

How has the Alberta Court of Appeal been articulating the test(s) for summary judgment/summary dismissal post *Hyrniak v. Mauldin*?

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November 22, 2017

The Alberta Court of Appeal has been articulating the tests for summary judgment/summary dismissal post *Hyrniak v. Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, a January 2014 decision, in what can best be described as an undulating manner over the last three years, resting with some fixity on the test for summary judgment, but without a fixed end regarding the test for summary dismissal seemingly in sight. Moreover, it may also be up in the air whether there are two tests – one for summary judgment, and one for summary dismissal – or whether there is just one overarching test, with “special evidential requirements” regarding summary dismissal.

Our appellate court was quick out of the gate in March 2014 in *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, 572 AR 317 to establish a post *Hyrniak* test for summary judgment in Alberta. Over the intervening three years the Alberta Court of Appeal has articulated a fairly consistent test for summary judgment, fluctuating in minor nuances. The test for summary dismissal has fluctuated to a much greater extent, however.

These iterations in the tests seem to vary with the panel of the appellate judges writing the decision. Paperny JA as lead justice on several panels seems to have one clear view – Watson JA as lead justice on other panels has expressed another clear view regarding summary dismissal. Differently constituted panels have expressed different views.

Thus to the practitioner it seems that our appellate court continues to be engaged in a dialogue between the judges, and hence the undulating articulations of the tests.

A judgment was released on November 10, 2017, *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378 (O’Ferrall and Velduis JJA for the majority, Paperny JA in dissent), which has pinpointed a slightly different test for summary judgment, which harkens back to the seminal decision of *Windsor*, and a markedly different test

for summary dismissal. Whether this is the last word from our appellate court on the appropriate tests, given the track record, seems doubtful.

Just a little background to the *Hyrniak* decision. The Ontario government, very concerned with the perceived lack of access to justice and proliferation of self-represented litigants in the Ontario courts, commissioned then Associate Chief Justice Coulter Osbourne, Q.C. to report on how the civil court system could be improved. He reported in 2007, and amendments to the Ontario Rules of Court were made in 2010, which introduced revised rules governing summary judgment procedure. Rule 20 had this explicit language:

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 ...

In addition new powers were given to judges in a summary judgment procedure, including the explicit power to order oral evidence.

The case involved a civil fraud, and the Chambers judge had granted summary judgment against Hyrniak, although the judge sent the claims against the other parties on for trial. Although upholding the Chambers judge in the result on appeal, the Ontario Court of Appeal had interpreted the new Rule in accordance with the old case law, seeing summary judgment mainly as a way of weeding out unmeritorious claims. They had defaulted to the trial scenario. As stated by the Supreme Court of Canada, “In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the “full appreciation” of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants.” (para. 4)

When one reads the *Hyrniak* decision, (written by Karakatsanis J for the full seven member panel), you can see that it is in large part a general statement of guiding principles, discussing concern over the need to preserve the rule of law, the “culture shift” in the courts, the principle of proportionality and the overwhelming need for greater access to justice, among other things. The

Supreme Court of Canada in *Hyrniak* comes firmly down on the side of more liberal access to summary judgment, and states that a trial should not be the default position. While stating that the values and principles underlying the *Hyrniak* interpretation of the Ontario rule are of general application (para. 35), Karakatsanis largely leaves the “roadmap” of how to gain this greater access to justice, beyond Ontario, to the implementation of the various provincial courts (likely as necessitated by the differing rules regarding summary judgment in the differing jurisdictions).

Here is the bottom line of *Hyrniak*:

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.

The Alberta Court of Appeal first embraced the challenge of implementing the broad principles of *Hyrniak* within the context of the Alberta rules in the 2014 case of [*Windsor v. Canadian Pacific Railway*](#), 2014 ABCA 108, 572 AR 317 (Paperny, Watson and Slatter JJA). In this seminal *per curiam* decision the appellate court set out the following test for summary judgment:

Summary judgment is now an appropriate procedure where there is no genuine issue requiring a trial:

49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. [*Hyrniak*]

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.

As can be seen, the Alberta Court of Appeal in *Windsor* adopts the language of *Hyrniak*, including the phraseology of the Ontario rule, but is unique in emphasizing the need to examine the existing record in a summary judgment application. In contrast, in *Hyrniak*, in interpreting the Ontario rule, emphasis is given to the new explicit power to call oral evidence in a summary judgment proceeding. This unique Alberta view is maintained through all iterations of the Alberta summary judgment test.

The appellate court identified the underlying Alberta rule:

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.

And concluded:

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

The court therefore asked:

On appeal it is appropriate to examine the summary dismissal application to see whether there is in fact any issue of “merit” that genuinely requires a trial.

