In the Court of Appeal of Alberta

Citation: Hannam v Medicine Hat School District No. 76, 2020 ABCA 343

Date: 20200925
Docket: 1901-0002-AC
Registry: Calgary

2020 ABCA 343 (CanLII)

Between:

Angelina Hannam and
Her Majesty the Queen in Right of Alberta

Respondents
(Plaintiff)

- and -

Medicine Hat School District No. 76

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment of the Honourable Mr. Justice Thomas W. Wakeling and the Honourable Mr. Justice Kevin Feehan

Dissenting Memorandum of Judgment of the Honourable Mr. Justice Brian O'Ferrall

Appeal from the Order by
The Honourable Mr. Justice D.K. Miller
Dated the 7th day of December, 2018
Filed the 30th day of September, 2019
(Docket: 1508 00014)

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Memorandum of Judgment

The Majority:

I. Introduction

[1] *Hryniak v. Mauldin*[1] extols the benefits of summary judgment.[2] This is not the first time Canada's highest court or other leading appellate common law courts have expressly recognized the value summary judgment adds to the civil process. The Supreme Court of Canada did so five years earlier in *Lameman v. Canada*.[3] The House of Lords,[4] in 1901, the English Court of Appeal,[5] in 2001, and the United States Supreme Court,[6] in 1986, have also recognized that summary judgment is an essential feature of a modern civil process.

[2] After the release of *Hryniak* on January 29, 2014 three provinces amended their summary judgment rules to give summary judgment a new and expanded role.[7]

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[1] 2014 SCC 7, ¶¶ 2-3; [2014] 1 S.C.R. 87, 92-93 ("Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. ... Summary judgment motions provide one such opportunity").

[2] Summary judgment is the remedy sought by a plaintiff who seeks judgment at a pretrial stage of the proceedings and a defendant who seeks dismissal of the plaintiff's claim at a pretrial stage of the proceedings. "Summary disposition" might be a better term. But as all rules of court with which we are familiar use the term "summary judgment", we will as well.

[3] 2008 SCC 14, ¶ 10; [2008] 1 S.C.R. 372, 378 ("Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system").

[4] *Jacobs v. Booth Distillery Co.*, 85 Law T.R. 261, 262 (H.L. 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 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 endeavoring to enforce their rights").

[5] *Swain v. Hillman*, [2001] 1 All E.R. 91, 92 & 94 (C.A.) per Lord Woolf, M.R. ("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").

[6] *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'").

[7] Manitoba (*Court of Queen's Bench Rules, amendment*, Man. Reg. 121/2019, ss. 2 & 5 & *Court of Queen's Bench Rules, amendment*, Man. Reg. 130/2017, s. 8), New Brunswick (*New Brunswick Regulation* 2016-73, O.C. 216-313, s.

[3] In the post *Hryniak* era, appeal courts Manitoba[8] and Nova Scotia[9] acknowledged the advantages a robust summary judgment rule offered but were satisfied *Hryniak* had no effect on the substantive content of their rules.

[4] Panels of this Court expressed different opinions on *Hryniak*'s impact in Alberta. Some were convinced that the Supreme Court's strong endorsement of summary judgment compelled a new interpretation of the summary judgment test.[10] Others accorded *Hryniak* no or marginal attention.[11] They were influenced by the fact that the text of the summary judgment rule was

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1) & Nova Scotia (*Nova Scotia Civil Procedure Rules Amendment*, 225 N.S. Gazette 322 (March 2, 2016)). See *Court of Queen's Bench Rules*, Man. Reg. 553/88, rr. 20.03(1) & (2) ("(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 (2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial: (a) weighing the evidence; (b) evaluating the credibility of a deponent; (c) drawing any reasonable inference from the evidence; unless it is in the interest of justice for these powers to be exercised only at trial"); *Rules of Court*, N.B. Reg. 82-73, R. 22.04(1)-(3) ("(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 a defence ... (2) In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and may exercise any of the following powers for the purpose, unless it is in the interests of justice for those powers to be exercised only at trial: (a) weighing the evidence; (b) evaluating the credibility of a deponent; and (c) drawing a reasonable inference from the evidence; (3) For the purpose of exercising the powers set out in this subrule, a judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation") & *Nova Scotia Civil Procedure Rules*, r. 13.04(1) ("A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action: (a) there is no genuine issue of material facts, whether on its own or mixed with a question of law, for the trial of the claim or defence; (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in Rule 13.04 to determine the question").

[8] *Berscheid v. Federated Co-operative 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) & *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").

[9] E.g., *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").

[10] E.g., *Stefanyk v. Sobeys Capital Inc.*, 2018 ABCA 125, ¶ 15; [2018] 5 W.W.R. 654, 660 ("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?").

[11] 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 ... unassailable or 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 ... 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") & *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280, ¶ 45; 584 A.R. 68, 78 ("The principles which govern summary judgment … are distilled in *Beier v. Proper Cat Construction*: … 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").

exactly the same after January 24, 2014 as it was before January 24, 2014, as were the statutory and common law principles used to interpret legal text.[12]

[5] A five-judge panel resolved the controversy. In *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*[13] the Court fashioned a new summary judgment rule that indisputably had much more bite than any of its predecessors. A court under the new protocol may award summary judgment if the moving party establishes the facts in issue on a balance of probabilities, and demonstrates that there is no genuine issue requiring trial.[14] As a result, Alberta's summary judgment and summary trial protocols share important common features.

[6] This appeal gives the Court an opportunity to assess the practical significance of *Weir-Jones*, evaluate its place in historical evolution of summary judgment, and suggest other possible protocols that may allow courts to increase the likelihood that more disputes will be resolved as soon as possible at the least expense without sacrificing the quality of the adjudication and the fairness of the proceeding.

II. Questions Presented

[7] This is an appeal against a pre *Weir-Jones* Court of Queen's Bench order dismissing the Medicine Hat School District's application for summary dismissal of Angelina Hannam's slip-and-fall action against it.[15]

[8] The Master concluded that the plaintiff had no chance of succeeding[16] and granted summary judgment dismissing the plaintiffs' claims.

[9] The chambers judge held that there were "conflicting bits of evidence" and that a trial was needed to resolve them.[17] He stated that he could not "agree that a finding of no negligence on the part of the defendant is so simple, so direct, and so straightforward".[18]

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[12] See *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 101; 315 C.C.C. 3d 337, 387 per Wakeling, J.A. ("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. 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*").

[13] 2019 ABCA 49; 442 D.L.R. 4th 9.

[14] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 47; 442 D.L.R. 4th 9, 50.

[15] An order dismissing an application for summary judgment is a pretrial order. Some pretrial decisions identified in r. 14.5(1)(b) of the *Alberta Rules of Court*, Alta. Reg. 124/2010, may only be appealed with permission. This is not one of those stipulated pretrial decisions.

[16] Appeal Record F1: 41- F2: 8.

[17] Appeal Record F5: 24-25.

[18] Id. F5: 34-35.

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[10] What are the elements of summary judgment post *Weir-Jones*?

[11] Has the Medicine Hat School District met the elements of the *Weir-Jones* test?

III. Brief Answers

[12] The *Weir-Jones* standard sanctions summary judgment if "the presiding judge ... [is] left with sufficient confidence in the ... record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute".[19] More specifically, if the moving party has proved the material facts on a balance of probabilities and advances the law that vindicates the moving party's position, summary judgment is appropriate. The outcome does not have to be obvious.[20]

[13] Summary judgment cannot be granted if the application presents "a genuine issue requiring a trial."[21]

[14] This case is ideally suited for summary disposition.

[15] It can be fairly resolved at this stage of the litigation.

[16] There are no material facts in dispute. Counsel for the Medicine Hat School District conceded for the purpose of this application that the sidewalk was slippery before the school custodian sanded it. Ms. Hannam slipped and fell on a school sidewalk moments after the school custodian had sanded it. She was walking behind the school custodian while he was spreading sand.

[17] The chambers judge did not apply the *Weir-Jones* standard. He, in essence, asked if the outcome was obvious.

[18] If he had applied *Weir-Jones*, he would have summarily dismissed the plaintiff's action.

[19] There is no genuine issue to be tried.

[20] The Medicine Hat School District was not negligent. It discharged its obligations under the *Occupiers' Liability Act*[22] "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there".

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[19] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 47; 442 D.L.R. 4th 9, 50.

[20] Id. at ¶ 48; 442 D.L.R. 4th at 51.

[21] Id. at ¶ 47; 442 D.L.R. 4th at 51.

[22] R.S.A. 2000, c. O-4, s. 5.

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[21] There was nothing more the Medicine Hat School District should have done to make its sidewalk safe for visitors. Alberta's winters present conditions that present risks to its inhabitants. Albertans can mitigate those risks but never eliminate them. Every Albertan knows this.

[22] A summary disposition on this record is just and fair.

[23] We allow the appeal and reinstate Master Robertson's order summarily dismissing the action of Ms. Hannam and Her Majesty the Queen in Right of Alberta.

IV. Statement of Facts

A. The Slip-and-Fall Incident

[24] At 6:30 a.m. on January 17, 2013 the head custodian of the River Heights Elementary School in Medicine Hat reported for duty.

[25] He first checked the condition of the sidewalk to the school's main entrance and concluded it was not slippery.

[26] The sidewalks became slippery a couple of hours later.[23] This condition no doubt was attributable to the fact that the air temperature was around zero and warming up.[24]

[27] At the request of the school's vice-principal, the school custodian spread sand on the main-entrance sidewalks.[25]

[28] Seconds after the school custodian had sanded the sidewalks connecting the school's entrance and the adjacent city street, Ms. Hannam slipped, fell, and broke her right ankle.[26] This occurred at approximately 8:45 a.m.

