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Featured Cases:

RFG Private Equity Limited Partnership No. 1B v. Value Creation Inc., 2018 ABCA 85

Areas of Law: Corporations; Shareholder Dissent; Asset Values; Oil Sands

~A benefit flowing from the transaction that is the subject of a dissent by shareholders should not be included in the valuation of those shareholders' shares~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The Appellants, RFG Private Equity Limited Partnership No. 1B et al, were shareholders of the Respondent, Value Creation Inc. In January 2009, the Respondent entered into an agreement with its lenders to move the maturity date of a $474 million loan to February 15, 2010, which would then be extended to March 31, 2010 if the Respondent entered into an agreement that would allow for repayment of the loan. The Respondent also entered into a consent receivership order that the lenders would file if the loan was not repaid by the February date. The Respondent engaged financial advisors to assist in repaying the loan and continuing with asset development. For a 75% interest in the in the Respondent's non-operating oil sands leases, BP Canada Energy Company offered US $500 million and gave a covenant to pay a further amount over a defined period for capital costs, and if not paid by March 15, 2017, BP would be obligated to pay a further US $400 million. In January 2010, the Respondent entered into a transaction with BP and sought shareholder approval that March.

RFG Private Equity Limited Partnership No. 1B v. Value Creation Inc., (cont.)

The Appellants exercised their dissent rights and sued for determination of the "fair value" of their shares as of March 11, 2010. The Respondent's assets after closing included the remaining 25% interest in the non-operating oil

RFG Private Equity Limited Partnership No. 1B v. Value Creation Inc., (cont.)

sands, oil sand leases at two other sites, technologies that the Respondent was developing to license to BA Energy Inc., tax attributes, working capital and shares in BA. BA owned a partially built, but no longer viable, upgrader. As part of the consideration payable to the Respondent under the BP transaction, BP covenanted to spend US $1.6 billion in development capital. Although the transaction had not closed by the valuation date of March 11, 2010, the trial judge found it to be only an insignificant theoretical possibility that the transaction would fail. All conditions precedent had been met. The judge was satisfied that as a result of the assurances that the BP transaction would close, the Respondent was no longer in financial distress at the valuation date. If that transaction did not close, there were at least four other buyers prepared to step in. The trial judge concluded that synergies and benefits that arise from an acquirer's further implementation of a business plan are not to be included in determining fair value as long as they are not "operationally implemented" before the transaction occurs. After reviewing competing expert opinions regarding BP's development capital expenditures to develop the non-operating oil sand leases, the judge found that they must be excluded from valuation because they arose from the execution of a business plan that was not yet implemented on the valuation date.

RFG Private Equity Limited Partnership No. 1B v. Value Creation Inc., (cont.)

APPELLATE DECISION

The appeal and the cross-appeal were dismissed. The Appellants argued that the trial judge should not have removed the development capital expenditures from the valuation. The Respondent cross-appealed the trial judge's decision to include any part of the BP transaction in the value of the leases. The main point of contention was whether the BP contribution should be characterized as a benefit or "synergistic benefit" of the transaction dissented from, and therefore excluded from the fair value of the Appellants' shares on that basis. The majority found that although the judge considered synergistic benefits, she ultimately excluded the BP contribution because it was a business plan that had not been implemented or operative on the valuation date. It was a benefit flowing from the transaction that was the subject of the dissent. Nor did she err in finding that the Respondent was not in financial distress at the valuation date.

O'Ferrall JA dissented. He would have allowed the Appellants' appeal and dismissed the cross-appeal. He held that by excluding the present value of a future consideration committed to be paid for the asset, the trial judge failed to derive the entire value which the sale indicated. He likened the exclusion of the BP contribution to a situation in which a house is valued based only on the first instalment paid on it, and not the complete amount set out in the agreement for sale. He would have valued the shares having regard to the additional consideration payable by BP in the event that it did not invest $1.6 billion in the company's oil sands lease.

