party summary judgment if there was a marked disparity between the strength of the position of the moving and nonmoving parties. This was a libel action commenced by a public figure against a publisher. Under the *New York Times Co. v. Sullivan* [376 U.S. 254 (U.S. Ala. S.C. 1964)] doctrine, a public official or public figure must prove with convincing clarity — a higher standard than the normal civil standard of persuasion — that the defendant knew the alleged defamatory statements were false or acted with reckless disregard for the truth of the contested statement. The plaintiff led no evidence that the publisher acted with malice. The Supreme Court reversed the Court of Appeals for the District of Columbia and granted the defendant publisher summary judgment.

89 The Supreme Court affirmed a number of important propositions.

90 First, summary judgment is appropriate if there is a marked difference in the strength of the cases. Justice White, writing for the majority, favored this test — "is [the case] ... so one-sided that one party must prevail as a matter of law".[141] But, the moving party does not have to convince the court that its position is so strong that the nonmoving party cannot possibly prevail.[142]

91 Second, if a defendant moves for summary judgment and the plaintiff presents only a "scintilla of evidence"[143] that would not survive a motion for a directed verdict — assuming the evidence led by the plaintiff to be true, no reasonable jury could return a verdict in favor of the nonmoving party.

92 Third, summary judgment is not appropriate if the nonmoving party presents evidence that if believed by the jury could cause it to render a verdict in favor of the nonmoving party.[144] Justice White said this: "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether ... there are any genuine factual issues that properly can be resolved only be a finder of fact because they may reasonably be resolved in favor of either party".[145]

93 After 1985 there was a dramatic decline in the number of trials conducted by the federal courts on an annual basis and the proportion of actions disposed of by trial. Professor Galanter reports that from 1986 to 2004 "the number of trials in federal court has dropped by more than 60 percent and the portion of cases disposed of by trial has fallen from 4.7 percent to 1.8 percent".[146]

94 What impact, if any, did the Supreme Court's endorsement of summary judgment as a practical and desirable dispute resolution process have on this new litigation landscape?

95 Professor Redish ventures this opinion:[147]

> While it is possible that the temporal connection between the Supreme Court's significant expansion of the availability of summary judgment and the dramatic drop in federal trials is nothing more than a coincidence, common sense suggests otherwise. ... Because the very purpose of summary judgment is to avoid unnecessary trials, one need not be a trained logician to conclude that an increase in the availability of summary judgments will naturally have a corresponding negative impact on the number of trials.

96 The existence of such a correlation would not surprise us. We would have expected that the introduction of a workable summary judgment protocol would reduce the absolute number of trials and decrease the ratio of actions resolved by conventional trial as opposed to by summary judgment. This supposition does not preclude the likelihood that other factors have also contributed to the decline of federal trials.[148]

97 Rule 56 of the *Federal Rules of Civil Procedure* scores very high on the five criteria adopted to evaluate different summary judgment methodologies. Either a plaintiff or a defendant may be the beneficiary of summary judgment. There is no limitation whatsoever on the kind of action that may be disposed of by summary judgment. It can be accessed very early in the process and is not difficult. The standard is the generally accepted test in the common law world — does the nonmoving party have little chance of success? And the losing party can appeal. It does not matter whether the appellant complains that summary judgment should not have been granted or that it should have been created.

4. Alberta

a. Pre November 1, 2010

98 On June 19, 1986 an Alberta regulation[149] introduced a new summary judgment rule:

> 159(1) In any action in which a defence has been filed, the plaintiff may, on the ground that there is *no defence to a claim* or part of a claim or that the only genuine issue is as to amount, apply to the court for judgment on an affidavit made by him or some other person who can swear positively to the facts, verifying the claim or part of the claim and stating that in the deponent's belief there is no issue to be tried or that the only genuine issue is as to amount.
>
> (2) A defendant may, after delivering a statement of defence, on the ground that there is *no merit to a claim* or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.
>
> (3) On hearing the motion, if the court is satisfied that there is *no genuine issue for trial* with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

99 The 1986 rule displayed three noteworthy features.

100 First, it allowed either a plaintiff or a defendant to apply for summary judgment. In doing so, it followed Rule 56 of the United States' *Federal Rules of Civil Procedure*[150] adopted on September 16, 1938. This was not a feature of the English rules until *The Civil Procedure Rules 1998*[151] came into force on April 26, 1999. The previous version of Rule 159, in force from January 1, 1969 to June 18, 1986 did not bestow this option on a defendant.[152]

101 Second, Rule 159 placed no restrictions on the types of actions that could be the subject of summary judgment. Again, this was a feature of Rule 56 of the *Federal Rules of Civil Procedure*. The English civil procedure rules had a limitation provision until April 26, 1999 when *The Civil Procedure Rules 1998* came into force.

102 Third, the new Alberta rule adopted the summary judgment standard embedded in Rule 56(c) of the American *Federal Rules of Civil Procedure* — a court may grant summary judgment if "there is no genuine issue as to any material fact".[153]

103 The links to the *Federal Rules of Civil Procedure*[154] are easy to demonstrate. Here are the key parts of Rule 56, as it existed on June 18, 1986:

> **Rule 56. Summary Judgment**
>
> (a) For Claimant. A party seeking to recover upon a claim ... or to obtain a declaratory judgment may ... move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For the Defending Party. A party against whom a claim ... is asserted or a declaratory judgment is sought may ... move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogations, and admissions on file, together with the affidavits, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law.

104 Equally obvious is the magnitude of the differences between Order 14 of England's *Rules of the Supreme Court 1965*[155] and Alberta's 1986 summary judgment rule. The most important parts of Order 14 are set out below:

> 1(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has *no defence to a claim* included in the writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
>
> (2) Subject to paragraph (3) this rule applies to every action begun by writ in the Queen's Bench Division or the Chancery Division begun by a writ other than one which includes —
>
> > (a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, or
> >
> > (b) a claim by the plaintiff based on an allegation of fraud.
>
> . . . . .
>
> (3) This Order shall not apply to an action to which Order 86 applies.[156]

105 *Canada (Attorney General) v. Lameman*[157] was the leading summary judgment case in the period commencing June 19, 1986 and ending October 31, 2010. The Supreme Court, in a unanimous judgment, stated that

> [t]he summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have *no chance of success* from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have *no chance of success* be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
>
> For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "*no genuine issue of material fact requiring trial*".

106 In other words, there is "no genuine issue of material fact requiring trial" if a nonmoving party's position has "no chance of success".[158]

107 This insistence that summary judgment was designed to remove claims and defences that had little chance to succeed from the litigation stream was consistent with Alberta,[159] Canadian,[160] English,[161] Australian,[162] New Zealand,[163] Hong Kong[164] and American[165] jurisprudence.

108 Rule 159 was in effect until November 1, 2010 when the current *Alberta Rules of Court*[166] were introduced.

b. November 1, 2010 to January 23, 2014

109 The Rules Project General Rewrite Committee, in its Consultation Memorandum No. 12.12 noted that "Alberta has the toughest [summary judgment] test in Canada ... — 'beyond a reasonable doubt'" and recommended that this stringent standard be maintained.[167] It stated "that the test for summary judgment ... [should] remain as it is" and "that the current (or similar wording) of the test ... [should] be retained".[168]

110 The Alberta Rules of Court Project produced no other material on this topic after it released Consultation Memorandum No. 12.12.

111 On November 1, 2010 the current summary judgment rule came into force. Rule 7.3[169] reads, in part:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> > (a) there is *no defence* to a claim or part of it;
> >
> > (b) there is *no merit* to a claim or part of it;

> (c) the only real issue is the amount to be awarded.
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.
>
> (3) If the application is successful the Court may, with respect to all or part of the claim ... do one or more of the following:
>
> (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount ....

112 Rule 7.3 is substantially the same as its predecessor Rule 159.[170]

113 First, both rules allow a court to grant summary judgment to either a plaintiff or a defendant.

114 Second, both rules place no restriction on the kind of actions that may be subject of summary judgment.

115 Third, both rules allow an applicant to file a summary judgment application very early in the civil process. Rule 7(2) states that an application may be made "at any time". Rule 159 stipulates that no application may be made until the defendant has filed a defence. This is not a significant difference.

116 Both court rules utilize the same benchmark for identifying when summary judgment is appropriate.[171] Summary judgment is available if the action went to trial the result would not be in doubt.

117 For some unknown reason, the new version deleted the central component of Rule 159. Gone was Rule 159(3), the provision that expressly stated the summary-judgment standard: "On hearing the motion, if a court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or defendant". The comparable component in California's *Code of Civil Procedure* declares that "[t]he motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law".[172] A rule should state when a court may grant the relief that accounts for the existence of the rule. This is its most important element.

118 The overall effect of rule 7.3 is that a court may grant summary judgment if there is no genuine issue to be tried, just as it could when Rule 159(3) was in force. There is no genuine issue to be tried if there is no defence to a claim or a claim has no merit.

119 Most courts interpreting the Rule 159 standard concluded that there was no genuine issue to be tried if the outcome of the dispute had it gone to trial was never in doubt.[173]

120 For roughly the first three years that rule 7.3 was in force Alberta courts consistently interpreted it this way.[174]

c. Post January 23, 2014

121 But this consistency started to slip away after January 23, 2014, the date the Supreme Court of Canada released its judgment in *Hryniak v. Mauldin*.[175]

122 *Hryniak* reminded Canadians that the cost of litigation is so high that it precludes an unacceptably large portion of the public from accessing judicial resolution of their disputes.[176] Justice Karakatsanis called for a "culture shift".[177] She urged those responsible for the administration of justice to "simplify ... pretrial procedures"[178] and make available procedural protocols that were suitable for less complicated disputes. Not all disputes require access to the full spectrum of the civil process to be fairly and justly adjudicated. "[T]he best forum for resolving a dispute is not always that with the most painstaking procedure".[179]

123 Professor Galanter, in his 2004 article, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", recorded the extent of the demise of the trial as a dispute resolution tool in the United States:[180]

> [The] portion of ... [American] federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the 60 percent decline in the absolute number of trials since the mid 1980s. ... The phenomenon is not confined to the federal courts; there are comparable declines of trials, both civil and criminal, in the state courts, where the great majority of trials occur. ... Although virtually every other indicator of legal activity is rising, trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy.

124 We are satisfied that Professor Galanter's findings accurately describe the role of trials in Alberta.[181]

125 *Hryniak*'s celebration of proportionality, expedition and economy squares with Alberta's foundational rules. Rule 1.2(2)(b) of the *Alberta Rules of Court*[182] states that "these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense". The same is true for Ontario's *Rules of Civil Procedure*:[183] "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".

126 In 1985, Ontario adopted the core feature of Rule 56 of the *Federal Rules of Civil Procedure*[184] and stated in rule 20.04(2) that a court must grant summary judgment if "there is no genuine issue for trial with respect to a claim or defence". The Supreme Court of Canada, in *Hryniak*,[185] declared that

> [t]here 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.

127 This new interpretation substituted a procedural — is the process fair to the parties — for a substantive test — an assessment of the merits of the moving and nonmoving parties' positions. The following extract supports this claim:[186]

> These principles ... all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows a judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a *process* that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute.

128 After *Hryniak* some panels of this Court were convinced that the Supreme Court's strong endorsement of the merits of summary judgment compelled a new interpretation of the summary judgment rule.[187]

129 *Windsor v. Canadian Pacific Railway*[188] was the first judgment that concluded *Hryniak v. Mauldin*[189] had this transformative effect. It appeared on March 9, 2014. The Court declared that "[s]ummary judgment is *now*[190] an appropriate procedure where there is no genuine issue requiring a trial ... [and that t]he modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record".

130 Other panels of this Court that applied rule 7.3 in the post-*Hryniak v. Mauldin* era accorded *Hryniak v. Mauldin* no or marginal attention.[191] For these judges it was business as usual. In *Can v. Calgary Police Service*, in a concurring opinion, Justice Wakeling said this:[192]

> The fact that the Supreme Court declared in *Hryniak v. Mauldin* ... that its positive evaluation of expedited dispute resolution mechanisms is of "general application" does not mean that Alberta's robust Part 7 suite of "rocket docket" provisions is in any respect deficient. ... *Hryniak v. Mauldin* does not, in any way, support the notion that the existing principles which govern Alberta's summary judgment rule need to be revised.

131 Other provincial appeal courts[193] and the Federal Court of Appeal[194] shared this assessment of *Hryniak*'s impact on their summary judgment law.[195]

132 Even though *Windsor v. Canadian Pacific Railway*[196] and *Can v. Calgary Police Service*[197] assessed the impact *Hryniak v. Mauldin* had on Part 7 of the *Alberta Rules of Court* differently the two judgments contained no doctrinal conflicts.[198]

133 *Windsor* delivered two messages, neither of which was inconsistent in any way with preexisting generally accepted summary judgment principles.

134 First, "summary judgment is an appropriate procedure when there is no genuine issue requiring a trial".[199] This is the same standard incorporated in Rule 159(3) of the previous version of *Alberta Rules of Court* in force from June 19, 1986 to October 31, 2010.[200] The Supreme Court, in *Canada (Attorney General) v. Lameman*,[201] declared that "claims that have no chance of success [must] be weeded out at an early stage". Chief Justice Fraser, in *Poliquin v. Devon Canada Corp.*,[202] a 2009 decision that followed the release date of *Lameman*, asked whether "it is plain and obvious that ... [the plaintiff's] wrongful dismissal action cannot succeed".

135 Second, *Windsor* held that "[t]he modern test for summary judgment is ... to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record".[203] This is not a controversial statement.[204] This has been the law since summary judgment became a fixture in sophisticated civil processes. Courts are not in the business of making orders that are unfair and unjust. A court must not grant summary judgment if it is not fair and just to do so. Historically, summary judgment courts have concluded that it is not fair and just to do so unless the facts are incontrovertible and the ultimate trial outcome is obvious.

136 But the progeny of *Windsor* did introduce conflict with the preexisting principle that summary judgment was a prediction of the likely outcome if the matter went to trial.

137 In *Stefanyk v. Sobeys Capital Incorporated*[205] a panel of this Court presented a new standard — "The ultimate issue is whether the appellant has proven on a balance of probabilities that it is not liable for the plaintiff's injuries".[206]

138 This is a trial standard. Justices Lederman, Bryant and Fuerst, writing extrajudicially, identified the civil trial standard in this sentence: "Simply put, the trier-of-fact must find that the existence of the contested fact is more probable than its non-existence".[207]

139 This formulation of the summary judgment test broke new ground in at least two respects.

140 First, summary judgment was never before regarded as a trial. Common law judges sing from the same song sheet when the summary judgment tune comes up. Lord Woolf, M.R. in *Swain v. Hillman*[208] opined that "the proper disposal of an issue under [the summary judgment part] does not involve the judge conducting a mini-trial, that is not the object of the [summary judgment] provisions". In *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*[209] Justice Slatter acknowledged that "[s]ummary disposition is a way of resolving disputes without a trial; a summary trial is a trial". Justice Wakeling said the same thing in *Can v. Calgary Police Service*:[210] "Summary judgment disposes of a suit before trial and summary trial after trial". The Australian High Court has observed that summary judgment allows for the "summary determination of a proceeding without trial".[211] It is also gospel in the United States. Justice White in *Anderson v. Liberty Lobby, Inc.*[212] opined that "at the summary judgment stage the judge's function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial".

141 Second, *Stefanyk* contemplates the summary judgment adjudicator resolving material facts in dispute if the record allows it. That used to be the exclusive responsibility of a trial judge.[213]

142 The Chief Justice of Alberta convened a five-judge panel to hear the appeal in *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.* and to determine the law of summary judgment in Alberta post *Hryniak v. Mauldin*.

143 The pivotal issue presented to the five-judge panel was the impact*Hryniak v. Mauldin* had on rule 7.3 of the *Alberta*

Rules of Court. The *Stefanyk v. Sobeys Capital Incorporated*[214] school of thought was that the 2014 Supreme Court judgment was a game changer. The *Can v. Calgary Police Service*[215] view was that it had no impact whatsoever on the summary judgment law in Alberta.[216]

144 The *Stefanyk* school of thought carried the day:[217]

> [T]here has been a paradigm shift in the approach to summary judgment since the decision in *Hryniak v Mauldin* in 2014. ...
>
> Prior to ... *Hryniak v Mauldin* the trial was seen as the default procedure for resolving disputes. There was a resistance to using summary judgment, because it was seen as a procedural "short cut" that might compromise the substantive and procedural rights of the resisting party. As a result, while the basic test for summary judgment was whether there was a "genuine issue requiring a trial", the case law set a very high standard of proof before summary judgment was permitted. ...
>
> In *Hryniak v Mauldin* the Supreme Court of Canada called for a "shift in culture" with respect to the resolution of litigation. Reliance on "the conventional trial no longer reflects the modern reality and needs to be re-adjusted" in favour of more proportionate, timely and affordable procedures. Summary judgment procedures should increasingly be used, and the previous presumption of referring all matters to trial should end. ...
>
> . . . . .
>
> ... Historical analyses are not determinative given the call for a "shift in culture". Decisions of the Supreme Court of Canada prevail.

145 Justice Slatter summarized the governing principles:[218]

> 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.

146 There are a number of points that merit emphasis.

147 First, this interpretation allows a summary judgment court to make contested findings of material facts. This is corollary of Justice Slatter's statement that "[s]ummary judgment is not limited to cases where the facts are not in dispute".[219] This is a departure from the traditional understanding that a dispute about a material fact disqualifies an action from the summary judgment process.[220]

148 Second, summary judgment courts should not be reluctant to make material fact findings:[221] Justice Slatter encouraged summary judgment adjudication to hear oral testimony: "[W]here possible findings of fact can and should be made on a summary disposition application".[222]

149 Third, before a summary judgment court resolves a material factual dispute, it should ask if it constitutes a genuine issue requiring a trial. Justice Slatter explained it this way:[223] "A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial".

150 Fourth, the moving party must prove the facts on which it relies on a balance of probabilities.[224] This is consistent with the general trial principle that the plaintiff must prove the facts on a balance of probabilities that establish the elements of the action.

151 Fifth, "if there is a genuine issue requiring a trial, summary disposition is not available".

152 What does "genuine issue requiring a trial" mean in this context?

153 Does it mean what the United States Supreme Court said it means when interpreting the "genuine issue" concept incorporated in rule 56(c) of the *Federal Rules of Civil Procedure*?[225]

154 Does it mean what our Court said it means when interpreting Rule 159(3) of the *Alberta Rules of Court*,[226] in force from June 19, 1986 to October 31, 2010? Rule 159(3) provided that "if the court is satisfied that *there is no genuine issue for trial* with respect to any claim, the court may give summary judgment against the plaintiff or the defendant".[227]

155 Or does it mean something else?

156 American and Canadian courts have occupied common ground and interpreted this standard to mean that summary judgment may only be granted if the ultimate disposition is not in doubt.

157 But Justice Slatter expressly rejected this interpretation of "no genuine issue": "Imposing standards like 'high likelihood of success', 'obvious', or 'unassailable' is ... unjustified. A disposition does not have to be 'obvious', 'beyond doubt' or 'highly unlikely' to be fair".[228]

158 So what does "genuine issue requiring a trial" mean?

159 In *Hryniak* the Supreme Court of Canada adopted this definition of "no genuine issue requiring a trial", the language in rule 20.04(2) of the Ontario *Rules of Civil Procedure*:[229]

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. 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.

160 This Court, in *North Bank Potato Farms Ltd v. The Canadian Food Inspection Agency*,[230] adopted the Supreme Court's position.

161 The "no genuine issue" concept no longer measures the merits of the parties' positions. It now concentrates on procedural fairness.

C. The Practical Implications of the New Way

162 We have reviewed all the reported and some unreported cases in the roughly 530-day period following the release of *Weir-Jones* on February 6, 2019 and the roughly 530-day period preceding the release of *Weir-Jones* — over 1000 days — in order to gain some insights into the impact *Weir-Jones* has had on how primary adjudicators actually decide summary judgment applications.

163 This review supports a number of conclusions.

164 First, defendants are more likely to bring a summary judgment application than plaintiffs. In the 1,000-day period defendants were the moving party in over sixty percent of the cases. In America, summary judgment is regarded as a device that primarily benefits defendants.[231] According to Professors Eisenberg and Clermont, "[t]he much ballyhooed Supreme Court cases on summary judgment ... had palpably negative effects on plaintiffs".[232]

165 Second, most courts have no appetite for resolving contests on disputed material facts[233] — those essential to the establishment of a claim or a defence.[234] We do not recall a single case in our review of summary judgment decisions issued in the 1,000-day period in which an adjudicator heard oral testimony.[235] Adjudicators do not invite the parties to introduce oral evidence, as Justice Verville did in *Valard Construction Ltd. v. Bird Construction Co.*[236]

166 Third, adjudicators are most comfortable working with material facts that are not the subject of controversy. This is the flip side of the first conclusion. The presence of uncontested material facts increases the likelihood significantly that a court will grant summary judgment.[237] Adjudicators who are uncomfortable resolving contested material facts are likely to conclude that the record does not allow for a fair and just determination and decline to award summary judgment.[238]

167 Fourth, most adjudicators grant summary judgment only if they have no doubt about the correct disposition.[239] They are reluctant to resolve disputes the outcome of which is unclear.[240]

168 Fifth, most of the time the result would be the same regardless of which summary judgment test is applied.[241]

169 Sixth, while the *Weir-Jones* summary judgment test is more conducive to the granting of summary judgment than the traditional summary judgment standard, the data recorded in Schedule C shows only a modest upward adjustment to the success rate for summary judgment applications — from forty-eight percent in the pre *Weir-Jones* period to fifty-seven percent in the post *Weir-Jones* period. We would have expected a much higher success rate if summary judgment adjudicators were actually resolving factual disputes and deciding doubtful cases. Data from Ontario in a one-year period following the release of *Hryniak* showed that "close to 75% of Ontario decisions granted full or partial summary judgment".[242] This is in the range we anticipated. We are also mindful of the data Professor Galanter produced. In the period from 1986, the year of the American summary judgment trilogy, to 2004 "the number of trials in federal court ... dropped by more than 60 percent and the portion of cases disposed of by trial has fallen from 4.7 percent to 1.8 percent".[243]

170 Seventh, the new summary judgment regime resembles the summary trial process that has been part of the *Alberta Rules of Court* since September 1, 1998.[244]

171 The *Weir-Jones* summary judgment model fares extremely well under the scoring system we have employed. Again, like the English and American methodologies, either a plaintiff or a defendant may apply for and be granted summary judgment. And like Rule 56 of the *Federal Rules of Civil Procedure*, the *Weir-Jones* test features no subject matter limitations. Like both the English and American versions an Alberta applicant can apply for summary judgment very early in the civil process. Summary judgment adjudication is very easy to access. The most noteworthy difference between the *Weir-Jones* protocol and the English and American summary judgment rules is the applicable test for granting summary judgment. An Alberta court may grant summary judgment even if the applicant has not convinced the court that the strength of the applicant's case is so much greater than the respondents that the ultimate trial outcome is obvious. *Weir-Jones* allows the summary judgment adjudicator to make contested finding of facts on a balance of probabilities when it is fair and just to do so. There are no special appeal rules in Alberta that detract from the effectiveness of *Weir-Jones*. The losing party may appeal whether or not the losing side wishes to contest the grant of summary judgment or its denial.[245]

D. The Future of Part 7 of the Alberta Rules of Court

172 The Rules of Court Committee has indicated that it is considering Division 3 of Part 7 of the *Alberta Rules of Court* — summary trials — so that this option may become "a more efficient way of resolving disputes".[246]

173 This is a timely and worthwhile project.

174 In discharging this task, the Rules of Court Committee will, no doubt, take into account the enhanced role *Weir-Jones* assigns to the summary judgment protocol — Division 2 of Part 7.

175 The current summary judgment protocol now shares one of the key components of a trial. A summary judgment adjudication may determine contested material facts. Justice Slatter, in *Weir-Jones*, held that "[s]ummary judgment is not limited to cases where the [material] facts are not in dispute" and invited adjudicators to "hear ... oral testimony" and decide factual controversies on a balance of probabilities.[247]

176 At the same time, our review of the several hundred summary judgment cases decided in the 1,000-day period commencing August 20, 2017 — Schedules A and B — suggests that the inherent conservatism of most adjudicators makes them reluctant to resolve disputes that contain contested material facts.[248] Not one judge heard oral testimony. And many expressly declared that the absence of an incontrovertible factual foundation precluded them from resolving the dispute.[249]

177 The Rules of Court Committee may wish to keep this on-the-ground reality in mind when considering the framework for an effective nonstandard trial protocol.[250]

178 We agree that Part 7 has great potential and present our views on the practical consequences of the resistance of summary judgment adjudicators to resolve factual controversies.

179 In short, for Part 7 to achieve its full potential, Division 3 — summary trials — must be an attractive option from the perspective of both litigants[251] and judges.

180 Part 7 of the *Alberta Rules of Court* presents three separate protocols — trial of a question or issue, summary judgment, and summary trial — that are designed to reduce the amount of time and cost needed to resolve a proceeding commenced under the *Alberta Rules of Court*.

181 The underlying premise of Part 7 is that the features a dispute displays may determine the parts of the litigation spectrum that must be accessed to fairly and accurately resolve it.[252] The corollary of this is that some disputes may be fairly and accurately adjudicated without accessing all the discrete stages of the procedural spectrum[253] or limiting the use a party may make of a discrete litigation stage. An example of the latter condition is a time limit on the questioning process.[254]

182 A large number of commercial disputes are resolved by private arbitrators in an abbreviated dispute resolution process. This dispute resolution process accords the parties little more than an opportunity to present witnesses and cross-examine their adversaries' witnesses and make written or oral argument or both.[255] And this system works. The disputants, as a rule, are satisfied that they are fairly heard and accept the outcome as the product of a rational process. The fact that they are willing to return to the private forum is the best proof that they are satisfied with the protocol.

183 But some disputes are of such a nature that the parties must be allowed to access every procedural stage that the civil process offers and make unlimited use of it to ensure that justice is done. Disputes on complex material facts and those in which one or both of the parties do not abide by the rules or court orders[256] are two obvious examples of this type of dispute.

184 The crucial questions are these.

185 What are the stages of the civil process that a dispute must pass through to be fairly and accurately assessed?

186 Who is entitled to make that decision? The litigators or the courts?

187 And when should that decision be made?

188 Historically, litigants made most of the important litigation decisions and determined individually the stages of the civil process that a litigant would utilize and when.[257]

189 That is not the case anymore.

190 Our *Alberta Rules of Court*[258] now assign the courts a major role in determining the pace of litigation and the stages of the litigation process that a party may access.[259]

191 We are satisfied that many of the important procedural decisions should be made at the outset of the litigation. Part 4

of the *Alberta Rules of Court* deals with the management of litigation and provides a mechanism for the creation of litigation plans.

192 Parties to a complex case must have a litigation plan. If they cannot agree on its components, the court may stipulate them.[260] In the absence of a compelling reason, courts should construct one when asked to do so.

193 While the parties to a standard case are not obliged to work under the terms of a litigation plan, they have the option to construct one or ask a court to do it for them if they cannot agree.[261] Again, a court should have a very good reason before declining to accede to such a request.

194 In our opinion, a robust case management system is the protocol that has the greatest potential to generate resolutions at the earliest possible stage of the litigation spectrum and at the lowest possible cost.[262] We are familiar with other jurisdictions that have authorized courts to compel litigants to move through the litigation process at a stipulated rate and reaped the benefits associated with close control of the process.[263]

195 A modern civil procedure model must offer a variety of dispute resolution options to its users and adjudicators.

196 This is the role Part 7 of the *Alberta Rules of Court* plays.

197 It features three distinct protocols that if used effectively will achieve the goals set out in the foundational rules — the prompt resolution of disputes at the least expense in a fair manner.

198 The first is a trial of a particular question or issue.

199 Part of rule 7.1(1) follows:

> 7.1(1) On application, the Court may
>
> (a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of
>
> (i) disposing of all or part of a claim,
>
> (ii) substantially shortening a trial, or
>
> (iii) saving expense
>
> . . . . .
>
> (3) If the court is satisfied that a determination of a question or issue substantially disposes of a claim or makes the trial of an issue unnecessary, it may
>
> . . . . .
>
> (b) give judgment on all or part of a claim and make any order it considers necessary,
>
> (c) make a determination on a question of law, or
>
> (d) make a finding of fact.

200 We are content with one observation.

201 This provision is invoked less frequently than it should be.

202 *Gablehouse v. Borza*,[264] a personal injury action, demonstrates the rule's utility.

203 A Dodge van driven by an employee of the van's lessee collided with the plaintiff causing the plaintiff catastrophic injuries. Derrick Dodge Ltd. was the lessor. Just before the collision the lessee had mailed to the lessor a cheque that once processed would oblige the lessor to transfer title to the lessee. The lease provided that title to the van would not pass to the lessee until the lessee paid the purchase price in full. The plaintiff sued Derrick Dodge, the van's lessor and owner, the lessee and the employee of the lessee. Invoking the postal acceptance rule, Derrick Dodge took the position that it was not the van's owner at the time of the collision. Was it the owner and vicariously responsible for the negligence of the lesses's employee? Counsel for the plaintiff and Derrick Dodge asked the Court of Queen's Bench, in a pre-trial application, to determine whether Derrick Dodge was the van's owner at the time of collision. The Court of Queen's Bench found that Derrick Dodge was the van's owner and the Court of Appeal dismissed Derrick Dodge's appeal. This process brought the case to a close, as Justice Côté explained:[265]

> Just before the trial date, all parties in the suit limited its issues to one. They asked the Court to rule on that one issue in special chambers. The question is whether the lease by the appellant to the employer was still in force at the time of the collision, and whether the appellant lessor was still the owner or deemed owner of the van. A Pierringer settlement also agreed that the driver and employer were negligent and responsible for the collision, and would pay the injured respondent $1,000,000. If found still the van owner, the appellant lessor agreed then to pay an additional $900,000 to the respondent.

204 The summary trial portion of Part 7 also has great potential. But unless the impediments that currently dissuade lawyers from utilizing it[266] are either ameliorated or removed, its potential will never be achieved.

205 An ideal summary trial model allows a case management judge to select from a list of options those that are suitable for a particular dispute. The menu may consist of specific limitations on the questioning stage, the mode for the presentation of evidence and the time allotted for the presentation of evidence and oral argument.

206 The Ontario *Rules of Civil Procedure* contains a simplified procedure for a class of stipulated claims — generally under $100,000 — that incorporates limitations on the normal civil process that may be desirable if adopted in a modified form.

207 If the rulemakers build a new summary trial procedure that is attractive to litigants, they, no doubt, will use it. It will save them money and conclude actions earlier than otherwise would be the case.

208 A revitalized summary trial protocol may cause the Rules of Court Committee to reconsider the features of summary judgment. It would not make a lot of sense to have two components of Part 7 that are virtually the same.

E. Application of the Governing Principles to this Case

209 The chambers judge decided this case on December 7, 2018.

210 He did not have the benefit of the *Weir-Jones* judgment and did not apply the *Weir-Jones* standard. Instead of asking whether he could decide the facts on a balance of probabilities, he considered whether the ultimate disposition if there was a trial was obvious. The chambers judge said it was not obvious: "I cannot agree that a finding of no negligence on the part of the defendant is so simple, so direct and so straight forward".[267]

211 It is "possible to fairly resolve the dispute on a summary basis".[268]

212 The facts and the law are incontrovertible.

213 A trial will not produce a more complete factual record than already exists. Counsel for the Medicine Hat School District conceded for the purpose of this application that the sidewalk was slippery before the school custodian sanded it.

214 The unfortunate accident occurred at around 8:45 a.m. A chinook was blowing in. The air temperature was around the freezing point and warming. The sidewalk was slippery. The custodian sanded it while Ms. Hannam was walking behind him.

She slipped.

215 Under the circumstances, there is nothing more the Medicine Hat School District could or should have done to make the sidewalk any safer for Ms. Hannam and other sidewalk users.[269]

216 The Medicine Hat School District was neither negligent nor in breach of its duty under the *Occupiers' Liability Act*.[270]

217 Ms. Hannam's case has no merit. Summary judgment is the appropriate remedy.

VII. Conclusion

218 The appeal is allowed. The defendant's application for summary dismissal is granted.

***Brian O'Ferrall J.A.* (dissenting):**

219 With respect, I would have dismissed the school district's appeal.

220 I agree with much of what my colleagues have had to say about summary judgment in their well-reasoned, interesting and thoroughly-researched judgment but, strictly speaking, this case did not involve a summary judgment. It involved a denial of summary judgment where the governing principles may be nuanced.

221 Rule 7.3(1)(a) of the *Alberta Rules of Court* provides that summary judgment may be given to a plaintiff when there is no defence to its claim. Rule 7.3(1)(b) provides that summary judgment may also be given to a defendant when there is no merit to the claim against it. This latter form of summary judgment is sometimes referred to as summary dismissal.

222 In the case before us, there was no summary judgment as provided for in the *Rules*. There was a refusal to grant summary judgment to a defendant. That is, this case involved a refusal to summarily dismiss a claim. The significance of this is that the judgment appealed from was not a final judgment, summary or otherwise. It could be characterized as a non-decision. Such decisions, although appealable, do not lend themselves comfortably to appellate review. While the *Rules of Court* confer a right to appeal such decisions, such appeals often offer little to the appellate court to review because what is being reviewed is not a determination of a question of law or a finding of fact, but rather what is being reviewed is the trial judge's confidence level or level of satisfaction as to whether, on a balance of probabilities, and on the basis of a limited record, there is any merit to a claim.

223 Before a trial judge may summarily dismiss a claim, he or she must be satisfied, on a balance of probabilities, that there is no merit to the claim. It is the trial judge who must be persuaded. It is not for this Court to tell the trial judge he or she ought to have been persuaded, except in the clearest of cases. This Court's jurisdiction to summarily dismiss a claim which has not been litigated and adjudicated ought to be limited to cases of patently obvious error.

224 Appeals of refusals to grant a plaintiff summary judgment or to grant a defendant summary dismissal ought to be discouraged because they tend to be premature. No determination has been made. There is nothing to yet review: no decision and typically a sparse record. As this Court stated in *Condominium Corp. No. 0321365 v. Cuthbert*, 2015 ABCA 49 (Alta. C.A.) [hereinafter Ostrowercha] at paragraph 7, "appeals from denials of motions for summary judgment will be difficult to establish". *Ostrowercha* was a case in which the chambers judge declined to summarily dismiss a claim. This Court dismissed the defendant's appeal of that decision and said:
Also, in *Mulholland v. Rensonnet*, 2018 ABCA 24 (Alta. C.A.) at paragraph 3, this Court stated:

225 A summary dismissal of a claim gives this Court a final decision to assess. The merits of the dismissal can be assessed. A refusal to dismiss a claim on the basis that the chambers judge is not yet satisfied that the claim is without merit offers little to assess. There is little room for error because no disposition, one way or the other, has been made.

226 A summary judgment in favour of a plaintiff also gives this Court something to review. A refusal to grant the plaintiff summary judgment on the basis that the trial judge is not yet satisfied that the claim has merit offers little for an appeal court

to scrutinize. Again, there is little room for error because no decision has been made one way or the other.

227 An appellate court does not ordinarily assess the merits of a claim until the trial judge has completed his or her assessment.

228 The standard of review of decisions dismissing summary judgment or summary dismissal applications must be very deferential. The review should be limited to assessing whether the chambers judge was completely unreasonable in concluding that the court required more evidence or more fulsome argument in order for it to reach a conclusion on the merits of a claim.

229 The so-called modern approach to summary judgment motions is intended to improve access to justice by empowering trial courts to adjudicate more cases through summary judgment motions, not by compelling them to do so when they find they are unable to make the necessary findings of fact without more evidence. The so-called modern approach is also not intended to empower appellate courts to decide the merits of claims at first instance which is what they are asked to do on appeals of decisions dismissing summary judgment applications or summary dismissal applications.

230 Once a trial judge has summarily dismissed a claim or granted summary judgment to a plaintiff, this Court can then safely commence to assess the merits of the claim which has been summarily dismissed or allowed. But not until.

231 This was a slip and fall case. It took place on a sidewalk at a school in Medicine Hat on a Thursday in January. The plaintiff was delivering her daughter to school. The time was roughly 8:45 a.m. and the school's custodian was busy spreading sand on the sidewalk when the plaintiff arrived with her daughter. The plaintiff slipped on a patch of ice, fell and hurt herself.

232 It was conceded that a duty of care was owed by the school district. The question was whether the duty of care was breached and that question engaged the issue of what standard of care was required to discharge the duty of care.

233 That issue was never resolved. The school district argued that the standard of care had been discharged by the spreading of sand. However, the chambers judge was not so sure because the school itself had a policy with respect to snow and ice removal which stated that the removal of snow and ice should be completed by 8:00 a.m. The school district's policy also provided that although sanding was an option, every effort should be made to remove the ice, not just sand it, weather permitting. There was evidence that the ice had been on the sidewalks for several days prior to the slip and fall and had not been attended to.

234 The chambers judge also found that there was conflicting evidence, as well as an issue as to whether certain photographs of the sidewalk, not taken on the day of the slip and fall, accurately depicted the state of the sidewalks the morning of the accident as claimed. The chambers judge was further of the view that a trial was needed to test the credibility of the defendant's witnesses who apparently did not impress him. He also thought a trial was needed to determine why the school district's own policy was not followed as there was no evidence of any effort that morning or earlier in the week to deal with the ice by either chipping or scraping it or putting de-icer on it.

235 The chambers judge expressly recognized that the defendant school district was not an insurer and could not be held to a standard of perfection. He also acknowledged the merits of what he called "the trend towards summary resolution of matters either by way of summary dismissal or summary judgment". He nevertheless concluded, "I cannot agree that a finding of no negligence on the part of the defendant is so simple, so direct and so straightforward" as to make summary dismissal appropriate.

236 It may be open to a chambers judge deciding a summary dismissal application to determine matters such as whether there has been a breach of the standard of care expected of a particular occupier as a matter of common experience. But what if the chambers judge is uncomfortable or lacks confidence that the common experience of which he is urged to take judicial notice of is reliable? Also, on a summary judgment application, such as in this case, the chambers judge may have doubts based on an absence of evidence. In those circumstances, is it the law that the chambers judge must summarily dismiss a claim as having no merit when he has doubts? I think not.

237 If the test is one of whether the evidence adduced on the summary dismissal application permitted the chambers

judge to make the necessary finding of fact and law to conclude that the claim had no merit, clearly the chambers judge's view was that the evidence did not permit that conclusion.

238 I take from *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.) the proposition that if the defendant is the moving party, it must prove that there is no merit to the plaintiff's claim. The plaintiff need not prove the opposite. The plaintiff need only demonstrate that the defendant has failed to establish that there is no genuine issue requiring a trial (paras 32 and 33). The presiding judge is to consider whether the quality of the evidence is such that it is fair to conclusively adjudicate the action summarily (para 34). Considerations of fairness have not yet been eclipsed by expediency and economy. Fairness remains a factor in deciding whether summary dismissal is appropriate.

239 In *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), the Supreme Court stated that on a summary judgment motion, the evidence must be such that the judge is "confident" that he or she can fairly resolve the dispute without more (para 57). This dicta was echoed in *Weir-Jones* at paragraph 47 where this Court stated that the judge must be left with sufficient confidence in the state of the record that he or she is prepared to exercise judicial discretion to resolve the dispute. Having properly instructed himself, the chambers judge in this case did not have "sufficient confidence" to summarily dismiss the plaintiff's claim. I simply do not see on what basis this Court could allow an appeal of the chambers judge's confidence level. I would have dismissed it.

Appeal allowed.

ScheduleA[271]

Final Summary Judgment Dispositions in the pre Weir-Jones Period Commencing August 20, 2017 and Ending February 5, 2019[272]

No.	*Case*	*Application*	*Provincial Court*	*Master*[273]	*Queen's Bench*[274]	*Court of Appeal*
1	*1336868 Alberta Ltd. v. Romspen Investment Corp.*	dismissal		granted 2018 ABQB 824		
2	*1402445 Alberta Ltd. v. 1722353 Alberta Ltd.*	judgment		denied unreported	denied 2018 ABQB 546	
3	*1808882 Alberta Ltd. v Moderno Ventures Ltd.*	judgment		denied unreported	granted 2018 ABQB 885	
4	*330626 Alberta Ltd. v. Ho & Laviolette Engineering Ltd.*	dismissal			denied 2018 ABQB 478	
5	*898294 Alberta Ltd. v. Riverside Quays Limited Partnership*	judgment			denied unreported	granted 2018 ABCA 281
6	*Aircraft Finance Services Inc. v. Miller*	dismissal		denied 2018 ABQB 1005		
7	*Alberta Finance & Mortgage Corp. v. Prasad*	judgment		granted unreported	denied 2018 ABQB 453	denied 2019 ABCA 4
8	*Alberta Finance & Mortgage Corp. v. Bruce Steel Erectors*	judgment		granted unreported	denied 2018 ABQB 453	
9	*Amik Oilfield Equipment & Rentals Ltd. v. Beaumont Energy Inc.*	judgment		granted 2016 ABQB 192	granted 2017 ABQB 427	granted 2018 ABCA 88
10	*Angus Partnership Inc v. Salvation Army (Governing Council)*	dismissal		denied unreported	denied 2017 ABQB 568	granted 2018 ABCA 206
11	*Arc Line Construction Ltd. v. Smith Trucking Services (1976) Ltd.*	judgment		denied 2018 ABQB 448		

12	*Arc Line Construction Ltd. v. Smith Trucking Services (1976) Ltd.*	dismissal		denied 2018 ABQB 448		
13	*Armstrong v. United Alarm Systems Inc.*	dismissal	granted 2017 ABPC 242			
14	*Armstrong v. United Alarm Systems Inc.*	judgment	granted 2017 ABPC 242			
15	*Arndt v. Banerji*	dismissal			granted unreported	granted 2018 ABCA 176 (Alta. C.A.)
16	*Ashlar Developments Inc. v. Barakat Industries Ltd.*	judgment		denied 2018 ABQB 67		
17	*Ashlar Developments Inc. v. Barakat Industries Ltd.*	dismissal		denied 2018 ABQB 67		
18	*ATM Cash Systems (Canada) Ltd v. Vanshaw Enterprises Ltd.*	judgment		denied 2017 ABQB 622		
19	*Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*	judgment		denied unreported	denied 2018 ABQB 626	
20	*Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*	dismissal		denied unreported	denied 2018 ABQB 626	
21	*Bacexha Ltd v. Karam*	dismissal		granted 2018 ABQB 1020		
22	*Bank of Nova Scotia v. Graves*	judgment		granted 2018 ABQB 107		
23	*Barrie v. Quickwrap Canada Ltd.*	dismissal	denied 2018 ABPC 205			
24	*Beal v. Vermillion-River (Municipality)*	dismissal		denied 2017 ABQB 437	denied 2018 ABQB 435	
25	*Biocomposites Group Inc. v. 0975138 BC Ltd. (DH Manufacturing)*	judgment			denied 2018 ABQB 63	
26	*Birss v. Tien Lung Taekwon-Do Club*	dismissal		denied 2017 ABQB 518		
27	*Brio-Tech Inc. v. Western Pressure Controls (2005) Ltd.*	judgment			denied 2018 ABQB 500	
28	*Brio-Tech Inc. v. Western Pressure Controls (2005) Ltd.*	judgment			granted 2018 ABQB 500	
29	*Brio-Tech Inc. v. Western Pressure Controls (2005) Ltd.*	judgment			denied 2018 ABQB 500	
30	*Bussey Seed Farms Ltd v. DBC Contractors*	judgment		granted 2017 ABQB 598		
31	*Cardinal v. Alberta Motor Association Insurance Co.*	dismissal		granted unreported	denied 2017 ABQB 487	granted 2018 ABCA 69
32	*Caryk v. Alberta*	dismissal		granted 2017 ABQB 737		
33	*CCS Corp. v. Secure Energy Services Inc.*	dismissal			granted 2016 ABQB 582	
34	*CCS Corp. v. Secure Energy*	dismissal			denied 2016	

	Services Inc.				ABQB 582	
35	*Champagne v. Sidorsky*	dismissal			granted 2017 ABQB 557	granted 2018 ABCA 394
36	*Clover Four Farm Ltd. v. Alberta Turkey Producers*	dismissal	granted 2018 ABPC 103			
37	*Coffey v. Nine Energy Canada Inc.*	judgment		denied 2017 ABQB 417	denied 2018 ABQB 898	
38	*Coffey v. Nine Energy Canada Inc.*	judgment			denied 2018 ABQB 898	
39	*Cole v. Brower*	dismissal			granted 2017 ABQB 766	
40	*Cole v. Brower*	dismissal			granted 2017 ABQB 766	
41	*Correa v. 368753 Alberta Ltd.*	dismissal		denied unreported	denied 2018 ABQB 938	
42	*Da Silva v. River Run Vistas Corp.*	dismissal			granted 2018 ABQB 869	
43	*Dion v. Security National Insurance Co.*	dismissal	denied 2018 ABPC 242			
44	*Dion v. Security National Insurance Co.*	dismissal	granted 2018 ABPC 242			
45	*Eberle v. Sunhills Mining Ltd. Partnership*	judgment		granted 2018 ABQB 389		
46	*Edmonton Kenworth Ltd. v. Kos*	judgment			denied 2018 ABQB 439	
47	*Edmonton Kenworth Ltd. v. Kos*	dismissal			denied 2018 ABQB 439	
48	*Ens v. Evans*	dismissal		granted 2018 ABQB 139		
49	*Environmental Refuelling Systems Inc. v. Dougan*	judgment			granted 2018 ABQB 208, ¶ 74	
50	*Environmental Refuelling Systems Inc. v. Dougan*	judgment			denied 2018 ABQB 208, ¶ 74	
51	*Factors Western Inc v. Point Design Homes Ltd.*	judgment		denied 2018 ABQB 1004		
52	*Fyffe v. Wadhwa*	dismissal		denied unreported	denied 2018 ABQB 919	
53	*Geophysical Service Incorporated v. Murphy Oil Co.*	dismissal			granted 2017 ABQB 464	granted 2018 ABCA 380
54	*Geophysical Service Inc. v. Encana Corp.*	judgment			granted 2017 ABQB 466, ¶ 62	denied 2018 ABCA 384
55	*Geophysical Service Inc. v. Encana Corp.*	judgment			denied 2017 ABQB 466	denied 2018 ABCA 384
56	*Geophysical Service Inc. v. Encana Corp.*	dismissed			granted 2017 ABQB 466, ¶¶ 89 & 96	granted 2018 ABCA 384

57	*Intact Insurance Co. v. NCC Dowland Construction Ltd.*	judgment		granted unreported	granted 2018 ABQB 381	
58	*Chevalier Estate v. Chevalier Geo-Con Ltd.*	dismissal			denied 2019 ABQB 190	
59	*Chevalier Estate v. Chevalier Geo-Con Ltd.*	judgment			denied 2019 ABQB 190	
60	*JS v. Alberta*	dismissal		denied 2017 ABQB 231	granted 2018 ABQB 129	
61	*Karagic v. Rajan*	dismissal			denied 2018 ABQB 910	
62	*Kelro Pump and Mechanical Ltd. v. Aqua Terra Water Management Inc.*	Judgment		granted 2018 ABQB 515		
63	*Khalil v. Durant*	judgment		granted 2018 ABQB 17	granted 2018 ABQB 473	
64	*Lay v. Lay*	dismissal			granted 2017 ABQB 29	granted 2019 ABCA 21
65	*Lee v. Hache*	dismissal		granted 2018 ABQB 88		
66	*LNR v. Moutview Pharma Corp.*	dismissal		denied 2017 ABQB 137	denied 2017 ABQB 730	
67	*Montague v. Pelletier*	dismissal			denied 2018 ABQB 1047	
68	*Mulholland v. Rensonnet*	judgment			denied unreported	denied 2018 ABCA 24
69	*Nelson v. City of Grande Prairie*	dismissal		denied 2018 ABQB 537		
70	*O'Brien v. Akita Drilling Ltd.*	judgment			denied 2018 ABQB 1062	
71	*O'Brien v. Akita Drilling Ltd.*	dismissal			denied 2018 ABQB 1062	
72	*O'Chiese Energy Ltd. Partnership v. Bellatrix Exploration Ltd.*	dismissal		granted 2019 ABQB 53		
73	*Omnus Investments Ltd. v. Rethink and Diversify Securities Inc.*	judgment		granted 2018 ABQB 868		
74	*Paraniuk v. Pierce*	dismissal			granted 2018 ABQB 1015	
75	*Parent v. Northbridge General Insurance Corp.*	judgment		denied unreported	denied 2018 ABQB 263	
76	*Precision Drilling Canada Ltd. Partnership v. Yongarra Resources Ltd.*	judgment		granted 2015 ABQB 433	granted 2016 ABQB 365	denied 2017 ABCA 378
77	*Prestige Granite & Marble Inc. v. Maillot Homes Inc.*	judgment		denied unreported	denied 2018 ABQB 1040	
78	*Prestige Granite & Marble Inc. v. Maillot Homes Inc.*	dismissal		granted unreported	denied 2018 ABQB 1040	
79	*Rahall v. Intact Insurance Co.*	dismissal	granted 2019 ABPC 11			
80	*Rainmakers Marketing*	judgment		granted		

	Group Inc. v. AS America, Inc.				
81	*Rainmakers Marketing Group Inc. v. AS America, Inc.*	dismissal	denied 2017 ABQB 624		
82	*Rajotte v. National Bank Financial Inc.*	judgment	granted 2017 ABQB 697		
83	*Rajotte v. National Bank Financial Inc.*	dismissal	denied 2017 ABQB 697		
84	*Remple v. Shawcross*	dismissal	denied unreported	granted 2018 ABQB 582	
85	*Rogal v. Stonefield (Fort Saskatchewan) Gp Ltd.*	dismissal	granted 2018 ABQB 270		
86	*Roman Catholic Bishop of the Diocese of Calgary v. Schuster*	judgment	denied 2017 ABQB 230	denied 2018 ABQB 372	denied 2019 ABCA 64
87	*Schell v. Schell*	dismissal		denied 2018 ABQB 991	
88	*Snyder v. Snyder*	judgment		granted 2018 ABQB 318	
89	*SSQ Insurance Company Inc. v. Sutherland*	judgment	denied 2018 ABQB 934		
90	*Stackard v. 1256009 Alberta Ltd.*	judgment		denied 2018 ABQB 924	
91	*Steer v. Mawji*	judgment	denied 2017 ABQB 762		
92	*Stefanyk v. Sobeys Capital Inc.*	dismissal	granted unreported	denied 2017 ABQB 402	granted 2018 ABCA 125
93	*Stoney Tribal Council v. Canadian Pacific Railway*	dismissal		granted 2016 ABQB 193	granted 2017 ABCA 432
94	*Templanza v. Ford*	dismissal		granted 2018 ABQB 168	
95	*Terry v. Knysh*	judgment	denied 2017 ABQB 716		
96	*Tesla Exploration Ltd. v. Encana Corp.*	judgment	granted 2018 ABQB 286		
97	*Tesla Exploration Ltd. v. Encana Corp.*	dismissal	denied 2018 ABQB 286		
98	*Tesla Exploration Ltd. v. Encana Corp.*	judgment	denied 2018 ABQB 286		
99	*Toole v. Northern Blizzard Resources Inc.*	judgment	granted 2017 ABQB 760		
100	*University of Lethbridge v. University of Lethbridge Faculty Ass'n*	dismissal		granted 2017 ABQB 556	
101	*Valayati v. Cheema*	dismissal	granted unreported	granted 2018 ABQB 1014	
102	*Valayati v. Cheema*	dismissal	denied unreported	denied 2018 ABQB 1014	
103	*Whissell Contracting Ltd. v. Calgary (City)*	judgment		denied 2017 ABQB 644	denied 2018

						ABCA 204
104	*Woitas v. Tremblay*	dismissal		granted 2018 ABQB 588		
105	*Yuill v. Workers' Compensation Appeals Comm'n*	dismissal			granted 2017 ABQB 523	

ScheduleB[275]

Final Summary Judgment Dispositions in the Post Weir-Jones Period Commencing February 6, 2019 and Ending July 23, 2020[276]

No.	*Case*	*Application*	*Provincial Court*	*Master*[277]	*Queen's Bench*[278]	*Court of Appeal*
1	*102 Street Developments Ltd. v. Derk's Formals Ltd.*	dismissal		denied unreported	denied 2019 ABQB 781	
2	*1332721 Alberta Inc v. Jenkins & Associates*	dismissal		denied unreported	denied 2020 ABQB 8	
3	*1490703 Alberta Ltd. v. Chahal*	dismissal		granted 2020 ABQB 33		
4	*Acden Environment Ltd. Partnership v. Environmental Metal Works Ltd.*	judgment		granted 2019 ABQB 659		
5	*Agriculture Financial Services Corp. v. Optilume Inc.*	judgment		denied unreported	denied 2020 ABQB 340	
6	*Agrium Inc v. Colt Engineering Corp.*	dismissal		denied 2019 ABQB 978		
7	*Alberta v. M.L.*	judgment	granted 2020 ABPC 28			
8	*Alberta v. Bassett*	dismissal			granted 2019 ABQB 759	
9	*Alberta v. Bassett*	dismissal			denied 2019 ABQB 759	
10	*Al-Ghamdi v. College and Association of Registered Nurses of Alberta*	dismissal			granted 2017 ABQB 685	granted 2020 ABCA 81
11	*Allnut v. Hudsons South Common Ltd.*	judgment		denied 2019 ABQB 143		
12	*Allnut v. Hudsons South Common Ltd.*	dismissal		denied 2019 ABQB 143		
13	*Andersen v. Canadian Western Trust Co.*	dismissal			denied 2019 ABQB 413	
14	*ATB Financial v. Coredent Partnership*	judgment			granted 2019 ABQB 680	
15	*Barclay v. Kodiak Heating & Air Conditioning Ltd.*	dismissal	granted unreported		granted 2019 ABQB 850	
16	*Belanger v. Western Ventilation Products Ltd.*	judgment		denied 2019 ABQB 571		
17	*Belanger v. Western Ventilation Products Ltd.*	dismissal		granted 2019 ABQB 571		
18	*Bentley v. Hooton*	judgment		granted 2019 ABQB 822		
19	*BF v. BF*	dismissal			granted 2019 ABQB 102	

20	*Bilous v. Tkachuk*	dismissal	granted 2019 ABPC 241			
21	*Bilous v. Henderson*	dismissal	granted 2019 ABPC 241			
22	*Blicharz v. Alberta Motor Association Insurance Co.*	judgment	denied 2019 ABPC 112			
23	*Bragg Creek Community Ass'n v. Tyco Integrated Fire & Security Canada Inc.*	dismissal		granted 2019 ABQB 226		
24	*Calfrac Well Services Ltd. v. Wilks Bros., LLC*	judgment			denied 2019 ABQB 340	
25	*Calfrac Well Services Ltd. v. Wilks Bros., LLC*	dismissal			denied 2019 ABQB 340	
26	*Calgary Fleet Maintenance Ltd. v. 1330425 Alberta Ltd.*	dismissal		granted 2019 ABQB 518		
27	*Cancarb Ltd. v. Ace Ina Insurance*	dismissal		granted 2019 ABQB 258		
28	*Canterra Custom Homes Ltd. v. Curtis Engineering Assoc. Ltd.*	dismissal		denied unreported	denied 2019 ABQB 425	denied 2020 ABCA 115
29	*Canterra Custom Homes Ltd. v. Curtis Engineering Associates Ltd.*	dismissal		denied unreported	granted 2019 ABQB 425	
30	*Clark Builders v. GO Community Centre*	dismissal		denied unreported	granted 2019 ABQB 706	
31	*Clifton Associates Ltd. v. Shelbra International Ltd.*	judgment		granted unreported	denied 2019 ABQB 536	
32	*Colby v. Interior Lift Truck Services Inc.*	dismissal			granted 2019 ABQB 915	
33	*Cole v. Marten-Morrison*	judgment		denied 2019 ABQB 311		
34	*Collins v. Pearce*	dismissal			granted 2019 ABQB 868	
35	*Columbos v. QuinnCorp Holdings Inc.*	judgment		granted 2019 ABQB 853		
36	*Condominium Corp. No. 0613782 v. Country Hills Landing Ltd. Partnership*	dismissal		granted 2020 ABQB 36		
37	*Condominium Plan No 0213028 v. Pasera Corporation*	dismissal			denied 2019 ABQB 485 (Alta. Q.B.)	
38	*Costello v. Redcity Creative Agency Inc.*	judgment			denied 2019 ABQB 600	
39	*County of Vulcan v. Genesis Reciprocal Insurance Exchange*	dismissal		denied unreported	granted 2020 ABQB 93	
40	*County of Vulcan v. Genesis Insurance Exchange*	judgment		denied	denied 2020 ABQB 93	
41	*Dezotell Holdings Ltd. v. St. Jean*	dismissal		granted unreported	granted 2019 ABQB 286	
42	*DH v. Woodson*	dismissal			denied 2020 ABQB 367	

43	*Ethos Engineering Inc. v. Fortis LGS Structures Inc.*	judgment		granted 2019 ABQB 141		
44	*Farm Credit Canada v. Pacific Rockyview Enterprises Inc.*	judgment		denied unreported	granted 2020 ABQB 357	
45	*Federowich v. Alberta Transportation*	dismissal	granted 2020 ABPC 63			
46	*Fitzpatrick v. College of Physical Therapists of Alberta*	dismissal		granted 2017 ABQB 453	granted 2018 ABQB 989	granted 2020 ABCA 164
47	*Fitzpatrick v. College of Physical Therapists of Alberta*	dismissal		denied 2017 ABQB 453	granted 2018 ABQB 989	granted 2020 ABCA 164
48	*Freeman v. Koolman*	judgment		denied 2019 ABQB 857		
49	*Freeman v. Koolman*	dismissal		denied 2019 ABQB 857		
50	*Geophysical Service Inc. v. Falkland Oil and Gas Ltd.*	dismissal			granted 2019 ABQB 162	granted 2020 ABCA 21
51	*Gill v. Singh*	judgment			granted 2019 ABQB 819	
52	*Goodvin v. Penson*	dismissal		granted 2019 ABQB 867		
53	*Gouthro v. Kubicki*	dismissal		denied 2020 ABQB 205		
54	*Grainger v. Pentagon Farm Centre Ltd..*	judgment		granted 2019 ABQB 445		
55	*H2S Solutions Ltd. v. Tourmaline Oil Corp.*	dismissal			granted unreported	granted 2019 ABCA 373
56	*Hierath v. Shock*	judgment		denied 2020 ABQB 35		
57	*HOOP Realty Inc. v. Emery Jamieson LLP*	dismissal		granted 2018 ABQB 276	granted unreported	granted 2020 ABCA 159
58	*HOOP Realty Inc. v. Dentons Canada*	dismissal		denied 2018 ABQB 276	denied unreported	denied 2020 ABCA 159
59	*HPWC 9707 110 Street Ltd. Partnership v. Funds Administrative Service Inc.*	judgment			granted 2019 ABQB 167	
60	*James L. Dixon Professional Corp. v. Amundsen*	dismissal	granted 2019 ABPC 35			
61	*Kayler v. GEF Seniors Housing of Greater Edmonton Foundation*	dismissal	granted 2019 ABPC 323			
62	*Kostic v. Thom*	dismissal			granted 2020 ABQB 324	
63	*Kozina v. Redlick*	dismissal		denied 2019 ABQB 749		
64	*Kuzoff v. Talisman Peru BV Sucursal del Peru*	dismissal		granted unreported	granted 2020 ABQB 111	
65	*L. Egoroff Transport Ltd. v. Green Leaf Fuel Distributors Inc.*	dismissal		granted 2020 ABQB 360		
66	*L. Egoroff Transport Ltd. v. Green Leaf Fuel*	dismissal		granted 2020 ABQB 360		

	Distributors Inc.					
67	*Lam v. University of Calgary*	dismissal		granted 2019 ABQB 923		
68	*La Prairie Works Inc. v. Ledor Alberta Ltd.*	dismissal			granted 2019 ABQB 701	
69	*Lewandowska v. Vander Woude*	dismissal	granted 2019 ABPC 115			
70	*Love v. Generoux*	dismissal		denied 2020 ABQB 71		
71	*Love v. Generoux*	judgment		denied 2020 ABQB 71		
72	*Lovig v. Soost*	judgment			denied 2019 ABQB 498	denied 2020 ABCA 66
73	*Lynk v. Co-Operators General Insurance Co.*	dismissal			denied 2019 ABQB 417	
74	*Malkhassian Estate v. Scotia Life Insurance Co.*	judgment			denied 2020 ABQB 173	
75	*Malmberg v. Boyd Estate*	dismissal		granted 2020 ABQB 80		
76	*Malmberg v. Boyd Estate*	judgment		denied 2020 ABQB 80		
77	*Mehak Holdings Ltd. v. BBQ To-Night Ltd.*	dismissal		granted 2019 ABQB 556		
78	*Milota v. Momentive Speciality Chemicals Canada, Inc.*	dismissal		denied 2019 ABQB 117		
79	*Minex Minerals Ltd. v. Walker*	dismissal		granted 2019 ABQB 460		
80	*Moore's Industrial Service Ltd. v. Kugler*	dismissal			denied unreported	denied 2019 ABCA 178
81	*Mudrick Capital Management LP v. Wright*	dismissal			granted 2019 ABQB 662	
82	*Muirfield Village Ltd. v. Borsuk*	dismissal		granted 2019 ABQB 160		
83	*Muth Estate v. Liesch*	judgment			denied 2019 ABQB 922	
84	*Nadeau v. Neilson*	judgment		denied 2019 ABQB 810		
85	*Nelson & Nelson v. Condominium Corp. No. 0013187*	dismissal			denied 2019 ABQB 426	
86	*Nelson v. City of Grande Prairie*	dismissal		granted 2019 ABQB 897		
87	*North Bank Potato Farms Ltd. v. Canadian Food Inspection Agency*	dismissal		denied 2015 ABQB 653	granted 2018 ABQB 505	granted 2019 ABCA 344
88	*Ontrea Inc. v. De Beers Diamond Jewellers (Canada) Ltd.*	judgment		granted 2019 ABQB 926		
89	*Owners Condominium Plan No. 7721985 v. Breakwell*	judgment		denied unreported	granted 2019 ABQB 674	
90	*Owners Condominium Plan No. 7721985 v. Breakwell*	dismissal		granted unreported	denied 2019 ABQB 674	

91	*P & C Law Firm Management Inc. v. Sabourin*	judgment		granted unreported	denied 2019 ABQB 537	
92	*Panther Sports Medicine & Rehabilitation Centres Inc. v. Adrian G. Anderton Prof. Corp.*	judgment		denied 2019 ABQB 599	denied 2019 ABQB 973	
93	*Petrogas Energy Corp. v. ACCEL Energy Canada Ltd.*	dismissal		granted 2019 ABQB 427		
94	*Plesa v. Richardson*	dismissal		granted unreported	granted unreported	denied 2019 ABCA 264
95	*Pricewaterhouse—Coopers Inc. v. Perpetual Energy Inc.*	dismissal			denied 2020 ABQB 6, ¶ 101	
96	*Pricewaterhouse—Coopers Inc. v. Perpetual Energy Inc.*	dismissal			granted 2019 ABQB 6, ¶¶ 327 & 369	
97	*Proline Pipe Equipment Inc. v. Provincial Rentals Ltd.*	judgment			denied 2019 ABQB 983	
98	*Raun v. Shumborski*	dismissal		denied unreported	denied 2019 ABQB 823	
99	*Re Rifco Inc.*	judgment			denied 2020 ABQB 366	
100	*Roberts v. Edmonton Northlands*	dismissal			denied 2019 ABQB 9	denied 2019 ABCA 229
101	*Rockyview Enterprises Inc. v. Clean Team Property Services Ltd.*	dismissal		denied 2017 Carswell Alta 3033	granted 2019 ABQB 807	
102	*Royal Bank of Canada v. Warionmor*	judgment		granted 2019 ABQB 419		
103	*Royal Bank of Canada v. Warionmor*	judgment		denied 2019 ABQB 419		
104	*Royal Camp Services Ltd. v. Sunshine Oilsands Ltd.*	judgment		granted unreported	granted 2019 ABQB 911	
105	*Rudichuk v. Genesis Land Development Corp.*	judgment		granted 2017 ABQB 285	denied 2019 ABQB 133	denied 2020 ABCA 42
106	*Sangha v. Sintra Engineering Inc.*	dismissal		granted 2019 ABQB 924		
107	*Scherle v. Treadz Auto Group Inc.*	dismissal			granted 2019 ABQB 987	
108	*Scotia Mortgage Corp. v. Meshkati*	judgment		denied unreported	granted 2019 ABQB 267	
109	*Sehic v. National Home Warranty Group Inc.*	dismissal		granted unreported	denied 2019 ABQB 955	
110	*Sewak Gill Enterprises Inc. v. Bedaux Real Estate Inc.*	judgment			granted 2018 ABQB 823	denied 2020 ABCA 125
111	*Simmie v. JRJ Concrete Ltd.*	judgment		denied unreported	granted 2019 ABQB 409	
112	*Smith v. Grant MacEwan University*	dismissal	granted 2019 ABPC 303			
113	*Smith v. John Doe*	dismissal			granted 2020 ABQB 59	
114	*Smith v. Uhersky*	judgment		granted 2019		

				ABQB 761		
115	*Sobey's Capital Inc. v. Whitecourt Shopping Centre (GP) Ltd.*	judgment			granted 2018 ABQB 517	granted 2019 ABCA 367
116	*Sonny's Trucking Ltd. v. Edmonton Kenworth Ltd.*	dismissal		denied 2019 ABQB 696		
117	*SSAB Inc. v. Generation Steel Inc.*	judgment		granted 2019 ABQB 380	granted 2020 ABQB 44	
118	*SSAB Inc. v. Generation Steel Inc.*	judgment		granted 2019 ABQB 380	denied 2020 ABQB 44	
119	*SSC North America, LLC v. Federkiewicz*	judgment		granted 2019 ABQB 391	denied 2020 ABQB 176	
120	*Stankovic v. 1536679 Alberta Ltd.*	judgment		granted unreported	granted unreported	denied 2019 ABCA 187
121	*Steer v. Chicago Title Insurance Co.*	judgment		denied 2018 ABQB 28	denied 2019 ABQB 318, ¶ 52	
122	*Steer v. Chicago Title Insurance Co.*	dismissal			granted 2019 ABQB 318, ¶ 53	
123	*Superior Energies Insulation Group Canada Inc. v. Aluma Systems Inc.*	dismissal		denied unreported	denied 2019 ABQB 166	
124	*TA v. Alberta*	dismissal			granted 2020 ABQB 97	
125	*Urban Square Holdings Ltd. v. Governali*	dismissal		granted 2020 ABQB 240		
126	*von der Ohe v. Porsche Cars Canada Ltd.*	dismissal	denied 2019 ABPC 46			
127	*Wage v. Canadian Direct Insurance Inc.*	dismissal		granted 2018 ABQB 352	denied 2019 ABQB 303	granted 2020 ABCA 49
128	*Wasylynuk v. Bouma*	dismissal			granted 2018 ABQB 159	granted 2019 ABCA 234
129	*West Edmonton Mall Property Inc. v. Proctor*	judgment			granted 2020 ABQB 161	
130	*Westpoint Capital Corp. v. Black & Assoc. Appraisal Inc.*	dismissal		granted 2019 Carswell Alta 1166		

ScheduleC

Global Review of the Outcome of Applications in the Pre and Post Weir-Jones Period

	Before *Weir-Jones*		**After *Weir-Jones***		**Before and After**	
Applications by plaintiffs for judgment	48	46%	48	37%	96	41%
Successful	18	*38%*	20	*42%*	38	*40%*
Unsuccessful	30	*63%*	28	*58%*	58	*60%*
—						
Applications by defendants for dismissal	57	54%	82	63%	139	59%
Successful	32	*56%*	54	*66%*	86	*61%*
Unsuccessful	25	*44%*	28	*34%*	53	*39%*
—						
Total applications by both plaintiffs and defendants	105	100%	130	100%	235	100%
Successful	50	*48%*	74	*57%*	124	*53%*
Unsuccessful	55	*52%*	56	*43%*	111	*47%*

ScheduleD[279]

Applications Heard by Each Court Level in the Pre and Post Weir-Jones Period

	Before *Weir-Jones*		**After *Weir-Jones***		**Before and After**	

Provincial Court		8	4%	10	7%	18	5%
Masters		90	46%	49	35%	139	41%
Court of Queen's Bench		79	41%	62	44%	141	42%
Court of Appeal		18	9%	19	14%	37	11%
	Total	195	100%	140	100%	335	100%

ScheduleE

Applications Heard by Provincial Court in the Pre and Post Weir-Jones Period

Applications heard by Provincial Court		**Before *Weir-Jones***		**After *Weir-Jones***		**Before and After**	
By plaintiffs for judgment		1	13%	2	20%	3	17%
Successful		1	*100%*	1	*50%*	2	*67%*
Unsuccessful		0	*0%*	1	*50%*	1	*33%*
—							
By defendants for dismissal		7	88%	8	80%	15	83%
Successful		5	*71%*	7	*88%*	12	*80%*
Unsuccessful		2	*29%*	1	*12%*	3	*20%*
	Total	8	100%	10	100%	18	100%

ScheduleF

Applications Heard by Masters in the Pre and Post Weir-Jones Period

Applications heard by Masters		**Before *Weir-Jones***		**After *Weir-Jones***		**Before and After**	
By plaintiffs for judgment		42	47%	21	43%	63	45%
Successful		21	*50%*	10	*48%*	31	*49%*
Unsuccessful		21	*50%*	11	*52%*	32	*51%*
—							
By defendants for dismissal		48	53%	28	57%	76	55%
Successful		19	*40%*	20	*71%*	39	*51%*
Unsuccessful		29	*60%*	8	*29%*	37	*49%*
	Total	90	100%	49	100%	139	100%

ScheduleG

Applications Heard by the Court of Queen's Bench in the Pre and Post Weir-Jones Period

Applications heard by Court of Queen's Bench		**Before *Weir-Jones***		**After *Weir-Jones***		**Before and After**	
By plaintiffs for judgment		32	41%	27	44%	59	42%
Successful		11	*34%*	11	*41%*	22	*37%*
Unsuccessful		21	*66%*	16	*59%*	37	*63%*
—							
By defendants for dismissal		47	59%	35	56%	82	58%
Successful		25	*53%*	20	*57%*	45	*55%*
Unsuccessful		22	*47%*	15	*43%*	37	*45%*
	Total	79	100%	62	100%	141	100%

ScheduleH

Applications Heard by the Court of Appeal of Alberta in the Pre and Post Weir-Jones Period

Applications heard by Court of Appeal		**Before *Weir-Jones***		**After *Weir-Jones***		**Before and After**	
By plaintiffs for judgment		9	50%	5	26%	14	38%
Successful		2	*22%*	1	*20%*	3	*21%*
Unsuccessful		7	*78%*	4	*80%*	11	*79%*
—							
By defendants for dismissal		9	50%	14	74%	23	62%
Successful		9	*100%*	9	*64%*	18	*78%*
Unsuccessful		0	*0%*	5	*36%*	5	*22%*
	Total	18	100%	19	100%	37	100%

ScheduleI

Review of Appeals in the Pre and Post Weir-Jones Period

	Before *Weir-Jones*		After *Weir-Jones*		Before and After	
Applications with no appeals	143	73%	94	68%	237	71%
Applications with appeals	52	27%	46	32%	98	29%
To Court of Queen's Bench from Provincial Court	0	2%	1	2%	1	2%
Allowed	0	-	0	0%	0	0%
Dismissed	0	-	1	100%	1	100%
To Court of Queen's Bench from Master	34	65%	28	62%	62	64%
Allowed	11	32%	15	54%	26	42%
Dismissed	23	68%	13	46%	36	58%
To the Court of Appeal from Court of Queen's Bench	18[280]	35%	17[281]	38%	35	36%
Allowed	6	33%	4	24%	10	29%
Dismissed	12	67%	13	76%	25	71%
Total	195	100%	140	100%	335	100%

While the culture shift in Canadian law towards using alternative but fair and just methods of adjudication is well established in Alberta, front line judges are entitled to deference on their decisions as to whether summary judgment under Rule 7.3 is a fair and appropriate means for adjudication in a given case: *W. P. v Alberta*, 2014 ABCA 404 at para 15.