Following the *Windsor* decision, however, the Alberta Court of Appeal wrestled with different iterations of the tests. Some of the key decisions include:

– [*Access Mortgage Corp. \(2004\) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280](#) (Martin and Wakeling JJA and Nation J)

“Rule 7.3 of the new *Alberta Rules of Court* allows a court to grant summary judgment to a moving party if the nonmoving party’s position is without merit. A party’s position is without merit if the facts and law make the moving party’s position unassailable and entitle it to the relief it seeks. A party’s position is unassailable if it is so compelling that the likelihood of success is very high.”(para. 45, applying [*Beir v. Proper Cat Construction Ltd.*](#), 2013 ABQB 351 at para. 61)

-[*W.P. v. Alberta*](#), 2014 ABCA 404 (Costigan, Watson and Brown JJA)

“Summary judgment is therefore no longer to be denied solely on the basis that the evidence discloses a triable issue. 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: *Windsor* at para 16; *Beier* at paras 56, 59-68 and 70.” (para. 26)

– [776826 Alberta Ltd. v. Ostrowercha, 2015 ABCA 49](#) (Paperny, Watson and Brown JJA)

“The governing test for summary judgment in Alberta finds expression in *Windsor v CPR*, [2014 ABCA 108 \(CanLII\)](#) at para 13, 572 AR 317; *Sherwood Steel Ltd v Odyssey Construction Inc.*, [2014 ABCA 320 \(CanLII\)](#), at paras 7 to 8, 59 CPC (7th) 22; *Maxwell v Wal-Mart*, [2014 ABCA 383\(CanLII\)](#) at para 12; *W. P.* and cases mentioned therein, *inter alia*. From the process perspective, summary judgment can be given if a disposition that is fair and just to both parties can be made on the existing record by using that alternative method for adjudication: *Hryniak v Mauldin*, [2014 SCC 8 \(CanLII\)](#), [2014] 1 SCR 87.

From the substantive perspective, summary judgment can be granted if, in light of what that fair and just process reveals, there is no merit to the claim. No “merit” means that, even assuming the accuracy of the position of the non-moving party as to any material and potentially decisive matters -- matters which would usually require ordinary forensic testing through a trial procedure with *viva voce* evidence and which could not be resolved through the fair and just alternative -- the non-moving party’s position viewed in the round has no merit in law or in fact.

Stated another way, in order for the non-moving party's case to have merit, there must be a genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the “fair and just process”. The mere assertion of a position by the non-moving party in a pleading or otherwise, or the mere hope of the non-moving party that something will turn up at a trial, does not suffice. The key is whether the circumstances require a *viva voce* evidence in order to properly resolve the case: see *Canada v Lameman*, [2008 SCC 14\(CanLII\)](#) at paras 10 to 11, [2008] 1 SCR 372.” (paras. 9 – 11)

– [Whitecourt Power Limited Partnership v Elliott Turbomachinery Canada Inc.](#), 2015 ABCA 252 (Paperny and Rowbotham JJA and Eidsvik J)

“In light of the Supreme Court’s decision in *Hryniak v Mauldin*, [2014 SCC 8 \(CanLII\)](#), [2014] 1 SCR 87 and decisions of this court since *Hryniak*, summary judgment is no longer denied solely on the basis that the evidence discloses a triable issue. Rather, the court asks 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. 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. See generally *W.P v Alberta*, [2014 ABCA 404 \(CanLII\)](#) at para 26, 7 Alta LR (6th) 319; *Windsor v CPR*, [2014 ABCA 108\(CanLII\)](#) at para 16, 572 AR 317.” (para. 9)

I will not mine the past, however, and will skip ahead to the more recent 2016 and 2017 appellate decisions.

In February 2016 the appellate court, (Paperny, Rowbotham and Veldhuis JJA), threw out an anchor and sought to fix the principled test for summary judgment that would govern Alberta in [*Condominium Corp. No. 0321365 v. Cuthbert*](#), 2016 ABCA 46, 612 AR 284 . The *per curiam* decision stated:

27 When deciding a summary judgment application, there are two considerations. With respect to the process, the court must ask, “whether examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties”: *Whitecourt* at para 9; see also *Ostrowercha* at para 9; *P. (W.)* at para 26; *Windsor* at para 16. With respect to the substantive issues, the court must ask “whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defense is so compelling that the likelihood it will succeed is very high such that it should be determined summarily”: *Whitecourt* at para 9; see also *Ostrowercha* at para 10. An issue of merit is established when the respondent’s (non-moving party) case discloses a “genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the ‘fair and just [summary] process’”: *Ostrowercha* at para 11.

28 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: *Sherwood Steel* at paras 7-8; *Whitecourt* at paras 31, 40-41.