[29] Ms. Hannam had just dropped off her daughter who attended kindergarten at River Heights Elementary School.[27]

[30] There was no evidence about the condition of the sidewalk that suggested the use of an ice chipper or ice melt would have improved the quality of the sidewalk surface for walkers.[28]

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[23] Ms. Hannam did not recall that the sidewalk was icy. Questioning of Ms. Hannam. Appellant's Extracts of Key Evidence A60:7-11.

[24] Questioning of Gary John Getz. Appellant's Extracts of Key Evidence A202: 2-11.

[25] Questioning of Gary John Getz. Appellant's Extracts of Key Evidence A179:8-A180:20 & A186:20-25.

[26] Questioning of Ms. Hannam A51:21-A52:13 & A130:27-A131:3.

[27] Questioning of Ms. Hannam. Appellant's Extracts of Key Evidence A40:3-8.

B. The Action

[31] On January 15, 2015, just before the two-year limitation period under the *Limitations Act*[29] was about to expire, Ms. Hannam commenced an action against the Medicine Hat School District[30] alleging negligence and breach of the *Occupiers' Liability Act*.[31]

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C. The Summary Dismissal Application

1. The Application

[32] On September 5, 2017 the Medicine Hat School District applied for summary judgment.[32]

2. Master Robertson's Decision

[33] Master Robertson granted the application:[33]

> At the end of the day, … the law is focused on … occupiers taking reasonable steps to make the premises safe. The case law is replete with comments about how occupiers are not insurers … . [T]he evidence is clear that … [the custodian] had sanded, and that she slipped … . [T]he question is not whether it was impossible to slip given the amount of sand he put down, but whether what he was doing was reasonable.
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> …
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> I don't see any negligence here. I don't see any breach of the *Occupiers Liability Act*. … I just don't see any evidence to justify a finding of negligence that warrants sending this case to trial. The … essential question … [is] whether there is anything really to send to trial, to the extent that there are conflicting bits of evidence here, it's not material, it would not change the outcome of the trial ... .

3. Justice Miller's Decision

[34] Ms. Hannam appealed to the Court of Queen's Bench.[34]

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[28] Questioning of Gary John Getz. Appellant's Extracts of Key Evidence A196:24-A197:4 & A198:20-26.

[29] R.S.A. 2000, c. L-12, s. 3(1).

[30] Appellant's Extracts of Key Evidence A7.

[31] R.S.A. 2000, c. O-4.

[32] Appeal Record P1.

[33] Appeal Record F48:23-31 & F48:4-F49:10.

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[35] Justice Miller, in reasons delivered December 7, 2018, allowed Ms. Hannam's appeal:[35]

> There is not clear evidence before me, nor was there before Master Robertson, that there was no negligence. The master … makes reference to "conflicting bits of evidence" and that the photograph "doesn't suggest that this was actually icy."
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> With respect, if there is conflicting bits of evidence, that is what I think a trial is designed to determine. …
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> …
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> … [I]n this case, I cannot agree that a finding of no negligence on the part of the defendant is so simple, so direct and so straightforward.
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> …
>
> The solution, in my view, is to put that issue to trial to test the credibility of the defendant's witnesses and to determine why the defendant's own policy was not followed and allow a trial judge to determine if the defendant is in fact negligent.

4. Appeal to the Court of Appeal

[36] The Medicine Hat School District appeals to this Court.[36]

V. Relevant Statutory Provisions

A. Alberta Rules of Court

1. Current Rules

[37] Rules 7.2 and 7.3 of the *Alberta Rules of Court*[37] read as follows:

> 7.2 On application, the Court may at any time in an action give judgment or an order to which an applicant is entitled when
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> (a) admissions of fact are made in a pleading or otherwise, or

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[34] Appeal Record P6.

[35] Appeal Record F5:19-22, 24-25 & 34-35 & F6:1-4.

[36] Appeal Record F8.

[37] Alta. Reg. 124/2010. (emphasis added).

(b) the only evidence consists of records and an affidavit is sufficient to prove the authenticity of the records in which the evidence is contained.

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.

2. Rules in Effect from June 19, 1986 to October 31, 2010

[38] Rules 159 and 162 of the previous iteration of the *Alberta Rules of Court*,[38] 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

[38] *Rules To Amend the Alberta Rules of Court*, Alta. Reg. 216/86. *The Supreme Court Rules*, Alta. Reg. 390/68 (in force January 1, 1969) did not allow a defendant to apply for summary judgment. 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"). Effective June 19, 1986 a defendant was given the option of applying for summary judgment. *Rules To Amend the Alberta Rules of Court*, Alta. Reg. 216/86.

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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 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.

…

(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.

3. Rules in Effect from January 1, 1969 to June 18, 1986

[39] Rule 159 was in this form from January 1, 1969 to June 18, 1986:[39]

159.(1) In any action in which a defence has been filed the plaintiff may, on the grounds that there is no defence to a claim, or a particular part of a claim, or there is no defence to such a claim or part of a claim except 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 his belief the defendant has no defence to that claim or part of the claim, or that the defence is to amount only.

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[39] *The Supreme Court Rules*, Alta. Reg. 390/68.

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(2) Upon the application, unless the defendant, by affidavit or otherwise, satisfies the court that he has a good defence on the merits, or that there ought, for some other reason, to be a trial of the claim or the part of the claim, the court may direct such judgment for the plaintiff as he may be entitled to.

B. Comparable Summary Judgment Provisions for England and Wales

[40] Rule 24.2 of the *The Civil Procedure Rules 1998* is the counterpart summary judgment rule for England and Wales:[40]

24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other reason why the case or issue should be disposed of at a trial.

24.3(1) The court may give summary judgment against a claimant in any type of proceedings.

(2) The court may give summary judgment against a defendant in any type of proceedings except –

(a) proceedings for possession of residential premises …; and

(b) proceedings for an admiralty claim in rem.

24.4(1) A claimant may not apply for summary judgment until the defendant against whom the application is made has filed –

(a) an acknowledgment of service; or

(b) a defence,

unless –

(i) the court gives permission; or

[40] S.I. 1998/3132.

(ii) a practice direction provides otherwise.

C. Comparable American Summary Judgment Provisions

1. Federal Rules of Civil Procedure

[41] Rule 56 of the *Federal Rules of Civil Procedure*[41] was in this form as of March 26, 1986. This is the date the United States Supreme Court released *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[42] the first of the three 1986 landmark summary judgment cases:

> Rule 56. Summary Judgment
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> For the Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> Motion and Proceedings Therein. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to the interrogations, and admissions in file, together with the affidavits, if any, *show that there is no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law.
>
> Case Not Fully Adjudicated on Motion. If on motions under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings

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[41] 28 U.S.C. Federal Rules of Civil Procedure (emphasis added).

[42] 475 U.S. 574 (1986).

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in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. … When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[42] The current version of Rule 56 is in this form:[43]

Rule 56 Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defence – or the part of each claim or defence – on which summary judgment is sought. 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 court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

2. California

[43] The relevant part of California's *Code of Civil Procedure*[44] is set out below:

Title 6 of the Pleadings in Civil Actions

Chapter 5. Summary Judgments and Motions for Judgment on the Pleadings

437c. (a)(1) A party may move for summary judgment in an action or proceedings if it is contended that *the action has no merit or that there is no defense to the action*

[43] 28 U.S.C. Federal Rules of Civil Procedure (emphasis added).

[44] Cal. Civ. Proc. Code (West) (emphasis added).

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> *or proceeding*. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court with or without notice and upon good cause shown, may direct.
>
> …
>
> (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*. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact.

3. New York

[44] The important features of rule 3212 of New York's *Civil Practise Law and Rules*[45] follow:

> Rule 3212. Motion for summary judgment
>
> (a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined … .
>
> (b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. *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 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 either party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. …

D. *Occupiers' Liability Act*

[45] Section 5 of the *Occupiers' Liability Act*[46] states as follows:

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[45] N.Y. Civ. Prac. Law, c. 8 (McKinney) (emphasis added).

[46] R.S.A. 2000, c. O-4.

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> An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.

VI. Analysis

A. Summary Judgment Is a Valuable Option in Modern Civil Procedure Systems

1. Conventional Trials Are Expensive and Plagued by Delay

[46] The value[47] of summary judgment and summary trial as dispute resolution processes increases as the amount of time[48] that separates the commencement of actions and their final trial

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[47] *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 trial diminished the value of conventional trials to litigants and correspondingly enhanced the value of other dispute-resolution procedures); Schwarzer, Hirsch & Barrans, "The Analysis and Decision of Summary Judgment Motions" vii (Federal Judicial Center 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").