A chambers judge is not required to grant summary judgment where he or she does not feel they can fairly and properly adjudicate the issue before them on the record presented.

Footnotes

1 2014 SCC 7 (S.C.C.), ¶¶ 2-3; [2014] 1 S.C.R. 87 (S.C.C.), 92-93 ("Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. ... Summary judgment motions provide one such opportunity").

2 Summary judgment is the remedy sought by a plaintiff who seeks judgment at a pretrial stage of the proceedings and a defendant who seeks dismissal of the plaintiff's claim at a pretrial stage of the proceedings. "Summary disposition" might be a better term. But as all rules of court with which we are familiar use the term "summary judgment", we will as well.

3 2008 SCC 14 (S.C.C.), ¶ 10; [2008] 1 S.C.R. 372 (S.C.C.), 378 ("Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system").

4 *Jacobs v. Booth's Distillery Co.* (1901), 85 L.T. 262 (U.K. H.L.) per Halsbury, L.C. ("There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV. was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavoring to enforce their rights").

5 *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 92 & 94 per Lord Woolf, M.R. ("Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. ... [Summary judgment] saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no

purpose").

6 *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 327 ("The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action'").

7 Manitoba (*Court of Queen's Bench Rules, amendment*, Man. Reg. 121/2019, ss. 2 & 5 & *Court of Queen's Bench Rules, amendment*, Man. Reg. 130/2017, s. 8), New Brunswick (*New Brunswick Regulation* 2016-73, O.C. 216-313, s. 1) & Nova Scotia (*Nova Scotia Civil Procedure Rules Amendment*, 225 N.S. Gazette 322 (March 2, 2016)). See *Court of Queen's Bench Rules*, Man. Reg. 553/88, rr. 20.03(1) & (2) ("(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence (2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial: (a) weighing the evidence; (b) evaluating the credibility of a deponent; (c) drawing any reasonable inference from the evidence; unless it is in the interest of justice for these powers to be exercised only at trial"); *Rules of Court*, N.B. Reg. 82-73, R. 22.04(1)-(3) ("(1) The court shall grant summary judgment if (a) the court is satisfied there is no genuine issue requiring a trial with respect to a claim or a defence ... (2) In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and may exercise any of the following powers for the purpose, unless it is in the interests of justice for those powers to be exercised only at trial: (a) weighing the evidence; (b) evaluating the credibility of a deponent; and (c) drawing a reasonable inference from the evidence; (3) For the purpose of exercising the powers set out in this subrule, a judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation") & *Nova Scotia Civil Procedure Rules*, r. 13.04(1) ("A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action: (a) there is no genuine issue of material facts, whether on its own or mixed with a question of law, for the trial of the claim or defence; (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in Rule 13.04 to determine the question").

8 *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27 (Man. C.A.), ¶ 32; (2018), 421 D.L.R. (4th) 315 (Man. C.A.), 325 ("The Supreme Court of Canada's decision in *Hryniak* did not alter the basic test for summary judgment in Manitoba) & *Lenko v. Manitoba*, 2016 MBCA 52 (Man. C.A.), ¶ 71; (2016), [2017] 1 W.W.R. 291 (Man. C.A.), 311 ("*Hryniak* did not ... change the test to be applied on a motion for summary judgment in Manitoba").

9 E.g., *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52 (N.S. C.A.), ¶ 6; (2014), 68 C.P.C. (7th) 267 (N.S. C.A.), 269 ("*Hryniak v. Mauldin* ... has little bearing upon the circumstances, analysis, reasoning or result in this case").

10 E.g., *Stefanyk v. Sobeys Capital Incorporated*, 2018 ABCA 125 (Alta. C.A.), ¶ 15; [2018] 5 W.W.R. 654 (Alta. C.A.), 660 ("is the record such that it is fair and just to decide summarily if the moving party has proven the case on a balance of probabilities?").

11 E.g., *898294 Alberta Ltd v. Riverside Quays Limited Partnership*, 2018 ABCA 281 (Alta. C.A.), ¶ 12 ("Summary judgment is reserved for the resolution of disputes where the outcome of the contest ... [is] obvious. ... Is the 'moving party's position ... unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success very low?'"); *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160 (Alta. C.A.), ¶ 2; (2017), 100 C.P.C. (7th) 52 (Alta. C.A.), 61 ("Rule 7.3 ... allows a court to summarily dismiss an action that is without merit. A nonmoving party's position is without merit if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low") & *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.), ¶ 45; (2014), 584 A.R. 68 (Alta. C.A.), 78 ("The principles which govern summary judgment ... are distilled in *Beier v. Proper Cat Construction Ltd.*: ... A party's position is without merit if the facts and the law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high").

12 See *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 101; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 387 per Wakeling, J.A. ("There is no need to revisit either the purpose or the principles used to implement the summary judgment rule. Rule 7.3 and its predecessors have been in place since 1914. There is a settled understanding of the rule's purpose and principles. And these are entirely in accord with the values endorsed by *Hryniak v. Mauldin*").

13 2019 ABCA 49 (Alta. C.A.), ¶47; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.).

14 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ 47; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 50.

15 An order dismissing an application for summary judgment is a pretrial order. Some pretrial decisions identified in r. 14.5(1)(b) of the *Alberta Rules of Court*, Alta. Reg. 124/2010, may only be appealed with permission. This is not one of those stipulated pretrial decisions.

16 Appeal Record F1: 41-F2: 8.

17 Appeal Record F5: 24-25.

18 Id. F5: 34-35.

19 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ 47; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 50.

20 Id. at ¶ 48; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.) at 51.

21 Id. at ¶ 47; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.) at 51.

22 R.S.A. 2000, c. O-4, s. 5.

23 Ms. Hannam did not recall that the sidewalk was icy. Questioning of Ms. Hannam. Appellant's Extracts of Key Evidence A60:7-11.

24 Questioning of Gary John Getz. Appellant's Extracts of Key Evidence A202: 2-11.

25 Questioning of Gary John Getz. Appellant's Extracts of Key Evidence A179:8-A180:20 & A186:20-25.

26 Questioning of Ms. Hannam A51:21-A52:13 & A130:27-A131:3.

27 Questioning of Ms. Hannam. Appellant's Extracts of Key Evidence A40:3-8.

28 Questioning of Gary John Getz. Appellant's Extracts of Key Evidence A196:24-A197:4 & A198:20-26.

29 R.S.A. 2000, c. L-12, s. 3(1).

30 Appellant's Extracts of Key Evidence A7.

31 R.S.A. 2000, c. O-4.

32 Appeal Record P1.

33 Appeal Record F48:23-31 & F48:4-F49:10.

34 Appeal Record P6.

35 Appeal Record F5:19-22, 24-25 & 34-35 & F6:1-4.

36 Appeal Record F8.

37 Alta. Reg. 124/2010. (emphasis added).

38 *Rules To Amend the Alberta Rules of Court*, Alta. Reg. 216/86. *The Supreme Court Rules*, Alta. Reg. 390/68 (in force January 1, 1969) did not allow a defendant to apply for summary judgment. The rules were cited as *The Supreme Court Rules* until September 7, 1983. Alta. Reg. 338/83, s. 2. See Laycraft & Stevenson, "The Alberta Rules of Court — 1969", 7 Alta. L. Rev. 190, 192 (1969) ("The one major change in these rules is the replacement of the old Rules 128 and 140 with the single Rule 159. ... This procedure may... be available in tort actions where it was not previously available"). Effective June 19, 1986 a defendant was given the option of applying for summary judgment. *Rules To Amend the Alberta Rules of Court*, Alta. Reg. 216/86.

39 *The Supreme Court Rules*, Alta. Reg. 390/68.

40 S.I. 1998/3132.

41 28 U.S.C. Federal Rules of Civil Procedure (emphasis added).

42 475 U.S. 574 (U.S. Pa. S.C. 1986).

43 28 U.S.C. Federal Rules of Civil Procedure (emphasis added).

44 Cal. Civ. Proc. Code (West) (emphasis added).

45 N.Y. Civ. Prac. Law, c. 8 (McKinney) (emphasis added).

46 R.S.A. 2000, c. O-4.

47 *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), ¶¶ 1-3; [2014] 1 S.C.R. 87 (S.C.C.), 92-93 (the Court acknowledged that the cost and delay associated with conventional trial diminished the value of conventional trials to litigants and correspondingly enhanced the value of other dispute-resolution procedures); Schwarzer, Hirsch & Barrans, "The Analysis and Decision of Summary Judgment Motions" vii (Federal Judicial Center 1991) ("Growing concern over cost and delay in civil litigation has focused increased attention on Rule 56 as a vehicle to implement the objectives of Fed. R. Civ. P. 1 — the just, speedy and inexpensive resolution of litigation").

48 See American Bar Association, Judicial Administration Division, Standards Relating to Trial Courts § 2.52(a) (1992) ("General civil — 90% of all civil cases should be settled, tried or otherwise concluded with 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur"). This is a very demanding standard. The Superior Court of California — it has jurisdiction over all criminal and civil cases — for the fiscal year 2018 disposed of sixty-four percent of civil cases in which the claimant sought more than $25,000 within twelve months of the filing of the action, seventy-seven percent within eighteen months and eighty-five percent within twenty-four months. Judicial Council of California, 2019 Court Statistics Report, Statewide Caseload Trends 2008-09 Through 2017-18, at 94 (2019). There were 221,090 civil cases of this nature filed in fiscal year 2018. Id. The Superior Court disposed of 193,615 of these cases in the fiscal year 2018 — a caseload clearance rate of eighty-eight percent. Id. The Superior Court's clearance rate was over ninety percent in the period commencing fiscal year 2011 and ending fiscal year 2016, topping out at 100 percent in fiscal year 2011. Id. See *California Rules of Court*, Standard 2.2(f) (rev. Sept. 1, 2020) ("The goal of each trial court should be to manage general civil cases, except those exempt under (g), so that they meet the following case disposition time goals: (1) Unlimited civil cases [claims over $25,000]: The goal of each trial court should be to manage unlimited civil cases from filing so that (A) 75 percent are disposed of within 12 months; (B) 85 percent are disposed of within 18 months; and (C) 100 percent are disposed of within 24 months"). Writing in 1933, Justice Finch of the Supreme Court of New York reported that "the jury calendars in large centers of population are generally from two to three years behind". "Summary Judgment Procedure", 19 A.B.A.J. 504, 504 (1933). While the Court of Queen's Bench of Alberta does not compile statistics of the time lines for the resolution of actions, given what it does publish — lead times for trials and half-day applications — it is safe to say that the Alberta timelines are far in excess of those proposed by the American Bar Association. Court of Queen's Bench of Alberta Annual Report 2016 to 2017, Appendix 3 (2017). See D. Field & J. Dillon, Report of the Special Committee Appointed To Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and if So, By What Means, 8 A.B.A. Rep. 323, 327 (August 9, 1885) ("In the city of New York, we have ... the means of ascertaining with considerable exactness the number of cases brought into the courts, and the number decided within a definite period. It is to be regretted that is it not made the duty of some public officer in every state to furnish the statistics of litigation").

49 Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact", 99 F.R.D. 465, 467 (1984) ("This [unawareness of the utility of summary judgment] is a regrettable state of affairs, frustrating the intent of those who drafted Rule 56 and the Supreme Court and Congress which adopted it to further the efficient and economical resolution of issues not requiring an evidentiary trial").

50 *Biss v. Lambeth, Southwark & Lewisham Health Authority* (1977), [1978] 1 W.L.R. 382 (Eng. C.A.), 389 per Lord Denning, M.R. ("The business house was prejudiced because it could not carry on its business affairs with any confidence — or enter into forward commitments — while the action for damages was still in being against it. ... There comes a time when it is entitled to have some peace of mind and to regard the incident as closed"); Organization for Economic Cooperation and Development, Economics Department Policy Note No. 18, "What Makes Civil Justice Effective?" 2 (June 2013) ("Lengthy [periods between the commencement of proceedings and trial disposition] ... undermine certainty of transactions and investment returns, and impose heavy costs on firms") & D. Field & J. Dillon, Report of the Special Committee Appointed To Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and if So, By What Means, 8 A.B.A. Rep. 323, 324 (August 9, 1885) ("The insecurity of life and property which a dilatory or uncertain administration of justice entails operates as a blight upon enterprise and frightens away not only the timid, but all, even the boldest").

51 *Bailey v. Bailey* (1884), 13 Q.B.D. 855 (Eng. C.A.), 856 per Grove J. ("The object of ... [Order XIV] is ... to prevent a debtor who unquestionably owes a debt from putting the creditor to great expense with the chance of the debtor proving insolvent") & Finch, "Extension of the Right of Summary Judgment", 4 N.Y. State B. Ass'n Bull. 264, 266 (1932) ("There has been ... a great deal of criticism of court procedure in connection with the foreclosure of mortgages, and many lenders have been so delayed by answers raising fictitious issues that they have resolved never again will they lend money on mortgage. This attitude, unless corrected, will go a long way towards hampering and hurting those interested in the development of real estate").

52 Organization for Economic Co-operation and Development, Economics Department Policy No. 18, "What Makes Civil Justice Effective?" 8 (June 2013) ("Predictability of court decisions, that is, the possibility to predict *ex ante* how the law will be applied by the court, is extremely important from an economic perspective. It provides legal certainty and enables economic agents to form expectations about the potential legal and economic consequences of their actions. Predictability of court decisions also influences choices on whether to initiate litigation or appeal judicial outcomes").

53 Defendants who have no defence and have the resources to litigate are probably the only exception. See Organization for Economic Co-operation and Development, Economics Department Policy No. 18, "What Makes Civil Justice Effective?" 2 (June 2013) ("OECD analyses ... suggest that a 10% increase in the average length [of a dispute] ... is associated with a decrease of around 2 percentage points in the probability to have confidence in the justice system").

54 *Pillar Resource Services Inc. v. PrimeWest Energy Inc.*, 2017 ABCA 19 (Alta. C.A.), ¶ 68 per Wakeling, J.A. ("[litigation causes] stress, inconvenience and distraction") & *McPhilemy v. Times Newspapers Ltd.*, [2001] EWCA Civ 933 (Eng. & Wales C.A. (Civil)), ¶ 20; [2001] 4 All E.R. 861 (Eng. & Wales C.A. (Civil)), 872 ("[litigation causes] inconvenience, anxiety and distress").

55 *Humphreys v. Trebilcock*, 2017 ABCA 116 (Alta. C.A.), ¶ 90; [2017] 7 W.W.R. 343 (Alta. C.A.), 369 ("People understandably expect that the mechanisms our state has constructed for the resolution of disputes will process them at a reasonable rate .... When these legitimate expectations are not met, individuals most closely linked to actions and the greater community may lose confidence and respect for the manner in which justice is administered"); *National Metropolitan Bank of Washington v. Hitz*, 1 MacArth. & M. 198, 199 (D.C. Sup. Ct. 1879) per Cartter C.J. ("This rule was adopted ... when we were overwhelmed with a great oppression of business. The calendar ... had run up to a thousand cases or thereabouts. Great delays in judgment occurred; creditors were postponed in the collection to an indefinite time. Defendants resorted to formal denials of pleading for the purpose of securing the time that the delays of the law gave them") & Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 6(1) (1953) ("In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law").

56 See *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), ¶ 1; [2014] 1 S.C.R. 87 (S.C.C.), 92 ("without public adjudication of civil cases, the development of the common law is stunted") & Royal Commission on the Dispatch of Business at Common Law 1934-36, Final Report 31 (1936) ("This preference of the commercial community for the settlement of their disputes by arbitration is due, no doubt, to its greater freedom from appeals; its informality, privacy and friendly atmosphere; the saving of the great expense of copying documents; and, above all, the fact that the issue is determined speedily and on a fixed date, arranged to suit the convenience of the maximum number of parties concerned in the dispute").

57 D. Field & J. Dillon, Report of the Special Committee Appointed To Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and if So, By What Means, 8 A.B.A. Rep. 323, 324 (August 9, 1885).

58 Data published in The Court of Queen's Bench Annual Report 2016 to 2017, Appendix 2 shows that there were 46,381 civil actions, 10,376 divorce actions and 6,670 family actions commenced in the period covered by the report. If there were 100 Court of Queen's Bench judges and Masters hearing proceedings, which there were not at the time, this works out to roughly 634 new matters for each adjudicator. The Annual Report for 2016 to 2017 provides no data about resolution rates. How many days have elapsed between the date an action was commenced and when it was resolved either by trial or some other pre-trial disposition? This is critical information. Without this information, it is difficult to assess how long it takes to close files on average. *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ 129; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 85 per Wakeling, J.A. ("Regrettably, there is no reason to believe that the amount of time it currently takes for conventional trials in the Court of Queen's Bench of Alberta to close litigation files will trend downwards in the foreseeable future"). Nothing will change unless the Court adopts measures that force the parties to complete litigation milestones within time lines imposed at the commencement of the action or by case management. Vigilant case management is indispensable to expedited litigation. See *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 1.4 (1) & (2) (U.K.) ((1) "The court must further the overriding objective [of enabling the court to deal with cases justly, which includes expeditiously and fairly] by actively managing cases ... (2) Active case management includes ... (g) fixing timetables or otherwise controlling the progress of the case"); A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 19 (3d ed. 2013) ("The court is entrusted with the task of actively managing cases in order to further the overriding objective by, amongst other measures controlling the progress of the case (... [*The Civil Procedure Rules 1998*] 1.4(2)(g)). By including the need for expedition amongst the goals of the overriding objective, the CPR has made the need for timely resolution a major consideration in case management") & Organization for Economic Co-operation and Development, Economics Department Policy No. 18, "What Makes Civil Justice Effective?" 5-6 (June 2013) ("A court system with a good degree of informatisation is essential to the development of so-called caseflow management techniques that allow for a smoother functioning of courts. Caseflow management broadly indicates the set of actions that a court can take to monitor the progress of cases and to make sure that they are managed efficiently. It includes for example the monitoring and enforcement of deadlines, the screening of cases for the selection of an appropriate dispute resolution track, and the early identification of potentially problematic cases. ... An important condition for the implementation of caseflow management techniques is the systematic collection of detailed statistics on caseflows, trial length, judges' workload and other operational dimensions. Recording data on the functioning

of courts on a regular basis allows soundly monitoring and managing the performance of judges and staff. With some exceptions (England and Wales, Slovenia), trial length appears to be shorter in systems with a higher production of statistics").

59 Alta. Reg. 124/2010.

60 *Department of Transport v. Chris Smaller (Transport) Ltd.*, [1989] 1 All E.R. 897 (U.K. H.L.), 903 per Lord Griffiths ("I recommend a radical overhaul of the whole civil procedural process and the introduction of court controlled case management techniques designed to ensure ... [that litigation] proceeds in accordance with a timetable as prescribed by rules of court or as modified by a judge").

61 *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 1.2(2)(b).

62 Albertans are not alone in their recognition of the virtue of expedited dispute resolution procedures. Major common law jurisdictions — England and Wales, Australia, New Zealand, Hong Kong and the United States — have adopted them. For a description of these country-specific protocols see *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), nn. 64-68; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), nn. 64-68.

63 2019 ABCA 49, 442 D.L.R. (4th) 9 (Alta. C.A.).

64 *Summary Procedure on Bills of Exchange Act, 1855*, 18 & 19 Vict. c. 67, s. 1 (U.K.) (only the plaintiff in actions to enforce a specific form of debt could apply for summary judgment); *Rules of Procedure*, Order XIV & *Supreme Court of Judicature Act, 1875*, 38 & 39 Vict., c. 77, First Sch. (in force November 1, 1875); *The Rules of the Supreme Court, 1883*, Order III, R. 6 & Order XIV, R. 1 (in force October 24, 1883) (U.K.); *Rules of the Supreme Court, 1965*, Order 14, R. 1 (in force October 1, 1966) (U.K.); *The Consolidated Rules of the Supreme Court*, O.C. August 12, 1914, r. 129 (Alta.); *The Consolidated Rules of the Supreme Court*, O.C. 716/44, r. 128 (Alta.) (in force July 1, 1944) & *The Consolidated Rules of the Supreme Court*, O.C. August 12, 1914, r. 129 (in force September 1, 1914).

65 We are not aware of any summary judgment protocol that allows only defendants to access it.

66 *Rules To Amend the Alberta Rules of Court*, Alta. Reg. 216/86 (Alta.) (effective January 1, 1969); *The Civil Procedure Rules 1998*, r. 24.2, S.I. 1998/3132 (U.K.) (effective April 26, 1999); *Federal Rules of Civil Procedure*, 28 U.S.C., R. 56 (effective September 16, 1938) & *Rules of Civil Procedure*, r. 113 (N.Y.) (effective April 15, 1932).

67 See Eisenberg & Clermont, "Plaintiphobia in the Supreme Court", 100 Cornell L. Rev. 193, 193 (2014) ("The ballyhooed Supreme Court cases on summary judgment ... had palpably negative effects on plaintiffs"). Some commentators believe that the existence of a summary judgment rule gives defendants a tactical advantage. Magistrate Judge Denlow for the Northern District of Illinois states that "[a]lthough a plaintiff has equal recourse to summary judgment under Rule 56 [of the *Federal Rules of Civil Procedure*], the motion has largely become a defendant's weapon"). Denlow, "Boon or Burden?", 37 Judges' Journal 26, 27 (1998).

68 *Summary Procedure on Bills of Exchange Act, 1855*, 18 & 19 Vict., c. 67.

69 *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 7.3(1) (effective November 1, 2010); *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.2 (effective April 26, 1999) & *Federal Rules of Civil Procedure*, R. 56 (effective September 16, 1938).

70 *Alberta Rules of Court*, Alta. Reg. 390/68, r. 159(1) (effective January 1, 1969) ("In any action in which a defence has been filed, the plaintiff may ... apply to the court for judgment"); *The Consolidated Rules of the Supreme Court*, O.C. 716/44, r. 128 (effective July 1, 1944) ("When a statement of claim includes a claim for a debt or liquidated demand and any defendant has delivered a defence, the plaintiff may ... apply for leave to enter final judgment"); *Federal Rules of Civil Procedure*, 28 U.S.C., R. 56(b)

(effective September 16, 1938) ("Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery"); *Code of Civil Procedure*, West's Ann. Cal. C.C.P., r. 437c(a)(1) ("The motion [for summary judgment] may be made at any time after 60 days have elapsed since the general appearance in the action") & *Civil Practise Law and Rules*, N.Y. Civ. Proc. Law (Consol.), c. 8, r. 3212(a) ("Any party may move for summary judgment in any action, after issue has been joined").

71 *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 71; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 134 ("summary judgment ... expedites litigation, reduces costs for the litigants, frees up scarce judicial resources and ameliorates access to justice issues").

72 Clark & Samenow, "The Summary Judgment", 38 Yale L.J. 423, 471 (1929) ("Our procedural rules have been designed in large part to avoid harsh and drastic measures against litigants. ... We should not overlook, however, the objective towards which those rules should be directed, that of a simple, orderly and prompt presentation of the substantive issues in dispute between the parties. The strength of the summary procedure is that it achieves that objective in many cases. The speed of the procedure is desirable, but still more to be emphasized is its simplicity and directness in bringing out the real dispute").

73 *Walia v. University of Manitoba*, 2005 MBQB 278 (Man. Q.B.), ¶ 16 (Master) ("To not allow the summary judgment hearing to proceed, and to allow the pre-trial procedures to run their course, defeats the purpose of the summary judgment relief").

74 *Stout v. Track*, 2015 ABCA 10 (Alta. C.A.), ¶ 50; (2015), 62 C.P.C. (7th) 260 (Alta. C.A.), 279 per Wakeling, J.A. ("the comparative strengths of the moving and nonmoving party's positions need not be so disparate that the nonmoving party's prospects of success must be close to zero before summary judgment may be granted. If that was the law, the purpose of summary judgment would be frustrated") & *Chubbs v. New York (City)*, 324 F.Supp. 1183 (U.S. Dist. Ct. E.D. N.Y. 1971), 1189 ("Since courts are composed of mere mortals, they can decide matters only on the basis of probability, never on certainty. The 'slightest doubt' test, if it is taken seriously, means that summary judgment is almost never to be used — a pity in this critical time of overstrained legal resources").

75 There were other detractors. E.g., *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (U.S. Sup. Ct. 1970), 176 per Black, J. ("The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases") & *Whitaker v. Coleman*, 115 F.2d 305 (U.S. C.A. 4th Cir. 1940), 306 per Hutcheson, J. ("[Rule 56 of the *Federal Rules of Civil Procedure*], valuable as it is for striking through sham claims and defences which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial"). The Fifth Circuits' dislike for summary judgment was so notorious that a federal district court judge posted a sign in his courtroom "No spitting, no summary judgments". Childress, "A New Era for Summary Judgments: Recent Shifts at the Supreme Court", 6 Rev. Litig. 263, 264 (1987).

76 *Doehler Metal Furniture Co., Inc.*, 149 F.2d 130 (U.S. C.A. 2nd Cir. 1945), 135 (emphasis added).

77 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ 139; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 99 per Wakeling, J.A. ("Most jurisdictions are prepared to deprive the nonmoving party of access to the full civil procedure spectrum only if the disparity between the strengths of the moving and nonmoving parties' positions is so great that the likelihood the moving party's position will prevail is very high — the ultimate trial disposition is obvious. This marked disparity element is produced by the employment of tests that ask if the nonmoving party's position is devoid of merit or if there is a genuine issue to be tried. If the nonmoving party's position is without merit, there is no genuine issues to be tried") & *Chubbs v. New York (City)*, 324 F.Supp. 1183 (U.S. Dist. Ct. E.D. N.Y. 1971), 1185 ("the probability of [the plaintiff] ... obtaining a significant remedy is miniscule and the burdens on the court, the defendants, the bar and the penal system of allowing the litigation to proceed are great. Under the circumstances ... we refuse to permit this hopeless case to proceed").

78 See *Sewak Gill Enterprises Inc. v. Bedaux Real Estate Inc.*, 2020 ABCA 125 (Alta. C.A.), ¶ 13 ("the 'unassailable' test ... involves a more stringent standard for granting summary judgment [than the *Weir-Jones* test]") & *Rudichuk v. Genesis Land Development Corp*, 2019 ABQB 133 (Alta. Q.B.), ¶ 27 ("[The *Weir-Jones* test] is a more liberal approach to granting summary judgment than the test in *Whissell*").

79 *Doehler Metal Furniture Co., Inc.*, 149 F.2d 130 (U.S. C.A. 2nd Cir. 1945), 135 per Frank J. (”denial of [the right to a trial] ... is reviewable; but refusal to grant summary judgment is not”) & *Dwan v. Massarene*, 199 App. Div. 872 (U.S. N.Y.A.D. 1st Dept. 1922), 880 (”If ... [the defendant] shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend, this court will not review the order, as we consider that no substantial right of the plaintiff has been violated”), overruled, *Lee v. Graubard*, 205 App. Div. 344 (U.S. N.Y.A.D. 1st Dept. 1923).

80 ”Three American Ventures in Summary Civil Procedure”, 38 Yale L.J. 193, 193-94 (1928).

81 18 & 19 Vict., c. 67, recital (”Whereas *bona fide* holders of dishonoured Bills of Exchange and Promissory Notes are often unjustly delayed and put to unnecessary Expense in recovering the Amount thereof by reason of frivolous or fictitious Defences to Actions thereon, and it is expedient that greater facilities than now exist should be given for the Recovery of Money due on such Bills and Notes”).

82 18 & 19 Vict., c. 67.

83 18 & 19 Vict., c. 67, s.1. (”From and after the 24th of October 1855, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable may be by writ of summons in the special Form .... and endorsed as therein mentioned; it shall be lawful for the plaintiff, on filing an affidavit of personal service ... at once to sign final judgment in the Form ... for any sum not exceeding the sum endorsed on the writ”).

84 9 J. Am. Jud. Soc. 164, 165-66 (1926). See *Walker v. Hicks* (1877), 3 Q.B.D. 8 (Eng. Q.B.) per Cockburn, C.J. (”The object of the special indorsement is this: on the one hand, it is to have a very prompt and summary effect in favour of the plaintiff, by entitling him to apply to sign formal judgment under Order XIV, and on the other hand, it is intended that the defendant should have an opportunity of avoiding such further proceedings by payment of the debt”).

85 A defendant could not apply for summary judgment until April 26, 1999. *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.2.

86 38 & 39 Vict., c. 77.

87 Id. First Schedule, *Rules of Court*, Order III, r. 6.

88 ”An American Appraisal of English Procedure”, 9 J. Am. Jud. Soc. 164, 166 (1926).

89 *Rules of the Supreme Court, 1883* (No. 1), Order III, r. 6 (1933).

90 *The Rules of the Supreme Court, 1883*, Order III, R.6 & Order XIV, R. 1 (effective October 24, 1883).

91 ”The New Supreme Court Rules”, 77 Sol. J. 476 (1933). See also Millar, “A Septennium of English Civil Procedure, 1932-1939”, 25 Wash. U.L.Q. 525, 536 (”In 1933, the then existing scope of summary judgment practice ... became widened in important measure”).

92 Id.

93 S.I. 1998/3132.

94 *Rules of the Supreme Court, 1965*, S.I. 1965/1776, Order 14, R. 1 (in force October 1, 1966); *The Rules of the Supreme Court, 1883*, Order III, R. 6 & Order XIV, R. 1 (in force October 24, 1883) & *Rules of Procedure*, Order XIV & *Supreme Court of Judicature Act, 1875*, 38 & 39 Vict., c. 77, First Schedule (in force November 1, 1875).

95 *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.3(1).

96 Id. r. 24.3(2) (”The court may give summary judgment against a defendant in any type of proceedings except — (a) the proceedings for possession of residential premises against — (i) a mortgagor, or (ii) a tenant or a person holding over until after the end of his tenancy whose occupancy is protected within the meaning of the Rent Act 1977 or the Housing Act 1988 and (b) proceedings for an admiralty claim in rem”).

97 A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 378 (3d ed. 2013).

98 18 & 19 Vict. 67, c. 67.

99 *Ray v. Barker* (1879), 41 L.T. 265 (Eng. C.A.), 265-66 per Bramwell, L.J. (”Order XIV. was intended to facilitate the operations of the High Court in debt collecting, and rule 1 of that order enabling the plaintiff to sign judgment summarily ought not to be made use of except in cases ... which are *free from doubt*. People should recollect that it is ... to be applied ... only in *clear cases*”) (emphasis added).

100 *Dummer v. Brown*, [1953] 1 All E.R. 1158 (Eng. C.A.), 1161 per Singleton, L.J. (”it is only in a case where there is clearly no defence that judgment ought to be given against a defendant under the ... [summary judgment provisions of the *Rules of the Supreme Court*]”) & *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 94 per Lord Woolf, M.R. (”If a claimant has a case which is bound to fail, then it is in the claimant’s interests to know as soon as possible .... Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible”) & 95 (”The proper disposal of an issue under [the summary judgment part] does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily”) & Woolf, Access to Justice Final Report to the Civil Justice System in England and Wales 123 (1996) (”The test for making an order would be that the court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue”).

101 *Chief Constable of Greater Manchester Police v. Carroll*, [2017] EWCA Civ 1992 (Eng. & Wales C.A. (Civil)), ¶ 60 per Etherton, M.R. (”It cannot be said that the claim [of the nonmoving party] is so weak ... that it could be ... dismissed on summary judgment”).

102 *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.2.

103 Id. r. 24.3(1).

104 Id. r. 24.3(2).

105 Id. r. 24.4(b).

106 Id. r. 24.5.

107 Id. r. 24.2 (”The court may grant summary judgment against a claimant or defendant on the whole of a claim or on a particular

issue if — (a) it considers that — (i) the claimant has no real prospect of succeeding on the claim or issue, or; (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other reason why the case or issue should be disposed of at trial").

108 See Chestnut, "Analysis of Proposed New Federal Rules of Civil Procedure", 22 A.B.A.J. 533, 537 (1936) ("This proposed [federal summary judgment rule] seems to have been influenced largely by the recently published English rule under the *Judicature Act of 1935*") & Clark, "The Proposed Federal Rules of Civil Procedure", 22 A.B.A.J. 447, 450 (1936) ("An important section of the proposed rules is that making provision for discovery and summary judgment in accordance with the general trend of procedural reform in England and in this country since these are devices which aid enormously in the speedy ascertainment of the real issues involved in litigation and their expeditious adjudication").

109 E.g., N.J. Laws 1912, 380; *Judicature Act of 1915*, 3 Mich. Comp. Laws (Camill, 1915), c. 234, §§ 12581 & 12582; *Rules of the Supreme Court of the District of Columbia*, Rule 73(1); Delaware Rev. Code, c. 128, s. 6 (1915); Ind. Ann. Stat. (Burns 1926) § 409; Va. Code (1849), c. 167, s. 5 & W. Va. Code. Ann. (Barnes 1923), c. 121, s. 6 & 1937 Ill. Rev. Stat., c. 110, §§ 181, 259.15 & 259. The summary judgment provisions in Michigan and Illinois allowed plaintiffs to apply for summary judgment in other actions besides claims for liquidated demands. 3 Comp. Laws (1929) § 14260 & 1937 Ill. Rev. Stat., c. 110, §§ 181, 259.15 & 259.16. For earlier examples see generally, Millar, "Three American Ventures in Summary Civil Procedure", 38 Yale L.J. 193 (1928).

110 Finch, "Summary Judgment Procedure", 19 A.B.A.J. 504, 506 (1933) ("In 1922, the first full year of the operation of the limited summary judgment procedure first adopted, there were 174 applications under the rule. The next year there were 448, 447 brought by plaintiffs and one brought by a defendant on a counterclaim. The full figures from June 1931 to June 1932, are 750 granted, 480 denied, 81 withdrawn, or a total of 1,311. From June 1932 to June 1933, there were 988 granted, 552 denied, 29 withdrawn, or a total of 1,569 applications. Causes were thus disposed of which, if tried in the ordinary way, would have taken the time of several additional Supreme Court Judges for one full court year"). See also Finch, "Extension of the Right of Summary Judgment", 4 N.Y. State B. Ass'n Bull. 264, 266 (1932) ("Issues were thus disposed of [by summary judgment in 1931] which, if tried in the ordinary way, would have taken the time of three Supreme Court judges one full court year").

111 Finch, "Summary Judgment Procedure", 19 A.B.A.J. 504, 507 (1933) ("Our [1921] ... rule has been twice amended. The first amendment took effect April 15, 1932, and the second ... June 15, 1933").

112 *Supreme Court Rules*, 1976, r. 18(6).

113 Ontario, with its 1985 amendment to the court rules, allowed defendants to apply for summary judgment for the first time. *Rules of Civil Procedure*. See G. Watson & M. McGowan, Ontario Supreme and District Court Practice 1985, at 248 (1984) ("[Rule 20] represents a dramatic departure from the previous practice under which a motion for summary judgment was only available to a plaintiff, and only when the claims were properly specially endorsed. Now the procedure is available in any case to either a plaintiff or a defendant. The motion may be brought with respect to all or part of the claim") & *Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242 (Ont. H.C.), 245 ("Rule 20 has introduced several important changes. Most dramatically, summary judgment is now available to all parties. In contrast to the former rule [58(2)] which protected only a plaintiff from delay in obtaining judgment in an appropriate action, the extension of the remedy to defendants surely recognizes the prejudice that may be faced in defending inappropriate actions").

114 *Rules to Amend the Alberta Rules of Court*, Alta. Reg. 216/86.

115 *The Civil Procedure Rules 1998*, S.I. 1998/3132.

116 Pub. L. No. 415, 48 Stat. 1064 (1934) ("Be it enacted ... That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law").

117 The Supreme Court appointed an advisory drafting committee consisting of fourteen lawyers and law professors. Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935).

118 28 U.S.C. Federal Rules of Civil Procedure.

119 Report of the Commission on the Administration of Justice in New York State 287 (1934).

120 E.g., Conboy, "Depositions, Discovery and Summary Judgments as Dealt with in the Title V of the Proposed Rules of Civil Procedure for the Federal Courts", 22 A.B.A.J. 881, 884 (1936) & Clark, "The Proposed Federal Rules of Civil Procedure", 22 A.B.A.J. 447, 450 (1936).

121 Conboy, "Depositions, Discovery and Summary Judgments as Dealt with in the Title V of the Proposed Rules of Civil Procedure for the Federal Courts", 22 A.B.A.J. 881, 884 (1936) (emphasis added).

122 28 U.S.C.

123 Issacharoff & Lowenstein, "Second Thoughts About Summary Judgment", 100 Yale L.J. 73, 76 (1990).

124 Emphasis added. The other important parts of the original rule are reproduced here:
Rule 56. Summary Judgment
(a) For Claimant. A party seeking to recover upon a claim ... may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
(b) For Defending Party. A party against whom a claim ... is asserted ... may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
(c) Motion and Proceedings Thereon. ... The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
. . . . .
(e) Form of Affidavits; Further Testimony: Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmation that the affiant is competent to testify to the matters stated therein. ... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogations, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response ... must set for the specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.
Rule 56 was rewritten in 2007 "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules". Committee Notes on Rules — 2007 Amendment. The test for summary judgment remains the same. Rule 56(a) currently states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law".

125 *Supreme Court Civil Rules*, B.C. Reg. 168/2009, R. 9-6(5)(a) ("On hearing an application under subrule (2) or (4), the court ... if satisfied that there is *no genuine issue for trial* must pronounce judgment or dismiss the claim accordingly") (emphasis added); *The Queen's Bench Rules*, r. 7-5(1) (Saskatchewan) ("The Court may grant summary judgment if: (a) the Court is satisfied that there is *no genuine issue requiring a trial* with respect to a claim or defence; or (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment") (emphasis added); *Court of Queen's Bench Rules*, Man. Reg. 553/88, 20.07(1) ("The judge must grant summary judgment if he or she is satisfied that there is *no genuine issue requiring a trial* with respect to a claim or defence") (emphasis added); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2) ("The court shall grant summary judgment if, (a) the court is satisfied that there is *no genuine issue requiring a trial* with respect to a claim or defence; or (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment") (emphasis added); *Rules of Court*,

N.B. Reg. 82-73, R. 22.04(1) ("The court shall grant summary judgment if (a) the court is satisfied there is *no genuine issue requiring a trial* with respect to a claim or defence, or (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied it is appropriate to grant summary judgment") (emphasis added); *Nova Scotia's Civil Procedure Rules*, r. 13.04(2) ("When the *absence of a genuine issue of material fact for trial* and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success") (emphasis added); *Rules of Civil Procedure*, R. 20.04(1) (P.E.I.) ("The court shall grant summary judgment if ... the court is satisfied that there is *no genuine issue requiring a trial* with respect to a claim or defence) (emphasis added); *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, r. 17.01 (a court may grant summary judgment to a plaintiff if the "defendant has no defence to a claim") & 17A.03(1) ("Where the Court is satisfied that there is *no genuine issue for trial* with respect to a claim or defence, the Court shall grant summary judgment accordingly") (emphasis added); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 176(2) ("Where the Court is satisfied that there is *no genuine issue for trial* with respect to a claim or defence, the Court shall grant summary judgment accordingly") (emphasis added) & *Federal Court Rules*, SOR/98-106, r. 215 (1) ("If on a motion for summary judgment the Court is satisfied that there is *no genuine issue for trial* with respect to a claim or defence, the Court shall grant summary judgment accordingly") (emphasis added). See *Irving Ungerman Ltd. v. Galanis* (1991), 83 D.L.R. (4th) 734 (Ont. C.A.), 738 ("The expression 'genuine issue' was borrowed from the third sentence in Rule 56(c) of the *Federal Rules of Civil Procedure* in the United States which were adopted in 1938").

126 McLauchlan, "An Empirical Study of the Federal Summary Judgment Rule", 6 J. Leg. Stud. 427, 452 (1977) ("The general data regarding summary judgments in the Illinois District Court show that summary judgment motions were used in about four percent of the cases (80 of 1984). The motion was successful in just over half of the cases in which it was used (58.7 percent or 47 of 80), but it was the means of terminating only about 2.3 percent of the cases (47 of 1984). This percentage of cases disposed of by summary judgment could be reduced if we consider all cases initiated during the year, including those pending. Thus, if there were about 3,000 cases filed during the fiscal year 1970, then the percentage resolved through summary judgment was about 1.5 percent. These statistics would certainly disappoint the early advocates of the summary judgment rule, who suggested that it would allow speedy disposition of a large number of cases, thus eliminating much docket congestion").

127 Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact", 99 F.R.D. 465, 465-67 (1984) (emphasis added).

128 475 U.S. 574 (U.S. Pa. S.C. 1986).

129 477 U.S. 317 (U.S. Sup. Ct. 1986).

130 477 U.S. 242 (U.S. Sup. Ct. 1986).

131 477 U.S. 317 (U.S. Sup. Ct. 1986), 327.

132 477 U.S. 317 (U.S. Sup. Ct. 1986).

133 756 F.2d 181 (U.S. D.C. Ct. App. 1985).

134 477 U.S. 317 (U.S. Sup. Ct. 1986), 322-23.

135 475 U.S. 574 (U.S. Pa. S.C. 1986).

136 Bratton, "Summary Judgment Practice in the 1990s: A New Day Has Begun — Hopefully", 14 Am. J. Trial Advoc. 441, 463 (1991) ("Sometimes referred to as the 'New Era' summary judgment cases, or 'the trilogy', these cases, when read together, represent an event as equally important and momentous for the litigator as the adoption of the Federal Rules themselves").

137 The Supreme Court remanded the case to the Court of Appeals for the Third Circuit "to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so". 475 U.S. 574 (U.S. Pa. S.C. 1986), 597.

138 475 U.S. 574 (U.S. Pa. S.C. 1986), 576-77.

139 Id. 597.

140 477 U.S. 242 (U.S. Sup. Ct. 1986).

141 Id.

142 Id. 252. But if there is no evidence presented by the nonmoving party, summary judgment is the appropriate remedy. "For example, there is no genuine issue if the evidence presented in the opposing affidavits is one of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence". Id. 254.

143 Id. 252.

144 Id. 255.

145 Id. 250.

146 "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 461 (2004).

147 "Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix", 57 Stan. L. Rev. 1329, 1335 (2005).

148 Cecil, Eyre, Miletich & Rindskopf, "A Quarter-Century of Summary Judgment Practice in Six Federal District Courts", 4 J. Empirical Legal Stud. 861, 906 (2007) ("after we controlled for differences across courts and the changing mix of cases, we found four changes in summary judgment activity after the Supreme Court trilogy. ... Although increases in summary judgment may be part of the reason for the decrease in trial rates, the decline in trials reflects far broader changes in litigation practice than simply a response to the Supreme Court's affirmation of summary judgment practice"). See also Twohig, Baar, Myers & Predko, "Empirical Analysis of Civil Cases Commenced and Cases Tried in Toronto 1973-1994" in 1 Ontario Law Reform Commission, Rethinking Civil Justice: Research Studies for the Civil Justice Review 77, 127 (1996) (trials declined both in absolute and percentage terms as the method for resolution from 1973 to 1994).

149 *Rules To Amend the Alberta Rules of Court,* Alta. Reg. 216/86 (emphasis added).

150 28 U.S.C. Federal Rules of Civil Procedure.

151 S.I. 1998/3132.

152 *The Supreme Court Rules*, Alta. Reg. 390/68.

153 For some reason, the drafters altered the text slightly — substituting "no genuine issue for trial" for "no genuine issue as to any material fact". Nothing turns on this change. "No genuine issue for trial", by implication, means "no genuine issue as to any material fact". The Rule 56(c) version is more accurate. *Irving Ungerman Ltd. v. Galanis* (1991), 83 D.L.R. (4th) 734 (Ont. C.A.), 738 ("Our rule does not contain after 'genuine issue', the additional words 'as to any material fact'. Such a requirement is implicit. If a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a 'genuine issue for trial'").

154 28 U.S.C. *Federal Rules of Court Procedure*.

155 S.I. 1965/1776 (in force October 1, 1966).

156 Order 86 allows a plaintiff in the Chancery Division to apply for summary judgment relating to specific performance and rescission of property agreements.

157 2008 SCC 14 (S.C.C.), ¶¶ 10 & 11; [2008] 1 S.C.R. 372 (S.C.C.), 378.

158 *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (U.S. Pa. S.C. 1986), 587 per Powell J. ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial").

159 E.g., *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.), ¶ 10; [2008] 1 S.C.R. 372 (S.C.C.), 378 ("The summary judgment rule ... prevents claims or defences that have no chance of success from proceeding to trial"); *Poliquin v. Devon Canada Corp.*, 2009 ABCA 216 (Alta. C.A.), ¶ 76; (2009), 454 A.R. 61 (Alta. C.A.), 81-82 per Fraser, C.J. ("there is no genuine issue of material fact requiring trial. On the uncontroverted evidence here, it is *plain and obvious* that Poliquin's wrongful dismissal action cannot succeed. The appeal is allowed and Poliquin's wrongful dismissal action is summarily dismissed") (emphasis added); *Stoddard v. Montague*, 2006 ABCA 109 (Alta. C.A.), ¶ 13; (2006), 412 A.R. 88 (Alta. C.A.), 91 ("In applications for summary dismissal, the moving party has the onus of filing evidence to demonstrate the claims against him or her are *hopeless and beyond doubt*") (emphasis added); *Prefontaine v. Veale*, 2003 ABCA 367 (Alta. C.A.), ¶¶ 9 & 13; (2003), 339 A.R. 340 (Alta. C.A.), 344 & 345 ("The Court must look at the merits of the claim and the defence and determine whether there is an issue requiring trial. A defendant [applying for summary judgment] ... must show that the claim has no reasonable prospect of success. ... A careful examination of the record ... reveals that the factual underpinnings are not, and cannot in any way be defamatory of the Appellant"); *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298 (Alta. C.A.), ¶ 19; (2003), 339 A.R. 165 (Alta. C.A.), 168 per Wittmann, J.A. ("It must be *beyond doubt* that no genuine issue for trial exists") (emphasis added); *Mellon (Next Friend of) v. Gore Mutual Insurance Co.*, 1995 ABCA 340 (Alta. C.A.); ¶ 3; (1995), 174 A.R. 200 (Alta. C.A.), 201 ("It is not manifestly clear or *beyond a reasonable doubt* that there is not a triable issue raised"); *Zebroski v. Jehovah's Witnesses*, 1988 ABCA 256 (Alta. C.A.), ¶ 5; (1988), 87 A.R. 229 (Alta. C.A.), 232 ("We agree ... that summary judgment is available to a defendant, where the material clearly demonstrates that the action is *bound to fail*") (emphasis added); *Greene v. Field Atkinson Perraton*, 1999 ABQB 239 (Alta. Q.B.), ¶ 1 (Master) ("The purpose of the rules is to reject promptly and inexpensively, claims and defences that are *bound to fail* at trial") (emphasis added); *Espey v. Chapters Inc.* (1998), 225 A.R. 68 (Alta. Q.B.), 70 per Fruman, J. ("The test is sometimes stated as the law and facts must be *beyond doubt*. If there is a triable issue, summary judgment is an inappropriate remedy") (emphasis added) & *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Alta. Q.B.), 47 (Master Funduk 1982) ("If, after weighing the evidence supporting the defendant's position, the court is satisfied *beyond all doubt* that the plaintiff is entitled to judgment, then [summary] judgment should be given for the plaintiff") (emphasis added).

160 *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), 434 ("The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial"); *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 (B.C. C.A.), ¶ 50 ("I cannot conclude that B & L's claim is bound to fail"); *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137 (B.C. C.A.), 139 ("if the defendant is bound to lose, the [summary judgment] application should be granted"); *Green v. Tram*, 2015 MBCA 8 (Man. C.A.), ¶ 2 ("The motions judge concluded that ... the appellant's claims ... must fail"); *Beavis v. PricewaterhouseCoopers Inc.*, 2010 MBCA 69 (Man. C.A.), ¶ 12; (2010), 258 Man. R. (2d) 15 (Man. C.A.), 20 (an applicant for summary judgment must prove that

the respondent's position "must fail"); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), 265 ("The essential purpose of summary judgment is to ... terminate ... claims and defences that are factually unsupported"); *Forsythe v. Furlotte*, 2016 NBCA 6 (N.B. C.A.), ¶ 24 ("The summary judgment test ... is a stringent one and is designed to determine whether there is any reason to doubt the outcome of a matter ... because the moving party's case is 'unanswerable'"); *656340 N.B. Inc. v. 059143 N.B. Inc.*, 2014 NBCA 46 (N.B. C.A.), ¶ 10 ("[to grant summary judgment] the moving party's case must be unanswerable"); *Schram v. Nunavut*, 2014 NBCA 53 (N.B. C.A.), ¶ 8 ("Before granting summary judgment, the motion judge had to determine on the record ... that the outcome was a foregone conclusion"); *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 (N.S. C.A.), ¶ 59 ("In my view, given the Release and Indemnity, Mr. Upham's claim against Shannex for unjust enrichment has no real chance of success. ... Summary judgment should issue to dismiss Mr. Upham's direct claims against Shannex"); *RBC v. MJL Enterprises & Ors.*, 2017 PECA 10 (P.E.I. C.A.), ¶ 9 ("Rule 20.04(1) allows a court, on motion, to grant summary judgment if the court is satisfied there is no genuine issue requiring a trial") & *Burns Bog Conservation Society v. Canada (Attorney General)*, 2014 FCA 170 (F.C.A.), ¶ 43 ("this is a clear case where the appellant's claim must be weeded out because it is bound to fail").

161 *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 94 per Lord Woolf, M.R. ("a judge ... should make use of the [summary judgment] powers contained in Pt. 24. In doing so he or she gives effect to the overriding objectives contained in Pt. 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice").

162 *Rich v. CGU Insurance Ltd.*, [2005] HCA 16 (Australia H.C.), ¶ 18; (2005), 214 A.L.R. 370 (Australia H.C.), 375 per Gleeson, C.J. & McHugh & Gummow, JJ. ("issues raised in proceedings are to be determined in a summary way only in the clearest of cases") & *Agar v. Hyde*, [2000] HCA 41 (Australia H.C.), ¶ 57; (2000), 201 C.L.R. 552 (Australia H.C.), 576 per Gaudron, McHugh, Gummow & Hayne, JJ. ("The test to be applied [for summary judgment] has been expressed in various ways, but all ... are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way").

163 *High Court Rules 2016*, r. 12.2(1) ("The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action ... or to a particular part of ... [a] cause of action" & r. 12.2(2) ("The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action ... can succeed").

164 *The Rules of the High Court*, H.C. Ordinance, c. 4, s. 54, Ord. 14, r. 1(1) ("the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ ... apply to the Court for judgment against that defendant").

165 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 251-52 per White, J. ("[summary judgment is appropriate if the case is] so one-sided that one party must prevail at trial as a matter of law"); *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 323-24 per Rehnquist, J. ("[summary judgment may be granted to] dispose of factually unsupported claims or defenses") & *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (U.S. Pa. S.C. 1986), 587 per Powell, J. ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'").

166 Alta. Reg. 124/2010.

167 Alberta Rules of Court Project, Summary Disposition of Actions (Consultation Memorandum No. 12.12), ¶ 80 (August 2004).

168 Id. ¶ 92.

169 *Alberta Rules of Court* Alta. Reg. 124/2010 (emphasis added). Rule 7.3(1) of the *Alberta Rules of Court* bears a strong resemblance to the leading features of the summary judgment provisions in the California's *Code of Civil Procedure* (West's Ann. Cal. C.C.P., r. 437c(a)(1) and New York's *Civil Practise Law and Rules* (N.Y. Civ. Prac. Law (Consol.), c. 8, r. 3212(b)). Part of the California code states that "[a] party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding". The New York provision contains the same core components: "The affidavit shall ... show that there is no defense to the cause of action or defense has no merit". See California

Civil Courtroom Handbook and Desktop Reference § 22.49 (2020) ("A defendant moving for summary judgment bears the burden of persuasion that the cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action") & § 22.50 ("A plaintiff's motion for summary judgment ... bears the burden of persuasion that each element of the cause of action at issue has been proved, and as a result, there is no defense to the cause of action. ... The law no longer requires a plaintiff seeking summary judgment to affirmatively disprove any defense asserted by the defendant in addition to proving each element of its own cause of action").

170 *Alberta Rules of Court*, Alta. Reg. 390/68 (in force January 1, 1969).

171 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 10; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 356 ("the new Rule [7.3] has not substantively changed the test for summary judgment from that under former Rule 159(3) which spoke in terms of 'no genuine issue for trial'"); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), n. 2.; (2013), 564 A.R. 357 (Alta. Q.B.), 388 n. 2 ("The test for summary judgment is the same under the new and old rules"); *Manson Insulation Products Ltd. v. Crossroads C & I Distributors*, 2011 ABQB 51 (Alta. Q.B.), ¶ 31 ("There is no material difference between new rule 7.2(a) and former rule 162"); *Manufacturers Life Insurance Co. v. Executive Centre at Manulife Place Inc.*, 2011 ABQB 189 (Alta. Q.B.), ¶ 11; [2011] 11 W.W.R. 833 (Alta. Q.B.), 838 ("The parties agree that new Rule 7.3 has not amended the test developed in Alberta jurisprudence for summary judgment under old rule 159"); *Mraiche Investment Corp. v. Paul*, 2011 ABQB 164 (Alta. Q.B.), ¶ 11 ("It is common ground between the parties that although this rule is worded slightly differently than the previous existing ... summary judgment [rule], previous authorities on the subject are still applicable"); *Kwan v. Superfly Inc.*, 2011 ABQB 343 (Alta. Q.B.), ¶ 20 ("Rule 7.3 operates in the same manner and follows the same legal principles as its precursor") & *Encana Corp. v. ARC Resources Ltd.*, 2011 ABQB 431 (Alta. Q.B.), ¶ 7 ("[t]he test for summary judgment under new rule 7.3 is the same as under the old rules"). The old rules were in force after January 1, 1969. Alta. Reg. 390/68.

172 Cal. Civ. Proc. Code, r. 437c(c) (West).

173 E.g., *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.), ¶ 10; [2008] 1 S.C.R. 372 (S.C.C.), 378 ("The summary judgment rule ... prevents claims or defences that have no chance of success from proceeding to trial"); *Poliquin v. Devon Canada Corp.*, 2009 ABCA 216 (Alta. C.A.), ¶ 76; (2009), 454 A.R. 61 (Alta. C.A.), 81-82 per Fraser, C.J. ("on the uncontroverted evidence here, it is plain and obvious that Poliquin's wrongful dismissal action cannot succeed. ... Poliquin's wrongful dismissal action is summarily dismissed"); *Stoddard v. Montague*, 2006 ABCA 109 (Alta. C.A.), ¶ 13; (2006), 412 A.R. 88 (Alta. C.A.), 91 ("In applications for summary dismissal, the moving party has the onus ... to demonstrate the claims against him or her are hopeless and beyond doubt"); *Zebroski v. Jehovah's Witnesses*, 1988 ABCA 256 (Alta. C.A.), ¶ 5; (1988), 87 A.R. 229 (Alta. C.A.), 232 ("We agree ... that summary judgment is available to a defendant, where the material clearly demonstrates that the action is bound to fail"); *Kary Investment Corp. v. Tremblay*, 2003 ABQB 315 (Alta. Q.B.), ¶ 26 ("summary judgment may only be granted where it is demonstrated that the outcome is virtually certain"); *Tanar Industries Ltd. v. Outokumpu Ecoenergy Inc.*, 1999 ABQB 597 (Alta. Q.B.), ¶ 26; [1999] 11 W.W.R. 146 (Alta. Q.B.), 153 ("[a moving party must] clearly demonstrate that the Plaintiff's action is bound to fail"); *Union of India v. Bumper Development Corp.* (1995), 171 A.R. 166 (Alta. Q.B.), 180 ("on an application for summary judgment, the parties are entitled to an answer if in the opinion of the court the matter is beyond doubt"); *Royal Bank v. Starko* (1993), 9 Alta. L.R. (3d) 339 (Alta. Q.B.), 342 ("To obtain summary judgment pursuant to R. 159 ... the Applicant must show that the question at issue is beyond doubt"); *Investors Group Trust Co. v. Royal View Apartments Ltd.* (1986), 70 A.R. 41 (Alta. Q.B.), 47-48 ("summary judgment should not be granted ... 'unless the question is beyond doubt'") & *Rencor Developments Inc. v. First Capital Realty Inc.*, 2009 ABQB 262 (Alta. Q.B.), ¶ 8 (Master) ("An applicant for summary judgment or dismissal ... must establish that it is 'plain and obvious' or 'beyond a doubt' that the action will not succeed").

174 *Another Look Ventures Inc. v. 642157 Alberta Ltd.*, 2012 ABCA 253 (Alta. C.A.), ¶ 8 (Costigan, Paperny & Slatter, JJ.A.) ("It is common ground that the ... correct test for summary judgment ... is whether it is plain and obvious that the action cannot succeed"); *Enokhok Development Corp. v. Alberta Treasury Branches*, 2011 ABCA 322 (Alta. C.A.), ¶ 12; (2011), 68 Alta. L.R. (5th) 126 (Alta. C.A.), 131 (Ritter, O'Brien & Bielby, JJ.A.) ("Summary judgment should only be granted if the matter is factually and legally beyond doubt"); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 61; (2013), 564 A.R. 357 (Alta. Q.B.), 374 per Wakeling, J. ("Rule 7.3 of the new *Alberta Rules of Court* allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit. A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high"); *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶ 12; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 80 per Wakeling, J. ("The plaintiffs are entitled to summary judgment. ... Their cases are so strong that the likelihood of success is very high. The defendants have no defence to the plaintiffs' claims") & *Deguire v.*

Burnett, 2013 ABQB 488 (Alta. Q.B.), ¶ 22; (2013), 36 R.P.R. (5th) 60 (Alta. Q.B.), 69 per Brown, J. ("Justice Wakeling's formulation of the test for obtaining summary judgment — that is, whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high — not only expresses the high threshold set by the Court of Appeal ..., it also contains within it the rationale for granting summary judgment and thereby depriving a litigant of full access to all litigation tools. Accordingly, the question to be answered ... is whether the likelihood of the respective applicant's success is very high, such that it is just to determine the parties' dispute summarily").

175 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.). *Hryniak* interpreted Ontario's new summary judgment rule. Rule 20.04(2)(a) of Ontario's *Rules of Civil Procedure*, in force before 2010, stated that "[t]he court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence". According to the Osborne Report, the bar seldom invoked rule 20.04(2). One reason was the governing standard — it was difficult to meet — and the other was the onerous cost consequences associated with a failed summary judgment application — rule 20.06. Mr. Osborne, Q.C. recommended that rule 20 be amended "to expressly confer on a motion judge or master the authority to weigh evidence, evaluate credibility and draw any reasonable inference from the evidence and documents filed". He did not recommend a change to the existing standard — "no genuine issue for trial". He also recommended a rule change to "to permit the court to direct a 'mini-trial' on one or more issues, with or without viva voce evidence, where the interests of justice require a brief trial to dispose of the summary judgment motion". He also supported the adoption of a "summary trial mechanism, similar to rule 18A in British Columbia". C. Osborne, Q.C., Summary of Findings and Recommendations of the Civil Justice Reform Project 42 (November 20, 2007). Ontario adopted some of Mr. Osborne's recommendations. Effective January 1, 2010 changes to rule 20.04 came into force. The key parts of the new rule now read this way:

20.04(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence;

. . . . .

(2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

176 2014 SCC 7 (S.C.C.), ¶ 1; [2014] 1 S.C.R. 87 (S.C.C.), 92.

177 Id. at ¶ 2; [2014] 1 S.C.R. 87 (S.C.C.) at 92. See *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd.* (1997), [1998] 2 All E.R. 181 (Eng. C.A.), 191 per Lord Woolf, M.R. ("We think that the *change in culture* which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process") (emphasis added).

