# Summary Judgment

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Presented by:

**Kyle R. Kawanami**

**Emery Jamieson LLP**

**Edmonton, Alberta**

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# Summary Judgment

Kyle R. Kawanami

## Introduction

A summary judgment application is an application to have a matter decided summarily, without going to trial. Trials can be time consuming and may come at a great expense. Fortunately, a trial may not always be necessary to resolve a legal dispute. The *Rules*[1] enable parties to avoid a trial by way of a summary judgment application. A summary judgment application is a way in which a party can attempt to resolve their matter based on affidavit evidence and legal argument alone.

When used appropriately, an application for summary judgment can significantly shorten what otherwise might turn into a lengthy proceeding. This paper looks to summarize recent changes in the law of summary judgment, both in terms of legislation and case law. Select decisions applying the current law will also be examined.

## Amendments to the *Rules*

In 2010, the *Rules* were significantly amended. Ones of the purposes given for the new *Rules* at the time was to provide a means by which claims could be resolved in more a timely and cost-effective way. The rule with respect to summary judgment was no exception to these amendments.

Prior to the 2010 amendments, the rule with respect to summary judgment provided that:

> 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.

[1] *Alberta Rules of Court,* Alta Reg 124/2010 [*Rules*].

> (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.
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> (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.[2]

Following the 2010 amendments, the current rule provides that:

> 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:
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> (a) there is no defence to a claim or part of it;
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> (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]

The key difference between the former and the current rule is that although the current rule states the grounds in which a summary judgment application can be brought, it does not provide a basis for how the application should be decided. The former rule provided that the Court could decide the application based on if there was a genuine issue requiring trial; the current rule identifies no such basis.

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[2] *Alberta Rules of Court,* Alta Reg 390/68, r 159.
[3] *Supra* note 1, r 7.3.

**Pre-2010 Jurisprudence**

Prior to the 2010 amendments to the *Rules,* the Alberta Court set a high threshold to be successful on a summary judgment application and the summary judgment rule was strictly applied. For example, the Alberta Court of Appeal ("ABCA") in *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd*.[4] held that:

> First, the plaintiff bears the evidentiary burden of proving its cause of action on a balance of probabilities. Each and every fact necessary to support the claim must be proven.
>
> After the plaintiff has proved its case on a balance of probabilities, the evidentiary burden shifts to the defendant but the ultimate burden remains, as always, with the plaintiff. The defendant can avoid a summary judgment in favour of the plaintiff by proving that there is a genuine issue for trial. If the defendant meets this evidentiary burden, the plaintiff fails to meet its ultimate burden. It must be beyond doubt that no genuine issue for trial exists.[5]

The Court of Queen's Bench in *Hutchinson (Estate of) v. Hutchinson*[6] further clarified when summary judgment should not be granted. The then-current state of the law was summarized that:

> Summary judgment should not be granted if:
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> 1. opposing affidavits clash on relevant facts;
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> 2. the chambers Judge must assess the quality and weight of the evidence;
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> 3. the action involves an interpretation of legal and factual issues.[7]

[4] *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd*., 2003 ABCA 298.
[5] *Ibid* at paras 18-19.
[6] *Hutchinson (Estate of) v. Hutchinson*, 2006 ABQB 418.
[7] *Ibid* at para 24.

The strict application of the rule was traditionally used as a mechanism to weed out meritless claims as the Court engaged its gatekeeper function. The Courts' foregoing decisions make it clear that the standard of proof to bring a successful summary judgment application involved a high threshold and would only be available when it was "beyond doubt"[8] that there is no genuine issue requiring trial.