[48] 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 with 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"). This is a very demanding standard. The Superior Court of California – it has jurisdiction over all criminal and civil cases – for the fiscal year 2018 disposed of sixty-four percent of civil cases in which the claimant sought more than $25,000 within twelve months of the filing of the action, seventy-seven percent within eighteen months and eighty-five percent within twenty-four months. Judicial Council of California, 2019 Court Statistics Report, Statewide Caseload Trends 2008-09 Through 2017-18, at 94 (2019). There were 221,090 civil cases of this nature filed in fiscal year 2018. Id. The Superior Court disposed of 193,615 of these cases in the fiscal year 2018 – a caseload clearance rate of eighty-eight percent. Id. The Superior Court's clearance rate was over ninety percent in the period commencing fiscal year 2011 and ending fiscal year 2016, topping out at 100 percent in fiscal year 2011. Id. See *California Rules of Court*, Standard 2.2(f) (rev. Sept. 1, 2020) ("The goal of each trial court should be to manage general civil cases, except those exempt under (g), so that they meet the following case disposition time goals: (1) Unlimited civil cases [claims over $25,000]: The goal of each trial court should be to manage unlimited civil cases from filing so that (A) 75 percent are disposed of within 12 months; (B) 85 percent are disposed of within 18 months; and (C) 100 percent are disposed of within 24 months"). Writing in 1933, Justice Finch of the Supreme Court of New York reported that "the jury calendars in large centers of population are generally from two to three years behind". "Summary Judgment Procedure", 19 A.B.A.J. 504, 504 (1933). While the Court of Queen's Bench of Alberta does not compile statistics of the time lines for the resolution of actions, given what it does publish – lead times for trials and half-day applications – it is safe to say that the Alberta timelines are far in excess of those proposed by the American Bar Association. Court of Queen's Bench of Alberta Annual Report 2016 to 2017, Appendix 3 (2017). See D. Field & J. Dillon, Report of the Special Committee Appointed To Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and if So, By What Means, 8 A.B.A. Rep. 323, 327 (August 9, 1885) ("In the city of New York, we have … the means of ascertaining with considerable exactness the number of

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resolutions and the costs associated with conventional trials escalates.[49] Business dislikes uncertainty that litigation delay inevitably introduces.[50] Uncertainty undermines the reliability of transactions and imperils investment returns.[51] Most litigants crave predictability,[52] finality and abhor delay.[53] The financial and emotional costs of unresolved disputes may be debilitating.[54]

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cases brought into the courts, and the number decided within a definite period. It is to be regretted that is it not made the duty of some public officer in every state to furnish the statistics of litigation").

[49] Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact", 99 F.R.D. 465, 467 (1984) ("This [unawareness of the utility of summary judgment] is a regrettable state of affairs, frustrating the intent of those who drafted Rule 56 and the Supreme Court and Congress which adopted it to further the efficient and economical resolution of issues not requiring an evidentiary trial").

[50] *Biss v. Lambeth Southwark and Lewisham Area Health Authority*, [1978] 1 W.L.R. 382, 389 (C.A.) per Lord Denning, M.R. ("The business house was prejudiced because it could not carry on its business affairs with any confidence – or enter into forward commitments – while the action for damages was still in being against it. ... There comes a time when it is entitled to have some peace of mind and to regard the incident as closed"); Organization for Economic Cooperation 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") & D. Field & J. Dillon, Report of the Special Committee Appointed To Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and if So, By What Means, 8 A.B.A. Rep. 323, 324 (August 9, 1885) ("The insecurity of life and property which a dilatory or uncertain administration of justice entails operates as a blight upon enterprise and frightens away not only the timid, but all, even the boldest").

[51] *Bailey v. Bailey*, 13 Q.B. Div. 855, 856 (Q.B. 1884) per Grove J. ("The object of … [Order XIV] is … to prevent a debtor who unquestionably owes a debt from putting the creditor to great expense with the chance of the debtor proving insolvent") & Finch, "Extension of the Right of Summary Judgment", 4 N.Y. State B. Ass'n Bull. 264, 266 (1932) ("There has been … a great deal of criticism of court procedure in connection with the foreclosure of mortgages, and many lenders have been so delayed by answers raising fictitious issues that they have resolved never again will they lend money on mortgage. This attitude, unless corrected, will go a long way towards hampering and hurting those interested in the development of real estate").

[52] Organization for Economic Co-operation and Development, Economics Department Policy No. 18, "What Makes Civil Justice Effective?" 8 (June 2013) ("Predictability of court decisions, that is, the possibility to predict *ex ante* how the law will be applied by the court, is extremely important from an economic perspective. It provides legal certainty and enables economic agents to form expectations about the potential legal and economic consequences of their actions. Predictability of court decisions also influences choices on whether to initiate litigation or appeal judicial outcomes").

[53] Defendants who have no defence and have the resources to litigate are probably the only exception. See Organization for Economic Co-operation and Development, Economics Department Policy No. 18, "What Makes Civil Justice Effective?" 2 (June 2013) ("OECD analyses … suggest that a 10% increase in the average length [of a dispute] … is associated with a decrease of around 2 percentage points in the probability to have confidence in the justice system").

[54] *Pillar Resource Services Inc. v. PrimeWest Energy Inc.*, 2017 ABCA 19, ¶ 68 per Wakeling, J.A. ("[litigation causes] stress, inconvenience and distraction") & *McPhilemy v. Times Newspapers Ltd. (No. 2)*, [2001] EWCA Civ 933, ¶ 20; 2001 4 All E.R. 861, 872 ("[litigation causes] inconvenience, anxiety and distress").

Prolonged delays also undermine public confidence in the administration of justice[55] and encourage disputants to utilize private mechanisms to resolve their differences.[56] An 1885 American Bar Association report laments that "[a]lready we see arbitration committees in large departments of business supplanting the courts".[57]

[47] This has been the case in England and the United States for a very long time.

[48] It is certainly true in Alberta today and it has been for many years. Currently the amount of time that separates the date an action is commenced in Alberta and the date it is resolved by trial is trending upwards.[58] Until this trend is reversed, Alberta litigants will have a high interest in having

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[55] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 90; [2017] 7 W.W.R. 343, 369 ("People understandably expect that the mechanisms our state has constructed for the resolution of disputes will process them at a reasonable rate … . When these legitimate expectations are not met, individuals most closely linked to actions and the greater community may lose confidence and respect for the manner in which justice is administered"); *National Metropolitan Bank of Washington v. Hitz*, 1 MacArth. & M. 198, 199 (D.C. Sup. Ct. 1879) per Cartter C.J. ("This rule was adopted … when we were overwhelmed with a great oppression of business. The calendar … had run up to a thousand cases or thereabouts. Great delays in judgment occurred; creditors were postponed in the collection to an indefinite time. Defendants resorted to formal denials of pleading for the purpose of securing the time that the delays of the law gave them") & Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 6(1) (1953) ("In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law").

[56] See *Hryniak v. Mauldin*, 2014 SCC 7, ¶ 1; [2014] 1 S.C.R. 27, 92 ("without public adjudication of civil cases, the development of the common law is stunted") & Royal Commission on the Dispatch of Business at Common Law 1934-36, Final Report 31 (1936) ("This preference of the commercial community for the settlement of their disputes by arbitration is due, no doubt, to its greater freedom from appeals; its informality, privacy and friendly atmosphere; the saving of the great expense of copying documents; and, above all, the fact that the issue is determined speedily and on a fixed date, arranged to suit the convenience of the maximum number of parties concerned in the dispute").

[57] D. Field & J. Dillon, Report of the Special Committee Appointed To Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and if So, By What Means, 8 A.B.A. Rep. 323, 324 (August 9, 1885).

[58] Data published in The Court of Queen's Bench Annual Report 2016 to 2017, Appendix 2 shows that there were 46,381 civil actions, 10,376 divorce actions and 6,670 family actions commenced in the period covered by the report. If there were 100 Court of Queen's Bench judges and Masters hearing proceedings, which there were not at the time, this works out to roughly 634 new matters for each adjudicator. The Annual Report for 2016 to 2017 provides no data about resolution rates. How many days have elapsed between the date an action was commenced and when it was resolved either by trial or some other pre-trial disposition? This is critical information. Without this information, it is difficult to assess how long it takes to close files on average. *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 129; 442 D.L.R. 4th 9, 85 per Wakeling, J.A. ("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"). Nothing will change unless the Court adopts measures that force the parties to complete litigation milestones within time lines imposed at the commencement of the action or by case management. Vigilant case management is indispensable to expedited litigation. See *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 1.4 (1) & (2) (U.K.) ((1) "The court must further the overriding objective [of enabling the court to deal with cases justly, which includes expeditiously and fairly] by actively managing cases … (2) Active case management includes … (g) fixing timetables or otherwise controlling the progress of the case"); A. Zuckerman,

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access to a workable expedited dispute resolution procedure – summary judgment or summary trial. Or they will continue to take their commercial business elsewhere – private dispute resolution.

2. Alberta's Response to the Undue Delay and High Cost Associated with Conventional Trials

[49] The *Alberta Rules of Court*[59] that came into force on November 1, 2010 contained features that Lord Griffiths probably had in mind when he asserted that the civil process required a major overhaul.[60]

[50] The foundational rules collected in Part 1 exhort the court and litigants to search for a dispute resolution process that best suits the features of an action and that "facilitate the quickest means of resolving a claim at the least expense".[61]

[51] Part 7 of the *Alberta Rules of Court*[62] gives the Court of Queen's Bench the tools needed to fairly resolve disputes that do not require the parties and the court to devote the time and the resources associated with resolution by a traditional trial.

Zuckerman on Civil Procedure: Principles of Practice 19 (3d ed. 2013) ("The court is entrusted with the task of actively managing cases in order to further the overriding objective by, amongst other measures controlling the progress of the case (… [*The Civil Procedure Rules 1998*] 1.4(2)(g)). By including the need for expedition amongst the goals of the overriding objective, the CPR has made the need for timely resolution a major consideration in case management") & Organization for Economic Co-operation and Development, Economics Department Policy No. 18, "What Makes Civil Justice Effective?" 5-6 (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. … An important condition for the implementation of caseflow management techniques is the systematic collection of detailed statistics on caseflows, trial length, judges' workload and other operational dimensions. Recording data on the functioning of courts on a regular basis allows soundly monitoring and managing the performance of judges and staff. With some exceptions (England and Wales, Slovenia), trial length appears to be shorter in systems with a higher production of statistics").