178 Id. at ¶ 2; [2014] 1 S.C.R. 87 (S.C.C.) at 92-93.

179 Id. at ¶ 28; [2014] 1 S.C.R. 87 (S.C.C.) at 99. Professor Bogart invited courts to come to this conclusion in a 1981 article: "[T]he courts must be persuaded to alter their position away from adherence to a philosophy which stipulates that, except in the clearest of cases, parties should have a right to a trial. The courts should recognize that the need to advance the administration of justice and to prevent the party moving for summary judgment from being subjected to the costs and delay of a full trial before the case is disposed of may outweigh, in some cases, the predilection to permit a full trial to dispose of a lawsuit". "Summary Judgment: A Comparative and Critical Analysis", 19 Osgoode Hall L.J. 552, 554 (1981).

180 1 J. Empirical Legal Stud. 459, 459-60 (2004).

181 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), n. 118; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), n. 118 per Wakeling, J.A. ("I suspect that the percentage of court files resolved by a conventional trial judgment in Alberta has been in decline for over sixty years"). See 1 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook

2019, at 7.14 (2019) ("Trial never was the ordinary or usual course") & Twohig, Baar, Meyers & Predko, "Empirical Analysis of Civil Cases Commenced and Cases Tried in Toronto 1973-1994" in 1 Ontario Law Reform Commission, Rethinking Civil Justice: Research Studies for the Civil Justice Review 77, 127 (1996) (trials declined both in absolute and percentage terms as the method of resolution from 1973 to 1994).

182 Alta. Reg. 124/2010.

183 R.R.O. 1990, Reg. 194, r. 1.04(1).

184 28 U.S.C. *Federal Rules of Civil Procedure*.

185 2014 SCC 7 (S.C.C.), ¶ 49; [2014] 1 S.C.R. 87 (S.C.C.), 106.

186 Id. at ¶ 50; [2014] 1 S.C.R. 87 (S.C.C.) at 106-07.

187 *Arndt v. Banerji*, 2018 ABCA 176 (Alta. C.A.), ¶ 36 (the Court applied the *Stefanyk v. Sobeys Capital Incorporated* test); *Stefanyk v. Sobeys Capital Incorporated*, 2018 ABCA 125 (Alta. C.A.), ¶ 15; [2018] 5 W.W.R. 654 (Alta. C.A.), 661 ("is the record such that it is fair and just to decide summarily if the moving party has proven the case on a balance of probabilities"). There are a number of opinions that make no mention of the balance of probabilities component but favour the fair-and-just standard. *Amik Oilfield Equipment & Rentals Ltd. v. Beaumont Energy Inc.*, 2018 ABCA 88 (Alta. C.A.), ¶ 6 ("Under the new approach, summary judgment ought to be granted whenever there is no genuine issue requiring trial where the judge is able to reach a 'fair and just determination on the merits on a motion for summary judgment'"); *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432 (Alta. C.A.), ¶ 11; (2017), [2018] 5 W.W.R. 32 (Alta. C.A.), 47 ("The [*Hryniak v. Mauldin*] test requires the court to examine the existing record to see if a disposition that is fair and just to both parties can be made on that record"); *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd*, 2017 ABCA 378 (Alta. C.A.), ¶ 15; (2017), 60 Alta. L.R. (6th) 57 (Alta. C.A.), 67 ("The so-called modern approach to summary judgment as laid out in *Hryniak* was confirmed by the Alberta Court of Appeal in *Windsor v. Canadian Pacific Railway* .... *Windsor* indicates that on a summary judgment application, the appropriate question to ask is whether there is an issue of 'merit' that genuinely requires a trial .... A second consideration is 'whether examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties'"); *Goodswimmer v. Canada (Attorney General)*, 2017 ABCA 365 (Alta. C.A.), ¶ 25; (2017), 418 D.L.R. (4th) 157 (Alta. C.A.), 177 ("Litigation can be disposed of summarily when the court is able to reach a fair and just determination on the merits using a summary process. 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"); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.), ¶ 25; (2016), 612 A.R. 284 (Alta. C.A.), 289 ("The Supreme Court [in *Hryniak v. Mauldin*] held that summary judgment ought to be granted whenever there is no genuine issue requiring trial: 'when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment'"); *Templanza v. Wolfman*, 2016 ABCA 1 (Alta. C.A.), ¶ 18; (2016), 612 A.R. 67 (Alta. C.A.), 71 ("summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record"); *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 406 (Alta. C.A.), ¶ 15; (2015), 52 C.L.R. (4th) 17 (Alta. C.A.), 24 ("*Hryniak* .... and *Windsor* ... hold that summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record. ... Examining whether there is a 'genuine issue for trial' is still a valuable analytical tool in deciding whether a trial is required, or whether the matter can be disposed of summarily"); *Bilawchuk v. Bloos*, 2014 ABCA 399 (Alta. C.A.), ¶ 14 ("Under the new Rule, summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record"); *Maxwell v. Wal-Mart Canada Corp.*, 2014 ABCA 383 (Alta. C.A.), ¶ 12; (2014), 588 A.R. 6 (Alta. C.A.), 10 ("Under the new Rule, no genuine issue for trial exists where the judge is able to make a fair and just determination on the merits without a trial, because the summary judgment process allows him or her to make the necessary findings of fact, to apply the law to those facts and is a proportionate, more expeditious and just means to achieve a just result. Under the new Rule, summary judgment may be granted if a disposition that is fair and just to both parties can be made on the existing record") & *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶ 13; (2014), 371 D.L.R. (4th) 339 (Alta. C.A.), 349 ("The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record").

188 2014 ABCA 108 (Alta. C.A.), ¶ 13; (2014), 371 D.L.R. (4th) 339 (Alta. C.A.), 348 (emphasis added).

189 2014 SCC 7 (S.C.C.), ¶ 2; [2014] 1 S.C.R. 87 (S.C.C.), 92.

190 The Supreme Court of Canada's endorsement of summary judgment as an important component of a modern civil procedure system was a position which lawyers and judges in Alberta had long ago adopted. Lawyers applied for summary judgment routinely. There are over 1000 reported summary judgments in the period commencing 1908 and ending January 31, 2014. *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ n. 61; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 88 n. 61. Summary judgment had been incorporated into the *Alberta Rules of Court* for a very long time. See 1 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2013-2014, at 7-12 (2014) ("This Rule is one of the most important and most heavily relied upon, in chambers. ... Summary judgment is important, and cases with no chance of success should be weeded out early"). Alberta judges promoted its use. E.g., *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 71; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 134 ("summary judgment is an important procedure which could be invoked more often than it is").

191 *898294 Alberta Ltd v. Riverside Quays Limited Partnership*, 2018 ABCA 281 (Alta. C.A.), ¶ 12 (Berger, O'Ferrall & Wakeling, JJ.A.) ("Summary judgment is reserved for the resolution of disputes where the outcome of the contest is obvious .... Is the 'moving party's position ... unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success very low?'"); *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204 (Alta. C.A.), ¶ 2; (2018), 20 C.P.C. (8th) 43 (Alta. C.A.), 46-47 (O'Ferrall & Wakeling, JJ.A.) ("Summary judgment may be appropriate 'if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low'. This is an onerous standard and rightly so"); *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153 (Alta. C.A.), ¶ 15; (2018), 17 C.P.C. (8th) 252 (Alta. C.A.), 255 (Berger, O'Ferrall & Wakeling, JJ.A.) ("Summary dismissal is appropriate 'if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low"); *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160 (Alta. C.A.), ¶ 2; (2017), 100 C.P.C. (7th) 52 (Alta. C.A.), 61 (Watson, Wakeling & Schutz, JJ.A.) ("Rule 7.3 of the *Alberta Rules of Court* allows a court to summarily dismiss an action that is without merit. A nonmoving party's position is without merit if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low"); *Talisman Energy Inc v. Questerre Energy Corporation*, 2017 ABCA 218 (Alta. C.A.), ¶ 18; (2017), 57 Alta. L.R. (6th) 19 (Alta. C.A.), 29 (O'Ferrall, Veldhuis & Martin, JJ.A.) ("the court must ask 'whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily'"); *Baim v. North Country Catering Ltd.*, 2017 ABCA 206 (Alta. C.A.), ¶ 12 (McDonald, Schutz & Martin, JJ.A.) ("The test for summary judgment is whether the claim or defence is so compelling that the likelihood it will succeed is very high, such that it should be determined summarily"); *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331 (Alta. C.A.), ¶ 10 (Watson, Bielby & Wakeling, JJ.A.) ("The case management judge correctly stated the legal test for summary dismissal as found in this Court's recent decisions in *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.* ... and *776826 Alberta Ltd. v. Ostrowercha*");*Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.), ¶ 27; (2016), 612 A.R. 284 (Alta. C.A.), 289 (Paperny, Rowbotham & Veldhuis, JJ.A.) ("the court must ask 'whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defense is so compelling that the likelihood it will succeed is very high such that it should be determined summarily'"); *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12 (Alta. C.A.), ¶ 19 (Berger, McDonald & Schutz, JJ.A.) (the Court adopted the test set out in *P. (W.) v. Alberta*); *Condominium Corp. No. 0321365 v. Cuthbert*, 2015 ABCA 49 (Alta. C.A.), ¶ 13; (2015), 593 A.R. 391 (Alta. C.A.), 395 (the Court adopted the test set out in *P. (W.) v. Alberta*); *776826 Alberta Ltd. v. Ostrowercha*, 2014 ABCA 404 (Alta. C.A.), ¶ 26; (2014), 378 D.L.R. (4th) 629 (Alta. C.A.), 642 (Costigan, Watson & Brown JJ.A.) ("The question is whether there is in fact any issue of 'merit' that *genuinely* requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily") (emphasis in original); *Stout v. Track*, 2015 ABCA 10 (Alta. C.A.), ¶¶ 48 & 50; (2015), 62 C.P.C. (7th) 260 (Alta. C.A.), 279 per Wakeling, J.A. ("Rule 7.3(1)(b) of the *Alberta Rules of Court* allows a court to dismiss a plaintiff's claim if it has no merit. The nonmoving party's position is without merit if the likelihood the moving party's position will prevail is very high. The likelihood the moving party's position will prevail is very high if the comparative strengths of the moving and nonmoving party's positions are so disparate that the likelihood the moving party's position will prevail is many times greater than the likelihood that the nonmoving party's position will carry the day. ... [T]he comparative strengths of the moving and nonmoving parties' positions need not be so disparate that the nonmoving party's prospects of success must be close to zero before summary judgment may be granted"); *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.), ¶¶ 45 & 46; (2014), 584 A.R. 68 (Alta. C.A.), 78 (Martin & Wakeling, JJ.A. & Nation, J.) ("The principles which govern summary judgment in Alberta after November 1, 2010 are distilled in *Beier v. Proper Cat Construction Ltd.* ...: 'Rule 7.3 of the new *Alberta Rules of Court* allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit. A party's position is without merit if the facts and the law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high'"); *Can v. Calgary Police*

Service, 2014 ABCA 322 (Alta. C.A.), ¶ 20; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 357 per Wakeling, J.A. ("Summary judgment is appropriate if the nonmoving party's position is without merit. ... 'A party's position is without merit if the facts and law make the moving party's position unassailable .... A party's position is unassailable if it is so compelling that the likelihood of success is very high'"); *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626 (Alta. Q.B.), ¶ 60 ("The question is whether, on the record, the probative value of the non-moving party's evidence is so low that it does not preclude the inferences sought by the moving party. In that sense, the non-moving party's likelihood of success must be 'very low'"); *Quinney v. 1075398 Alberta Ltd.*, 2015 ABQB 452 (Alta. Q.B.), ¶ 39; (2015), 24 Alta. L.R. (6th) 202 (Alta. Q.B.), 214 ("With respect to Rule 7.3(1), a party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. To be unassailable, the position must be so compelling that the likelihood of success is very high"); *Rohit Land Inc. v. Cambrian Strathcona Properties Corp.*, 2015 ABQB 375 (Alta. Q.B.), ¶ 48; [2015] 12 W.W.R. 728 (Alta. Q.B.), 744 (the Court adopted the *Beier* principles); *Mackey v. Squair*, 2015 ABQB 329 (Alta. Q.B.), ¶ 22; (2015), 617 A.R. 259 (Alta. Q.B.), 264 ("A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. In this regard, 'unassailable' means if it is so compelling that the likelihood of success is very high"); *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120 (Alta. C.A.), ¶ 51; (2015), 40 C.L.R. (4th) 187 (Alta. Q.B.), 208-09 (the Court applied the principles set out in *Access Mortgage Corp. (2004)* and *Beier v. Proper Cat Construction Ltd.*); *Nipshank v. Trimble*, 2014 ABQB 120 (Alta. Q.B.), ¶ 14; (2014), 8 Alta. L.R. (6th) 152 (Alta. Q.B.), 158-59 per Brown, J. ("the preferable formulation ... is stated in *Beier v. Proper Cat Construction Ltd.* ... and in *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* ... which requires the Court to consider whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high. The reason this is preferable is that it not only states the high threshold which an applicant must meet for obtaining summary judgment, but also contains within it the rationale for granting summary judgment and depriving the respondent of full access to all litigation tools"); *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 29; (2014), 587 A.R. 16 (Alta. Q.B.), 26 per Brown, J. ("The formulation I [prefer is] that stated in *Beier v. Proper Cat Construction Ltd.*... and in *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* ..., which requires the Court to consider whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high"); *Deguire v. Burnett*, 2013 ABQB 488 (Alta. Q.B.), ¶ 22; (2013), 36 R.P.R. (5th) 60 (Alta. Q.B.), 69 per Brown, J. ("Justice Wakeling's formulation of the test for obtaining summary judgment — that is, whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high — not only expresses the high threshold set by the Court of Appeal in *Murphy Oil Co. v. Predator Corp.* [2006 CarswellAlta 233 (Alta. C.A.)] and *Boudreault v. Barrett* [1998 CarswellAlta 638 (Alta. C.A.)]; it also contains within it the rationale for granting summary judgment and thereby depriving a litigant of full access to all litigation tools"); *Hari Estate v. Hari Estate*, 2015 ABQB 605 (Alta. Q.B.), ¶ 80 (Master) ("The test for summary judgment is whether the applicant's position is 'unassailable', but that does not mean that there is 'no reasonable doubt' about its success. A party's position is unassailable if it is so compelling that the likelihood of success is very high") & *Rai v. 1294477 Alberta Ltd.*, 2015 ABQB 349 (Alta. Q.B.), ¶ 22 & 35; (2015), 618 A.R. 220 (Alta. Q.B.), 225 & 227 (Master) ("There is no doubt that a high degree of certainty is required to end a case early. ... The Defendant's position is unassailable on the record before the Court. This case does not merit further consumption of judicial resources").

192 2014 ABCA 322 (Alta. C.A.), ¶ 97; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 385.

193 *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27 (Man. C.A.), ¶ 32; (2018), 421 D.L.R. (4th) 315 (Man. C.A.), 325 ("The Supreme Court of Canada's decision in *Hryniak* did not alter the basic test for summary judgment in Manitoba. However, it did make courts acutely aware of the need to consider the concept of proportionality in all aspects of the justice system"); *Lenko v. Manitoba*, 2016 MBCA 52 (Man. C.A.), ¶ 71; (2016), [2017] 1 W.W.R. 291 (Man. C.A.), 311 ("*Hryniak* did not ... change the test to be applied on a motion for summary judgment in Manitoba") & *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52 (N.S. C.A.), ¶ 6; (2014), 68 C.P.C. (7th) 267 (N.S. C.A.), 269 ("*Hryniak v. Mauldin* ... has little bearing upon the circumstances, analysis, reasoning or result in this case. There ... [the Court] considered the application of a new Rule in Ontario ... which now empowers judges in that province to weigh the evidence, draw reasonable inferences from the evidence, and settle matters of credibility when deciding whether to grant summary judgment. Those powers are foreign to the well-established procedures and settled law which operate in Nova Scotia"). See also *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 (B.C. C.A.), ¶ 50 ("I cannot conclude that B&L's claim is bound to fail"); *Green v. Tram*, 2015 MBCA 8 (Man. C.A.), ¶ 2 ("The motions judge concluded that ... the appellant's claims ... must fail"); *656340 N.B. Inc. v. 059143 N.B. Inc.*, 2014 NBCA 46 (N.B. C.A.), ¶ 10 ("[to grant summary judgment] the moving party's case must be unanswerable"); *Forsythe v. Furlotte*, 2016 NBCA 6 (N.B. C.A.), ¶ 24 ("The summary judgment test ... is a stringent one and is designed to determine whether there is any reason to doubt the outcome of a matter ... because the moving party's case is 'unanswerable'"); *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 (N.S. C.A.), ¶ 59 ("In my view ... Mr. Upham's claim against Shannex ... has no real chance of success"); *Schram v. Nunavut*, 2014 NBCA 53 (N.B. C.A.), ¶ 8; (2014), 376 D.L.R. (4th) 655 (N.B. C.A.), 661-62 ("Before granting summary judgment, the motion judge had to determine on the record ... that the outcome was a foregone conclusion") & *RBC v. MJL Enterprises & Ors.*, 2017 PECA 10 (P.E.I. C.A.), ¶ 9 ("Rule 20.04(1) allows a court, on motion, to grant summary judgment if the court is satisfied there is no genuine issue requiring a trial").

194 *Manitoba v. Canada*, 2015 FCA 57 (F.C.A.), ¶ 17 per Stratas, J.A. ("Like the Alberta Court of Appeal in *Can v. Calgary Police Service* ..., I conclude that *Hryniak* does not change the substantive content of ... the *Federal Court Rules*") & *Burns Bog Conservation Society v. Canada (Attorney General)*, 2014 FCA 170 (F.C.A.), ¶ 43 ("this is a clear case where the appellant's claim must be weeded out because it is bound to fail").

195 See Karabus & Tjaden, "*The Impact of Hryniak v. Maudlin on Summary Judgments in Canada One Year Later*", 44 Adv. Q. 85, 101-02 (2015) ("Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Prince Edward Island, Yukon and the Federal Court have a distinct summary *judgment* rule that generally decides the question whether there is a *bona fide* triable issue without any weighing of the facts, in addition to a summary or expedited *trial* rule under which the court actually tries the issues raised by the pleadings on affidavits, or in some cases, with the assistance of *viva voce* evidence") (emphasis added for non-Latin words).

196 2014 ABCA 108, 371 D.L.R. (4th) 339 (Alta. C.A.).

197 2014 ABCA 322 (Alta. C.A.); (2014), 315 C.C.C. (3d) 337 (Alta. C.A.).

198 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶¶ 98 & 100; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 385-86. ("*Windsor v. Canadian Pacific Railway* ... does not stand for the proposition that *Hryniak v. Mauldin*jettisoned a made-in-Alberta summary judgment rule that was straightforward, simple and easy to apply and the progeny of the Supreme Court of Canada's judgment in *Canada (Attorney General) v. Lameman* .... Rule 7.3 of the *Alberta Rules of Court* came into effect on November 1, 2010, literally on the heels of the Supreme Court of Canada's opinion in *Lameman*, interpreting the predecessor of r. 7.3. ... Nothing in *Windsor v. Canadian Pacific Railway* is inconsistent with the theme of this part of ... [my] judgment").

199 2014 ABCA 108 (Alta. C.A.), ¶ 13; (2014), 371 D.L.R. (4th) 339 (Alta. C.A.), 348.

200 See *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), 434 ("The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial").

201 2008 SCC 14 (S.C.C.), ¶ 10; [2008] 1 S.C.R. 372 (S.C.C.), 378.

202 2009 ABCA 216 (Alta. C.A.), ¶ 76; (2009), 454 A.R. 61 (Alta. C.A.), 81-82.

203 *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶ 13; (2014), 371 D.L.R. (4th) 339 (Alta. C.A.), 349.

204 *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶¶ 34 & 41; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 88 & 91 per Wakeling, J. ("Legislators in the United Kingdom, Canada and the United States have introduced summary judgment into their litigation model to ensure that dispute resolution takes place at the earliest point in the litigation continuum when it is just to do so" & "the court must be satisfied that the determination of the dispute without making available to a party all stages of the litigation spectrum is just").

205 2018 ABCA 125 (Alta. C.A.), ¶ 13; [2018] 5 W.W.R. 654 (Alta. C.A.), 661. See also *Arndt v. Banerji*, 2018 ABCA 176 (Alta. C.A.), ¶ 36; (2018), 424 D.L.R. (4th) 656 (Alta. C.A.), 679 ("if the moving party can prove on a balance of probabilities that it has proven the facts needed to support its claim or defence, it is entitled to summary disposition").

206 2018 ABCA 125 (Alta. C.A.), ¶ 17; [2018] 5 W.W.R. 654 (Alta. C.A.), 662.

207 S. Lederman, A. Bryant & M. Fuerst, The Law of Evidence in Canada 221 (5th ed. 2018).

208 (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 95.

209 2019 ABCA 49 (Alta. C.A.), ¶ 18; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 40 (emphasis omitted).

210 2014 ABCA 322 (Alta. C.A.), ¶ 87; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 380.

211 *Jackamarra v. Krakouer*, [1998] HCA 27 (Australia H.C.), (1998), 195 C.L.R. 516 (Australia H.C.), 528.

212 477 U.S. 242 (U.S. Sup. Ct. 1986), 249.

213 *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶ 16; (2014), 371 D.L.R. (4th) 339 (Alta. C.A.), 350 (”Trials are for determining facts”). See Billingsley, “*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials”, 55 Alta. L. Rev. 1, 8-9 (2017) (”unlike the current Ontario provision, Alberta’s summary judgment rule does not endow the Court with additional fact-finding powers for the purpose of deciding a summary judgment application. On its face, Alberta’s summary judgment rule assumes that a decision will be made on the basis of the affidavit evidence submitted by the parties, and does not expressly authorize a court to weigh evidence in order to resolve disputed issues of fact”).

214 2018 ABCA 125, [2018] 5 W.W.R. 654 (Alta. C.A.).

215 2014 ABCA 322, 315 C.C.C. (3d) 337 (Alta. C.A.).

216 Other courts that have considered this issue aligned with the view expressed in *Can v. Calgary Police Service*. *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27 (Man. C.A.), ¶ 32; (2018), 421 D.L.R. (4th) 315 (Man. C.A.), 325 (”The Supreme Court of Canada’s decision in *Hryniak* did not alter the basic test for summary judgment in Manitoba. However, it did make courts acutely aware of the need to consider the concept of proportionality in all aspects of the justice system”); *Lenko v. Manitoba*, 2016 MBCA 52 (Man. C.A.), ¶ 71; (2016), [2017] 1 W.W.R. 291 (Man. C.A.), 311 (”*Hryniak* did not ... change the test to be applied on a motion for summary judgment”); *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52 (N.S. C.A.), ¶ 6; (2014), 68 C.P.C. (7th) 267 (N.S. C.A.), 269 (”*Hryniak v. Mauldin* ... has little bearing upon the circumstances, analysis, reasoning or result in this case. There ... [the Court] considered the application of a new Rule in Ontario ... which now empowers judges in that province to weigh the evidence, draw reasonable inferences from the evidence, and settle matters of credibility when deciding whether to grant summary judgment. Those powers are foreign to the well-established procedures and settled law which operate in Nova Scotia”) & *Manitoba v. Canada*, 2015 FCA 57 (F.C.A.), ¶ 17 per Stratas, J.A. (”like the Alberta Court of Appeal in *Can v. Calgary Police Service* ..., I conclude that *Hryniak* does not change the substantive content of ... [the *Federal Court Rules*]”).

217 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶¶ 13-15 & 23; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 38-39 & 42.

218 Id. at ¶ 47; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.) at 50.

219 Id. at ¶ 21; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.) at 41.

220 *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204 (Alta. C.A.), ¶ 3; (2018), 20 C.P.C. (8th) 43 (Alta. C.A.), 48 (”An incontrovertible factual foundation is an essential aspect of a controversy ripe for summary adjudication”); *Mulholland v. Rensonnet*, 2018 ABCA 24 (Alta. C.A.), ¶ 1 (the Court upheld a chambers judge’s order dismissing a summary judgment application because the “three parties [were] all saying something different”); *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*,

2016 ABCA 331 (Alta. C.A.), ¶ 23 ("Summary judgment is not appropriate when *vive voce* evidence is needed, where the judge is required to weigh evidence or make findings of credibility"); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.), ¶ 28; (2016), 612 A.R. 284 (Alta. C.A.), 289 ("Summary judgment is not possible if opposing parties' affidavits and evidence conflict on *material* facts because a chambers judge cannot weigh evidence or credibility on a summary judgment application") (emphasis in original); *Charles v. Young*, 2014 ABCA 200 (Alta. C.A.), ¶ 4; (2014), 97 E.T.R. (3d) 1 (Alta. C.A.), 3 ("In our view, it was an error for the chambers judge to determine this matter simply on the basis of conflicting affidavits and documents that would support either party's position"); *Kristal Inc. v. Nicholl & Akers*, 2007 ABCA 162 (Alta. C.A.), ¶ 12; (2007), 41 C.P.C. (6th) 381 (Alta. C.A.), 386 ("We conclude ... that there is ... no genuine issue to be tried and no disputed facts which would warrant a trial") & *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 16; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 114 ("The facts and the law on which the plaintiffs rely are incontrovertible").

221 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ 36; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 46.

222 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ 16; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 40 ("Like Ontario's R. 20, Alberta's R. 6.11(1) and 7.3 specifically enable fact finding in chambers applications, including (with permission) by hearing oral testimony"). See *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶¶ 85-96; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 379-85 per Wakeling, J.A. ("Four reasons explain my opposition to the use of oral evidence in a summary judgment application. First, summary judgment serves a completely different purpose than summary trial. ... Summary judgment disposes of a suit before trial and summary trial after trial. ... Third, the motions court may have to invest a significant amount of time to hear oral evidence") & *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶ 16; (2014), 371 D.L.R. (4th) 339 (Alta. C.A.), 350 ("Trials are for determining facts").

223 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ 35; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 46.

224 Id. at ¶ 47; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.) at 50.

225 Justice White, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 252, opined that summary judgment is appropriate if the dispute is "so one-sided that one party must prevail as a matter of law". Justice Powell, for the majority in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (U.S. Pa. S.C. 1986), 587, concluded that a summary disposition is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party".

226 *Rules to Amend the Alberta Rules of Court*, Alta. Reg. 216/86.

227 The Supreme Court of Canada in *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.), ¶ 10; [2008] 1 S.C.R. 372 (S.C.C.), 378, was also adamant that summary judgment not be granted unless a claim has "no chance of success". Chief Justice Fraser said the same in *Poliquin v. Devon Canada Corp.*, 2009 ABCA 216 (Alta. C.A.), ¶ 76; (2009), 454 A.R. 61 (Alta. C.A.), 81-82: "I have concluded that there is no genuine issue of material fact requiring trial. On the uncontroverted evidence here, it is plain and obvious that Poliquin's wrongful dismissal action cannot succeed".

228 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ 33; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 45. See also *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), 434 ("The appropriate test to be applied on a motion for summary judgment is satisfied when there is no genuine issue of material fact requiring trial").

229 R.R.O. 1990, Reg. 194.

230 2019 ABCA 344 (Alta. C.A.), ¶ 28.

231 Denlow, "Boon or Burden?", 37 Judges' Journal 26, 27 (1998) ("the [Rule 56 summary judgment] motion has largely become a defendant's weapon"); Haramati, "Procedural History: The Development of Summary Judgment as Rule 56", 5 N.Y.U.J.L. & Liberty 173, 174 (2010) ("Although summary judgment is now most commonly used to aid defendants, it was initially devised and developed as a plaintiffs' remedy") & Cecil, Eyre, Miletich & Rindskopf, "A Quarter Century of Summary Judgment Practice in Six Federal District Courts", 4 J. Empirical L. Stud. 861, 886 (2007) ("Defendants' motions for summary judgment are far more common than plaintiffs' motions. ... [T]here were 2,526 motions by defendants [72%], and only 967 motions by plaintiffs [28%]").

232 "Plaintiphobia in the Supreme Court", 100 Cornell L. Rev. 193, 193 (2014).

233 E.g., *DH v. Woodson*, 2020 ABQB 367 (Alta. Q.B.), ¶ 93 ("in applications that involve different factual questions, 51% should not carry the day. In those cases, a finding that there is a 'genuine issue requiring a trial' is appropriate even if the moving party has met the threshold burden of proof"); *Costello v. Redcity Creative Agency Inc*, 2019 ABQB 600 (Alta. Q.B.), ¶ 91 ("I am not satisfied that the August 30th Parlee Letter engaged the Shotgun Provisions of the Final USA. Further evidence is required on several points. First, additional evidence is required proving whether Costello was operating under the Draft USA"); *Condominium Plan No 0213028 v. Pasera Corporation*, 2019 ABQB 485 (Alta. Q.B.), ¶ 17 ("when the application for summary judgment is made on the basis of the expiration of a limitation period, the Court must be satisfied that the facts are not 'seriously in dispute, and the real question is how the law applies to those facts'"); *Cole v. Martin-Morrison*, 2019 ABQB 311 (Alta. Q.B.), ¶ 22 ("The plaintiffs signed at least some documents acknowledging duties to seek legal and accounting advice and risk. All of that needs [to be] weighed. Consideration of issues such as those, and no doubt many others, require a complete factual matrix with *viva voce* evidence in order to deal with them fairly and justly"); *Allnut v. Hudsons South Common Ltd.*, 2019 ABQB 143 (Alta. Q.B.), ¶ 25 (Master Smart) ("There are uncertainties in the facts and record provided by both parties. In sum, I do not have a sufficient measure of confidence in the state of the record such that I am prepared to exercise my judicial discretion to make a summary determination in favour of either party") & *von der Ohe v. Porsche Cars Canada Ltd*, 2019 ABPC 46 (Alta. Prov. Ct.), ¶ 72 ("the record is not sufficient for me to make the necessary findings of fact, on a balance of probabilities, to determine the key legal issues").

234 E.g., *Plesa v. Richardson*, 2019 ABCA 264 (Alta. C.A.), ¶ 40 ("the state of the record was not one which afforded sufficient confidence to exercise judicial discretion to summarily resolve the dispute"); *Rudichuk v. Genesis Land Development Corp.*, 2020 ABCA 42 (Alta. C.A.), ¶ 32 ("The plaintiffs have not demonstrated that the chambers judge made a reviewable error in concluding that there was a credibility contest that needed to be determined at trial and that she was unable to make a just determination on the record"); *SSC North America, LLC v. Federkiewicz*, 2020 ABQB 176 (Alta. Q.B.), ¶ 81 ("In short, a trial is required to sift through the extrinsic evidence and resolve the credibility issues and conflicting assertions"); *Malkhassian Estate v. Scotia Life Insurance Company*, 2020 ABQB 173 (Alta. Q.B.), ¶ 77 ("The conflicting information in the hospital records and in the ME certificate about the cause of death does not permit me to find the necessary facts to interpret the wording of the [accidental death insurance] Policy to make those decisions. The record is not sufficient for me to decide this application in a fair and just manner to both parties"); *PricewaterhouseCoopers Inc v. Perpetual Energy Inc*, 2020 ABQB 6 (Alta. Q.B.), ¶ 98 ("the determination of the 'arm's length issue' will turn on the credibility of witnesses who were directly involved in the negotiation of the Asset Transaction. ... I find that the cogency of the evidence does not allow me to conclude that it is more probable than not that the Purchaser Team had the degree of 'influence' that would be necessary for me [to] conclude that they exercised the prerequisite control"); *Nelson & Nelson v. Condominium Corporation No. 0013187*, 2019 ABQB 426 (Alta. Q.B.), ¶ 24 ("There are simply too many disputed material facts and issues requiring a determination of credibility to place enough confidence in this record to say that Nelson has no possible liability for his handling of these funds"); *Freeman v. Kooiman*, 2019 ABQB 857 (Alta. Q.B.), ¶ 9 ("this dispute is not appropriate for summary determination. The issues raised by the pleadings are the subject of competing evidence that cannot be fairly and justly resolved in chambers on this record"); *Lynk v. Co-Operators General Insurance Company*, 2019 ABQB 417 (Alta. Q.B.), ¶ 24 ("Having regard to the state of the record and uncertainties in the facts, it is not possible to resolve DHI's actual or apparent authority to bind Co-Operators contractually on a summary basis") & *Superior Energies Insulation Group Canada Inc v. Aluma Systems Inc*, 2019 ABQB 166 (Alta. Q.B.), ¶ 6 ("To fairly and justly resolve the issues in dispute, the Court needs a better evidentiary record, and that can be reasonably expected to be created by a trial").

235 See Schedules A and B of this opinion. A master has no authority to hear oral evidence. *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 9(3)(b).

236 2015 ABQB 141 (Alta. Q.B.), ¶ 7; (2015), 41 C.L.R. (4th) 51 (Alta. Q.B.), 55 ("This matter was set down for trial in May of 2014.

Valard opposed Bird's request that its summary dismissal application be heard before the commencement of the trial. Bird was permitted to bring its application, but after hearing short submissions from Valard, the Court decided that the most efficient way to proceed would be to hear the mini-trial, and Bird's counsel agreed that its submissions would in effect constitute its opening statement. Three witnesses were called to testify and their combined testimony took less than a day").

237 E.g., *Wage v. Canadian Direct Insurance Incorporated*, 2020 ABCA 49 (Alta. C.A.), ¶ 13 ("Here, the material facts are not in dispute. Selecting the correct interpretation of the policy and SEF Endorsement 44 is well-suited to summary disposition"); *Kostic v. Thom*, 2020 ABQB 324 (Alta. Q.B.), ¶ 15 ("Having regard to the state of the record and the issues, I conclude that this Action ... should ... be resolved on a summary basis. There are no material facts in dispute"); *County of Vulcan v. Genesis Reciprocal Insurance Exchange*, 2020 ABQB 93 (Alta. Q.B.), ¶ 155 ("This is not a 'close call' on the evidence. There is no evidence admissible on these applications to the contrary"); *Westpoint Capital Corp. v. Black & Associates Appraisal Inc.*, 2019 CarswellAlta 1166 (Alta. Q.B.), ¶ 6 (Master) ("There's no great dispute over any of the facts giving rise to an assessment of the limitation period question, and the parties simply do not agree on when the limitation period ought to start"); *Dezotell Holdings Ltd. v. St Jean*, 2019 ABQB 286 (Alta. Q.B.), ¶ 71 ("This is not a case that features conflicting evidence on matters of significance. There is no need for *viva voce* evidence so that credibility assessments may be undertaken"); *Columbos v. QuinnCorp Holdings Inc*, 2019 ABQB 853 (Alta. Q.B.), ¶ 75 (Master) ("I am able to find the necessary facts and apply the law on this record, and it is fair and just to do so in the circumstances"); *Gill v. Singh*, 2019 ABQB 819 (Alta. Q.B.), ¶ 15 ("This case is ... appropriate ... for summary judgment. Its resolution depends solely on the interpretation of the Agreement .... In light of facts not contested ..., the answer to this dispute lies within the Agreement itself"); *Kozina v. Redlick*, 2019 ABQB 749 (Alta. Q.B.), ¶ 72 (Master Smart) ("there are sufficient uncertainties in the facts and the law that it would be inappropriate for me to resolve the dispute on a summary basis. ... I do not have confidence in the state of the record to exercise my discretion to summarily resolve the dispute"); *Grainger v. Pentagon Farm Centre Ltd.*, 2019 ABQB 445 (Alta. Q.B.), ¶ 36 (Master Schulz) ("this question is suitable for summary judgment. There is no conflict on the evidence ...; the interpretation of documents is 'ideally suited to summary judgment' .... Further, the law is relatively clear and appropriate to apply to these facts"); *Scotia Mortgage Corporation v. Meshkati*, 2019 ABQB 267 (Alta. Q.B.), ¶ 37 ("This case is appropriate for summary judgment. There is no material dispute between the parties on the central facts") & *HPWC 9707 110 Street Limited Partnership v. Funds Administrative Service Inc*, 2019 ABQB 167 (Alta. Q.B.), ¶ 25 ("Although details were contested between the parties, the facts are not seriously in dispute .... As such, this case is ideally situated for summary disposition").

238 E.g., *Love v. Generoux*, 2020 ABQB 71 (Alta. Q.B.), ¶ 8 ("Both *Hryniak v. Mauldin* ... and *Weir-Jones* ... stress the importance ... of being able to have confidence in the result based upon the nature of the record before the Court. This is not a case where I can have that confidence"); *Agrium Inc v. Colt Engineering Corporation*, 2019 ABQB 978 (Alta. Q.B.), ¶ 32 (Master Prowse) ("I am not sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial"); *102 Street Developments Ltd. v. Derk's Formals Ltd.*, 2019 ABQB 781 (Alta. Q.B.), ¶ 42 ("the Appellant has not satisfied the Court on appeal that there is no real issue between the parties, given the contradictory evidence on material issues. ... The Court is unable to apply the several legal elements in this action for negligent misrepresentation to a sufficiently settled factual matrix. Summary disposition ... would not be a means to achieve a just result and the issues must proceed to a trial"); *Sonny's Trucking Ltd v. Edmonton Kenworth Ltd*, 2019 ABQB 696 (Alta. Q.B.), ¶ 50 ("I am not satisfied ... that I have sufficient confidence in the record presently before the Court to dispose of this summarily"); *Clifton Associates Ltd. v. Shelbra International Ltd.*, 2019 ABQB 536 (Alta. Q.B.), ¶ 37 ("the Master's Order under appeal does not satisfy the *Weir-Jones* criteria ... where the overall considerations of fairness and the ability to achieve a just result are not met") & *Andersen v. Canadian Western Trust Company*, 2019 ABQB 413 (Alta. Q.B.), ¶¶ 52 & 54 ("I am not confident that this record would permit me to determine that the Applicants probably did not owe such a duty of care to any of their plaintiff clients. ... I therefore agree with CWT that the record does not permit a fair and just determination of these issues").

239 E.g., *Fitzpatrick v. The College of Physical Therapists of Alberta*, 2020 ABCA 164 (Alta. C.A.), ¶ 40 ("It is clear and obvious there is no merit to the claim advanced by Ms. Fitzpatrick and no genuine issue requiring a trial"); *Smith v. John Doe*, 2020 ABQB 59 (Alta. Q.B.), ¶ 33 ("the evidence falls short of establishing that Dr. Miller should immediately have sent ... [the plaintiff] out for a referral in order to have ... [met] the standard of care"); *Urban Square Holdings Ltd. v. Governali*, 2020 ABQB 240 (Alta. Q.B.), ¶ 57 ("there is no merit to this claim under any analysis"); *TA v. Alberta (Children's Services)*, 2020 ABQB 97 (Alta. Q.B.), ¶ 91 ("The plaintiff has not presented responding evidence or suggested that evidence may exist which contradicts that presented by the defendants [who seek summary dismissal]. There are no obvious issues requiring a full trial"); *Scherle v. Treadz Auto Group Inc*, 2019 ABQB 987 (Alta. Q.B.), ¶ 84 ("the Action against AMVIC and Service Alberta is well-suited for a summary dismissal judgment. There are no material facts seriously in dispute and there is no need for the full machinery of a trial to conclude that there is no private law duty of care owed in the circumstances here and that AMVIC, in any event, is immune from liability under the ... [*Fair Trading Act*]"); *Goodvin v. Penson*, 2019 ABQB 867 (Alta. Q.B.), ¶¶ 14-15 (Master Schlosser) ("The law is well settled. ... Russell and Shelley Penson's defence has merit. The claim against them is dismissed"); *LaPrairie Works Inc v. Ledcor*

Alberta Limited, 2019 ABQB 701 (Alta. Q.B.), ¶ 3 ("this is an appropriate issue for summary-dismissal resolution and there is no genuine issue about the existence of the asserted contract: it is plain that no such contract existed here"); *Farm Credit Canada v. Pacific Rockyview Enterprises Inc*, 2020 ABQB 357 (Alta. Q.B.), ¶ 162 ("I have sufficient confidence in the state of the record and exercise my discretion and judgment to resolve this lawsuit by granting summary judgment to FCC in the sum owing under the guarantees"); *Condominium Corporation No 0613782 v. Country Hills Landing Limited Partnership by its limited partners Cardel Homes Limited Partnership*, 2020 ABQB 36 (Alta. Q.B.), ¶ 45 (Master Robertson) ("If the facts are clear, and the issues are amenable to summary disposition, a decision should be made"); *Mehak Holdings Ltd v. BBQ To-Night Ltd*, 2019 ABQB 556 (Alta. Q.B.), ¶ 16 ("Reena has met the onus on it to prove that there is no merit to the claim. In fact, ... Reena has achieved the higher 'pre-[*Hryniak*]' threshold of showing that the claim against it is hopeless"); *Collins v. Pearce*, 2019 ABQB 868 (Alta. Q.B.), ¶ 77 ("summary adjudication in this case is possible on the extensive record that was entered into evidence. In my view, there are no genuine issues left for trial as against the Applicant Defendants"); *Mudrick Capital Management LP v. Wright*, 2019 ABQB 662 (Alta. Q.B.), ¶ 128 ("The claims of breach of duty and misrepresentation are also bound to fail as against the other directors and officers for the same basic reason; there is no evidence suggesting that they did anything wrong"); *Minex Minerals Ltd v. Walker*, 2019 ABQB 460 (Alta. Q.B.), ¶ 179 (Master Hanebury) ("There is no actual evidence that supports Minex' allegations of a plan or common intention by the Tattersall companies and Mr. Clark to lure Mr. Clark's investment away from Minex or to interfere with economic relations"); *Simmie v. JRJ Concrete Ltd.*, 2019 ABQB 409 (Alta. Q.B.), ¶ 80 ("the documentary evidence ... clearly corroborates the evidence of ... [the plaintiffs] that they loaned money to JRJ Concrete at Carlos' request. The only evidence the Respondent has been able to provide in support of its assertion that the money ... was loaned to Carlos in his personal capacity is evidence rendered irrelevant by the 'indoor management rule'"); *Smith v. Uhersky*, 2019 ABQB 761 (Alta. Q.B.), ¶¶ 84 & 86 ("it is clear that the promissory notes are enforceable and there has only been one payment. ... I declare the defendants to be liable on the promissory notes that they signed"); *Muirfield Village Ltd. v. Borsuk*, 2019 ABQB 160 (Alta. Q.B.), ¶ 122 (Master Robertson) (the court summarily dismissed the claim against the lawyers: "The evidence is clear that the agreement drafted was the agreement ... [Muirfield Village Ltd.] wanted"); *Ethos Engineering Inc v. Fortis LGS Structures Inc*, 2019 ABQB 141 (Alta. Q.B.), ¶ 14 ("[the evidence] will not get better at trial and there is no genuine issue requiring a trial. It is fair and just to all the parties to resolve this matter in a summary manner"); *Alberta (Child, Youth and Family Enhancement Act, Director) v. M.L.*, 2020 ABPC 28 (Alta. Prov. Ct.), ¶ 38 ("there is no defence to the application of the Director. There is no chance of success that the child could be returned to his mother in a reasonable time"); *Kayler v. GEF Seniors Housing of Greater Edmonton Foundation*, 2019 ABPC 323 (Alta. Prov. Ct.), ¶ 25 ("The Plaintiff's claim has no chance of success if it proceeds to trial") & *James L. Dixon Professional Corporation v. Amundsen*, 2019 ABPC 35 (Alta. Prov. Ct.), ¶ 29 ("The Plaintiff's claim is clearly statute barred. There is no genuine issue to be tried").

240 R. Susskind, Online Courts and the Future of Justice 4 (2019) ("By disposition, ... [lawyers and judges] are often conservative and risk-averse").

241 E.g., *Roman Catholic Bishop of the Diocese of Calgary v. Schuster*, 2019 ABCA 64 (Alta. C.A.), ¶ 7 ("While the appropriate test for summary judgment remains unsettled, we conclude that on either test, the appeal must be dismissed. Under both tests, a controversy over relevant facts or an inadequate factual record precludes the issuance of summary judgment"); *Roberts v. Edmonton Northlands*, 2019 ABQB 9 (Alta. Q.B.), ¶ 23 ("the result ... does not turn on the test to be applied for summary judgment. Under either test articulated by the Alberta Court of Appeal ..., the Defendants have not proved that the defamation and constructive claims have no merit."); *Schell Estate (Re)*, 2018 ABQB 991 (Alta. Q.B.), ¶ 90 ("A trial is necessary to determine the truth. On either of the tests currently promulgated by the Court of Appeal, the application for summary dismissal ... fails.") & *Stackard v. 1256009 Alberta Ltd*, 2018 ABQB 924 (Alta. Q.B.), ¶ 28 ("Irrespective of how the issue is resolved, it will not affect my decision. Nora has failed to prove on the existing record that there is no genuine issue requiring a trial, either to the lower standard in *Stefanyk* or the higher standard in *Whissell*").

242 Karabus & Tjaden, "*The Impact of Hryniak v. Maudlin on Summary Judgment in Canada One Year Later*", 44 Advoc. Q. 85, 90 (2015).

243 Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 461 (2004).

244 *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 152/98.

245 It is important to keep in mind that with the enactment the *Alberta Rules of Court Amendment* (Alta. Reg. 41/2014) there were new

appeal rules in force September 1, 2014. Rule 14.5(1)(b) provides that a party could only appeal a "pre-trial decision directing adjournments, time periods or time limits" with permission. An order dismissing a summary judgment application, while a pre-trial decision, is not a decision relating to "adjournment, time periods or time limits". It follows that a party wishing to appeal an order dismissing a summary judgment application does not need permission to appeal. A party whose interests were adversely affected by summary judgment has a right to appeal under rule 14.4(1) of the *Alberta Rules of Court*: "Except as otherwise provided, an appeal lies to the Court of Appeal from the whole or any party of a decision of a Court of Queen's Bench judge sitting in court or chambers ...".

246 Rules of Court Committee, Request for Comments 2020-1 Summary Trials 1 (2020).

247 2019 ABCA 49 (Alta. C.A.), ¶¶ 16, 21 & 47; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 40, 41 & 50.

248 R. Susskind, Online Courts and the Future of Justice 4 (2019) ("By disposition, ... [lawyers and judges] are often conservative and risk-averse").

249 Supra notes 234 & 238.

250 See Heise, "Following Data and a Giant: Remembering Ted Eisenberg", 100 Cornell L. Rev. 8, 9 (2014) ("Ted [Professor Eisenberg of Cornell Law School] ... encouraged me to continue to 'trust and follow the data, wherever they might lead you'. He went on to note that 'quality data, careful methods, and an appropriate research design will invariably yield an interesting paper'. The key, Ted repeated for emphasis was 'to simply follow the data'").

251 Rules of Court Committee, Request for Comments 2020-1 Summary Trials 2 ("Lawyers are not in the habit of holding summary trials").

252 *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 1.2(1) ("The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way"). See R. Susskind, Online Courts and the Future of Justice 6 (2019) ("Online judging is not appropriate for all cases but its advocates claim it is well-suited to many low value disputes that current courts struggle to handle efficiently").

253 *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 56; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 126 ("Most legal systems recognize that there is no reason to accord every party to an action full access to all stages of the litigation spectrum".); *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶ 34; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 88 ("Legislators in the United Kingdom, Canada and the United States have introduced summary judgment into their litigation model to ensure that dispute resolution takes place at the earliest point in the litigation continuum where it is just to do so") & *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 27; (2014), 587 A.R. 16 (Alta. Q.B.), 26 ("the purpose of the *Rules of Court* is to provide a means by which claims can be fairly and justly resolved ... by a court process in a timely and cost effective manner").

254 See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 76.04(1) ("The following are not permitted in an action under this Rule: 1. Examination for discovery by written questions and answers under Rule 35").

255 J. Casey, Arbitration Law of Canada: Practice and Procedure 237 (3d ed. 2017) ("The strength of the arbitral process is the ability to tailor the procedure to the dispute at hand. A skilled arbitrator can ... help the parties devise a process that cuts to the core of the dispute, but maintains the essential elements of fairness and due process") & D. Sutton, J. Gill, Q.C., & M. Gearing, Q.C., Russell on Arbitration 242-43 (24th ed. 2015) ("The parties may prefer a quick and cheap resolution of their dispute to a slow, expensive solution, and may be prepared, up to a point, to bear any consequent cutting down of the opportunities to put their case across. At one extreme, the procedure in an arbitration may be very similar to that applicable to proceedings in the larger and more complex cases that come before the court, with full oral hearings, strict adherence to the rules of evidence, pleadings, extensive disclosure of documents, and factual and expert witnesses. At the other extreme, it may be agreed that the tribunal should decide the dispute on

the basis of a limited range of documents, with no hearings, pleadings or submissions (oral or written). Between these extremes procedures may be modified or mixed as desired").

256 E.g., *Dreco Energy Services Ltd. v. Wenzel*, 2006 ABQB 356 (Alta. Q.B.), ¶ 41; (2006), 399 A.R. 166 (Alta. Q.B.), 177 ("I conclude ... that the destruction of these computer files was intentional and deliberate. The Defendants gave undertakings to provide computer records. There was a Court Order ... that required these records be produced by May 12, 2004. The records were not produced. Instead, they were destroyed when, after February 27, 2004 the assets of KW Downhole Tools Inc. were sold to Wenzel Downhole Tools Ltd. .... I find that the purpose for their destruction was to destroy evidence which would have been relevant and admissible in these proceedings").

257 *Ursa Ventures Ltd. v. Edmonton (City)*, 2016 ABCA 135 (Alta. C.A.), ¶ 91; (2016), 91 C.P.C. (7th) 73 (Alta. C.A.), 111 per Wakeling, J.A. ("Common law civil procedure is based on the adversarial system that places some limits on the role of the judiciary and values party autonomy. Under traditional common law regimes, the parties make many important litigation decisions").

258 Alta. Reg. 124/2010.

259 *Humphreys v. Trebilcock*, 2017 ABCA 116 (Alta. C.A.), ¶ 99; [2017] 7 W.W.R. 343 (Alta. C.A.), 372 ("The court has the jurisdiction to ensure that litigants do not abuse their rights and unjustifiably adversely affect the interests of their adversaries") & *Ursa Ventures Ltd. v. Edmonton (City)*, 2016 ABCA 135 (Alta. C.A.), ¶ 92; (2016), 91 C.P.C. (7th) 73 (Alta. C.A.), 111-12 ("The judicial branch, as the steward of valuable public resources, attempts to put those resources to their highest and best use. They should not be squandered on actions that are not moved along in accordance with the rules of court or court order").

260 *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 4.5 & 4.6.

261 Id. r. 4.4.

262 See *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 1.4(1) & (2) (U.K.) ("(1) The court must further the overriding objective by actively managing cases ... (2) Active case management includes ... (g) fixing time tables or otherwise controlling progress of the cases"); A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 19 (3d ed. 2013) ("The court is entrusted with the task of actively managing cases"); *Department of Transport v. Chris Smaller (Transport) Ltd.*, [1989] 1 All E.R. 897 (U.K. H.L.), 903 per Lord Griffiths ("I ... recommend a radical overhaul of the whole civil procedural process and the introduction of court controlled case management techniques designed to ensure ... [that litigation] proceeds in accordance with a timetable as prescribed by rules of court or as modified by a judge"); *Trial Court Delay Reduction Act*, Cal. Government Code § 68607 (West 2018) ("In accordance with this article and consistent with statute, judges shall have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action") & Superior Court of California, County of Santa Clara, 2018-2019 Annual Report 12 ("Santa Clara County Superior Court's complex civil litigation program manages complex cases more efficiently and effectively. Complex cases benefit from specialized and long-term case management techniques, including identification of discrete issues for discovery. The Court uses issue-related and phased discovery, identification of discrete issues for resolution through dispositive motions or bifurcated trials, and settlement techniques").

263 E.g., Judicial Council of California, 2019 Court Statistics Report Statewide Caseload Trends 2008-09 Through 2017-18, Appendix F.

264 *Gablehouse v. Borza*, 2011 ABCA 102, 333 D.L.R. (4th) 689 (Alta. C.A.), aff'd, 2010 ABQB 294, 72 B.L.R. (4th) 198 (Alta. Q.B.).

265 2011 ABCA 102 (Alta. C.A.), ¶5; (2011), 333 D.L.R. (4th) 689 (Alta. C.A.), 691-92.

266 Rules of Court Committee, Request for Comments 2020-1 Summary Trials 2 (2020) ("Lawyers are not in the habit of holding summary trials").

267 Appeal Record F5: 34-35.

268 *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), ¶ 47; (2019), 442 D.L.R. (4th) 9 (Alta. C.A.), 50. The chambers judge decided this case on December 7, 2018, before the Court of Appeal released *Weir-Jones*. He did not apply the *Weir-Jones* test.

269 See *Rogal v. Stonefield (Fort Saskatchewan) Gp Ltd*, 2018 ABQB 270 (Alta. Q.B.), ¶ 15 (Master Schlosser) ("There is nothing on the record to show that the defendants were negligent or breached their duty under the *Occupiers' Liability Act*. In fact, the accident is equally well explained, or perhaps better explained, by momentary inattention on the part of the Plaintiff").

270 R.S.A. 2000, c. O-4.

271 This schedule is organized alphabetically.

272 This period covers 536 days.

273 There are undoubtedly unreported decisions of which we are not aware.

274 There are undoubtedly unreported decisions of which we are not aware.

275 This schedule was organized alphabetically. It includes decisions that were issued before February 6, 2019 if the ultimate decision is issued on or after February 6, 2019.

276 This period covers 533 days.

277 There are undoubtedly unreported decisions of which we are not aware.

278 There are undoubtedly unreported decisions of which we are not aware.

279 The number of applications recorded in Schedule D exceeds the number of applications listed in Schedules A and B. This is because more than one court may have determined the same dispute.

280 This includes one decision confirming the Court of Queen's Bench of Alberta decision to allow an appeal against a decision of a Master ([*Alberta Finance & Mortgage Corporation v. Prasad*] 2019 ABCA 4 (Alta. C.A.)), one decision denying an application after both the Court of Queen's Bench and a Master granted it (2017 ABCA 378 (Alta. C.A.)), two decisions confirming the Master's decision after the Court of Queen's Bench set aside the Master's decision ([*Cardinal v. Alberta Motor Association Insurance Company*] 2018 ABCA 69 (Alta. C.A.), 2018 ABCA 125 (Alta. C.A.)), and two decisions dismissing the appeal and upholding the decision of both the Master and the Court of Queen's Bench (2018 ABCA 88 (Alta. C.A.) & 2019 ABCA 64 (Alta. C.A.)).

281 This includes three decisions confirming the Court of Queen's Bench of Alberta decision to allow an appeal against a decision of a Master (2019 ABCA 344 (Alta. C.A.), 2020 ABCA 42 (Alta. C.A.) & 2020 ABCA 164 (Alta. C.A.)), one decision confirming the Master's decision after the Court of Queen's Bench set aside the Master's decision (2020 ABCA 125 (Alta. C.A.)), two decisions denying an application after both the Court of Queen's Bench and a Master granted it 2019 ABCA 264 (Alta. C.A.) & [*Stankovic v. 1536679 Alberta Ltd.*] 2019 ABCA 187 (Alta. C.A.)), and four decisions dismissing the appeal and upholding the decision of both the Master and the Court of Queen's Bench ([*Canterra Custom Homes Ltd v. Curtis Engineering Associates Ltd*] 2020 ABCA 115 (Alta. C.A.), [*HOOPP Realty Inc v. Emery Jamieson LLP*] 2020 ABCA 159 (Alta. C.A.) for two applications & 2020 ABCA 164 (Alta. C.A.)).

End of Document

TAB 9

KeyCite treatment

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): 401683 Alberta Ltd. v. Co-Operators General Insurance Company | 2025 ABKB 28, 2025 CarswellAlta 64 | (Alta. K.B., Jan 16, 2025)

2019 ABCA 49
Alberta Court of Appeal

Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.

2019 CarswellAlta 204, 2019 ABCA 49, [2019] 6 W.W.R. 567, [2019] A.W.L.D. 1078, [2019] A.W.L.D. 1084, [2019] A.J. No. 144, 301 A.C.W.S. (3d) 643, 32 C.P.C. (8th) 247, 442 D.L.R. (4th) 9, 86 Alta. L.R. (6th) 240

Weir-Jones Technical Services Incorporated (Appellant / Respondent / Plaintiff) and Purolator Courier Ltd., Purolator Inc. and Purolator Freight (Respondents / Applicants / Defendants)

Catherine Fraser C.J.A., Jack Watson, Frans Slatter, Thomas W. Wakeling, Jo'Anne Strekaf JJ.A.

Heard: September 7, 2018
Judgment: February 6, 2019
Docket: Edmonton Appeal 1703-0218-AC

Proceedings: affirming *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.* (2017), 2017 CarswellAlta 1437, 2017 ABQB 491, D.L. Shelley J. (Alta. Q.B.)

Counsel: T.J. Byron, for Appellant
T.V.G. Duke, N.J. Willis, for Respondents

Subject: Civil Practice and Procedure; Contracts

Related Abridgment Classifications

Civil practice and procedure
VII Limitation of actions
VII.4 Actions in contract or debt
VII.4.a Statutory limitation periods
VII.4.a.iii When statute commences to run
VII.4.a.iii.C Miscellaneous

Civil practice and procedure
XVIII Summary judgment
XVIII.9 Practice and procedure
XVIII.9.b Miscellaneous

Headnote

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous

In January 2008, defendant courier began providing services to plaintiff company pursuant to agreement comprised of collective agreement, owner/operator contract, and standards of performance contract — General manager and employee of company filed grievances in January 2009 related to claims for compensation for services rendered, unpaid invoices of company, termination of agreement, and other matters — Courier terminated agreement in August 2009 — Company commenced action for damages for breach of agreement — Grievances were settled by agreement in 2015 — Courier successfully brought application for summary dismissal of company's action as statute-barred — Evidence established company communicated concerns about breaches of agreement to courier in November 2008 and February 2009 — Limitation period for breach of contract commenced on date of breach — Company appealed — Appeal dismissed — Emergence of case law rift respecting summary judgment test in Alberta and standard of proof, and resort must be had to principles behind modern law of summary judgment, standard of proof, type of record to be used in summary dispositions, and fairness — There was no policy reason to cling to old, strict rules for summary judgment, and summary judgment should be used when it was proportionate, more expeditious and less expensive procedure — To obtain summary dismissal of claim based on expiration of limitation period, courier had to show from record that injury alleged by company arising from alleged breaches of contract was reasonably known, attributable to courier, and sufficiently serious to warrant proceeding no later than July 22, 2009 — Chambers judge proceeded on erroneous assumption that limitation period started to run at time of breach, but she made necessary findings of fact as to when company discovered and could reasonably have commenced action, and error did not affect result — There was no doubt that company was aware of claim before July 22, 2009 — Record did not disclose any circumstances that would extend commencement of limitation period — Chambers judge did not make reviewable error in concluding that there was no standstill agreement or any representation that limitation period would not be relied on.

Civil practice and procedure --- Summary judgment — Practice and procedure — Miscellaneous

The parties had a contractual relationship under which the company would transport packages on behalf of the courier. The company terminated the contractual arrangement in August 2009. In November 2008 and January 2009, the union filed grievances on behalf of the principals of the company, which were arbitrated in September 2015 and settled in October 2015. The company took the position that some of its allegations of breach of contract were not covered by the collective agreement or the arbitration. On January 22, 2011 the company commenced an action seeking damages for breach of contract.

The courier successfully applied for the dismissal of the company's action based on the expiration of the limitation period pursuant to the Limitations Act (Act). The chambers judge concluded that the company was aware of the facts on which it based its action against the courier and that the injury warranted bringing a proceeding more than two years before it commenced an action against the courier. The chambers judge found that there was no standstill agreement in place. The chambers judge found that nothing that was done amounted to an express or implied representation that the limitation period would not be relied upon. The company appealed.

Held: The appeal was dismissed.

Per Slatter J.A. (Fraser C.J.A, Watson, Strekaf JJ.A. concurring): The threshold burden on the moving party with respect to establishing the factual basis of a summary judgment application is proof on a balance of probabilities. Balance of probabilities applied in the context of summary judgment does not mean that summary judgment will always be appropriate when the standard is met — it is not the case that "51 percent carries the day".

The balance of probabilities standard only applies to proof of the facts and is but one of the steps in determining whether it is possible to decide the case on a summary basis. Establishing the facts on a balance of probabilities is not a proxy for summary judgment. Consistent with the modern principles of summary judgment set out in Hryniak, whether summary judgment is appropriate and fair involves an element of judicial discretion, but making the underlying findings of fact is an exercise in weighing the evidence. Where there were "difficult factual questions, requiring a tough call on contested facts", there may well be a "genuine issue requiring a trial", even if the moving party has met the balance of probabilities threshold burden of proof.

Based on the Hryniak test, the proper approach should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The key considerations were: a) Having regard to the record and the issues, was it possible to fairly resolve the dispute on a summary basis, or did uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial? b) Had the moving party met the burden on it to show that there was either "no merit" or "no defence" and that there was 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 met its burden, the resisting party must put its best foot forward and demonstrate that there was a genuine issue requiring a trial. d) In any event, the judge must be left with sufficient confidence in the state of the record such that they were prepared to exercise the judicial discretion to summarily resolve the dispute. The analysis does not have to proceed sequentially, or in any 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. There was no policy reason to cling to the old, strict rules for summary judgment. This can only serve to undermine the shift in culture called for by Hryniak. Summary judgment should be used when it is the proportionate, more expeditious and less expensive procedure. It frequently will be. Its usefulness should not be undermined by attaching conclusory and exaggerated criteria like "obvious" or "high likelihood" to it.

The chambers judge erred in holding the former Limitations Act applied under the current Limitations Act. The present Act contains no separate rule for limitation periods for breaches of contract. In order to obtain summary dismissal based on the expiration of the limitation period, the courier had to show from the record that the injury alleged by the company arising from the alleged breaches of contract was reasonably known, attributable to the courier, and sufficiently serious to warrant a proceeding no later than July 2009.

The chambers judge proceeded under the erroneous assumption that the limitation period started to run at the time of breach, but made the necessary findings of fact as to when the company discovered and could reasonably have commenced the action, and the error did not affect the result. The chambers judge found that the alleged breaches, the injury that resulted, and the knowledge that the injuries warranted a proceeding were known more than two years before the action was commenced, which was a finding of fact that deserved deference. There company was aware of the claim before July 22, 2009 and communications amply supported the chambers judge's conclusion.

The record did not disclose any circumstances that would extend the commencement of the limitation period. There was dispute about whether the company and its allegations of breach of contract were covered by the collective agreement, but uncertainty about which claims were covered by the arbitration process did not delay commencement of the limitation period. If a party failed to seek a remedial order within the limitation period because of a mistaken view of the availability of an alternative procedure, the claim would be barred. Discoverability did not require perfect knowledge or certainty that the claim would succeed.

There were various communications between the parties about the alleged breaches of the contract, which expressed a willingness to resolve the outstanding issues. The correspondence did not use the word "standstill", and there was no mention of the Act. The clear recognition in the correspondence that legal proceedings would follow if negotiations were unsuccessful was inconsistent with any inference that legal rights were being waived. The chambers judge did not make a reviewable error in concluding that there was no standstill agreement or any representation that the limitation period would not be relied on. The allegation of a standstill agreement did not raise any issue requiring a trial, and there was no prospect of a significantly better record emerging from a trial. The company's hope that the dispute could be settled by negotiation did not have the effect of extending the limitation period. The company failed to show any reviewable error in the fact findings made by the chambers judge or the inferences she drew from the record.

Per Wakeling J.A. (concurring in the result): There were two conflicting summary judgment tests, and the difference between the different standards was the degree of disparate strength necessary. One approach insisted that that the responding party's position be completely without merit so that it could not possibly succeed. Using that measure increased the degree of disparity to the maximum point and reduced considerably the utility of the summary judgment process. The other approach granted summary judgment even though the responding party's position had some merit. Summary judgment would be granted if the moving party's position was established on a balance of probabilities, and it was fair and just to deny the responding party access to the full trial process. That test reduced the requisite degree of disparity and increased the utility of the summary judgment process. That approach was preferred.

The Hryniak decision was important as it expressly declared the value of summary judgment procedures. It confirmed that summary judgment was not an inferior dispute resolution device that sacrificed procedural fairness in the pursuit of economical and expeditious resolution of disputes. However, Hryniak's importance in Alberta must not be overstated, as it did not alter the text of R. 7.3 of the Alberta Rules of Court. There was no valid reason post-Hryniak to interpret R. 7.3 of the

Rules in a manner different from that favoured pre-Hryniak. The court must give the text of R. 7.3 its plain and ordinary meaning, and may grant summary judgment only if it concluded that the disparity between the strength of the parties' positions was so marked that the ultimate outcome of the dispute was obvious.

The courier's argument that the company's action was barred by the two-year limitation period in the Act was much more compelling than the company's argument that its claim was not barred by the Act that the likelihood the courier would ultimately succeed was very high. The company had no chance of succeeding, and the outcome of the trial was obvious.

