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Summary Judgment - Competing Lines of Authority from the Court of Appeal

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Since 2010 summary judgment has undergone a transformation in Alberta, and across Canada. The Supreme Court of Canada ignited a "cultural shift" in the seminal case of *Hryniak v. Mauldin* 2014 SCC 7 and solidified the approach courts should take when applying summary procedure rules. The impetus for the change was a concerted effort by the legal profession, and the courts to find ways to resolve disputes quicker and more cost effectively.

In *Windsor v. Canadian Pacific Railway Ltd* 2014 ABCA 108 the Alberta Court of Appeal adopted *Hyrniak,* applying it to Alberta's summary judgment rule (at paragraph 14):

> New R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules.

Six months after the *Windsor* judgment was issued the Court of Appeal considered summary judgment again in *Access Mortgage Corporation (2004) Limited v Arres Capital Inc.,* 2014 ABCA 280. In *Access*, the Court expanded on *Windsor* and defined what it means for a case to be without "merit" by quoting from *Beier v. Proper Cat Construction* 2013 ABQB 351 (a pre-*Hryniak* decision) which states (at paragraph 61):

> 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.

This passage from *Beier* was also quoted in two subsequent Court of Appeal decisions, *Can v. Calgary (Police Service),* 2014 ABCA 322 and *WP v. Alberta*, 2014 ABCA 404, which were released shortly after *Access*.

The requirement that the applicant's case be "unassailable" remained the law in Alberta and was followed by Queen's Bench Courts regularly when deciding summary judgment applications.

The legal test for summary judgement applications was further modified by the Court of Appeal with its decision of *Stefanyk v. Stevens,* 2018 ABCA 125. In the lower court, the judge applied the case law flowing from *Access* and found that the applicant's case was not "so compelling that the likelihood of success is so high that it should be determined summarily." As a result, the application was dismissed. On appeal, the Court of Appeal departed from *Access* and *WP* and held (at paragraph 11):

> A threshold issue is whether this case is suitable for summary dismissal, a form of summary disposition under R. 7.3. It would be unfortunate if our civil procedure was unable to resolve a simple dispute like this, where the facts are not seriously in dispute, without a full trial.

At paragraph 14 the Court held that "'[u]nassailable' and 'very high likelihood' are not recognized standards of proof". At paragraph 17 the Court held:

> 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….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.

Curiously, the Court does not mention either *Access* or *WP* in its *Stefanyk* decision but rather refers to *Hryniak* and *Windsor*.

Things start to get interesting very shortly after the release of *Stefanyk.* Despite the panel's intention in *Stefanyk* to chart a course away from the case law developed by *Access* and *WP* and towards a world where summary judgment applications can be determined without the burden of establishing an "unassailable" case, certain Appellate Justices had other designs.

While *Stefanyk* was still hot-off-the-press, two further Court of Appeal decisions were released: *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153, and *Whissell Contracting Ltd. v. Calgary (City),* 2018 ABCA 204. Justices Wakeling and O'Ferrall were on the panel for *Rotzang* and *Whissell*, and Wakeling JA had also been on the panel in *Access* and *Can*.

In *Rotzang* and *Whissell* the Court of Appeal refers to the "unassailable" test and applies it as though the decision in *Stefanyk* did not exist.

In *Whissel,* Justice Schutz (who was on the panel in *Stefanyk*) wrote a short concurring decision but in her separate reasons she stated:

> I find myself unable to endorse, however, the dicta concerning the correct test for summary judgment, or the standard of proof required to be established for the moving party to succeed on an application for summary judgment… In my view, the proper test will have to be set when it is necessary to resolve the issue.

These decisions left the Justices in Queen's Bench without firm direction on the standard to apply in summary judgment applications. In *Nelson v. Grande Prairie (City),* 2018 ABQB 537 the Court examined both lines of authority, and attempted to find a middle ground between them. In *obiter* the Court commented that the higher standard was not a different standard of proof, but rather a higher standard for "what the Court thinks of the record, or the quality of the evidence at this stage of the proceedings."

Other courts have determined that the two positions are irreconcilable. In *330626 Alberta Ltd v. Ho & Laviolette Engineering Ltd*, 2018 ABQB 478 the Court stated (at

paragraph 41): "It would be helpful if the Court of Appeal could definitively resolve this issue with a five person panel in the near future".

Sage that advice may seem, it was not immediately acted upon. *Angus Partnership Inc. v Salvation Army (Governing Council)*, 2018 ABCA 206 was released on June 1, 2018. The Court referenced and applied the law as set out in *Stefanyk*, and did not reference *Rotzang* or *Whissell*.

The tug-of-war continued. *898294 Alberta Ltd. v. Riverside Quays Limited Partnership,* 2018 ABCA 281, was released on September 4, 2018. The Court applied the "unassailable" test. Like the cases on the other side of the proverbial rope, it also failed to reference *Stefanyk* or *Angus*. The panel in *898294* was comprised of Justices Berger, O'Ferrall, and Wakeling. One may recall that Justices O'Ferrall and Wakeling also sat in *Rotzang* and *Whissell*. These two lines of authority appear to be developing like two ships passing in the night.

Litigation is difficult to predict even at the best of times when the parties know and agree on the legal test to apply in any given situation, but it is impossible to predict when a litigant is unsure of the law to be applied before even entering into the courtroom. The current state of summary judgment in Alberta further clouds the crystal ball that counsel are often expected to consult when advising a client.

Fortunately, clearer skies appear to be on the horizon. In *Sobeys Capital Incorporated v. Whitecourt Shopping Centre (GP) Ltd,* 2018 ABQB 517 the Court (at paragraph 54) states that a five person panel of the Court of Appeal is scheduled to sit in September, 2018. The Court of Appeal's online schedule indicated that a five member panel of the Court of Appeal heard two summary judgment appeals on September 7, 2018, those being *Brookfield Residential (Alberta) LP v. Imperial Oil Limited,* and *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.* Hopefully a clear precedent is set by the Court on the correct test. After all, the whole point of summary judgment was to simplify litigation.