[59] Alta. Reg. 124/2010.

[60] *Department of Transport v. Chris Smaller (Transport) Ltd.*, [1989] 1 All E.R. 897, 903 (H.L.) per Lord Griffiths ("I recommend a radical overhaul of the whole civil procedural process and the introduction of court controlled case management techniques designed to ensure … [that litigation] proceeds in accordance with a timetable as prescribed by rules of court or as modified by a judge").

[61] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 1.2(2)(b).

[62] Albertans are not alone in their recognition of the virtue of expedited dispute resolution procedures. Major common law jurisdictions – England and Wales, Australia, New Zealand, Hong Kong and the United States – have adopted them. For a description of these country-specific protocols see *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, nn. 64-68; 442 D.L.R. 4th 9, nn. 64-68.

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[52] In *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*,[63] this Court resolved a conflict between two schools of thought and identified the core elements of the summary judgment protocol.

[53] To appreciate the full significance of this Court's new summary judgment protocol, it is necessary to sketch the historical path that summary judgment has followed in England, United States and the common law jurisdictions.

3. Criteria To Evaluate the Merits of a Summary Judgment Protocol

[54] The utility of summary judgment is a function of how its components measure against five distinct elements.

[55] The first element identifies who may apply for summary judgment. Rulemakers have three options – only the plaintiff,[64] only the defendant[65] or both.[66] If the rulemakers allow either the plaintiff or the defendant to apply for summary judgment, they maximize the likelihood summary judgment will be sought in appropriate cases.[67]

[56] The second element is the population of the set of eligible actions. Set size impacts the effect summary judgment will have on any civil procedure system. The first summary judgment protocol was available only for actions enforcing bills of exchange or promissory notes.[68] A protocol that may be invoked regardless of the nature of the action obviously increases the

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[63] 2019 ABCA 49; 442 D.L.R. 4th 9.

[64] *Summary Procedure on Bills of Exchange Act*, *1855*, 18 & 19 Vict. c. 67, s. 1 (U.K.) (only the plaintiff in actions to enforce a specific form of debt could apply for summary judgment); *Rules of Procedure*, Order XIV & *Supreme Court of Judicature Act*, *1875*, 38 & 39 Vict., c. 77, First Sch. (in force November 1, 1875); *The Rules of the Supreme Court, 1883*, Order III, R. 6 & Order XIV, R. 1 (in force October 24, 1883) (U.K.); *Rules of the Supreme Court, 1965*, Order 14, R. 1 (in force October 1, 1966) (U.K.); *The Consolidated Rules of the Supreme Court*, O.C. August 12, 1914, r. 129 (Alta.); *The Consolidated Rules of the Supreme Court*, O.C. 716/44, r. 128 (Alta.) (in force July 1, 1944) & *The Consolidated Rules of the Supreme Court*, O.C. August 12, 1914, r. 129 (in force September 1, 1914).

[65] We are not aware of any summary judgment protocol that allows only defendants to access it.

[66] *Rules To Amend the Alberta Rules of Court*, Alta. Reg. 216/86 (Alta.) (effective January 1, 1969); *The Civil Procedure Rules 1998*, r. 24.2, S.I. 1998/3132 (U.K.) (effective April 26, 1999); *Federal Rules of Civil Procedure*, 28 U.S.C., R. 56 (effective September 16, 1938) & *Rules of Civil Procedure*, r. 113 (N.Y.) (effective April 15, 1932).

[67] See Eisenberg & Clermont, "Plaintiphobia in the Supreme Court", 100 Cornell L. Rev. 193, 193 (2014) ("The ballyhooed Supreme Court cases on summary judgment … had palpably negative effects on plaintiffs"). Some commentators believe that the existence of a summary judgment rule gives defendants a tactical advantage. Magistrate Judge Denlow for the Northern District of Illinois states that "[a]lthough a plaintiff has equal recourse to summary judgment under Rule 56 [of the *Federal Rules of Civil Procedure*], the motion has largely become a defendant's weapon"). Denlow, "Boon or Burden?", 37 Judges' Journal 26, 27 (1998).

[68] *Summary Procedure on Bills of Exchange Act, 1855*, 18 & 19 Vict., c. 67.

potential impact summary judgment may have on the volume of actions that are ultimately resolved by resorting to the conventional trial stream.[69]

[57] The third element records the procedure that an applicant must navigate to gain access to the summary judgment adjudication. A protocol that can be accessed early in the process[70] and is easy to complete – costs the parties less[71] – will increase the number of actions that are resolved by summary judgment and improve the case-closure ratio between summary judgment and conventional trial.[72] Suppose a rule denied access to the summary judgment protocol until the parties have completed discovery. This might deter some litigants from applying for summary judgment.[73]

[58] The fourth element focuses on the necessary disparity between the strength of the moving and nonmoving parties' cases in order to grant summary judgment. Summary judgment is less likely to be invoked if the degree of disparity between the strength of the moving parties' position must be at its greatest – the nonmoving party has no chance of success.[74] For example, Judge

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[69] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 7.3(1) (effective November 1, 2010); *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.2 (effective April 26, 1999) & *Federal Rules of Civil Procedure*, R. 56 (effective September 16, 1938).

[70] *Alberta Rules of Court*, Alta. Reg. 390/68, r. 159(1) (effective January 1, 1969) ("In any action in which a defence has been filed, the plaintiff may … apply to the court for judgment"); *The Consolidated Rules of the Supreme Court*, O.C. 716/44, r. 128 (effective July 1, 1944) ("When a statement of claim includes a claim for a debt or liquidated demand and any defendant has delivered a defence, the plaintiff may … apply for leave to enter final judgment"); *Federal Rules of Civil Procedure*, 28 U.S.C., R. 56(b) (effective September 16, 1938) ("Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery"); *Code of Civil Procedure*, West's Ann. Cal. C.C.P., r. 437c(a)(1) ("The motion [for summary judgment] may be made at any time after 60 days have elapsed since the general appearance in the action") & *Civil Practise Law and Rules*, N.Y. Civ. Proc. Law (Consol.), c. 8, r. 3212(a) ("Any party may move for summary judgment in any action, after issue has been joined").

[71] *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 71; 35 R.P.R. 5th 105, 134 ("summary judgment … expedites litigation, reduces costs for the litigants, frees up scarce judicial resources and ameliorates access to justice issues").

[72] Clark & Samenow, "The Summary Judgment", 38 Yale L.J. 423, 471 (1929) ("Our procedural rules have been designed in large part to avoid harsh and drastic measures against litigants. ... We should not overlook, however, the objective towards which those rules should be directed, that of a simple, orderly and prompt presentation of the substantive issues in dispute between the parties. The strength of the summary procedure is that it achieves that objective in many cases. The speed of the procedure is desirable, but still more to be emphasized is its simplicity and directness in bringing out the real dispute").

[73] *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").

[74] *Stout v. Track*, 2015 ABCA 10, ¶ 50; 62 C.P.C. 7th 260, 279 per Wakeling, J.A. ("the comparative strengths of the moving and nonmoving party's 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

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Jerome Frank, of the Second Circuit Court of Appeals and an opponent of summary judgment,[75] favored the maximum degree of disparity: "We ... suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the *slightest doubt* as to the facts".[76] Some courts would grant summary judgment only if the disparity between the strength of the two parties' cases was so marked that the result was obvious.[77] If a rulemaker adjusts the tipping point so that the requisite degree of disparity is less, the number of actions resolved by the summary judgment methodology should go up.[78]

[59] The fifth element measures access to an appeal court. May a party only appeal if summary judgment was granted? Or may a party also appeal if summary judgment was not granted? Obviously, a protocol that allows appeals against orders granting summary judgment but not orders refusing summary judgment is a barrier undermining the utility of the summary judgment methodology.[79]

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would be frustrated") & *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (E.D.N.Y. 1971) ("Since courts are composed of mere mortals, they can decide matters only on the basis of probability, never on certainty. The 'slightest doubt' test, if it is taken seriously, means that summary judgment is almost never to be used – a pity in this critical time of overstrained legal resources").

[75] There were other detractors. 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) per Hutcheson, J. ("[Rule 56 of the *Federal Rules of Civil Procedure*], 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"). The Fifth Circuits' dislike for summary judgment was so notorious that a federal district court judge posted a sign in his courtroom "No spitting, no summary judgments". Childress, "A New Era for Summary Judgments: Recent Shifts at the Supreme Court", 6 Rev. Litig. 263, 264 (1987).

[76] *Doehler Metal Furniture Co. v. United States*, 149 F. 2d 130, 135 (2d Cir. 1945) (emphasis added).

[77] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 139; 442 D.L.R. 4th 9, 99 per Wakeling, J.A. ("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") & *Chubbs v. City of New York*, 324 F. Supp. 1183, 1185 (E.D.N.Y. 1971) ("the probability of [the plaintiff] … obtaining a significant remedy is miniscule and the burdens on the court, the defendants, the bar and the penal system of allowing the litigation to proceed are great. Under the circumstances … we refuse to permit this hopeless case to proceed").

[78] See *Sewak Gill Enterprises Inc. v. Bedaux Real Estate Inc.*, 2020 ABCA 125, ¶ 13 ("the 'unassailable' test ... involves a more stringent standard for granting summary judgment [than the *Weir-Jones* test]") & *Rudichuk v. Genesis Land Development Corp.*, 2019 ABQB 133, ¶ 27 ("[The *Weir-Jones* test] is a more liberal approach to granting summary judgment than the test in *Whissell*").