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Dreco Energy Services Ltd. v. Wenzel (2003), 2003 ABQB 1067, 2003 CarswellAlta 1874, 24 Alta. L.R. (4th) 360, 344 A.R. 299 (Alta. Q.B.) — considered

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Eng v. Eng (2010), 2010 ABCA 19, 2010 CarswellAlta 115, [2010] 6 W.W.R. 29 (Alta. C.A.) — considered

Engl v. Aetna Life Insurance Co. (1943), 139 F.2d 469 (U.S. C.A. 2nd Cir.) — considered

Enokhok Development Corp. v. Alberta Treasury Branches (2011), 2011 ABCA 322, 2011 CarswellAlta 2034, 68 Alta. L.R. (5th) 126 (Alta. C.A.) — considered

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Espey v. Chapters Inc. (1998), 225 A.R. 68, 1998 CarswellAlta 1325 (Alta. Q.B.) — considered

Federal Deposit Ins. Corp. v. Willis (1980), 497 F.Supp. 272 (U.S. Dist. Ct. S.D. N.Y.) — referred to

Fielding & Platt Ltd. v. Najjar (1969), [1969] 1 W.L.R. 357, [1969] 2 All E.R. 150 (Eng. C.A.) — referred to

Fierro v. Sinclair (2012), 2012 NSSC 429, 2012 CarswellNS 978 (N.S. S.C.) — referred to

First National Bank of Arizona v. Cities Service Co. (1968), 391 U.S. 253 (U.S. Sup. Ct.) — considered

Forsythe v. Furlotte (2016), 2016 NBCA 6, 2016 CarswellNB 52, 2016 CarswellNB 53, 81 C.P.C. (7th) 15, 396 D.L.R. (4th) 664, 93 M.V.R. (6th) 193, 1171 A.P.R. 48, 447 N.B.R. (2d) 48 (N.B. C.A.) — considered

Fougere v. Blunden Construction Ltd. (2014), 2014 NSCA 52, 2014 CarswellNS 376, 1092 A.P.R. 385, 345 N.S.R. (2d) 385, 68 C.P.C. (7th) 267 (N.S. C.A.) — referred to

General Steel Industries Inc. v. Commissioner for Railways (1964), 38 A.L.J.R. 253, 112 C.L.R. 125, [1964] H.C.A. 69 (Australia H.C.) — considered

German v. Major (1985), 39 Alta. L.R. (2d) 270, 20 D.L.R. (4th) 703, 62 A.R. 2, 34 C.C.L.T. 257, 1985 CarswellAlta 145, 1985 ABCA 176 (Alta. C.A.) — considered

Ghost Riders Farm Inc. v. Boyd Distributors Inc. (2016), 2016 ABCA 331, 2016 CarswellAlta 2044 (Alta. C.A.) — considered

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Green v. Tram (2015), 2015 MBCA 8, 2015 CarswellMan 17, 315 Man. R. (2d) 54, 630 W.A.C. 54 (Man. C.A.) — considered

Greene v. Field Atkinson Perraton (1999), 1999 CarswellAlta 516, 1999 ABQB 239 (Alta. Q.B.) — considered

Griffon LLC v. 11 East 36th LLC (2011), 934 N.Y.S.2d 472, 90 A.D.3d 705 (U.S. N.Y.A.D. 2nd Dept.) — referred to

Gull Lexington Group Pty. Ltd. v. Laguna Bay (Banongill) Agricultural Pty. Ltd. (2018), [2018] VSCA 85 (Australia Vic. Sup. Ct.) — considered

HSBC Bank Canada v. Vallet (2009), 2009 ABQB 743, 2009 CarswellAlta 2125, 62 C.B.R. (5th) 153, 483 A.R. 240 (Alta. Q.B.) — referred to

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Heaman v. Schnurr (2011), 2011 ONSC 2661, 2011 CarswellOnt 7980 (Ont. S.C.J.) — referred to

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Holy Trinity Church v. United States (1892), 143 U.S. 457 (U.S. Sup. Ct.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7, 366 D.L.R. (4th) 641 (S.C.C.) — followed

Humphreys v. Trebilcock (2017), 2017 ABCA 116, 2017 CarswellAlta 647, [2017] 7 W.W.R. 343, 51 Alta. L.R. (6th) 1, 8 C.P.C. (8th) 19 (Alta. C.A.) — considered

Hussain v. Royal Bank of Canada (2017), 2017 ONCA 956, 2017 CarswellOnt 19246 (Ont. C.A.) — considered

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Jackamarra v. Krakouer (1998), [1998] H.C.A. 27, 195 C.L.R. 516 (Australia H.C.) — considered

Jackson v. Canadian National Railway (2012), 2012 ABQB 652, 2012 CarswellAlta 2304, [2013] 4 W.W.R. 311, 73 Alta. L.R. (5th) 219, 555 A.R. 1 (Alta. Q.B.) — considered

Jason Development Corp. v. Robertoria Properties Ltd. (1980), 42 A.R. 369, 1980 CarswellAlta 460 (Alta. Q.B.) — considered

Jodrey Estate v. Nova Scotia (Minister of Finance) (1980), [1980] 2 S.C.R. 774, 8 E.T.R. 69, (sub nom. *Covert v. Nova Scotia (Minister of Finance)*) 41 N.S.R. (2d) 181, 32 N.R. 275, [1980] C.T.C. 437, 1980 CarswellNS 78, 81 D.T.C. 5344, 1980 CarswellNS 82 (S.C.C.) — considered

Johnson v. Southern Pacific Co. (1904), 49 L.Ed. 363, 25 S.Ct. 158, 196 U.S. 1 (U.S. Sup. Ct.) — considered

Jones v. Stone (1894), [1894] A.C. 122 (Australia P.C.) — considered

Kary Investment Corp. v. Tremblay (2003), 2003 ABQB 315, 2003 CarswellAlta 808 (Alta. Q.B.) — considered

Kimber v. Owners Strata Plan No. 48216 (2017), [2017] FCAFC 226 (Australia Fed. Ct.) — considered

Kristal Inc. v. Nicholl & Akers (2007), 2007 ABCA 162, 2007 CarswellAlta 592, 41 C.P.C. (6th) 381, 81 Alta. L.R. (4th) 11 (Alta. C.A.) — considered

Lenko v. Manitoba (2016), 2016 MBCA 52, 2016 CarswellMan 177, 330 Man. R. (2d) 48, 675 W.A.C. 48, [2017] 1 W.W.R. 291 (Man. C.A.) — considered

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R.F.L. (7th) 29, 37 Alta. L.R. (6th) 48, 616 A.R. 346, 672 W.A.C. 346 (Alta. C.A.) — considered

Loeppky v. Taylor McCaffrey LLP (2015), 2015 MBCA 83, 2015 CarswellMan 497 (Man. C.A.) — considered

Mackey v. Squair (2015), 2015 ABQB 329, 2015 CarswellAlta 912, 617 A.R. 259 (Alta. Q.B.) — referred to

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Maxwell v. Wal-Mart Canada Corp. (2014), 2014 ABCA 383, 2014 CarswellAlta 2070, 588 A.R. 6, 626 W.A.C. 6 (Alta. C.A.) — considered

McBratney v. McBratney (1919), [1919] 3 W.W.R. 1000, 59 S.C.R. 550, 50 D.L.R. 132, 1919 CarswellAlta 193 (S.C.C.) — considered

McDonald v. Sproule Management GP Limited (2018), 2018 ABCA 295, 2018 CarswellAlta 1900 (Alta. C.A.) — considered

McKay v. Sandman (2018), [2018] NZCA 103 (New Zealand C.A.) — considered

McMorran v. McMorran (2014), 2014 ABCA 387, 2014 CarswellAlta 2105, 378 D.L.R. (4th) 103, 19 C.C.E.L. (4th) 50, 53 R.F.L. (7th) 13, 2014 C.E.B. & P.G.R. 8106 (headnote only), 16 C.C.P.B. (2nd) 53, 588 A.R. 22, 626 W.A.C. 22, 5 Alta. L.R. (6th) 324 (Alta. C.A.) — considered

Mellon (Next Friend of) v. Gore Mutual Insurance Co. (1995), 34 Alta. L.R. (3d) 125, 31 C.C.L.I. (2d) 302, [1996] 1 W.W.R. 348, *(*sub nom. *Mellon v. Gore Mutual Insurance Co.)* 174 A.R. 200, *(*sub nom. *Mellon v. Gore Mutual Insurance Co.)* 102 W.A.C. 200, 1995 CarswellAlta 421, 1995 ABCA 340 (Alta. C.A.) — considered

Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd. (1984), 55 B.C.L.R. 137, 1984 CarswellBC 213 (B.C. C.A.) — considered

Mr. Submarine Ltd. v. Aristotelis Holdings Ltd. (1993), 17 C.P.C. (3d) 137, 102 D.L.R. (4th) 764, 1993 CarswellAlta 473, 1993 ABCA 153 (Alta. C.A.) — considered

Mulholland v. Rensonnet (2018), 2018 ABCA 24, 2018 CarswellAlta 93 (Alta. C.A.) — considered

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Nelson v. Grande Prairie (City) (2018), 2018 ABQB 537, 2018 CarswellAlta 1362, 75 Alta. L.R. (6th) 36, 79 M.P.L.R. (5th) 78 (Alta. Q.B.) — considered

Nipshank v. Trimble (2014), 2014 ABQB 120, 2014 CarswellAlta 322, 8 Alta. L.R. (6th) 152 (Alta. Q.B.) — considered

O'Hanlon Paving Ltd. v. Serengetti Developments Ltd. (2013), 2013 ABQB 428, 2013 CarswellAlta 1426, 18 B.L.R. (5th) 73, 91 Alta. L.R. (5th) 1, 567 A.R. 140 (Alta. Q.B.) — considered

Orr v. Fort McKay First Nation (2014), 2014 ABQB 111, 2014 CarswellAlta 312, 587 A.R. 16, 6 Alta. L.R. (6th) 307 (Alta. Q.B.) — considered

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P. Burns Resources Ltd. v. Patrick Burns Memorial Trust (Trustee of) (2015), 2015 ABCA 390, 2015 CarswellAlta 2282, 26 Alta. L.R. (6th) 1, 79 C.P.C. (7th) 29, *(*sub nom. *Burns Estate v. Burns (P.) Estate Ltd.)* 612 A.R. 63, *(*sub nom. *Burns Estate v. Burns (P.) Estate Ltd.)* 662 W.A.C. 63 (Alta. C.A.) — considered

Pacific Western Airlines Ltd. v. Gauthier (1977), 2 Alta. L.R. (2d) 52, *(*sub nom. *Pacific Western Airlines Ltd. v. D.E.E.L. Enterprises)* 2 A.R. 166, 1977 CarswellAlta 9 (Alta. C.A.) — considered

Palermo v. National Australia Bank Ltd. (2017), [2017] QCA 321 (Queensland S.C.) — considered

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2004), 2004 ABQB 655, 2004 CarswellAlta 1170, [2004] 4 C.N.L.R. 110, 43 Alta. L.R. (4th) 41, [2005] 8 W.W.R. 442, *(*sub nom. *Lameman v. Canada (Attorney General))* 365 A.R. 1 (Alta. Q.B.) — considered

Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd. (2003), 2003 ABCA 298, 2003 CarswellAlta 1498, 339 A.R. 165, 312 W.A.C. 165, 27 Alta. L.R. (4th) 62 (Alta. C.A.) — considered

Pointe of View Developments Inc. v. Cannon & McDonald Ltd. (2008), 2008 ABQB 713, 2008 CarswellAlta 1783, 68 C.C.L.I. (4th) 311, 99 Alta. L.R. (4th) 365, 77 C.L.R. (3d) 213 (Alta. Q.B.) — considered

Poliquin v. Devon Canada Corp. (2009), 2009 ABCA 216, 2009 CarswellAlta 903, 2009 C.L.L.C. 210-030, 75 C.C.E.L. (3d) 1, 8 Alta. L.R. (5th) 45, [2009] 9 W.W.R. 416, 454 A.R. 61, 455 W.A.C. 61 (Alta. C.A.) — considered

Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd, (2017), 2017 ABCA 378, 2017 CarswellAlta 2336, 60 Alta. L.R. (6th) 57, [2018] 2 W.W.R. 1, 417 D.L.R. (4th) 666, 76 B.L.R. (5th) 75 (Alta. C.A.) — considered

Prefontaine v. Veale (2003), 2003 ABCA 367, 2003 CarswellAlta 1773, 339 A.R. 340, 312 W.A.C. 340, 24 Alta. L.R. (4th) 223, [2004] 6 W.W.R. 472 (Alta. C.A.) — considered

Puolitaipale Estate v. Grace General Hospital (2002), 2002 MBCA 147, 2002 CarswellMan 511, 170 Man. R. (2d) 32, 285 W.A.C. 32 (Man. C.A.) — considered

Purba v. Ryan (2006), 2006 ABCA 229, 2006 CarswellAlta 1006, 61 Alta. L.R. (4th) 112, 30 C.P.C. (6th) 35, 397 A.R. 251, 384 W.A.C. 251 (Alta. C.A.) — considered

Pyrrha Design Inc. v. Plum and Posey Inc. (2016), 2016 ABCA 12, 2016 CarswellAlta 165 (Alta. C.A.) — considered

Quick Credit v. 1575463 Ontario Inc. (2010), 2010 ONSC 7227, 2010 CarswellOnt 9980, 78 B.L.R. (4th) 234 (Ont. S.C.J.) — referred to

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R. v. Barbour (2016), 2016 ABCA 161, 2016 CarswellAlta 943, 336 C.C.C. (3d) 542, 37 Alta. L.R. (6th) 22 (Alta. C.A.) — considered

R. v. I. (D.) (2012), 2012 SCC 5, 2012 CarswellOnt 1089, 2012 CarswellOnt 1090, *(*sub nom. *R. v. D.A.I.)* 89 C.R. (6th) 221, 427 N.R. 4, 280 C.C.C. (3d) 127, 288 O.A.C. 1, 345 D.L.R. (4th) 385, *(*sub nom. *R. v. D.A.I.)* [2012] 1 S.C.R. 149 (S.C.C.) — considered

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R. v. Rodgers (2006), 2006 SCC 15, 2006 CarswellOnt 2498, 2006 CarswellOnt 2499, 37 C.R. (6th) 1, *(*sub nom. *R. v. Jackpine)* 207 C.C.C. (3d) 225, [2006] 1 S.C.R. 554, *(*sub nom. *R. v. Jackpine)* 266 D.L.R. (4th) 101, *(*sub nom. *R. v. Jackpine)* 347 N.R. 201, *(*sub nom. *R. v. Jackpine)* 210 O.A.C. 200, 140 C.R.R. (2d) 1 (S.C.C.) — considered

R. v. Zundel (1992), 16 C.R. (4th) 1, 75 C.C.C. (3d) 449, 10 C.R.R. (2d) 193, *(*sub nom. *R. v. Zundel (No. 2))* 56 O.A.C. 161, [1992] 2 S.C.R. 731, *(*sub nom. *R. v. Zundel (No. 2))* 140 N.R. 1, 95 D.L.R. (4th) 202, 1992 CarswellOnt 109, 1992 CarswellOnt 995 (S.C.C.) — considered

R.B. New Co. v. 1331440 Alberta Ltd. (2013), 2013 ABQB 487, 2013 CarswellAlta 1678, 8 Alta. L.R. (6th) 40 (Alta. Q.B.) — considered

RBC v. MJL Enterprises & Ors. (2017), 2017 PECA 10, 2017 CarswellPEI 24 (P.E.I. C.A.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Rai v. 1294477 Alberta Ltd. (2015), 2015 ABQB 349, 2015 CarswellAlta 971, 618 A.R. 220 (Alta. Q.B.) — considered

Rainy Sky S.A. v. Kookmin Bank (2011), [2011] 1 W.L.R. 2900, [2011] 2 C.L.C. 923, [2011] UKSC 50 (U.K. S.C.) — considered

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Rohit Land Inc. v. Cambrian Strathcona Properties Corp. (2015), 2015 ABQB 375, 2015 CarswellAlta 1069, 58 R.P.R. (5th) 177, [2015] 12 W.W.R. 728, 615 A.R. 375, 618 A.R. 360 (Alta. Q.B.) — considered

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Royal Bank v. Starko (1993), 9 Alta. L.R. (3d) 339, 1993 CarswellAlta 347 (Alta. Q.B.) — considered

Russell v. Wisewould Mahony Lawyers (2018), [2018] VSCA 125 (Australia Vic. Sup. Ct.) — considered

Saville v. Virginia Railway & Power Co. (1913), 76 S.E. 954, 114 Va. 444 (U.S. Va. S.C.) — considered

Saxton v. Credit Union Deposit Guarantee Corp. (2006), 2006 ABCA 175, 2006 CarswellAlta 738, 384 A.R. 309, 367 W.A.C. 309, 60 Alta. L.R. (4th) 10 (Alta. C.A.) — considered

Scandinavian American National Bank of Minneapolis v. Shuman (1917), [1917] 3 W.W.R. 745, 12 Alta. L.R. 338, 37 D.L.R. 419, 1917 CarswellAlta 99 (Alta. C.A.) — considered

Schram v. Nunavut (2014), 2014 NBCA 53, 2014 CarswellNB 406, 2014 CarswellNB 407, 18 C.C.E.L. (4th) 1, 376 D.L.R. (4th) 655, *(*sub nom. *Nunavut v. Schram)* 423 N.B.R. (2d) 294, *(*sub nom. *Nunavut v. Schram)* 1103 A.P.R. 294 (N.B. C.A.) — considered

Scott v. Cresswell (1975), [1975] 3 W.W.R. 193, 56 D.L.R. (3d) 268, 1975 CarswellAlta 15 (Alta. C.A.) — considered

Shannex Inc. v. Dora Construction Ltd. (2016), 2016 NSCA 89, 2016 CarswellNS 1030, 93 C.P.C. (7th) 225, 58 C.L.R. (4th) 1 (N.S. C.A.) — considered

Shaw v. Deputy Commission of Taxation (2016), [2016] QCA 275 (Queensland S.C.) — considered

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Shell Canada Ltd.) 247 N.R. 19, [1999] 4 C.T.C. 313, *(*sub nom. *Shell Canada Ltd. v. Canada)* [1999] 3 S.C.R. 622 (S.C.C.) — considered

Soni v. Malik (1985), 61 B.C.L.R. 36, 1 C.P.C. (2d) 53, 1985 CarswellBC 53 (B.C. S.C.) — considered

Spencer v. Commonwealth (2010), [2010] H.C.A. 28, 241 C.L.R. 118 (Australia H.C.) — considered

State Bank of Butler v. Benzanson (1914), 27 W.L.R. 812, 16 D.L.R. 848, 1914 CarswellAlta 151 (Alta. T.D.) — referred to

Steadman v. Steadman (1974), [1976] A.C. 536, 29 P. & C.R. 46, [1974] 3 W.L.R. 56, [1974] 2 All E.R. 977 (U.K. H.L.) — considered

Stefanyk v. Sobeys Capital Incorporated (2018), 2018 ABCA 125, 2018 CarswellAlta 587, [2018] 5 W.W.R. 654, 67 Alta. L.R. (6th) 215 (Alta. C.A.) — considered

Sterling Lumber Co. v. Harrison (2010), 2010 FCA 21, 2010 CarswellNat 69, *(*sub nom. *Harrison v. Sterling Lumber Co.)* 399 N.R. 21, 2010 CAF 21, 2010 CarswellNat 4175 (F.C.A.) — considered

Stoddard v. Montague (2006), 2006 ABCA 109, 2006 CarswellAlta 1826, 412 A.R. 88, 404 W.A.C. 88 (Alta. C.A.) — considered

Stolberg Mill Construction Ltd. v. Selkirk Spruce Mills Ltd. (1957), 22 W.W.R. 605, 1957 CarswellBC 95 (B.C. S.C.) — referred to

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Stout v. Track (2015), 2015 ABCA 10, 2015 CarswellAlta 160, 62 C.P.C. (7th) 260, 599 A.R. 98, 643 W.A.C. 98, 9 Alta. L.R. (6th) 341 (Alta. C.A.) — referred to

Suncor Inc. v. Canada Wire & Cable Ltd. (1993), 7 Alta. L.R. (3d) 182, 15 C.P.C. (3d) 201, [1993] 3 W.W.R. 630, 1993 CarswellAlta 257 (Alta. Q.B.) — considered

Swain v. Hillman (1999), [2001] 1 All E.R. 91, [1999] EWCA Civ 3053, [2001] C.P. Rep. 16, [2000] P.I.Q.R. 51, [1999] C.P.L.R. 779 (Eng. & Wales C.A. (Civil)) — referred to

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Tanar Industries Ltd. v. Outokumpu Ecoenergy Inc. (1999), 1999 CarswellAlta 739, 47 C.L.R. (2d) 135, [1999] 11 W.W.R. 146, 74 Alta. L.R. (3d) 135, 249 A.R. 1, 1999 ABQB 597 (Alta. Q.B.) — considered

Taylor v. Midland Bank Trust Co. Ltd. (1999), [1999] EWCA Civ 1917 (Eng. & Wales C.A. (Civil)) — referred to

Templanza v. Wolfman (2016), 2016 ABCA 1, 2016 CarswellAlta 1, 612 A.R. 67, 662 W.A.C. 67 (Alta. C.A.) — considered

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s. 4(1)(g) — considered

Limitations Act, R.S.A. 2000, c. L-12
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s. 3(1) — considered

s. 3(1)(a)(iii) — considered

s. 7 — considered

s. 9 — considered

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s. 3(1) "bargaining agent" — referred to

s. 27(1) — referred to

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s. 61 — considered

s. 62 — considered

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s. 437c(a)(1) — considered

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s. 31A(1) — considered

s. 31A(3) — considered

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Generally — referred to

s. 10 — considered

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Generally — referred to

s. 3(1) — considered

s. 3(1)(a) — considered

s. 3(1)(b) — referred to

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R. 1.2 — considered

R. 3.68 — referred to

R. 6.11(1) — considered

R. 7.1 — considered

R. 7.3 — considered

R. 7.3(1) — considered

R. 8.17 — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — considered

R. 76.02 — referred to

R. 76.12 — referred to

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Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

Pt. 1 — referred to

Pt. 7 — referred to

R. 1.2(1) — considered

R. 1.2(2)(a) — considered

R. 1.2(2)(b) — considered

R. 1.2(3)(d) — considered

R. 5.19 — considered

R. 7.1 — considered

R. 7.1(1)(a) — considered

R. 7.1(3)(b) — considered

R. 7.3 — considered

R. 7.3(1) — considered

R. 7.3(1)(b) — considered

R. 7.5 — considered

R. 7.6 — considered

Alberta Rules of Court, Alta. Reg. 390/68
R. 128 — referred to

R. 140 — referred to

R. 159 — referred to

R. 159(1) — considered

R. 159(2) — considered

R. 159(3) — considered

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R. 128 — considered

R. 129 — considered

R. 129-131 — referred to

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R. 13.04(2) — considered

R. 13.04(6)(b) — considered

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R. 24.2 — considered

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R. 1147 — considered

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R. 215(1) — considered

R. 216(3) — considered

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R. 56(d) — considered

R. 56(f) — considered

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R. 2.116(I)(1) — considered

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R. 20.03(7) — considered

R. 20.07(1) — considered

Queen's Bench Rules, Sask. Q.B. Rules 2013
Pt. 8 — referred to

R. 7-5(1) — considered

R. 7-5(3) — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — referred to

R. 20.01(1) — considered

R. 20.01(3) — considered

R. 20.03(1) — referred to

R. 20.04(1) — referred to

R. 20.04(2) — considered

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

R. 76 — referred to

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R. 20.04 — considered

R. 20.04(6) — considered

R. 75 — referred to

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R. 22.04(1) — considered

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R. 18(1) — considered

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R. 1(1) — considered

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R. 176(2) — considered

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R. 9-6(5)(a) — considered

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R. 232 — considered

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R. 357 — referred to

R. 367 — referred to

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R. 292 — considered

R. 293 — considered

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R. 13.1(1) — considered

Regulations considered by *Thomas W. Wakeling J.A.*:

Court of Queen's Bench Act, R.S.A. 2000, c. C-31
Alberta Rules of Court Amendment Regulation, Alta. Reg. 152/98

Generally — referred to

APPEAL by plaintiff company from judgment reported at *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.* (2017), 2017 ABQB 491, 2017 CarswellAlta 1437 (Alta. Q.B.), granting defendant courier`s application for summary judgment on basis plaintiff`s claim was statute-barred.

***Frans Slatter J.A.*:**

1 The appellant appeals the summary dismissal of its claim because it was not brought within the limitation period: *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2017 ABQB 491 (Alta. Q.B.).

Facts

2 The appellant and the respondents had a contractual relationship under which the appellant would transport packages on behalf of the respondents. The contractual arrangement was comprised of a Collective Agreement, an Owner/Operator Contract, and a Standards of Performance Contract. The appellant argues that these written contracts were supplemented by a verbal contract including other matters such as the provision of a trailer that would be used to transport packages. The contractual arrangement was terminated by the appellant in August, 2009.

3 In November 2008 and January 2009 the Union filed grievances on behalf of the principals of the appellant relating to claims for compensation, unpaid invoices, and other matters. Those grievances went to arbitration in September 2015, following proceedings before the Canada Industrial Relations Board. The grievances were settled on October 2, 2015.

4 The corporate appellant takes the position that some of its allegations of breach of contract were not covered by the collective agreement or the arbitration. It commenced this action on July 22, 2011 claiming damages. The respondents brought an application to dismiss the claim based on the expiration of the limitation period. The appellant responds that the limitation period had not expired, and in any event there was a standstill agreement in place.

5 The chambers judge concluded at para. 37 that the appellant was aware of the alleged breaches of contract more than two years before July 22, 2011. The appellant had alleged those breaches in communications with the respondents, and had sought legal advice. Even though there was some uncertainty as to which claims fell outside the arbitration process, the appellant had knowledge that some of the claims warranted a proceeding for a remedial order. Ultimately, the action was actually commenced even before the conclusion of the arbitration proceedings in which the scope of the claims encompassed by that proceeding was established.

6 The chambers judge found that there was no standstill agreement in place. The sincere belief of the principal of the appellant that the limitation period only started on the date of termination of the contract, and was extended by settlement discussions, was an unfortunate error of law. The parties were engaged in the normal efforts to resolve the dispute, and nothing that was done amounted to an express or implied representation that the limitation period would not be relied upon.

Further, s. 7 and s. 9 of the *Limitations Act*, RSA 2000, c. L-12 required that any extension be in writing.

7 As a result, the chambers judge concluded that there was no merit to the claim, and it was summarily dismissed.

Issues and Standards of Review

8 The appellant raises seven grounds of appeal, but they can be grouped as follows:

a) the chambers judge erred in concluding that the limitation period commenced prior to the termination of the contract on August 21, 2009;

b) the limitation period was effectively extended by the uncertainty over whether the arbitration proceedings afforded a venue for resolution of the dispute; and

c) the limitation period was suspended or waived during the period of negotiations.

The first and second issues raise questions of law as to the proper interpretation of the limitations legislation, and mixed questions of fact and law as to the application of that law to the facts. The third issue challenges the fact findings of the chambers judge.

9 The standards of review are summarized in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.):

a) conclusions on issues of law are reviewed for correctness: *Housen* at para. 8,

b) findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error: *Housen* at paras. 10, 23; *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25 (S.C.C.) at para. 74, [2005] 1 S.C.R. 401 (S.C.C.), and

c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": *Housen* at paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: *Housen* at paras. 33, 36.

The standard of review for findings of fact and for inferences drawn from the facts is the same even when the judge heard no oral evidence: *Housen* at paras. 19, 24-25; *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 406 (Alta. C.A.) at para. 9, (2015), 609 A.R. 313 (Alta. C.A.).

10 The statement of the test for summary dismissal, and the interpretation of the applicable limitations statute and the *Rules of Court*, are questions of law which are reviewed for correctness. The findings of fact underlying the summary dismissal are entitled to deference. The chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at paras. 81-4, [2014] 1 S.C.R. 87 (S.C.C.); *Amack v. Yu*, 2015 ABCA 147 (Alta. C.A.) at para. 27, (2015), 24 Alta. L.R. (6th) 44, 602 A.R. 62 (Alta. C.A.).

The Test for Summary Dismissal

11 The *Rules of Court* provide for the summary disposition of claims:

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

(a) there is no defence to a claim or part of it;

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

(c) the only real issue is the amount to be awarded.

The key issue is the approach to be taken in determining the absence of a defence to, or "merit" in a claim.

12 A rift has recently emerged in the case law discussing the test for summary judgment in Alberta, and in particular the standard of proof that is required for summary judgment. The divergence can be illustrated by comparing *Can v. Calgary Police Service*, 2014 ABCA 322, 584 A.R. 147 (Alta. C.A.) with *Stefanyk v. Sobeys Capital Incorporated*, 2018 ABCA 125, 67 Alta. L.R. (6th) 215 (Alta. C.A.):

> ***Can*** at para. 20: Summary judgment is appropriate if the nonmoving party's position is without merit. *Alberta Rules of Court*, r. 7.3. "A party's position is without merit if the facts and law make the moving party's position unassailable ... A party's position is unassailable if it is so compelling that the likelihood of success is very high". *Beier v. Proper Cat Construction Ltd.*, 564 A.R. 357, 374 (Q.B. 2013). Mr. Can's claims are without merit. Justice Bensler's decision was correct and hence, reasonable.
>
> ***Stefanyk*** at para. 17: Therefore, in this appeal the issue is not whether the appellant's position is "unassailable". The first question is whether the record is sufficient to decide if the appellant is liable for the plaintiff's injuries. There are no material facts in dispute, no overwhelming issues of credibility, and the court is able to apply the law to the facts. It is unlikely that the cost and expense of a trial is justified because of an expectation of a significantly better record. In this case summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result, and therefore it is an appropriate procedure. The ultimate issue is whether the appellant has proven on a balance of probabilities that it is not liable for the plaintiff's injuries.

This appeal and the companion appeal in *Brookfield Residential (Alberta) LP (Carma Developers LP) v. Imperial Oil Limited*, 2019 ABCA 35 (Alta. C.A.) were set down to settle the law.

13 What is the source of this jurisprudential divergence? The short answer is that there has been a paradigm shift in the approach to summary judgment since the decision in *Hryniak v. Mauldin* in 2014. Uncertainty has arisen from the interpretation and application of the new principles governing summary judgment.

14 Prior to the decision in *Hryniak v. Mauldin* the trial was seen as the default procedure for resolving disputes. There was a resistance to using summary judgment, because it was seen as a procedural "short cut" that might compromise the substantive and procedural rights of the resisting party. As a result, while the basic test for summary judgment was whether there was a "genuine issue requiring a trial", the case law set a very high standard of proof before summary judgment was permitted. The case law was full of phraseology such as "plain and obvious", "bar to summary judgment is high", "clearest of cases", "beyond doubt", "obvious", "unassailable", "incontrovertible", "so compelling that the likelihood of success is high", "clear and unanswerable case", "bound to fail", and the like.

15 In *Hryniak v. Mauldin* the Supreme Court of Canada called for a "shift in culture" with respect to the resolution of litigation. Reliance on "the conventional trial no longer reflects the modern reality and needs to be re-adjusted" in favour of more proportionate, timely and affordable procedures. Summary judgment procedures should increasingly be used, and the previous presumption of referring all matters to trial should end:

> 23 This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.
>
> 24 However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. The cost and delay associated with the traditional process means that ... the trial process denies ordinary people the opportunity to have adjudication. ... (emphasis in original)
>
> 28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the

> relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible - proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
>
> 34 The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure. Generally, summary judgment is available where there is no genuine issue for trial.

This last passage in *Hryniak v. Mauldin* noted that every province (except Québec) has a summary judgment procedure, with no indication that the new "shift in culture" applied only in Ontario.

16 The new approach to summary adjudication was based on the principle of "proportionality" in civil procedure, which is a principle underlying the Alberta *Rules of Court*. The new approach to the disposition of litigation was therefore quickly adopted in Alberta: *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at para. 14, (2014), 94 Alta. L.R. (5th) 301, 572 A.R. 317 (Alta. C.A.); B. Billingsley, *Hryniak v Mauldin Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials* (2017), 55 Alta Law Rev 1 at p. 13. Like Ontario's R. 20, Alberta's R. 6.11(1) and 7.3 specifically enable fact finding in chambers applications, including (with permission) by hearing oral testimony.

17 The Alberta *Rules of Court* provide for two types of trial: "summary trials", and what might be called standard trials. The primary difference between the two is that standard trials presumptively proceed based on oral evidence (R. 8.17), whereas summary trials streamline the evidentiary process. In summary trials, affidavits are common, expert witnesses are not always called, and business records and other documents are introduced without "proof in solemn form".

18 Despite the similarity in the names, there is a fundamental difference between "summary judgment" and "summary trial". Summary disposition is a way of resolving disputes *without* a trial; a summary trial *is* a trial: *Windsor v. Canadian Pacific Railway* at para. 14. The distinction was noted in *Hryniak v. Mauldin* (a summary judgment case) which contrasted (at paras. 73, 77) summary disposition with summary trials and streamlined trials (Ontario R. 76.02 and 76.12).

19 Summary judgment is available before or at any time during the pretrial process. The advantage of summary disposition is not only that it avoids a trial, in many cases it also avoids the full expense and delay of those pretrial procedures. A summary trial results in a final adjudication and creates *res judicata*. A successful summary judgment application has the same effect, but an unsuccessful summary judgment application merely means a trial is needed. There is accordingly no "continuum" between summary judgment and summary trial. They are distinct processes. If summary judgment is not available under the test, the dispute must go to trial (summary or standard), but that is a distinct procedure.

20 Since *Hryniak v. Mauldin* the presumption that most disputes could or should "go to trial" is seen as being unrealistic. The parties' resources often do not allow a trial on every issue. Indeed, our civil justice system would be deficient if it could not resolve most claims without a trial. Trials are too expensive for many litigants, and disproportionate for many disputes. Seeing a trial as the default procedure is therefore not realistic; the expense of trial may cause some plaintiffs to "simply give up on justice": *Hryniak v. Mauldin* at para. 25. We have to strive for a "fair and just process" recognizing that "alternative models of adjudication are no less legitimate than the conventional trial": *Hryniak v. Mauldin* at para. 27.

21 *Hryniak v. Mauldin* at para. 49 sets out a three part test for when summary judgment is an appropriate procedure:

> 49 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.

This outline of the procedural approach to summary judgment encompasses a number of points. To enable a "fair and just summary determination" the record before the court and the issues must:

> (a) *Allow the judge to make the necessary findings of fact.* An important thing to observe about this part of the test is that it assumes the summary judgment judge (or Master) is able to make findings of fact. The judge is entitled, where

possible, to make those findings from the record and draw the necessary inferences. The parameters on fact finding are discussed, *infra*, para. 38. Summary judgment is not limited to cases where the facts are not in dispute. If the summary judgment judge is not able to make the necessary findings of fact, that is an indication that there is a "genuine issue requiring a trial". This issue is discussed, *infra*, paras. 27ff.

(b) *Allow the judge to apply the law to the facts*. There are cases where the facts are not seriously in dispute, and the real question is how the law applies to those facts. Those cases are ideally suited for summary judgment: *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.) at para. 11, (2006), 68 Alta. L.R. (4th) 237, 401 A.R. 88 (Alta. C.A.). If the record allows the judge to make the necessary findings of fact (as contemplated by the first part of the test), applying the law to those facts essentially comes down to a question of law. Cases like this one, based on the expiration of the limitation period, often fall into this category, as do those that turn on the interpretation of documents.

(c) Assuming the first two parts of the test are met, *summary disposition must be a proportionate, more expeditious and less expensive means to achieve a just result*. This third criterion is a final check, to ensure that the use of a summary judgment *procedure* (rather than a trial) will not cause any procedural or substantive injustice to either party. Summary judgment will almost always be "more expeditious and less expensive" than a trial. In the end, if the judge finds that summary adjudication might be possible, but might not "achieve a just result" there is a discretion to send the matter to trial. This discretion, however, should not be used as a pretext to avoid resolving the dispute when possible.

These foundational criteria set the procedural framework of the modern law of summary dismissal. They set the procedure for determining whether there is "no merit" or "no defence" to the claim under R. 7.3.

22 What then is the source of the rift in the case law respecting the test for summary disposition? Part of it may simply be that old habits die hard. Some of the stern vocabulary used before *Hryniak v. Mauldin* continued to be used after it was decided, including by this Court. Sometimes this may have been a failure to fully embrace the "shift in culture" called for. Sometimes it was merely a shorthand for saying that there was a "genuine issue requiring a trial". Sometimes it may have been an unfocused way of saying that on the particular record, given the nature of the issues, summary judgment would not "achieve a just result". Sometimes this conclusory wording was used without regard to whether it is consistent with the modern principles of summary judgment.

23 The result is that it is now possible to find a quote in the case law to support virtually any view of the test to be used in summary judgment. The issue cannot be resolved by seeing which "school of thought" has the most support in the case law. Historical analyses are not determinative given the call for a "shift in culture". Decisions of the Supreme Court of Canada prevail.

24 The solution must be to go back to first principles: the principles behind the modern law of summary judgment, the principles behind the modern law of proof, the principles behind the type of record to be used in summary dispositions, and principles of fairness.

I. Principles of Summary Judgment

25 The procedures underlying summary judgment are established by *Hryniak v. Mauldin*, and have already been set out, *supra* paras. 14-16, 20-21. It comes down to whether summary disposition is possible, considering the record, the evidence, the facts, and the law that must be applied to them. If the record allows the judge to make the necessary findings of fact and apply the law, then the summary procedure should be used unless there is a substantive reason to conclude that summary disposition would not "achieve a just result". Presuming that summary disposition will always be "unjust" unless it meets some high standard of irrefutability defeats the whole concept of the "culture shift" mandated by *Hryniak v. Mauldin*.

26 The *Hryniak v. Mauldin* approach is not in any way anomalous, because it is consistent with the overriding goal of "proportionality" in civil procedure recognized by R. 1.2 of the Alberta *Rules of Court*: *Burns Bog Conservation Society v. Canada (Attorney General)*, 2014 FCA 170 (F.C.A.) at para. 42, (2014), 83 C.E.L.R. (3d) 1 (F.C.A.). All procedures for resolving civil disputes, including summary dispositions, should be timely, cost-effective, and proportionate to the importance and complexity of the issues.

II. Principles of Proof

27 The principal difference in the approaches taken by *Can* and *Stefanyk* (which are summarized *supra*, para. 12) relates to the test to be met by the moving party in a summary judgment application. *Can* suggested the moving party's position must be "unassailable" or so compelling that the likelihood of success was "very high". *Stefanyk* proposed proof on a balance of probabilities. Neither "test" can simply be read in isolation, detached from the summary judgment context. As noted (*supra*, paras. 17-9) there are fundamental differences between summary judgment, summary trials, and standard trials. Meeting the test for proof of the underlying facts is not a proxy for summary judgment.

28 There was a time when there were numerous standards of proof used in civil law. The uncertainty and complications created were eliminated by the decision in *C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.) at para. 40, [2008] 3 S.C.R. 41 (S.C.C.) which held that there is only one standard of proof in civil law: proof on a balance of probabilities. That standard was confirmed in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 (S.C.C.) at paras. 35-7, [2016] 2 S.C.R. 720 (S.C.C.). Specifically, "obvious", "unassailable" and "very high likelihood" are no longer recognized standards of proof in Alberta civil proceedings.

29 The standard of proof applies only to findings of *fact*. It does not apply to whether, at the end of the day, it is possible to achieve a fair and just adjudication on a summary basis. As pointed out in *Hryniak v. Mauldin* at paras. 81-4, whether summary judgment is appropriate and fair involves an element of judicial discretion, but making the underlying findings of fact is an exercise in weighing the evidence.

30 Addressing the "standard of proof" is not therefore a stand-alone test for whether summary judgment is possible or appropriate. Proving the factual basis of the application on a balance of probabilities is not in itself sufficient for summary adjudication, but merely one of the steps in determining if there is a genuine issue requiring a trial. Even if the factual record is proven on a balance of probabilities, the presiding judge must still be sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial. *Hryniak v. Mauldin* does not contemplate summary adjudication on difficult factual questions, requiring a tough call on contested facts, on the basis that "51% carries the day": see *Hryniak v. Mauldin* at para. 51. Those are cases where the summary disposition judge would usually determine that there is a "genuine issue requiring a trial", even if the moving party had met the threshold burden of proof.

31 In Alberta, *Hryniak v. Mauldin* must be applied having regard to the specific wording of the Alberta *Rules of Court*. Rule 7.3 uses the expressions "no merit", "no defence" and "the only real issue is the amount". The word "no" can in some contexts be taken to mean "a complete absence", but if that standard of proof was required for summary judgment, summary judgment would never be possible. That standard would appear to be even higher than "incontrovertible" or "unassailable", and would amount to proof to a certainty, a standard that is rejected even in the criminal law as "unrealistically high": *R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.) at para. 31. The search for a shift in culture would become illusory. The word "no" cannot be severed from the phrases "no merit" or "no defence", and should be viewed not in absolute terms but in the context of there being "no real issue".

32 A notable aspect of summary judgment applications is that there is no symmetry of burdens. The party moving for summary judgment must, at the threshold stage, prove the *factual* elements of its case on a balance of probabilities, and that there is no genuine issue requiring a trial. If the plaintiff is the moving party, it must prove "no defence". If the defendant is the moving party, it must prove "no merit". The resisting party need not prove the opposite in order to send the matter to trial. The party resisting summary judgment need only demonstrate that the record, the facts, or the law preclude a fair disposition, or, in other words, that the moving party has failed to establish there is no genuine issue requiring a trial: see para. 35, *infra*.

33 The threshold burden on the moving party with respect to the factual basis of a summary judgment application is therefore proof on a balance of probabilities. If the moving party cannot meet that standard, summary judgment is simply not available. On the other hand, merely establishing the *factual record* on a balance of probabilities is not sufficient to obtain summary judgment, because proof of the *facts* does not determine whether the moving party has also proven that there is no "genuine issue requiring a trial". Imposing standards like "high likelihood of success", "obvious", or "unassailable" is, however, unjustified. A disposition does not have to be "obvious", "beyond doubt" or "highly likely" to be fair.

34 The suggestion that there is some intermediate standard of proof that applies to summary dispositions is inconsistent with *Hryniak v. Mauldin*, *McDougall* and *Fairmont Hotels*. However, as a part of the overall assessment of whether summary disposition is a suitable "means to achieve a just result", the presiding judge can consider whether the quality of the evidence is such that it is fair to conclusively adjudicate the action summarily. Proof of the factual basis of the claim or defence by the moving party at the stage of the *Hryniak v. Mauldin* test during which the "judge makes the necessary findings of fact", does not displace issues of fairness. The chambers judge's ultimate determination on whether summary resolution is appropriate, or whether there is a genuine issue requiring a trial, must still have regard to the summary nature of the proceedings.

35 Related to the issue of the "standard of proof", is the "burden of proof" in summary dispositions, the test for which was confirmed in *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69 (Alta. C.A.) at para. 25, (2006), 55 Alta. L.R. (4th) 1, 384 A.R. 251 (Alta. C.A.). The moving party has the burden of establishing that, considering the facts, the record, and the law, it is entitled to summary judgment on the merits of the case, and that there is no genuine issue for trial. The resisting party then has an evidentiary burden of persuading the court that there is a genuine issue requiring a trial, or in other words that the moving party has not met that aspect of its burden. The ultimate burden remains on the moving party to establish that there is no genuine issue requiring a trial, and that a fair and just adjudication is possible on a summary basis. The resisting party can meet its evidentiary burden by challenging the moving party's entitlement to summary judgment (based on gaps or uncertainties in the facts, the record, or the law, etc.), or by raising a positive defence (such as a limitations defence). A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial. As noted, *infra* para. 37, the resistance to summary judgment must be grounded in the record, not mere speculation. Sometimes the resisting party can succeed by demonstrating that the complexity of the issues makes the case unsuitable for summary disposition, or in other words that there are genuine issues requiring a trial.

III. Principles Relating to the Record in Summary Dispositions

36 As noted (*supra*, para. 21(a)), where possible findings of fact can and should be made on a summary disposition application. The law is now clear that the mere presence of some conflicting evidence on the record does not preclude summary disposition. As pointed out in *Hryniak v. Mauldin* at para. 48, summary judgment is not limited to cases based on documentary evidence, or where the facts are essentially admitted. It observed at para. 57: "On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is *confident* that she can fairly resolve the dispute" (emphasis added). The sufficiency of the record will depend on the issues, the source and continuity of the evidence, and other relevant considerations.

37 Even before *Hryniak v. Mauldin* it was established that the parties to a summary disposition application must "put their best foot forward": *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.) at para. 11, [2008] 1 S.C.R. 372 (S.C.C.). One could not resist summary disposition, or create a "genuine issue requiring a trial" by speculation about what might turn up in the future. *Lameman* stated the principle at para. 19:

> 19 We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others. (emphasis added)

From this it is clear that the *Hryniak v. Mauldin* test is to be applied based on the record actually before the summary disposition judge.

38 Summary dismissal was resisted in *Goodswimmer v. Canada (Attorney General)*, 2017 ABCA 365 (Alta. C.A.) at paras. 38-45, (2017), 60 Alta. L.R. (6th) 226 (Alta. C.A.), leave to appeal refused SCC #37899 (July 5, 2018) [2018 CarswellAlta 1331 (S.C.C.)], based on affidavits containing opinions, hearsay, irrelevant facts said to be in dispute, and statements that were clearly contradicted by the rest of the record. That decision noted:

> 39 ... Not every conflict in the evidence precludes the chambers judge from drawing inferences from the admitted facts,

> the undisputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability) ...
>
> 40 The mere fact that there might be some conflicting evidence on the record does not mean that a "fair and just adjudication" is not possible ...

The chambers judge can make findings of fact if, viewed overall, the record permits that to be done: *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103 (Alta. C.A.) at para. 113, (2016), 31 Alta. L.R. (6th) 1, 616 A.R. 290 (Alta. C.A.); *Arndt v. Banerji*, 2018 ABCA 176 (Alta. C.A.) at para. 42. There are some issues of fact (such as issues of credibility, or conflicts in the evidence on material issues) that are not amenable to summary adjudication, and that are markers of genuine issues requiring a trial. There are also cases where summary disposition is possible because even if the facts asserted by the resisting party were true, they would not support that party's claim: *Arndt v. Banerji* at para. 36(b).

39 Whether it is possible for "the judge to make the necessary findings of fact" is tested based on the actual record, and not on speculation about what type of record might be available at trial. In those cases where there is a "genuine issue requiring a trial", it will be because there is a realistic prospect that a trial will create a *better* record, but that conclusion must be reached based on the evidence before the summary disposition judge, not speculation. In this respect, the traditional test of whether there is a "genuine issue requiring a trial" still has utility.

40 Again, having regard to overall considerations of fairness and the ability "to achieve a just result", there can be occasions when the "best foot forward" approach is not strictly applied. That may happen, for example, where one party effectively controls all of the records and evidence with respect to the claim: e.g. *P. Burns Resources Ltd. v. Patrick Burns Memorial Trust (Trustee of)*, 2015 ABCA 390 (Alta. C.A.) at para. 11, (2015), 26 Alta. L.R. (6th) 1, 612 A.R. 63 (Alta. C.A.). In those circumstances, the application for summary determination can be adjourned to permit some pre-trial discovery.

IV. Principles of Fairness

41 The final principle is a need to ensure an appropriate level of fairness in the procedures used to resolve disputes. Considerations of "fairness" are built into the *Hryniak v. Mauldin* test, which specifies that summary disposition must be a suitable "means to achieve a just result".

42 Restrictions on summary disposition are sometimes justified on the basis that summary disposition deprives the plaintiff of "the right to go to trial", or "full access to the civil procedure spectrum". This is essentially a procedural argument about fairness. There is, however, no right to take an unmeritorious claim to trial, a process described in *Hryniak v. Mauldin* at para 28 as "the most painstaking procedure". All claims are subject to screening at various stages. Claims must disclose a cause of action, or they will be struck: R. 3.68. Plaintiffs must be able to demonstrate sufficient "merit" to avoid summary disposition: R. 7.3. There is no "right" to use the most expensive modality of dispute resolution (i.e., the trial) if these hurdles cannot be overcome: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 324 (B.C. C.A.) at paras. 21, 56, (2017), [2018] 2 W.W.R. 480 (B.C. C.A.), leave to appeal refused SCC #37843 (July 26, 2018) [2018 CarswellBC 2029 (S.C.C.)].

43 In any event, any "right of the plaintiff to have a trial" is equally offset by the "right of the defendant *not* to have a trial on an unmeritorious claim". Fairness is a two-way street. Litigation is expensive and distracting, and the costs awarded to the successful party seldom amount to full indemnity. Cost, delay and inequality of arms may mean that the right to adjudicative fairness, justice, and reliability can actually be hindered by a full trial. A defendant who can show that a claim has "no merit" on a summary disposition application should not have to suffer a trial. As noted, *supra* para. 32, the resisting party does not have to prove its own case at this stage, but only demonstrate that the moving party has failed to show there is no genuine issue requiring a trial.

44 All of the parties and the court must make efficient use of limited resources:

> ... the problem of systemic delay is exacerbated by cases like this where a summary judgment motion has been properly brought and a judge refuses to adjudicate it on its merits. On a summary judgment motion, a judge has the duty to take

"a hard look" at the merits of a claim: *Knee v. Knee*, 2018 MBCA 20 (Man. C.A.) at para. 33.

As the Court noted in *Hryniak v. Mauldin* at paras. 27-8, a fair and just summary dismissal procedure is "... illusory unless it is also accessible - proportionate, timely and affordable", and that summary procedures are "no less legitimate" than trials.

45 While the law does not have to be beyond doubt before summary judgment can be granted, there are occasions when the law is so unsettled or complex that it is not possible to apply the law to the facts without the benefit of a full trial record: e.g. *Tottrup v. Clearwater (Municipal District) No. 99* at para. 11; *Cardinal v. Alberta Motor Association Insurance Company*, 2018 ABCA 69 (Alta. C.A.) at para. 10, (2018), 66 Alta. L.R. (6th) 15 (Alta. C.A.); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.) at para. 29, (2016), 33 Alta. L.R. (6th) 209, 612 A.R. 284 (Alta. C.A.); *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626 (Alta. Q.B.) at para. 49. Where the case presents complex factual issues, such as those based on highly technical scientific and medical evidence, summary disposition will often be inappropriate. There are other occasions where there will be a genuine issue requiring a trial.

46 Procedural and substantive fairness must always be a part of the summary disposition process. Considerations of fairness need not be a threshold requirement, nor should they only arise at the conclusion of the application. The chambers judge is entitled to take into consideration the fairness of the process, and its ability to achieve a just result, at all stages. Thus considerations of fairness will always be in the background, including during the fact-finding process, in determining whether the moving party has proven its case on a balance of probabilities, in deciding if there is a genuine issue requiring a trial, and in deciding if, considered overall, summary disposition is a "suitable means to achieve a just result". The ultimate determination of whether summary disposition is appropriate is up to the chambers judge: *Hryniak v. Mauldin* at para. 83. As stated in *Hryniak v. Mauldin* at para. 50 and *Nelson v. Grande Prairie (City)*, 2018 ABQB 537 (Alta. Q.B.) at para. 47, (2018), 75 Alta. L.R. (6th) 36 (Alta. Q.B.), whether a summary disposition will be fair and just will often come down to whether the chambers judge has a sufficient measure of confidence in the factual record before the court. In practical terms, that level of confidence will not often be reached in close cases.

V. Summary of the Application of the Principles

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.

48 There is no policy reason to cling to the old, strict rules for summary judgment. This can only serve to undermine the shift in culture called for by *Hryniak v. Mauldin*. Summary judgment should be used when it is the proportionate, more

expeditious and less expensive procedure. It frequently will be. Its usefulness should not be undermined by attaching conclusory and exaggerated criteria like “obvious” or “high likelihood” to it.

49 In closing, it is helpful to note that the judge who dismisses an application for summary adjudication may still be in a position to advance the litigation. The judge may be able to isolate and identify issues that can be tried separately under R. 7.1. The summary judgment materials may form a suitable platform for a summary trial, as happened in *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, 41 C.L.R. (4th) 51 (Alta. Q.B.). While serial applications for summary judgment are not to be encouraged, a second application for summary judgment may be appropriate later in the proceedings when the record is clarified and the issues are perhaps narrowed: *Milne v. Alberta (Workers' Compensation Board)*, 2013 ABCA 379 (Alta. C.A.) at para. 6, (2013), 561 A.R. 313 (Alta. C.A.).

The Limitation Period

50 The *Limitations Act* provides:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

There is therefore a three part test, based on a reasonable awareness of the injury, attribution of the injury to the defendant, and a claim warranting a proceeding for a remedial order.

51 The limitation period for breaches of contract is covered by this provision. Under s. 4(g) of the previous *Limitation of Actions Act*, RSA 1980, c. L-15, the limitation period for breaches of contract started when the “cause of action arose”: *Fidelity Trust Co. v. 98956 Investments Ltd. (Receiver of)*, 1988 ABCA 267 (Alta. C.A.) at para. 28, (1988), 89 A.R. 151, 61 Alta. L.R. (2d) 193 (Alta. C.A.). That occurred at the time of the breach of the contract, regardless of “discoverability” of the claim or any damage. The specific wording of the statute drove that result.

52 The chambers judge concluded that the same rule still applies under the new *Limitations Act*, citing *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655 (Alta. Q.B.) at para 155, (2004), 365 A.R. 1 (Alta. Q.B.), aff'd *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.) at para. 12, [2008] 1 S.C.R. 372 (S.C.C.). The breach of contract in *Papaschase*, however, occurred in the 1880s, and that case was decided under the old legislation. The present *Limitations Act* contains no separate rule for limitation periods for breaches of contract, and they are covered by the same three part test: reasonable awareness of the injury, attribution of the injury to the defendant, and a claim warranting a proceeding. In many cases arising from breach of contract the three part test may in fact be met at the time of the breach of contract, but that is not invariably so.

53 Since the statute provides the test for the commencement of the limitation period, the alternative starting points proposed by the appellant do not apply. Unless the alternative proposed dates happen to coincide with the test in the

Limitations Act, the limitation period does not commence on (a) the date of breach, (b) the date the last services are provided under a service contract, (c) the date that economic loss emerges, (d) the date of acceptance of repudiation, or (e) the termination of the contract.

54 In order to obtain summary dismissal of the claim based on the expiration of the limitation period, the respondents had to show from the record that the injury alleged by the appellant (arising from the alleged breaches of contract) was reasonably known, attributable to the respondents, and sufficiently serious to warrant a proceeding, no later than July 22, 2009. While the chambers judge proceeded on the erroneous assumption that the limitation period started to run at the time of breach, she made the necessary findings of fact as to when the appellant discovered and could reasonably have commenced the action.

55 The chambers judge found that the breaches alleged by the appellant, the injury that resulted, and the knowledge that the injuries warranted a proceeding were known more than two years before the action was commenced. This is a finding of fact, to which deference must be extended. There is in substance no doubt that the appellant was aware of the claim before July 22, 2009. It acknowledges in para. 2 of its factum: "The appellant states that it first became aware of a claim against the Respondents in February 19, 2009, after obtaining a legal opinion from his legal counsel." A number of the alleged breaches of contract are mentioned in a memorandum of a telephone conversation of November 1, 2008 (EKE R4-7). The appellant's letter to the Union dated June 13, 2009 (EKE A10-13) also contains particulars of many elements of the claim. There were other communications that amply support the chambers judge's conclusion that the breaches were known months before July 22, 2009. The determinative issue is therefore whether there were any circumstances that would, in law, extend the commencement date of the limitation period.

56 There was some dispute or uncertainty about whether the corporate appellant and its allegations of breach of contract were covered by the collective agreement, and therefore whether it was bound to pursue any claims through the arbitration process. Uncertainty about which claims were covered by the arbitration process does not delay commencement of the limitation period. Reliance on the possible efficacy of other procedures amounts at most to an error of law, which does not have the effect of delaying commencement of the limitation period. Discovery relates to the facts, not the applicable law or any assurance of success: *Templanza v. Wolfman*, 2016 ABCA 1 (Alta. C.A.) at para. 19, (2016), 612 A.R. 67 (Alta. C.A.), leave to appeal refused [2016] 2 S.C.R. xi (note) (S.C.C.); *De Shazo v. Nations Energy Co.*, 2005 ABCA 241 (Alta. C.A.) at para. 31, (2005), 48 Alta. L.R. (4th) 25, 367 A.R. 267 (Alta. C.A.).

57 The appellant indicates that it did not commence a court action for close to three years after it discovered its claim "in part because of the potential for a global settlement of the matters alleged in the Statement of Claim, informally or otherwise, along with the labour matters." If the plaintiff fails to seek a "remedial order" within the limitation period because of a mistaken view of the availability of an alternative procedure, the claim will be barred: *Babcock & Wilcox Canada Ltd. v. Agrium Inc.*, 2005 ABCA 82 (Alta. C.A.) at para. 16, (2005), 39 Alta. L.R. (4th) 197, 363 A.R. 103 (Alta. C.A.).

58 Section 3(1)(a)(iii) requires knowledge of an injury warranting a proceeding "*assuming* liability on the part of the defendant". Discoverability does not require perfect knowledge or certainty that the claim will succeed: *De Shazo* at paras. 31-2. The record does not disclose any circumstances that would extend the commencement of the limitation period.

Settlement Negotiations

59 As noted (*supra*, para. 55) there were various communications between the parties about the alleged breaches of the contract. Some of those communications expressed a willingness to resolve the outstanding issues, and they expressed a preference for avoiding unnecessary legal fees and court costs. Reminders that court remedies were always available if negotiations were unsuccessful tempered those expressions of intention. The respondents requested documentation to support some of the claims, and expressed a willingness to discuss the issues. In the meantime, the grievance and arbitration procedures were unfolding.

60 The appellant argues that this correspondence amounted to a standstill agreement, under which the respondents agreed that proceedings need not be commenced. Alternatively, they argue that the respondents made representations that estop them from now pleading the *Limitations Act*.

61 The correspondence in question does not use the word "standstill", or any synonym. There is no mention of the

Limitations Act. The chambers judge characterized it at para. 40 as "no more than normal dealings between parties attempting to resolve a claim". The clear recognition in the correspondence that legal proceedings would follow if negotiations were unsuccessful is inconsistent with any inference that legal rights were being waived. The appellant correctly characterizes the correspondence in its factum as evidence of "an agreement to negotiate rather than litigate". It does not disclose any agreement to waive legal rights. The chambers judge's conclusion that there was no standstill agreement, nor any representation that the limitation period would not be relied on, discloses no reviewable error.

62 The allegation of a standstill agreement does not raise any issue requiring a trial, and there is no prospect of a significantly better record emerging from a trial. The correspondence said to create the standstill agreement or estoppel is on the record. The chambers judge had affidavits from the appellant's officer setting out his expectations and understandings of the correspondence and the negotiations. Some of his expectations are inconsistent with the correspondence, and others depend on an erroneous view of the legal consequences of the correspondence. His hope that the dispute could be settled by negotiation did not have the effect of extending the limitation period. The chambers judge was entitled to conclude that the appellant had not proven, on a balance of probabilities, that there was any standstill agreement or estoppel.

Conclusion

63 In conclusion, the appellant has failed to show any reviewable error in the fact findings of the chambers judge, or the inferences she drew from the record. The incorrect assumption about when the limitation period commences for breach of contract claims did not affect the outcome. The appeal is accordingly dismissed.

***Catherine Fraser C.J.A.*:**
I concur:

***Jack Watson J.A.*:**
I concur:

***Jo'Anne Strekaf J.A.*:**
I concur:

***Thomas W. Wakeling J.A.*:**

I. Introduction

64 There are two conflicting summary judgment tests that have appealed to panels of this Court in the post *Hryniak v. Mauldin*[1] era.

65 One states that summary judgment may be granted only if the disparity between the strength of the moving and nonmoving parties' positions is so marked that the likelihood the moving party's position will ultimately prevail is very high — the outcome is obvious.[2] This is the standard in force throughout the common law world.[3] It has been utilized in Alberta[4] and other provinces[5] long before the Supreme Court released *Hryniak v. Mauldin*.

66 The only difference between the different standards is the degree of disparate strength necessary. Some courts have insisted that the nonmoving party's position be completely without merit so that the nonmoving party could not possibly succeed.[6] This means that the likelihood the moving party will succeed must approach 100 percent and the likelihood the nonmoving party will prevail must be around zero percent. Using this measure increases the degree of disparity to the maximum point and reduces considerably the utility of the summary judgment process. Others have granted summary judgment even though the nonmoving party's position has some merit. This test reduces the requisite degree of disparity and increases the utility of the summary judgment process. It is enough if the likelihood that the moving party's position will ultimately prevail is very high[7] — the strength of the moving party's case is many times that of the nonmoving party.[8]

67 I adhere to this school of thought.

68 So does Justice Brown, now of the Supreme Court of Canada. He has unequivocally endorsed this standard both before[9] and after[10] the Supreme Court's judgment in *Hryniak v. Mauldin* came out. In *Orr v. Fort McKay First Nation*,[11] delivered after *Hryniak v. Mauldin*, he said this:

> In *Deguire v Burnett* ..., I recounted the various formulations found in our jurisprudence of the test for obtaining summary judgment. This included the threshold that it be 'plain and obvious' that the claim or defence will fail; that the claim or defence must be 'bound to fail' or have 'no prospect of success' or have 'no merit' or raise 'no genuine issue for trial'. They are ... different ways of stating the same test. The formulation I preferred was (and remains) that stated in *Beier v Proper Cat Construction* ..., and in *O'Hanlon Paving Ltd v Serengetti Developments Ltd.* ... which requires the Court to consider whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high. This formulation ... not only states the high threshold which an applicant must meet for obtaining summary judgment, but also contains within it the rationale for granting summary judgment and depriving the respondent of full access to all litigation tools. It is also consistent with those aspects of the Supreme Court's statements in *Canada v Lameman* and *Hryniak v Mauldin* which I have identified as generally applicable to summary judgment applications brought beyond Ontario's borders. Just as it serves neither litigants nor the administration of justice to have claims or defences which are highly likely to succeed thwarted or delayed by forcing litigants to undertake the expense and delay of a full trial, neither are they served when summary judgment is used to prematurely extinguish a potentially meritorious claim or defence for the sake of economy. By its terms, the formulation of the test for summary judgment in *Beier v Proper Cat Construction* keeps the master's or judge's attention focussed upon resolving litigation in a timely and cost-effective manner by imposing a proportionate remedy where it can be said that a claim or defence ought to succeed or fail without further process. In doing so, it promotes robust application of Alberta's summary judgment rule despite its preclusion of factual determinations.

69 The other test is of very recent origin — post *Hryniak v. Mauldin*. It insists that summary judgment may be granted if the moving party's position is established on a balance of probabilities and it is fair and just to deny the nonmoving party access to the full trial process.[12]

70 The Chief Justice of Alberta struck a five-judge panel to resolve this controversy.[13]

71 The chambers judge properly granted the respondent summary judgment.[14] It is incontestable that the respondents, having pleaded the *Limitations Act*,[15] are entitled to immunity from liability in respect of the appellant's claim.

II. Questions Presented

72 Does the Supreme Court of Canada's judgment in *Hryniak v. Mauldin* affect the proper interpretation of the test for summary judgment under r. 7.3(1) of the *Alberta Rules of Court*?[16]

73 If so, to what effect?

74 What is the test for summary judgment in Alberta in the post *Hryniak v. Mauldin* era?

75 Must the disparity between the strength of the moving and nonmoving parties' positions be so marked that the likelihood the moving party's position will ultimately prevail is very high? Must the ultimate outcome be obvious? Or is it enough if the court concludes that the moving party has established its case on a balance of probabilities and it is fair and just to make a determination?

76 If the ultimate outcome must be obvious before summary judgment may be granted, is the respondent's position that the limitation period expired between four and eight months before the appellant commenced its action so much stronger than the appellant's position that the likelihood the respondent will prevail is very high?

77 If the summary judgment test is less demanding and only insists that the moving party establish its position on a balance of probabilities, has the respondent met this standard?

III. Brief Answers

78 *Hryniak v. Mauldin*[17] is an important decision.

79 It makes two transcendent statements.

80 First, it expressly declares the value of summary judgment and, by implication, other expedited dispute resolution procedures in a civil process environment in which conventional trials play a less prominent role than they once did because of their cost and the amount of time they require.

81 Second, it confirms the assessment made long ago by the House of Lords,[18] the English Court of Appeal[19] and the United States Supreme Court[20] that summary judgment is not an inferior dispute resolution device that sacrifices procedural fairness in the pursuit of economical and expeditious resolution of disputes.

82 But *Hryniak v. Mauldin*'s importance in Alberta must not be overstated. The Supreme Court's judgment did not alter the text of r. 7.3 or Part 1 — the foundational principles — of the *Alberta Rules of Court*[21] or Alberta's *Interpretation Act*.[22]

83 There is no valid reason in the post *Hryniak v. Mauldin* era to interpret r. 7.3 of the *Alberta Rules of Court* in a manner different from that favoured in the pre-*Hryniak v. Mauldin* period.

84 Courts must be faithful to the text of r. 7.3 of the *Alberta Rules of Court* and give the rule its plain and ordinary meaning, just as they did before January 23, 2014.

85 A court may grant summary judgment only if it concludes that the disparity between the strength of the moving and nonmoving parties' positions is so marked that the ultimate outcome of the dispute is obvious.

86 The respondents' argument that the appellant's action is barred by the two-year limitation period in the *Limitations Act*[23] is so much more compelling than the appellant's argument that its claim is not barred by the *Limitations Act* that the likelihood the respondent will ultimately prevail is very high. The appellant has no chance of succeeding; the trial outcome is obvious.

87 Summary judgment is the appropriate remedy under both the onerous and less onerous standards under review.

IV. Applicable Provisions of the Alberta Rules of Court and Their Historical Antecedents and the Limitations Act

A. Current Rules

88 The key portions of Parts 1 and 7 of the *Alberta Rules of Court*,[24] in force as of November 1, 2010, are set out below:

> Part 1: Foundational Rules
>
> Division 1
>
> Purpose and Intention of These Rules
>
> . . . . .
>
> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
>
> (b) to facilitate the quickest means of resolving a claim at the least expense ....

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

. . . . .

(d) when using publicly funded Court resources, use them effectively

. . . . .

Part 7: Resolving Claims Without Full Trial

Division 1

Trial of Particular Questions or Issues

7.1(1) On application, the Court may

(a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of

(i) disposing of all or part of a claim,

(ii) substantially shortening a trial, or

(iii) saving expense ....

. . . . .

(3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of the issue unnecessary, it may

. . . . .

(b) give judgment on all or part of a claim and make any order it considers necessary ....

. . . . .

Division 2

Summary Judgment

. . . . .

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

(a) there is no defence to a claim or part of it;

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

(c) the only real issue is the amount to be awarded.

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

(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

(a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;

(b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;

(c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

. . . . .

Division 3

Summary Trials

. . . . .

7.5(1) A party may apply to a judge for judgment by way of a summary trial on an issue, a question, or generally.

(2) The application must

(a) be in Form 36,

(b) specify the issue or question to be determined, or that the claim as a whole is to be determined,

(c) include reasons why the matter is suitable for determination by way of summary trial,

(d) be accompanied with an affidavit or any other evidence to be relied on, and

(e) specify a date for the hearing of the summary trial scheduled by the court clerk, which must be one month or longer after service of notice of the application on the respondent.

