In the Court of Appeal of Alberta

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

Date: 20190206
Docket: 1703-0218-AC
Registry: Edmonton

Between:

Weir-Jones Technical Services Incorporated

Appellant
(Respondent/Plaintiff)

- and -

Purolator Courier Ltd., Purolator Inc. and Purolator Freight

Respondents
(Applicants/Defendants)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Jo'Anne Strekaf

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Chief Justice Fraser
Concurred in by the Honourable Mr. Justice Watson
Concurred in by the Honourable Madam Justice Strekaf

Reasons for Judgment Reserved of the Honourable Mr. Justice Wakeling
Concurring in the Result

Appeal from the Judgment by
The Honourable Madam Justice D.L. Shelley
Dated the 10th day of August, 2017
Filed the 19th day of September, 2017
(2017 ABQB 491, Docket: 1114 00276)

Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter

[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.

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 SCR 235:

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; ***H.L. v Canada (Attorney General),*** 2005 SCC 25 at para. 74, [2005] 1 SCR 401, 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 at para. 9, 609 AR 313.

[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 at paras. 81-4, [2014] 1 SCR 87; ***Amack v AW Holdings Corp.***, 2015 ABCA 147 at para. 27, 24 Alta LR (6th) 44, 602 AR 62.

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 AR 147 with ***Stefanyk v Sobeys Capital Incorporated***, 2018 ABCA 125, 67 Alta LR (6th) 215:

> ***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.
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> ***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 v Imperial Oil Limited***, 2019 ABCA 35 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.
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> 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 Ltd***., 2014 ABCA 108 at para. 14, 94 Alta LR (5th) 301, 572 AR 317; 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.
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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 applies to those facts. Those cases are ideally suited for summary judgment: ***Tottrup v Clearwater (Municipal District No. 99)***, 2006 ABCA 380 at para. 11, 68 Alta LR (4th) 237, 401 AR 88. 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 (A. G.)***, 2014 FCA 170 at para. 42, 83 CELR (3d) 1. 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 ***F.H. v McDougall***, 2008 SCC 53 at para. 40, [2008] 3 SCR 41 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 (A. G.) v Fairmont Hotels Inc.***, 2016 SCC 56 at paras. 35-7, [2016] 2 SCR 720. 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 SCR 320 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 at para. 25, 55 Alta LR (4th) 1, 384 AR 251. 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 (A.G.) v Lameman***, 2008 SCC 14 at para. 11, [2008] 1 SCR 372. 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 ***Sturgeon Lake Indian Band v Canada (A. G.)***, 2017 ABCA 365 at paras. 38-45, 60 Alta LR (6th) 226, leave to appeal refused SCC #37899 (July 5, 2018), 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 at para. 113, 31 Alta LR (6th) 1, 616 AR 290; ***Arndt v Banerji***, 2018 ABCA 176 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. ***Honourable Patrick Burns Memorial Trust (Trustee of) v P. Burns Resources Ltd.***, 2015 ABCA 390 at para. 11, 26 Alta LR (6th) 1, 612 AR 63. 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 Ass'n of British Columbia v British Columbia (A. G.)***, 2017 BCCA 324 at paras. 21, 56, [2018] 2 WWR 480, leave to appeal refused SCC #37843 (July 26, 2018).

[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 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*** at para. 11; ***Cardinal v Alberta Motor Association Insurance Co***., 2018 ABCA 69 at para. 10, 66 Alta LR (6th) 15; ***Condominium Corp. No. 0321365 v Cuthbert***, 2016 ABCA 46 at para. 29, 33 Alta LR (6th) 209, 612 AR 284; ***Axcess Mortgage Fund Ltd. v 1177620 Alberta Ltd.***, 2018 ABQB 626 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 at para. 47, 75 Alta LR (6th) 36, 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 ***Vallard Construction Ltd. v Bird Construction***, 2015 ABQB 141, 41 CLR (4th) 51. 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 Barnes***, 2013 ABCA 379 at para. 6, 561 AR 256.

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.,*** 1988 ABCA 267 at para. 28, 89 AR 151, 61 Alta LR (2d) 193. 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 at para 155, 365 AR 1, aff'd ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para. 12, [2008] 1 SCR 372. 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 at para. 19, 612 AR 67, leave to appeal refused [2016] 2 SCR xi; ***De Shazo v Nations Energy Co.***, 2005 ABCA 241 at para. 31, 48 Alta LR (4th) 25, 367 AR 267.

[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 and Wilcock Canada Ltd. v Agrium Inc.***, 2005 ABCA 82 at para. 16, 39 Alta LR (4th) 197, 363 AR 103.

[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.

Appeal heard on September 7, 2018

Reasons filed at Edmonton, Alberta
this 6th day of February, 2019

Slatter J.A.

I concur:
Fraser C.J.A.

I concur:
Watson J.A.

I concur:
Authorized to sign for: Strekaf J.A.

Judgment Reserved of the Honourable Mr. Justice Wakeling
Concurring in the Result

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

[1] 2014 SCC 7; [2014] 1 S.C.R. 87. The Supreme Court released this judgment on January 23, 2014.