**Post-2010 Jurisprudence**

The amendments to the *Rules* did not change the Alberta Courts' strict application of summary judgment. In *Beier v. Proper Cat Construction Ltd.*,[9] the Court considered the amended rule with respect to summary judgment and held:

> 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.[10]

The ABCA in *Condominium Corporation No. 0321365 v MCAP Financial Corporation*,[11] noted that it is clear that under both the amended *Rules* and the former *Rules* that "summary judgment may be granted where this is no merit to a claim or part of it."[12] The Court went on to state the following test for summary judgment:

> The moving party must adduce evidence to show there is no genuine issue for trial. This is a high threshold. If there is no genuine issue for trial, then there will be no merit to a claim. Accordingly, if the evidentiary record establishes either that there are missing links in the essential elements of a cause of action or that there is no cause of action in law, then there will be no genuine issue for trial.[13]

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[8] *Supra* note 6.
[9] *Beier v. Proper Cat Construction Ltd., 2013 ABQB 351*.
[10] *Ibid* at para 61.
[11] *Condominium Corporation No. 0321365 v MCAP Financial Corporation*, 2012 ABCA 26.
[12] *Ibid* at para 42.
[13] *Ibid* para 43.

The jurisprudence, before and after the 2010 amendments to the *Rules*, set a high standard of proof for the moving party. If a party brought a summary judgment application, all that was required by the non-moving party was to indicate to the Court that there was a triable issue and the application for summary judgment would fail. A Supreme Court of Canada ("SCC") decision in 2014 would lead to a change in this approach.

**Cultural Shift**

In 2014, the SCC in *Hryniak v Mauldin*,[14] called for a culture shift with respect to the principle of proportionality in the civil justice system, and its impact on summary judgment procedures. In *Hryniak*, the Respondents brought an action with respect to civil fraud against the Appellant and subsequently brought an application for summary judgment.[15] In 2010, the Ontario Superior Court of Justice granted summary judgment against the Appellant.[16] In 2011, the Court of Appeal for Ontario upheld the motion judge's decision and dismissed the appeal.[17] The SCC agreed, finding that the motion judge did not err in granting summary judgment and dismissed the appeal.[18]

In deciding *Hryniak*, the SCC recognized the longstanding issue with respect to access to justice for many Canadians and that adjudicating claims by way of trial may not always be feasible for many who enter the justice system. As stated by Justice Karakatsanis,

> 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.[19]

The SCC further noted that the proportionality principle acts as a "touchstone for access to civil justice"[20] and includes "an underlying principle…which means taking into account of the

[14] *Hryniak v Mauldin*, 2014 SCC 7 ["*Hryniak*"].
[15] *Ibid*.
[16] *Ibid* at para 14.
[17] *Ibid* at para 20.
[18] *Ibid* at para 95.
[19] *Ibid* at para 1.
[20] *Ibid* at para 30.

appropriateness of the procedure, its costs and impact on the litigation, and its timeliness, given the nature and complexity of the litigation."[21] As such, the SCC sought to shift adjudication from the drawn out and expensive process of trials, to focusing on other less complex methods as alternatives. The SCC held that a culture shift was required:

> 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.[22]

The SCC held that summary judgment applications must be granted when there is no genuine issue requiring trial.[23] While this formulation is similar to much of the pre-*Hryniak* jurisprudence, the Court went on to clarify that 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.[24]

The clarity provided by the SCC with respect to summary judgments invariably lowered the threshold with respect to a moving party obtaining summary judgment stating, "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."[25]

In sum, the SCC expanded the scope of summary judgment from a limited and strictly applied method of adjudication to the preferred mechanism in which to resolve disputes in situations where it is a proportionate, more expeditious and less expensive means to achieve a just result.

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[21] *Ibid* at para 31.
[22] *Ibid* at para 2.
[23] *Ibid* at para 49.
[24] *Ibid* at para 49.
[25] *Ibid* at para 57.