[79] *Doehler Metal Furniture Co. v. United States*, 149 F. 2d 130, 135 (2d. Cir. 1945) per Frank J. ("denial of [the right to a trial] … is reviewable; but refusal to grant summary judgment is not") & *Dwan v. Massarene*, 199 App. Div. 872,

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B. Historical Development of the Summary Judgment Process

1. Europe

[60] The attraction of a civil process that is simpler and can be navigated in less time and at less expense than the ordinary mechanism for the resolution of civil disputes can be traced to Roman law and its middle ages progeny. Professor Millar of Northwestern University provides this historical account:[80]

> The term "summary" as applied to civil procedure had its origin in the *summatim cognoscere* of the Roman Law. In the late Middle Ages it was applied by the Italian jurists to that simplified and abbreviated form of procedure prescribed by the decretal *Saepe contingit* (1306) of Pope Clement V … . [T]he term summary became firmly established in Continental usage as applicable to … [the procedure] which differed from the ordinary form only in its elements of simplicity and abridgement … .

2. England

[61] In 1855, responding to pressure from English merchants,[81] Parliament passed the *Summary Procedure on Bills of Exchange Act, 1855*.[82] This enactment allowed the holders of negotiable instruments who had commenced an action against the defaulting promisor to apply for summary judgment.[83] Professor Sunderland, of the University of Michigan, in a 1926 article entitled "An American Appraisal of English Procedure",[84] expressed his admiration for this significant English contribution to civil procedure:

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880 (N.Y. 1922) ("If … [the defendant] shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend, this court will not review the order, as we consider that no substantial right of the plaintiff has been violated"), overruled, *Lee v. Graubard*, 205 App. Div. 344 (N.Y. 1923).

[80] "Three American Ventures in Summary Civil Procedure", 38 Yale L.J. 193, 193-94 (1928).

[81] 18 & 19 Vict., c. 67, recital ("Whereas *bona fide* holders of dishonoured Bills of Exchange and Promissory Notes are often unjustly delayed and put to unnecessary Expense in recovering the Amount thereof by reason of frivolous or fictitious Defences to Actions thereon, and it is expedient that greater facilities than now exist should be given for the Recovery of Money due on such Bills and Notes").

[82] 18 & 19 Vict., c. 67.

[83] 18 & 19 Vict., c. 67, s.1. ("From and after the 24th of October 1855, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable may be by writ of summons in the special Form …. and endorsed as therein mentioned; it shall be lawful for the plaintiff, on filing an affidavit of personal service … at once to sign final judgment in the Form … for any sum not exceeding the sum endorsed on the writ").

[84] 9 J. Am. Jud. Soc. 164, 165-66 (1926). See *Walker v. Hicks*, 3 Q.B. Div. 8. 9 (C.A. 1877) per Cockburn, C.J. ("The object of the special indorsement is this: on the one hand, it is to have a very prompt and summary effect in favour of

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> Summary judgment procedure, in essence, is nothing but a process for the prompt collection of [uncontroverted] debts. …
>
> The creditor issues a summons with a description of the debt endorsed upon it, files an affidavit of the truth of his claim and of his belief that there is no defense, and upon that showing, without pleadings and the aid of counsel, he may bring the debtor before a High Court master on four days' notice to show cause why a summary judgment should not be forthwith rendered against him. The burden is thus placed on the debtor to satisfy the master, by convincing proofs, that he ought to be given the right to litigate the claim. … The masters want solid assurances and sham defences are ruthlessly rejected. Under the skillful hands of the masters these cases are disposed of very rapidly, five or ten minutes are usually enough. Very large judgments, running into thousands and even millions of dollars, are constantly being rendered in this summary way.

[62] Within twenty years, Parliament substantially expanded the types of claims for which a plaintiff[85] could apply for summary judgment. In 1875, with the passage of the *Judicature Act, 1875*[86] and the introduction of the *Rules of Court*,[87] the plaintiffs seeking

> to recover a debt or liquidated demand in money payable by the defendant … arising upon a contract … as for instance, on a bill of exchange, promissory note, cheque or other simple contract debt or on a bond or contract under seal for the payment of a liquidated amount of money, or on a statute where the sum sought … is a fixed sum of money … or on a guaranty … where the claim against the principal is in respect to such debt or liquidated demand, bill, cheque or note, or on a trust

was eligible to apply for summary judgment.

[63] This innovation was well received.

[64] Professor Sunderland reported data that confirms the popularity of the summary judgment innovation:[88]

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the plaintiff, by entitling him to apply to sign formal judgment under Order XIV, and on the other hand, it is intended that the defendant should have an opportunity of avoiding such further proceedings by payment of the debt").

[85] A defendant could not apply for summary judgment until April 26, 1999. *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.2.

[86] 38 & 39 Vict., c. 77.

[87] Id. First Schedule, *Rules of Court*, Order III, r. 6.

[88] "An American Appraisal of English Procedure", 9 J. Am. Jud. Soc. 164, 166 (1926).

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> The immense value of the practice is indicated by its wide use. In the year 1924, for example, there were 6,773 summary judgments rendered by the masters of the King's Bench Division, as compared with 1,546 judgments entered by the judges after trial of issues. That means that by this device the trial dockets were relieved of 80 percent of the cases which would otherwise have come before the courts for formal trial, and that claimants in all these cases got their judgments in as many days as it would have required months through ordinary litigation in the courts.

[65] A 1933 amendment to the *Rules of the Supreme Court, 1883*[89] dramatically expanded the class of plaintiffs for whom summary judgment was an option.[90]

[66] The Solicitor's Journal described the 1933 amendment as "the most sweeping changes in practice yet attempted by those responsible for reforming High Court procedure".[91] It described the new rule this way:[92]

> By an amendment of Ord. 3, r. 6, the practice as to special endorsement of the writ of summons is extended to all actions in the King's Bench Division, except actions for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise, or actions in which fraud is alleged by the plaintiff.
>
> The effect of bringing all these actions within the scope of Ord. 14, r. 1 … is almost revolutionary. In all King's Bench actions, except those mentioned alone, it will only be necessary for a plaintiff to swear that to the best of his knowledge and belief there is no defence to the action … to bring the merits of the action under the consideration of the Master for him to decide whether there is a *bona fide* defence.

[67] Defendants were precluded from invoking this procedure until April 26, 1999 when *The Civil Procedure Rules 1998*[93] came into force. Under previous regimes only the plaintiff could apply for summary judgment.[94] Rule 24.2 of *The Civil Procedure Rule 1998* authorizes the court to give summary judgment against a claimant or defendant if "the claimant has no real prospect of

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[89] *Rules of the Supreme Court, 1883* (No. 1), Order III, r. 6 (1933).

[90] *The Rules of the Supreme Court, 1883*, Order III, R.6 & Order XIV, R. 1 (effective October 24, 1883).

[91] "The New Supreme Court Rules", 77 Sol. J. 476 (1933). See also Millar, "A Septennium of English Civil Procedure, 1932-1939", 25 Wash. U.L.Q. 525, 536 ("In 1933, the then existing scope of summary judgment practice ... became widened in important measure").

[92] Id.

[93] S.I. 1998/3132.

[94] *Rules of the Supreme Court, 1965*, S.I. 1965/1776, 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 Schedule (in force November 1, 1875).

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 trial".

[68] After the effective date of *The Civil Procedure Rules 1998*, the court could grant a defendant summary judgment against a plaintiff "in any type of proceedings".[95] There were still some limitations in place if a plaintiff was the applicant.[96]

[69] English courts currently grant summary judgment if the outcome is obvious. Professor Zuckerman of Oxford University summarizes the applicable law: "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".[97]

[70] This has been the English law since Parliament passed the *Summary Procedure on Bills of Exchange Act, 1855*.[98]

[71] Judges have said so in cases from each of the nineteenth,[99] twentieth[100] and twenty-first[101] centuries.

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[95] *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.3(1).

[96] Id. r. 24.3(2) ("The court may give summary judgment against a defendant in any type of proceedings except – (a) the proceedings for possession of residential premises against – (i) a mortgagor, or (ii) a tenant or a person holding over until after the end of his tenancy whose occupancy is protected within the meaning of the Rent Act 1977 or the Housing Act 1988 and (b) proceedings for an admiralty claim in rem").

[97] A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 378 (3d ed. 2013).

[98] 18 & 19 Vict. 67, c. 67.

[99] *Ray v. Barker*, 41 L.T. 265, 265-66 (C.A. 1879) per Bramwell, L.J. ("Order XIV. was intended to facilitate the operations of the High Court in debt collecting, and rule 1 of that order enabling the plaintiff to sign judgment summarily ought not to be made use of except in cases ... which are *free from doubt*. People should recollect that it is ... to be applied ... only in *clear cases*") (emphasis added).

[100] *Dummer v. Brown*, [1953] 1 All E.R. 1158, 1161 (C.A.) per Singleton, L.J. ("it is only in a case where there is clearly no defence that judgment ought to be given against a defendant under the ... [summary judgment provisions of the *Rules of the Supreme Court*]") & *Swain v. Hillman*, [2001] 1 All E.R. 91, 94 (C.A. 1999) per Lord Woolf, M.R. ("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 … . Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible") & 95 ("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; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily") & 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").

[101] *Chief Constable of Greater Manchester Police v. Carroll*, [2017] EWCA Civ 1992, ¶ 60 per 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").