May v. 1986855 Alberta Ltd., 2018 ABCA 94

Areas of Law: Property Law; Restrictive Covenants; Interim Injunctions

~On an application for an interim injunction, the test for irreparable harm is whether the possible harm is "of such a nature that no fair and reasonable redress would be available after trial."~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The Appellant, Virginia May, and the Respondents, 1986855 Alberta Ltd., Norstar Industries Ltd., 1282127 Alberta Ltd., Neil Vinet and Anju Gupta, are in disagreement regarding what the Respondents are able to do with a residential lot owned by 1986855 and adjacent to the Appellant's property. The Respondents intend to build a three-storey duplex on the lot. The Appellant said this would breach the terms of agreements entered into in 1999 by the then owners of the lots and registered on the titles of both. She argued that those agreements restrict future development on each lot to a single dwelling unit only. The Respondents disagree. The Appellant applied in morning chambers for an interim injunction enjoining the Respondents from breaching or inducing a breach of the agreements pending a final determination by the court as to the proper interpretation of the agreements. The Respondents conceded that there is a serious issue to be tried as to the meaning

May v. 1986855 Alberta Ltd., (cont.)

of the agreements. The chambers judge also determined this was the case. The judge decided, however, that the Appellant had not established she would suffer irreparable harm if the injunction were refused because the amount of her loss would be capable of proof and could be the subject of an award of damages.

APPELLATE DECISION

The appeal was allowed. The Court of Appeal noted that interim injunctions are discretionary orders attracting a high level of deference. However, the Court found that irreparable harm was established. The test for irreparable harm is whether the possible harm is "of such a nature that no fair and reasonable redress would be available after trial." The judge concluded that harm flowing from the construction of the duplex wold at most result in a diminution of the

May v. 1986855 Alberta Ltd., *(cont.)*

Appellant's property value, which could be remedied by an award of money damages. That conclusion does not consider whether a monetary award would amount to fair and reasonable compensation. Denying an injunction here would allow the Respondents to proceed with their development and potentially deny the Appellant the ability to enforce the agreements, unless a court were willing to order the development be torn down. The Court was satisfied that irreparable harm was established. The Court then went on to find that there was no evidence the Respondents would suffer any damage if the injunction was granted, that could not be compensated in damages. Any such damages would presumably be related to losses or expenses associated with delaying the development of the lot. On the other hand, the consequences to the Appellant of not allowing the injunction would be far more serious. The balance of convenience favoured the Appellant.

COUNSEL COMMENTS

May v. 1986855 Alberta Ltd., 2018 ABCA 94

Counsel Comments provided by
Jeremy Taylor and Leah McDaniel, Counsel for the Appellant

"This case affirms the proper legal test for the irreparable harm branch of the three-stage test for an interim injunction. It also provides important guidance for how that test should be applied in the context of restrictive covenants over land.


Jeremy Taylor

Absent exigibility issues, the irreparable harm stage of the injunction test is sometimes understood as requiring the applicant to show that it would be impossible to quantify damages for the type of harm alleged. On this type of understanding, the chambers justice in this case decided that irreparable harm was not made out - because any harm was capable of being quantified in damages after the fact.

However, it is possible for almost any type of harm to be quantified in damages after the fact. As a result, applying the chambers justice's reasoning would make it virtually impossible to obtain an injunction in any case other than those where the defendant is impecunious.


Leah McDaniel

In reversing the chambers justice, the Court of Appeal affirmed that irreparable harm may be proven, even where it is "possible" to assess damages, so long as it is shown that damages would not be an "adequate" remedy. This analysis may engage factors other than the question of whether it is possible to assess damages, and the question of whether a judgment can be collected. In particular, it may raise the question of whether an

COUNSEL COMMENTS

May v. 1986855 Alberta Ltd., (cont.)

injunction is necessary to preserve the applicant's ability to seek final relief in a form other than damages.