That said, if used inappropriately, summary judgment can delay proceedings. The SCC, therefore, recognized that summary judgment may not always be the most effective and efficient method to resolve a dispute; what is required is that the legal process must be kept in line with the principle of proportionality.[26]

**Summary Judgment in Alberta Post-*Hryniak***

The ABCA considered the SCC's decision in *Hryniak* in *Windsor v Canadian Pacific Railway Ltd*.[27] The Defendant in this matter operated a train and repair facility.[28] A chemical solvent leaked from the facility into the groundwater.[29] The Plaintiffs commenced an action based upon a reduction to their property values and loss of rental income caused by the chemical.[30] The action was based on negligence, nuisance, trespass and strict liability.[31] The ABCA allowed the appeal in part, summarily dismissing the strict liability claims.

In coming to its decision, the ABCA summarized the traditional approach to summary judgment in Alberta stating,

> under the common law system, the default method for resolving disputes is the *viva voce* trial. Traditionally, interlocutory procedures that denied any party its "day in court" were strictly interpreted. When summary judgment procedures were first introduced, they were only considered appropriate when it was "plain and obvious", or "clear" or "beyond doubt" that there was no issue that should or could be put to trial. Likewise, the procedure for striking proceedings that did not disclose a cause of action was narrowly applied.[32]

[26] *Ibid* at para 32.
[27] *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108 ["*Windsor*"].
[28] *Ibid* at para 2.
[29] *Ibid*.
[30] *Ibid* at para 4.
[31] *Ibid*.
[32] *Ibid* at para 11.

The ABCA summarized the *Hryniak* decision and found that it applied in Alberta and adopted the modern test for summary judgment, noting that "modern civil procedure has come to recognize that a full trial is not always the sensible and proportionate way to resolve disputes."[33]

Just a few years later, the ABCA considered the matter of *Stefanyk v Sobeys Capital Incorporated*.[34] The claim was brought by the Plaintiff for injuries which were caused by a fall outside of a Sobeys store after she was startled by a dog, causing her to fall. The ABCA confirmed the summary dismissal of the claims against Sobeys, indicating that it was not negligent.

In coming to its decision, the ABCA again confirmed that the traditional strict application of summary judgment does not apply in Alberta. The ABCA recognized that "unassailable" and "very high likelihood" are not recognized as standards of proof.[35] The ABCA added to the application of summary judgment and discussed the applicable standard of proof. The Court found that the only applicable standard of proof engaged on summary judgment applications is a balance of probabilities. The ABCA stated,

> there is only one civil standard of proof at common law and that is proof on a balance of probabilities. That is the standard the summary judgment rule engages when it talks about "merit" … Summary judgment is one procedure for deciding whether the moving party has proven its case on a balance of probabilities. Summary judgment is the appropriate procedure where the record is such that a fair and just disposition can be made on it: [36]

In sum, the ABCA further refined the test for summary judgment holding that the question is not whether a moving party's position has a high likelihood of success at trial or is unassailable, but rather they have proven their case on the civil standard of proof: a balance of probabilities.

## Standard of Proof

Interpretive lines were drawn by the different justices of the ABCA between the traditional approach and the modern approach to summary judgment soon after the ABCA's decision in *Stefanyk.* A

[33] *Ibid* at para 12.
[34] *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125 ["*Stefanyk*"].
[35] *Ibid* at para 14.
[36] *Ibid* at paras 14-15.

different ABCA panel in *898294 Alberta Ltd. v Riverside Quays Limited Partnership*,[37] held that the approach to the standard of proof in summary judgment in Alberta was that of the traditional pre-*Hryniak* era.

In *Riverside* the Plaintiff appealed the dismissal of its summary judgment application. The Plaintiff had loaned the Defendant monies and brought a summary judgment application seeking repayment of the loan. The ABCA held that the summary judgment should have been granted in this matter and allowed the appeal.[38]

In coming to its conclusion, the ABCA cited a previous decision, which was decided by the same panel, in *Rotzang v CIBC World Markets Inc*,[39]. The Court held that:

> Summary judgment is reserved for the resolution of disputes where the outcome of the contest if 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?[40]

The combined result of *Stefanyk* and *Riverside* was confusion amongst the Alberta bar. Counsel wishing to bring applications for summary judgment would occasionally refer to both authorities in chambers, arguing that whichever was the standard, that it was met in their case. However, this was not a satisfactory situation. Clearly further guidance would be required from the Province's highest court.