[2] *898294 Alberta Ltd. v. Riverside Quays Ltd. Partnership*, 2018 ABCA 281, ¶ 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. City of Calgary*, 2018 ABCA 204, ¶ 2; 20 C.P.C. 8th 43, 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, ¶ 15; 17 C.P.C. 8th 252, 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, ¶ 2; 100 C.P.C. 7th 52, 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 Corp.*, 2017 ABCA 218, ¶ 18; 57 Alta. L.R. 6th 19, 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, ¶ 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, ¶ 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) Limited v. Arres Capital Inc. ...* and *776826 Alberta Ltd. v. Ostrowercha*"); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46, ¶ 27; 612 A.R. 284, 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, ¶ 19 (the Court adopted the test set out in *W.P. v. Alberta*); *776826 Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49, ¶ 13; 593 A.R. 391, 395 (the Court adopted the test set out in *W.P. v. Alberta*); *W.P. v. Alberta*, 2014 ABCA 404, ¶ 26; 378 D.L.R. 4th 629, 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, ¶¶ 48 & 50; 62 C.P.C. 7th 260, 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) v. Arres Capital Inc.*, 2014 ABCA 280, ¶¶ 45 & 46; 584 A.R. 68, 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, ¶ 20; 315 C.C.C. 3d 337, 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, ¶ 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, ¶ 39; 24 Alta. L.R. 6th 202, 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, ¶ 48; [2015] 12 W.W.R. 728, 744 (the Court adopted the *Beier* principles); *Mackey v. Squair*, 2015 ABQB 329, ¶ 22; 617 A.R. 259, 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, ¶ 51; 40 C.L.R. 4th 187, 208-09 (the Court applied the principles set out in *Access Mortgage Corp. (2004)* and *Beier v. Proper Cat Construction*); *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14; 8 Alta. L.R. 6th 152, 158-59 ("the preferable formulation I prefer is 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. 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, ¶ 29; 587 A.R. 16, 26 ("The formulation I [prefer is] 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"); *Deguire v. Burnett*, 2013 ABQB 488, ¶ 22; 36 R.P.R. 5th 60, 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 v. Bariana*, 2015 ABQB 605, ¶ 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, ¶ 22 & 36; 618 A.R. 220, 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").

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*.

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[3] E.g., *Chief Constable of Greater Manchester Police v. Carroll*, [2017] EWCA Civ 1992, ¶ 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] HCA 16, ¶ 18; 214 A.L.R. 370, 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, ¶ 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. Turner Hopkins*, [2018] NZCA 197, ¶ 8 ("Where a defendant applies for summary judgment, a defendant has to show that the plaintiff cannot succeed"); *Bigyard Holdings Ltd. (in receivership) v. Tasmandairy Ltd.*, [2017] NZHC 1918, ¶ 45 ("The Court must be left without any real doubt or uncertainty"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) ("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 Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("[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, 325 (1986) ("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, 905 (7th Cir. 2018) ("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 v. Lameman*, 2008 SCC 14, ¶ 10; [2008] 1 S.C.R. 372, 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, ¶ 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, ¶ 12; 68 Alta. L.R. 5th 126, 131 ("Summary judgment should only be granted if the matter is factually and legally beyond doubt"); *Eng v. Eng*, 2010 ABCA 19, ¶ 5; [2010] 6 W.W.R. 29, 31 ("It must be beyond doubt that no genuine issue for trial exists"); *Kristal Inc. v. Nicholl & Akers*, 2007 ABCA 162, ¶ 7; 41 C.P.C. 6th 381, 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, ¶ 18; 384 A.R. 309, 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, ¶ 13; 412 A.R. 88, 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, ¶ 24; 384 A.R. 251, 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, ¶ 19; 256 D.L.R. 4th 502, 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, ¶ 9; [2004] 6 W.W.R. 472, 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'"); *Trustee of Pioneer Exploration Inc. v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298, ¶ 19; 27 Alta. L.R. 4th 62, 65 ("It must be beyond doubt that no genuine issue for trial exists"); *Wilson v. City of Medicine Hat*, 2000 ABCA 247, ¶ 54; 87 Alta. L.R. 3d 25, 41 ("the suits... should be barred. ... [T]here would be an unanswerable defence for purposes of R. 159"); *Boudreault v. Barrett*, 1998 ABCA 232, ¶ 2; 219 A.R. 67, 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, ¶ 35; 46