29 Complex legal questions may be sufficient to deny summary judgment. A full trial is required when the summary record cannot be used to decide legal issues that are unsettled, complex or intertwined with facts: *Templanza v. Wolfman*, [2016 ABCA 1](#) (Alta. C.A.) at para 20; *Amack* at paras 36-37. A trial is also required when an applications judge is not satisfied she can fairly resolve the dispute on the record before her: *Templanza* at para 20.

In July 2017 the “*Cuthbert*” test was articulated by Lee J of the Alberta Court of Queen’s Bench in [*Cardinal v. Alberta Motor Association Insurance Company*](#), 2017 ABQB 487 at paragraph 17, pithily, as follows:

- “1. with respect to the process, the court must ask whether examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties; and
2. with respect to the substantive issues, the court must ask whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defense is so compelling that the likelihood it will succeed is very high such that it should be determined summarily.” (para. 17)

In October 2016 the appellate court reverted to the *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.* articulation of the test for summary dismissal, however, in *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331 (Watson, Bielby and Wakeling JJA):

10 The case management judge correctly stated the legal test for summary dismissal as found in this Court's recent decisions in *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.) at para 45, (2014), 584 A.R. 68 (Alta. C.A.) [*Access Mortgage Corp. (2004) Ltd.*] and 776826 *Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49 (Alta. C.A.) at paras 10-11, (2015), 593 A.R. 391 (Alta. C.A.) [*Ostrowercha*]. *Ostrowercha* stated the legal test as follows:

[10.] From the substantive perspective, summary judgment can be granted if, in light of what [a] fair and just process reveals, there is no merit to the claim. No "merit" means that, even assuming the accuracy of the position of the non-moving party as to any material and potentially decisive matters — matters which would usually require ordinary forensic testing through a trial procedure with *viva voce* evidence and which could not be resolved through the fair and just alternative — the non-moving party's position viewed in the round has no merit in law or in fact.

[11.] Stated another way, in order for the non-moving party's case to have merit, there must be a genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the "fair and just process"...

11 The case management judge went on to observe:

Therefore, if a judge on a summary judgment application can make the necessary findings of fact, is able to apply the law to the facts and the process is proportionate, more expeditious and less expensive than a trial, summary judgment is appropriate. If a fair and just adjudication can be made in determining whether a claim has merit, it is appropriate for a court to consider summary judgment. **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.** The key is whether the circumstances require *viva voce* evidence in order to properly resolve the case.

12 One of the circumstances in which a moving party's position can be unassailable is where there is no evidence to prove one or more of the essential elements of the action, ... [Emphasis added]

In December 2016 the appellate court dealt with summary dismissal in *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375 (Fraser CJA and Slatter and O'Ferrall JA) and did not apply this "unassailable" test, stating:

Rule 7.3 provides that an action can be summarily dismissed if there is "no merit to a claim or part of it". The onus is first on the defendant to bring forward evidence indicating an absence of merit. If that is done, the plaintiff must provide some evidence of "merit", which often involves demonstrating that there are

difficult questions of fact or law that cannot fairly be resolved summarily. The plaintiff is not required, at this stage, to demonstrate that the action will succeed, or to show that there is merit on a balance of probabilities. The application for summary dismissal can successfully be resisted without proving the case to the normal civil standard.

Summary judgment is an appropriate procedure where there is no genuine issue requiring a trial, which comes down to whether the chambers judge is able to reach a fair and just determination on the merits on the application 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. The summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: *Hryniak v Mauldin* at paras. 4, 5, 49; *Amack v Wishewan* at para. 26; *Windsor v Canadian Pacific Railway* at para. 13. (paras. 13, 14)

In May 2017 the appellate court *per curiam* summarized the “unassailable” test in [*Composite Technologies Inc. v. Shawcor Ltd.*](#), 2017 ABCA 160, [2017] 8 WWR 427 (Watson, Wakeling and Schutz JJA) as follows:

2 Rule 7.3 of the *Alberta Rules of Court*¹ 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.

Thus as of November 9, 2017 the appellate court could be construed as having set out two distinct tests: the “*Ostrowercha / Cuthbert*” test for summary judgment and the “unassailable” test for summary dismissal.

And then came November 10, 2017. On this date the Alberta Court of Appeal, with Paperny JA in dissent, again revised the test for summary judgment in [*Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*](#), 2017 ABCA 378 (O’Ferrall and Velduis JJA for the majority, Paperny JA in dissent). This was essentially an action in debt by Precision Drilling, but the defendant Yangarra Resources argued that the debt was not owing due to fraudulent misrepresentation, among other things, by Precision. The Chambers judge granted summary judgment to Precision. The majority of the appellate court reversed this grant of summary judgment, stating that a trial was necessary. They stated:

[14] Rule 7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010 allows a party to apply for summary judgment when “there is no defence to a claim or part of it” or when “there is no merit to a claim or part of it”. This rule must be considered in light of *Hryniak v Mauldin*, 2014 SCC 7, where the Supreme Court of Canada indicated that “[t]here will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment”: para 49.