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[72] England fares very well on the criteria used to measure the merits of a summary judgment protocol. Either a plaintiff or a defendant may apply for summary judgment.[102] There is no restriction on the type of action that may be the subject of a summary judgment application if the defendant is the applicant.[103] Some minor restrictions apply if the plaintiff is the applicant.[104] The summary judgment procedure is relatively easy to access. Unless the court grants permission to apply earlier, a plaintiff must wait until the defendant has filed an acknowledgment of service or a defence.[105] The procedural demands imposed on the parties are insignificant.[106] The standard is that the applicant's claim is so much stronger than the respondent's that the ultimate trial outcome is obvious.[107]

[73] The early English experience with summary judgment greatly influenced American civil procedure reforms at both the state and federal levels.[108]

3. United States of America

[74] By the end of the first quarter of the twentieth century, many American states had adopted the key features of the early English summary judgment model – only the plaintiff could apply for summary judgment and the type of actions eligible for the process were limited.[109] For example, rule 113 of New York's *Rules of Civil Practice* came into force on October 1, 1921:

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[102] *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.2.

[103] Id. r. 24.3(1).

[104] Id. r. 24.3(2).

[105] Id. r. 24.4(b).

[106] Id. r. 24.5.

[107] Id. r. 24.2 ("The court may grant summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if – (a) it considers that – (i) the claimant has no real prospect of succeeding on the claim or issue, or; (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other reason why the case or issue should be disposed of at trial").

[108] See Chestnut, "Analysis of Proposed New Federal Rules of Civil Procedure", 22 A.B.A.J. 533, 537 (1936) ("This proposed [federal summary judgment rule] seems to have been influenced largely by the recently published English rule under the *Judicature Act of 1935*") & Clark, "The Proposed Federal Rules of Civil Procedure", 22 A.B.A.J. 447, 450 (1936) ("An important section of the proposed rules is that making provision for discovery and summary judgment in accordance with the general trend of procedural reform in England and in this country since these are devices which aid enormously in the speedy ascertainment of the real issues involved in litigation and their expeditious adjudication").

[109] E.g., N.J. Laws 1912, 380; *Judicature Act of 1915*, 3 Mich. Comp. Laws (Camill, 1915), c. 234, §§ 12581 & 12582; *Rules of the Supreme Court of the District of Columbia*, Rule 73(1); Delaware Rev. Code, c. 128, s. 6 (1915); Ind. Ann. Stat. (Burns 1926) ɠ 409; Va. Code (1849), c. 167, s. 5 & W. Va. Code. Ann. (Barnes 1923), c. 121, s. 6 & 1937 Ill. Rev. Stat., c. 110, ɠɠ 181, 259.15 & 259. The summary judgment provisions in Michigan and Illinois allowed plaintiffs to apply for summary judgment in other actions besides claims for liquidated demands. 3 Comp. Laws

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> Rule 113. Summary Judgment – When an answer is served in an action to recover a debt or liquidated demand arising,
>
> 1. on a contract, express or implied, sealed or not sealed; or
> 2. on a judgment for a stated sum;
>
> the answer may be struck out and judgment entered thereon on motion, and the affidavit of the plaintiff or any other person having knowledge of the facts, verifying the cause of action and stating the amount claimed, and his belief that there is no defence to the action; unless the defendant by affidavit, or other proof, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.

[75] New York litigants embraced this new initiative.[110] In short order the rule was amended to expand the type of actions covered and to allow defendants, as well as plaintiffs, to apply for summary judgment.[111] This option was not available for defendants in any province for some time – British Columbia until 1977,[112] Ontario until 1985,[113] Alberta in 1986[114] – and in England until

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(1929) ∮ 14260 & 1937 Ill. Rev. Stat., c. 110, §§ 181, 259.15 & 259.16. For earlier examples see generally, Millar, "Three American Ventures in Summary Civil Procedure", 38 Yale L.J. 193 (1928).

[110] Finch, "Summary Judgment Procedure", 19 A.B.A.J. 504, 506 (1933) ("In 1922, the first full year of the operation of the limited summary judgment procedure first adopted, there were 174 applications under the rule. The next year there were 448, 447 brought by plaintiffs and one brought by a defendant on a counterclaim. The full figures from June 1931 to June 1932, are 750 granted, 480 denied, 81 withdrawn, or a total of 1,311. From June 1932 to June 1933, there were 988 granted, 552 denied, 29 withdrawn, or a total of 1,569 applications. Causes were thus disposed of which, if tried in the ordinary way, would have taken the time of several additional Supreme Court Judges for one full court year"). See also Finch, "Extension of the Right of Summary Judgment", 4 N.Y. State B. Ass'n Bull. 264, 266 (1932) ("Issues were thus disposed of [by summary judgment in 1931] which, if tried in the ordinary way, would have taken the time of three Supreme Court judges one full court year").

[111] Finch, "Summary Judgment Procedure", 19 A.B.A.J. 504, 507 (1933) ("Our [1921] … rule has been twice amended. The first amendment took effect April 15, 1932, and the second … June 15, 1933").

[112] *Supreme Court Rules*, 1976, r. 18(6).

[113] Ontario, with its 1985 amendment to the court rules, allowed defendants to apply for summary judgment for the first time. *Rules of Civil Procedure*. See G. Watson & M. McGowan, Ontario Supreme and District Court Practice 1985, at 248 (1984) ("[Rule 20] represents a dramatic departure from the previous practice under which a motion for summary judgment was only available to a plaintiff, and only when the claims were properly specially endorsed. Now the procedure is available in any case to either a plaintiff or a defendant. The motion may be brought with respect to all or part of the claim") & *Vaughan v. Warner Communications Inc.*, 56 O.R. 2d 242, 245 (High Ct. J. 1986) ("Rule 20 has introduced several important changes. Most dramatically, summary judgment is now available to all parties. In contrast to the former rule [58(2)] which protected only a plaintiff from delay in obtaining judgment in an appropriate action, the extension of the remedy to defendants surely recognizes the prejudice that may be faced in defending inappropriate actions").

[114] *Rules to Amend the Alberta Rules of Court*, Alta. Reg. 216/86.

1999.[115] New York, as far as we can tell, was the first jurisdiction in the common law world to do this.

[76] In 1934, the same year Congress passed the *Rules Enabling Act*[116] and kickstarted the process[117] leading to the adoption on September 16, 1938 of the *Federal Rules of Civil Procedure*,[118] the New York Commission on the Administration of Justice recommended that summary judgment be available "in any action".[119]

[77] The positive New York experience caused some academics and practitioners who participated in the process leading to the adoption of the *Federal Rules of Civil Procedure* to support a robust summary judgment protocol.[120] In a 1936 speech at the annual meeting of the American Bar Association, Martin Conboy, a senior member of the New York Bar, stated that

> [t]he purpose of summary judgment is to enable a party who has an *undeniable* cause of action or defence to be freed from the delays involved in sham claims or defenses presented by his adversary and from the expense and inconvenience of a trial. The effect of the [proposed] rule is to enable the Court to find in advance that there is no issue of fact which necessitates a trial.[121]

[78] The proponents of a summary judgment rule with teeth carried the day.

[79] Rule 56 of the *Federal Rules of Civil Procedure*,[122] in force effective September 16, 1938, "extended the applicability of … [summary judgment] to all cases, including those arising in

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[115] *The Civil Procedure Rules 1998*, S.I. 1998/3132.

[116] Pub. L. No. 415, 48 Stat. 1064 (1934) ("Be it enacted ... That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law").

[117] The Supreme Court appointed an advisory drafting committee consisting of fourteen lawyers and law professors. Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935).

[118] 28 U.S.C. Federal Rules of Civil Procedure.

[119] Report of the Commission on the Administration of Justice in New York State 287 (1934).

[120] E.g., Conboy, "Depositions, Discovery and Summary Judgments as Dealt with in the Title V of the Proposed Rules of Civil Procedure for the Federal Courts", 22 A.B.A.J. 881, 884 (1936) & Clark, "The Proposed Federal Rules of Civil Procedure", 22 A.B.A.J. 447, 450 (1936).

[121] Conboy, "Depositions, Discovery and Summary Judgments as Dealt with in the Title V of the Proposed Rules of Civil Procedure for the Federal Courts", 22 A.B.A.J. 881, 884 (1936) (emphasis added).

[122] 28 U.S.C.

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equity, and to all parties"[123] and allowed both plaintiffs and defendants to apply for summary judgment.

[80] The key portion of the rule as originally enacted declared that "judgment shall be rendered forthwith if … there is *no genuine issue as to any material fact* and the moving party is entitled to judgment as a matter of law".[124]

[81] Most Canadian rules of court have adopted the "no genuine issue" concept as a determinant for summary judgment.[125]

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[123] Issacharoff & Lowenstein, "Second Thoughts About Summary Judgment", 100 Yale L.J. 73, 76 (1990).

[124] Emphasis added. The other important parts of the original rule are reproduced here:

> Rule 56. Summary Judgment
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> (a) For Claimant. A party seeking to recover upon a claim … may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim … is asserted … may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. … The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> …
>
> (e) Form of Affidavits; Further Testimony: Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmation that the affiant is competent to testify to the matters stated therein. … The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogations, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response … must set for the specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 56 was rewritten in 2007 "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules". Committee Notes on Rules – 2007 Amendment. The test for summary judgment remains the same. Rule 56(a) currently states that "[t]he 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".