(3) The applicant may not file anything else for the purposes of the application except

(a) to adduce evidence that would, at trial, be admitted as rebuttal evidence, or

(b) with the judge's permission.

7.6 The respondent to an application for judgment by way of a summary trial must, 10 days or more before the date scheduled for the hearing of the application, file and serve on the applicant any affidavit or other evidence on which the respondent intends to rely at the hearing of the application.

B. Historical Antecedents

1. January 1, 1969 to October 31, 2010

89 Rules 159 and 162 of the previous iteration of the *Alberta Rules of Court*,[25] in force before November 1, 2010, are as follows:

159(1) In any action in which a defence has been filed, the plaintiff may, on the ground that there is no defence to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for judgment on an affidavit made by him or some other person who can swear positively to the facts, verifying the claim or part of the claim and stating that in the deponent's belief there is no genuine issue to be tried or that the only genuine issue is as to amount.

(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.[26]

. . . . .

(3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

. . . . .

> 162 At any stage of the proceedings the court may, upon application, give any judgment to which the applicant may be entitled when
>
> (a) admissions of fact have been made on the pleadings or otherwise, or
>
> (b) the only evidence consists of documents and such affidavits as are sufficient to prove their execution or identity.

2. July 1, 1944 to December 31, 1968

90 Order XI of *The Consolidated Rules of the Supreme Court*,[27] in force as of July 1, 1944, reads, in part, as follows:

> 128 When a statement of claim includes a claim for a debt or liquidated demand and any defendant has delivered a defence, the plaintiff may on affidavit made by himself, or any other person who can swear positively to the facts, verifying the cause of action in respect of the debt or liquidated demand and the amount claimed and stating that in his belief there is no defence thereto, apply to a judge for leave to enter final judgment for the amount so verified together with interest, if any, and costs.
>
> 129 Upon the hearing of the motion, unless the defendant by affidavit or his *viva voce* evidence or otherwise shall satisfy the judge that he has a good defence to the action on the merits or disclose such facts as may be deemed sufficient to entitle him to defend or shall bring into court the amount verified, the judge may direct that judgment be entered accordingly; but such judgment shall be without prejudice to the plaintiff's right to proceed against any other defendant or in respect of any other cause of action included in the statement of claim.

3. September 1, 1914 to June 30, 1944

91 Rules 275 to 278 of *The Consolidated Rules of the Supreme Court*[28] are substantially the same as Rules 129 to 131 of the successor rules in force as of July 1, 1944.

> 129 Upon the hearing of the motion, unless the defendant by affidavit or his *viva voce* evidence or otherwise shall satisfy the judge that he has a good defence to the action on the merits or disclose such facts as may be deemed sufficient to entitle him to defend or shall bring into court the amount verified, the judge may direct that judgment be entered accordingly ....
>
> 130 If it appears that the defence set up by the defendant applies only to part of the plaintiff's claim or that any part of his claim is admitted, the judge may, if the circumstances make it convenient, direct that the plaintiff have judgment forthwith for or in respect of such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution or the payment of the amount levied or any part thereof into court by the sheriff; the taxation of costs or otherwise as the judge may think fit; and the defendant may be allowed to defend as to the residue of the plaintiff's claim.
>
> 131 If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action and that any other defendant has not such a defence and ought not to be permitted to defend, the former may be permitted to defend; and the judge may, if the circumstances make it convenient, direct that the plaintiff have judgment against the latter and the plaintiff may enforce such judgment without prejudice to his right to proceed with his action against the former.

C. Limitations Act

92 Section 3(1) of the *Limitations Act*[29] reads as follows:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose, whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

V. Statement of Facts

A. Purolator's Business Structure

93 Purolator Inc.[30] conducts an extensive freight-service business in Alberta.

94 It operates a number of depots throughout Alberta that are serviced by owner-operator contractors.

95 Purolator enters into owner-operator contracts with individuals or corporations to pick up and deliver freight. These contracts oblige an owner-operator to bear operation and maintenance costs and to secure liability insurance. Owner-operators must deliver to Purolator a daily summary of services provided. Purolator pays for these services "in accordance with the Owner Operator Compensation Plan". There is a base rate for a working day, a kilometer rate, a piece rate and other compensatory mechanisms.

96 The Canadian Council of Teamsters is the sole bargaining agent under the *Canada Labour Code*[31] "for all Owner/Operators performing pick-up and delivery work in ... Alberta". This is so whether the owner-operator is an individual or a corporation.

97 Purolator and the Teamsters entered into a collective agreement binding Purolator, the Teamsters and the owner-operators.

98 The collective agreement stipulates that "[a]ll Owners/Operators hired must maintain membership in good standing in the Union for the duration of the present agreement, as a condition of continued service to the Company". It also provides that the "Owner/Operator shall personally and exclusively operate the equipment supplied pursuant to this Owner/Operator Contract with [Purolator] ... [unless the owner-operator] is absent because of vacation, illness, accident or on leave of absence for reasons acceptable to [Purolator] and the Union".

99 The collective agreement has a grievance procedure for "any disagreement relating to the interpretation, application or alleged violation of the present Collective Agreement." If a grievance cannot be resolved, an arbitrator selected by Purolator and the Teamsters or appointed by the Minster of Labour resolves the dispute.

B. Weir-Jones Technical Provided Pickup and Delivery Services for Purolator

100 On January 23, 2008 Weir-Jones Technical Services Incorporated signed an owner-operator contact with Purolator.

101 Under this agreement Weir-Jones Technical provided pickup and delivery services for routes in Bonnyville and Cold Lake from some time shortly after January 23, 2008 until August 21, 2009. Andrew Weir-Jones, Samantha Gordey and Robin Staff discharged Weir-Jones Technical's obligations to Purolator under the owner-operator contract.

C. Weir-Jones Technical Alleged that Purolator Breached Contractual Commitments

102 Weir-Jones Technical believed that Purolator failed to honor commitments made to Weir-Jones Technical to provide line-haul contracts for all oil field supplies and deliveries in the Cold Lake and Bonnyville areas and to utilize Weir-Jones Technical's fuel-saving technology in its vehicles.

103 Weir-Jones Technical first comprehensively stated its complaints to Purolator in a November 3, 2008 letter.[32] This letter unequivocally states that Purolator has "intentionally and fraudulently misrepresented Purolator's intentions."

104 The inadequacy of Purolator's response to this letter must account for Weir-Jones Technical's February 24, 2009 letter to Purolator's chief executive officer, part of which is as follows:[33]

> In Q3 2007 staff from Weir-Jones Technical Services commenced a series of discussions with Purolator management from your Edmonton offices. This discussion concerned the implementation of innovative low carbon footprint vehicles on line haul routes initially in Northern Alberta. The vehicles would utilize thermal efficiency enhancement technologies, something which we have been working on for a number of years. The objectives were (a) to demonstrate the efficiency of the technologies (b) to enable Purolator to show, in a very practical manner, that they were committed to reducing their corporate carbon footprint, (c) to implement a technology which would have an immediate impact on Purolator's operating costs, and (d) to provide ... [Weir-Jones Technical] with a long term revenue stream.
>
> The discussions continued and, in Q4 2007, Mike Gieck assumed the role of point man for Purolator. In summary Mr. Gieck made commitments that one or more line-haul routes would be awarded to ... [Weir-Jones Technical], however, in order to facilitate this he requested that we enter into contracts for the provision of local delivery services on routes in Bonnyville and Cold Lake. This was done in January 2008 and, subsequent to commencing these contracts discussions continued in great detail about the promised line-haul routes. ... [I]n the final analysis Mr. Gieck reneged on this commitment to make one or more line-haul routes available to us. In the words of a Purolator manager "*Mike conned you and led you up the garden path - all he really wanted was someone to handle the Bonnyville and Cold Lake routes*".
>
> Our position is that we have incurred significant expenses, both capital and operational, in order to provide the services which were requested of us by Mr. Gieck. *Since September 2008 it has become apparent to us that Mr. Gieck's objectives were not as he represented to us.*

105 Weir-Jones Technical enclosed in its February 24, 2009 letter its counsel's February 18, 2009 letter. Counsel unequivocally stated that Weir-Jones Technical may have an action against Purolator based on the facts recorded in the November 3, 2008 and February 24, 2009 letters from Weir-Jones Technical to Purolator:

> As I indicated at the outset of this correspondence, you have asked me to opine on the availability of remedies that ... [Weir-Jones Technical] may have against Purolator. The information you have provided to me suggests that there are several instances where representations were made to ... [Weir-Jones Technical] by senior Purolator personnel and that ... [Weir-Jones Technical] has relied on those representations to its detriment. On the proof of those circumstances ... [Weir-Jones Technical] would likely be entitled to damages, certainly equalling its lost expenditures, and in the ordinary cause, compensating for profits which would have been earned had Purolator's representations been honoured.

106 Purolator's in-house counsel replied on March 25, 2009. She asked Weir-Jones Technical to produce the documents that contain the promises to which Weir-Jones Technical referred in its February 24, 2009 letter. Responding directly to Weir-Jones Technical's statement in its February 24, 2009 letter that it would like to resolve outstanding issues "without the need to further involve counsel", in-house counsel acknowledged that "Purolator would also like to resolve this matter

without costly legal proceedings".

107 In a May 11, 2009 letter Weir-Jones Technical informed Purolator's in-house counsel that most of its claims "are unrelated to the matters covered by the Collective Agreement" and that it intends to "[c]ommence action(s) in all appropriate jurisdictions in connections with all matters which do not fall under the terms of the Collective Agreement".

D. Weir-Jones Technical Invokes the Teamsters' Assistance

108 Sometime in 2008 Weir-Jones Technical asked the Teamsters for assistance.

109 The Teamsters filed eight grievances on behalf of Andrew Weir-Jones and Samantha Gordey in the period commencing November 12, 2008 and ending April 23, 2009.

110 These grievances were the subject of a memorandum of agreement dated October 2, 2015 between Purolator and Mr. Weir-Jones and Ms. Gordey. Purolator promised to pay the grievors a sum of money within a defined period of time. Another provision in the October 2, 2015 memorandum of agreement stated that "[t]he present memorandum is made without prejudice whatsoever to the Plaintiffs' [sic] and Defendants' respective claims and positions in the civil action instituted before the Court of Queen's Bench of Alberta, in Court file No. 1114-00276 ...."[34]

E. Weir-Jones Technical Commenced an Action Against Purolator on July 22, 2011

111 On July 22, 2011 Weir-Jones Technical Services sued Purolator Courier Ltd., Purolator Inc. and Purolator Freight. The key parts of the claim are set out below:

> 3. On or about February 2008 through August 2009, the parties entered into an agreement for services and supplies which provided, inter alia, that the Plaintiff would perform courier services on behalf of the Defendant [sic] in and around Bonnyville ... and supply proprietary fuel saving technology installations for the Defendant's courier truck fleet. In addition, by agreement with the Defendant [sic], the Plaintiff performed repairs on trucks which the Defendant [sic] rented from Ryder's Connection truck rental services. In addition, the Defendant [sic] agreed to reimburse the ... [Plaintiff] for travel and accommodation costs incurred for performing its contractual obligations to the Defendant [sic] in and around Bonnyville, Alberta.
>
> 4. On or about February 2008, through August 2009, the Defendant [sic] represented that it would provide line haul contracts to the Plaintiff for all oil field supplies and deliveries within the Cold Lake/Bonnyville areas. In reliance upon the Defendants' representation(s), the Plaintiff incurred expenses for the placement of equipment and vehicles in the area for the provision of the oil field services.

112 The plaintiff claimed damages for breach of contract and detrimental reliance "of at least $211,000.00" plus interest.

113 Almost two months before Purolator settled the outstanding grievances the Teamsters had filed on behalf of Mr. Weir-Jones and Ms. Gordey, Purolator filed a statement of defence, part of which is as follows:

> 12. The Plaintiff knew or ought to have known by October of 2008, of all facts giving rise to any potential claim.
>
> 13. The Defendants plead and rely upon the *Limitations Act*, RSA 2000, c L-12.

F. Purolator Applied for Summary Dismissal of Weir-Jones Technical's Action

114 On October 9, 2015 Purolator applied for summary dismissal of Weir-Jones Technical's action.

115 It filed a supporting affidavit that exhibited Weir-Jones Technical's correspondence to Purolator claiming a breach by

Purolator of its legal obligations to Weir-Jones Technical.[35] The deponent stated that he believed there is no merit to Weir-Jones Technical's claim.[36]

116 Weir-Jones Technical filed two affidavits by the same deponent opposing summary dismissal of its claim.[37]

117 These affidavits pursued one objective - explain why Weir-Jones Technical waited until July 22, 2011 to sue Purolator.

118 The deponent advanced three reasons.

119 First, the company hoped that the Teamsters might be able to assist with not only the resolution of the issues captured by the grievances that were filed before April 24, 2009 but those that fell outside the scope of the collective agreement. The deponent swore that the Teamsters had "indicated its willingness to resolve our issues collectively, whether strictly inside ... [or] outside of the Collective Agreement."[38]

120 Second, the company believed that it "had an agreement with Purolator in 2009 to hold off on litigation and to attempt to negotiate a settlement".[39] The bases for this belief were statements by both sides that they wished to resolve their differences without resorting to litigation.

121 Third, the deponent thought that the two-year limitation period expired August 18, 2011:[40]

> 6. At the time I filed the Statement of Claim, July 22, 2011, I did so on the understanding that Weir-Jones Technical ... had terminated its relations with Purolator by way of a termination letter dated August 18, 2009 .... I believed that the letter would start the limitation period running, i.e., that I believed that I would have two years within which to sue Purolator from the date of the termination letter, August 18, 2009.

G. The Chambers Judge Granted Purolator Summary Judgment

122 Justice Shelley accepted all Purolator's major arguments and granted it summary dismissal.[41]

123 First, she concluded that Weir-Jones Technical was aware of the facts on which it based its action against Purolator and that the injury warranted bringing a proceeding more than two years before it sued Purolator.[42]

124 Second, there was no standstill argument in effect. The correspondence on which Weir-Jones Technical relied did nothing more than document the disputants' "desire to attempt to settle the matter without recourse to the Courts".[43]

125 Third, the essential components of promissory estoppel were not in place.[44] Purolator never promised not to invoke the *Limitations Act*.[45]

126 Justice Shelley held that summary judgment may be granted if there is no "issue of merit that genuinely requires a trial or, conversely, whether the defence is so compelling that the likelihood it will succeed is very high."[46] While Justice Shelley did not identify the standard she favoured or applied, she held that "[t]he evidence ... clearly establishes that ... [Weir-Jones Technical] was aware of the alleged breaches ... [and that it filed its suit] more than two years after the limitation period or periods commenced and the claims it contained were ... barred by s 3(1) of the [*Limitations Act*]".[47]

VI. Analysis

A. Summary Judgment Is an Essential Feature of a Modern Civil Procedure System

127 Summary judgment is an essential feature of a modern civil procedure system.[48] I know of no Canadian or Commonwealth judge who disagrees with this proposition.[49]

128 There is an inverse relationship between the importance of summary judgment and other expedited dispute resolution procedures and the efficacy of the traditional trial process. As the amount of time that separates the commencement of an

action and its resolution by conventional trial[50] escalates[51] — the passage of time diminishes the value of the conventional trial[52] — the need to have a functioning summary judgment model increases in importance.[53]

129 Regrettably, there is no reason to believe that the amount of time it currently takes for conventional trials in the Court of Queen's Bench of Alberta to close litigation files will trend downwards in the foreseeable future.[54] Until this happens, expedited dispute resolution processes will continue to be of paramount importance in Alberta.

130 Needless to say, the test for summary judgment or any other Part 7 protocol is contained in the text and is not a function of how poorly funded the court system or how clogged the conventional trial process is.

131 Part 7 of the *Alberta Rules of Court*[55] allows a court to resolve a dispute without utilizing the time-consuming and expensive processes associated with a traditional trial.[56] Our rules recognize that a party does not have an absolute right to "access ... all stages of the litigation spectrum".[57]

132 Part 7 introduces distinct[58] protocols that authorize a court to determine relatively early in the civil procedure process questions of fact or law in order to expedite the resolution of all or part of a claim or to grant judgment under an application for summary judgment or summary trial.[59] "Alberta's summary judgment protocol and the other procedures in the Part 7 suite of expedited procedures are built on a foundation that assumes the features a dispute displays may determine the parts of the litigation spectrum which must be accessed to resolve it".[60]

133 Summary judgment is undoubtedly the Part 7 protocol most frequently utilized by Alberta litigants who seek expedited judicial recognition of the strength of either their claim or their defence to a claim.[61] Alberta judges have promoted its use.[62]

134 This expedited dispute resolution process is also an important aspect of the civil procedure regimes of all Canadian jurisdictions[63] and those of England and Wales,[64]Australia,[65] New Zealand,[66] Hong Kong[67] and the United States.[68] Sophisticated civil process systems recognize that the public interest is best served by mechanisms that allow a court to resolve a dispute as early in the process as is feasible and with the utilization of the least-possible judicial and private resources.[69]

135 Summary judgment protocols in common law jurisdictions can be traced to England's 1855 *Summary Procedure on Bills of Exchange Act*.[70] This statute and subsequent enactments introduced a streamlined civil process for the resolution of a small number of specified actions[71] the outcome of which could be safely predicted or, in other words, was obvious.[72]

B. Summary Judgment May Be Granted if the Ultimate Outcome Is Obvious

1. There Must Be a Marked Disparity Between the Strength of the Moving and Nonmoving Parties' Positions

136 Summary judgment may be granted if the moving party discharges the legal or persuasive burden[73] and satisfies the court that the likelihood its position will prevail is very high and the likelihood that the nonmoving party will succeed is very low.[74] The disparity between the strength of the positions of the moving and nonmoving parties' must be so marked that the ultimate outcome of the dispute is obvious — the likelihood that a court will ultimately adopt the moving party's position is many times greater than the likelihood it will favor the nonmoving party's position.[75]

137 I have stated before that[76] "the comparative strengths of the moving and nonmoving parties' positions need not be so disparate that the nonmoving party's prospects of success must be close to zero before summary judgment may be granted. If that was the law, the purpose of summary judgment would be frustrated".

138 To be clear, the moving party does not have to establish that the likelihood the court will adopt its position at trial is close to 100 percent so that the outcome is beyond doubt.[77] The corollary of this proposition is that the nonmoving party may not survive a summary judgment motion by showing that its prospects of success are marginally better than extremely low.

139 Most jurisdictions are prepared to deprive the nonmoving party of access to the full civil procedure spectrum only if the disparity between the strengths of the moving and nonmoving parties' positions is so great that the likelihood the moving party's position will prevail is very high - the ultimate trial disposition is obvious. This marked disparity element is produced

by the employment of tests that ask if the nonmoving party's position is devoid of merit or if there is a genuine issue to be tried. If the nonmoving party's position is without merit, there is no genuine issues to be tried.[78]

140 This demanding standard ensures that the desire to be efficient does not deprive the nonmoving party of the right to fairly advance its position.[79]

141 A leading civil procedure scholar observed in his text, Zuckerman on Civil Procedure, that "English law has evolved a summary judgment procedure for enabling litigants with a clear and unanswerable case to obtain judgment without having to negotiate the normal procedural hurdles".[80]

142 The modern standard for the evaluation of summary judgment claims has not changed since the Westminster Parliament passed the 1855 *Summary Procedure on Bills of Exchange Act*[81] and allowed the *bona fide* holders of dishonoured bills of exchange and promissory notes to secure summary judgment and avoid the necessity of contending with "frivolous or fictitious defences".[82]

143 This is also the law in Australia, New Zealand and the United States.

144 In *Rich v. CGU Insurance Ltd.*[83] Chief Justice Gleeson and Justices McHugh and Gummow of the Australian High Court opined that "issues raised in proceedings are to be determined in a summary way only in the clearest of cases". Another High Court judgment delivers the identical message:[84] "The test to be applied has been expressed in various ways, but all ... are intended to describe a high degree of certainty about the ultimate outcome of the proceedings if it were allowed to go to trial in the ordinary way".

145 The New Zealand High Court recently declared that summary judgment is appropriate if a court is "left without any real doubt or uncertainty"[85] about the frailities of the nonmoving party's position.

146 The United States Supreme Court holds a similar view. In *Anderson v. Liberty Lobby, Inc.*,[86] Justice White, writing for the Court, succinctly stated that summary judgment is appropriate if the case is "so one-sided that one party must prevail at trial as a matter of law". Justice Rehnquist, in *Celotex Corp. v. Catrett*,[87] noted that summary judgment may be granted to "dispose of factually unsupported claims or defences".

147 This high summary judgment standard does not now and has never meant that the court has jettisoned the appropriate standard of proof in a civil case — the plaintiff must prove the facts that are essential under the applicable legal test on a balance of probabilities. No court hearing a summary judgment application and imposing a high threshold such as I favor has ever suggested that it is necessary to alter the rules of the game. There is only one standard of proof in Canada for civil proceedings — the claimant must prove the essential facts of its case on a balance of probabilities?[88] A high summary judgment standard simply means that a court should not award final judgment before trial unless it is satisfied, after taking into account incontrovertible facts and law, that the disparity between the strength of the moving and nonmoving parties' cases is so marked that the trial result is obvious. Summary judgment is the product of judicial prognostication of ultimate trial outcome based on incontrovertible facts and law.[89]

148 It is also important to remember that summary judgment is not a trial.[90]

149 The fact that courts grant interim or interlocutory injunctions without asking whether the moving party's position is more likely to succeed than the nonmoving party's position does not translate into a new level of persuasion in civil disputes.[91]

150 Suppose that a sophisticated corporate client asks litigation counsel for an opinion on the likelihood of ultimate success in a proposed complex civil action. Counsel has estimated that legal fees will exceed $5 million. The client needs to know the prospects of success before making a final decision about suing a joint venture partner. Counsel informs the client that the likelihood a trial court will conclude that the client has proved the contested facts on a balance of probabilities is around 66 2/3% — the client is twice as likely to succeed as the proposed defendant. The fact that the lawyer proffers an opinion as to the future trial disposition does not mean that the basic trial rules have changed. They obviously do not. The plaintiff cannot succeed unless it presents admissible evidence that allows the court to find that the plaintiff has proved the essential facts of its case on a balance of probabilities.

2. There Must Be an Incontrovertible Factual Foundation

a. Relevant Facts

151 A summary judgment applicant must satisfy the court that the facts and the law on which the applicant relies make it highly unlikely that the nonmoving party's position will prevail.

152 An assessment of likely trial outcomes cannot be made unless the material facts are incontrovertible.[92]

153 I will start with an example presented by Justice Brennan in *Anderson v. Liberty Lobby, Inc.*[93] that does not warrant summary judgment because the material facts are in dispute:

> Imagine a suit for breach of contract. If ... the defendant moves for summary judgment and produces one purported eye witness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contact, while the plaintiff produces one purported eye witness who asserts that the parties did in fact come to terms, presumably that case would go to the jury.

154 Here is an example of a fact pattern that warrants summary judgment because the facts are incontrovertible and the law is clear.[94]

155 A files an affidavit swearing that on January 1, 2017 his brother B borrowed $1 million from A and promised to pay A on January 1, 2018 $1 million plus ten percent interest. The affidavit also claims that A signed a promissory note dated January 1, 2017 documenting the terms of the loan and that B has failed to repay A. B files no affidavit and does not cross-examine A.[95]

156 A requirement of an incontrovertible factual foundation does not mean that the nonmoving party may effectively block a summary judgment order by denying, without any objective basis, the existence of an essential fact.[96] A court must carefully review the affidavit evidence in order to determine whether there exists a core set of indisputable facts. There may be agreements or letters that neither party denies were signed or delivered.[97] By comparing them with allegations not in accord with this core set of indisputable facts, an adjudicator may determine whether the likelihood the factual allegations of the moving party are sustainable is very high.[98] If the likelihood that the facts relied on by the moving party exist is very high, there is an incontrovertible factual foundation.

157 Suppose that in the promissory note example B filed an affidavit stating that he repaid A the agreed-upon sum on December 31, 2017 and that A provided him with a receipt. B does not attach the receipt to his affidavit. A filed an affidavit of C, A and B's mother, in which she states that B sent her an email on December 30, 2017 stating that B owed A $1 million and had no money to repay A and asked her to pay A $1 million to extinguish B's debt to A, a request she denied. On cross-examination, B admits that he sent his mother the December 30, 2017 email and that she refused his request. B maintains his position that he has repaid the sum due but cannot present the receipt and refuses to say where he found the money to repay A.

158 A court would not have any trouble concluding that there is an incontrovertible factual basis that supports A's application for summary judgment enforcing B's promissory note. It is undeniable that A lent B $1 million and that B signed a promissory note confirming the debt and his obligation to repay. Also indisputable is the existence of B's conversation with his mother and B's failure to produce a receipt. The likelihood that B repaid the $1 million he owes A is extremely low - somewhere around zero.

159 *898294 Alberta Ltd v. Riverside Quays Limited Partnership*,[99] a very recent decision of this Court, illustrates the degree of scrutiny that is appropriate in assessing the presence of an incontrovertible factual foundation. Pursuant to an oral agreement, 898294 Alberta Ltd. lent Riverside Quays $183,750 with no particular repayment terms. Riverside Quays recorded its debt to 898294 Alberta Ltd. in its financial records and repaid 898294 Alberta Ltd. $10,699.66 in March 2009. 898294 Alberta Ltd. demanded repayment from Riverside Quay in 2015 and commenced an action seeking judgment for the

outstanding debt. The plaintiff applied for summary judgment. The defendant argued that the debt the plaintiff sought to recover was payable to the Statesman Group of Companies Ltd. and relied on an affidavit filed by the chief financial officer of Statesman in an earlier proceeding in which he asserted that Riverside Quays' debt to Statesman included the sum 898294 Alberta lent to Riverside Quays. There was no objective support for this assertion. This Court responded as follows:[100]

> Nor is 898 bound by any evidence given by Kevin Ingalls on behalf of Statesman, no matter what his position with 898 was. It appears that in 2013 Mr. Ingalls was merely a shareholder of 898 along with dozens of other employees of Statesman and their spouses. He was also an officer and director of 898 but he did nothing which would bind the shareholders of 898.

160 *Composite Technologies Inc. v. Shawcor Ltd.*[101] also warrants review. Shawcor and the other defendants successfully moved for summary judgment dismissing the plaintiffs' claims. One plaintiff, Proflex Pipe, had been struck off the corporate registry and its action was clearly a nullity. The defendants also successfully argued that Composite Technologies Inc. had sold its intellectual property in composite flexible pipe to Proflex Pipe before the purchaser was struck off the registry and had no property interest to protect. Both the chief executive officer and the vice-president finance of the two plaintiffs — the contracting parties to the technology transfer agreement on which the defendants relied — denied that Composite Technologies had given up its interest in the flexible composite pipe technology by signing the technology transfer agreement. This Court clearly rejected these assertions:[102]

> Taking into account... the text of the whole document, the purpose accounting for the technology transfer agreement and the business environment in which it would operate, we unhesitatingly conclude that Composite Technologies transferred to Proflex Pipe any interest it had in the issued and pending patents described in schedule A, any interest it may have in future patents relating to flexible composite pipe technology and any other proprietary information not protected by the issued or pending patents disclosed in schedule A.... This is a comprehensive sale on the part of Composite Technologies.
>
> There is no other plausible interpretation of the text.
>
> This inescapable interpretation of the technology transfer agreement, by itself, completely undermines the position of Composite Technologies.

b. Irrelevant Facts

161 A contest regarding a fact that has no impact on the outcome of a summary judgment application is of no consequence.[103]

162 In *Can v. Calgary Police Service*[104] this Court upheld the motion court's decision summarily dismissing the plaintiff's action against members of the Calgary Police Service for wrongful arrest, false imprisonment and negligent investigation. The plaintiff challenged the arrestor's claim that he relied on a particular piece of evidence before he made the decision to order the plaintiff's arrest. This Court concluded that this dispute was irrelevant. There was ample evidence without considering the contested item to justify the conclusion that the warrantless arrest was lawful.[105]

3. A Summary Judgment Application May Be Delayed To Allow a Party To Question the Moving Summary Judgment Party if Denying the Right To Question Would Cause Unreasonable Litigation Prejudice

163 As a general rule any application by the nonmoving summary judgment party to seek access to a part of the civil process that has not yet been utilized and has the effect of forestalling the adjudication of the summary judgment application should be dismissed.[106] Such an application introduces delay and additional costs and undermines the purpose of the summary judgment protocol.[107]

164 For example, an order allowing the nonmoving summary judgment party to question the moving party may introduce considerable delay. The nonmoving party, once given the opportunity to question the moving party, has no incentive to expedite the discovery process. And if one side is given the right to question, the other may conclude that it should as well.

165 But the value summary judgment represents in a modern civil procedure system — expeditious resolution of a dispute — does not justify abridgment of the civil process if the nonmoving summary judgment party can demonstrate that denying it access to a portion of the civil process would cause it unreasonable litigation prejudice.[108]

166 This is not an easy burden to discharge.[109] While it is fair to say that any party deprived of the right to question is prejudiced, this alone does not constitute unreasonable prejudice. The party who seeks the opportunity to question must identify other reasons that explain why the opportunity to cross-examine the moving party's deponents and to present its own affidavit evidence does not allow the nonmoving party to fairly answer the allegations of the moving party.[110]

167 The nonmoving summary judgment party may be unreasonably prejudiced if there is reason to believe that the moving party alone has access to the relevant information that directly relates to the merits of the dispute between the parties.[111] The moving party may be seeking summary judgment to forestall discovery.

168 Suppose that A Co. purchases from B all B's shares in B Co. for $25 million. B has exceptional skills doing X. B is the only person in the world who can do X. The purchase-and-sale agreement obliges B to work for B Co. doing X as an employee for not less than five years and for a stipulated ten-year period not to assist in any manner or have an interest in any business that competes with B Co.[112] B Co. does business worldwide. Shortly after A Co. has paid B, Texas customers of B Co. notify B Co. that a sales representative for D Co. has offered to do X. A Co. cannot immediately determine who owns D Co. It is convinced that B is the directing mind of D Co. A Co. confronts B. B falsely claims that he has never heard of D Co., that he has no interest in it and that he is not competing with B Co. B has used the money A Co. paid him to purchase property in Alberta, construct a large tool shop and order the special equipment needed to manufacture the tools necessary to do X. A Co. receives more reports from the field about D Co.'s appearance in the market. A Co. sues B and D Co. A Co. alleges that B has an interest in D Co. and is in breach of B's obligations under the purchase-sale agreement. B, convinced that A Co. cannot be aware of the full extent of his subterfuge, immediately applies for summary judgment falsely swearing in his affidavit that he has no interest in D Co. and is not competing with B Co. B Co. serves an appointment on B for questioning and B moves under r. 5.19 of the *Alberta Rules of Court* for a set-aside order. A Co. files an affidavit stating that B is the only person in the world who can do X; that D Co. is now offering to do X for customers of A Co. and that the deponent believes that B is the directing mind of D Co. This is an appropriate case to order questioning and, in effect, delay adjudication of B's summary judgment application.

169 Or the only contest between the moving and the nonmoving party may be the amount of damages to which the moving party is entitled. The nonmoving party may be prejudiced if it is unable to question the moving party about the facts relevant to its damages claim.[113]

C. Hryniak v. Mauldin *Proclaims the Merits of Summary Judgment*

170 *Hryniak v. Mauldin*[114] is an important decision. It proclaims the merits of summary judgment, a protocol universally appreciated.[115]

171 Recognizing a trend that started in 1855 with the Westminster Parliament's passage of *The Summary Procedure on Bills of Exchange Act*[116] and that has gained momentum with each passing decade and the observable increase in the cost of litigation and the time it consumes,[117] the Supreme Court of Canada declared its unequivocal support for summary judgment.[118] In doing so, the Supreme Court followed the lead of the House of Lords,[119] the English Court of Appeal[120] and the United States Supreme Court.[121]

172 To ensure that the benefits of summary judgment — "access to ... affordable, timely and just adjudication of claims"[122] — were enjoyed, the Supreme Court directed courts to interpret summary judgment rules liberally.[123]

173 The endorsement of summary judgment by the world's major common law jurisdictions makes sense. There are disputes that can be justly resolved without allocating to them the full array of the civil process. Parties to some disputes do not stand to derive a legitimate legal advantage from the time and expense associated with extensive discovery and trial processes. Delay does not qualify as a legitimate legal advantage. A debtor who has derived the benefits a promissory note represents but has not discharged his or her obligations under it for the simple reason that he or she is impecunious and has no defence to a claim for enforcement of the promissory note is a litigant who would derive no legitimate legal advantage

from having access to the full panoply of the civil process.[124] On the other hand a party who has been victimized by an unscrupulous defendant who has destroyed and fraudulently created documents and camouflaged contract-breaking acts would undoubtedly derive a legitimate legal advantage from fully exploiting the benefits associated with discovery and trial cross-examination. Denying such a victim access to these important tools would accord a rogue defendant an unconscionable assist.

174 This linkage between the characteristics of the dispute and the aspects of the civil process allocated to resolve it is a form of proportionality that appears in many walks of life. For example, health-care providers know that a patient who has a cold does not need to see an ear, nose and throat specialist. Someone with less training can tell the patient to rest and drink lots of water. It is poor management to assign a specialist tasks that other members of the health-care team with different skills could also perform and, as a consequence, to deprive other patients who would benefit only from the specialist's attention. And health-care providers know that a patient who presents with life-threatening burns requires a specialist's attention. In short, health-care providers attempt to align the skill sets of the health-care team with a patient's condition to optimize the use of everyone's training and skills without jeopardizing the patient's interests.

175 The Supreme Court's strong endorsement of the merits of summary judgment squares with the commitment of Alberta courts to resolve disputes in the least amount of time practicable and at the lowest possible cost[125] and the direction that they do so in r. 1.2(2)(b) of the *Alberta Rules of Court*.[126] Alberta courts are cheerleaders for summary judgment and expedited dispute resolution generally.[127]

176 As noted above, Justice Brown, now of the Supreme Court of Canada, gave his imprimatur to the summary judgment principles that this opinion champions.[128]

177 Noteworthy is his and my conclusion[129] that *Hryniak v. Mauldin* does not have any effect on the summary judgment test in force in Alberta before the Supreme Court released *Hryniak v. Mauldin*.

178 *Hryniak v. Mauldin* has caused some of my colleagues to reject the world view on the summary judgment standard and to embrace a new less onerous standard that encourages judges to resolve disputes if they are satisfied that the moving party has proved its case on a balance of probabilities and that it is fair and just to decide the case summarily.

179 I will explain in the next section why this Court must be faithful to the text of r. 7.3 of the *Alberta Rules of Court* and give the rule its plain and ordinary meaning as Alberta courts did before *Hryniak v. Mauldin*.[130]

D. Hryniak v. Mauldin *Has Not Altered the Text of Rule 7.3 of the Alberta Rules of Court, the Foundational Rules or the Interpretation Act*

180 While *Hryniak v. Mauldin* is indisputably an important decision, it is not a Swiss Army knife capable of almost anything. A Supreme Court of Canada judgment cannot amend the text of a constitutional statute or a rule of court and ignore the obvious meaning of a statute or a rule of court.

181 This assertion is easy to illustrate.

182 Suppose that Alberta's court rules bestowed the right to apply for summary judgment only on a plaintiff claiming to enforce a promissory note. Indeed, a defendant could not apply for summary judgment in Alberta until June 19, 1986.[131]

183 The Supreme Court's enthusiastic support for summary judgment would not allow an Alberta court to grant summary judgment to a defendant even though the defendant had an iron-clad defence — the defendant paid the promissory note and has a receipt from the plaintiff witnessed by a priest and the plaintiff's mother, all of which is captured on video tape. If the court rules preclude granting a defendant summary judgment, a court cannot ignore the plain text. Nor could the plaintiff in a wrongful dismissal action secure from an Alberta court summary judgment. This is so regardless of the strength of the plaintiff's case. The assumed rule gives a court jurisdiction to grant summary judgment only if the plaintiff sues on a promissory note.

184 *Hryniak v. Mauldin* has not altered the text of r. 7.3 or r. 1.2(2)(b) of the *Alberta Rules of Court*[132] or Alberta's

Interpretation Act.[133] Nothing in *Hryniak v. Mauldin* changed in any way the remedial interpretation focus.

185 There is no valid reason to interpret r. 7.3 in a manner different from that accorded it by many panels of this Court before the publication of *Hryniak v. Mauldin*.[134]

186 Rule 20 of Ontario's *Rules of Civil Procedure* is fundamentally different from Alberta's r. 7.3.[135] A cursory reading of the two rules reveals this. The Supreme Court's interpretation of r. 20 could not affect Alberta's r. 7.3.

187 The governing statutory principles are straightforward.

188 First, a court must read the entire statute.[136] It must give the text[137] its ordinary meaning.[138] A court may never give text a meaning it cannot support.[139] "Words must not be given meanings they cannot possibly bear".[140]

189 This initial reading plays a pivotal role. First, it may disclose the purpose or purposes the enactment pursues. Second, it identifies the potential plausible meanings of the contested provision.

190 If this process discloses only one plausible or permissible meaning the interpretation inquiry ends.[141] In this scenario, there is no need to factor in the effect of the purpose of the text. Suppose that an enactment entitled the *Railway Workers' Safety Enhancement Act* declares that freight and passenger cars must be equipped with automatic couplers that eliminate the need for railway workers to manually connect freight and passenger cars. A court applying generally accepted statutory interpretation principles could not declare that locomotives must be equipped with automatic couplers just because this declaration would make a railway workers' job considerably safer. A locomotive is not a freight or a passenger car. Purpose does not trump text.[142] Courts that are oblivious to this fundamental tenet of our legal system undermine the rule of law.[143] This is a cardinal judicial sin.

191 If the inquiry reveals more than one plausible meaning, the court must select the meaning that best promotes the purpose that animates the text.[144]

192 Suppose that the same *Railway Workers' Safety Enhancement Act* provided that all railway cars must be equipped with automatic couplers. Is a locomotive a railway car?[145] The words "railway car" may refer to rolling stock that does not supply power or it may include all stock that rolls on tracks. To promote the safety of railway workers, the court must interpret "railway car" to include locomotives. It would make no sense to come to the opposite conclusion and expose railway workers to hazardous working conditions that would exist if railway workers had to manually connect locomotives to freight cars and passenger cars.

193 An adjudicator tasked with the assessment of a r. 7.3 application both before and after *Hryniak v. Mauldin* must decide whether or not there is "no merit [to the nonmoving party's position]".

194 The crucial word in r. 7.3 is "no".

195 Both of the world's leading English language dictionaries - The Oxford English Dictionary[146] and Webster's Third New International Dictionary of the English Language[147] - state that "no" as an adjective means "not any". Webster's gives these illustrations: "< let there be ? strife between you and me ... > <and ? birds sing ... > <with ? dancing in the streets or ritual bonfires ... >". Here are some of the examples Oxford offers: "England had never no thoughts of securing this Right of the Flag by a formal Treaty ... There was no evidence that Nunney had authority to arrest".

196 Webster's also asserts that "no" as an adjective may mean "hardly any" or "very little".

197 Given that the adjective "no" may mean "hardly any" or "very little" merit, at what point does the strength of the nonmoving party' case preclude a court from granting the moving party summary judgment?

198 The answer to this question must take into account the foundational rules of the *Alberta Rules of Court*, the remedial nature of legislation, as declared by the *Interpretation Act*,[148] and the governing case law that discusses the foundational rules and the importance of matching the features of a dispute with an appropriate dispute-resolution methodology.

199 Insisting that summary judgment may be granted only if the nonmoving party's position is devoid of merit — it is hopeless and cannot possibly succeed — would diminish the value of summary judgment as an effective protocol in the Part 7 suite of expeditious dispute resolution mechanisms and would frustrate the goal of matching disputes with a resolution process that offers only the features that are needed to fairly and expeditiously determine the dispute at the least possible public and private cost.

200 The better view, and the one adopted by panels of this Court on many occasions, is that summary judgment is appropriate if the disparity between the strength of the moving and nonmoving parties' position is so marked that the likelihood the court will adopt the moving party's position is very high — the outcome is obvious. In other words, a court may grant summary judgment even if it cannot be said that the nonmoving party's position is completely devoid of merit — the little merit it has does not deny the inevitability of an outcome adverse to the interests of the nonmoving party.

201 This standard increases considerably the utility of the summary judgment protocol. It allows an adjudicator to resolve disputes the outcomes of which are obvious and that would not warrant making available to them the full spectrum of the civil trial process. It properly balances the legitimate interests of the litigants and the community's desire to allocate no more public resources to resolve disputes than is necessary in a process devoted to fairness, justice, expedition and economy. Rule 1.2(1) of the *Alberta Rules of Court* expressly declares that "[t]he purpose of these rules is to provide a means by which claims can be fairly and justly resolved in a timely and cost-effective way".

E. Hryniak v. Mauldin *Is of Limited Precedential Value in Alberta*

202 *Hryniak v. Mauldin* interprets r. 20 of Ontario's *Rules of Civil Procedure*.[149] Rule 20 allows an Ontario court to hear oral evidence and resolve credibility contests in the course of resolving a summary judgment application.

203 Rule 20 is not a summary judgment provision. It allows a court to hear oral evidence. Rule 20, in essence, is a summary trial rule. Justice Brown said precisely this in *Orr v. Fort McKay First Nation*:[150] "Ontario's Rule 20.04(2.1) provides for a process that is broadly comparable to an application under Alberta's civil procedure ... for judgment by way of summary trial under Rule 7.5".

204 I made the same point in my concurring opinion in *Can v. Calgary Police Service*:[151]

> Presumably Ontario welded these additional fact-finding features onto its summary judgment model because summary trial is not part of Ontario's expedited dispute resolution procedures. ... The conditions which prompted Ontario to marry two distinct concepts do not exist in Alberta. ...
>
> . . . . .
>
> [A] r. 7.3 summary judgment application is not an expedited dispute resolution protocol that has to be distorted to resolve disputes in less time and cost than a trial would necessitate. Part 7 of the *Alberta Rules of Court* introduces two other discrete models — trial of an issue and summary trial - that were created for that purpose. The trial of an issue and summary trial options may be more suitable than summary judgment in some fact patterns. But the point is this: their existence eliminates the need to convert Alberta's summary judgment vehicle into the hybrid model Ontario's rule makers built.
>
> The wisdom of converting a protocol designed to remove disputes from the active file list because the nonmoving party's position is without merit into one which resolves legitimate issues — both the moving and nonmoving parties' positions have merit — is not clear. Other components of the Part 7 suite of expedited dispute resolution tools are available to resolve disputes the outcomes of which are not obvious.

205 For jurisdictions with true summary judgment rules like Alberta's, the precedential value of *Hryniak v. Mauldin* is limited to its endorsement of public alternative dispute resolution procedures.[152] I strongly stated this view before:[153]

> The fact that the Supreme Court declared in *Hryniak v. Mauldin* ... that its positive evaluation of expedited dispute resolution mechanisms is of 'general application' does not mean that Alberta's robust Part 7 suite of 'rocket docket' provisions is in any respect deficient. ... *Hryniak v. Mauldin* does not, in any way, support the notion that the existing

> principles which govern Alberta's summary judgment rule need to be revised.
>
> . . . . .
>
> There is no need to revisit either the purpose or the principles used to implement the summary judgment rule. Rule 7.3 and its predecessors have been in place since 1914.

206 There is a settled understanding of the rule's purpose and principles. And these are entirely in accord with the values endorsed by *Hryniak v. Mauldin*.

F. Part 7 of the Alberta Rules of Court Presents a Suite of Complementary Expedited Dispute Resolution Protocols

207 Insisting that summary judgment may be granted only if the ultimate disposition of a dispute is obvious does not diminish in any way the ability of the Court of Queen's Bench to resolve in an expeditious manner disputes the outcomes of which are not obvious[154] but are otherwise ripe for adjudication.

208 Rules 7.1 and 7.5 of the *Alberta Rules of Court* give the Queen's Bench jurisdiction to try a decisive issue or conduct a summary trial and hear oral evidence.

209 Each of these processes is fundamentally different from summary judgment.[155] Summary judgment is easily distinguished from summary trial. "Summary judgment disposes of a suit before trial and summary trial after trial".[156] Oral evidence is a fundamental feature of a trial — not of summary judgment.[157]

210 There is no reason to apply the summary judgment protocol when a matter is best adjudged by hearing oral evidence.

211 Lord Woolf, M.R. made this point in *Swain v. Hillman*:[158]

> Useful though the [summary judgment] power ... is, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. ... [T]he proper disposal of an issue under [the summary judgment part] does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

212 A summary trial or a determination of an issue may be appropriate if a dispute has features that promote a just resolution without accessing all aspects of the trial protocol - no need for questioning, for example. A dispute may largely turn on the resolution of a credibility issue[159] or simply require the application of a known legal standard to an agreed fact pattern, the outcome of which is not obvious.[160] Sometimes a final disposition is the most important dimension of a dispute.[161] An adjudicator will decide these contests using the balance of probabilities standard.

213 *Valard Construction Ltd. v. Bird Construction Co.*[162] illustrates the effective use of r. 7.5. Justice Verville, a senior judge, converted a summary judgment application into a summary trial and was able to immediately resolve an important contested fact issue by hearing three witnesses within a matter of hours.[163]

G. Purolator's Position Is So Strong and Weir-Jones Technical's So Weak that the Ultimate Outcome of this Action Is Obvious

214 Purolator defended, in part, on the ground that Weir-Jones Technical commenced its lawsuit after the two-year limitation period under the *Limitations Act*[164] expired.

215 Its position is very strong. In letters dated November 3, 2008 and February 24, 2009 Weir-Jones Technical confirms that it had come to the conclusion that Purolator's conduct contravened its legal obligations to Weir-Jones Technical. In a November 3, 2008 letter to Purolator Weir-Jones Technical asserted that Purolator had "intentionally and fraudulently misrepresented Purolator's intentions." A May 11, 2009 letter from Weir-Jones Technical to Purolator's in-house counsel

recorded Weir-Jones Technical's intention to sue Purolator for "all matters that do not fall under the terms of the Collective Agreement".

216 It is beyond doubt that the two-year period under the *Limitations Act* commenced sometime between November 3, 2008 and February 29, 2009. Indeed, an overwhelming case can be made for a November 3, 2008 start date. By that date Weir-Jones Technical was not only aware of Purolator's failure to assign a line-haul route to it but had characterized this omission as intentional and a fraudulent misrepresentation.

217 Justice Shelley correctly concluded that "[t]he evidence ... clearly establishes that ... [Weir-Jones Technical] was aware of the alleged breaches by ... [Purolator] long before it filed its Statement of Claim on July 2011."[165]

218 Weir-Jones Technical should have filed its claim before November 3, 2010 or at the latest February 29, 2011. It filed its claim on July 22, 2011 — somewhere between four and eight months late.

219 Weir-Jones Technical's argument that the grievance delayed the start of the two-year *Limitations Act* period has no merit whatsoever. The grievance related to claims under the Teamsters-Purolator collective agreement and the lawsuit related to claims that were not covered by the collective agreement.[166] Weir-Jones Technical understood this distinction from the outset. Its May 11, 2009 letter to Purolator's in-house counsel expressly stated that Weir-Jones Technical intended to sue Purolator for "all matters which do not fall under the terms of the Collective Agreement."

220 The fact that the Teamsters expressed a willingness to help resolve differences Weir-Jones Technical had with Purolator outside the collective agreement is entirely irrelevant. Suppose that a mutual friend of the guiding minds of Purolator and Weir-Jones Technical had offered to mediate. This would be of no consequence. Of vital importance is when Weir-Jones Technical became aware of the facts that caused it to conclude that Purolator had breached its contractual obligations to it and that an action against Purolator was warranted.

221 Justice Shelley's conclusion to reject the grievance argument was indisputably correct.[167]

222 So were her decisions to reject Weir-Jones Technical's standstill agreement and promissory estoppel arguments.[168] They were completely unfounded. A joint wish to resolve differences without recourse to "costly legal proceedings" has no legal effect on the application of the two-year period under the *Limitations Act*.

223 Purolator's position is so strong and that of Weir-Jones Technical so weak that the ultimate outcome of this dispute is obvious. Weir-Jones Technical cannot possibly succeed.

224 It follows that the same result is compelled if the less onerous standard is applied.

VII. Conclusion

225 This appeal is dismissed.

Appeal dismissed.

Footnotes

1 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.). The Supreme Court released this judgment on January 23, 2014.

2 *898294 Alberta Ltd v. Riverside Quays Limited Partnership*, 2018 ABCA 281 (Alta. C.A.), ¶ 12 ("Summary judgment is reserved for the resolution of disputes where the outcome of the contest is obvious .... Is the 'moving party's position ... unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success very low?'"); *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204 (Alta. C.A.), ¶ 2; (2018), 20 C.P.C. (8th) 43 (Alta. C.A.), 46-47 ("Summary judgment may be appropriate 'if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low'. This is an onerous standard and rightly so"); *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153 (Alta. C.A.), ¶ 15; (2018), 17 C.P.C. (8th) 252 (Alta. C.A.), 255 ("Summary dismissal is

appropriate 'if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low"); *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160 (Alta. C.A.), ¶ 2; (2017), 100 C.P.C. (7th) 52 (Alta. C.A.), 61 ("Rule 7.3 of the *Alberta Rules of Court* allows a court to summarily dismiss an action that is without merit. A nonmoving party's position is without merit if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low"); *Talisman Energy Inc v. Questerre Energy Corporation*, 2017 ABCA 218 (Alta. C.A.), ¶ 18; (2017), 57 Alta. L.R. (6th) 19 (Alta. C.A.), 29 ("the court must ask 'whether there is any issue of merit that genuinely requires a trial or conversely, whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily'"); *Baim v. North Country Catering Ltd.*, 2017 ABCA 206 (Alta. C.A.), ¶ 12 ("The test for summary judgment is whether the claim or defence is so compelling that the likelihood it will succeed is very high, such that it should be determined summarily"); *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331 (Alta. C.A.), ¶ 10 ("The case management judge correctly stated the legal test for summary dismissal as found in this Court's recent decisions in *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.* ... and *776826 Alberta Ltd. v. Ostrowercha*"); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.), ¶ 27; (2016), 612 A.R. 284 (Alta. C.A.), 289 ("the court must ask 'whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defense is so compelling that the likelihood of it will succeed is very high such that it should be determined summarily'"); *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12 (Alta. C.A.), ¶ 19 (the Court adopted the test set out in *P. (W.) v. Alberta*); *776826 Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49 (Alta. C.A.), ¶ 13; (2015), 593 A.R. 391 (Alta. C.A.), 395 (the Court adopted the test set out in *P. (W.) v. Alberta*); *P. (W.) v. Alberta*, 2014 ABCA 404 (Alta. C.A.), ¶ 26; (2014), 378 D.L.R. (4th) 629 (Alta. C.A.), 642 ("The question is whether there is in fact any issue of 'merit' that *genuinely* requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily") (emphasis in original); *Stout v. Track*, 2015 ABCA 10 (Alta. C.A.), ¶¶ 48 & 50; (2015), 62 C.P.C. (7th) 260 (Alta. C.A.), 279 per Wakeling, J.A. ("Rule 7.3(1)(b) of the *Alberta Rules of Court* allows a court to dismiss a plaintiff's claim if it has no merit. The nonmoving party's position is without merit if the likelihood the moving party's position will prevail is very high. The likelihood the moving party's position will prevail is very high if the comparative strengths of the moving and nonmoving party's positions are so disparate that the likelihood the moving party's position will prevail is many times greater than the likelihood that the nonmoving party's position will carry the day. ... [T]he comparative strengths of the moving and nonmoving parties' positions need not be so disparate that the nonmoving party's prospects of success must be close to zero before summary judgment may be granted"); *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.), ¶¶ 45 & 46; (2014), 584 A.R. 68 (Alta. C.A.), 78 ("Rule 7.3 of the new *Alberta Rules of Court* allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit. A party's position is without merit if the facts and the law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high"); *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 20; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 357 per Wakeling, J.A. ("Summary judgment is appropriate if the nonmoving party's position is without merit. ... 'A party's position is without merit if the facts and law make the moving party's position unassailable .... A party's position is unassailable if it is so compelling that the likelihood of success is very high'"); *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626 (Alta. Q.B.), ¶ 60 ("The questions is whether, on the record, the probative value of the non-moving party's evidence is so low that it does not preclude the inferences sought by the moving party. In that sense, the non-moving party's likelihood of success must be 'very low'"); *Quinney v. 1075398 Alberta Ltd.*, 2015 ABQB 452 (Alta. Q.B.), ¶ 39; (2015), 24 Alta. L.R. (6th) 202 (Alta. Q.B.), 214 ("With respect to Rule 7.3(1), a party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. To be unassailable, the position must be so compelling that the likelihood of success is very high"); *Rohit Land Inc. v. Cambrian Strathcona Properties Corp.*, 2015 ABQB 375 (Alta. Q.B.), ¶ 48; [2015] 12 W.W.R. 728 (Alta. Q.B.), 744 (the Court adopted the *Beier* principles); *Mackey v. Squair*, 2015 ABQB 329 (Alta. Q.B.), ¶ 22; (2015), 617 A.R. 259 (Alta. Q.B.), 264 ("A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. In this regard, 'unassailable' means if it is so compelling that the likelihood of success is very high"); *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120 (Alta. Q.B.), ¶ 51; (2015), 40 C.L.R. (4th) 187 (Alta. Q.B.), 208-09 (the Court applied the principles set out in *Access Mortgage Corp. (2004)* and *Beier v. Proper Cat Construction Ltd.*); *Nipshank v. Trimble*, 2014 ABQB 120 (Alta. Q.B.), ¶ 14; (2014), 8 Alta. L.R. (6th) 152 (Alta. Q.B.), 158-59 ("the preferable formulation I prefer is stated in *Beier v. Proper Cat Construction Ltd.* ... and in *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* ... which requires the Court to consider whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high. The reason this is preferable is that it not only states the high threshold which an applicant must meet for obtaining summary judgment, but also contains within it the rationale for granting summary judgment and depriving the respondent of full access to all litigation tools"); *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 29; (2014), 587 A.R. 16 (Alta. Q.B.), 26 ("The formulation I [prefer is] that stated in *Beier v. Proper Cat Construction Ltd.*... and in *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* ..., which requires the Court to consider whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high"); *Deguire v. Burnett*, 2013 ABQB 488 (Alta. Q.B.), ¶ 22; (2013), 36 R.P.R. (5th) 60 (Alta. Q.B.), 69 ("Justice Wakeling's formulation of the test for obtaining summary judgment - that is, whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high - not only expresses the high threshold set by the Court of Appeal in *Murphy Oil* and *Boudreault*; it also contains within it the rationale for granting summary judgment and thereby depriving a litigant of full access to all litigation tools"); *Hari Estate v. Hari Estate*, 2015 ABQB 605 (Alta. Q.B.), ¶ 80 ("The test for summary judgment is whether

the applicant's position is 'unassailable', but that does not mean that there is 'no reasonable doubt' about its success. A party's position is unassailable if it is so compelling that the likelihood of success is very high") & *Rai v. 1294477 Alberta Ltd.*, 2015 ABQB 349 (Alta. Q.B.), ¶ 22 & 36; (2015), 618 A.R. 220 (Alta. Q.B.), 225 & 227 ("There is no doubt that a high degree of certainty is required to end a case early. ... The Defendant's position is unassailable on the record before the Court. This case does not merit further consumption of judicial resources").

3 E.g., *Chief Constable of Greater Manchester Police v. Carroll*, [2017] EWCA Civ 1992 (Eng. & Wales C.A. (Civil)), ¶ 60 per Sir Terence Etherton M.R. ("It cannot be said that the claim is so weak or inherently implausible that it could be ... dismissed on summary judgment"); *Rich v. CGU Insurance Ltd.*, [2005] H.C.A. 16 (Australia H.C.), ¶ 18; (2005), 214 A.L.R. 370 (Australia H.C.), 375 per Gleeson C.J. & McHugh & Gummow, J.J. ("issues ... are to be determined in a summary way only in the clearest of cases"); *Palermo v. National Australia Bank Ltd.*, [2017] QCA 321 (Queensland S.C.), ¶ 70 ("summary judgment for a plaintiff should be granted where it is clear that any available defence has no prospects of success ... or because a defence would be bound to fail"); *Thompson v. Hopkins*, [2018] NZCA 197 (New Zealand C.A.), ¶ 8 ("Where a defendant applies for summary judgment, a defendant has to show that the plaintiff cannot succeed"); *Bigyard Holdings Ltd. v. Tasmandairy Ltd.*, [2017] NZHC 1918 (New Zealand H.C.), ¶ 45 ("The Court must be left without any real doubt or uncertainty"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 251-52 ("In essence ... the inquiry ... is ... whether the evidence presents a sufficient disagreement to require submissions to a jury or whether it is so one-sided that one party must prevail as a matter of law"); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (U.S. Pa. S.C. 1986), 586-87 ("[The nonmoving party] must do more than simply show that there is some metaphysical doubt as to the material facts. ... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue for trial'"); *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 325 ("the burden on the moving party may be discharged by ... pointing out to the district court ... that there is an absence of evidence to support the nonmoving party's case") & *Dunn v. Menard, Inc.*, 880 F.3d 899 (U.S. C.A. 7th Cir. 2018), 905 ("Summary judgment is appropriate if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. ... A genuine dispute of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party'").

4 *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.), ¶ 10; [2008] 1 S.C.R. 372 (S.C.C.), 378 ("The summary judgment rule ... prevents claims or defences that have no chance of success from proceeding to trial"); *Another Look Ventures Inc. v. 642157 Alberta Ltd.*, 2012 ABCA 253 (Alta. C.A.), ¶ 8 ("[summary judgment may be granted if] it is plain and obvious that the action cannot succeed"); *Enokhok Development Corp. v. Alberta Treasury Branches*, 2011 ABCA 322 (Alta. C.A.), ¶ 12; (2011), 68 Alta. L.R. (5th) 126 (Alta. C.A.), 131 ("Summary judgment should only be granted if the matter is factually and legally beyond doubt"); *Eng v. Eng*, 2010 ABCA 19 (Alta. C.A.), ¶ 5; [2010] 6 W.W.R. 29 (Alta. C.A.), 31 ("It must be beyond doubt that no genuine issue for trial exists"); *Kristal Inc. v. Nicholl & Akers*, 2007 ABCA 162 (Alta. C.A.), ¶ 7; (2007), 41 C.P.C. (6th) 381 (Alta. C.A.), 385 ("The [summary judgment] test is whether it is plain and obvious that the action cannot succeed"); *Saxton v. Credit Union Deposit Guarantee Corp.*, 2006 ABCA 175 (Alta. C.A.), ¶ 18; (2006), 384 A.R. 309 (Alta. C.A.), 314 ("To grant ... [a summary judgment] application a court must be satisfied that it is 'plain and obvious' or 'beyond a doubt' the action will not succeed"); *Stoddard v. Montague*, 2006 ABCA 109 (Alta. C.A.), ¶ 13; (2006), 412 A.R. 88 (Alta. C.A.), 91 ("In applications for summary dismissal, the moving party has the onus of filing evidence to demonstrate the claims against him or her are hopeless and beyond doubt"); *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69 (Alta. C.A.), ¶ 24; (2006), 384 A.R. 251 (Alta. C.A.), 257 ("Summary judgment ... will only be granted where there is no genuine issue for trial. It must be 'plain and obvious' that the action cannot succeed. ... Other formulations of the burden to be met by a moving party include the 'beyond doubt' standard"); *De Shazo v. Nations Energy Co.*, 2005 ABCA 241 (Alta. C.A.), ¶ 19; (2005), 256 D.L.R. (4th) 502 (Alta. C.A.), 508 ("When faced with a summary judgment application of this type the court must ascertain whether there are undisputed facts that necessarily lead to the conclusion that it is plain and obvious that the plaintiff's claim is statute barred"); *Prefontaine v. Veale*, 2003 ABCA 367 (Alta. C.A.), ¶ 9; (2003), [2004] 6 W.W.R. 472 (Alta. C.A.), 478 ("The test for summary judgment in favour of a defendant under Rule 159 ... is whether 'it is plain and obvious that the action cannot succeed'"); *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298 (Alta. C.A.), ¶ 19; (2003), 27 Alta. L.R. (4th) 62 (Alta. C.A.), 65 ("It must be beyond doubt that no genuine issue for trial exists"); *Wilson v. Medicine Hat (City)*, 2000 ABCA 247 (Alta. C.A.), ¶ 54; (2000), 87 Alta. L.R. (3d) 25 (Alta. C.A.), 41 ("the suits... should be barred. ... [T]here would be an unanswerable defence for purposes of R. 159"); *Boudreault v. Barrett*, 1998 ABCA 232 (Alta. C.A.), ¶ 2; (1998), 219 A.R. 67 (Alta. C.A.), 69 ("In our view, the action could not succeed if it proceeded to trial and was properly dismissed under Rule 159"); *Wavel Ventures Corp. v. Constantini*, 1996 ABCA 415 (Alta. C.A.), ¶ 35; (1996), 46 Alta. L.R. (3d) 292 (Alta. C.A.), 305 ("Summary judgment cannot be granted unless the issue is beyond doubt") *Mellon (Next Friend of) v. Gore Mutual Insurance Co.*, 1995 ABCA 340 (Alta. C.A.), ¶ 3; (1995), 174 A.R. 200 (Alta. C.A.), 201 ("[summary judgment may be granted if it is] manifestly clear or beyond a reasonable doubt that there is not a triable issue"); *Mr. Submarine Ltd. v. Aristotelis Holdings Ltd.*, 1993 ABCA 153 (Alta. C.A.), ¶ 3; (1993), 102 D.L.R. (4th) 764 (Alta. C.A.), 765 ([summary judgment is unsafe unless] "all substantial doubt [about the nonmoving party's care] has been removed"); *Zebroski v. Jehovah's Witnesses*, 1988 ABCA 256 (Alta. C.A.), ¶ 5; (1988), 87 A.R. 229 (Alta. C.A.), 232 ("summary judgment is available to a defendant, where the material clearly demonstrates that the action is bound to fail"); *German v. Major*,

1985 ABCA 176 (Alta. C.A.), ¶ 37; (1985), 62 A.R. 2 (Alta. C.A.), 9 ("It is impossible for German to win this suit. ... It is, in short, plain and obvious that German's action will not succeed"); *Pacific Western Airlines Ltd. v. Gauthier* (1977), 2 Alta. L.R. (2d) 52 (Alta. C.A.), 54 ("[the summary judgment test is whether] the question at issue is beyond doubt"); *Scandinavian American National Bank of Minneapolis v. Shuman* (1917), 37 D.L.R. 419 (Alta. C.A.), 421 ("[summary judgment is appropriate only if] it was manifested that [the nonmoving party] had no defence in law to the action"); *R.B. New Co. v. 1331440 Alberta Ltd.*, 2013 ABQB 487 (Alta. Q.B.), ¶ 23; (2013), 8 Alta. L.R. (6th) 40 (Alta. Q.B.), 47-48 ("in essence, the test for summary judgment - whether for the plaintiff or defendant - remains the same: the applicant must prove that the party opposite has 'no chances of success': *Lameman*"); *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶ 38; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 91 (the Court adopted the *Beier* principles); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 61; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 129 ("Rule 7.3 of the new *Alberta Rules of Court* allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit. A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high"); *Jackson v. Canadian National Railway*, 2012 ABQB 652 (Alta. Q.B.), ¶ 112; (2012), [2013] 4 W.W.R. 311 (Alta. Q.B.), 360-61(the Court held that *Canada (Attorney General) v. Lameman* sets out the applicable summary judgment test); *Airco Aircraft Charters Ltd. v. Edmonton Regional Airports Authority*, 2010 ABQB 397 (Alta. Q.B.), ¶ 23; (2010), 28 Alta. L.R. (5th) 324 (Alta. Q.B.), 333 ("If a defendant applies for summary judgment, it must be plain and obvious, clear or beyond doubt that the action should be summarily dismissed"); *Donaldson v. Farrell*, 2011 ABQB 11 (Alta. Q.B.), ¶ 33 ("The Applicants have other remedies available to them such as summary dismissal proceedings if they consider that some of Ms. Donaldson's claims are hopeless"); *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655 (Alta. Q.B.), ¶¶ 58 & 157; (2004), [2005] 8 W.W.R. 442 (Alta. Q.B.), 477 & 514 ("All of these factors can be considered in deciding if the case is 'hopeless' or if there is a 'genuine' issue for trial. ... To use the language of the cases, the claim is bound to fail, has no prospect of success, and does not raise any genuine issue for trial"); *Kary Investment Corp. v. Tremblay*, 2003 ABQB 315 (Alta. Q.B.), ¶ 21 ("summary judgment may only be granted where it is demonstrated that the outcome is virtually certain"); *Dreco Energy Services Ltd. v. Wenzel*, 2003 ABQB 1067 (Alta. Q.B.), ¶ 41; (2003), 344 A.R. 299 (Alta. Q.B.), 309 ("The bar is high in an application for summary dismissal of a claim"); *Tanar Industries Ltd. v. Outokumpu Ecoenergy Inc.*, 1999 ABQB 597 (Alta. Q.B.), ¶ 26; [1999] 11 W.W.R. 146 (Alta. Q.B.), 153 (a moving party must "clearly demonstrate that the Plaintiff's action is bound to fail"); *Union of India v. Bumper Development Corp.* (1995), 171 A.R. 166 (Alta. Q.B.), 180 ("on an application for summary judgment, the parties are entitled to an answer if in the opinion of the court the matter is beyond doubt"); *Royal Bank v. Starko* (1993), 9 Alta. L.R. (3d) 339 (Alta. Q.B.), 342 ("To obtain summary judgment pursuant to R. 159 ... the Applicant must show that the question at issue is beyond doubt"); *Investors Group Trust Co. v. Royal View Apartments Ltd.* (1986), 70 A.R. 41 (Alta. Q.B.), 47-48 ("summary judgment should not be granted ... unless the question is beyond doubt and there is no reasonable cause of action"); *Allied-Signal Inc. v. Dome Petroleum Ltd.* (1991), 122 A.R. 321 (Alta. Q.B.), 329 ("A defendant must show more than a strong likelihood that he will succeed. To justify deciding the matter without a trial, the pleadings and evidence on the motion must show that the claim has no reasonable prospect of success"); *Wong v. Lantic Inc.*, 2012 ABQB 716 (Alta. Q.B.), ¶ 48; (2012), [2013] 4 W.W.R. 578 (Alta. Q.B.), 587 ("Before granting summary judgment, the court must be satisfied that it is plain and obvious that the action cannot succeed"); *Rencor Developments Inc. v. First Capital Realty Inc.*, 2009 ABQB 262 (Alta. Q.B.), ¶ 8 ("An applicant for summary judgment or dismissal must pass a high threshold .... The applicant must establish that it is 'plain and obvious' or 'beyond a doubt' that the action will not succeed"); *Pointe of View Developments Inc. v. Cannon & McDonald Ltd.*, 2008 ABQB 713 (Alta. Q.B.), ¶ 21; (2008), 77 C.L.R. (3d) 213 (Alta. Q.B.), 218 (the Court applied the *Lameman* test); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Alta. Q.B.), 47 (summary judgment may be granted if the ultimate disposition of the action is "beyond all doubt"); *Barrowman v. Ranchland Asphalt Services Ltd.* (1981), 29 A.R. 306 (Alta. Q.B.), 335-36 ("The decisions do indicate that summary judgment should not be granted unless the question at issue is beyond doubt") & *Jason Development Corp. v. Robertoria Properties Ltd.* (1980), 42 A.R. 369 (Alta. Q.B.), 371 ("summary judgment should not be granted 'unless the question at issue is beyond doubt'").