Alta. L.R. 3d 292, 305 ("Summary judgment cannot be granted unless the issue is beyond doubt")' *Mellon v. Gore Mutual Insurance Co.*, 1995 ABCA 340, ¶ 3; 174 A.R. 200, 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, ¶ 3; 102 D.L.R. 4th 764, 765 ([summary judgment is unsafe unless] "all substantial doubt [about the nonmoving party's care] has been removed"); *Zebroski v. Jehovah's Witnesses*, 1998 ABCA 256, ¶ 5; 87 A.R. 229, 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, ¶ 37; 62 A.R. 2, 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*, 2 Alta. L.R. 2d 52, 54 (Alta. Sup. Ct. App. Div. 1977) ("[the summary judgment test is whether] the question at issue is beyond doubt"); *Scandinavian Bank v. Shuman*, 37 D.L.R. 419, 421 (Alta. Sup. Ct. App. Div. 1917) ("[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. Ltd. v. 1331440 Alberta Ltd.*, 2013 ABQB 487, ¶ 23; 8 Alta. L.R. 6th 40, 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, ¶ 38; 18 B.L.R. 5th 73, 91 (the Court adopted the *Beier* principles); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 61; 35 R.P.R. 5th 105, 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, ¶ 112; [2013] 4 W.W.R. 311, 360-61(the Court held that *Canada v. Lameman* sets out the applicable summary judgment test); *Airco Aircraft Charters Ltd. v. Edmonton Regional Airports Authority*, 2010 ABQB 397, ¶ 23; 28 Alta. L.R. 5th 324, 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, ¶ 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*, 2004 ABQB 655, ¶¶ 58 & 157; [2005] 8 W.W.R. 442, 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, ¶ 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, ¶ 41; 344 A.R. 299, 309 ("The bar is high in an application for summary dismissal of a claim"); *Tanar Industries Ltd. v. Outokumpu Ecoenergy Inc.*, 1999 ABQB 597, ¶ 26; [1999] 11 W.W.R. 146, 153 (a moving party must "clearly demonstrate that the Plaintiff's action is bound to fail"); *Union of India v. Bumper Development Corp.*, 171 A.R. 166, 180 (Q.B. 1995) ("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 of Canada v. Starko*, 9 Alta. L.R. 3d 339, 342 (Q.B. 1993) ("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.*, 70 A.R. 41, 47-48 (Q.B. 1986) ("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.*, 122 A.R. 321, 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, ¶ 48; [2013] 4 W.W.R. 578, 587 (Master) ("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, ¶ 8 (Master) ("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, ¶ 21; 77 C.L.R. 3d 213, 218 (Master) (the Court applied the *Lameman* test); *Tucson Properties Ltd. v. Sentry Resources Ltd.*, 22 Alta. L.R. 2d 44, 47 (Master 1982) (summary judgment may be granted if the ultimate disposition of the action is "beyond all doubt"); *Barrowman v. Ranchland*

[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

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Asphault Services Ltd., 29 A.R. 306, 335-36 (Master 1981) ("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.*, 42 A.R. 369, 371 (Master 1980) ("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, ¶ 50 ("I cannot conclude that B & L's claim is bound to fail"); *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.*, 55 B.C.L.R. 137, 139 (C.A. 1984) ("if the defendant is bound to lose, the [summary judgment] application should be granted"); *Green v. Tram*, 2015 MBCA 8, ¶ 2 ("The motions judge concluded that ... the appellant's claims ... must fail"); *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, ¶ 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"); *059143 N.B. Inc. v. 656340 N.B. Inc.*, 2014 NBCA 46, ¶ 10 ("[to grant summary judgment] the moving party's case must be unanswerable"); *Forsythe v. Furlotte*, 2016 NBCA 6, ¶ 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, ¶ 8 ("Before granting summary judgment, the motion judge had to determine on the record ... that the outcome was a foregone conclusion"); *Royal Bank of Canada v. MJL Enterprises Inc.*, 2017 PECA 10, ¶ 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*, 2014 FCA 170, ¶ 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 v. Lameman*, 2008 SCC 14, ¶ 10; [2008] 1 S.C.R. 372, 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, ¶ 12; 68 Alta. L.R. 5th 126, 131 ("Summary judgment should only be granted if the matter is factually and legally beyond doubt"); *Stoddard v. Montague*, 2006 ABCA 109, ¶ 13; 412 A.R. 88, 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, ¶ 50 ("I cannot conclude that B&L's claim is bound to fail"); *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.*, 55 B.C.L.R. 137, 139 (C.A. 1984) ("if the defendant is bound to lose, the [summary judgment] application should be granted"); *Forsythe v. Furlotte*, 2016 NBCA 6, ¶ 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*, 2014 FCA 170, ¶ 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*, [2017] QCA 321, ¶ 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. Turner Hopkins*, [2018] NZCA 197, ¶ 8 ("Where a defendant applies for summary judgment, a defendant has to show that the plaintiff cannot succeed") & *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 per Powell, J. (1986) ("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'").

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*

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[7] E.g., *898294 Alberta Ltd. v. Riverside Quays Ltd. Partnership*, 2018 ABCA 281, ¶ 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, ¶ 2; 100 C.P.C. 7th 52, 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"); *W.P. v. Alberta*, 2014 ABCA 404, ¶ 26; 378 D.L.R. 4th 629, 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, 251-52 (1986) ("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, n. 65; 62 C.P.C. 7th 260, 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, ¶¶ 19-22; 36 R.P.R. 5th 60, 66-69.

[10] *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14; 8 Alta. L.R. 6th 152, 158-59 & *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 29; 587 A.R. 16, 26.

[11] 2014 ABQB 111, ¶ 29; 587 A.R. 16, 26.

> 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]

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[12] *Arndt v. Banerji*, 2018 ABCA 176, ¶ 36 (the Court applied the *Stefanyk v. Sobeys Capital Inc.* test); *Stefanyk v. Sobeys Capital Inc.*, 2018 ABCA 125, ¶ 15; [2018] 5 W.W.R. 654, 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, ¶ 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, ¶ 11; [2018] 5 W.W.R. 32, 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 Ltd. Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378, ¶ 15; 60 Alta. L.R. 6th 57, 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*, 2017 ABCA 365, ¶ 25; 418 D.L.R. 4th 157, 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, ¶ 25; 612 A.R. 284, 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, ¶ 18; 612 A.R. 67, 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, ¶ 15; 52 C.L.R. 4th 17, 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

[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

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required, or whether the matter can be disposed of summarily"); *Bilawchuk v. Bloos*, 2014 ABCA 399, ¶ 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, ¶ 12; 588 A.R. 6, 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, ¶ 13; 371 D.L.R. 4th 339, 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, ¶ 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, ¶ 8; [2002] 2 S.C.R. 235, 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.

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.

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[17] 2014 SCC 7; [2014] 1 S.C.R. 87.

[18] *Jacobs v. Booth's Distillery Co.*, 85 L.T.R. 262, 262 (H.L. 1901).

[19] *Swain v. Hillman*, [2001] 1 All E.R. 91, 92 & 94 (C.A.).

[20] *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

[21] Alta. Reg. 124/2010.

[22] R.S.A. 2000, c. I-8, s. 10.

[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,

[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.

(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

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[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").

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.

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[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.

> 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:

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[28] O.C. August 12, 1914.

> 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.

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[29] R.S.A. 2000, c. L-12.

[30] Purolator Courier Ltd. changed its name to Purolator Inc.

[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.

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[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.

[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*.

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[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.

[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.

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[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.

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

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[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.

> 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

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[41] 2017 ABQB 491.

[42] 2017 ABQB 491, ¶¶ 36, 37 & 42.

[43] Id. ¶ 40.

[44] Id. ¶¶ 40 & 41.

[45] R.S.A. 2000, c. L-12.

[46] 2017 ABQB 491, ¶ 24.

[47] Id. ¶¶ 36 & 42.

[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]

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[48] *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶ 1; 20 C.P.C. 8th 43, 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, 327 (1986) 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* at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?", 82 Antitrust L.J. 81, 111-12 (2018) ("*Matsushita*, together with its companion cases *Anderson* and *Celotex*, 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," 38 Yale L.J. 423, 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, 176 (1970) 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, 306 (5th Cir. 1940) ("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, ¶ 23; 22 C.P.C. 5th 73, 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").

[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

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[53] The Supreme Court of Canada has recognized this correlation. *Hryniak v. Mauldin*, 2014 SCC 7, ¶¶ 1-3; [2014] 1 S.C.R. 87, 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* at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?", 82 Antitrust L.J. 81, 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. City of Calgary*, 2018 ABCA 204, ¶ 1; 20 C.P.C. 8th 43, 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, ¶ 71; 35 R.P.R. 5th 105, 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, ¶ 1 (Master) ("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.*, 225 A.R. 68, 73 (Q.B. 1998) ("A summary judgment procedure is swift, cheap and efficient, with the same neutral evaluation before an impartial judge"); *Combined Air Mechanical*

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

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Services v. Flesch, 2011 ONCA 764, ¶ 2; 286 O.A.C. 3, 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*, [2001] 1 All E.R. 91, 94 per Lord Woolf, M.R. (C.A. 1999) ("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, 327 (1986) 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, 266-67 (1986) 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, ¶ 56; 35 R.P.R. 5th 105, 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, ¶ 33; 18 B.L.R. 5th 73, 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, ¶¶ 84-95; 315 C.C.C. 3d 337, 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

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]

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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, ¶ 78; 315 C.C.C. 3d 337, 374 per Wakeling, J.A. See also *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 29; 587 A.R. 16, 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, ¶ 71; 35 R.P.R. 5th 105, 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

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

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*, [2001] 1 All E.R. 91, 94 (C.A. 1999) 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*, 4 Ex. D. 279, 281-82 (1879) ("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, ¶ 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, ¶ 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, ¶ 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, ¶ 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, ¶ 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, 323-24 (1986) 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 Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 per Powell, J. (1986) ("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

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

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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, ¶ 75; [2018] 5 W.W.R. 32, 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, ¶ 14; 8 Alta. L.R. 6th 152, 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 Nations*, 2014 ABQB 111, ¶ 29; 587 A.R. 16, 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, ¶ 34; 18 B.L.R. 5th 73, 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. Rexcroft Storage and Warehouse Inc.*, 164 D.L.R. 4th 257, 265 (Ont. C.A. 1998) ("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, ¶ 2; 108 O.R. 3d 1, 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, 1230-31 (D. Kan. 2010) ("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").