[125] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, R. 9-6(5)(a) ("On hearing an application under subrule (2) or (4), the court ... if satisfied that there is *no genuine issue for trial* must pronounce judgment or dismiss the claim accordingly") (emphasis added); *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 summary judgment and the Court is satisfied that

[82] The promise Rule 56's drafters saw in their work was not fulfilled in the close to fifty-year period following its effective date.[126] In 1984 Judge Schwarzer of the United States District Court for the Northern District of California offered this thoughtful explanation for its unfulfilled promise:[127]

> The summary judgment procedure under Rule 56 is plagued by confusion and uncertainty. It suffers from misuse by those lawyers who insist on making a motion in the face of obvious fact issues; from neglect by others who, fearful of judicial hostility to the procedure, refrain from moving even where summary judgment would be appropriate; and from the failure of trial and appellate courts to define clearly what is a genuine issue of material fact.

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it is appropriate to grant summary judgment") (emphasis added); *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") (emphasis added); *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") (emphasis added); *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") (emphasis added); *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") (emphasis added); *Rules of Civil Procedure*, R. 20.04(1) (P.E.I.) ("The court shall grant summary judgment if ... the court is satisfied that there is *no genuine issue requiring a trial* with respect to a claim or defence) (emphasis added); *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 judgment accordingly") (emphasis added); *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") (emphasis added) & *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") (emphasis added). See *Irving Ungerman Ltd. v. Galanis*, 83 D.L.R. 4th 734, 738 (Ont. C.A. 1991) ("The expression 'genuine issue' was borrowed from the third sentence in Rule 56(c) of the *Federal Rules of Civil Procedure* in the United States which were adopted in 1938").

[126] McLauchlan, "An Empirical Study of the Federal Summary Judgment Rule", 6 J. Leg. Stud. 427, 452 (1977) ("The general data regarding summary judgments in the Illinois District Court show that summary judgment motions were used in about four percent of the cases (80 of 1984). The motion was successful in just over half of the cases in which it was used (58.7 percent or 47 of 80), but it was the means of terminating only about 2.3 percent of the cases (47 of 1984). This percentage of cases disposed of by summary judgment could be reduced if we consider all cases initiated during the year, including those pending. Thus, if there were about 3,000 cases filed during the fiscal year 1970, then the percentage resolved through summary judgment was about 1.5 percent. These statistics would certainly disappoint the early advocates of the summary judgment rule, who suggested that it would allow speedy disposition of a large number of cases, thus eliminating much docket congestion").

[127] Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact", 99 F.R.D. 465, 465-67 (1984) (emphasis added).

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…

> ... Rule 56 has frequently been misinterpreted and misapplied because the courts have failed to develop a principled analysis for summary judgment. ... Discussions of summary judgment generally consist of formalistic rhetoric and often reflect a hostility toward summary procedures, an inclination toward sparing application of the rule, and a commitment to resolve all doubts against the moving party.
>
> The chilling effect of this approach to summary judgment is reinforced by a perception that summary judgments suffer a disproportionately high rate of reversal. The reported decisions tend to present a distorted picture; cases in which the procedure is used properly and successfully are less likely to result in appeals and, if appealed, in reported opinions. This has contributed to the view that summary judgment is disfavored and therefore risky.
>
> This is a regrettable state of affairs, frustrating the intent of those who drafted Rule 56 and of the Supreme Court and Congress which adopted it to further the efficient and economical resolution of issues not requiring an evidentiary trial. It has particularly unfortunate consequences in this time of high litigation costs and heavily burdened court dockets. Public demand for greater efficiency and economy, which is served by early disposition of *baseless* claims and defenses, is insistent and well-founded and has led to widespread efforts to find alternative means of dispute resolution.

[83] Much changed in 1986.

[84] That year the Supreme Court released three judgments – *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[128] *Celotex Corp. v. Catrett*,[129] and *Anderson v. Liberty Lobby Inc.*[130] – that reinvigorated Rule 56 and accorded summary judgment the role its drafters envisaged it would play – the removal from the litigation stream of actions the outcomes of which is not in doubt.

[85] Chief Justice Rehnquist, in *Celotex Corp. v. Catrett*,[131] clearly stated that summary judgment is a sound procedural protocol: "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'".

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[128] 475 U.S. 574 (1986).

[129] 477 U.S. 317 (1986).

[130] 477 U.S. 242 (1986).

[131] 477 U.S. 317, 327 (1986).

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[86] In *Celotex Corp. v. Catrett* the Supreme Court upheld a District Court order dismissing Ms. Catrett's complaint against thirteen corporate defendants whose asbestos products, she alleged, caused her husband's death.[132] Ms. Catrett, when answering interrogatories, was unable to state when and where her late husband had been exposed to Celotex's asbestos products or identify any person who could testify that he had been. The District of Columbia Court of Appeals reversed,[133] holding that Celotex could not succeed unless it led evidence negating an essential element of the nonmoving party's claim. It refused to allow Celotex to rely on Ms. Catrett's interrogatory answers to buttress its case. The Court of Appeals' position greatly impaired the utility of summary judgment. Chief Justice Rehnquist, writing for the majority, explained why the Supreme Court disagreed:[134]

> [T]he position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue to any material fact and that the moving party is entitled to a judgment as a matter of law". In our view, the plain language of Rule 56(c) mandates the entry of summary judgment … against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact", since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

[87] The Supreme Court released its opinion in *Matsushita Electric Industrial Co. v. Zenith Radio Corp*.[135] three months before the landmark *Celotex* decision came out. *Matsushita Electric* presaged the new era *Celotex* was about to introduce.[136] The Supreme Court upheld the summary dismissal of a price-fixing action by American television manufacturers against their Japanese counterparts.[137] This was a bold move. The evidence was voluminous and required a solid

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[132] 477 U.S. 317 (1986).

[133] 756 F. 2d 181 (D.C. Cir. 1985).

[134] 477 U.S. 317, 322-23 (1986).

[135] 475 U.S. 574 (1986).

[136] Bratton, "Summary Judgment Practice in the 1990s: A New Day Has Begun – Hopefully", 14 Am. J. Trial Advoc. 441, 463 (1991) ("Sometimes referred to as the 'New Era' summary judgment cases, or 'the trilogy', these cases, when read together, represent an event as equally important and momentous for the litigator as the adoption of the Federal Rules themselves").

[137] The Supreme Court remanded the case to the Court of Appeals for the Third Circuit "to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so". 475 U.S. 574, 597 (1986).

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understanding of the economics of price-fixing.[138] But this did not prevent the Supreme Court from concluding that on the evidence brought to its attention, no rational trier of fact could conclude that the alleged conspiracy existed.[139] In short, the Supreme Court held that the outcome was obvious – the nonmoving plaintiffs could not succeed.

[88] *Anderson v. Liberty Lobby, Inc.*,[140] published the same day as *Celotex*, also emboldened federal courts responsible for applying Rule 56 to grant the moving party summary judgment if there was a marked disparity between the strength of the position of the moving and nonmoving parties. This was a libel action commenced by a public figure against a publisher. Under the *New York Times Co. v. Sullivan* doctrine, a public official or public figure must prove with convincing clarity – a higher standard than the normal civil standard of persuasion – that the defendant knew the alleged defamatory statements were false or acted with reckless disregard for the truth of the contested statement. The plaintiff led no evidence that the publisher acted with malice. The Supreme Court reversed the Court of Appeals for the District of Columbia and granted the defendant publisher summary judgment.

[89] The Supreme Court affirmed a number of important propositions.

[90] First, summary judgment is appropriate if there is a marked difference in the strength of the cases. Justice White, writing for the majority, favored this test – "is [the case] … so one-sided that one party must prevail as a matter of law".[141] But, the moving party does not have to convince the court that its position is so strong that the nonmoving party cannot possibly prevail.[142]

[91] Second, if a defendant moves for summary judgment and the plaintiff presents only a "scintilla of evidence"[143] that would not survive a motion for a directed verdict – assuming the evidence led by the plaintiff to be true, no reasonable jury could return a verdict in favor of the nonmoving party.

[92] Third, summary judgment is not appropriate if the nonmoving party presents evidence that if believed by the jury could cause it to render a verdict in favor of the nonmoving party.[144] Justice

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[138] 475 U.S. 574, 576-77 (1986).

[139] Id. 597.

[140] 477 U.S. 242 (1986).

[141] Id.

[142] Id. 252. But if there is no evidence presented by the nonmoving party, summary judgment is the appropriate remedy. "For example, there is no genuine issue if the evidence presented in the opposing affidavits is one of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence". Id. 254.

[143] Id. 252.

[144] Id. 255.

White said this: “The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether … there are any genuine factual issues that properly can be resolved only be a finder of fact because they may reasonably be resolved in favor of either party”.[145]

[93] After 1985 there was a dramatic decline in the number of trials conducted by the federal courts on an annual basis and the proportion of actions disposed of by trial. Professor Galanter reports that from 1986 to 2004 “the number of trials in federal court has dropped by more than 60 percent and the portion of cases disposed of by trial has fallen from 4.7 percent to 1.8 percent”.[146]

[94] What impact, if any, did the Supreme Court’s endorsement of summary judgment as a practical and desirable dispute resolution process have on this new litigation landscape?

[95] Professor Redish ventures this opinion:[147]

> While it is possible that the temporal connection between the Supreme Court’s significant expansion of the availability of summary judgment and the dramatic drop in federal trials is nothing more than a coincidence, common sense suggests otherwise. … Because the very purpose of summary judgment is to avoid unnecessary trials, one need not be a trained logician to conclude that an increase in the availability of summary judgments will naturally have a corresponding negative impact on the number of trials.