[15] The so-called modern approach to summary judgment as laid out in *Hryniak* was confirmed by the Alberta Court of Appeal in *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108. *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: para. 16; see also *WP v Alberta*, 2014 ABCA 404 at para 26, 378 DLR (4th) 629. 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”: *Whitcourt Power Limited Partnership v Elliott Turbomachinery Canada Inc*, 2015 ABCA 252 at para. 9.

[16] In *McDonald v Brookfield Asset Management Inc*, 2016 ABCA 375, this court provided the following useful summary as to evidential requirements in a summary dismissal application (being one form of summary judgment) at paragraph 13:

Rule 7.3 provides that an action can be summarily dismissed if there is "no merit to a claim or part of it". The onus is first on the defendant to bring forward evidence indicating an absence of merit. If that is done, the plaintiff must provide some evidence of "merit", which often involves demonstrating that there are difficult questions of fact or law that cannot fairly be resolved summarily. The plaintiff is not required, at this stage, to demonstrate that the action will succeed, or to show that there is merit on a balance of probabilities. The application for summary dismissal can successfully be resisted without proving the case to the normal civil standard.

Thus the majority in *Precision Drilling* in essence retains the “*Ostrowercha / Cuthbert*” test regarding summary judgments, without distinguishing between procedural and substantive elements. Given that the matter dealt with an appeal from the grant of a summary judgment, the discussion of the *Brookfield* evidential requirements was *obiter*. It is notable that the “unassailable” test for summary dismissal was not referenced, however.

In dissent in *Precision Drilling*, Paperny JA would have upheld the grant of summary judgment and expressed her view as follows:

[64] Rule 7.3 (1) of the Alberta *Rules of Court* provides that a party may apply for summary judgment in respect of all or part of a claim if there is no defence or merit to a claim or part of it. Summary judgment plays an important role in the justice system by providing a process to avoid the heavy burdens of time and cost associated with lengthy litigation, when a claim or defence has no reasonable prospect of success: *Windsor* at para 12.

[65] Courts have more recently been encouraged to embrace summary judgment purposively; to focus on whether it would be fair and just to both sides to determine an issue on the record before the court on the summary judgment application. Summary judgment is an appropriate procedure where there is no genuine issue requiring a trial. This is the case when the summary judgment process allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak* at para 49; *Windsor* at para 13.

[66] It is expected that a party faced with a summary judgment application will put its best foot forward, and marshal sufficient evidence to show that there is a genuine issue requiring a trial. Speculating that evidence might be available at trial is not sufficient to resist summary judgment: *Windsor* at para 21.

The lower courts over the years have had a difficult time following the dance set by the Alberta Court of Appeal regarding the tests for summary judgment/summary dismissal, and some jurists seem to throw up their hands and fashion their own test. This is illustrated by the July 2017 decision of Master Schlosser in [*Kerich v. Victoria Trail Physiotherapy Ltd.*](#), 2017 ABQB 471 wherein he states:

[37] Summary Judgment applications are life-and-death struggles for a claim or defence. The Court travels down a fairly well worn highway and engages in a six-step process, as follows:

- a) presume that the best evidence from both sides is before the court;
- b) ask whether a negative inference can be drawn from the absence of evidence on certain points;
- c) determine whether all of the evidence is admissible;
- d) ask whether there is conflict in the evidence and, if so, whether it has been resolved or whether it is self-serving;
- e) examine the evidence, including its sufficiency, admissibility and reliability; and
- f) grant summary judgment if the applicant can prove all elements of the cause of action and the defendant either has no defence or is missing critical elements of proof necessary to maintain that defence.

Thus it seems that the differing justices of the Alberta Court of Appeal are engaged in an ongoing dialogue as to exactly what the tests for summary judgment/summary dismissal should be. Notwithstanding the undulating decisions, however, I think it can be fairly clearly stated what the test for summary judgment is today. I think we are left with the “*Ostrowercha /Cuthbert*” test, aptly summarized by Lee J as:

1. with respect to the process, the court must ask whether examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties; and
2. with respect to the substantive issues, the court must ask whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defense is so compelling that the likelihood it will succeed is very high such that it should be determined summarily.

The test for summary dismissal is not so clear, however, and we must await the further dialogue of the appellate court for clarification.

What should an Alberta practitioner do? It seems that there is nothing else to be done but to follow the dance of the Alberta Court of Appeal, and pay close attention to the latest iteration of the tests.

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