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

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[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) v. Arres Capital Inc.*, 2014 ABCA 280, ¶ 45; 584 A.R. 68, 78 ("the legal or persuasive burden rests on the moving party"); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 66; 35 R.P.R. 5th 105, 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 v. Lameman*, 2008 SCC 14, ¶ 11; [2008] 1 S.C.R. 372, 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*, 170 Man. R. 2d 32, 33 (C.A. 2002) ("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*, 231 O.R. 3d 547, 557 (C.A. 1995) ("a respondent on a motion for summary judgment must lead trump or risk losing") & *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) per Harlan, J. (the nonmoving party declines to lead evidence at its own peril).

[74] *898294 Alberta Ltd. v. Riverside Quays Ltd. Partnership*, 2018 ABCA 281, ¶ 12; *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 2014, ¶ 2; 20 C.P.C. 8th 43, 46-47; *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153, ¶ 15; 17 C.P.C. 8th 252, 255; *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶ 2; 100 C.P.C. 7th 52, 61; *Talisman Energy Inc. v. Questerre Energy Corp.*, 2017 ABCA 218, ¶ 18; 57 Alta. L.R. 6th 19, 29; *Baim v. North Country Catering Ltd.*, 2017 ABCA 206, ¶ 12; *Condominium Corp. No. 032 1365 v. Cuthbert*, 2016 ABCA 46, ¶ 27; 612 A.R. 284, 289; *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12, ¶ 19; *776826*

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]

Alberta Ltd. v. Ostrowercha, 2015 ABCA 49, ¶ 13; 593 A.R. 391, 395; *W.P. v. Alberta*, 2014 ABCA 404, ¶ 26; 378 D.L.R. 4th 629, 642; *Access Mortgage Corp. (2004) v. Arres Capital Inc.*, 2014 ABCA 280, ¶¶ 45 & 46; 584 A.R. 68, 78; *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626, ¶ 60; *Quinney v. 1075398 Alberta Ltd.*, 2015 ABQB 452, ¶ 39; 24 Alta. L.R. 6th 202, 214; *Rohit Land Inc. v. Cambrian Strathcona Properties Corp.*, 2015 ABQB 375, ¶ 48; [2015] 12 W.W.R. 728, 744; *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120, ¶ 51; 40 C.L.R. 4th 187, 208-09; *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14; 8 Alta. L.R. 6th 152, 158-59; *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 29; 587 A.R. 16, 26; *Deguire v. Burnett*, 2013 ABQB 488, ¶ 22; 36 R.P.R. 5th 60, 69; *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, ¶ 38; 18 B.L.R. 5th 73, 91; *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 61; 35 R.P.R. 5th 105, 129 & *Hari v. Bariana*, 2015 ABQB 605, ¶ 80 (Master).

[75] *Stout v. Track*, 2015 ABCA 10, ¶ 48 & n. 65; 62 C.P.C. 7th 260, 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").

[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]

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[79] *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶ 2; 20 C.P.C. 8th 43, 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, ¶ 14; 8 Alta. L.R. 6th 152, 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, ¶ 29; 587 A.R. 16, 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, ¶ 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, ¶ 21; 618 A.R. 220, 224 (Master) ("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, ¶ 44 ("The bar on a motion for summary judgment is high"); *Weyburn Security Bank v. Martin*, 22 D.L.R. 689, 690 (Sask. Sup. Ct. 1915) ("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*, [2001] 1 All E.R. 91, 96 (C.A. 1999) 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. Australia*, [2010] HCA 28, ¶ 24; 241 C.L.R. 118, 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] HCA 41, ¶ 57; 201 C.L.R. 552, 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] HCA 69, ¶ 10; 112 C.L.R. 125, 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, ¶ 50; 302 A.L.R. 671, 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, 307 (5th Cir. 1940) ("[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, ¶ 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

[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

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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, ¶ 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*, [2001] 1 All E.R. 91, 94 per Lord Woolf, M.R. (C.A. 1999) ("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, 124 (P.C.) (W. Austl.) ("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] HCA 16, ¶ 18; 214 A.L.R. 370, 375. See also *General Steel Industries Inc. v. Commissioner for Railways*, [1964] HCA 69, ¶ 8; 112 C.L.R. 125, 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 Railway Commissioners*, [1949] HCA 1; 78 C.L.R. 62, 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, ¶ 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 Commissioners of Taxation*, [2016] QCA 275, ¶ 31 (the Court adopted Lord Woolf's test in *Swain v. Hillman*).

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

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[84] *Agar v. Hyde*, [2000] HCA 41, ¶ 57; 201 C.L.R. 552, 576 per Gaudron, McHugh, Gummow & Hayne, JJ.

[85] *Bigyard Holdings Ltd. (in receivership) v. Tasmandairy Ltd.*, [2017] NZHC 1918, ¶ 45. See also *Thompson v. Turner Hopkins*, [2018] NZCA 197, ¶ 8 ("Where a defendant applies for summary judgment, a defendant has to show that the plaintiff cannot succeed") & *McKay v. Sandman*, [2018] NZCA 103, ¶¶ 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, 251-52 (1986).