[96] The existence of such a correlation would not surprise us. We would have expected that the introduction of a workable summary judgment protocol would reduce the absolute number of trials and decrease the ratio of actions resolved by conventional trial as opposed to by summary judgment. This supposition does not preclude the likelihood that other factors have also contributed to the decline of federal trials.[148]

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[145] Id. 250.

[146] “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts”, 1 J. Empirical Legal Stud. 459, 461 (2004).

[147] “Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix”, 57 Stan. L. Rev. 1329, 1335 (2005).

[148] Cecil, Eyre, Miletich & Rindskopf, “A Quarter-Century of Summary Judgment Practice in Six Federal District Courts”, 4 J. Empirical Legal Stud. 861, 906 (2007) (“after we controlled for differences across courts and the changing mix of cases, we found four changes in summary judgment activity after the Supreme Court trilogy. … Although increases in summary judgment may be part of the reason for the decrease in trial rates, the decline in trials reflects far broader changes in litigation practice than simply a response to the Supreme Court’s affirmation of summary judgment practice”). See also Twohig, Baar, Myers & Predko, “Empirical Analysis 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 for resolution from 1973 to 1994).

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[97] Rule 56 of the *Federal Rules of Civil Procedure* scores very high on the five criteria adopted to evaluate different summary judgment methodologies. Either a plaintiff or a defendant may be the beneficiary of summary judgment. There is no limitation whatsoever on the kind of action that may be disposed of by summary judgment. It can be accessed very early in the process and is not difficult. The standard is the generally accepted test in the common law world – does the nonmoving party have little chance of success? And the losing party can appeal. It does not matter whether the appellant complains that summary judgment should not have been granted or that it should have been created.

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4. Alberta

a. Pre November 1, 2010

[98] On June 19, 1986 an Alberta regulation[149] introduced a new summary judgment rule:

> 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 there is no 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.
>
> (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.

[99] The 1986 rule displayed three noteworthy features.

[100] First, it allowed either a plaintiff or a defendant to apply for summary judgment. In doing so, it followed Rule 56 of the United States' *Federal Rules of Civil Procedure*[150] adopted on September 16, 1938. This was not a feature of the English rules until *The Civil Procedure Rules*

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[149] *Rules To Amend the Alberta Rules of Court*, Alta. Reg. 216/86 (emphasis added).

[150] 28 U.S.C. Federal Rules of Civil Procedure.

1998[151] came into force on April 26, 1999. The previous version of Rule 159, in force from January 1, 1969 to June 18, 1986 did not bestow this option on a defendant.[152]

[101] Second, Rule 159 placed no restrictions on the types of actions that could be the subject of summary judgment. Again, this was a feature of Rule 56 of the *Federal Rules of Civil Procedure*. The English civil procedure rules had a limitation provision until April 26, 1999 when *The Civil Procedure Rules 1998* came into force.

[102] Third, the new Alberta rule adopted the summary judgment standard embedded in Rule 56(c) of the American *Federal Rules of Civil Procedure* – a court may grant summary judgment if "there is no genuine issue as to any material fact".[153]

[103] The links to the *Federal Rules of Civil Procedure*[154] are easy to demonstrate. Here are the key parts of Rule 56, as it existed on June 18, 1986:

> Rule 56. Summary Judgment
>
> (a) For Claimant. A party seeking to recover upon a claim … or to obtain a declaratory judgment may … move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For the Defending Party. A party against whom a claim … is asserted or a declaratory judgment is sought may … move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. … The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogations, and admissions on file, together with the affidavits, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law.

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[151] S.I. 1998/3132.

[152] *The Supreme Court Rules*, Alta. Reg. 390/68.

[153] For some reason, the drafters altered the text slightly – substituting "no genuine issue for trial" for "no genuine issue as to any material fact". Nothing turns on this change. "No genuine issue for trial", by implication, means "no genuine issue as to any material fact". The Rule 56(c) version is more accurate. *Irving Ungerman Ltd. v. Galanis*, 83 D.L.R. 4th 734, 738 (Ont. C.A. 1991) ("Our rule does not contain after 'genuine issue', the additional words 'as to any material fact'. Such a requirement is implicit. If a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a 'genuine issue for trial'").

[154] 28 U.S.C. *Federal Rules of Court Procedure*.

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[104] Equally obvious is the magnitude of the differences between Order 14 of England's *Rules of the Supreme Court 1965*[155] and Alberta's 1986 summary judgment rule. The most important parts of Order 14 are set out below:

> 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 entered an appearance in the action, the plaintiff may, on the ground that the defendant has *no defence to a claim* included in the writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
>
> (2) Subject to paragraph (3) this rule applies to every action begun by writ in the Queen's Bench Division or the Chancery Division begun by a writ other than one which includes –
>
> > (a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, or
> >
> > (b) a claim by the plaintiff based on an allegation of fraud.
>
> ...
>
> (3) This Order shall not apply to an action to which Order 86 applies.[156]

[105] *Canada v. Lameman*[157] was the leading summary judgment case in the period commencing June 19, 1986 and ending October 31, 2010. The Supreme Court, in a unanimous judgment, stated that

> [t]he summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have *no chance of success* from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have *no chance of success* be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

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[155] S.I. 1965/1776 (in force October 1, 1966).

[156] Order 86 allows a plaintiff in the Chancery Division to apply for summary judgment relating to specific performance and rescission of property agreements.

[157] 2008 SCC 14, ¶¶ 10 & 11; [2008] 1 S.C.R. 372, 378.

> For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "*no genuine issue of material fact requiring trial*".

[106] In other words, there is "no genuine issue of material fact requiring trial" if a nonmoving party's position has "no chance of success".[158]

[107] This insistence that summary judgment was designed to remove claims and defences that had little chance to succeed from the litigation stream was consistent with Alberta,[159] Canadian,[160] English,[161] Australian,[162] New Zealand,[163] Hong Kong[164] and American[165] jurisprudence.

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[158] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) per Powell J. ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial").

[159] 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"); *Poliquin v. Devon Canada Corp.*, 2009 ABCA 216, ¶ 76; 454 A.R. 61, 81-82 per Fraser, C.J. ("there is no genuine issue of material fact requiring trial. On the uncontroverted evidence here, it is *plain and obvious* that Poliquin's wrongful dismissal action cannot succeed. The appeal is allowed and Poliquin's wrongful dismissal action is summarily dismissed") (emphasis added); *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*") (emphasis added); *Prefontaine v. Veale*, 2003 ABCA 367, ¶¶ 9 & 13; 339 A.R. 340, 344 & 345 ("The Court must look at the merits of the claim and the defence and determine whether there is an issue requiring trial. A defendant [applying for summary judgment] … must show that the claim has no reasonable prospect of success. … A careful examination of the record … reveals that the factual underpinnings are not, and cannot in any way be defamatory of the Appellant"); *Pioneer Exploration Inc. Estate v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298, ¶ 19; 339 A.R. 165, 168 per Wittmann, J.A. ("It must be *beyond doubt* that no genuine issue for trial exists") (emphasis added); *Mellon v. Gore Mutual Insurance Co.*, 1995 ABCA 340; ¶ 3; 174 A.R. 200, 201 ("It is not manifestly clear or *beyond a reasonable doubt* that there is not a triable issue raised"); *Zebroski v. Jehovah's Witnesses*, 1988 ABCA 256, ¶ 5; 87 A.R. 229, 232 ("We agree … that summary judgment is available to a defendant, where the material clearly demonstrates that the action is *bound to fail*") (emphasis added); *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") (emphasis added); *Espey v. Chapters Inc.*, 225 A.R. 68, 70 (Q.B. 1998) per Fruman, J. ("The test is sometimes stated as the law and facts must be *beyond doubt*. If there is a triable issue, summary judgment is an inappropriate remedy") (emphasis added) & *Tuscon Property Ltd. v. Sentry Resources*, 22 Alta. L.R. 2d 44, 47 (Master Funduk 1982) ("If, after weighing the evidence supporting the defendant's position, the court is satisfied *beyond all doubt* that the plaintiff is entitled to judgment, then [summary] judgment should be given for the plaintiff") (emphasis added).

[160] *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 434 ("The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial"); *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"); *Beavis v. PricewaterhouseCoopers Inc.*, 2010 MBCA 69, ¶ 12; 258 Man. R. 2d 15, 20 (an applicant for summary judgment must prove that the respondent's position "must fail"); *Dawson v. Rexcraft Storage and Warehouse Inc.*, 164 D.L.R. 4th 257, 265 (Ont. C.A. 1998) ("The essential purpose of summary judgment is to ... terminate ... claims and defences that

[108] Rule 159 was in effect until November 1, 2010 when the current *Alberta Rules of Court*[166] were introduced.

b. November 1, 2010 to January 23, 2014

[109] The Rules Project General Rewrite Committee, in its Consultation Memorandum No. 12.12 noted that "Alberta has the toughest [summary judgment] test in Canada … – 'beyond a reasonable doubt'" and recommended that this stringent standard be maintained.[167] It stated "that

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are factually unsupported"); *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'"); *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"); *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"); *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"); *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").

[161] *Swain v. Hillman*, [2001] 1 All E.R. 91, 94 (C.A. 1999) per Lord Woolf, M.R. ("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").

[162] *Rich v. CGU Insurance Ltd.*, [2005] HCA 16, ¶ 18; 214 A.L.R. 370, 375 per Gleeson, C.J. & McHugh & Gummow, JJ. ("issues raised in proceedings are to be determined in a summary way only in the clearest of cases") & *Agar v. Hyde*, [2000] HCA 41, ¶ 57; 201 C.L.R. 552, 576 per Gaudron, McHugh, Gummow & