SUMMARY JUDGMENT

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Introduction: What is Summary Judgment?

The *Alberta Rules of Court*, by way of a Summary Judgment application, enable parties to attempt to resolve their matter without proceeding to trial

- Can significantly shorten a matter
- Can be more cost efficient
- Resolution of the matter based on affidavit evidence and legal argument alone

2010 Amendments to the *Alberta Rules of Court*

Purpose of the amendments was to provide a means by which claims could be resolved in a more timely and cost-effective way

Amendments made to the *Rule* with respect to Summary Judgment

- Previous Rule
- New Rule
- Key Differences

PRE-2010 JURISPRUDENCE

Pre-2010 Jurisprudence

High threshold to be successful

Summary Judgment rule was strictly applied & used as a mechanism to weed out meritless claims

Hutchinson (Estate of) v. Hutchinson, 2006 ABQB 418

- Clarified when Summary Judgment should not be granted

Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd, 2003 ABCA 298

- "It must be beyond doubt that no genuine issue for trial exists"

POST-2010 JURISPRUDENCE

Post-2010 Jurisprudence

Amendments to the *Rules* did not change the Alberta Courts' strict application of Summary Judgment

Beier v. Proper Cat Construction Ltd., 2013 ABQB 351

- "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"

THE CULTURAL SHIFT

Hryniak v Mauldin, 2014 SCC 7

Background

The SCC recognized concerns with respect to access to justice

- "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"

The Proportionality Principle

Culture Shift from the drawn out and expensive process of trials, to focusing on less complex methods of adjudication

- "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"

Clarification of "no genuine issue" requiring trial

- Set out 3-part test

    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

- Lowered the threshold

SUMMARY JUDGMENT IN ALBERTA: POST-*HRYNIAK*

Summary Judgment in Alberta: Post-*Hryniak*

Windsor v Canadian Pacific Railway Ltd, 2014 ABCA 108

- Background
- Applied *Hryniak* and adopted the modern test for Summary Judgment
  - "modern civil procedure has come to recognize that a full trial is not always the sensible and proportionate way to resolve disputes"

Stefanyk v Sobeys Capital Incorporated, 2018 ABCA 125

- Background
- Applicable standard of proof
  - "there is only one civil standard of proof at common law and that is proof on a balance of probabilities"

Competing Jurisprudence: Standard of Proof

***Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125**

Adopted the Supreme Court of Canada's approach to Summary Judgment in *Hryniak v Mauldin*, 2014 SCC 7

Stefanyk v Sobeys Capital Incorporated, 2018 ABCA 125

- "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"

***898294 Alberta Ltd. v Riverside Quays Limited Partnership*, 2018 ABCA 281**

Held that Summary Judgment in Alberta was that of the pre-*Hryniak* approach

Citing to *Rotzang v CIBC World Markets Inc*, 2018 ABCA 153

- "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?"

THE FINAL DECISION

Weir-Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49

Background

Clarified the divergent lines of jurisprudence in *Stefanyk* and *Riverside*

Majority held that the proper approach to Summary Judgment is based on the test set out in *Hryniak*

1) Allow the judge to make the necessary findings of fact
2) Allow the judge to apply the law to the facts
3) 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

Standard of proof as balance of probabilities

The standard 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"

Majority further set out key considerations with respect to Summary Judgment

1) 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?
2) 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.
3) 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.
4) 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.

APPLICATION OF *WEIR-JONES*

Summary Judgment & Expert Evidence

Smith v John Doe, 2020 ABQB 59

Background

The Court clarified that conflicting expert reports will not necessarily assist the moving party in avoiding summary judgment

- "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"

Applied 3 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

2) It might be added that if there were competing but equally compelling expert opinions, setting out divergent approaches to a particular case, 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

Summary Judgment & Uncertainty in the Law

Panther Sports Medicine and Rehabilitation Centres Inc v Adrian G Anderton Professional Corporation, 2019 ABQB 973

- Background

The Court cited *Weir-Jones* where the ABCA held,

- "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"

The Court found that the central question to be considered in the application was sufficiently uncertain so as to preclude the Plaintiff's Summary Judgment application

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

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?"