This is important for cases (like this one) involving covenants over land. The primary legal remedy for a breach of a covenant over land is a permanent injunction, not damages. If interim injunctions are not granted in such cases, the applicant risks being deprived of their primary legal remedy. A damage award cannot be adequate where the law presumes that a remedy other than damages is the appropriate form of final relief. This reasoning (effectively adopted in the Court of Appeal decision at paragraph 16) suggests that irreparable harm should almost always be found in cases involving covenants over land.

Since the appeal was allowed on this basis alone, the Court did not need to decide another important question raised by this case – whether the requirement of irreparable harm even applies in cases involving clear negative covenants. Many decisions have found that irreparable harm is not required in those circumstances. However, Alberta authority on this is unclear. It would be desirable for this point of law to be clarified in a future case."

Pacer Construction Holdings Corporation v. Pacer Promec Energy Corporation, 2018 ABCA 113

Areas of Law: Construction Law; Subcontractors; Termination of Contract; Receivership; Liens

~The determination of a court-appointed Claims Officer is entitled to the same degree of deference as that which would be owed to the appointing judge~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

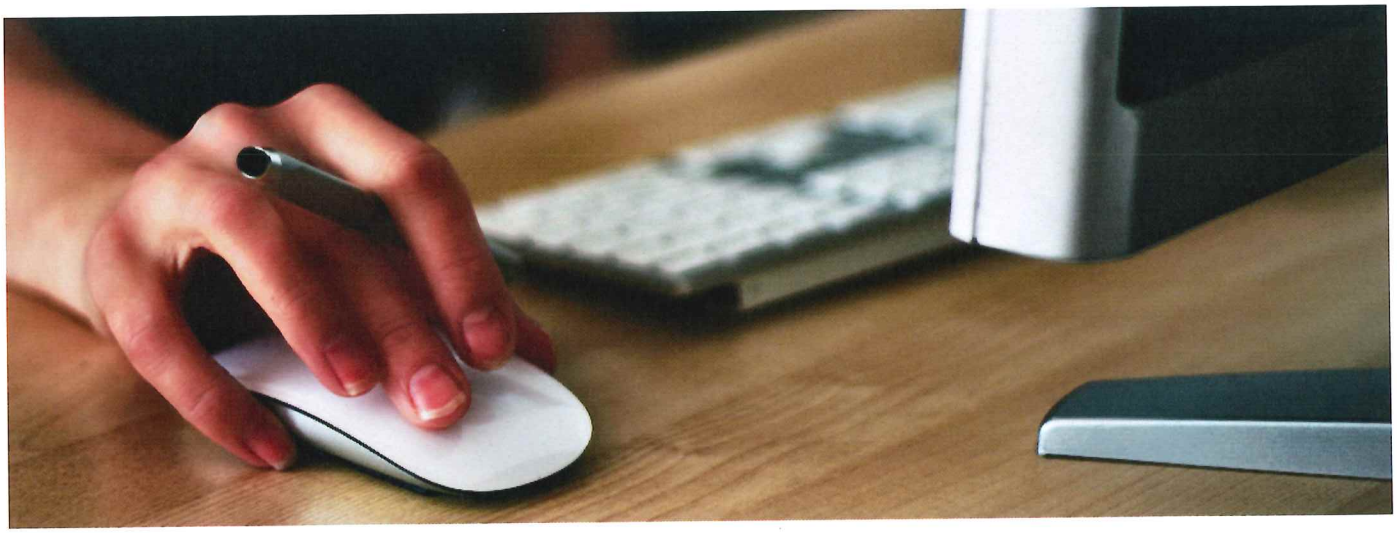
The Appellant, FTI Consulting Canada Inc, is the court-appointed receiver of both Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation (collectively "PPEC"). The Respondent, FDS Prime Energy Services Ltd., subcontracted with PPEC for work to be done on the site of Canadian Natural Resources Limited's Alberta Horizon plant. The Respondent eventually filed liens on property owned by PPEC. It submitted to the Appellant a secured proof of claim in the amount of almost $3 million ("Lien 1") relating to work it claimed to have done pursuant to four contracts and three purchase orders. The Appellant disallowed Lien 1 and the disputed claim was then dealt with by an appointed Claims Officer, pursuant to a Claims Procedure Order ("CPO") granted in the receiverships. The Claims Officer partially allowed the Lien 1 claim, to the extent of $87,377.42. The main disagreement between the parties was whether a subcontract, N5000, was terminated or abandoned. The Appellant took the position that N5000 was terminated or abandoned in December 2014, after which time the Respondent merely rented scaffolding to it pursuant to a new contract. The Respondent maintained that N5000 subsisted. The Claims Officer found for the Appellant. The Respondent sought review in Queen's Bench. A chambers judge decided that N5000 continued at least until May 5, 2015. Since the Appellant took no steps to terminate N5000 before May 5, 2015, Lien 1 filed on July 2, 2015 was valid. The judge made no comment about its value. The Respondent then registered a second lien for $1.3 million ("Lien 2"). The Appellant applied before the chambers judge to have Lien 2 discharged and the related claim dismissed because the Respondent had not submitted a Proof of Claim notwithstanding the CPO. The chambers judge held that there was nothing improper in the

