SUMMARY JUDGMENT: A TALE OF TWO TESTS

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A panel from the Alberta Court of Appeal recently issued their split decision in *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204, on May 25, 2018. In that decision, the Court said 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 case came out less than two months after *Stefanyk v. Sobeys Capital Inc.*, 2018 ABCA 125 was decided. In *Stefanyk*, the Court said, "there is only one civil standard of proof, and it is proof on a balance of probabilities... unassailable and very high likelihood are not recognized standards of proof." Therefore, it appears two separate tests for summary judgment have been enunciated by the Alberta Court of Appeal which may present an inconsistency in the law.

In *Whissell Contracting*, the plaintiff applied for summary judgment with respect to the interpretation of a construction contract. After hearing two days of argument, Justice McLeod ruled that several important facts were left unresolved on the record. Accordingly, the plaintiff's summary judgment application was dismissed. The plaintiff appealed. The panel consisting of Justice O'Ferrall, Justice Wakeling and Madam Justice Schutz, dismissed the appeal and upheld the reasoning of Justice McLeod. Given there were unresolved facts before Justice McLeod, the panel agreed that it was not possible for the learned justice to grant summary judgment on the record before him.

However, the majority, made up of Justice O'Ferrall and Justice Wakeling, indicated that summary judgment could only be granted if the moving party's position was unassailable or its likelihood of success was very high. In addition, in order to grant summary judgment, there must be an incontrovertible factual foundation. Therefore, it appears the majority outlined two pre-conditions for a successful summary judgment application. First, there must be no material facts in issue. Second, there must be a marked disparity in the relative strengths of the parties' positions. In a concurring minority decision, Madam Justice Schutz agreed with the majority's outcome, but was unable to endorse the two pre-conditions for summary judgment or the majority's description of the standard of proof. It appears Justice Schutz did not agree that the standard of proof required one party's position to be unassailable or highly likely to succeed.

Interestingly, Justice Schutz was on the panel for *Sobeys*. In that case, in a unanimous decision, the panel agreed that the only standard of proof to be applied on a summary judgment application was that of a balance of probabilities. "Unassailable" and "very high likelihood" are not recognized standards of proof. In addition, the Court declined to endorse the idea that summary judgment required a weighing of the relative strengths of each party's position. According to *Sobeys*, the ultimate issue is whether a party has proven its case on a balance of probabilities. That is the test to be applied for summary judgment according to the panel who decided *Sobeys*.

Therefore, it appears that several justices on the Alberta Court of Appeal disagree with respect to the test for summary judgment and the standard of proof to be applied. In the last two months, most of the decisions on summary judgment applications have preferred the test outlined in *Sobeys* rather than the previously cited test of unassailability and high likelihood of success. However, only time will tell which test and standard of proof is ultimately upheld, adopted and enforced by the Alberta Court of Appeal. Perhaps a trip to the Supreme Court of Canada is not too far off.