[87] 477 U.S. 317, 323-24 (1986). See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("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] *F.H. v. McDougall*, 2008 SCC 53, ¶¶ 40 & 49; [2008] 3 S.C.R. 41, 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, 169 ("in civil litigation, the ... burden of proof ... [is] proof on a balance of probabilities"); *Scott v. Cresswell*, 56 D.L.R. 3d 268, 271 (Alta. Sup. Ct. App. Div. 1975) ("in civil cases ... the fact must be proved by a balance of probabilities"); *Steadman v. Steadman*, [1974] 2 All E.R. 977, 981 (H.L.) ("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, 55-56 (E.D.N.Y. 1968) ("[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 &

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 66⅔% – 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

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*, [2003] 2 A.C. 1, 260 (H.L. 2000) per Lord Hope ("In *Taylor v. Midland Bank Trust Co Ltd* 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*, [2001] 1 All E.R. 91, 95 (C.A. 1999) 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, 249 (1986) 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*, [1994] 1 S.C.R. 311, 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").

[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]

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[92] *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶ 3; 20 C.P.C. 8th 43, 48 ("An incontrovertible factual foundation is an essential element of a controversy ripe for summary adjudication"); *Mulholland v. Rensonnet*, 2018 ABCA 24, ¶ 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, ¶ 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, ¶ 28; 612 A.R. 284, 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, ¶ 4; 97 E.T.R. 3d, 1, 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 and Akers*, 2007 ABCA 162, ¶ 12; 41 C.P.C. 6th 381, 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, ¶ 16; 35 R.P.R. 5th 105, 114 ("The facts and the law on which the plaintiff rely are incontrovertible").

[93] 477 U.S. 242, 267 (1986). See also *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 68; 35 R.P.R. 5th 105, 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, ¶ 57; 18 B.L.R. 5th, 73, 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

[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.

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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; *Dushenski v. Lymer*, 2010 ABQB 605; 500 A.R. 48; *HSBC Bank of Canada v. Vallet*, 2009 ABQB 743; 483 A.R. 240; *State Bank of Butler v. Banzanson*, 16 D.L.R. 848 (Alta. Sup. Ct. 1914); *Bank of Montreal v. Mangold*, 86 A.R. 215 (Master 1988); *Stolberg Mill Construction Ltd. v. Selkirk Spruce Mills Ltd.*, 22 W.W.R. 605 (B.C. Sup. Ct. 1957); *Butkowsky v. Jalbuena*, 132 D.L.R. 3d 177 (B.C. Co. Ct. 1982); *Heaman v. Schnurr*, 2011 ONSC 2661; *Quick Credit v. 1575463 Ontario Inc.*, 2010 ONSC 7227; *Fierro v. Sinclair*, 2012 NSSC 429; *Fielding & Platt Ltd. v. Najjar*, [1969] 1 W.L.R. 357 (C.A.); *Griffon V, LLC v. 11 East 36th LLC*, 934 N.Y.S. 2d 472 (App. Div. 2011); *Federal Deposit Insurance Corp. v. Willis*, 497 F. Supp. 272 (S.D. Ga. 1980); *Nonneman v. Murphy*, 2012 Bankr. Lexis 4264 (Bankr. Ct. E.D. Ky.) & *Wells Fargo Bank N.A. v. Ortega*, 2012 WL 3570734 (10th Cir.).

[96] *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626, ¶ 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, ¶ 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*, [2003] 2 A.C. 1, 261 (H.L. 2000) 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, ¶ 92; 35 R.P.R. 5th 105, 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, ¶ 4; 192 Man. R. 2d 154, 155 ("Normally issues of credibility are not resolved on a motion

[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 Ltd. 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.

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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. See also *Argyle UAE Ltd. v. Par-La-Ville Hotel and Residences Ltd.*, [2018] EWCA Civ 1762, ¶ 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, ¶ 26.

[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

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[101] 2017 ABCA 160; 100 C.P.C. 7th 52.

[102] Id. at ¶¶ 116-18; 100 C.P.C. 7th at 95-97.

[103] *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 68; 35 R.P.R. 5th 105, 133 ("a controversy over nonmaterial facts ... is irrelevant") *& Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("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.

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]

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[105] Id. at ¶¶ 11 & 166; 315 C.C.C. 3d 337, 356 & 424.

[106] E.g., *McDonald v. Sproule Management GP Ltd.*, 2018 ABCA 295 (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, ¶ 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"). See Cavanagh, "*Matsushita* at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?", 82 Antitrust L.J. 81, 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. Commissioners for Railways*, [1964] HCA 69, ¶ 10; 112 C.L.R. 125, 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, n. 30; 315 C.C.C. 3d 337, 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

[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.

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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 v. Lameman*, 2008 SCC 14, ¶ 19; [2008] 1 S.C.R. 372, 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, ¶ 70; 454 A.R. 61, 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, ¶ 11; 115 A.R. 321, 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*, 2004 ABQB 655, ¶ 55; [2005] 8 W.W.R. 442, 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. Canadian Wire and Cable Ltd.*, 7 Alta. L.R. 3d 182, 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. v. Canada Life Assurance Co.*, 28 O.R. 3d 423, 434 (Gen. Div. 1996) ("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, ¶ 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"); *Engel v. Aetna Life Insurance Co.*, 139 F. 2d 469, 473 (2d Cir. 1943) (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, 1231 (D. Kan. 2010) ("a party must do more than simply claim that discovery is incomplete").