Pacer Construction Holdings Corporation v. Pacer Promec Energy Corporation, (cont.)

Respondent not making a claim under the CPO by the stipulated deadline to make claims. Further, if a filed claim was required under the CPO, in this case it would be appropriate to extend the time until after the site owner, Canadian Natural Resources Limited, had provided the information it was gathering on the subject. The judge made no determination as to whether the claim was actually caught by the CPO.

APPELLATE DECISION

The appeal was dismissed. The Appellant contended that the chambers judge erred by conducting a hearing *de novo* as opposed to a true appeal, by determining that N5000 continued past December 2014, and by failing to discharge Lien 2 and dismiss the Respondent's claim based on its failure to comply with the CPO. The Respondent argued that the chambers judge correctly engaged in a hearing *de novo*, as this was the appropriate form of review of a Claims Officer's decision. The Appellant took the position that the Claims Officer's decision attracted a high level of deference and should only be interfered with on an error of law. The Court of Appeal noted that the resolution



Pacer Construction Holdings Corporation v. Pacer Promec Energy Corporation, (cont.)

to this conflict could be found in the language of the CPO itself. The Court held that the Claims Officer made a disposition which was subject to a true appeal. Although the chambers judge erred in determining that the Claims Officer was not entitled to the same level of deference as the judge appointing him, the Court nevertheless found that the chambers judge actually applied the appropriate standard of review when he reviewed the disposition. There was no palpable and overriding error in the chambers judge's conclusion that the Claims Officer had erred. The record showed clear evidence supporting his decision. Similarly, the chambers judge made no reviewable error in failing to discharge Lien 2 and dismiss the Respondent's claim.

COUNSEL COMMENTS

Pacer Construction Holdings Corporation v. Pacer Promec Energy Corporation, 2018 ABCA 113

Counsel Comments provided by
David LeGeyt, Counsel for the Appellant

"Pacer Promec Energy Corporation and its affiliates (collectively, the "**Debtors**") were in the business of oilfield construction. In late 2014, the Debtors' business began to fail and they were placed into a receivership by order of the Court of Queen's Bench of Alberta. FTI Canada Consulting Inc. (the "**Receiver**") was appointed as Receiver.


David LeGeyt

Early in the receivership, the Receiver made the somewhat unusual decision to complete some of the very significant construction projects the Debtors were involved with. As a result, it was anticipated that the Receiver would potentially be subject to a large number of claims in addition to the usual pre-receivership claims against the Debtors, all of which would need to be addressed in the receivership. As many of these claims would be pursuant to the *Builders' Lien Act* (Alberta) the Receiver would need to review both the validity and priority of the claims.

As a result, the Receiver applied to the court in May of 2015 for an Order which prescribed a process for reviewing and, if necessary, litigating the claims (the "**Claims Procedure Order**"). The Claims Procedure Order appointed a Claims Officer who was empowered to hear any disputed claims in the first instance. The Claims Procedure Order was inherently flexible in that it prescribed some of the litigation process, but also empowered the Claims Officer to control the process.

One of the claims that proceeded before the Claims Officer was the disputed builders' lien claim of FDS Prime Energy Services Ltd. ("**FDS**").

The Receiver was largely successful before the Claims Officer in that the

COUNSEL COMMENTS

Pacer Construction Holdings Corporation v. Pacer Promec Energy Corporation, (cont.)

builders' lien claim of FDS was allowed only in a relatively small amount which the Receiver had agreed to. FDS appealed this decision to the Court of Queen's Bench which reversed the decision of the Claims Officer and found that the entirety of the FDS claim was rightfully secured by its builders' lien. However, in reaching this conclusion, the Queen's Bench Justice made a number of troubling remarks about the role of Claims Officers in insolvency proceedings and the standard of review applicable when the Court of Queen's Bench reviewed the decision of a Claims Officer. As a result, the Receiver appealed to the Court of Appeal of Alberta.

The decision of the Court of Appeal is helpful to insolvency practitioners in that it clarifies that in determining the appropriate standard of review for the Court to employ, the Court should (i) review the Order appointing the Claims Officer, and (ii) carefully review the proceeding which took place before the Claims Officer.

It is also noteworthy that the Court of Appeal specifically recognized that insolvency processes often include a large number of claims, and that cost-effective and timely procedures are desirable and should be encouraged. Further, the Court of Appeal noted that given Alberta's current environment of limited judicial resources, the use of the Court of Queen's Bench and traditional litigation processes likely do not achieve these goals. The Court of Appeal has clearly encouraged the use of Claims Officers in insolvency proceedings where appropriate, and has mandated a deferential approach to the decisions of Claims Officers provided a thorough and fair process was implemented before the Claims Officer.

Our experience in the Debtors' receivership bears witness to the utility of Claims Officers. The numerous claims submitted against the Debtors and the Receiver were all subject to the Claims Procedure Order and the vast majority of them were resolved without the need to attend in Court. Indeed, FDS was the only creditor who appealed to the Court."

JCC v. NNC, 2018 ABCA 115

Areas of Law: Family Law; Child Support; Paternity; DNA Testing

~The test for granting permission to obtain DNA tests in Alberta is a discretionary one with a low evidentiary threshold~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The Appellant, JCC, was married to the Respondent, NNC, ("mother") from November 2002 until August 2016. The mother had one child before the marriage (MC), and then had four more during the course of the relationship. The Appellant believed that the mother did not know the paternity of MC. However, he believed that he was the biological father of the mother's other children. Through DNA testing, he learned that he is not the biological father of the mother's second and third children (LC and DC). He is the biological father of the youngest two (NC and AC). In the summer of 2016, the mother told the Appellant that a man named RL was the biological father of MC and LC, while another man, BTC, was the biological father of DC. The Appellant requested that these men attend for DNA testing at his expense, but they both refused. They are both Respondents on this appeal. The Appellant then brought an application on July 24, 2017 in morning chambers requesting a declaration under the *Family Law Act* that RL was the biological father of MC and LC, and seeking an order for child support. He sought the same order in respect of BTC and DC. During the course of the application it became clear that the Appellant was actually seeking a grant of permission to obtain the DNA tests he sought. The chambers judge declined to grant such permission because she was not satisfied that the Appellant had standing to bring the application. She also questioned whether there was an evidentiary basis for making the orders requested. The mother did not participate in the hearing, and the hearsay evidence the Appellant provided was insufficient to justify interfering with the other two men's privacy and autonomy. The chambers

JCC v. NNC, *(cont.)*

judge also commented that given that the Appellant had stood in the place of a parent to the children for most if not all of their lives, she was not satisfied there was a legal context in which parentage as opposed to guardianship would be relevant for making support decisions.