## The Final Decision

In *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*,[41] decided before a panel of 5, including justices on both sides of *Sobeys / Riverside* divide, the ABCA sought to clarify the divergent lines of jurisprudence in Alberta. *Weir-Jones* concerned an action brought with respect to a breach of contract.[42] The Plaintiff appealed the summary dismissal of its claim on the basis that it was not brought within the limitations period.[43]

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[37] *898294 Alberta Ltd. v Riverside Quays Limited Partnership*, 2018 ABCA 281 ["*Riverside*"].
[38] *Ibid* at para 14.
[39] *Rotzang v CIBC World Markets Inc*, 2018 ABCA 153.
[40] *Supra* note 37 at para 12.
[41] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA* 49 ["*Weir-Jones*"].
[42] *Ibid* at para 5.
[43] *Ibid* at para 7.

The Majority judgment stated that the proper approach to summary dispositions is based on the test set out by the SCC in *Hryniak*. Likewise, the Majority addressed and clarified the issue with respect to the standard of proof and held that the standard of proof is a balance of probabilities.[44] The Majority went on to explain that the standard of proof only applies to findings of fact and does "not apply to whether…it is possible to achieve a fair and just adjudication on a summary basis."[45] To summarize,

> 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.[46]

The Majority further outlined and reiterated the test set out in *Hryniak*, indicating the procedural approach and foundational criteria for summary judgment:[47]

> 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…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".
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> 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

[44] *Ibid* at para 28.
[45] *Ibid* at para 29.
[46] *Ibid* at para 33.
[47] *Ibid* at para 21.

applies to those facts. Those cases are ideally suited for summary judgment. 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.[48]

Based on an analysis of *Hryniak* and other jurisprudence, the Majority held that the key considerations with respect to summary judgment are as follows:

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.

[48] *Ibid* at para 21.

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.[49]

The Majority further explained that the analysis need not proceed sequentially and at any stage of the analysis the Court may rule that determining the action summarily "is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result," or there is a genuine issue requiring a trial."[50]

Separate reasons were issued by Justice Wakeling, concurring in the result.

Prior to *Weir-Jones*, the divide in the jurisprudence caused great confusion for those seeking summary judgment. In its decision, the Court of Appeal definitively resolves the conflicting lines of jurisprudence in favor of making summary judgment a more accessible means of adjudication rather than trial being the default procedure. In sum, the Majority acknowledged that "there is no policy reason to cling to the old, strict rules for summary judgment…and [it] should be used when it is the proportionate, more expeditious and less expensive procedure."[51]

### Application of *Weir-Jones*

While it was released only a little over a year ago (February 6, 2019), *Weir-Jones*, at the time of the preparation of this paper, was cited 133 times on CanLII. Two recent decisions will be reviewed that highlight the different ways that the Courts have applied *Weir-Jones* in the context of summary judgment applications.

[49] *Ibid* at para 47.
[50] *Ibid*.
[51] *Ibid* at para 48.

## Summary Judgment & Expert Evidence

In *Smith v John Doe*,[52] one of the Defendants sought summary judgment against the Plaintiff in relation to a medical negligence action.[53] The Defendant, a doctor, had treated the Plaintiff while he was incarcerated.[54] While treating the Plaintiff, the Defendant took the Plaintiff off of his prior pain medication, prescribed by a different doctor, and started him on a new pain medication.[55] The Plaintiff claimed that the medications prescribed by the Defendant caused him liver damage and he further claimed that the Defendant was negligent in inevitably cutting him off from all of his pain medication.[56]