[110] *Papaschase Indian Band No. 136 v. Canada*, 2004 ABQB 655, ¶ 57; [2005] 8 W.W.R. 442, 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, ¶ 4 ("any potential prejudice to the plaintiffs can be overcome by way of cross-examination").

[111] *Trustee v. P. Burns Resources Ltd.*, 2015 ABCA 390, ¶ 8; 79 C.P.C. 7th 29, 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

[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]

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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*, 2004 ABQB 655, ¶ 57; [2005] 8 W.W.R. 442, 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, ¶ 15 (Ch.) ("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 Ltd.*, 2018 MBCA 27, ¶ 26; 421 D.L.R. 4th 315, 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).

[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]

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[114] 2014 SCC 7, ¶¶ 2 & 3; [2014] 1 S.C.R. 87, 92 & 93.

[115] *Can v. Calgary Police Service*, 2014 ABCA 322, ¶¶ 73-75; 315 C.C.C. 3d 337, 370-78 per Wakeling, J.A. & *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52, ¶ 7; 68 C.P.C. 7th 267, 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*, 22 C.P.C. 5th 73 (B.C. Sup. Ct. 2002). 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

[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.

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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*, [2001] 1 All E.R. 91, 92 & 94 (C.A.) ("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.*, [1998] 2 All E.R. 181, 191 (C.A. 1997).

[121] The United States Supreme Court delivered its strong endorsement of summary judgment in 1986. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("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 SCC 7, ¶ 5; [2014] 1 S.C.R. 87, 93.

[123] 2014 SCC 7, ¶ 5; [2014] 1 S.C.R. 87, 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, ¶ 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").

[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*.

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[125] *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 76; 315 C.C.C. 3d 337, 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, ¶ 34; 18 B.L.R. 5th 73, 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, ¶ 71; 35 R.P.R. 5th 105, 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, ¶ 14; 371 D.L.R. 4th 339, 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, ¶ 77; 315 C.C.C. 3d 337, 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, ¶ 71; 35 R.P.R. 5th 105, 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, ¶ 29; 587 A.R. 16, 26; *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14; 8 Alta. L.R. 6th 152, 158-59 & *Deguire v. Burnett*, 2013 ABQB 488, ¶ 22; 36 R.P.R. 5th 60, 69.

[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.

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[129] *898294 Alberta Ltd. v. Riverside Quays Ltd. Partnership*, 2018 ABCA 281, ¶¶ 12 & 27; *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶¶ 2-3; 20 C.P.C. 8th 43, 46-48; *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153, ¶ 15; 17 C.P.C. 8th 252, 255; *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶ 2; 100 C.P.C. 7th 52, 61; *Ghost Riders Farm Inc. v. Boyd Distributors*, 2016 ABCA 331, ¶¶ 11 & 12; *Stout v. Track*, 2015 ABCA 10, ¶¶ 8 & 9; 62 C.P.C. 7th 260, 266 per Wakeling, J.A.; *Access Mortgage Corp. (2004) v. Arres Capital Inc.*, 2014 ABCA 280, ¶¶ 45 & 46; 584 A.R. 68, 78 & *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 104; 315 C.C.C. 3d 337, 388 per Wakeling, J.A.

[130] Supra note 4.

[131] *Rules to Amend the Alberta Rules of Court*, Alta. Reg. 216/1986.

[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.

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[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 Ltd.*, 2018 MBCA 27, ¶ 32; 421 D.L.R. 4th 315, 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, ¶ 71; [2017] 1 W.W.R. 291, 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") & *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52, ¶ 6; 68 C.P.C. 7th 267, 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, ¶ 92; 315 C.C.C. 3d 337, 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, ¶ 19; 587 A.R. 16, 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, ¶ 115; [2013] 4 W.W.R. 311, 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, ¶ 71; [2017] 1 W.W.R. 291, 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").

[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.

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[136] *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 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. Australia*, [2010] HCA 28, ¶ 50; 241 C.L.R. 118, 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] *The Queen v. D.A.I.*, 2012 SCC 5, ¶ 26; [2012] 1 S.C.R. 149, 166 ("The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision"); *Thomson v. Canada*, [1992] 1 S.C.R. 385, 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, ¶ 109; [2017] 7 W.W.R. 343, 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, 485-86 (1917)("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, ¶ 81; 47 Alta. L.R. 6th 28, 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, ¶ 4, 399 D.L.R. 4th 1, 6 ("A contrary interpretation would give the text an implausible meaning. A court may never do this"); *The Queen v. Barbour*, 2016 ABCA 161, ¶ 43; 336 C.C.C. 3d 542, 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, ¶ 69; 378 D.L.R. 4th 103, 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. Communications, Energy and Paper Workers Union of Canada, Local 819*, 147 O.A.C. 331, 332 (C.A. 2001)("[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 Assoc.*, 2018 ABCA 270, ¶ 159.

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.

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[141] *The Queen v. Rodgers*, 2006 SCC 15, ¶ 20; [2006] 1 S.C.R. 554, 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. Canada*, 2005 SCC 54, ¶ 10; [2005] 2 S.C.R. 601, 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"); *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 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 v. Mossop*, [1993] 1 S.C.R. 554, 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, ¶ 82; 47 Alta. L.R. 6th 28, 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, ¶ 55; 397 A.R. 251, 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*, 2018 SCC 4, ¶ 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. Canada*, [1999] 3 S.C.R. 622, 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"); *The Queen v. Zundel*, [1992] 2 S.C.R. 731, 771 (the Court held that a statute cannot be given a meaning it cannot bear in order to promote equality and multiculturalism); *Covert v. Nova Scotia*, [1980] 2 S.C.R. 774, 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. City of Edmonton*, 2016 ABCA 135, ¶ 85; 91 C.P.C. 7th 73, 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, ¶ 23; [2014] 7 W.W.R. 559, 571 ("No statutory decision maker can ignore substantive statutory provisions because it believes [they produce] ... unfair results"); *Williams v. Canada*, 2017 FCA 252, ¶ 50; 417 D.L.R. 4th 173, 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, 957 (Sup. Ct. 1913) ("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 (the statutory delegate deliberately ignored the governing statutory provision and awarded long-term disability benefits to an employee who obviously was not

[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".

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entitled to them) & *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)(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*, 2011 SCC 1, ¶ 21; [2011] 1 S.C.R. 3, 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*, 59 S.C.R. 550, 561 (1919)("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, ¶ 109; [2017] 7 W.W.R. 343, 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, ¶ 69; 378 D.L.R. 4th 103, 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 SA v. Kookmin Bank*, [2011] UKSC 50, ¶ 21; [2011] 1 W.L.R. 2900, 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, ¶ 70; 378 D.L.R. 4th 103, 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, 14-15 (1904)(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).

[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

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[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.

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.

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[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.

[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.

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[150] 2014 ABQB 111, ¶ 19; 587 A.R. 16, 22. See also *Jackson v. Canadian National Railway*, 2012 ABQB 652, ¶ 115; [2013] 4 W.W.R. 311, 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, ¶¶ 93, 95 & 96; 315 C.C.C. 3d 337, 383-85. See *Nelson v. City of Grande Prairie*, 2018 ABQB 537, ¶ 37 (Master Schlosser notes "the formal absence of a summary trial procedure in Ontario").

[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.

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[152] *Berscheid v. Federated Co-operatives Ltd.*, 2018 MBCA 27, ¶ 32; 421 D.L.R. 4th 315, 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, ¶ 71; [2017] 1 W.W.R. 291, 311 ("*Hryniak* did not ... change the test to be applied on a motion for summary judgment") & *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52, ¶ 6; 68 C.P.C. 7th 267, 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, ¶¶ 97 & 101; 315 C.C.C. 3d 337, 385 & 387.

[154] See *Stout v. Track*, 2015 ABCA 10, ¶ 51; 62 C.P.C. 7th 260, 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

[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]

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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, 288-89 (1968) ("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, ¶ 17; 315 C.C.C. 3d 337, 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*, 61 B.C.L.R. 36, 40 (Sup. Ct. 1985) ("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, ¶ 11; 242 A.R. 3, 7 (Q.B. 1999) ("in a summary trial, the court actually tries the issues raised by the pleadings and weighs the evidence"); *Chu v. Chen*, 2002 BCSC 906, ¶ 19; 22 C.P.C. 5th 73, 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.*, 36 B.C.L.R. 2d 202, 211 (C.A. 1989) ("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, ¶ 87; 315 C.C.C. 3d 337, 380 per Wakeling, J.A. See also *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, ¶ 14; 371 D.L.R. 4th 339, 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, ¶ 2; 303 D.L.R. 4th 704 ("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 ¶ 5; 258 A.R. 325, 327 ("a summary trial is, indeed, a trial; it is intended to provide a

[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

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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") & *Jackamaira v. Krakover*, [1998] HCA 27, ¶ 32; 195 C.L.R. 516, 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, ¶ 84; 315 C.C.C. 3d 337, 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] [2001] 1 All E.R. 91, 95 (C.A. 1999). See *Re High Fructose Corn Syrup Antitrust Litigation*, 295 F. 3d 651, 655 (7th Cir. 2002) ("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, ¶ 116; 371 D.L.R. 4th 339, 350 ("Trials are for determining facts").

[160] See *Erik v. McDonald*, 2017 ABQB 39, ¶¶ 1 & 2 (the Court, with the agreement of the parties, converted a summary judgment application into a summary trial procedure).

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

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[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.

[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 *Choquette v. Viczko*, 2016 SKCA 52, ¶ 54; 396 D.L.R. 4th 449, 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, ¶ 51; [2014] 1 S.C.R. 87, 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).

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

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[165] 2017 ABQB 491, ¶ 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* 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, ¶ 39.

[168] Id. ¶¶ 40 & 41.

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 heard on September 7, 2018

Reasons filed at Edmonton, Alberta
this 6th day of February, 2019

Wakeling J.A.

Appearances:

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