APPELLATE DECISION

The appeal was allowed. The Court noted that in family law appeals, intervention is only appropriate if the lower court erred in law or made a material error in its appreciation of the facts. The legal test in Alberta for granting permission to obtain DNA tests is set out in the Queen's Bench decision in *FJN v JK*. It is a discretionary test where there must be some evidence of contact between the putative father and the mother, the application is made *bona fide*, and there is no indication of adverse effects on the children. BTC and RL questioned whether the proceedings were properly commenced by a *Family Law Act* application within the divorce action between a mother and a father who stood in the place of a parent to the children during the marriage. They also questioned whether the Appellant had standing to bring the application, especially as MC was now of the age of majority and no longer a child of the marriage. All parties engaged on the issue of the public policy values at stake in a case where a father figure of many years learns at the end of the marriage that he is not the children's biological father and seeks DNA testing to establish the identity of the biological fathers. Section 9(b) of the *Act* provides that in a dispute, a person claiming not to be a parent can seek a declaration as to parentage. Furthermore, although MC had reached the age of majority, the Appellant had supported her during the many years of the marriage and was entitled to have the question of child support contributions from her biological father judicially determined. While the application should not have been

JCC v. NNC, *(cont.)*

brought as part of the divorce proceedings, this was a technical problem easily rectified. Although direct evidence from the mother regarding the children's conception is preferable and would carry more weight, the beliefs expressed to her former husband are the best evidence available on the facts in this case. The test set out in the case law was met. Answering the parentage question was a matter of justice. There were also practical considerations at play, including the children's need to know their genetic heritage for health purposes, or their potential interest in the estate of the father. The Court of Appeal granted the Appellant permission to obtain tests from RL and BTC.

COUNSEL COMMENTS

JCC v. NNC, 2018 ABCA 115

Counsel Comments provided by
Rod Onoferychuk, Counsel for the Appellant

"The "Best Interests of the Child" is always at the forefront of decisions involving children – oft times it is invoked by the Courts to get in evidence that may not otherwise be admissible.


Rod Onoferychuk

This case, once again, demonstrates the hegemony of this notion – that is to say, that any policy reasons for the "interference with personal autonomy and privacy as a DNA test" take the back seat when contrasted with the what is in the best interests of the children.

Going forward, a putative biological father ought to take a DNA test when presented with the opportunity to do so (assuming it is at no cost to them) as failure to do so will see the court simply declare the putative father as the paternal father.

Accordingly, if the putative father knows they are not the father, taking the test will 'exonerate' them in relatively short order (I query if I would still give this advice if I had a sworn affidavit that indicated that: the putative father was a homosexual and did not have sex with women, or had testicular cancer (and unable to conceive), or that though they were heterosexual, they never, ever had intercourse with the mother), and if they may be the father, not taking the test leaves them open to an adverse inference and declaration of parentage.

In this case, it was perhaps tactical on the putative father's not to put forth any evidence, as I suspect that tactic was chosen as neither wanted to be cross examined on their affidavits, because they would have admitted that they had sex with the mother.

COUNSEL COMMENTS

JCC v. NNC, (cont.)

Of course, this is just the beginning, going forward on the assumption that BTC and RL are the fathers of the children, some heavy lifting will be involved in terms if sorting out how much the biological father and the *in loco parentis* father will have to pay in child support going forward – it also raises the possibility of going after arrears – perhaps based on the "blameworthy conduct"[DBS] of the putative fathers …?"

Stefanyk v. Sobeys Capital Incorporated, 2018 ABCA 125

Areas of Law: Torts; Personal Injury; Common Law Duty of Care; Occupier; Summary Dismissal

~The test for civil summary judgment is whether the record is such that it is fair and just to decide summarily if the moving party has proven the case on a balance of probabilities~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The Respondent, Karren Stefanyk, was startled by a dog as she approached the Appellant Sobeys Capital Incorporated's store. She stepped backward, tripping over the edge of the sidewalk, and suffered injuries to her head, back, and wrists. She sued the owner of the dog, who had tied the animal to a bicycle rack. She also sued the Appellant. She stated that she did not see the dog because it was obscured by garbage receptacles on the sidewalk and that, when she passed the receptacles, the dog lunged at her. The Appellant leased the premises from the Respondent First Capital (Eastview) Corporation, and it was Eastview that had placed the receptacles on the sidewalk. The primary purpose of the sidewalk is to provide access to the store. Although the sidewalk is not part of the leased premises, there is an awning owned by the Appellant over a large section of it. The lease defined that portion of the sidewalk as a "common area" of the shopping centre, but the Appellant reserved the exclusive right to use the main entryway from the sidewalk. The lease obligated Eastview to maintain and manage the common areas, including keeping them clean and clear of debris. However, there is no express provision requiring Eastview to remove obstacles or hazards that do not impede access. The lease does prohibit the Appellant from permitting anything of a dangerous nature to be brought onto the property except in accordance with safe and proper procedures and applicable law. Although the Appellant had no prior knowledge or complaint of aggressive or dangerous dogs on the premises before the incident, the company was aware that people tied dogs up in front of the store. The Appellant brought an application for summary dismissal, arguing that it was not an "occupier" of the sidewalk under the *Occupiers' Liability Act*. It further argued that it owed no other duty

Stefanyk v. Sobeys Capital Incorporated, *(cont.)*

of care and that in any event it had not been negligent. Eastview opposed the application for summary judgment, although Ms. Stefanyk did not participate in the proceedings. A Master in chambers granted the application and dismissed the action against the Appellant, finding that the evidence did not support it was an occupier of the sidewalk. Furthermore, simply because customers needed to use the sidewalk, to enter and leave the store, it did not follow that the Appellant owed a duty of care. Finally, there was no basis on the evidence that would lead to the conclusion that the Appellant was negligent. Eastview appealed to a Justice in chambers. The Justice found that there were triable issues as to whether the Appellant was an occupier and whether it owed a common law duty of care.

APPELLATE DECISION

The appeal was allowed. The Court of Appeal found that the Justice had erred in stating that the test for summary judgment was whether the moving party's position was "unassailable", which was then defined as "so compelling that the likelihood of success at trial is very high". The Court held that there is only one civil standard of proof, being the balance of probabilities, and the test for summary judgment is whether the record is such that it is fair and just to decide summarily if the moving party has proven the case on a balance of probabilities. A trial may be preferred where there is a reasonable expectation that a better evidentiary record will be created by a trial, often because there are disputed issues of material fact or issues of credibility. In this case there were no material facts in dispute and no real issues of credibility. The ultimate issue was whether the Appellant proved on a balance of probabilities that it was not liable for Ms. Stefanyk's injuries. The Court of Appeal considered both the issue of the common law duty of care and the definition of an occupier under the *Occupier's Liability Act*, and concluded that the Appellant had not proven on a balance of probabilities that it did not owe either a common law

Stefanyk v. Sobeys Capital Incorporated, *(cont.)*

or a statutory duty of care to Ms. Stefanyk. However, the Court then went on to consider whether the Appellant had breached the standard of care. It cannot be negligent to have a bicycle rack or garbage bins on the sidewalk, even if they obstruct the view of other parts of the sidewalk. There was no evidence on the record supporting a "failure to inspect". The Appellant had no prior notice of a danger created by the rack, the receptacles, or dogs. The fact that the Appellant had no formal policy on dogs was of little significance, as its conduct with respect to the incident was reasonable. Negligence was not demonstrated.

COUNSEL COMMENTS

Stefanyk v. Sobeys Capital Incorporated, 2018 ABCA 125

Counsel Comments provided by
Nabeel Peermohamed, Counsel for the Appellant

"For years the Alberta Courts have struggled to apply a uniform standard of proof for summary judgment applications. Finally, in *Stefanyk v. Sobeys*, 2018 ABCA 125, the Alberta Court of Appeal has confirmed the standard of proof for summary judgment applications as the civil standard. In other words, summary judgment will be granted if one party can establish on a balance of probabilities that they have proven their case. Previously applied standards like "unassailable" and "very high likelihood of success" are not recognized standards of proof.