The Court was presented with two conflicting expert reports. In considering those expert reports, the Court clarified that conflicting expert reports will not necessarily assist the moving party in avoiding summary judgment. The Court stated,

> it is not enough…to tender an expert report that might have prevented a non-suit at trial to avoid a summary dismissal application. The Court is obliged to take a critical look at the evidence to see if a fair and just determination can be made within the principles of the *Weir-Jones* decision.[57]

In addition to the former tenet, the Court further applied the following principles in considering expert reports in the context of summary judgment:

> 1. Where there is a direct conflict between the opinions of the experts, it is not necessary to subject the opinions to a 'correctness standard' as some have done. The Court can weigh the value of the opinion in light of the whole of the evidence or as I have done here, largely to accept the Plaintiff's expert opinion at face value and see where that leads.
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> 2. It might be added that if there were competing but equally compelling expert opinions, setting out divergent approaches to a particular case,

[52] *Smith v John Doe, 2020 ABQB 59* ["*Smith*"].
[53] *Ibid* at para 2.
[54] *Ibid* at para 4.
[55] *Ibid* at paras 5-8.
[56] *Ibid* at para 17.
[57] *Ibid* at para 11.

it would be difficult to fault a Defendant for following one of them. Opinions about the standard of care may not mandate only one choice but support a range of acceptable choices within which clinical judgment can be exercised. An error of judgment within that range is not negligence.

3. Another key question when there are competing opinions, is whether the factual foundation supporting the expert's conclusions have been made out.[58]

The expert reports in this case raised three issues:

1. Whether [the Defendant] should have prescribed opioid pain killers straight away (or at all);

2. Whether [the Defendant] should have referred [the Plaintiff] out for consultation and evaluation; and

3. Whether [the Defendant] should have obtained [the Plaintiff's] informed consent for the use of Toradol because of its potential side effects.[59]

With respect to the issue of informed consent, the Plaintiff's expert, conceded that the Plaintiff would, if properly informed, have accepted the risks of using the medication prescribed by the Defendant.[60] The Court found that even if the Defendant fell short of the standard of care with respect to obtaining the Plaintiff's informed consent, there was no proof of any actionable harm suffered as a result.[61]

The Plaintiff's expert further provided evidence that the Defendant should have strongly considered putting the Plaintiff on an opioid pain trial, rather than prescribing non-opioid painkillers.[62] The Court considered the factual basis of the expert's conclusion and found that there had been no material

[58] *Ibid* at paras 12-14.
[59] *Ibid* at para 20.
[60] *Ibid* at para 22.
[61] *Ibid*.
[62] *Ibid* at para 25.

change in the Plaintiff's condition once the Defendant began treating him.[63] The Court further found that exercising clinical judgment to prefer using one option over another, was not negligent.[64] As such, the Court found that the evidence fell short of establishing that the Defendant had not met the standard of care.[65]

Further, the Plaintiff's expert was of the opinion that the Defendant should have referred the Plaintiff to a specialist.[66] The Court found that no evidence had been tendered to establish that referring the Plaintiff to a specialist would have made a significant difference to the outcome, particularly during the short time that the Defendant treated the Plaintiff.[67] The Court found that the Plaintiff's expert failed to establish a link between the failure to act and an actionable, foreseeable consequence.[68]

Applying the principles set out in *Weir-Jones*, [69] generally, and with respect to conflicting expert reports, the Court ruled in favour of the Defendant and summarily dismissed the Plaintiff's action against him.

## Summary Judgment & Uncertainty in the Law

While *Hryniak* and *Weir-Jones* can certainly be seen as encouraging summary judgment and summary dismissal as dispute resolution mechanisms, that does not mean that the mere fact of an application will necessarily lead to success.

In *Panther Sports Medicine and Rehabilitation Centres Inc v Adrian G Anderton Professional Corporation*,[70] the Court considered an appeal of summary judgment application brought by the Plaintiff against the Defendant.[71] The Defendant attempted to repudiate a lease provide by the Plaintiff, by moving out of the property.[72] The Plaintiff refused repudiation and treated the lease as ongoing.[73] The Plaintiff sought to collect the amounts not paid under the lease by way of summary

[63] *Ibid* at para 26.
[64] *Ibid* at para 29.
[65] *Ibid* at para 30.
[66] *Ibid* at para 31.
[67] *Ibid* at para 32.
[68] *Ibid* at para 34.
[69] *Supra* note 41.
[70] *Panther Sports Medicine and Rehabilitation Centres Inc v Adrian G Anderton Professional Corporation*, 2019 ABQB 973.
[71] *Ibid* at para 8.
[72] *Ibid* at para 4.
[73] *Ibid*.

judgment. The central issue was whether or not the Plaintiff had a duty to mitigate its losses once the Defendant moved out of the property.[74]

In coming to its conclusion, the Court cited *Weir-Jones*[75] where the ABCA held "that in some cases, while the facts may be capable of being established, uncertainties or difficulties in the law will properly preclude summary judgment."[76] Specifically, the ABCA stated,

> 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.[77]

The Plaintiff had referred the Court to several decisions that supported its claim that it could refuse to accept the Defendant's repudiation and assert its rights to the rent, with no duty to mitigate.[78] However, the Court found that the majority of the cases that the Plaintiff referred the Court to predated a SCC decision on the matter, which was not brought to the Court's attention. The Court found that the SCC decision, fundamentally changed the legal framework for assessing the available remedies where a party has breached a contract related to land.[79]

The Court reviewed the decisions provided by the Plaintiff as well as the SCC's decision and determined that the question of whether or not the Plaintiff had a duty to mitigate was sufficiently uncertain so as to preclude its summary judgment application.[80] The Court further found that there were additional uncertainties in the factual and legal record that suggested that summary judgment should not have been granted.[81] The Court found that there was a factual issue with respect to the nature of the agreement between the parties.[82] Further, as the agreement was a sub-lease, the Court found that there may be other legal considerations in relation to sub-leases and the duty to

[74] *Ibid* at para 5.
[75] *Supra* note 41.
[76] *Supra* note 83 at para 39.
[77] *Ibid* citing to *Weir* at para 45.
[78] *Ibid* at para 50.
[79] *Ibid* at para 51.
[80] *Ibid* at para 64.
[81] *Ibid* at para 65.
[82] *Ibid* at para 66.

mitigate that merited legal analysis.[83] Finally, the Court found that the legal record did not show, on a balance of probabilities, that the Plaintiff refused repudiation.[84]

For the above reasons, the Court found that the Plaintiff's application failed on the first branch of the *Weir-Jones* test:

> 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?[85]

As such, the Court denied the Plaintiff's appeal and refused to grant the Plaintiff's application for summary judgment and further ordered the Plaintiff to provide additional disclosure with respect to its efforts to mitigate its losses.[86]

## Conclusion

Over the last 10 years there has been a change in how summary judgment is granted in Alberta. First, with the amendments to the *Rules*, then the decision in *Hryniak*, the adoption of *Hryniak* in Alberta in *CPR v Windsor*, and finally with the clarification provided in *Weir-Jones*, the type of situation which will now lead to a successful summary judgment application is very different than would have been the case 10 years ago.

Summary judgment can be a powerful weapon in chambers, and with recent decisions the Courts have signaled an expanded scope for potential summary judgment applications. While the idea is that summary judgment can be looked at as a more frequent, and proportional, option than a full trial, recent decisions also indicate that the Court will still be prepared to refuse to summarily determine a case if it lacks confidence in the sufficiency of the record, or that a just result can be reached.

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[83] *Ibid* at para 67.
[84] *Ibid* at para 68.
[85] *Ibid* at para 40 citing to *supra* note 49.
[86] *Ibid* at para 71.