5 *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 (B.C. C.A.), ¶ 50 ("I cannot conclude that B & L's claim is bound to fail"); *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137 (B.C. C.A.), 139 ("if the defendant is bound to lose, the [summary judgment] application should be granted"); *Green v. Tram*, 2015 MBCA 8 (Man. C.A.), ¶ 2 ("The motions judge concluded that ... the appellant's claims ... must fail"); *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 (N.S. C.A.), ¶ 59 ("In my view, given the Release and Indemnity, Mr. Upham's claim against Shannex for unjust enrichment has no real chance of success. ... Summary judgment should issue to dismiss Mr. Upham's direct claims against Shannex"); *656340 N.B. Inc. v. 059143 N.B. Inc.*, 2014 NBCA 46 (N.B. C.A.), ¶ 10 ("[to grant summary judgment] the moving party's case must be unanswerable"); *Forsythe v. Furlotte*, 2016 NBCA 6 (N.B. C.A.), ¶ 24 ("The summary judgment test ... is a stringent one and is designed to determine whether there is any reason to doubt the outcome of a matter ... because the moving party's case is 'unanswerable'"); *Schram v. Nunavut*, 2014 NBCA 53 (N.B. C.A.), ¶ 8 ("Before granting summary judgment, the motion judge had to determine on the record ... that the outcome was a foregone conclusion"); *RBC v. MJL Enterprises & Ors.*, 2017 PECA 10 (P.E.I. C.A.), ¶ 9 ("Rule 20.04(1) allows a court, on motion, to grant summary judgment if the court is satisfied there is no genuine issue requiring a trial") & *Burns Bog Conservation Society v. Canada (Attorney General)*, 2014 FCA 170 (F.C.A.), ¶ 43 ("this is a clear case where the appellant's claim must be weeded out because it is bound to fail").

6 E.g., *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.), ¶ 10; [2008] 1 S.C.R. 372 (S.C.C.), 378 ("The summary judgment rule ... prevents claims or defences that have no chance of success from proceeding to trial"); *Enokhok Development Corp. v. Alberta Treasury Branches*, 2011 ABCA 322 (Alta. C.A.), ¶ 12; (2011), 68 Alta. L.R. (5th) 126 (Alta. C.A.), 131 ("Summary judgment should only be granted if the matter is factually and legally beyond doubt"); *Stoddard v. Montague*, 2006 ABCA 109 (Alta. C.A.), ¶ 13; (2006), 412 A.R. 88 (Alta. C.A.), 91 ("In applications for summary dismissal, the moving party has the onus of filing evidence to demonstrate the claims against him or her are hopeless and beyond doubt"); *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 (B.C. C.A.), ¶ 50 ("I cannot conclude that B&L's claim is bound to fail"); *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137 (B.C. C.A.), 139 ("if the defendant is bound to lose, the [summary judgment] application should be granted"); *Forsythe v. Furlotte*, 2016 NBCA 6 (N.B. C.A.), ¶ 24 ("The summary judgment test ... is a stringent one and is designed to determine whether there is any reason to doubt the outcome of the matter"); *Burns Bog Conservation Society v. Canada (Attorney General)*, 2014 FCA 170 (F.C.A.), ¶ 43 ("This is a clear case where the appellant's claim must be weeded out because it is bound to fail"); *Palermo v. National Australia Bank Ltd.*, [2017] QCA 321 (Queensland S.C.), ¶ 70 ("summary judgment for a plaintiff should be granted where it is clear that any available defence has no prospects of success ... or because a defence would be bound to fail"); *Thompson v. Hopkins*, [2018] NZCA 197 (New Zealand C.A.), ¶ 8 ("Where a defendant applies for summary judgment, a defendant has to show that the plaintiff cannot succeed") & *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (U.S. Pa. S.C. 1986), 587 per Powell, J. ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'").

7 E.g., *898294 Alberta Ltd v. Riverside Quays Limited Partnership*, 2018 ABCA 281 (Alta. C.A.), ¶ 12 ("Summary judgment is reserved for the resolution of disputes where the outcome of the contest is obvious. ... Is the moving party's position ... so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success very low?"); *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160 (Alta. C.A.), ¶ 2; (2017), 100 C.P.C. (7th) 52 (Alta. C.A.), 61 ("Rule 7.3 of the *Alberta Rules of Court* allows a court to summarily dismiss an action that is without merit. A nonmoving party's position is without merit if the moving party's position is ... so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low"); *P. (W.) v. Alberta*, 2014 ABCA 404 (Alta. C.A.), ¶ 26; (2014), 378 D.L.R. (4th) 629 (Alta. C.A.), 642 ("The question is whether there is ... any issue of merit that *genuinely* requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily") (emphasis in original) & *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 251-52 ("In essence ... the inquiry ... is ... whether the evidence presents a sufficient disagreement to require submissions to a jury or whether it is so one-sided that one party must prevail as a matter of law").

8 *Stout v. Track*, 2015 ABCA 10 (Alta. C.A.), n. 65; (2015), 62 C.P.C. (7th) 260 (Alta. C.A.), n. 65 per Wakeling, J.A. (there is a marked disparity if the moving party's likelihood of success is at least four times greater than that of the nonmoving party).

9 *Deguire v. Burnett*, 2013 ABQB 488 (Alta. Q.B.), ¶¶ 19-22; (2013), 36 R.P.R. (5th) 60 (Alta. Q.B.), 66-69.

10 *Nipshank v. Trimble*, 2014 ABQB 120 (Alta. Q.B.), ¶ 14; (2014), 8 Alta. L.R. (6th) 152 (Alta. Q.B.), 158-59 & *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 29; (2014), 587 A.R. 16 (Alta. Q.B.), 26.

11 2014 ABQB 111 (Alta. Q.B.), ¶ 29; (2014), 587 A.R. 16 (Alta. Q.B.), 26.

12 *Arndt v. Banerji*, 2018 ABCA 176 (Alta. C.A.), ¶ 36 (the Court applied the *Stefanyk v. Sobeys Capital Incorporated* test); *Stefanyk v. Sobeys Capital Incorporated*, 2018 ABCA 125 (Alta. C.A.), ¶ 15; [2018] 5 W.W.R. 654 (Alta. C.A.), 661 ("is the record such that it is fair and just to decide summarily if the moving party has proven the case on a balance of probabilities"). There are a number of opinions that make no mention of the balance of probabilities component but favour the fair-and-just standard. *Amik Oilfield Equipment & Rentals Ltd. v. Beaumont Energy Inc.*, 2018 ABCA 88 (Alta. C.A.), ¶ 6 ("Under the new approach, summary judgment ought to be granted whenever there is no genuine issue requiring trial where the judge is able to reach a 'fair and just determination on the merits on a motion for summary judgment'"); *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432 (Alta. C.A.), ¶ 11; (2017), [2018] 5 W.W.R. 32 (Alta. C.A.), 47 ("The [*Hryniak v. Mauldin*] test requires the court to examine the existing record to see if a disposition that is fair and just to both parties can be made on the record"); *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378 (Alta. C.A.), ¶ 15; (2017), 60 Alta. L.R. (6th) 57 (Alta. C.A.), 67 ("The so-called modern approach to summary judgment as laid out in *Hryniak v. Mauldin* was confirmed by the

Alberta Court of Appeal in *Windsor v. Canadian Pacific Railway*.... *Windsor* indicates that on a summary judgment application, the appropriate question to ask is whether there is an issue of 'merit' that genuinely requires a trial .... A second consideration is 'whether examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties'"); *Goodswimmer v. Canada (Attorney General)*, 2017 ABCA 365 (Alta. C.A.), ¶ 25; (2017), 418 D.L.R. (4th) 157 (Alta. C.A.), 177 ("Litigation can be disposed of summarily when the court is able to reach a fair and just determination on the merits using a summary process. 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"); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.), ¶ 25; (2016), 612 A.R. 284 (Alta. C.A.), 289 ("The Supreme Court [in *Hryniak v. Mauldin*] held that summary judgment ought to be granted whenever there is no genuine issue requiring trial: 'when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment'"); *Templanza v. Wolfman*, 2016 ABCA 1 (Alta. C.A.), ¶ 18; (2016), 612 A.R. 67 (Alta. C.A.), 71 ("summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record"); *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 406 (Alta. C.A.), ¶ 15; (2015), 52 C.L.R. (4th) 17 (Alta. C.A.), 24 ("*Hryniak* .... and *Windsor* ... hold that summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record. ... Examining whether there is a 'genuine issue for trial' is still a valuable analytical tool in deciding whether a trial is required, or whether the matter can be disposed of summarily"); *Bilawchuk v. Bloos*, 2014 ABCA 399 (Alta. C.A.), ¶ 14 ("Under the new Rule, summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record"); *Maxwell v. Wal-Mart Canada Corp.*, 2014 ABCA 383 (Alta. C.A.), ¶ 12; (2014), 588 A.R. 6 (Alta. C.A.), 10 ("Under the new Rule, no genuine issue for trial exists where the judge is able to make a fair and just determination on the merits without a trial, because the summary judgment process allows him or her to make the necessary findings of fact, to apply the law to those facts and is a proportionate, more expeditious and just means to achieve a just result. Under the new Rule, summary judgment may be granted if a disposition that is fair and just to both parties can be made on the existing record") & *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶ 13; (2014), 371 D.L.R. (4th) 339 (Alta. C.A.), 349 ("The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record").

13 See *330626 Alberta Ltd. v. Ho & Laviolette Engineering Ltd.*, 2018 ABQB 478 (Alta. Q.B.), ¶ 41 (Feehan, J. asked the Court of Appeal to resolve this question).

14 An appeal court may substitute its assessment of the law if it disagrees with the original court. *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.), ¶ 8; [2002] 2 S.C.R. 235 (S.C.C.), 247. A more demanding standard applies to the facts. An appeal court may disregard an original court's fact-finding decision only if it concludes that it is the product of a palpable and overriding error and is clearly wrong. Id. at ¶ 10; [2002] 2 S.C.R. at 248. An original court's application of the correct legal standard to facts may only be set aside by an appeal court if it concludes that the original court made a palpable and overriding error or is clearly wrong. Id. at ¶ 36; [2002] 2 S.C.R. at 262. The chambers judge made no reversible error.

15 R.S.A. 2000, c. L-12, s. 3(1)(a).

16 Alta. Reg. 124/2010.

17 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.).

18 *Jacobs v. Booth's Distillery Co.*, 85 L.T.R. 262, 262 (H.L. 1901).

19 *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 92 & 94.

20 *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 327.

21 Alta. Reg. 124/2010.

22 R.S.A. 2000, c. I-8, s. 10.

23 R.S.A. 2000, c. L-12, c. 3(1)(a).

24 Alta. Reg. 124/2010. Section 92(13) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) authorizes a province to make laws in relations to "Property and Civil Rights in the Province". This provision authorizes a province to make civil procedure court rules. Section 28.1 of the *Judicature Act*, R.S.A. 2000, c. J-2 empowers the Lieutenant Governor in Council to make rules of court by regulation. The current *Alberta Rules of Court*, Alta. Reg. 124/2010 were enacted by the Lieutenant Governor in Council by order in council on July 14, 2010 and came into force on November 1, 2010. They were agreed to by the judicial branch of government.

25 *Alberta Rules of Court*, Alta. Reg. 390/68 (in force January 1, 1969). The rules were cited as *The Supreme Court Rules* until September 7, 1983. Alta. Reg. 338/83, s. 2. See Laycraft & Stevenson, "The Alberta Rules of Court - 1969", 7 Alta. L. Rev. 190, 192 (1969) ("The one major change in these rules is the replacement of the old Rules 128 and 140 with the single Rule 159. ... This procedure may be ... available in tort actions where it was not previously available").

26 Effective June 19, 1986 a defendant was given the option of applying for summary judgment. Alta. Reg. 216/86.

27 O.C. 716/44.

28 O.C. August 12, 1914.

29 R.S.A. 2000, c. L-12.

30 Purolator Courier Ltd. changed its name to Purolator Inc.

31 R.S.C. 1985, c. L-2, ss. 3(1) & 27(1). Owner-operators are dependent contractors. Dependent contractors are employees. Trade unions are certified bargaining agents of employees.

32 An October 8, 2008 letter from Weir-Jones Technical to Purolator asserted that Purolator had failed as promised "to award ... [Weir-Jones Technical] a contract for the bulk delivery of freight from Purolator's depot in Edmonton to distribution sites in Bonnyville and Fort McMurray".

33 Emphasis added.

34 This is the action Weir-Jones Technical commenced against Purolator Courier Ltd., Purolator Ltd. and Purolator Freight in the Court of Queen's Bench on July 22, 2011.

35 Affidavit of Mike Gieck sworn October 14, 2015.

36 Id. ¶ 10.

37 Affidavits of Andrew Weir-Jones sworn December 4, 2015 and April 8, 2016.

38 December 4, 2015 affidavit, ¶ 19.

39 April 8, 2016 affidavit, ¶ 26.

40 Id. ¶ 6.

41 2017 ABQB 491 (Alta. Q.B.).

42 2017 ABQB 491 (Alta. Q.B.), ¶¶ 36, 37 & 42.

43 Id. ¶ 40.

44 Id. ¶¶ 40 & 41.

45 R.S.A. 2000, c. L-12.

46 2017 ABQB 491 (Alta. Q.B.), ¶ 24.

47 Id. ¶¶ 36 & 42.

48 *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204 (Alta. C.A.), ¶ 1; (2018), 20 C.P.C. (8th) 43 (Alta. C.A.), 45 (”Modern civil procedure codes have a summary judgment protocol. They are designed to remove from the litigation stream proceedings the outcomes of which are obvious”); *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 327 per Rehnquist, J. (”Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole”); Cavanagh, “*Matsushita Electrical Industrial Co. v. Zenith Radio Corp.* at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?”, (1986), 82 Antitrust L.J. 81 (U.S. Pa. S.C.) , 111-12 (2018) (”*Matsushita*, together with its companion cases *Anderson* and *Celotex Corp. v. Catrett*, has ... revived Rule 56 from its dormancy and restored summary judgment to its proper role in the Federal Rule’s procedural scheme - to provide a mechanism for disposal of cases not worthy of trial. ... [S]ummary judgment ... is an integral part of the Federal Rules and consistent with their goal ‘to secure the just, speedy and inexpensive determination of every action and proceeding’”) & Clark & Samenow, “The Summary Judgment,” (1986), 38 Yale L.J. 423 (U.S. Sup. Ct.) , 423 (1929) (”As an effective remedy for such delay within the limits prescribed by its form and purpose, the summary judgment procedure has become an important feature of the most modern practice systems”).

49 Some American judges do. E.g., *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (U.S. Sup. Ct. 1970), 176 per Black, J. (”The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases”) & *Whitaker v. Coleman*, 115 F.2d 305 (U.S. C.A. 4th Cir. 1940), 306 (”The invoked procedure [*Federal Rules of Civil Procedure* 56], valuable as it is for striking through sham claims and defences which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial”).

50 See American Bar Association Judicial Administration Division, Standards Relating to Trial Courts § 2.52(a) (1992) (”General civil - 90% of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur”).

51 E.g., *Chu v. Chen*, 2002 BCSC 906 (B.C. S.C.), ¶ 23; (2002), 22 C.P.C. (5th) 73 (B.C. S.C.), 80 (”In the mid to late 1970’s there was a time interval of about 6 to 9 months from the date a party applied to the court for a trial date and the first day the court assigned for the trial’s commencement. ... By the early 1980’s, the time interval from application for a trial date to the conventional

trial date itself increased from about 6 to 9 months to around 12 to 18 months").

52 Organization for Economic Co-operation and Development, Economics Department Policy Note No. 18, "What Makes Civil Justice Effective?" ¶ 2 (June 2013) ("Lengthy [periods between the commencement of proceedings and trial disposition] ... undermine certainty of transactions and investment returns, and impose heavy costs on firms. Moreover, the length of trials is related to other crucial measures of performance such as confidence in the justice system: OECD analyses on surveys of individuals in different countries suggest that a 10% increase in the average length of [trial disposition] ... is associated with a decrease of around 2 percentage points in the probability to have confidence in the justice system").

53 The Supreme Court of Canada has recognized this correlation. *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), ¶¶ 1-3; [2014] 1 S.C.R. 87 (S.C.C.), 92-93 (the Court acknowledged that the cost and delay associated with conventional trials diminished their value and correspondingly enhanced the value of other dispute resolution procedures). Americans refuse to accept that excessive delay is inevitable. American Bar Association Judicial Administration Division, Standards Relating to Trial Courts § 2.51(a) (1992) ("[the Standards promote] Court supervision and control of the movement of all cases from the time of filing ... through final disposition") & Kolb, "ABA Fights Court Delay", 72 A.B.A.J. 161 (1986) ("The [ABA] task force is seeking to have the bench and bar in every jurisdiction adopt the Court Delay Reduction Standards"). See also Cavanagh, "*Matsushita Electrical Industrial Co. v. Zenith Radio Corp.* at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?", (1986), 82 Antitrust L.J. 81 (U.S. Pa. S.C.) , 119 (2018) ("As caseloads expand and litigation costs escalate, judges will continue to use summary judgment to manage their dockets") & Schwarzer, Hirsch & Barrans, "The Analysis and Decision of Summary Judgment Motions" vii (Federal Judicial Centre 1991) ("Growing concern over cost and delay in civil litigation has focused increased attention on Rule 56 as a vehicle to implement the objectives of Fed. R. Civ. P. 1 - the just, speedy, and inexpensive resolution of litigation").

54 The Court of Queen's Bench of Alberta does not publish statistics recording on an annual basis the number of actions that are concluded by summary judgment, summary trial or a conventional trial or the amount of time that passes after an action is commenced and it is concluded by various file-closing events. This is essential information for those interested in the efficacious administration of justice. See Organization for Economic Co-operation and Development, Economics Department Policy Note No. 18, "What Makes Civil Justice Effective?" ¶ 10 (June 2013) ("A court system with a good degree of informatisation is essential to the development of so-called caseflow management techniques that allow for a smoother functioning of courts. Caseflow management broadly indicates the set of actions that a court can take to monitor the progress of cases and to make sure that they are managed efficiently. It includes for example the monitoring and enforcement of deadlines, the screening of cases for the selection of an appropriate dispute resolution track, and the early identification of potentially problematic cases").

55 Alta. Reg. 124/2010.

56 *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204 (Alta. C.A.), ¶ 1; (2018), 20 C.P.C. (8th) 43 (Alta. C.A.), 45-46 ("[summary judgment protocols] are designed to remove from the litigation stream proceedings the outcomes of which are obvious — they feature either unmeritorious claims or defences — and warrant allocation of minimal public and private resources"); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 71; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 134 ("[the] proper use [of summary judgment] expedites litigation, reduces costs for the litigants, frees up scarce judicial resources and ameliorates access to justice issues"); *Greene v. Field Atkinson Perraton*, 1999 ABQB 239 (Alta. Q.B.), ¶ 1 ("The purpose of the rules is to reject promptly and inexpensively, claims and defences that are bound to fail at trial"); *Espey v. Chapters Inc.* (1998), 225 A.R. 68 (Alta. Q.B.), 73 ("A summary judgment procedure is swift, cheap and efficient, with the same neutral evaluation before an impartial judge"); *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.), ¶ 2; (2011), 286 O.A.C. 3 (Ont. C.A.), 17 ("summary judgment is intended to provide a means for resolving litigation expeditiously and with comparatively less cost than is associated with a conventional trial"); *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 94 per Lord Woolf, M.R. ("a judge ... should make use of the [summary judgment] powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt. 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice"); *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 327 per Rehnquist, J. ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integrated part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action'") & *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 266-67 per Brennan, J. ("[summary judgment is] an expedited ... procedure"). See also A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 378 (3d ed. 2013) ("To insist that such disputes should nevertheless follow the full procedural course would waste valuable resources and, worse still, would enable unscrupulous litigants to harass their opponents by putting them to unnecessary trouble and expense and by keeping them out of their entitlements pending resolution of the case").

57 *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 56; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 126. See also id. ("The common law principle that a person has a right to be heard ... is not more important than speedy resolution of meritless claims or defences the continuation of which drive up the cost of litigation for everyone not just those prosecuting an action or maintaining a defence which has no real prospect of success") & *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶ 33; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 88 ("A summary judgment protocol recognizes that it is not unjust to deny a plaintiff with a meritless claim or a defendant with a meritless defence access to all stages of the litigation process").

58 Summary judgment and summary trial are fundamentally different processes. One is a trial; one is not. One may hear oral evidence. The other should not. *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶¶ 84-95; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 378-84 per Wakeling, J.A. These differences account for the Alberta Law Reform Commissions' recommendation to accord them distinct roles. Summary Disposition of Actions xv (Consultation Memorandum No. 12.12 August 2004).

59 Summary trials have been available in British Columbia since September 1, 1983. B.C. Reg. 178/83, s. 3. The current provision is r. 9-7. *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Alberta has had summary trials with oral evidence since September 1, 1998. *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 152/98. Summary trials are features of Saskatchewan's *Queen's Bench Rules*, r. 7-5(3) ("For the purposes of exercising any of the powers set out in subrule (2), a judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation") & Part 8 (abbreviated trial procedure if the trial of an action will be three days or less), Manitoba's *Court of Queen's Bench Rules*, Man. Reg. 553/88, r. 20.03(7) ("Without limiting the generality of subrule (6), the judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation"), Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2.2) ("A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation"), & r. 76 (simplified procedure for a restricted category of claims), Prince Edward Island's *Rules of Civil Procedure*, R. 20.04(6) ("A judge may, for the purpose of exercising any of the powers set out in subrule (5), order that oral evidence be presented by one or more parties, with or without time limits on its presentation") & R. 75 (quick ruling procedure) and the *Federal Court Rules*, SOR/98-106, r. 216 (3) ("The Court may make any order required for the conduct of the summary trial, including an order requiring a deponent or an expert who has given a statement to attend for cross-examination before the Court"). Summary trial procedures were used, in Roman law, continental law and early Anglo-American chancery and admiralty procedures. Millar, "Three American Ventures in Summary Civil Procedure", 38 Yale L.J. 193 (1928).

60 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 78; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 374 per Wakeling, J.A. See also *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 29; (2014), 587 A.R. 16 (Alta. Q.B.), 26 (summary judgment is a "proportionate remedy").

61 I have identified over 1000 reported Alberta judgments in the period commencing 1908 and ending January 31, 2014. See 1 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2019, at 7-13 ("This Rule is one of the most important, and most heavily relied upon in chambers"). Regrettably, neither the records of the Court of Queen's Bench or the Court of Appeal track the number of summary judgment applications made and heard on an annual basis.

62 E.g., *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 71; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 134 ("summary judgment is an important procedure which could be invoked more often than it is").

63 *Supreme Court Rules*, B.C. Reg. 168/2009, R. 9-6(5)(a) (a court may grant summary judgment if "there is no genuine issue for trial"); *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 7.3 (a court may grant summary judgment if a claim or defence has no merit); *The Queen's Bench Rules*, r. 7-5(1) (Saskatchewan) ("The Court may grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment"); *Court of Queen's Bench Rules*, Man. Reg. 553/88, 20.07(1) ("The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence"); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2) ("The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial with respect to

a claim or defence; or (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment"); *Rules of Court*, N.B. Reg. 82-73, R. 22.04(1) ("The court shall grant summary judgment if (a) the court is satisfied there is no genuine issue requiring a trial with respect to a claim or defence, or (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied it is appropriate to grant summary judgment"); Nova Scotia's *Civil Procedure Rules*, r. 13.04(2) ("When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success"); Prince Edward Island's *Rules of Civil Procedure*, R. 20.04 (a court may grant summary judgment if there is no "genuine issue requiring a trial"); *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, r. 17.01 (a court may grant summary judgment to a plaintiff if the "defendant has no defence to a claim") & 17A.03(1) ("Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly"); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 176(2) ("Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly"); *Rules of Court for the Supreme Court of Yukon*, R. 18(1)("the plaintiff, on the ground that there is no defence to the whole or part of a claim ... may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount") & *Federal Court Rules*, SOR/98-106, r. 215 (1) ("If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly").

64 *Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.2 (a court may give summary judgment against a claimant or defendant if the "claimant has no real prospect of succeeding on the claim ... or ... [the] defendant has no real prospect of successfully defending the claim ... and ... there is no other reason why the case or issue should be disposed of at a trial"). See *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 94 per Lord Woolf M.R. ("It is important that a judge in appropriate cases should make use of the powers contained in Pt. 24. ... If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible") & Woolf, Access to Justice: Final Report to the Civil Justice System in England and Wales 123 (1996) ("The test for making an order would be that the court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue"). This rule came into force on April 26, 1999. Under the previous regimes, only the plaintiff could apply for summary judgment and had to establish that the "defendant [had] ... no defence". *Rules of the Supreme Court, 1965*, Order 14, R. 1 (in force October 1, 1966); *The Rules of the Supreme Court, 1883*, Order III, R. 6 & Order XIV, R. 1 (in force October 24, 1883) & *Rules of Procedure*, Order XIV & *Supreme Court of Judicature Act, 1875*, 38 & 39 Vict., c. 77, First Sch. (in force November 1, 1875). See *Ray v. Barker* (1879), 4 Ex. D. 279 (Eng. C.A.), 281-82 ("Order XIV ... improves the procedure very much in actions for debts, where there is really no defence, for it saves the expense attending the formality of a trial at which perhaps the defendant will not appear. Nevertheless it is a remedy, which ought not to be used except where the plaintiff's case is clear: if there be any doubt as to the right to recover, he ought not be allowed to avail himself of a process, so summary in its nature").

65 New South Wales' *Uniform Civil Procedure Rules 2005*, r. 13.1(1) ("If, on application by the plaintiff in relation to the plaintiff's claim for relief or any part of the plaintiff's claim for relief: (a) there is evidence of the facts on which the claim or part of the claim is based, and (b) there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed, the court may give such judgment for the plaintiff, or make such order on the claim or that part of the claim, as the case requires"); Queensland's *Uniform Civil Procedure Rules 1999*, rr. 292 & 293 (the court may give judgment for the moving party if the nonmoving party "has no real prospect" of defending its position); *Palermo v. National Australia Bank Ltd.*, [2017] QCA 321 (Queensland S.C.), ¶ 70 ("a case for summary judgment is one where it is clear that a trial is unnecessary, and that it is better to end the proceedings, than to proceed to a contest. ... This approach is consistent with the UK legislation on which the rule was modelled"); Victoria's *Civil Procedure Act 2010*, No. 47, ss. 61 & 62 & *Supreme Court (General Civil Procedure) Rules 2015*, S.R. No. 103/2015, R. 22.04 (the court may give summary judgment for the moving party if the nonmoving party "has no real prospect" of defending its position); *Russell v. Wisewould Mahony Lawyers*, [2018] VSCA 125 (Australia Vic. Sup. Ct.), ¶ 8 ("The test for summary judgment is a stringent one. It must be shown that the proceeding has no real prospect of success, in the sense that a claim or defence has only a 'fanciful' prospect of success"); *Gull Lexington Group Pty. Ltd. v. Laguna Bay (Banongill) Agricultural Pty. Ltd.*, [2018] VSCA 85 (Australia Vic. Sup. Ct.), ¶ 123 ("the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried"); Tasmania's *Supreme Court Rules 2000*, rr. 357 & 367 (a court may give a plaintiff summary judgment if the nonmoving party has "no defence" to the claim; a court may give summary judgment to a defendant if the "defendant has a good defence on the merits"); Western Australia's *Rules of the Supreme Court 1971*, Order 14, r. 1(1) ("the plaintiff may, on the ground that ... [the] defendant has no defence to ... such claim ... within 21 days after appearance or at any later time by leave of the Court, apply to the Court for judgment against ... [the] defendant") & Order 16, r. 1(1) ("Any defendant ... may ... apply to the Court for summary judgment, and

the Court, if satisfied that the action is frivolous or vexatious, that the defendant has a good defence on the merits, or that the action should be disposed of summarily ... may order ... that judgment be entered for the defendant"); *Davey v. Quigley*, [2018] WASCA 137 (Western Australia S.C.), ¶ 19 ("summary judgment ... should be awarded only in the clearest of cases, where one party can demonstrate that the question will certainly be resolved in their favour"); South Australia's *Supreme Court Civil Rules 2006*, r. 232 (the Court may give summary judgment if satisfied that the nonmoving party has no "reasonable basis" for its position); Northern Territory's *Supreme Court Rules*, r. 22.01(1) & (2) (a court may give summary judgment if it is satisfied that the nonmoving party "has no reasonable prospect of successfully [prosecuting or defending])" & r. 22.01(3) ("For this rule, a defence of a proceeding ... need not be hopeless or bound to fail for it to have no reasonable prospect of success"); Australian Capital Territory's *Court Procedure Rules 2006*, rr. 1146 & 1147 (the court may give the moving party summary judgment if satisfied that the nonmoving party's position is indefensible); *Federal Court of Australia Act 1976*, No. 156, s. 31A(1) (the Court may grant summary judgment if satisfied that the nonmoving party "has no reasonable prospect of successfully defending" its position) & (3) ("For the purposes of this section, a defence or a proceeding ... need not be: (a) hopeless; or (b) bound to fail; for it to have no reasonable prospects of success") & *Kimber v. Owners Strata Plan No. 48216*, [2017] FCAFC 226 (Australia Fed. Ct.), ¶ 78 ("the moving party on an application for summary judgment or dismissal would have to show a substantial absence of merit on either issues of fact or law to have a chance of persuading the Court that those questions should be resolved summarily").

66 *High Court Rules 2016*, r. 12.2(1) ("The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action ... or to a particular part of ... [a] cause of action") & r.12.2(2) ("The court may give judgment against a plaintiff if the defendant satisfies the court the none of the causes of action ... can succeed").

67 *The Rules of the High Court*, H.C. Ordinance, c. 4, s. 54, Ord. 14, r. 1(1)("Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part ... apply to the Court for judgment against that defendant"). See *Skillsoft Asia Pacific Pty Ltd. v. Ambow Education Holdings Ltd.*, [2013] HKCFI 2108, ¶ 26 (the court granted summary judgment for the payment of an outstanding amount payable before the defendant terminated the contract: "I agree ... that the [defendant's] argument is completely contrary to the established principle of law that the termination of an agreement would not affect any right or liability which has been crystallised prior to termination. In the absence of clear wording, I do not begin to see how the court can construe the Agreement as one which undermines such established principle") & Cameron, "Summary Judgment: Law and Procedure in Transition", 24 Hong Kong L. Rev. 347 (1994).

68 This is so for both federal and state civil procedure. For the federal process see *Federal Rules of Civil Procedure* 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"). The *Federal Rules of Civil Procedure*, in force since 1938, "extended the applicability of ... [summary judgment] to all cases, including those arising in equity, and to all parties". Issacharoff & Loewenstein, "Second Thoughts About Summary Judgment", 100 Yale L.J. 73, 76 (1990). See also *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 323-24 per Rehnquist, J. ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defences"); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (U.S. Pa. S.C. 1986), 587 per Powell, J. ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'") & The Federal Judicial Center, Report on Summary Judgment Practice Across Districts with Variations in Local Rules 2 (2008) ("Overall, 17% of the cases [in the federal district court] have at least one motion for summary judgment"). See generally Schwarzer, Hirsch & Barrans, "The Analysis and Decision of Summary Judgment Motions" (Federal Judicial Centre 1991). American state civil procedure rules also feature summary judgment. E.g., *California Code of Civil Procedure*, § 437c (a)(1) ("A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding") & (c) ("The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); New York's *Civil Practice Law and Rules* 3212 (b) ("A motion for summary judgment shall be supported by affidavit. ... The affidavit ... shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. ... The motion [for summary judgment] shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party") & *Michigan Court Rules of 1985*, 2.116(I)(1) ("[I]f the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay"). See also, Clark & Samenow, "The Summary Judgment", 38 Yale L.J. 423, 423 (1929) ("Dissatisfaction in and out of the profession with the 'law's delay' has long been manifested. As an effective remedy for such delay within the limits prescribed by its form and purpose, the summary judgment procedure has become an important feature of the most modern practice systems") & Friedenthal & Gardner, "Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging", 31 Hofstra L. Rev. 91, 97 (2002)("several states enacted summary judgment statutes based on the English model in the late 1800s").

69 *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432 (Alta. C.A.), ¶ 75; (2017), [2018] 5 W.W.R. 32 (Alta. C.A.), 58 per Wakeling, J.A. (”These [summary judgment] measures recognized that it was not in the public interest to allocate more judicial and private resources or utilize more time than was absolutely necessary to resolve disputes the ultimate outcome of which was obvious at the earliest possible stage of the litigation”); *Nipshank v. Trimble*, 2014 ABQB 120 (Alta. Q.B.), ¶ 14; (2014), 8 Alta. L.R. (6th) 152 (Alta. Q.B.), 158-59 (Brown, J. asserted that it was also desirable to match the dispute and the resolution process that was most suitable to the features of the dispute); *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 29; (2014), 587 A.R. 16 (Alta. Q.B.), 26 (”By its terms, the formulation of the test for summary judgment in *Beier v. Proper Cat Construction Ltd.* keeps the ... judge’s attention focussed upon resolving litigation in a timely and cost-effective manner by imposing a proportionate remedy where it can be said that a claim or defence ought to succeed or fail without further process”); *O’Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶ 34; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 88 (”Legislators in the United Kingdom, Canada and the United States have introduced summary judgment into their litigation model to ensure that dispute resolution takes place at the earliest point in the litigation continuum where it is just to do so”); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), 265 (”The essential purpose of summary judgment is to isolate, and then terminate, claims and defences that are factually unsupported”); *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.), ¶ 2; (2011), 108 O.R. (3d) 1 (Ont. C.A.), 7 (”the vehicle of a motion for summary judgment is intended to provide a means for resolving litigation expeditiously and with comparatively less cost than is associated with a conventional trial”) & *Apsley v. Boeing Co.*, 722 F.Supp.2d 1218 (U.S. Dist. Ct. D. Kan. 2010), 1230-31 (”summary judgment ... is an important procedure designed to secure just, speedy and inexpensive determination of every action”). See also Clark & Samenow, “The Summary Judgment”, 38 Yale L.J. 423, 435 (1929) (”The English rules seemed to have well served the purposes for which they were designed. ... Their effect on English procedure can best be shown by the court statistics of recent years when the process of litigation has well brought out the efficacy of the Rules”) & Sunderland, “An Appraisal of English Procedure”, 9 J. Am. Jud. Soc. 164, 165 (1926) (”Summary judgment procedure ... is nothing but a process for the prompt collection of debts. ... Machinery for that purpose must provide a test to determine that the plaintiff has a debt and not a controverted claim, and a means for getting an immediate judgment without the expense and delay of a trial. The English practice does both of these things with neatness and dispatch”).

70 18 & 19 Vict., c. 67.

71 See Bauman, “The Evolution of Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating’s Act”, 31 Ind. L.J. 329, 350 (1956) (”In actions on negotiable instruments, when plaintiff establishes his claim by the production of the instrument, and the defendant fails to attack its validity or substantiates any other defense, the court is justified in ordering judgment for the plaintiff”); Clark & Samenow, “The Summary Judgment”, 38 Yale L.J. 423, 430 (1929) (”The [summary judgment moving party’s] affidavit must be made by the plaintiff in person or by one with knowledge of the facts. ... The affidavit must verify the cause of action on the deponent’s own knowledge and must contain a statement of belief that the defendant has no defence”) & Sunderland, “An Appraisal of English Procedure”, 9 J. Am. Jud. Soc. 164, 165 (1926) (”Summary judgment procedure, in essence, is nothing but a process for the prompt collection of [uncontroverted] debts”).

72 Bauman, “The Evolution of Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating’s Act”, 31 Ind. L.J. 329, 350 (1956) (”The remedy [of summary judgment] must be restricted to cases where the court may safely determine even in the absence of demeanor evidence that the plaintiff is entitled to judgment without a trial”).

73 *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.), ¶ 45; (2014), 584 A.R. 68 (Alta. C.A.), 78 (”the legal or persuasive burden rests on the moving party”); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 66; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 131 (”the nonmoving party has no legal or persuasive burden to discharge. ... In some circumstances the nonmoving party may be at risk of losing the summary judgment application if it fails to present a version of the facts which is inconsistent with that relied on by the moving party”) & 2 W. Stevenson & J. Côté, Civil Procedure Encyclopedia 31-8 (2003) (”The legal onus remains throughout on the party seeking summary judgment to show that he has met the standard of proof for judgment”). See also *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.), ¶ 11; [2008] 1 S.C.R. 372 (S.C.C.), 378 (on a summary judgment application each side “must ‘put its best foot forward’ with respect to the existence or non-existence of material issues to be tried”); *Puolitaipale Estate v. Grace General Hospital* (2002), 170 Man. R. (2d) 32 (Man. C.A.), 33 (”Once the moving party has crossed the threshold and moved the ball into the respondent’s court, it is time for the respondent to put his or her ‘best foot forward’”); *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (Ont. C.A.), 557 (”a respondent on a motion for summary judgment must lead trump or risk losing”) & *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (U.S. Sup. Ct. 1970), 161 per Harlan, J. (the nonmoving party declines to lead evidence at its own peril).

74 *898294 Alberta Ltd v. Riverside Quays Limited Partnership*, 2018 ABCA 281 (Alta. C.A.), ¶ 12; *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204 (Alta. C.A.), ¶ 2; (2018), 20 C.P.C. (8th) 43 (Alta. C.A.), 46-47; *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153 (Alta. C.A.), ¶ 15; (2018), 17 C.P.C. (8th) 252 (Alta. C.A.), 255; *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160 (Alta. C.A.), ¶ 2; (2017), 100 C.P.C. (7th) 52 (Alta. C.A.), 61; *Talisman Energy Inc v. Questerre Energy Corporation*, 2017 ABCA 218 (Alta. C.A.), ¶ 18; (2017), 57 Alta. L.R. (6th) 19 (Alta. C.A.), 29; *Baim v. North Country Catering Ltd.*, 2017 ABCA 206 (Alta. C.A.), ¶ 12; *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.), ¶ 27; (2016), 612 A.R. 284 (Alta. C.A.), 289; *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12 (Alta. C.A.), ¶ 19; *776826 Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49 (Alta. C.A.), ¶ 13; (2015), 593 A.R. 391 (Alta. C.A.), 395; *P. (W.) v. Alberta*, 2014 ABCA 404 (Alta. C.A.), ¶ 26; (2014), 378 D.L.R. (4th) 629 (Alta. C.A.), 642; *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.), ¶¶ 45 & 46; (2014), 584 A.R. 68 (Alta. C.A.), 78; *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626 (Alta. Q.B.), ¶ 60; *Quinney v. 1075398 Alberta Ltd.*, 2015 ABQB 452 (Alta. Q.B.), ¶ 39; (2015), 24 Alta. L.R. (6th) 202 (Alta. Q.B.), 214; *Rohit Land Inc. v. Cambrian Strathcona Properties Corp.*, 2015 ABQB 375 (Alta. Q.B.), ¶ 48; [2015] 12 W.W.R. 728 (Alta. Q.B.), 744; *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120 (Alta. Q.B.), ¶ 51; (2015), 40 C.L.R. (4th) 187 (Alta. Q.B.), 208-09; *Nipshank v. Trimble*, 2014 ABQB 120 (Alta. Q.B.), ¶ 14; (2014), 8 Alta. L.R. (6th) 152 (Alta. Q.B.), 158-59; *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 29; (2014), 587 A.R. 16 (Alta. Q.B.), 26; *Deguire v. Burnett*, 2013 ABQB 488 (Alta. Q.B.), ¶ 22; (2013), 36 R.P.R. (5th) 60 (Alta. Q.B.), 69; *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶ 38; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 91; *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 61; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 129 & *Hari Estate v. Hari Estate*, 2015 ABQB 605 (Alta. Q.B.), ¶ 80.

75 *Stout v. Track*, 2015 ABCA 10 (Alta. C.A.), ¶ 48 & n. 65; (2015), 62 C.P.C. (7th) 260 (Alta. C.A.), 278 & n. 65 per Wakeling, J.A. (there is a marked disparity if the moving party's likelihood of success is at least four times greater than that of the nonmoving party).

76 Id. at ¶ 50; 62 C.P.C. 7th at 279.

77 Id. at n. 66; 62 C.P.C. 7th at n. 66.

78 Id. at ¶ 2; 62 C.P.C. 7th at 265 ("if there was no genuine issue for trial, there would be no merit to the claim").

79 *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204 (Alta. C.A.), ¶ 2; (2018), 20 C.P.C. (8th) 43 (Alta. C.A.), 46-47 ("[the summary judgment test] is an onerous standard and rightly so. A grant of summary judgment ends a dispute without affording the litigants full access to the civil procedure spectrum"); *Nipshank v. Trimble*, 2014 ABQB 120 (Alta. Q.B.), ¶ 14; (2014), 8 Alta. L.R. (6th) 152 (Alta. Q.B.), 159 ("The reason this is preferable is that it not only states the high threshold which an applicant must meet for obtaining summary judgment, but also contains within it the rationale for granting summary judgment and depriving the respondent of full access to all litigation tools"); *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 29; (2014), 587 A.R. 16 (Alta. Q.B.), 26 ("neither [litigants nor the administration of justice] are ... served when summary judgment is used to prematurely extinguish a potentially meritorious claim or defence for the sake of economy"); *Kary Investment Corp. v. Tremblay*, 2003 ABQB 315 (Alta. Q.B.), ¶ 21 ("To be just, the [summary judgment] applicant must establish, beyond a reasonable doubt, that there is no real dispute in law or fact. The standard must be set that high because a successful application for summary judgment will deprive the other party of the right to have matters determined following a full trial of all the issues"); *Rai v. 1294477 Alberta Ltd.*, 2015 ABQB 349 (Alta. Q.B.), ¶ 21; (2015), 618 A.R. 220 (Alta. Q.B.), 224 ("Depriving a civil litigant of full participation in the civil legal process ... requires a high standard, though not necessarily as high as the criminal standard"); *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 (B.C. C.A.), ¶ 44 ("The bar on a motion for summary judgment is high"); *Weyburn Security Bank v. Martin* (1915), 22 D.L.R. 689 (Sask. S.C.), 690 ("summary jurisdiction ... must be used with great care; that a defendant ought not to be shut out from defending unless it is very clear that he has no defence"); *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 96 per Judge L.J. ("To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step"); *Jacobs v. Booth Distillery Co.*, 85 L.T.R. 262, 262 (H.L. 1901) ("People do not seem to understand that the effect of Order XIV. is, that, upon the allegation of the one side ..., a man is not to be permitted to defend himself in a court; that his rights are not to be litigated at all");*Spencer v. Commonwealth*, [2010] H.C.A. 28 (Australia H.C.), ¶ 24; (2010), 241 C.L.R. 118 (Australia H.C.), 131 per French, C.J. & Gummow, J. ("The exercise of powers to summarily terminate proceedings must always be attended with caution"); *Agar v. Hyde*, [2000] H.C.A. 41 (Australia H.C.), ¶ 57; (2000), 201 C.L.R. 552 (Australia H.C.), 575-76 ("Ordinarily, a party is not to be denied

the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes"); *General Steel Industries Inc. v. Commissioner for Railways*, [1964] H.C.A. 69 (Australia H.C.), ¶ 10; (1964), 112 C.L.R. 125 (Australia H.C.), 130 per Barwick, C.J. ("great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal"); *Australian Securities and Investment Commission v. Cassimatis*, [2013] FCA 641 (Australia Fed. Ct.), ¶ 50; 302 A.L.R. 671 (Australia Fed. Ct.), 686 ("while s 31A [of the *Federal Court of Australia Act 1976*] sets a lower bar, or a softened test, for the summary determination of proceedings, any such summary determination still has to be approached with caution. This is so because a trial is the usual and accepted means by which disputed questions of fact are determined in this country") & *Whitaker v. Coleman*, 115 F.2d 305 (U.S. C.A. 4th Cir. 1940), 307 ("[summary judgment is not designed as] a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial").

80 A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 378 (3d ed. 2013). See also *Argyle UAE Ltd. v. Par-La-Ville Hotel and Residences Ltd.*, [2018] EWCA Civ 1762 (Eng. & Wales C.A. (Civil)), ¶ 54 per Flaux, L.J. ("In circumstances where the appellants have not put forward any case as to why they should be entitled to retain the monies as against Argyle, the judge was quite right to grant summary judgment [for unjust enrichment] against them"); *Chief Constable of Greater Manchester Police v. Carroll*, [2017] EWCA Civ 1992 (Eng. & Wales C.A. (Civil)), ¶ 60 per Sir Terence Etherton, M.R. ("It cannot be said that the claim [of the nonmoving party] is so weak ... that it could be ... dismissed on summary judgment"); *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 94 per Lord Woolf, M.R. ("If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible"); *Jacobs v. Booth's Distillery Co.*, 85 L.T.R. 262, 262 (H.L. 1901) per Lord Chancellor Halsbury ("There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV. was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights") & per Lord James ("[a court should grant summary judgment] only when it can say to the person who opposes the order, 'You have no defence'"); *Jones v. Stone*, [1894] A.C. 122 (Australia P.C.), 124 ("it is abundantly clear to their Lordships that there are very serious questions of fact in debate which never ought to have been determined in a summary manner under Order XIV. ... [Summary judgment is] intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay"); I. Jacob, P. Adams, J. Neave & K. McGuffie, The Supreme Court Practice 1967, at 113 ("Actions for damages for negligence are suitable for procedure under 0.14 only if it is clearly established that there is no defence as to liability") & G. King & W. Ball, The Annual Practice 1926, at 153 ("The purpose of 0.14 is to enable a plaintiff suing by writ, specially indorsed under 0.3, r. 6, to obtain summary judgment without trial, if he can prove his claim clearly; and if the defendant is unable to set up a *bona fide* defence, or raise an issue against the claim which ought to be tried").

81 18 & 19 Vict., c. 67. See Bauman, "The Evolution of Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating's Act". 31 Ind. L.J. 329 (1956) & Clark & Samenow, "The Summary Judgment", 38 Yale L.J. 423 (1929).

82 18 & 19 Vict., c. 67, recital.

83 [2005] H.C.A. 16 (Australia H.C.), ¶ 18; (2005), 214 A.L.R. 370 (Australia H.C.), 375. See also *General Steel Industries Inc. v. Commissioner for Railways*, [1964] H.C.A. 69 (Australia H.C.), ¶ 8; (1964), 112 C.L.R. 125 (Australia H.C.), 129 per Barwick, C.J. ("the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action ... is clearly demonstrated"); *Dey v. Victorian Railways Commissioners*, [1949] H.C.A. 1, 78 C.L.R. 62 (Australia H.C.), 91 per Dixon, J. ("A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court"); *Palermo v. National Australia Bank Ltd.*, [2017] QCA 321 (Queensland S.C.), ¶ 70 ("a case for summary judgment is one where it is clear that a trial is unnecessary, and that is it better to end the proceedings, than to proceed to a contest. ... This approach is consistent with the UK legislation on which the rule was modelled") & *Shaw v. Deputy Commission of Taxation*, [2016] QCA 275 (Queensland S.C.), ¶ 31 (the Court adopted Lord Woolf's test in *Swain v. Hillman*).

84 *Agar v. Hyde*, [2000] H.C.A. 41 (Australia H.C.), ¶ 57; (2000), 201 C.L.R. 552 (Australia H.C.), 576 per Gaudron, McHugh, Gummow & Hayne, JJ.

85 *Bigyard Holdings Ltd. v. Tasmandairy Ltd.*, [2017] NZHC 1918 (New Zealand H.C.), ¶ 45. See also *Thompson v. Hopkins*, [2018] NZCA 197 (New Zealand C.A.), ¶ 8 (”Where a defendant applies for summary judgment, a defendant has to show that the plaintiff cannot succeed”) & *McKay v. Sandman*, [2018] NZCA 103 (New Zealand C.A.), ¶¶ 91 & 92 (”In our view all the points of criticism have been aired and satisfactorily answered. Viewed realistically the allegation of dishonesty is without merit. ... Consequently we are satisfied that Mr Sandman could not establish at trial that the Firm’s actions ... were undertaken dishonestly”).

86 477 U.S. 242 (U.S. Sup. Ct. 1986), 251-52.

87 477 U.S. 317 (U.S. Sup. Ct. 1986), 323-24. See also *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (U.S. Pa. S.C. 1986), 587 (”Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial’”).

88 *C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.), ¶¶ 40 & 49; [2008] 3 S.C.R. 41 (S.C.C.), 58 & 61 (”Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. ... In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred”); *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 (S.C.C.), 169 (”in civil litigation, the ... burden of proof ... [is] proof on a balance of probabilities”); *Scott v. Cresswell* (1975), 56 D.L.R. (3d) 268 (Alta. C.A.), 271 (”in civil cases ... the fact must be proved by a balance of probabilities”); *Steadman v. Steadman*, [1974] 2 All E.R. 977 (U.K. H.L.), 981 (”A thing is proved in civil litigation by shewing that it is more probably true than not”); *United States v. Schipani*, 289 F.Supp. 43 (U.S. Dist. Ct. E.D. N.Y. 1968), 55-56 (”[in] an ordinary civil case ... the trier must be convinced ... that the proposition is more probably true than false (50+% probable for purposes of this analysis)”) & Rothstein, Centa & Adams, “Balancing Probabilities: The Overlooked Complexity of the Standard of Proof” in The Law Society of Upper Canada, Special Lectures 2003: The Law of Evidence 459 (2004) (”Proof on a balance of probabilities is most often understood as requiring the adjudicator to determine that it is more likely than not that a disputed fact exists or occurred”).

89 *Three Rivers District Council v. Bank of England (No. 3)* (2000), [2003] 2 A.C. 1 (U.K. H.L.), 260 per Lord Hope (”In *Taylor v. Midland Bank Trust Co. Ltd.* [[1999] EWCA Civ 1917 (Eng. & Wales C.A. (Civil))], 21 July 1999[Stuart Smith L.J.] ... said that ... the court should look to see what will happen at the trial and that if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred”).

90 *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 95 per Lord Woolf, M.R. (”the proper disposal of an issue under [the summary judgment part] does not involve the judge conducting a mini-trial, that is not the object of the provisions”) & *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 249 per White, J. (”at the summary judgment stage the judge’s function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. ... [T]here is no issue for trial unless there is sufficient evidence favouring the nonmoving party for a jury to return a verdict for that party”).

91 E.g., *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), 334 (”First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried”).

92 *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204 (Alta. C.A.), ¶ 3; (2018), 20 C.P.C. (8th) 43 (Alta. C.A.), 48 (”An incontrovertible factual foundation is an essential element of a controversy ripe for summary adjudication”); *Mulholland v. Rensonnet*, 2018 ABCA 24 (Alta. C.A.), ¶ 1 (the Court upheld a chambers judge’s order dismissing a summary judgment application because the “three parties [were] all saying something different”); *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331 (Alta. C.A.), ¶ 23 (”Summary judgment is not appropriate when *viva voce* evidence is needed, where the judge is required to weigh evidence or make findings of credibility”); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.), ¶ 28; (2016), 612 A.R. 284 (Alta. C.A.), 289 (”Summary judgment is not possible if opposing parties’ affidavits and evidence conflict on *material* facts because a chambers judge cannot weigh evidence or credibility on a summary judgment application”) (emphasis in original); *Charles v. Young*, 2014 ABCA 200 (Alta. C.A.), ¶ 4; (2014), 97 E.T.R. (3d) 1 (Alta. C.A.), 3 (”In our view, it was an error for the chambers judge to determine this matter simply on the basis of conflicting affidavits and documents that would support either party’s position”); *Kristal Inc. v. Nicholl & Akers*, 2007 ABCA 162 (Alta. C.A.), ¶ 12; (2007), 41 C.P.C. (6th) 381 (Alta. C.A.), 386 (”We conclude ... that there is ... no genuine issue to be tried and no disputed facts which

would warrant a trial") & *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 16; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 114 ("The facts and the law on which the plaintiff rely are incontrovertible").

93 477 U.S. 242 (U.S. Sup. Ct. 1986), 267. See also *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 68; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 133 ("if, in the promissory note example, B swore in an affidavit that she repaid A in accordance with the terms of the promissory note and produced a receipt signed by A, the motions court would be required to dismiss A's summary judgment application").

94 See *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶ 57; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 98 ("Through the affidavits of each of Messrs. Oborowsky and Fath the plaintiffs have established the essential elements of their claims. They proved that the defendants are the makers of the O'Hanlon and Waiward instruments and that they have not paid the sums due under them. The plaintiffs did not have to demand payment [of the promissory notes] before commencing these actions. The defendants are jointly and severally liable. ... The applicable law states that the payee of a dishonoured promissory note may sue for payment of the notes and interest. ... The defendants have led no evidence to support and the questioning of Messrs. Oborowsky and Fath produced no admissions which supported the position the defendants took in their defences").

95 Common law courts have frequently given summary judgment to enforce promissory notes. E.g., *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, 18 B.L.R. (5th) 73 (Alta. Q.B.); *Dushenski v. Lymer*, 2010 ABQB 605, 500 A.R. 48 (Alta. Q.B.); *HSBC Bank Canada v. Vallet*, 2009 ABQB 743, 483 A.R. 240 (Alta. Q.B.); *State Bank of Butler v. Benzanson* (1914), 16 D.L.R. 848 (Alta. T.D.); *Bank of Montreal v. Mangold* (1988), 86 A.R. 215 (Alta. Q.B.); *Stolberg Mill Construction Ltd. v. Selkirk Spruce Mills Ltd.* (1957), 22 W.W.R. 605 (B.C. S.C.); *Butkovsky v. Jalbuena* (1982), 132 D.L.R. (3d) 177 (B.C. Co. Ct.); *Heaman v. Schnurr*, 2011 ONSC 2661 (Ont. S.C.J.); *Quick Credit v. 1575463 Ontario Inc.*, 2010 ONSC 7227 (Ont. S.C.J.); *Fierro v. Sinclair*, 2012 NSSC 429 (N.S. S.C.); *Fielding & Platt Ltd. v. Najjar*, [1969] 1 W.L.R. 357 (Eng. C.A.); *Griffon LLC v. 11 East 36th LLC*, 934 N.Y.S.2d 472 (U.S. N.Y.A.D. 2nd Dept. 2011); *Federal Deposit Ins. Corp. v. Willis*, 497 F.Supp. 272 (U.S. Dist. Ct. S.D. N.Y. 1980); *Nonneman v. Murphy*, 2012 Bankr. Lexis 4264 (Bankr. Ct. E.D. Ky.) & *Wells Fargo Bank, N.A. v. Ortega* [, Doc. 11-8060; 2:09-CV-00241-WFD (U.S. C.A. 10th Cir. August 21, 2012)], 2012 WL 3570734.

96 *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626 (Alta. Q.B.), ¶ 62 ("summary judgment is not precluded just because affidavits conflict. Decision makers have some latitude for fact-finding and assessing the chance of success at trial in the face of conflicting affidavit evidence - if *the record* provides a foundation for substantially discounting the probative value of a party's claim") (emphasis in the original) & *McKay v. Sandman*, [2018] NZCA 103 (New Zealand C.A.), ¶ 30 ("While summary judgment is inappropriate where there are factual disputes or where the courts must determine material facts independently of affidavit evidence, the court may disregard factual disputes which are plainly spurious or contrived").

97 *Three Rivers District Council v. Bank of England (No. 3)*, [2003] 2 A.C. 1 (U.K. H.L.), 261 per Lord Hope ("it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based").

98 E.g., *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 92; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 141-42 (the Court carefully reviewed the documents before concluding that the plaintiff did not repudiate the settlement agreement; the Court ordered specific performance in a summary judgment) & *Haji-Hamzeh v. Wawanesa Mutual Insurance Co.*, 2005 MBCA 17 (Man. C.A.), ¶ 4; (2005), 192 Man. R. (2d) 154 (Man. C.A.), 155 ("Normally issues of credibility are not resolved on a motion for summary judgment, but in certain instances the evidence may be so overbalanced in one direction that the 'so-called credibility issue evaporates'").

99 2018 ABCA 281 (Alta. C.A.). See also *Argyle UAE Ltd. v. Par-La-Ville Hotel and Residences Ltd.*, [2018] EWCA Civ 1762 (Eng. & Wales C.A. (Civil)), ¶ 23 (the Court upheld a summary restitution judgment of $12.5 million US ignoring the defendants' unsubstantiated claims that the sums involved were paid as director loans).

100 2018 ABCA 281 (Alta. C.A.), ¶ 26.

101 2017 ABCA 160, 100 C.P.C. (7th) 52 (Alta. C.A.).

102 Id. at ¶¶ 116-18; 100 C.P.C. 7th at 95-97.

103 *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 68; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 133 (”a controversy over nonmaterial facts ... is irrelevant”) & *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 248 (”Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment”).

104 2014 ABCA 322, 315 C.C.C. (3d) 337 (Alta. C.A.).

105 Id. at ¶¶ 11 & 166; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 356 & 424.

106 E.g., *McDonald v. Sproule Management GP Limited*, 2018 ABCA 295 (Alta. C.A.) (the Court upheld the chambers judge’s decision denying the employer-defendant the right to question the plaintiff-employee before the hearing of a summary judgment application). See *Federal Rules of Civil Procedure* 56(d) (”If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the Court may ... allow time ... to take discovery”).

107 *Walia v. University of Manitoba*, 2005 MBQB 278 (Man. Q.B.), ¶ 16 (”To not allow the summary judgment hearing to proceed, and to allow the pre-trial procedures to run their course, defeats the purpose of the summary judgment relief”). See Cavanagh, “*Matsushita Electrical Industrial Co. v. Zenith Radio Corp.* at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?”, (1986), 82 Antitrust L.J. 81 (U.S. Pa. S.C.) , 114 (2018) (”Discovery costs, already substantial in antitrust cases, are pushed even higher as the parties position themselves for summary judgment. ... [S]ummary judgment motions take time for the parties to prepare and for the courts to decide”).

108 See *General Steel Industries Inc. v. Commissioner for Railways*, [1964] H.C.A. 69 (Australia H.C.), ¶ 10; (1964), 112 C.L.R. 125 (Australia H.C.), 130 per Barwick, CJ. (”great care must be exercised to ensure that under the guise of achieving expeditious finality, a party is not deprived of the opportunity for the trial of their case”); *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), n. 30; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), n. 30 per Wakeling, J.A. (”There may be some exceptional cases where it is appropriate to adjourn a summary judgment application to allow for questioning”); Nova Scotia’s *Civil Procedure Rules*, r. 13.04(6)(b) (”A judge who hears a motion for summary judgment on evidence has discretion to ... adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence”) & *Federal Rules of Civil Procedure* 56(f): (”Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just”).

109 *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.), ¶ 19; [2008] 1 S.C.R. 372 (S.C.C.), 382 (”A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed”); *Poliquin v. Devon Canada Corp.*, 2009 ABCA 216 (Alta. C.A.), ¶ 70; (2009), 454 A.R. 61 (Alta. C.A.), 80 (”Courts should not deny summary judgment on the off-chance that a party might, were there to be a trial, present evidence refuting what are undisputed facts at the summary judgment hearing”); *Brown v. Northey*, 1991 ABCA 75 (Alta. C.A.), ¶ 11; (1991), 115 A.R. 321 (Alta. C.A.), 324 (”It is not enough ... merely to argue that there may be facts somewhere which might emerge at trial and might turn out to be relevant”); *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655 (Alta. Q.B.), ¶ 55; (2004), [2005] 8 W.W.R. 442 (Alta. Q.B.), 475 (”A plaintiff responding to a summary dismissal application cannot simply rely on its pleadings and bare allegations of a cause of action, or argue that evidence might turn up later”); *Suncor Inc. v. Canada Wire & Cable Ltd.* (1993), 7 Alta. L.R. (3d) 182 (Alta. Q.B.), 185-86 (”If a ... [respondent] wishes the trial of an action merely in the ... [hope] that a discovery and trial will, by luck, produce some evidence that aids it (although it does not know at the time of the summary judgment application what it would hope to prove through that evidence), summary judgment should be granted against it”); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), 434 (”It is clearly established that on a motion for summary judgment a party is no longer entitled to sit back and rely on the possibility that more favourable facts may develop at trial”); *Sterling Lumber Co. v. Harrison*, 2010 FCA 21 (F.C.A.), ¶ 8 (”the principle that

parties ... must put their best foot forward precludes the respondents from saying that other evidence may be adduced at trial that contradicts Mr. Harrison' statement against interest"); *Engl v. Aetna Life Insurance Co.*, 139 F.2d 469 (U.S. C.A. 2nd Cir. 1943), 473 (the court confirmed summary judgment because "we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence") & *Apsley v. Boeing Co.*, 722 F.Supp.2d 1218 (U.S. Dist. Ct. D. Kan. 2010), 1231 ("a party must do more than simply claim that discovery is incomplete").

110 *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655 (Alta. Q.B.), ¶ 57; (2004), [2005] 8 W.W.R. 442 (Alta. Q.B.), 476 ("The respondent [to a summary judgment application] is not without weapons, as it is allowed to cross-examine on the applicant's affidavit and file a conflicting affidavit") & *Loeppky v. Taylor McCaffrey LLP*, 2015 MBCA 83 (Man. C.A.), ¶ 4 ("any potential prejudice to the plaintiffs can be overcome by way of cross-examination").

111 *P. Burns Resources Ltd. v. Patrick Burns Memorial Trust (Trustee of)*, 2015 ABCA 390 (Alta. C.A.), ¶ 8; (2015), 79 C.P.C. (7th) 29 (Alta. C.A.), 32 ("Where the nature of the action is such that much of the evidence supporting the cause of action is likely to be in the sole possession of the defendants, the plaintiff is more likely to require access to disclosure of documents and questioning to be able to make full answer to any subsequent application for summary judgment") & *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655 (Alta. Q.B.), ¶ 57; (2004), [2005] 8 W.W.R. 442 (Alta. Q.B.), 476 ("There may be cases where the applicant is in such complete control of the records that it would be unfair not to have it discover documents before the application is heard"). See also *Easyair Ltd. v. Opal Telecom Ltd.*, [2009] EWHC 339 (Eng. Ch. Div.), ¶ 15 ("the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case").

112 A noncompetition agreement in a sale-of-business contract is subject to a less rigorous test of reasonableness than is used to evaluate a noncompetition agreement in an employment contract.

113 *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27 (Man. C.A.), ¶ 26; (2018), 421 D.L.R. (4th) 315 (Man. C.A.), 324 (the nonmoving party admitted the cattle supplements it sold the moving party were defective and that it breached its contract with the moving party; but discovery was necessary to ascertain the facts that are the foundation for a damage claim).

114 2014 SCC 7 (S.C.C.), ¶¶ 2 & 3; [2014] 1 S.C.R. 87 (S.C.C.), 92 & 93.

115 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶¶ 73-75; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 370-78 per Wakeling, J.A. & *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52 (N.S. C.A.), ¶ 7; (2014), 68 C.P.C. (7th) 267 (N.S. C.A.), 269.

116 18 & 19 Vict., c. 67.

117 For some time the high cost of litigation and the delays associated with it have caused disputants to seek other forms of redress outside the public court system. They may turn to private mediation or arbitration. Or they may pursue expedited litigation alternatives that are components of a modern public civil process. The factors that make the traditional litigation model unattractive may be directly attributable to the increased level of complexity of actions. There is a direct correlation between the complexity of an action and its costs. The more complex a matter is the more time lawyers must devote to identify the issues and develop the best arguments to resolve these issues in the client's favor. Most lawyer's fees are a product of time spent on a client's file. Complex matters frequently require the retention of experts. Experts are usually expensive. In addition, complex actions make increased demands on a client's time. Clients must spend more time in discoveries and in the affidavit-drafting process. All of these factors have a cumulative impact on the time frame an action is a live file. See generally, Report of the Canadian Bar Association Task Force on Systems of Civil Justice 15-16 (1996). These factors no doubt contribute to the declining percentage that conventional trials represent as the ultimate method by which disputes are resolved. Professor Galanter reports that the "portion of [American] federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the 60 percent decline in the absolute number of trials since the mid 1980s. ... The phenomenon is not confined to the federal courts; there are comparable declines of trials, both civil and criminal, in the state courts, where the great majority of trials occur. ... Although virtually every other indicator of legal activity is rising, trials are declining not only in relation to cases in the

courts but to the size of the population and the size of the economy". "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 459-60 (2004). See also Twohig, Baar, Meyers & Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973-1994" in 1 Ontario Law Reform Commission, Rethinking Civil Justice: Research Studies for the Civil Justice Review 77, 127 (1996) (trials declined both in absolute and percentage terms as the method of resolution from 1973 to 1994). Justice Bouck provides some insights into why in British Columbia delay is a problem. *Chu v. Chen* (2002), 22 C.P.C. (5th) 73 (B.C. S.C.). Some have argued that the summary judgment device has directly contributed to the declining rate at which trial dispositions resolve disputes in American federal courts. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 483 (2004) & Simmons, Jacobs, O'Malley & Tami, "The *Celotex* Trilogy Revisited: How Misapplication of the Federal Summary Judgment Standard Is Undermining the Seventh Amendment Right to a Jury Trial", 1 Fla. A & M.U.L. Rev. 1, 3 (2006).