Nabeel Peermohamed

In *Stefanyk*, the plaintiff alleged she was injured from falling off a sidewalk into a parking lot after being startled by a dog leashed to a bike rack hidden from view by garbage bins. Sobeys operated a grocery store adjacent to the sidewalk. The area leased to Sobeys by the landlord did not include the sidewalk or the parking lot. The bins and the bike rack were placed on the sidewalk by the landlord. The plaintiff sued Sobeys, the landlord, the dog owner and the dog walker.

Sobeys initially applied for summary dismissal. Master Prowse granted the application and dismissed the action against Sobeys. The landlord appealed the decision to a justice in chambers. The learned justice allowed the appeal, found that summary dismissal was not appropriate in this case, and indicated there were triable issues regarding whether Sobeys was an occupier and whether Sobeys owed a common law duty of care. The learned justice did not perform an analysis of whether Sobeys was negligent. Sobeys appealed that decision.

COUNSEL COMMENTS

Stefanyk v. Sobeys Capital Incorporated, (cont.)

The Alberta Court of Appeal allowed Sobeys' appeal, restored Master Prowse's decision, and confirmed the action against Sobeys was dismissed. In addition, the Court confirmed the standard of proof for summary judgment applications.

The Court confirmed that there is only one civil standard of proof. That is, a party must establish on a balance of probabilities that they have proven their case. The Court established that is the standard to be applied when ruling on a summary judgment application. That is the standard to be used when assessing whether a claim has "merit". The Court was explicit when it said standards such as "unassailable" and "very high likelihood" are not recognized standards of proof.

In the end, the Alberta Court of Appeal concluded that the reasons provided by the learned justice did not correctly state the test for summary judgment and did not consider whether Sobeys was negligent. This case was appropriate for summary judgment given there were no material facts in issue. A trial was not necessary. Accordingly, the Alberta Court of Appeal dismissed the action against Sobeys.

Stefanyk was decided approximately three years after the decision in *Stout v. Track*, 2015 ABCA 10 was released. In *Stout*, the Alberta Court of Appeal upheld the summary dismissal of Mr. Stout's claim by the court below. However, while the Court unanimously agreed the claim should be dismissed, the majority did not agree with the minority's mathematical approach. The minority decision placed upper and lower percentage bounds for a claim's likelihood of success at trial in order to grant summary judgment.

In *Stout*, after Ms. Track ended her relationship with him, Mr. Stout called her over 500 times, sent her over 130 text messages, and left her over 15 voicemails in a three-month period. One night she was awoken by a sound and her security alarm went off. She locked herself in a bedroom and called the police. When she looked out the window, she saw Mr. Stout's vehicle drive away. Ms. Stout told the police she suspected Mr. Stout had tried to enter her house based on the numerous attempts he had made to contact her. Mr. Stout was arrested and released on terms forbidding

COUNSEL COMMENTS

Stefanyk v. Sobeys Capital Incorporated, (cont.)

him to contact Ms. Track, which he subsequently breached by following her. Mr. Stout was arrested again. Mr. Stout commenced an action for malicious prosecution. He alleged Ms. Track made false allegations to the police resulting in his arrest. Ms. Track made an application for summary dismissal of the claim, which the chamber's judge granted.

On appeal, the justice who wrote the minority decision said the Alberta *Rules of Court* allowed summary dismissal of a claim if it has no merit (i.e. if the likelihood the moving side's position will prevail is high). He said this required comparing the relative strengths of each party's position. However, he said the positions need not be so disparate that the plaintiff's prospects of success are close to zero before summary judgment may be granted.

On the other hand, "if the likelihood the moving party will prevail at trial is only fifty-one percent, the moving party will not be granted summary judgment… Other protocols are available…where the outcome is not obvious…summary trial may be the best protocol." While the minority concurred with the majority that the claim should be summarily dismissed, the majority decided not to use the minority's mathematical approach.

Now, after *Stefanyk*, it is clear that even on a summary judgment application, a party need only meet the civil standard of proof (i.e. they must prove their case on a balance of probabilities or 51%)."

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