118 I suspect that the percentage of court files resolved by a conventional trial judgment in Alberta has been in decline for over sixty years.

119 *Jacobs v. Booth's Distillery Co.*, 85 L.T.R. 262, 262 (1901) per Halsbury, L.C. ("There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV. was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights").

120 *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 92 & 94 ("Under r. 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. ... [Summary judgment] saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose").Lord Woolf referred to the new civil procedure era as a "change in culture". *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd.* (1997), [1998] 2 All E.R. 181 (Eng. C.A.), 191.

121 The United States Supreme Court delivered its strong endorsement of summary judgment in 1986. *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 327 ("The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action'").

122 2014 CSC 7 (S.C.C.), ¶ 5; [2014] 1 S.C.R. 87 (S.C.C.), 93.

123 2014 SCC 7 (S.C.C.), ¶ 5; [2014] 1 S.C.R. 87 (S.C.C.), 93. This direction is consistent with s. 10 of the *Interpretation Act*, R.S.A. 2000, c. I-8 ("An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best assures the attainment of its objects") and r. 1.2(2)(b) of the *Alberta Rules of Court*, Alta. Reg. 124/2010 ("these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense").

124 See *Hussain v. Royal Bank of Canada*, 2017 ONCA 956 (Ont. C.A.), ¶ 4 (the Court dismissed a debtor's appeal against a summary judgment order granted in the creditor bank's favour noting that "[i]n oral submissions the appellant acknowledged that he owed the principal amounts claimed under the debt instruments").

125 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 76; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 373 per Wakeling, J.A. ("Alberta courts are dedicated to resolving disputes in the least amount of time practicable and at the lowest possible cost"); *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶ 34; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 88 ("Legislators in the United Kingdom, Canada and the United States have introduced summary judgment into their litigation model to ensure that dispute resolution takes place at the earliest point in the litigation continuum where it is just to do so"); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 71; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 134 ("[the] proper use [of summary judgment] expedites litigation, reduces costs for the litigants, frees up scarce judicial resources and ameliorates access to justice issues") & *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶ 14; (2014), 371

D.L.R. (4th) 339 (Alta. C.A.), 349 ("[the] principles stated in ... *Hryniak v. Mauldin* [regarding Ontario's r. 20] are consistent with modern Alberta summary judgment practice as set out [in r. 7.3 of the *Alberta Rules of Court*]").

126 Alta. Reg. 124/2010 ("these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense").

127 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 77; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 374 per Wakeling, J.A. ("It can, without exaggeration, be asserted that the Supreme Court of Canada is preaching to the converted, if part of its target audience includes Alberta's superior courts") & *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶ 71; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 134 ("summary judgment is an important procedure which could be invoked more often than it is").

128 *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 29; (2014), 587 A.R. 16 (Alta. Q.B.), 26; *Nipshank v. Trimble*, 2014 ABQB 120 (Alta. Q.B.), ¶ 14; (2014), 8 Alta. L.R. (6th) 152 (Alta. Q.B.), 158-59 & *Deguire v. Burnett*, 2013 ABQB 488 (Alta. Q.B.), ¶ 22; (2013), 36 R.P.R. (5th) 60 (Alta. Q.B.), 69.

129 *898294 Alberta Ltd v. Riverside Quays Limited Partnership*, 2018 ABCA 281 (Alta. C.A.), ¶¶ 12 & 27; *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204 (Alta. C.A.), ¶¶ 2-3; (2018), 20 C.P.C. (8th) 43 (Alta. C.A.), 46-48; *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153 (Alta. C.A.), ¶ 15; (2018), 17 C.P.C. (8th) 252 (Alta. C.A.), 255; *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160 (Alta. C.A.), ¶ 2; (2017), 100 C.P.C. (7th) 52 (Alta. C.A.), 61; *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331 (Alta. C.A.), ¶¶ 11 & 12; *Stout v. Track*, 2015 ABCA 10 (Alta. C.A.), ¶¶ 8 & 9; (2015), 62 C.P.C. (7th) 260 (Alta. C.A.), 266 per Wakeling, J.A.; *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.), ¶¶ 45 & 46; (2014), 584 A.R. 68 (Alta. C.A.), 78 & *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 104; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 388 per Wakeling, J.A.

130 Supra note 4.

131 *Rules to Amend the Alberta Rules of Court*, Alta. Reg. 216/1986.

132 Alta. Reg. 124/2010 ("these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense").

133 R.S.A. 2000, c. I-8, s. 10 ("An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects").

134 *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27 (Man. C.A.), ¶ 32; (2018), 421 D.L.R. (4th) 315 (Man. C.A.), 325 ("The Supreme Court of Canada's decision in *Hryniak* did not alter the basic test for summary judgment in Manitoba. However, it did make courts acutely aware of the need to consider the concept of proportionality in all aspects of the justice system"); *Lenko v. Manitoba*, 2016 MBCA 52 (Man. C.A.), ¶ 71; (2016), [2017] 1 W.W.R. 291 (Man. C.A.), 311 ("*Hryniak* did not ... change the test to be applied on a motion for summary judgment in Manitoba. The test remains whether the claim or defence raises a genuine issue for trial (r. 20.03(1)). If there is a genuine issue for trial, it is not for the motion court to resolve that issue; rather the motion should be dismissed and the matter should proceed to trial. The situation is different in Ontario, where the summary judgment rules have been substantially amended to expand the role of the court in resolving claims without a trial. This difference must be kept in mind when applying *Hryniak* to a motion for summary judgment under the Manitoba Rules") & *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52 (N.S. C.A.), ¶ 6; (2014), 68 C.P.C. (7th) 267 (N.S. C.A.), 269 ("*Hryniak v. Mauldin* ... has little bearing upon the circumstances, analysis, reasoning or result in this case. There, Justice Karakatsanis ... considered the application of a new Rule in Ontario (their Rule 20) which now empowers judges in that province to weigh the evidence, draw reasonable inferences from the evidence, and settle matters of credibility when deciding whether to grant summary judgment. Those powers are foreign to the well-established procedures and settled law which operate in Nova Scotia").

135 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 92; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 383 per Wakeling, J.A. ("Alberta's summary judgment protocol [is] dramatically different from Ontario's counterpart"); *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶ 19; (2014), 587 A.R. 16 (Alta. Q.B.), 22 (Ontario's Rule 20.04(2.1) provides for a process that is broadly comparable to an application under Alberta's civil procedure ... for judgment by way of summary trial under Rule 7.5"); *Jackson v. Canadian National Railway*, 2012 ABQB 652 (Alta. Q.B.), ¶ 115; (2012), [2013] 4 W.W.R. 311 (Alta. Q.B.), 362 ("[Rule 20 of Ontario's *Rules of Civil Procedure* is] significantly different from r. 7.3(1) of the *Alberta Rules of Court*") & *Lenko v. Manitoba*, 2016 MBCA 52 (Man. C.A.), ¶ 71; (2016), [2017] 1 W.W.R. 291 (Man. C.A.), 311 ("If there is a genuine issue for trial, it is not for the motion court to resolve that issue; rather, the motion should be dismissed and the matter should proceed to trial. The situation is different in Ontario, where the summary judgment rules have been substantially amended to expand the role of the court in resolving claims without a trial").

136 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), 41 (the Court approved this statement: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament").

137 *Spencer v. Commonwealth*, [2010] H.C.A. 28 (Australia H.C.), ¶ 50; (2010), 241 C.L.R. 118 (Australia H.C.), 138 per Hayne, Crennan, Kiefel & Bell, JJ. ("Consideration of the operation and application ... [of the summary judgment rule] must begin from consideration of its text").

138 *R. v. I. (D.)*, 2012 SCC 5 (S.C.C.), ¶ 26; [2012] 1 S.C.R. 149 (S.C.C.), 166 ("The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision"); *Thomson v. Canada (Department of Agriculture)*, [1992] 1 S.C.R. 385 (S.C.C.), 399-400 (unless an enactment indicates a contrary intention a word should be given its ordinary or usual meaning); *Humphreys v. Trebilcock*, 2017 ABCA 116 (Alta. C.A.), ¶ 109; [2017] 7 W.W.R. 343 (Alta. C.A.), 375 ("To do so one must identify the potential permissible meanings of these terms, taking into account their ordinary meanings"); *Caminetti v. United States*, 242 U.S. 470 (U.S. Sup. Ct. 1917), 485-86 ("Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them"); R. Sullivan, Sullivan on the Construction of Statutes 28 (6th ed. 2014)("It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012)("Words are to be understood in their ordinary, everyday meanings — unless the context indicates that they bear a technical sense").

139 A permissible meaning is an interpretation that a reasonable reader could have given the text when it was produced. *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81 (Alta. C.A.), ¶ 81; (2017), 47 Alta. L.R. (6th) 28 (Alta. C.A.), 56 per Wakeling, J.A. An impermissible meaning is a meaning that the text, given its ordinary meaning, cannot bear. *Lenz v. Sculptoreanu*, 2016 ABCA 111 (Alta. C.A.), ¶ 4, (2016), 399 D.L.R. (4th) 1 (Alta. C.A.), 6 ("A contrary interpretation would give the text an implausible meaning. A court may never do this"); *R. v. Barbour*, 2016 ABCA 161 (Alta. C.A.), ¶ 43; (2016), 336 C.C.C. (3d) 542 (Alta. C.A.), 553 (chambers)("in this pre-sentence period 'custody' means imprisonment. Any other interpretation would accord the text an implausible meaning"); *McMorran v. McMorran*, 2014 ABCA 387 (Alta. C.A.), ¶ 69; (2014), 378 D.L.R. (4th) 103 (Alta. C.A.), 141 per Wakeling, J.A. ("A court must guard against attaching undue weight to the purpose which accounts for the text's existence lest the court adopt a meaning which a reader competent in the use of the language could not reasonably attach to it"); *W. Ralston (Canada) Inc. v. C.E.P., Local 819* (2001), 147 O.A.C. 331 (Ont. Div. Ct.), 332 ("[a] statute ... [must be] given a meaning it can reasonably bear"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 31 (2012)("A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear") & Frankfurter, "Some Reflections on the Reading of Statutes", 47 Colum. L. Rev. 527, 543 (1947)("Violence must not be done to the words chosen by the legislature").

140 *Zuk v. Alberta Dental Association and College*, 2018 ABCA 270 (Alta. C.A.), ¶ 159.

141 *R. v. Rodgers*, 2006 SCC 15 (S.C.C.), ¶ 20; [2006] 1 S.C.R. 554 (S.C.C.), 573 ("The clear language of s. 487.055(1) [of the *Criminal Code*] indicates that Parliament intended to authorize *ex parte* applications under this section. There is no room to interpret the provision as presumptively requiring that applications be brought on notice"); *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54 (S.C.C.), ¶ 10; [2005] 2 S.C.R. 601 (S.C.C.), 610 ("When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process"); *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.), 704 ("where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced"); *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), 581 ("when Parliamentary intent is clear,

courts ... are not empowered to do anything else but to apply the law") & *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81 (Alta. C.A.), ¶ 82; (2017), 47 Alta. L.R. (6th) 28 (Alta. C.A.), 56 per Wakeling, J.A. ("If this endeavor produces only one ... [plausible] meaning the interpretation process comes to an end"). Suppose that a plaintiff seeking damages of $75,000 in a civil action applies for a jury trial. The applicable enactment provides that a court may order a jury trial if the plaintiff seeks damages in excess of $100,000 and the plaintiff is the applicant. If a court granted this request it would attach a meaning to the text that it cannot support. A claim for $75,000 is not a claim in excess of $100,000. See *Purba v. Ryan*, 2006 ABCA 229 (Alta. C.A.), ¶ 55; (2006), 397 A.R. 251 (Alta. C.A.), 262 (the Court rejected out-of-hand the notion that a court could order a jury trial when the plaintiff's claim was for an amount below the $75,000 floor).

142 *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (S.C.C.), ¶ 202 per Brown, J. ("The Tribunal is no more constitutionally empowered than this Court to aim for a result consistent with its own policy preferences by holding fast to the bits of statutory text that it likes while ignoring the bits that it does not"); *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.), 642 ("the general object and spirit of the provision can never supplant a court's duty to apply an unambiguous provision of the Act .... Where the provision is clear and unambiguous, its terms must simply be applied"); *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.), 771 (the Court held that a statute cannot be given a meaning it cannot bear in order to promote equality and multiculturalism); *Jodrey Estate v. Nova Scotia (Minister of Finance)*, [1980] 2 S.C.R. 774 (S.C.C.), 807 per Dickson, J. ("Although a court is entitled ... to look to the purpose of the Act ... it must still respect the actual words which express the legislative intention"); *Ursa Ventures Ltd. v. Edmonton (City)*, 2016 ABCA 135 (Alta. C.A.), ¶ 85; (2016), 91 C.P.C. (7th) 73 (Alta. C.A.), 106 per Wakeling, J.A. ("Overzealous pursuit of an undeniable legislative purpose must not cause one to overlook the limited scope of the words the legislators used"); *Alberta v. McGeady*, 2014 ABQB 104 (Alta. Q.B.), ¶ 23; [2014] 7 W.W.R. 559 (Alta. Q.B.), 571 ("No statutory decision maker can ignore substantive statutory provisions because it believes [they produce] ... unfair results"); *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 (F.C.A.), ¶ 50; (2017), 417 D.L.R. (4th) 173 (F.C.A.), 189 per Stratas, J.A. ("judges — like everyone else — are bound by legislation. They must take it as it is. They must not insert it into the meaning they want. They must discern and apply its authentic meaning, nothing else") & *Saville v. Virginia Railway & Power Co.*, 114 Va. 444, 76 S.E. 954 (U.S. Va. S.C. 1913), 957 ("We hear a great deal about the spirit of the law, but the duty of this court is not to make the law, but to construe it .... It is our duty to take the words which the legislature has seen fit to employ and give to them their usual and ordinary signification, ... to give effect to it, unless it transcends the legislative power as limited by the Constitution").

143 E.g., *Alberta v. McGeady*, 2014 ABQB 104, [2014] 7 W.W.R. 559 (Alta. Q.B.) (the statutory delegate deliberately ignored the governing statutory provision and awarded long-term disability benefits to an employee who obviously was not entitled to them) & *Holy Trinity Church v. United States*, 143 U.S. 457 (U.S. Sup. Ct. 1982), 459 (the Court refused to give unambiguous legislative text its plain and ordinary meaning — penalize a church for hiring a foreigner to serve as its pastor — because it was satisfied Congress did not intend the result the plain meaning mandated holding that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers [Congress only intended to prohibit employers from hiring foreign manual labourers]").

144 *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (S.C.C.), ¶ 21; [2011] 1 S.C.R. 3 (S.C.C.), 13 ("The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute"); *McBratney v. McBratney* (1919), 59 S.C.R. 550 (S.C.C.), 561 ("where you have rival constructions of which the language of the statute is capable you must resort to the object ... of the statute ... [and adopt] the construction which best gives effect to the governing intention"); *Humphreys v. Trebilcock*, 2017 ABCA 116 (Alta. C.A.), ¶ 109; [2017] 7 W.W.R. 343 (Alta. C.A.), 375-76 ("If there is more than one potential meaning, the court must select the option that best advances the purpose that accounts for the text"); *McMorran v. McMorran*, 2014 ABCA 387 (Alta. C.A.), ¶ 69; (2014), 378 D.L.R. (4th) 103 (Alta. C.A.), 142 per Wakeling, J.A. ("[a] failure to be mindful of the purpose may cause a court to select from several permissible meanings one that does not best promote the attainment of the text's object"); *Rainy Sky S.A. v. Kookmin Bank*, [2011] UKSC 50 (U.K. S.C.), ¶ 21; [2011] 1 W.L.R. 2900 (U.K. S.C.), 2908 ("If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 63 (2012)("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored"). Sometimes knowledge of the enactment's purpose is of minimal assistance. This is usually so if it is stated abstractly. *McMorran v. McMorran*, 2014 ABCA 387 (Alta. C.A.), ¶ 70; (2014), 378 D.L.R. (4th) 103 (Alta. C.A.), 143 per Wakeling, J.A. ("For example, the determination that a labour relations statute exists to promote collective bargaining by government employees does not assist much in determining whether a worker is employed by government or is an independent contractor").

145 *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (U.S. Sup. Ct. 1904), 14-15 (the Court refused to interpret "car" in railways safety legislation narrowly — "any car ... not equipped with couplers coupling automatically by impact and which can be uncoupled

without the necessity of men going between the ends of the cars" — and exclude locomotives in order to promote the safety of railway employees responsible for coupling and uncoupling activities).

146 The Oxford English Dictionary (2d ed. 1989).

147 Webster's Third New International Dictionary of the English Language Unabridged (2002).

148 R.S.A. 2000, c. I-8.

149 R.R.O. 1990, Reg. 194. Rule 20 reads, in part, as follows:
20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.
. . . . .
(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.
. . . . .
20.04(2) The court shall grant summary judgment if,
(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
(2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.
(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

150 2014 ABQB 111 (Alta. Q.B.), ¶ 19; (2014), 587 A.R. 16 (Alta. Q.B.), 22. See also *Jackson v. Canadian National Railway*, 2012 ABQB 652 (Alta. Q.B.), ¶ 115; (2012), [2013] 4 W.W.R. 311 (Alta. Q.B.), 362 (Justice Martin, when a Court of Queen's Bench justice, observed that R. 20 of Ontario's *Rules of Civil Procedure* is "significantly different from Rule 7.3(1) of the *Alberta Rules of Court*") & Billingsley, "*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials", 55 Alta. L. Rev. 1, 8-9 ("unlike the current Ontario provision, Alberta's summary judgment rule does not endow the Court with additional fact-finding powers for the purpose of deciding a summary judgment application. On its face, Alberta's summary judgment rule assumes that a decision will be made on the basis of the affidavit evidence submitted by the parties, and does not expressly authorize a court to weigh evidence in order to resolve disputed issues of fact").

151 2014 ABCA 322 (Alta. C.A.), ¶¶ 93, 95 & 96; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 383-85. See *Nelson v. Grande Prairie (City)*, 2018 ABQB 537 (Alta. Q.B.), ¶ 37 (Master Schlosser notes "the formal absence of a summary trial procedure in Ontario").

152 *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27 (Man. C.A.), ¶ 32; (2018), 421 D.L.R. (4th) 315 (Man. C.A.), 325 ("The Supreme Court of Canada's decision in *Hryniak* did not alter the basic test for summary judgment in Manitoba. However, it did make courts acutely aware of the need to consider the concept of proportionality in all aspects of the justice system"); *Lenko v. Manitoba*, 2016 MBCA 52 (Man. C.A.), ¶ 71; (2016), [2017] 1 W.W.R. 291 (Man. C.A.), 311 ("*Hryniak* did not ... change the test to be applied on a motion for summary judgment") & *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52 (N.S. C.A.), ¶ 6; (2014), 68 C.P.C. (7th) 267 (N.S. C.A.), 269 ("*Hryniak v. Mauldin* ... has little bearing upon the circumstances, analysis, reasoning or result in this case. There ... [the Court] considered the application of a new Rule in Ontario ... which now empowers judges in that province to weigh the evidence, draw reasonable inferences from the evidence, and settle matters of credibility when deciding whether to grant summary judgment. Those powers are foreign to the well-established procedures and settled law which operate in Nova Scotia").

153 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶¶ 97 & 101; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 385 & 387.

154 See *Stout v. Track*, 2015 ABCA 10 (Alta. C.A.), ¶ 51; (2015), 62 C.P.C. (7th) 260 (Alta. C.A.), 279 per Wakeling, J.A. ("if the comparative strengths of the moving and nonmoving parties' positions are just about equal, so that the best one can say is that the moving party's position is marginally stronger than the nonmoving party's position, summary judgment is not appropriate. ... Other protocols are available for the timely and cost-effective resolution of disputes where the outcome is not obvious. For this subset of litigation, summary trial may be the best protocol") & *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (U.S. Sup. Ct. 1968), 288-89 ("It is true that the issue of material fact required ... to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a judge or jury to resolve the parties' differing versions of the truth at trial").

155 Queen's Bench of Alberta Civil Practice Note No. 8, at 2 (effective September 1, 2000 to October 30, 2010) ("There is a very clear distinction between an application for summary judgment ... and a summary trial, which is like any other 'conventional' trial, except the procedures are simplified"); *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 17; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 357 per Wakeling, J.A. ("Ontario's hybrid summary judgment and trial rule ... is fundamentally different [from] ... Alberta's summary judgment rule"); *Soni v. Malik* (1985), 61 B.C.L.R. 36 (B.C. S.C.), 40 ("There are substantial differences between [summary judgment and summary trial] ... [T]he raising of a triable issue ... will not defeat an application under rule 18A [the summary trial rule]"); *Compton Petroleum Corp. v. Alberta Power Ltd.*, 1999 ABQB 42 (Alta. Q.B.), ¶ 11; (1999), 242 A.R. 3 (Alta. Q.B.), 7 (("in a summary trial, the court actually tries the issues raised by the pleadings and weighs the evidence"); *Chu v. Chen*, 2002 BCSC 906 (B.C. S.C.), ¶ 19; (2002), 22 C.P.C. (5th) 73 (B.C. S.C.), 79 ("Under Rule 18A ... the hearing judge may enter judgment ... even though some of the facts may be disputed and the law may be in conflict"); *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C. C.A.), 211 ("R. 18A was added to the Rules of Court in 1983 ... to expedite the early resolution of many cases by authorizing a judge in chambers to give judgment in any case where he can decide disputed questions of fact on affidavits or by way of the other proceedings authorized by R. 18A(5)" & Welsh, "Judging the Summary Trial Rule", 44 The Advocate 173, 174 (1986) ("Rule 18A is referred to as a summary *trial* rule rather than a ... summary judgment rule"). The unique role summary judgment played caused the Alberta Law Reform Institute in its Consultation Memorandum No. 12.12 (August 2004) entitled Summary Disposition of Actions at p. xv to oppose combining summary judgment with any other expedited dispute resolution device: "[W]hile there are some reasons why it might make sense to combine Rule 159 [summary judgment] with the summary trial procedures under Rules 158.1-158.7, the Committee decided that the functions of the two rules are too different to amalgamate them". Redish, "Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix", 57 Stan. L. Rev. 1329, 1335 (2005) ("the very purpose of summary judgment is to avoid unnecessary trials"); Issacharoff & Lowenstein, "Second Thoughts About Summary Judgment", 100 Yale L.J. 73, 74 (1990) ("The summary judgment trilogy [of 1986] seems consistent with the spirit of the 1983 revisions to the Federal Rules in encouraging the judiciary to screen as well as to adjudicate cases") & Louis, "Federal Summary Judgment Doctrine: A Critical Analysis", 83 Yale L.J. 745, 769 (1974) ("The primary function of summary judgment is to intercept factually deficient claims and defenses in advance of trial").

156 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 87; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 380 per Wakeling, J.A. See also *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶ 14; (2014), 371 D.L.R. (4th) 339 (Alta. C.A.), 349, ("[r. 7.3 of the *Alberta Rules of Court* is a procedure] for resolving disputes *without* a trial (as compared with Alberta's summary trial procedure which is a form of trial") (emphasis in original); *Diegel v. Diegel*, 2008 ABCA 389 (Alta. C.A.), ¶ 2; (2008), 303 D.L.R. (4th) 704 (Alta. C.A.) ("A decision on summary judgment is not the same thing as a judgment on a summary trial, which may achieve fact findings from which an appeal of the typical sort might lie"); *U.B.'s Autobody Ltd. v. Reid's Welding (1981) Inc.*, 1999 ABQB 956 (Alta. Q.B.)¶ 5; (1999), 258 A.R. 325 (Alta. Q.B.), 327 ("a summary trial is, indeed, a trial; it is intended to provide a final resolution of the matter or an issue. The only avenue open to a party who is dissatisfied with the result of the trial is to file an appeal to the Court of Appeal") & *Jackamarra v. Krakouer*, [1998] HCA 27, ¶ 32; (1998), 195 C.L.R. 516 (Australia H.C.), 528 per Gummow & Hayne, JJ. ("[summary judgment allows for the] summary determination of proceedings without trial").

157 *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶ 84; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 378-79 per Wakeling, J.A. ("While there is no provision in the *Alberta Rules of Court* which expressly precludes a motions court hearing a summary judgment application from ... [allowing a party to introduce oral evidence], there are sound reasons to conclude that the *Alberta Rules of Court* do so by implication"). See Billingsley, "*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials", 55 Alta. L. Rev. 1, 8 ("unlike the current Ontario provision, Alberta's summary judgment rule does not endow the court with additional fact-finding powers for the purpose of deciding a summary judgment application. On its face, Alberta's summary judgment rule assumes that a decision will be made on the basis of the affidavit

evidence submitted by the parties, and does not expressly authorize a court to weigh evidence in order to resolve disputed issues of fact").

158 (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 95. See *High Fructose Corn Syrup Antitrust Litigation, Re*, 295 F.3d 651 (U.S. C.A. 7th Cir. 2002), 655 ("In deciding whether there is enough evidence of price fixing to create a jury issue, a court asked to dismiss a price fixing suit on summary judgment must be careful to avoid three traps .... The first is to weigh conflicting evidence (the job of the jury)").

159 *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶ 116; (2014), 371 D.L.R. (4th) 339 (Alta. C.A.), 350 ("Trials are for determining facts").

160 See *Erik v. McDonald*, 2017 ABQB 39 (Alta. Q.B.), ¶¶ 1 & 2 (the Court, with the agreement of the parties, converted a summary judgment application into a summary trial procedure).

161 Yungwirth, "Summary Trials in Family Law: A Reasonable Alternative" 16 (March 2012) (Legal Education Society of Alberta Conference on Issues in Matrimonial Property) ("Parties are sometimes prepared to sacrifice 'perfect justice' in order to achieve a final result, especially given the effect on families of the litigation process").

162 2015 ABQB 141, 41 C.L.R. (4th) 51 (Alta. Q.B.).

163 Id. at ¶ 7; 41 C.L.R. 4th at 55 ("This matter was set down for trial .... Valard opposed Bird's request that its summary dismissal application be heard before the commencement of the trial. Bird was permitted to bring its application, but after hearing short submissions from Valard, the Court decided that the most efficient way to proceed would be to hear the mini-trial, and Bird's counsel agreed that its submissions would in effect constitute its opening statement. Three witnesses were called ... and their combined testimony took less than a day"). See also *Viczko v. Choquette*, 2016 SKCA 52 (Sask. C.A.), ¶ 54; (2016), 396 D.L.R. (4th) 449 (Sask. C.A.), 470 ("the Chambers judge could not have been truly confident in the result based only on the affidavit and documentary evidence in front of him. The finding ... of wilful blindness ... is controversial and evidence to support that finding is inconclusive at best. As this finding is pivotal to the Chamber judge's conclusion, it is a genuine issue requiring a trial or at the very least, oral evidence") & *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), ¶ 51; [2014] 1 S.C.R. 87 (S.C.C.), 107 ("Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself").

164 R.S.A. 2000, c. L-12, s. 3(1)(b).

165 2017 ABQB 491 (Alta. Q.B.), ¶ 36.

166 See R. Snyder, Collective Agreement Arbitration in Canada 154 (6th ed. 2017) ("In a series of decisions issued over the last four decades, the Supreme Court of Canada has steadily expanded the scope of an arbitrator's jurisdiction and, at the same time, narrowed the jurisdiction of other courts and tribunals to adjudicate disputes arising in unionized workplaces. Perhaps the most important of these decisions is *Weber v. Ontario Hydro* [1995 CarswellOnt 240 (S.C.C.)] which determined that arbitrators have been statutorily granted exclusive jurisdiction to deal with all workplace issues provided the essence of the disputes arise from the collective agreement").

167 2017 ABQB 491 (Alta. Q.B.), ¶ 39.

168 Id. ¶¶ 40 & 41.

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TAB 10

2021 ABQB 287
Alberta Court of Queen's Bench

Stepanik v. Timmons

2021 CarswellAlta 1160, 2021 ABQB 287, [2021] A.W.L.D. 2407, 332 A.C.W.S. (3d) 523

Lisa Stepanik (Applicant) and Benjamin William Timmons (Respondent)

M. David Gates J.

Heard: February 17, 2021
Judgment: April 14, 2021
Docket: Ft. McMurray FL13-01868

Counsel: J.M. Hackett, for Applicant
M. Jones, for Respondent

Subject: Civil Practice and Procedure; Family

Related Abridgment Classifications

Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.a Security for costs

Headnote

Family law --- Practice and procedure — Costs — Security for costs
Parties were in common-law relationship for three years, and they had one child — Mother brought application seeking primary parenting of child and requiring supervised access by father, and she also sought permission to relocate with child from Alberta to Manitoba — Assessment was ordered that recommended mother be granted day-to-day parenting responsibility and authority to make parenting decisions without father's agreement — Mother applied for order pursuant to Rule 4.22 and Rule 4.23 of Alberta Rules of Court for father to post security for costs of $20,000 — Application granted — Family law litigation required more nuanced approach to application for security for costs than might otherwise be case in typical civil dispute — Security for costs awards should be approached with some caution when dealing with family law litigation involving children, but it was not reserved for exceptional cases only — Based on evidence, it seemed highly unlikely that mother would be able to enforce order or judgment against assets held by father in Alberta — Father did not challenge contention that he would be unable to pay costs award — It was possible at this stage to assess relative merit of both party's positions on mobility application scheduled for trial — Mother's prospects for success were high, while father's prospects for success were low — Father did not disclose his current assets or negate possibility of borrowing necessary funds to continue action — Father offered no particulars to support his claim that he was not in position to take on additional debt and that he would have to discharge his counsel if required to post security for costs — In all of circumstances, court was not satisfied that father's ability to continue action would be unduly prejudiced if award for security for costs in favour of mother was made — Mother established that this was appropriate case to make order awarding security for costs of $20,000 in accordance with Rule 4.22 and 4.23 — Father had fundamentally changed process that was previously agreed to by parties as result of change in his trial strategy, and former two-day trial would now last 10 days — Mother sought trial fairness through mechanism that mitigated her risk of unrecoverable increased costs as result of father's claimed inability to pay costs, and such approach reflected balanced response focused on leveling of playing field fundamentally altered as result of actions of father — If father failed to post security for costs, trial would be reduced from 10 days to five days with father permitted to call total of three witnesses.

Table of Authorities

Cases considered by *M. David Gates J.*:

Amex Electrical Ltd. v. 726934 Alberta Ltd. (2014), 2014 ABQB 66, 2014 CarswellAlta 166, [2014] 8 W.W.R. 581, 54 C.P.C. (7th) 146, 99 Alta. L.R. (5th) 1, 582 A.R. 304 (Alta. Q.B.) — considered

Arhum & Huzaifa Enterprises Ltd. v. 1231993 Alberta Ltd. (2013), 2013 ABQB 333, 2013 CarswellAlta 975, 563 A.R. 335 (Alta. Q.B.) — referred to

Attila Dogan Construction & Installation Co. v. AMEC Americas Ltd. (2011), 2011 ABQB 175, 2011 CarswellAlta 407, 100 C.L.R. (3d) 213, 49 Alta. L.R. (5th) 212, 504 A.R. 295, 14 C.P.C. (7th) 174 (Alta. Q.B.) — referred to

Autoweld Systems Ltd. v. CRC-Evans Pipeline International Inc. (2011), 2011 ABQB 265, 2011 CarswellAlta 679, 504 A.R. 288 (Alta. Q.B.) — referred to

B., Re (1965), [1965] 1 W.L.R. 946, [1965] 2 All E.R. 651n (Eng. Ch. Div.) — considered

Bragg v. Bruyere (2007), 2007 ONCJ 515, 2007 CarswellOnt 7239, 45 R.F.L. (6th) 226 (Ont. C.J.) — followed

Calmont Leasing Ltd. v. 32262 B.C. Ltd. (2002), 2002 ABCA 290, 2002 CarswellAlta 1512, 317 A.R. 331, 284 W.A.C. 331 (Alta. C.A.) — considered

Hodgins v. Buddhu (2013), 2013 ONCJ 137, 2013 CarswellOnt 3083, 28 R.F.L. (7th) 492 (Ont. C.J.) — followed

Kaiser v. Wein (2014), 2014 ONSC 752, 2014 CarswellOnt 2468 (Ont. S.C.J.) — followed

Kaushal v. Kaushal (2020), 2020 ABCA 340, 2020 CarswellAlta 1698 (Alta. C.A.) — considered

Marcocchio v. Marcocchio (1981), 32 O.R. (2d) 536, 1981 CarswellOnt 1222 (Ont. H.C.) — followed

PM&C Specialist Contractors Inc v. Horton CBI Limited (2017), 2017 ABQB 400, 2017 CarswellAlta 1314 (Alta. Q.B.) — considered

Parker v. Parker (2019), 2019 ABCA 114, 2019 CarswellAlta 574, 89 Alta. L.R. (6th) 104 (Alta. C.A.) — considered

Parkland Industries Ltd. v. 897728 Alberta Ltd. (2015), 2015 ABQB 10, 2015 CarswellAlta 23, 608 A.R. 223 (Alta. Q.B.) — followed

Schumilas v. Porter-Schumilas (2009), 2009 CarswellOnt 6166, 76 R.F.L. (6th) 294 (Ont. S.C.J.) — considered

Stacey v. Foy (2014), 2014 ABCA 420, 2014 CarswellAlta 2208 (Alta. C.A.) — considered

Toronto Dominion Bank v. Suitel Canada Executive Suites Corp. (2011), 2011 ABQB 519, 2011 CarswellAlta 2250, 527 A.R. 97 (Alta. Q.B.) — distinguished

1251165 Alberta Ltd. v. Wells Fargo Equipment Finance Co. (2013), 2013 ABQB 533, 2013 CarswellAlta 1720, 91 Alta. L.R. (5th) 273 (Alta. Q.B.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

Family Law Act, S.A. 2003, c. F-4.5
s. 18(1) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Pt. 1 — pursuant to

R. 1.2 — considered

R. 1.2(1) — pursuant to

R. 1.2(2) — pursuant to

R. 1.2(3) — pursuant to

R. 4.22 — considered

R. 4.23 — pursuant to

R. 4.23(1) — referred to

R. 4.23(1)(d) — referred to

R. 4.23(4) — referred to

Family Law Rules, O. Reg. 114/99
R. 2(2) — referred to

Rules of Practice, R.R.O. 1970, Reg. 545
R. 373 — referred to

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Federal Child Support Guidelines, SOR/97-175

s. 3 — referred to

s. 7 — referred to

APPLICATION by mother for order for father to post security for costs.

***M. David Gates J.*:**

Introduction & Overview

1 Lisa Stepanik (”the Applicant”), seeks an order pursuant to Rule 4.22 and 4.23, requiring Benjamin Timmins (”the Respondent”), to post security for costs in the amount of $20,000, or such other amount to be determined by this Court, relative to the parties’ family law matters scheduled for a two-week trial commencing June 7, 2021. The Respondent resists this application on the basis that he is not in a financial position to pay $20,000 in a lump sum in advance of this trial.

2 This application was heard by me on February 17, 2021. At the conclusion of the oral submissions of counsel, I reserved my decision. On April 6, 2021, I advised counsel for the parties of the disposition of this application, with written reasons to follow. These are my reasons for decision.

Facts

3 The Parties began cohabitation in approximately June 2016. While there is some dispute between the parties as to the date of separation, the Applicant maintains that it took place on August 20, 2019, the day before she sought a restraining order against the Respondent, as more fully described below. It also appears that the parties were separated between November 2018, and February 2019.

4 There is one child of the relationship, JT, born [Date Omitted] currently three years of age. The Applicant has been the child's primary care-giver since birth.

5 The Applicant obtained a restraining order against the Respondent on August 21, 2019. On the review date for the Restraining Order, September 18, 2019, the parties entered into a Mutual No Contact Order that expired one year later on September 18, 2020. Following the separation and the granting of the Restraining Order, the Applicant took the child to stay with her family in Manitoba.

6 On August 28, 2019, the Respondent filed an application seeking shared parenting; an order preventing the Applicant from removing the child from Fort McMurray; an immediate return of the child to Fort McMurray from Manitoba; and an order for child support. The Applicant responded to this application on September 3, 2019, seeking day-to-day parenting of JT, and supervised access by the Respondent.

7 On September 3, 2019, I granted the Respondent shared parenting on a week on/week off basis. It is not clear whether this order was ever implemented as Children and Family Services ("CFS"), applied for a supervision order on September 27, 2019. This application was heard by Jacques PCJ on October 8, 2019, at which time he granted a one-month supervision order that required the Respondent to submit to a Risk Assessment for Violent Offenders and restricted the Respondent's access to JT to supervised access until the Risk Assessment was completed. On November 7, 2019, the Respondent's counsel was informed by counsel for the Director of CFS, that the Risk Assessment revealed that Mr. Timmons did not pose a risk to the child during his parenting time, and confirmed that the existing Supervision Order would expire on November 12, 2019.

8 On September 30, 2019, the Applicant filed an application seeking primary parenting of the child and requiring supervised access by the Respondent. The Applicant also sought an order permitting her to relocate with the child to Manitoba. Further, she sought partner support, as well as a continuation of child support and continuing contribution to the child's section 7 extraordinary expenses.

9 Shortly after the conclusion of the CFS investigation, the Respondent was advised by the RCMP that he was under investigation for allegations made by the Applicant relating to assault and sexual assault.

10 The Respondent was charged with sexual assault, two counts of assault, uttering threats, breach of recognizance, and obstruction of justice, in an information sworn on November 12, 2019. He entered pleas of guilty to one count of assault, uttering threats and two breaches of recognizance on August 28, 2020. He was sentenced to a six-month conditional sentence involving house arrest, followed by a period of 18 months probation during which he could have no direct contact with the Applicant. Pursuant to the terms of the conditional sentence order, the Respondent continued to be able to parent JT, the parties' child, and to take him to daycare and to his extracurricular activities.

11 On February 3, 2020, prior to the resolution of the Respondent's outstanding criminal charges, Inglis J. varied the September 3, 2019 parenting order. The Respondent was granted daily access every other Saturday and Sunday until trial, as well as two-hour access visits every other Monday and Thursday evening and on Monday, Wednesday and Friday on the other week. This access arrangement was subsequently amended on consent in April 2020, as a result of the Respondent's change of employment. The current access schedule involves daytime access visits during the Respondent's days-off and the days in which he works the night shift. At the present time, he has a total of 44 hours of access during a three-week cycle. Overnight visits are not permitted.

12 A Case Conference was heard by McCarthy J on October 8, 2019, at which point the Applicant's mobility application, as well as the Respondent's application for parenting, were set for a two-day trial on March 26 and 27, 2020. However, due to Covid 19, the trial was then adjourned to June 18, 2020, and then adjourned *sine die* due to the health pandemic.

13 On November 14, 2019, the Respondent filed a further application seeking day-to-day parenting of the child. This application was heard by the Court on November 18, 2019, and adjourned *sine die*.

14 On March 9, 2020, at the request of the Respondent, and with the consent of the Applicant, the Court ordered a PN8 assessment. On August 30, 2020, Dr. Koreen Markfeld, Registered Psychologist, released her PN8 Bilateral Child Custody/Parenting Assessment. In her report, Dr. Martfeld recommended that the Applicant be granted day-to-day parenting responsibility and the authority to make parenting decisions without the consent or agreement of the Respondent. She also recommended that the Applicant be permitted to relocate to Manitoba with JT. So long as the Applicant continued to reside in Fort McMurray, Dr. Martfeld recommended that the Respondent have parenting time every other weekend from Saturday at 10:00 a.m. until Sunday at 5:00 p.m., as well as from 12:00 p.m. to 8:00 p.m. every other Wednesday, plus one weekday evening for a period of three hours. She also recommended that holiday time be divided equally between the parties.

15 If the Applicant were permitted by the Court to relocate to Manitoba, Dr. Martfeld recommended that the Respondent should be entitled to one week of parenting time every three months in Manitoba. Dr. Martfeld also recommended that the Respondent have graduated daily access with his son during the first few days of each week-long visit. She further recommended twice-weekly virtual contact between the Respondent and JT during the periods of separation. Finally, Dr. Martfeld recommended that both the Applicant and the Respondent participate in individualized psychotherapy focused on trauma recovery

16 The Applicant's claim for spousal support remains outstanding. No order, interim or otherwise, has ever been issued regarding the Applicant's entitlement to spousal support.

17 As previously indicated, the trial of this matter was originally scheduled for two days on March 26 and 27, 2020, but was adjourned on account of Covid-19. The duration of the trial was based on the number of witnesses each party intended to call. The trial has now been rescheduled for ten days commencing June 7, 2021. The increased trial time results from the Respondent's recent disclosure of his intention to call 10-12 witnesses at trial.

Position of the Parties

18 The Applicant filed an affidavit sworn January 6, 2021, in support of her application for Security for Costs relating to the now 10-day trial. In her affidavit, the Applicant expresses great concern regarding the additional legal costs associated with a significantly longer trial than originally scheduled. Moreover, she raises concern that she will be unable to realize on any costs award that might be granted in her favour at the conclusion of the trial.

19 The Applicant points to the fact that the Respondent has failed to pay his share of the section 7 expense relating to childcare since July 2020. In addition, she says that he initially agreed to pay her $1000 per month in partner support, but only made one payment in December 2019, and has failed to make any payments since that date. Further, the Applicant contends that the Respondent has failed to make full financial disclosure notwithstanding numerous requests for him to produce his information. Notwithstanding an undertaking that the Respondent gave during questioning on March 10, 2020, to provide a sworn statement of Income, Assets, and Liability, he has failed to do so.

20 The Applicant deposes to her belief that the Respondent does not own real property in Alberta, and that the Respondent has never fully disclosed to her the extent of his assets, if any, in Alberta, or elsewhere. Further, she deposes that she does not have the financial means to cover her own legal expenses for this now greatly expanded trial, as well as to secure legal assistance to enforce any cost award that may be awarded to her at the conclusion of the trial. In short, the Applicant says that the anticipated cost of this trial will cause her lasting financial hardship and adversely impact her ability to financially provide for the care of the parties' child.

21 Finally, the Applicant says that the Respondent's acknowledgement that he does not possess assets in either Alberta or elsewhere, combined with the other circumstances described above, places her in a situation where she has little if any prospect of realizing on any cost award that may be made in her favour at the conclusion of the parties' upcoming trial.

22 The Applicant maintains that the Respondent has the means to pay a security for costs award and, as such, there would

be no prejudice to his ability to pursue this litigation if required to post such security. Further, the Applicant says that the PN8 Assessment prepared by Dr. Martfield strongly supports her position relative to the mobility application.

23 In his affidavit sworn on January 22, 2021, the Respondent concedes that he has no real property in Alberta and that his Nova Scotia home is vacant and condemned. Further, he states that he is "swimming in debt" at least partly as a result of the legal costs to defend himself in the various family and criminal proceedings related to this matter. Further, he acknowledges that the trial of this matter will be "ruinously expensive".

24 The Respondent deposes that his 2020 income was $127,068.04, significantly less than he earned in 2019. He states that his new employment involves a lower hourly rate, but allows him great flexibility in terms of his hours of work so as to increase the opportunities for him to have regular access to the parties' child.

25 The Respondent takes the position that requiring him to post $20,000 in security for costs would be prejudicial in that it would require him to stop paying his lawyer and force him to represent himself at the upcoming trial. He maintains that his current budget, including his current debts, do not allow him any flexibility in terms of his available resources. If forced to self-represent, the Respondent maintains that this would place him at a significant disadvantage at the upcoming trial.

26 The Respondent further deposes that he is aware that an acquaintance of the Applicant made a sworn statement to the RCMP during the course of the criminal investigation in which the individual alleges that the Applicant has stated that she would do anything to ruin the Respondent's life so that she could relocate to Manitoba with the parties' child. As more fully described below, the Respondent also challenges some of the key conclusions and recommendations set forth in the PN8 report.

27 The Respondent filed a further affidavit sworn on January 12, 2021, in which he deposes that he is not currently in a financial position to pay $20,000 in a lump sum to the Applicant by way of security for costs. In his affidavit, he indicates that he currently has $116,233.50 in unsecured debt, together with a mortgage with an outstanding balance of $43,000 relative to a residence in Nova Scotia. He goes on to state that he is currently paying $1,612 per month in section 3 child support, as well as $867 per month as his proportionate share of section 7 extraordinary expenses, specifically child care expenses. His proportionate share of child care costs was reduced to $500 per month as of September, 2020.

The Law

28 Rule 4.22 of the *Alberta Rules of Court*, Alta Reg 124/2010 ("*Alberta Rules of Court*"), provides that a court may order a party to provide security for payment of costs if the court considers it "just and reasonable" in the circumstances. The Rule specifies as follows:

> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> a) whether it is likely the applicant for the order will be able to enforce an order or judgement against assets in Alberta;
>
> b) the ability of the respondent to the application to pay the costs award;
>
> c) merits of the action in which the application is filed;
>
> d) whether an action to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> e) any other matter the Court considers appropriate.
>
> 4.23 (1) An order to provide security for payment of a costs award must, unless the Court otherwise orders,
>
> a) specify the nature of the security to be provided, which may include payment into Court,

b) require a party to whom the order is directed to provide the security no later than two months after the date of the order or any other date specified in the order,

c) stay some or all applications and other proceedings in the action until the security is provided, and

d) state that if the security is not provided in accordance with the order, as the case requires,

(i) all or part of an action is dismissed without further order, or

(ii) a claim or defence is struck out.

. . .

(4) As circumstances require, the Court may

(a) increase or reduce the security required to be provided, and

(b) vary the nature of the security to be provided.

29 The proper interpretation and application of Rule 4.22 must take into consideration the Foundational Rules contained in Part 1 of the *Alberta Rules of Court*, specifically, Rule 1.2:

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issue in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgements.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually, during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using public funded Court resources, use them effectively.

Analysis

30 In *Kaushal v Kaushal* 2020 ABCA 340, Antonio JA, sitting as a single judge of the Court of Appeal, discussed Rule 4.22 in the following terms (at para 7-8):

> Other considerations which inform the test were succinctly summarized in ***Parker v Parker***, 2019 ABCA 114, at para 4:
>
> A security for costs order is discretionary and balances the reasonable expectations of the parties with their rights in order to arrive at a just and reasonable outcome: ***Haymour v The Owners Condominium Plan No 802-2845***, 2016 ABCA 367 at para 8. The onus rests with the applicant to establish that the factors in rule 4.22 are met: ***Aski Construction Ltd v Markos***, 2017 ABCA 341 at para 8. A failure to pay costs awarded in previous trial court processes, along with a demonstrated inability to pay costs if an appeal is unsuccessful, will be sufficient to grant a security for costs order in most cases: ***DataNet Information Systems Inc v Belzil***, 2011 ABCA 40 (Chambers) at para 4. "Access to justice does not wait to access to civil processes without fear of costs consequences": ***ibid***.
>
> Also, concerns regarding a party's ability to pay costs coupled with modest prospects of an appeal's success have been sufficient to justify granting an application for security for costs: ***Aski Construction Ltd v Markos***, 2017 ABCA 341 at para 8; ***Skolney v Nisha***, 2018 ABCA 78, at para 15.

31 This type of approach finds support in the decision of Wakeling J (as he then was) in *Amex Electrical Ltd. v 726934 Alberta Ltd* 2014 ABQB 66. Following a comprehensive discussion of the history and underlying principles surrounding applications seeking security for costs, Wakeling J noted that an applicant in this type of application "seeks relief to promote fair play values": at para 42. At paragraphs 40-42, he stated in part as follows:

> 40. There are several reasons why a court may direct a party to furnish security for costs. There are equally compelling reasons which may cause a court to decline to do so.
>
> 41. A litigant whose lack of resources or their location immunize him from some of the factors which cause a person to behave as a responsible litigant is a liability to the court system. *475878 Alberta Ltd. v Help-U-Sell Inc.*, 294 AR 151, 176 (QB 2001) ("the use of costs is to serve the... aim of encouraging the phenomenon of legal proceedings which became the tool of the recreational litigant, or worse, the litigation terrorist") & L. Abrams & K. McGuiness, *Canadian Civil Procedure Law 993* (2d ed. 2010)...
>
> 42. An applicant seeks relief to promote fair play values. A litigant who has no resources to pay a costs award granted against her does not have the attributes the law can justifiably insist a party who initiates its procedures display. *Keary Developments Ltd v Tarmac Construction Ltd.*, [1955] 3 All ER 534 (CA 1994). Poker players would not welcome to a high-stakes game a person who, at the outset, asks the others to lend him the money he needs to participate. They would not accept the risk that the borrower would be unable to repay the lenders. Why should they fund a venture which, if successful, costs them money and, if unsuccessful, cost them money? *Crothers v Simpson Sears Ltd.*, 51 DLR (4th) 529, 543 (Alta CA 1998)...

32 Similarly, the Court of Appeal in *Parker v Parker* 2019 ABCA 114, determined that an application for security for costs involves "balance[ing] expectations of the parties with their rights in order to arrive at a just and reasonable outcome": at para 4.

33 Counsel have referred me to the decision of Yamauchi J in *Toronto Dominion Bank v Suitel Canada Executive Suites Corp* 2011 ABQB 519. However, I have found this decision to be of very little assistance in this instance given that it was primarily concerned with whether one of the named defendants was normally resident in Canada, and the shifting evidentiary burden of proof that may arise in such circumstances.

34 Counsel for the Respondent has also referred me to a series of Ontario decisions, one citing a decision from the United Kingdom Chancery Division, that seem to suggest that applications for security for costs in family law litigation involves

special considerations in light of the court's primary focus on the best interests of the child. The Respondent relies on three Ontario decisions, *Bragg v Bruyere* 2007 ONCJ 515; *Hodgins v Buddhu* 2013 ONCJ 137; and *Marcocchio v Marcocchio* 1981 CarswellOnt 12.

35 In *Bragg*, a father sought an order for security for costs in circumstances in which the Respondent Mother had not only failed to pay court-ordered child support, but had also failed on two occasions to pay costs awarded to him. Prior to trial, the Father sought security for costs in the amount of $7,500 or, alternatively, an order striking out the Respondent's answer and claim. Justice McKay of the Ontario Court of Justice ultimately directed the Respondent to post $2,750 by way of security for costs, failing which her answer and claim would be struck and the matter proceed to an uncontested trial. However, he noted, at para 5:

> Courts are justifiably cautious in ordering security for costs in family litigation where the best interests of the children are paramount. The court does not wish to see the merits of the case determined by a party's inability to post security for costs. However, in appropriate circumstances, the court may make such an order.

36 O'Connell J of the Ontario Court of Justice addressed this same issue in *Hodgins*, where the Applicant Mother sought an order for security for costs against the Respondent Father prior to trial. In that instance, the Respondent Father had not complied with prior orders requiring the provision of financial disclosure. In dismissing the application for security for costs, the Court held (at para 19):

> In cases involving custody and access, where the best interests of the child are the paramount consideration, it has been held by a number of courts that security for costs should only be granted in exceptional circumstances. As Justice Peter B Hambly states in *Schumilas v Porter-Schumilas*, 2009 CanLII 55361, 76 RFL (6th), 2009 CarswellOnt 6166 (Ont SCJ) at paragraph 30 of that decision, while it is true that a party's position in a custody and access case may be unreasonable and lacking merit, "it can never be a waste of time or a nuisance for a court to concern itself with the custody of a young child."

37 Continuing at paras 21, 25, and 27, the Court went on to state:

> 21. First, Mr. Buddhu is not pursuing this litigation. The purpose of an order for security for costs is to control and curtail people from commencing litigation and pursuing another party in the court system in a frivolous and wasteful manner. As Justice Katarynych aptly states in *McGraw v Samra, supra*, an order for security for costs is "a control on a blithe pursuit of another person in the courts without attention to the merits of the pursuit and the legal costs likely to be incurred by the respondent to defend the case." [paragraph 24]...
>
> 25. Further, it is in Jonathan's best interests that the issue of access be determined on its merits. In my view, Mr. Buddhu's position with respect to access is not unreasonable, nor a waste of time or a nuisance. If security for costs were ordered in the amount of $7500, then it is very unlikely that the court would have the opportunity to hear from Mr. Buddhu to make a proper determination of what access order is in Jonathan's best interests. The case law is clear that an order for security for costs in cases involving custody and access should be made cautiously and in exceptional cases.
>
> 27... However, an order for security for costs is not the appropriate remedy in the circumstances of this case. It is the trial judge's role to determine what inferences should be drawn from Mr. Buddhu's failure to provide financial disclosure. I further leave it to the trial judge to determine whether Mr. Buddhu should be entitled to participate in a hearing of the child support issue at trial if he has not complied with the cost order that was made against him or filed a response to the motion to change.

38 Finally, in *Marcocchio*, Master Cork of the Ontario High Court of Justice considered a situation where the Respondent Mother sought an order for the posting of security for costs against the Applicant Father who resided outside of Ontario in the State of Illinois. While the decision turns on then Ontario Rule 373 dealing with plaintiffs who resided outside of Ontario, it contains some important discussion regarding this type of application in the context of a family law proceeding.

39 Referring to the decision of Pennycuick J in the Chancery Division in *Re B (Infants)* [1965] 2 All ER 651, at p 652, the

Court in *Marcocchio* adopted the following passage:

> Quite apart from that objection to the present motion, which is one of jurisdiction, it would, I think, be extremely unusual to order security for costs in an infant case against the party who was one of the parents of the infant. The general principle on which the court acts in infant cases is, I think, that either parent of the infant is entitled to put before the court his or her view on the point of what is for the welfare of the infants, and only in the most exceptional circumstances would the court prevent a parent from putting his views before the court by means of an order for security for costs. Counsel has mentioned certain special circumstances in this case, but it seems to me that, even assuming that I have jurisdiction to make an order at all — and I do not think I have got jurisdiction to make an order — still, in the exercise of my discretion I ought not to make the order. I must therefore dismiss the motion.

40 In *Marcocchio*, the Court went on to deny the request for security for costs stating, at para 20:

> It is apparent to me that on review of this paragraph, that the primary point in England, that of the welfare of the child, is identical to the real point at issue in this jurisdiction. I must therefore respectfully agree with that decision that only in the most exceptional circumstances should I prevent a parent from putting his views before the Court (in this jurisdiction) by means of an order for security for costs.... I believe the law is clear that the welfare of the child or children in issue should be paramount to all other considerations. Security of costs in favour of the wife, I think, should be well subservient to the interests of the child.

41 In *Schumilas*, one of the decisions referred to in *Hodgins*, I note that the judge made an order that required the Applicant Father to post $10,000 as security for costs if he wished to pursue his claim for joint custody. However, the judge determined that the Applicant Father had a strong case for expanded access and, as such, no security for costs would be required to be posted to maintain that claim only.

42 I accept the general proposition advanced in these Ontario decisions that family law litigation requires a somewhat more nuanced approach to an application for security for costs than might otherwise be the case in a typical civil dispute. Family law litigation typically involves continuing relationships between parents, at least as long as the children remain children of the marriage, and, more important, on-going relationships between parents and children. I also accept the notion that courts dealing with legal matters pertaining to children generally require the input of both parents in addressing any issue that triggers a "best interests" determination. If, hypothetically, an advance costs award was to have the effect of silencing a parent in a particular proceeding that engaged the "best interests" doctrine, it seems reasonable to predict that the silenced parent would likely seek future opportunities to pursue the dispute in other fora. Potentially prolonging the dispute — and the litigation — would obviously not be in the best interests of the child or children and, indeed, the parties.

43 As the Ontario cases suggest, security for costs awards should be approached with some caution when dealing with family law litigation involving children. While I agree with O'Connell J. in *Hodgins* that hearing from both parents "is not unreasonable, nor a waste of time or a nuisance", I do not believe that a parent thereby acquires a license to adduce whatever evidence that parent believes may be somehow relevant to the proceeding. Awarding security for costs in appropriate circumstances is one of many tools available to family law litigants and to courts to try and avoid unduly lengthy and cost-prohibitive proceedings. As Rule 1.2 directs, parties have a shared responsibility to effectively use publicly-funded court resources. Accordingly, while I share the view that courts should approach the awarding of security for costs in family law matters involving children with caution, I would respectfully disagree with the suggestion that this tool should be reserved for exceptional cases only.

Is it likely the Applicant will be able to enforce an order or judgement against assets in Alberta?

44 On the evidence before me, including the Respondent's candid statements regarding his current state of indebtedness, it seems highly unlikely that the Applicant will be able to enforce an order or judgement against assets held by the Respondent in Alberta. The Respondent does not suggest otherwise.

Is the Respondent able to pay a costs award?

45 The Applicant urges the Court to consider the Respondent's history in terms of the provision of financial disclosure in assessing his ability to pay a costs award and, indeed, the unlikelihood that he will volunteer to pay costs after trial. According to the Applicant, the Respondent continues to provide deficient materials relating to his financial disclosure materials. In particular, the Applicant points to missing bank account numbers, as well as missing account balances, combined with failures to respond to requests to provide updated information. The Applicant also refers to the fact that the Respondent did report funds in two different bank accounts with East Coast Credit Union, but that the last bank statement provided is dated July 2019.

46 I am satisfied that there is considerable merit to the Applicant's position in this regard. Indeed, the Respondent does not challenge the contention that he will be unable to pay a costs award. Indeed, he goes so far as to say that he is not only not in a position to take on more debt, but that he would have to discharge is counsel and continue the litigation as a self-represented litigant if required to post security for costs.

What are the merits of the action?

47 The Applicant relies on the decision of Michalyshyn J in *PM & C Specialist Contractors Inc v Horton CBI Limited* 2017 ABQB 400, in relation to this factor. The decision contains a valuable summary of the various Alberta decisions that have considered Rule 4.22, including *Attila Dogan Construction & Installation Co v AMEC Americas Ltd* 2011 ABQB 175; *Autoweld Systems Limited v CRC-Evans Pipeline International Inc* 2011 ABQB 265; *Arhum & Huzaifa Enterprises Ltd v 123-1993 Alberta Ltd* 2013 ABQB 333; *125-1165 Alberta Ltd v Wells Fargo Equipment Co* 2013 ABQB 533; and *Parkland Industries Ltd v 897728 Alberta Ltd* 2015 ABQB 10. While I note that most, if not all, of these decisions involved applications for security for costs initiated by defendants against plaintiffs, I am of the view that the articulated principles are nonetheless relevant to the within situation. Rule 4.22 refers to a "party" and, as such, draws no distinction between whether an applicant seeking security for costs is a plaintiff or a defendant.

48 In my view, the decision of Master Hanebury in *Parkland Industries*, provides a succinct summary of the element of Rule 4.22 that requires the court to consider the merits of the case. At para. 35-36, Master Hanebury held:

> The rule requires the Court to examine the action as a whole, both claim and defence: ***Arhum & Huzaifa Enterprises Ltd v 123-1993 Alberta Ltd***, 2013 ABQB 333, at para 25. This is, as is often the case, difficult to assess at an early stage in the action, and in this case, also on the evidence filed: *590863 Alberta Ltd v Deloitte Touche Inc*, 2012 ABQB 98, at para 21.
>
> The greater the likelihood of success for the plaintiff, insofar as that can be reasonably assessed, the more the court should take into account the unfairness of an order that would stop a meritorious claim from proceeding: *125-1165 Alberta Ltd v Wells Fargo Equipment Co*, 2013 ABQB 533, at para 43.

49 In *PM & C Specialist Contractors Inc*, Michalyshyn J noted, at para 24:

> I do not doubt that *Attila Dogan* can be read consistently with the cases mentioned above. It can be in the sense that a conclusion as to a reasonably meritorious defence can rarely be made without some broader consideration of the merits of the claim — if the likelihood the plaintiff will receive judgment is high, it can hardly be said the defendant has a reasonably meritorious defence; if the plaintiff's claim is weak, it may take relatively little to raise a reasonably meritorious defence. In any event it is hard to conceive of having little or no regard for the strength, or the merits, of *both* parties' positions. And the extent of that regard may depend on the stage of the litigation and on the availability of relevant and material evidence.

50 In this instance, the Applicant says that the prospects for success on her mobility application are high, given Dr. Martfeld's recommendation that she be permitted to relocate to Manitoba, as well as her long-standing role as JT's primary parent. As such, she relies on Dr. Martfeld's conclusion that there would be "limited benefit and substantive potential risk in preventing Ms. Stepanik from moving to Manitoba...".

51 The Respondent, on the other hand, deposes in his affidavit sworn January 22, 2021, that he disagrees with Dr. Martfeld's conclusion that the Applicant should be allowed to move to Manitoba with the parties' child. He suggests that there are some "serious flaws" in the report, namely that Dr. Martfeld over emphasized certain benefits flowing to the child if permitted to relocate to Manitoba, while underemphasizing the benefits flowing to the child from his continued exposure to the Respondent and his extended family in Alberta. Further, the Respondent suggests that Dr. Martfeld did not have access to the entire child welfare file or the RCMP file related to this matter. He maintains that the Trial Judge will have the benefit of access to all of this additional material and that this will reveal "a concerted effort on the part of the Applicant to systematically exclude me from JT's life."

52 In my view, Dr. Martfeld's report and recommendations will be important evidence at the upcoming trial. Her detailed report reveals an exhaustive review of the background to this matter, as well as extensive exposure to, and interactions with, both parents. While it will, of course, be for the trial judge to determine the weight to be placed on this evidence, the Respondent has not persuaded me that there are serious flaws in the report in terms of the parenting expert's emphasis on certain matters over other matters.

53 I accept the Respondent's suggestion that information not available to Dr. Martfield, specifically the full child welfare file and the police file relating to the November 2019 criminal allegations, could potentially reveal information that is favourable to his position. However, the Respondent does not provide any details or specifics in his assertions in this regard. As such, I am left with little more than the expression of a hope or a desire that this additional information, assuming that it is even available to the trial judge, may support the Respondent's contention that the Applicant has systematically sought to exclude him from his son's life.

54 I am satisfied that it is possible at this stage of the proceedings to assess the relative merit of both the Applicant's and the Respondent's positions on the mobility application now scheduled for trial in June 2021. A great deal of evidence is already before the Court in the form of the various affidavits filed by both of the parties since their separation in mid-2019. As noted above, the important evidence to be provided at trial by Dr. Martfeld is already available through her PN8 assessment report. While additional new evidence will doubtless be forthcoming at trial, this is not a situation, as described by Master Hanebury in *Parkland Industries*, where it is difficult to assess the merits of the case at an early stage in the action. As such, I accept the Applicant's contention that her prospects for success are high in this instance. At the same time, I am also satisfied that the Respondent's prospected for success are quite low.

Would granting security for payment of a costs unduly prejudice the Respondent's ability to continue the action?

55 As regards the question of whether an advance costs award will prejudice the Respondent in his defence of this action, I note that he has adduced little evidence on this point beyond his mere assertions to this effect. Nowhere in his materials does the Respondent fully disclose his current assets or negate the possibility of borrowing the necessary funds to satisfy this requirement. While he claims that he is not in a position to take on additional debt and that he is currently "swimming in debt", he offers no particulars or details to support these conclusions. Similarly, he claims that he will have to discharge his counsel if required to post security for costs, yet offers no evidence to support this contention.

56 Likewise, he has made no offer to try and reduce the time requirements for trial so as to reduce both the Applicant's financial exposure and his own. Indeed, when invited by the Court to consider reducing the number of witnesses required to testify at trial on his behalf by having potential witnesses file affidavit evidence, the Respondent responded that only two of his proposed ten witnesses could provide their evidence in this fashion. In short, the Respondent displayed a lack of flexibility in terms of attempting to find a way to resolve this issue.

57 In *PM & C Specialist Contractors Inc*, the Court referred to the decision in *Stacey v Foy* 2014 ABCA 420, in which Berger JA was prepared to draw an adverse inference against a security for costs respondent as a result of "a failure... to adduce meaningful evidence of his financial status and of the corporate entities". In *PM & C Specialist Contractors Inc*, the Court was also prepared to draw a similar adverse interest on the basis that a security for costs respondent "cannot rely on its own alleged impecuniosity to suggest that it will be unduly prejudiced, or that it would be unfair, if security for costs is ordered": at para 52.

58 Côté JA also considered this issue in *Calmont Leasing Ltd v 32262 BC Ltd* 2002 ABCA 290, at para 5-6 regarding the now repealed equivalent rule:

> ... It does not follow that the lack of income or assets of [the defendant] means that if security is ordered that will prevent the appeal from being prosecuted... The gap in this logic is this. A number of the reported cases say that it is not sufficient for the appellant (or in another case plaintiff) is say that it has no income or assets. It must also go on to depose that it has no way of raising any money or other property which could be put up as security.

59 In all of the circumstances, I am not satisfied that the Respondent's ability to continue this action would be *unduly* prejudiced if I were to make an award for security for costs in favour of the Applicant in this instance.

Are there any other matters the Court considers appropriate in these circumstances?

60 Other than the fact that this is family law litigation, as previously discussed, counsel have not identified any other factors that the Court should take into consideration in this situation.

Conclusion

61 I am satisfied that the Applicant has established that this is an appropriate case for the Court to make an order awarding security for costs in accordance with Rule 4.22 and 4.23. I would set the amount to be paid into court or transferred to the trust account of the Applicant's counsel at $20,000. The Respondent has until April 30, 2021, to post this amount.

62 I now turn to consider the issue of what consequences should flow if the Respondent fails to post the security for costs as directed.

Consequences For Failing to Post the Required Security for Costs

63 Subsequent to the hearing of this application, the Court wrote to counsel on February 21, 2021, seeking additional submissions regarding the crafting of an appropriate remedy in the event the Court decided in the Applicant's favour on the need for the Respondent to post security for costs.

64 In addition, the Court asked counsel to provide a list of witnesses for the forthcoming trial, together with a general overview of the type of evidence anticipated from each of these witnesses. Further, counsel were invited to consider the extent to which the current time estimate for the trial could be reduced through a procedural order that required some or all prospective witnesses to file affidavits in advance of trial outlining their essential evidence. With such affidavits in hand, time limits could be imposed relative to each witness, both in relation to evidence-in-chief and cross-examination, with a view to attempting to reduce the total amount of trial time required for this matter.

65 Counsel for the Applicant subsequently advised that he anticipated calling a total of three witnesses. The first witness, Lisa Stepanik, was estimated to require a full day to complete her trial evidence. Her counsel recommended that this evidence be provided *viva voce* and opposed the suggestion that her evidence be provided in whole or in part through an affidavit. The second witness, Sandra Stepanik, the Applicant's Mother, was estimated to require a half day to complete her trial evidence. Counsel took the position that her evidence should be given *viva voce* by videoconference from Manitoba. Finally, counsel for the Applicant indicated that a third potential witness would be the Applicant's brother, Andrew Stepanik. Counsel suggested that Mr. Stepanik's evidence could be adduced at least in part through an affidavit and pretrial cross-examination, if requested. Counsel estimated that Mr. Stepanik's evidence if given *viva voce* would require approximately one hour.

66 In total, the Applicant estimates that she will require approximately two days of trial time to complete her evidence. I note that the Applicant's witness list does not include Dr. Martfeld. In my view, Dr. Martfeld is properly viewed as the Court's witness and, as such, I do not factor her evidence into this exploration of the parties' time requirements for trial.

67 Counsel for the Respondent also provided a list of the anticipated Defence witnesses. The proposed witnesses are as follows:

> a) Benjamin Timmons — This evidence will require one full day. This evidence could not be provided by way of affidavit or be time-limited in terms of examination-in-chief or cross-examination;
>
> b) Doug Timmins — This evidence from the Respondent's brother requires one half day. This evidence would be best provided in person and without time limitations;
>
> c) Brittany Timmins — This evidence from the Respondent's adult stepdaughter requires one half day. Counsel suggests that this evidence could be given by way of affidavit with appropriate out-of-court cross-examination and with a transcript filed with the court;
>
> d) Penny Lockyer — The evidence from the Respondent's former counselor requires one half day. Counsel take the position that this evidence could not be provided by way of affidavit or be time limited in terms of either examination-in-chief or cross-examination;
>
> e) Christian Mazerolle — This evidence requires two hours. Counsel take the position that this evidence could not be provided by way of affidavit or be time limited in terms of examination-in-chief or cross-examination. This witness is anticipated to give evidence regarding several conversations he had with the Applicant regarding her intention to ruin the Respondent's life by having him arrested and put in jail;
>
> f) Children's Services — The Respondent seeks to elicit information from the CFS file from an as yet unidentified witness. He estimates that this evidence will require one half day to one full day to complete. Counsel take the position that this evidence could not easily be provided by way of affidavit or be time limited in either examination-in-chief or cross-examination;
>
> g) RCMP — The Respondent has filed an application seeking disclosure of the Applicant's RCMP file. This contested application is scheduled to be heard sometime during the week of April 19, 2021. The Respondent maintains that this material will contain relevant information regarding the Applicant's attempts to have the Respondent imprisoned on spurious criminal charges. The Respondent estimates that this evidence from an as yet unidentified witness will require one half day. Counsel take the position that this evidence could not easily be provided by way of affidavit or be time limited in either examination-in-chief or cross-examination;
>
> h) Dr. Edmund Ledi — The evidence from the Respondent's current counselor is anticipated to take one half day. Counsel for the Respondent anticipates Dr. Ledi's expert report being available by May 15, 2021. Counsel takes the view that this evidence could not be provided by way of affidavit or be time limited in terms of examination-in-chief or cross-examination;
>
> i) Dr. Lloyd Flaro — Dr. Flaro was engaged by CFS in 2019, to determine if the Respondent posed a danger to JT. Dr. Flaro conducted in-depth interviews and testing relating to the Respondent. An expert report from Dr. Flaro is expected to be completed on or before May 15, 2021. This evidence is expected to take one half day and is not suited to presentation by way of affidavit or to be time limited in either examination-in-chief or cross-examination;
>
> j) Dr. Martfield — The Respondent takes the position that this evidence will require one full day and cannot be provided by way of affidavit or be time limited in terms of cross-examination of this Court Expert by either of the parties.

68 The Respondent takes the position that Rules 4.23(d) allows a court to either dismiss all or part of an action, or to strike out a claim or defence, in the event that a respondent party fails to comply with in order to post security for costs. According to the Respondent, dismissing his action or striking out his claim or defence does not relieve the Applicant of the requirement to demonstrate that moving JT to Manitoba would be in the best interests of the child, as per section 18(1) of the *Family Law Act*, SA 2003, c 4.5.

69 The Respondent concedes that it may well be appropriate to dismiss or strike-out his application for shared parenting and day-to-day parenting if he is unable to meet a security for costs payment requirement that may be directed by the Court.

However, the Respondent says that it would be contrary to s. 18(1) of the *Family Law Act* for the court to make an order that allowed the Applicant to relocate to Manitoba with JT without a full hearing to determine whether such a move would be in JT's best interests. According to the Respondent, a full court hearing is required to make such a determination. Furthermore, the Respondent contends that his inability to pay a security for costs award has no relevance to his ability to parent, or to the "best interests" focus of the mobility application. In short, the Respondent maintains that the Applicant should, effectively, be denied a remedy that she is otherwise entitled to receive on the basis that this is family law litigation in which he must be permitted to fully advance his challenge to the request to relocate JT to Manitoba.

70 In my view, the Applicant has accurately captured the essence of what has transpired in this instance. She maintains that the Respondent has fundamentally changed the process previously agreed upon by the parties as a result of a change in the Respondent's trial strategy. What was formerly a two-day trial is now proposed to last ten days; a change that lies entirely at the feet of the Respondent. In these circumstances, the Applicant seeks trial fairness through a mechanism that mitigates her risk of unrecoverable increased costs as a result of the Respondent's claimed inability to pay costs. In my view, such an approach reflects a balanced response focused on a leveling of the playing field fundamentally altered as a result of the actions of one party only.

71 Earlier in these reasons, referring to a series of Ontario decisions that considered applications for security for costs in the context of family law litigation involving children, I concluded that courts should approach such applications with some caution given the nature of the proceedings. At the same time, I suggested that parents do not have a license to adduce whatever evidence they believe may be relevant to a proceeding without regard to the cost consequences to the other party or the time implications on over-burdened courts.

72 Family law litigants should, in my view, be required to follow the same general rules that apply to all litigants, including the requirement to post security for costs in appropriate circumstances. Parents as litigants are not somehow immunized against following the same "fair play" requirements that lie at the heart of the Rules of Court that empower courts to make an order of this nature in proper circumstances.

73 In all of the circumstances, I am not prepared to accede to the Respondent's suggestion that I direct the payment of an appropriate level of security for costs in this instance but then decline to direct any meaningful consequences in the event the Respondent fails to make the required payment. As counsel for the Applicant suggests, this would amount to a meaningless or "toothless" remedy to the Applicant and, as such would fail to properly account for the foundational goal of promoting fair play. To adopt the approach advanced by the Respondent would, in my view, deny the Applicant of any form of remedy notwithstanding that she has satisfied the general requirements of Rule 4.22. In my view, courts should look to creative remedies that balance the "best interests" foundation that lies at the heart of all family law litigation dealing with children with the need to ensure that family law litigants are held accountable for their litigation conduct.

74 In his supplementary written brief, counsel for the Applicant proposes a series of alternative remedies that I would summarize as follows:

> i) Require the Respondent to post security for costs in the amount of $20,000, or such other amount as may be deemed appropriate, within two months of the date of this decision. Failing payment, the Respondent's application and response materials would be struck, and the Applicant granted leave to apply for an order in default with costs;
>
> ii) Require the respondent to post security for costs in the amount of $20,000, or such other amount as may be deemed appropriate, within two months of the date of this decision. Failing payment, the trial date would be vacated and the action stayed. At the same time, an Interim Order would be granted allowing the Applicant to relocate to Manitoba with JT, as per the recommendations of Dr. Martfeld. The Respondent would be given an additional six months from the date of the Interim Order to post the required security. If the required security was posted within the six-month window, a new trial date would be set and the matter would proceed to trial. If the required security was not posted within the six-month window, the Applicant would be granted leave to apply for a permanent Order permitting her to relocate to Manitoba with JT;
>
> iii) Permit the Respondent to reconsider the change in his trial strategy increasing the length of time required for trial from two days to ten days. As such, the Respondent would be required to post security for costs in the amount of $20,000, or such other amount as may be deemed appropriate, no later than 30 days before the scheduled start date of

the trial of this matter (on or before May 7, 2021). Failing payment, the Respondent would be required to submit an updated witness list not exceeding four witnesses, the same number of witnesses proposed to be called by the Applicant, and limiting the Respondent to three full days of trial time to present his case in full.

75 The Applicant's third proposal is based on a decision Mesbur J of the Ontario Superior Court in *Kaiser v Wein* 2014 ONSC 752. The facts in *Kaiser* are somewhat similar to those in the within matter, though I note that there was a finding of blameworthy conduct on the part of the father in that instance that involved his "persistent and unrepentant" failure to pay past cost awards or child support over a period of five years: at para 26. In that instance, the Respondent Father advised of his intention to call 23 witnesses at a custody trial. Faced with significantly increased legal costs, the Applicant Mother brought an application for security for costs. The Court in *Kaiser* offered the Respondent Father the choice of either limiting his proposed list of witnesses and the trial time to match the Applicant Mother's anticipated witness list and trial time, or pay security for costs as sought. In this regard, Justice Mesbur, relied on Rule 2(2) of the *Family Law Rules*, promulgated under the *Courts of Justice Act*, RSO 1990, c. C-43, which states: "the primary objective of these rules is to enable the court to deal with cases justly".

76 I agree with the Applicant's submission that the essence of this Ontario rule more or less conforms to Alberta foundational Rule 1.2(1), set out in full earlier in these reasons. I also agree with Mesbur J that this creative approach represents a novel but effective way of balancing the interests of the parties.

77 I would dispose of the Applicant's application for security for costs as follows:

i) Ms. Stepanik's application for Security for Costs is granted;

ii) Mr. Timmons has until April 30, 2021, to deposit $20,000 with the Court as Security for Costs relative to the upcoming ten-day trial scheduled for this matter;

iii) If Mr. Timmons fails to post the $20,000 by April 30, 2021, the trial of this matter will be reduced from ten days to five days. These five days will be allocated as follows:

a) One Day — Dr. Martfeld (the Court's witness) — both parties will be allocated a maximum of 2.5 hours each for cross-examination of Dr. Martfeld;

b) Two Days — The Applicant will be permitted to call a total of three witnesses. The total time allotted for the examination-in-chief, cross-examination, and re-examination (if any) is two days;

c) Two Days — The Respondent will be permitted to call a total of three witnesses. The total time allotted for the examination-in-chief, cross-examination and re-examination (if any) is two days.

iv) The Applicant and Respondent will be required to produce to the Court and counsel for the opposing party their final, revised witness list by May 14, 2021;

v) With leave of the Court, additional evidence may be adduced by either party at trial through the filing of expert reports or affidavits of no more than five pages in length.

vi) If the Respondent call more witnesses, or their evidence-in-chief is longer than in his amended witness list, the trial judge will determine whether to limit the Respondent's further participation in the trial, or require him to post security for costs at that time.

Costs

78 The Applicant is entitled to her costs of this application. If the parties are unable to agree on the issue of costs, they may speak to the matter within 14 days of the release of these reasons.

Application granted.

End of Document

TAB 11

2020 ABCA 340
Alberta Court of Appeal

Kaushal v. Kaushal

2020 CarswellAlta 1698, 2020 ABCA 340, [2021] A.W.L.D. 416, 327 A.C.W.S. (3d) 35

Rajvinder Kaushal (Applicant / Respondent on Appeal) and Rakesh Kaushal (Respondent / Appellant on Appeal)

Jolaine Antonio J.A.

Heard: September 22, 2020
Judgment: September 24, 2020
Docket: Calgary Appeal 2001-0170-AC

Counsel: K. Anderson, A.S. Hayher, for Applicant
R.W. MacKenzie, for Respondent

Subject: Civil Practice and Procedure; Family

Related Abridgment Classifications

Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.a Security for costs

Headnote

Family law --- Practice and procedure — Costs — Security for costs
Wife filed statement of claim for issues including parenting, support, and division of matrimonial property — Husband's financial disclosure over course of proceedings was so inadequate that he was found in contempt of court for total of six times — Ultimately husband's pleadings in respect of support and matrimonial property issues were struck and ordered to be dealt with by way of summary trial at which husband could not make submissions or bring evidence — Husband appealed order on various grounds — Wife applied for order for security for costs — Application for security for costs granted — Throughout litigation, husband had avoided providing evidence about any of his assets in province and had attested that his income was reduced — In materials on application, husband had not sufficiently explained merits of his appeal — Appeal was not so meritorious as to make order for security for costs inappropriate — Husband was to post $40,000 with by specified date, failing which appeal was to be struck without more.

Table of Authorities

Cases considered by *Jolaine Antonio J.A.*:

Aski Construction Ltd v. Markos (2017), 2017 ABCA 341, 2017 CarswellAlta 1845 (Alta. C.A.) — referred to

Bains Engineering Corp. v. 734560 Alberta Ltd. (2004), 2004 ABQB 780, 2004 CarswellAlta 1455, 38 C.L.R. (3d) 212, 366 A.R. 291 (Alta. Q.B.) — referred to

Burn v. Burn (2018), 2018 ABQB 275 (Alta. Q.B.) — referred to

Imperial Finishing Ltd. v. Moderno Homes Inc. (2019), 2019 ABQB 64, 2019 CarswellAlta 181, 91 Alta. L.R. (6th) 257, 98 C.L.R. (4th) 114 (Alta. Q.B.) — referred to

Parker v. Parker (2019), 2019 ABCA 114, 2019 CarswellAlta 574, 89 Alta. L.R. (6th) 104 (Alta. C.A.) — considered

Skolney v. Nisha (2018), 2018 ABCA 78, 2018 CarswellAlta 342, 10 R.F.L. (8th) 34 (Alta. C.A.) — referred to

W. (S.) v. T. (K.) (2005), 2005 ABQB 298, 2005 CarswellAlta 566, 52 Alta. L.R. (4th) 57, 379 A.R. 320 (Alta. Q.B.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 4.22 — considered

R. 10.53(1)(d) — considered

APPLICATION by wife for security for costs.

***Jolaine Antonio J.A.*:**

1 The applicant, Ms Rajvinder Kaushal, applies for an order for security for costs against the respondent to this application, Mr. Rakesh Kaushal. She seeks $40,000 as an estimate of the costs of the appeal on a full indemnity basis, being the scale of costs ordered in the court below. She further asks this Court to order that if the costs are not posted by September 28, 2020, his appeal shall be struck.

Background

2 Ms Kaushal filed a statement of claim to determine issues of parenting, child support, spousal support, and matrimonial property division. The file was placed under case management in 2017. Since that time, the case management judge has made around 20 court orders, of which 13 pertained to Mr. Kaushal's inadequate financial disclosure. Between October 2017 and December 2018, Mr. Kaushal was found in contempt of court five times, and was incarcerated on one occasion.

3 A seven-day trial was scheduled to commence on October 5, 2020. The court ordered a litigation plan on June 4, 2020. Many trial preparation steps remained outstanding. Given the impending trial, the deadlines imposed were short, but they were imposed with the parties' consent. Contrary to the consent order, Mr. Kaushal provided his affidavit of records on August 13, well after the June 30 deadline; failed to provide updated financial disclosure per a standard notice to disclose; and failed to attend for questioning on July 22.

4 On August 14, 2020, the case management judge found Mr. Kaushal in contempt of court for a sixth time. He noted that after four years of trying at enormous expense, Ms Kaushal still had not obtained adequate financial disclosure from Mr. Kaushal. Mr. Kaushal's failure to comply with the litigation plan jeopardized the scheduled trial date and trial fairness. Mr. Kaushal had a history of disregard for court orders. The court's response to the contempt needed to deter Mr. Kaushal from such behavior and to reinforce the public's respect for court orders. Relying on Rule 10.53(1)(d), the case management judge ordered that Mr. Kaushal's pleadings be struck as they relate to issues of child support, spousal support, and matrimonial property division. The parenting issues remained to be resolved at trial. Child support, spousal support, and matrimonial property will be dealt with by way of summary trial at which Mr. Kaushal will have no ability to lead evidence or make submissions.

5 Mr. Kaushal has appealed the August 14 order on various grounds pertaining to the evidence before the case management judge, his failure to be sympathetic to the effect of the COVID-19 pandemic, and his scheduling of the contempt hearing. Mr. Kaushal also alleges that the case management judge erred in ordering certain information to be produced, but

that order was made by consent on June 4 and has not been appealed.

Test for security for costs

6 Rule 4.22 provides that the Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable, considering the following:

> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action; and
>
> (e) any other matter the Court considers appropriate.

7 Other considerations which inform the test were succinctly summarized in *Parker v. Parker*, 2019 ABCA 114 (Alta. C.A.) at para 4:

> A security for costs order is discretionary and balances the reasonable expectations of the parties with their rights in order to arrive at a just and reasonable outcome: ***Haymour v The Owners Condominium Plan No 802 2845***, 2016 ABCA 367 at para 8. The onus rests with the applicant to establish that the factors in r 4.22 are met: ***Aski Construction Ltd v Markos***, 2017 ABCA 341 at para 8. A failure to pay costs awarded in previous trial court processes, along with a demonstrated inability to pay costs if an appeal is unsuccessful, will be sufficient to grant a security for costs order in most cases: ***DataNet Information Systems, Inc v Belzil***, 2011 ABCA 40 (chambers) at para 4. "Access to justice does not equate to access to civil processes without fear of costs consequences": *ibid*.

8 Also, concerns regarding a party's ability to pay costs coupled with modest prospects of an appeal's success have been sufficient to justify granting an application for security for costs: *Aski Construction Ltd v. Markos* [2017 CarswellAlta 1845 (Alta. C.A.)], *supra* at para 8; *Skolney v. Nisha*, 2018 ABCA 78 (Alta. C.A.) at para 15.

Positions of the parties

a) Ability to enforce an order against assets in Alberta

9 Ms Kaushal submits she would likely be unable to enforce an order against Mr. Kaushal because, based on his own testimony, he has no permanent residence in Alberta and his restaurants are experiencing financial difficulties due to the COVID-19 pandemic. She has provided Mr. Kaushal's August 2020 affidavit in which he deposed that he had "limited resources".

10 Mr. Kaushal submits that he has assets, including assets in Alberta against which any judgment or order could be enforced. He has attested that he sold some assets formerly held in Alberta, withheld Ms Kaushal's share of the proceeds on a set-off theory of his own making, and used his share of the proceeds to buy restaurants, "usually" under certain trade names and in "small centres, like Lethbridge or Medicine Hat". He states that for each restaurant his ownership share ranges between 10 and 50%. He has not specified the number, names, location or value of these restaurants.

11 Mr. Kaushal is also involved in a restaurant franchise in Spokane, Washington. In his affidavit on this application, he has attested that he owns a 50% interest in the holding company that owns the restaurant. In an affidavit dated September 5, 2017, exhibited to Ms Kaushal's affidavit, Mr. Kaushal deposed that he did not own any interest in the holding company.

b) Ability to pay costs

12 Ms Kaushal has attested that Mr. Kaushal owes approximately $30,000.00 from two outstanding costs awards, plus costs owing from the August 14 appearance, the amount of which has yet to be finalized. She has provided past materials in which Mr. Kaushal has sworn that his income is low and that he has been relying on pandemic benefits.

13 In his memorandum of argument, Mr. Kaushal submits that he has paid all costs awards, except for the unfinalized August 14 award. In his affidavit, he makes no such assertion, but points to a past order that structured the payment of past costs awards and implies that the same structure could continue. In short, Mr. Kaushal has not provided evidence to support his assertion that he has paid all past costs awards that have been finalized. He further submits that reductions in his income due to the pandemic are temporary and will not affect his long-term ability to pay costs.

c) Merits of the Action

14 Ms Kaushal submits that Mr. Kaushal's notice of appeal does not articulate whether he attacks the finding of contempt or the sanction of striking the pleadings.

15 In his materials on this application, Mr. Kaushal re-argues various past rulings, makes submissions about the matters to be decided at the summary trial, and says that the summary trial will be unfair to him. He has indicated that he appeals both the finding of contempt and the sanction, but has not clarified his grounds of appeal or illustrated their merits.

d) Undue prejudice to ability to continue the action

16 Mr. Kaushal presses the point that a summary trial at which he cannot make submissions will be prejudicial to him. He submits that it "could be straining" or "may be difficult" for him to pay $40,000 at this time, but that he would be able to pay it over the long term.

Analysis

17 Throughout the history of this litigation, Mr. Kaushal has avoided providing evidence about any assets he may have in Alberta, and has attested that his income is reduced. For present purposes, I need not determine what assets, if any, he holds in Alberta or what his income level is. I am prepared to conclude that Mr. Kaushal is unlikely to comply willingly with any costs order. I also conclude that, lacking concrete financial information, it is unlikely that Ms Kaushal would be able to enforce any order or judgment against any assets Mr. Kaushal may have in Alberta.

18 Mr. Kaushal has not claimed that a costs award would unduly prejudice his ability to continue the appeal.

19 In his materials on this application, Mr. Kaushal has done little to explain the merits of his appeal. The grounds stated in his notice of appeal generally attract a deferential standard of review.

20 A decision to strike pleadings as a remedy for contempt "involves the exercise of a significant degree of discretion, and is largely fact based": *W. (S.) v. T. (K.)*, 2005 ABQB 298 (Alta. Q.B.) at para 19. Striking pleadings may be appropriate, for instance, where a party's pattern of delay and lack of cooperation in defiance of a court order threatens to thwart the progress of an action, or where the party has flouted the court's orders, demonstrating a persistent failure to obey: *Imperial Finishing Ltd. v. Moderno Homes Inc.*, 2019 ABQB 64 (Alta. Q.B.) ; *SW v KT*; *Bains Engineering Corp. v. 734560 Alberta Ltd.*, 2004 ABQB 780 (Alta. Q.B.) ; *Burn v. Burn*, 2018 ABQB 275 (Alta. Q.B.) . Without limiting the scope of deliberations on the merits of the appeal, I conclude the appeal is not so meritorious as to make an order for security for costs inappropriate.

Result

21 The application for security for costs is granted. Mr. Kaushal shall post $40,000 with the Registry of the Court of Appeal no later than 4:00 pm on Friday, October 2, 2020, failing which the appeal will be struck without more.

Application for security for costs granted.

TAB 12

2017 ABCA 341
Alberta Court of Appeal

Aski Construction Ltd v. Markos

2017 CarswellAlta 1845, 2017 ABCA 341, [2017] A.W.L.D. 5247, [2017] A.J. No. 1069, 284 A.C.W.S. (3d) 273

Aski Construction Ltd and Fikre Bekele (Applicants / Respondents) and Haimanot Markos and Abebayehu Abdi (Respondents / Appellants)

Frederica Schutz J.A.

Heard: October 3, 2017
Judgment: October 17, 2017
Docket: Edmonton Appeal 1603-0164-AC

Counsel: A. Poburan, for Applicants
Haimanot Markos, Abebayehu Abdi, Respondents, for themselves

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.3 Security for costs
XXIV.3.e Grounds for refusal to order security
XXIV.3.e.iii Miscellaneous

Headnote

Civil practice and procedure --- Costs — Security for costs — Grounds for refusal to order security — Miscellaneous
Self-represented appellants, HM and AA successfully applied to restore their appeal from Queen's Bench judgment against them — Applicants A Ltd. and FB applied for security of costs — Application for security of costs dismissed — Appeal was ready to proceed and was set for hearing in less than two months — To make order requiring HM and AA to provide security for substantial costs within such short time period before appeal hearing will, in all likelihood, result in further delay — HM and AA had been relatively diligent in moving appeal toward disposition — Application for security for costs was for anticipated future costs and should not generally be used as means to secure payment of trial costs that had already been incurred — Although A Ltd. and FB submitted that costs to date had been significant, in these circumstances court was not inclined to exercise discretion in A Ltd. and FB' favour by granting security for costs.

Table of Authorities

Cases considered by *Frederica Schutz J.A.*:

Abdi v. Aski Construction Ltd. (2017), 2017 ABCA 68, 2017 CarswellAlta 327 (Alta. C.A.) — considered

Castillo v. Go (2002), 2002 ABCA 271, 2002 CarswellAlta 1453, 28 C.P.C. (5th) 10, 317 A.R. 195, 284 W.A.C. 195 (Alta. C.A. [In Chambers]) — referred to

Collins v. Collins Estate (Administrator ad litem of) (2005), 2005 ABCA 41, 2005 CarswellAlta 131, 12 R.F.L. (6th)

278, 363 A.R. 91, 343 W.A.C. 91, 45 Alta. L.R. (4th) 15 (Alta. C.A.) — referred to

DataNet Information Systems Inc. v. Belzil (2011), 2011 ABCA 40, 2011 CarswellAlta 85 (Alta. C.A.) — referred to

Haymour v. Condominium Plan No. 802 2845 (2016), 2016 ABCA 367, 2016 CarswellAlta 2237 (Alta. C.A.) — referred to

Kindylides v. Korol (2012), 2012 ABCA 126, 2012 CarswellAlta 738 (Alta. C.A.) — considered

Marathon Canada Ltd. v. Enron Canada Corp. (2008), 2008 ABCA 424, 2008 CarswellAlta 1964, 446 A.R. 88, 442 W.A.C. 88 (Alta. C.A.) — referred to

Matty v. Rammasoot (2013), 2013 ABCA 170, 2013 CarswellAlta 753 (Alta. C.A.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 4.22 — considered

R. 14.67(1) — considered

APPLICATION by applicants A Ltd. and FB for security of costs.

***Frederica Schutz J.A.*:**

Introduction

1 This is an application by Aski Construction Ltd and Fikre Bekele relating to an upcoming appeal in which they are the respondents.

2 The self-represented appellants, Haimanot Markos and Abebayehu Abdi ("Markos and Abdi"), successfully applied to restore their appeal from a Queen's Bench judgment against them: *Abdi v. Aski Construction Ltd.*, 2017 ABCA 68 (Alta. C.A.) . During that application, Markos and Abdi were instructed by this Court about the procedure involved in filing an application to admit fresh evidence on appeal. On March 1, 2017, they filed a fresh evidence application; however, they also filed additional fresh evidence (not referenced in the fresh evidence application) in their Extracts of Key Evidence filed as part of their appeal material.

3 On May 1, 2017, the applicants filed their response materials on the appeal and a memorandum of argument on the fresh evidence application. On May 30, 2017, a hearing date of November 28, 2017 was set in the appeal.

4 By way of application filed September 11, 2017, the applicants now apply to strike portions of the appellants' Extracts of Key Evidence containing fresh evidence, as well as for an order that Markos and Abdi pay the $1,250 costs award previously ordered by this Court on the restoration application, and further request that this Court order Markos and Abdi to pay security for costs for the upcoming appeal in the amount of $10,000.

5 During the course of the application hearing on October 3, 2017, a number of issues were dealt with from the bench. In particular, the following orders were made:

1. Markos and Abdi were ordered to make an application to admit the fresh evidence contained in their Extracts of Key Evidence within 10 days of the application hearing;

2. The Extracts that had already been filed were ordered to be segregated and sealed until such time as they would be reviewed by the appeal panel;

3. Markos and Abdi were ordered to pay the costs of their successful application to restore their appeal in the amount of $1,250 within two weeks of the date of the application hearing; and

4. A previous order for substitutional service via email was replaced with an order that service upon the respondents be done via courier to their home address. If an adult person does not answer the door when the courier attends, then the courier is at liberty to leave the envelope in the mailbox. Such service shall be deemed good and sufficient service on the date delivered.

6 The remaining issue is whether Markos and Abdi should be ordered to pay security for costs on the appeal, and if so, in what amount.

Test for Security for Costs

7 Security for costs is a discretionary order that balances the reasonable expectations and rights of the parties to come to a just and reasonable conclusion: *Haymour v. Condominium Plan No. 802 2845*, 2016 ABCA 367 (Alta. C.A.) at para 8. A single appeal judge may award security for costs in accordance with Rules 14.67(1) and 4.22 of the *Alberta Rules of Court*, Alta Reg 124/2010. Rule 4.22 states that the court may order a party to provide security for cost if the court considers it just and reasonable to do so, taking into account all of the following:

a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;

b) the ability of the respondent to the application to pay the costs award;

c) the merits of the action in which the application is filed;

d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;

e) any other matter the Court considers appropriate.

8 The onus is on the applicant to prove these factors weigh in their favour. In previous decisions from this Court, concerns regarding a party's ability to pay costs coupled with modest prospects of an appeal's success have been sufficient to justify granting an application for security for costs: see for example *Matty v. Rammasoot*, 2013 ABCA 170 (Alta. C.A.) .

9 However, the analysis does not end there. The Court has the discretion to refuse to order security for costs where the application has not been made promptly and there is a risk of resultant prejudice: *Castillo v. Go*, 2002 ABCA 271 (Alta. C.A. [In Chambers]) at paras 14, 18, (2002), 317 A.R. 195 (Alta. C.A. [In Chambers]); *Collins v. Collins Estate (Administrator ad litem of)*, 2005 ABCA 41 (Alta. C.A.) at para 20. This is particularly the case when delay in bringing the application for security for costs is unexplained: *Marathon Canada Ltd. v. Enron Canada Corp.*, 2008 ABCA 424 (Alta. C.A.) at para 10, (2008), 446 A.R. 88 (Alta. C.A.) .

Analysis

10 During the course of oral argument, counsel for the applicants acknowledged the delay in making this application. However, she submitted that security for costs is nonetheless appropriate in this case because:

1. the respondents' costs on appeal would likely exceed $10,000;

2. the respondents have not recovered any of the damages or costs awarded by the lower court;

3. the respondents have not paid costs previously awarded by this Court; and

4. the appeal lacks merit where the appellants have failed to demonstrate any errors of law by the trial judge, and are in effect asking for a re-hearing of the underlying case.

11 Markos and Abdi have been granted indulgences by this Court in restoring their appeal and in connection with the orders made during the hearing of this application that permitted them to take further steps to perfect new aspects of their appeal. Applicants' counsel was fair-minded and even-handed in not objecting to the Court's suggestions about permitting the appellants to take further steps to regularize their appeal. The Court bears in mind that Markos and Abdi are self-represented, but "[a]ccess to justice does not equate to access to civil processes without fear of costs consequences": *Kindylides v. Korol*, 2012 ABCA 126 (Alta. C.A.) at para 6, citing *DataNet Information Systems Inc. v. Belzil*, 2011 ABCA 40 (Alta. C.A.) at para 4.

12 The judgment in the lower court is in the amount of $68,145.00 plus GST, as well as interest and costs. This is a significant sum. It has not been paid in trust to the applicants pending the outcome of the appeal or otherwise secured so as to be available if the appeal fails.

13 The appellants have not clearly articulated what errors of law or mixed fact and law they contend were committed in the trial judge's decision. Moreover, even assuming the appellants succeed in persuading the full panel that the fresh evidence ought to be admitted, about which I will say no more, the findings of fact made by the trial judge simply may not be amenable to appellate review. If the appellants do not succeed on appeal, adverse costs consequences will likely follow.

14 I will therefore assume without deciding, as did the Court in *Castillo* at paras 12-13, that both the financial considerations and the question of merit favour granting security for costs.

15 However, there remains to be considered the relevant factor of the applicants' lengthy delay in bringing this application.

16 Markos and Abdi complied with the order made by this Court on March 1, 2017, to file their factum and fresh evidence by March 15, 2017. Their factum, extracts of key evidence, and fresh evidence were all filed on March 1, 2017. The respondents filed their response materials on May 1, 2017. The Deputy Registrar sent a letter to the parties on May 30, 2017, confirming that the matter had been set for oral hearing on November 28, 2017. This application was brought almost three and a half months later, on September 11, 2017.

17 As in the case of *Marathon* , in my view, the delay is significant, essentially unexplained, and likely prejudicial to Markos and Abdi, who have incurred all attendant costs associated with this appeal except making oral argument, which at this point they presumably intend to do themselves.

18 This appeal is ready to proceed and is set for hearing in less than two months. In my view, to make an order requiring the appellants to provide security for substantial costs within such a short time period before the appeal hearing will, in all likelihood, result in further delay. Given that the appellants have been relatively diligent in moving this appeal toward disposition and noting that this Court in *Marathon* at para 8 (and the cases cited therein), has stated "an application to this Court for security for costs is for anticipated future costs and should not generally be used as a means to secure payment of trial costs that have already been incurred", in my view, although the applicant submitted that their costs to date have been significant, in these circumstances I am not inclined to exercise my discretion in the applicants' favour by granting security for costs.

Conclusion

19 The application for security for costs is dismissed.

Application dismissed.

End of Document

TAB 13

2018 ABCA 78
Alberta Court of Appeal

Skolney v. Nisha

2018 CarswellAlta 342, 2018 ABCA 78, [2018] A.W.L.D. 1674, [2018] A.W.L.D. 1677, 10 R.F.L. (8th) 34, 290 A.C.W.S. (3d) 561

Glenn Wayne Skolney (Applicant / Cross-Respondent) and Nazreen Nisha (Respondent / Cross-Applicant)

Sheila Greckol J.A.

Heard: January 31, 2018
Judgment: March 1, 2018
Docket: Edmonton Appeal 1703-0289-AC

Counsel: T. Huizinga, for Applicant / Cross-Respondent
Nazreen Nisha, Respondent / Cross-Applicant, for herself

Subject: Civil Practice and Procedure; Contracts; Family

Related Abridgment Classifications

Family law
VI Domestic contracts and settlements
VI.8 Miscellaneous

Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.a Security for costs

Headnote

Family law --- Costs — In family law proceedings generally — Security for costs
Parties met in 2000, began cohabiting in or before 2006, and entered into cohabitation and property agreement — Parties married in 2008 and separated in 2013 — Wife brought unsuccessful action to have agreement set aside for unconscionability, and because she alleged that husband had forged her signature — Wife appealed — Husband applied for security for costs; wife applied for stay of execution of underlying trial judgment and costs awards against her — Husband's application dismissed; wife's application granted — Insofar as husband sought payment of outstanding trial judgment and costs awards as condition of wife's appeal proceeding further, there was no statutory authority to make such order or to strike appeal if wife did not comply — Husband had legitimate concerns that wife would be unable to pay costs of appeal, that he would be unable to enforce against her exigible assets, and that appeal would not succeed — Wife had considerable assets and though she had numerous debts, there was no evidence that suggested that wife would not prioritized payments to husband or that all her debts would become due at same time — It was not entirely clear that her debts exceeded her assets, and that she would therefore be unable to pay costs of appeal if unsuccessful, and security for costs award may unduly prejudice wife at this stage and render her unable to continue with appeal.

Family law --- Domestic contracts and settlements — Miscellaneous
Stay pending appeal — Parties met in 2000, began cohabiting in or before 2006, and entered into cohabitation and property agreement — Parties married in 2008 and separated in 2013 — Wife brought unsuccessful action to have agreement set aside

for unconscionability and because she alleged that husband had forged her signature — Wife appealed — Husband applied for security for costs; wife applied for stay of execution of underlying trial judgment and costs awards against her — Husband's application dismissed; wife's application granted — It could not be said that wife's appeal had no reasonable possibility of success — Wife had shown that she would suffer irreparable harm if stay was not granted, and that balance of convenience favoured granting stay — Given large disparity of resources between parties and that husband was represented by counsel and wife was not, effect of enforcement was that wife may not have her day in court.

Table of Authorities

Cases considered by *Sheila Greckol J.A.*:

Canadian Natural Resources Ltd. v. Arcelormittal Tubular Products Roman S.A. (2013), 2013 ABCA 357, 2013 CarswellAlta 1980, 561 A.R. 180, 594 W.A.C. 180 (Alta. C.A.) — considered

Haymour v. Condominium Plan No. 802 2845 (2016), 2016 ABCA 367, 2016 CarswellAlta 2237 (Alta. C.A.) — referred to

Matty v. Rammasoot (2013), 2013 ABCA 170, 2013 CarswellAlta 753 (Alta. C.A.) — referred to

Pivotal Capital Advisory Group Ltd. v. NorAmera BioEnergy Corp. (2008), 2008 ABCA 279, 2008 CarswellAlta 1031 (Alta. C.A. [In Chambers]) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Skolney v. Nisha (2017), 2017 ABQB 765, 2017 CarswellAlta 2667 (Alta. Q.B.) — referred to

Triple Five Corp. v. United Western Communications Ltd. (1994), 19 Alta. L.R. (3d) 153, 27 C.P.C. (3d) 201, 1994 CarswellAlta 100, 1994 ABCA 141 (Alta. C.A.) — followed

1159465 Alberta Ltd. v. Adwood Manufacturing Ltd. (2010), 2010 ABCA 273, 2010 CarswellAlta 1847, 35 Alta. L.R. (5th) 37 (Alta. C.A.) — considered

Statutes considered:

Matrimonial Property Act, R.S.A. 2000, c. M-8
s. 37 — considered

s. 38 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 4.22 — considered

R. 4.22(a) — referred to

R. 4.22(b) — referred to

R. 4.22(c) — referred to

R. 14.48 — considered

R. 14.67(1) — considered

R. 14.68 — considered

APPLICATION by husband for security for costs; APPLICATION by wife for stay of execution.

***Sheila Greckol J.A.*:**

Introduction

1 Ms. Nisha and Mr. Skolney entered a prenuptial agreement prior to marriage ("the Agreement"). After their divorce, the Agreement was the subject of a trial. The trial judge found in favour of Mr. Skolney's position that the agreement was valid and enforceable. Ms. Nisha appealed that decision. Mr. Skolney now brings an application for security for costs. Ms. Nisha opposes the application and makes a cross-application for a stay of execution of the underlying trial judgment and the costs awards against her.

2 For the following reasons Mr. Skolney's application is denied and Ms. Nisha's cross-application is granted.

Facts

3 Mr. Skolney met Ms. Nisha in 2000. They began dating in 2001, cohabiting in or before 2006, and were married on October 26, 2008. They separated on March 9, 2013.

4 Around 2006, they discussed a cohabitation and property agreement. A final copy of the agreement, drafted by Mr. Skolney's counsel at the time, was given to Ms. Nisha in June of 2007. She sought independent legal advice and signed the agreement.

5 The agreement specified that upon marriage and in the case of a divorce, each party: retained the assets they owned before the marriage, along with any increase in value of those assets, or interest from the sale of the assets; retained sole ownership of any assets acquired after cohabitation; had not and would not acquire interest in property held by the other whether by trust, unjust enrichment, or *quantum meruit*; and waived any spousal support claims. The agreement also provided for co-ownership of a house.

6 After the divorce, Ms. Nisha filed an action in the Court of Queen's Bench to have the agreement set aside variously for unconscionability and because she alleged that Mr. Skolney forged her signature.

7 The trial judge issued his judgment on October 13, 2017, finding that the agreement was valid and complied with sections 37 and 38 of the *Matrimonial Property Act*, RSA 2000, c M-8. He found that Ms. Nisha had received independent legal advice, had not been pressured by Mr. Skolney, and had signed the document herself. He stated that Ms. Nisha had lied in her testimony and was not a credible witness.

8 The trial judge also awarded enhanced costs against Ms. Nisha because she "lied in her testimony concerning the alleged forgery" and her suit was "entirely without merit": *Skolney v. Nisha*, 2017 ABQB 765 (Alta. Q.B.) at para 6, (2017), [2018] A.W.L.D. 74 (Alta. Q.B.).

9 Ms. Nisha filed a notice of appeal on November 14, 2017 raising six grounds of appeal. Three of the grounds allege errors of fact or mixed fact and law. Two of the grounds relate to evidentiary rulings that were not the subject of objection by Ms. Nisha's counsel at trial. One of the grounds is an allegation of reasonable apprehension of bias that was not raised at trial.

10 It is inappropriate to comment on the merits of the appeal at this stage. During oral submissions, I indicated to Ms. Nisha that each of these grounds requires surmounting a presumption of deference to the trial judge, and advised her to seek

independent legal advice on the merits of her appeal.

Issues

1. Can this Court order payment of trial costs, failing which an appeal be struck?

11 In his materials, Mr. Skolney asks this Court to order Ms. Nisha to pay the outstanding trial judgment and costs awards, failing which her appeal will be struck. Counsel resiled from this position at the oral hearing, acknowledging that she could not point to any authority for it other than the general discretionary jurisdiction enjoyed by a single judge of this Court.

12 The Court of Appeal does not normally grant security for the payment of trial costs because it is not an "agency to ensure the collection of trial costs": *1159465 Alberta Ltd. v. Adwood Manufacturing Ltd.*, 2010 ABCA 273 at para 10, 35 Alta. L.R. (5th) 37 (Alta. C.A.), quoting *Pivotal Capital Advisory Group Ltd. v. NorAmera BioEnergy Corp.*, 2008 ABCA 279 at para 10, [2008] A.J. No. 844 (Alta. C.A. [In Chambers]) (QL). Insofar as Mr. Skolney seeks payment as a condition of Ms. Nisha's appeal proceeding further, there is no statutory authority to make such an order or to strike an appeal if Ms. Nisha does not comply.

13 This aspect of Mr. Skolney's application is therefore denied.

2. Should security for costs be granted against the appellant?

14 A single appeal judge may award security for costs in accordance with Rules 14.67(1) and 4.22 of the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules of Court*]. Rule 4.22 states:

> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

15 Concerns regarding a party's ability to pay costs coupled with modest prospects of an appeal's success have been sufficient to justify granting an application for security for costs: see for example *Matty v. Rammasoot*, 2013 ABCA 170, [2013] A.W.L.D. 3062 (Alta. C.A.).

16 Mr. Skolney has legitimate concerns that Ms. Nisha will be unable to pay the costs of this appeal (rule 4.22(b)), that he will be unable to enforce against her exigible assets (rule 4.22(a)) and that the appeal will not succeed (rule 4.22(c)).

17 Regarding her ability to pay the costs of the appeal, Ms. Nisha has conceded that she is at risk of becoming impecunious if execution of the trial judgment and costs award is enforced. The total amount of those awards is $118,402.78. In oral submissions, counsel for Mr. Skolney indicated that indeed he does intend to proceed to enforce the judgements pending hearing of the appeal. Ms. Nisha has also failed to pay outstanding costs of $750 from her unsuccessful interim application in the underlying matter for a period of two years, and she conceded in oral submissions that she has lost much of her income and that her business has not been doing well due to economic downturn. All in all, there is a legitimate concern

that Ms. Nisha will be unable to pay costs if her appeal is unsuccessful.

18 On the other hand, Ms. Nisha does have a number of exigible assets theoretically available for enforcement. In his affidavit, Mr. Skolney admitted that the value of these assets amounts to several hundred thousand dollars. However, he submits that the outstanding judgment and costs awards, as well as other debts and obligations (some of which are owed to Mr. Skolney) are in excess of Ms. Nisha's exigible assets.

19 Ms. Nisha contested Mr. Skolney's valuations of some of her exigible assets and pointed to other assets in her possession. She did not dispute her outstanding debts and obligations.

20 An order of security for costs is intended to balance the the reasonable expectations and rights of the parties to come to a just and reasonable conclusion: *Haymour v. Condominium Plan No. 802 2845*, 2016 ABCA 367 at para 8, 273 A.C.W.S. (3d) 47 (Alta. C.A.). Mr. Skolney reasonably expects that a judgment regarding his divorce agreement will be given legal effect. Ms. Nisha has the right to appeal that judgment. Mr. Skolney is possessed of very significant assets; the enforcement terms of the prenuptial agreement mean that Ms. Nisha has more limited assets.

21 Granting security for costs is a discretionary decision, which requires a judge to look to the equities of the case at bar before making an order. Rule 4.22 states the Court "may" order security for costs if it "considers it just and reasonable to do so". Mr. Skolney has admitted that Ms. Nisha has considerable assets. Though she has numerous debts, there was no evidence put before the Court to suggest that Ms. Nisha will not prioritize payments to Mr. Skolney, or that all her debts will become due at the same time. Moreover, given the contested evidence regarding Ms. Nisha's assets and debts, it is not entirely clear that her debts exceed her assets, and that she will therefore be unable to pay the costs of an appeal if unsuccessful. Finally, a security for costs award may unduly prejudice Ms. Nisha at this stage and render her unable to continue with her appeal.

22 Given the deference owed to the trial judge on findings of fact and credibility, Ms. Nisha would be well advised to seek independent legal advice regarding the viability of her appeal. However, given her rights and expectations of access to justice, I decline to grant the application for security of costs.

3. Is a stay of McCarthy J's awards appropriate pending appeal?

23 Ms. Nisha seeks a stay of execution of the Queen's Bench judgment and costs award made against her in the total amount of $118,402.78. Rule 14.68 of the *Rules of Court* provides that filing an appeal does not stay enforcement of the decision under appeal unless otherwise ordered under Rule 14.48. To obtain a stay pending appeal, Ms. Nisha must establish that her appeal raises an arguable issue or issues; that she would suffer irreparable harm if the stay is not granted; and that the balance of convenience favours granting the stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.).

24 As O'Ferrall, JA has written, "On applications for stays, sometimes the less said about the merits of the appellant's appeal the better, particularly when the judge hearing the stay application may be a member of the panel hearing the appeal.": *Canadian Natural Resources Ltd. v. Arcelormittal Tubular Products Roman S.A.*, 2013 ABCA 357 at para 7, 561 A.R. 180 (Alta. C.A.).

25 I cannot say that Ms. Nisha's appeal has no reasonable possibility of success, which is the test laid out in *Triple Five Corp. v. United Western Communications Ltd.*, 1994 ABCA 141, 19 Alta. L.R. (3d) 153 (Alta. C.A.) at 155.

26 Ms. Nisha has shown that she will suffer irreparable harm if a stay is not granted. In particular, she pointed to the potential loss of a legal right that cannot be remedied in damages: namely, her right to access the court process and appeal a decision that she submits was wrong. Moreover, she indicated that she has had issues with depression since her divorce and that the emotional and mental toll of having to pay a costs award at this stage could not be compensated in damages.

27 Mr. Skolney entered evidence of his significant assets. It is therefore unlikely that his financial well-being hinges on being able to enforce the costs award immediately. On the other hand, Ms. Nisha may be prejudiced in both her personal circumstances and in her ability to pursue her appeal if a costs award is enforceable immediately.

28 Finally, Ms. Nisha has shown that the balance of convenience favors granting a stay. Given the large disparity of resources between these two parties, and that Mr. Skolney is represented by counsel and Ms. Nisha is not, the effect of enforcement is that Ms. Nisha may not have her day in court. For these reasons, the cross-application for a stay is granted.

Conclusion

29 Mr. Skolney's application for security for costs of the appeal is denied. Ms. Nisha's cross-application for a stay of enforcement of the awards below is granted.

30 Ms. Nisha is entitled to costs of this application.

Application by husband dismissed; application by wife granted.

TAB 14

2013 ABCA 170
Alberta Court of Appeal

Matty v. Rammasoot

2013 CarswellAlta 753, 2013 ABCA 170, [2013] A.W.L.D. 3062, [2013] W.D.F.L. 3336, 228 A.C.W.S. (3d) 319

Thomas Jay Matty, Applicant (Respondent) and Nopparat Rammasoot, Respondent (Applicant)

Ronald Berger J.A.

Heard: May 08, 2013
Judgment: May 17, 2013
Docket: Edmonton Appeal 1103-0255-AC

Counsel: D.J. Kolinsky, for Applicant / Respondent
Z. Hardin, for Respondent / Applicant

Subject: Family; Civil Practice and Procedure

Related Abridgment Classifications

Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.a Security for costs

Headnote

Family law --- Costs — In family law proceedings generally — Security for costs
Trial was heard determining parties' matrimonial issues — Father commenced appealed — Mother brought application for order for security for costs — Application granted — Father was ordered to post security for costs in amount of $5,000 — There was ample evidence that costs may not be recovered or recovered only with great difficulty — Father failed to pay costs in Court of Queen's Bench, and was in arrears of maintenance and support — Father failed to prosecute his appeal promptly — There was little prospect of success on appeal.

Table of Authorities

Cases considered by *Ronald Berger J.A.*:

Branson v. Branson (2010), 2010 CarswellAlta 988, 2010 ABCA 166 (Alta. C.A.) — referred to

Gusky v. Rosedale Clay Products (1917), 34 D.L.R. 727, [1917] 2 W.W.R. 441, 1917 CarswellAlta 151 (Alta. C.A.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 524 — referred to

R. 524(1) — considered

APPLICATION by mother for order for security for costs.

***Ronald Berger J.A.*:**

1 The present motion seeks an order allowing the Applicant to extend filing deadlines and, if granted, to file a factum in excess of the normal 12 pages permitted by Practice Note J. The Respondent seeks security for costs pursuant to Rule 524 of the *Rules of Court*.

2 Following a nine day trial which culminated in a custody order on October 3, 2011, the Respondent mother was permitted to return with the three children of the common law relationship of the parties to her native Thailand. The Applicant father sought a shared custody arrangement in Edmonton. Issues of child and spousal support were also addressed by the trial judge.

3 The family lived in Thailand for many years. They began settling in Edmonton in June 2009. There are three children of the relationship aged 12, 10 and 8. The parties separated on or about June 15, 2010.

4 The father is a Canadian Citizen. The mother is a citizen of Thailand whose Canadian visitor permit has expired. She cannot legally work in Canada. During the family's move to Canada, the father indicated he would no longer sponsor the mother to live permanently in this country.

5 At the time of trial (in September 2011), the mother was living in a shelter and caring for the children Monday evening through Thursday evening. The father was living in a half duplex owned by his mother and caring for the children from Thursday evening to the start of the school day on Monday (with some exceptions). The father was working as a sessional instructor at a post-secondary institution. An interim child support order required him to pay the mother $600 per month. Both parties were in "dire economic straits". (Trial Transcript 858/26-30)

6 Following an expedited nine day trial, Germain J.:

- granted the mother primary residential care of the children and sole decision-making responsibility for the children's place of residence, education and medical, dental and health treatment;
- maintained the parties' existing parenting arrangement (as long as they continued to reside in Edmonton);
- ordered the father to continue to pay child support in the sum of $600 per month until January 2012 when he will be deemed to be earning $50,000 per year and must pay child support based on that income:
- ordered the father to pay retroactive and ongoing adult interdependent partner support in the sum of $1,200 per month;
- allowed the mother's mobility application (permitting her to return to Thailand to live with the children);
- made certain access orders to become effective on the mother's relocation to Thailand with the children; and
- awarded costs against the father.

7 The father's Notice of Appeal was filed on October 6, 2011. The grounds of appeal maintain that the trial judge either misapprehended or failed to consider relevant evidence; that he equated the mother's interest, both financial and otherwise, with that of the children; that the trial record as a whole gives rise to a reasonable apprehension of bias; that in imputing income to the Appellant for the purpose of calculating child support, the trial judge erred bymisapprehending the record before him and by giving insufficient reasons for judgment; that the trial judge in awarding spousal support to the mother erred by misapprehending the record before him and by giving insufficient reasons for his decision.

8 I have read the Applicant's proposed 12 page and 22 page factums. They are of considerable assistance in discerning the arguable merit of the proffered grounds of appeal and of assessing whether the more concise factum will suffice should the deadline for filing be extended.

9 Insofar as the latter issue is concerned, I note that, although the Notice of Appeal was filed in a timely fashion on October 6, 2011, there have been six orders resetting the filing deadlines. The most recent order made on March 7, 2013 fixed April 22, 2013 as the filing deadline for the Appellant. Through inadvertent error on the part of counsel for the Appellant, that deadline was missed.

10 I see no indication on the materials filed with this application that the sum of $19,760.74 in outstanding costs ordered against the Applicant has been paid in whole or in part. As of April 18, 2013, arrears for child and adult interdependent support are also outstanding in the amount of $22,778.36.

11 The record in the Court of Queen's Bench and in this Court reveals that an initial stay of enforcement of the judgment of Germain J. was granted by Rooke A.C.J. on October 6, 2011 to expire on October 12, 2011. On October 10, Côté J.A. dismissed an application to extend the stay.

12 Counsel for the Respondent, while denying the arguable merits of the appeal, concedes that the Applicant is entitled to an extension of time to file materials in support of the Notice of Appeal and takes no position with respect to the length of factum save to ask for the same courtesy granted to the Appellant. She does, however, seek a one month period in which to file her factum after receiving the Appellant's.

13 Both counsel assert that their respective clients are "impecunious" and that they have no exigible assets. Counsel for the Appellant, in resisting the Respondent's prayer for security for costs, acknowledges that the Appellant is a sessional instructor at Mount Royal College in Calgary and that his salary is $26,000 per annum. He has a Master's degree in Business Administration. During the course of oral argument, the Appellant's counsel suggested that the Respondent "has the usual mechanisms available to a judgment creditor, and one of those would be going to his employer and serving a notice of garnishment... she knows where he's working and she can get whatever is available through that means." The Appellant's counsel explains that his client "owes money to family, other creditors. His personal expenses are about $2,200 per month."

14 The thrust of the Respondent's application for security for costs is that notwithstanding the Appellant's alleged impecuniosity, there is little prospect of success on the appeal and that in all of the circumstances, including the non-payment of costs in the Court of Queen's Bench and arrears of maintenance and support, an order for security for appellate costs is justified. I agree.

15 Rule 524(1) of the *Rules of Court* provides that "[n]o security for costs shall be required in appeals unless by reason of special circumstances security is ordered by a judge".

16 When the Appellant is impecunious the following test approved many times over is engaged (*Gusky v. Rosedale Clay Products* (1917), 34 D.L.R. 727 (Alta. C.A.) at para. 5:

> ... The successful litigant should be entitled to an order for security upon proof of the appellant's poverty unless the appellant satisfies the judge or Court to whom the application is made that the case is one in which an appeal may properly be taken with some reasonable prospect of success....

17 In the instant case, there is ample evidence that costs may not be recovered or recovered only with great difficulty. In balancing the special circumstances for costs and the Appellant's right for legal process, I take into account the inordinate delay in this case in prosecuting the appeal. See *Branson v. Branson*, 2010 ABCA 166, [2010] A.J. No. 593 (Alta. C.A.) at para. 13 (single justice of appeal). In my view, given the historical process record, it is clear that the Appellant failed to prosecute his appeal promptly. The dilatory nature of this appeal, in all of the circumstances, warrants security for appellate costs.

18 The Respondent's application is granted. The Appellant will post security for costs in the amount of $5,000 on or

before June 30, 2013, failing which the application for an extension of time to file materials shall, without more, stand dismissed. In the event that the order for security for costs is complied with, the Appellant shall on or before June 30, 2013, file his 12 page factum together with all other supporting materials and shall forthwith effect service of same upon counsel for the Respondent. The Respondent shall file and serve her factum and all supporting materials on or before July 31, 2013.

Application granted.

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TAB 15

2024 ABCA 282
Alberta Court of Appeal

Abou Shaaban v. Baljak

2024 CarswellAlta 2216, 2024 ABCA 282, [2024] A.W.L.D. 3782, 2024 A.C.W.S. 4508

Neveen Abou Shaaban and Nav Sha Inc. (Respondent / Applicant) and Sasa Dusko Baljak, Rada Baljak, NT Exploration Inc., Mark Bajramovic, Deanmark Ltd., ABC Corporation and XYZ Corporation (Applicant / Respondent)

Tamara Friesen J.A.

Heard: August 8, 2024
Judgment: August 30, 2024
Docket: Calgary Appeal 2401-0029AC

Counsel: K.T.H. Smith, for Respondents, Neveen Abou Shaaban and Nav Sha Inc.
M. Potier, for Applicants, Sasa Dusko Baljak, Rada Baljak and NT Exploration Inc.
R. Barata, W. Spencer, for Applicants, Mark Bajramovic and Deanmark Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.3 Security for costs
XXIV.3.j Security for costs on appeal
XXIV.3.j.ii Grounds for requiring security
XXIV.3.j.ii.C Miscellaneous

Headnote

Civil practice and procedure --- Costs — Security for costs — Security for costs on appeal — Grounds for requiring security — Miscellaneous
Applications judge dismissed plaintiffs' action against defendants and dismissed counterclaim — Chambers judge dismissed plaintiffs' appeal — Plaintiffs appealed — Defendants brought application for security for costs of appeal — Application granted — Application was brought in timely and legally appropriate fashion — Any alleged ulterior motivation for bringing application was unsubstantiated and ultimately irrelevant — There were outstanding costs awards and sufficient support for defendants' position that plaintiffs were unlikely to be able to satisfy any potential future costs award arising from appeal — Preliminary assessment suggested that merits of appeal did not make order for security for costs inappropriate.

Table of Authorities

Cases considered by *Tamara Friesen J.A.*:

Abou Shaaban v. Baljak (2024), 2024 ABKB 28, 2024 CarswellAlta 131 (Alta. K.B.) — referred to

Abou Shaaban v. Baljak (2024), 2024 ABKB 125, 2024 CarswellAlta 489 (Alta. K.B.) — referred to

Aski Construction Ltd v. Markos (2017), 2017 ABCA 341, 2017 CarswellAlta 1845 (Alta. C.A.) — referred to

DataNet Information Systems Inc. v. Belzil (2011), 2011 ABCA 40, 2011 CarswellAlta 85 (Alta. C.A.) — referred to

Haymour v. Condominium Plan No. 802 2845 (2016), 2016 ABCA 367, 2016 CarswellAlta 2237 (Alta. C.A.) — referred to

PricewaterhouseCoopers Inc. v. Perpetual Energy Inc (2020), 2020 ABCA 36, 2020 CarswellAlta 143, 75 C.B.R. (6th) 179 (Alta. C.A.) — referred to

Skolney v. Nisha (2018), 2018 ABCA 78, 2018 CarswellAlta 342, 10 R.F.L. (8th) 34 (Alta. C.A.) — referred to

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9
s. 254 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Pt. 4, Div. 4 — referred to

R. 4.22 — considered

R. 4.33 — referred to

R. 14.67 — considered

R. 14.67(1) — referred to

R. 14.67(2) — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C — referred to

Sched. C, Tariff of Costs, column 5 — referred to

Proceeding: Motion/Application for Security for Costs.

APPLICATION by defendants for security for costs of appeal.

***Tamara Friesen J.A.*:**

Reasons for Decision

Introduction

1 The applicants Sasa Baljak, Rada Baljak, NT Exploration Inc, Mark Bajramovic and Deanmark Ltd apply for security for costs of this appeal pursuant to rules 14.67 and 4.22 of the *Alberta Rules of Court* and s 254 of the *Business Corporations Act*, RSA 2000, c B-9.

Procedural History

2 The respondent Neveen Abou Shaaban and the applicant Sasa Baljak had personal and business relationships which came to an end. In 2017, Ms Abou Shaaban and Nav Sha Inc brought a claim against Sasa Baljak; Rada Baljak, Mr Baljak's mother; and NT Exploration Inc, his corporation. The claim alleged that Ms Abou Shaaban incorporated Nav Sha in 2013 to develop, build and manufacture new technologies in alternative energy for specific use in real estate, oil and gas, agriculture, and electric systems, and alleged breach of a non-disclosure agreement by Sasa Baljak and interference with economic relations and breach of confidence by the Baljak defendants, among other claims.

3 The statement of claim was amended in 2018 to add the defendants Mark Bajramovic and Deanmark Ltd, the parties' landlord when they lived together. The claim sought declarations, injunctive relief, damages, special damages, restitution, an accounting, interest and costs. The Baljak defendants defended and filed a counterclaim against Ms Abou Shaaban for unpaid rent and an unpaid loan.

4 In 2022, an applications judge dismissed the plaintiffs' action against all defendants pursuant to rule 4.33 and dismissed the counterclaim. The applications judge awarded costs of the action and the application payable by Ms Abou Shaaban and Nav Sha Inc to the Baljak defendants in the amount of $5,000 and to Mr Bajramovic and Deanmark Ltd in the amount of $5,000. A chambers judge dismissed the plaintiffs' appeal, finding that the last significant advance in the action was on August 22, 2018 and the application judge's decision was correct: 2024 ABKB 28. Costs of that appeal were awarded to the Baljak defendants in the amount of $2,205 and to the landlord defendants in the amount of $1,685: 2024 ABKB 125, para 30. Ms Abou Shaaban and Nav Sha Inc now appeal to this Court.

Test for Security for Costs

5 A security for costs order is discretionary and balances the reasonable expectations and rights of the parties to come to a just and reasonable outcome: ***Haymour v The Owners Condominium Plan No 802 2845*, 2016 ABCA 367** at para 8; ***PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 36** at para 15.

6 A single appeal judge may award security for costs in accordance with rules 14.67(1) and 4.22. Rule 14.67 permits a single appeal judge to order a party to provide security for costs pursuant to Part 4, Division 4 of the Rules. Rule 4.22 provides that the Court may order a party to provide security for costs if the Court considers it just and reasonable to do so, taking into account all of the following:

> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

7 The onus is on applicants to prove that the factors in rule 4.22 weigh in their favour: ***Aski Construction Ltd v Markos*, 2017 ABCA 341** at para 8.

8 The *Business Corporations Act*, s 254 provides:

> In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

Parties' Positions

Ability to enforce an order or judgment against assets in Alberta; ability to pay costs

9 The applicants say the respondents currently owe them over $12,000 in outstanding costs awards and that the respondents owe money and are secured debtors in relation to other legal judgments, including one which has been outstanding for over seven years. They submit that Ms Abou Shaaban is subject to a deficiency judgment related to foreclosure of a property in the amount of $45,143.25. They argue that these unpaid debts, and the fact that Ms Abou Shaaban uses a PO Box for service, prove that she is impecunious. The affidavit of the applicant Mark Bajramovic states that personal property registry searches of the respondents were also conducted and that Ms Abou Shaaban has no exigible property in Alberta and Nav Sha Inc has no assets.

10 The respondents argue that the applicants have not established they do not have sufficient assets in Alberta to pay a future costs award and that use of a PO Box to receive mail is not proof of impecuniosity.

11 Ms Abou Shaaban's affidavit attests that she has assets primarily located in Alberta. She admits that Mr Baljak has been awarded costs against her but says he has taken no steps to enforce the awards, and that she was awarded costs against him in another action and took appropriate steps to enforce the award.

12 The respondents submit that the foreclosure debt is related to the joint venture agreement Ms Abou Shaaban entered into with the applicant Sasa Baljak. In their view, the applicants, having been denied enhanced costs below, are in effect attempting to seek security for steps already taken in the proceedings, which is inappropriate.

Merits of the appeal; undue prejudice to ability to continue the appeal

13 On the merits of the appeal, the applicants say the respondents' argument that additional steps were taken in the action beyond August 22, 2018 has been dismissed by both decision makers in the court below. They say that as the matter will now be scrutinized by this Court on a higher standard of review, the appeal has no reasonable prospect of success. The applicants seek security for costs of the appeal in the amount of $30,000.

14 On the merits, the respondents acknowledged that they will be "fighting uphill". They submit that an order for security for costs will prejudice their ability to continue with the appeal.

Analysis

15 To begin with, while the respondents expressed concerns over the timing of and motivation for the present application, I find that it was brought in a timely and legally appropriate fashion. Any alleged ulterior motivation for bringing it is unsubstantiated and ultimately irrelevant. A party's motive for making a security for costs application, if substantiated with evidence, might have some relevance when considering the issue of prejudice; however, in this case there is a paucity of submissions from the parties on the issue of prejudice to continuation of the appeal, or undue prejudice.

16 There is evidence that Ms Abou Shaaban has not paid costs awarded to the applicants and owes large sums of money to other parties which have not yet been paid. Her affidavit attesting to assets in Alberta does not provide details of those assets and does not address whether there are any assets of the corporation. Further, the respondents have done little to explain the merits of their appeal. Finally, they claim that their ability to carry on with the appeal will be prejudiced by having to give security for payment of a costs award; however, they have not elaborated on that claim, or provided information on the issue of undue prejudice.

17 The failure to pay costs awarded following trial court process, combined with a demonstrated inability to pay costs should an appeal be unsuccessful is, in most cases, good reason to grant a security for costs order: ***DataNet Information Systems, Inc v Belzil*, 2011 ABCA 40** at para 4. Concerns regarding a party's ability to pay costs coupled with modest prospects of an appeal's success have also been sufficient to justify granting an application for security for costs: ***Skolney v Nisha*, 2018 ABCA 78, para 15**.

18 In their submissions, the parties briefly referred to the test under s 254 of the *Business Corporations Act* on security for costs against a corporate plaintiff but focused primarily on the factors set out in rule 4.22. In considering those factors, I am satisfied it is appropriate to grant an order for security for costs in favour of the applicants. There are outstanding costs awards and sufficient support for the applicants' position that the respondents are unlikely to be able to satisfy any potential future costs award arising from this appeal. A preliminary assessment at this early stage suggests the merits of the appeal do not make an order for security for costs inappropriate.

19 Finally, I note that applicants are not required to provide a "Bill of Costs" in order to obtain security for costs of an appeal. Unlike an award of legal costs on a solicitor-client basis post-litigation, a security for costs order is forward-looking, or prospective in nature. Reference to the Schedule C tariffs in the *Rules of Court* will be sufficient in most cases to justify the amount sought.

Conclusion

20 The security for costs application is granted.

21 The amount awarded is $15,000 with respect to each defendant group. This amount represents the Schedule C, Column 5 amounts for preparation of a factum, other preparation and attendance for a half-day appeal.

22 Neveen Abou Shaaban and Nav Sha Inc must provide security for costs of the appeal in the amount of $30,000 if proceeding against both defendant groups, or $15,000 if proceeding against one of the defendant groups, within 30 days of the date of these reasons, failing which the appeal will be deemed abandoned: rule 14.67(2).

Application granted.

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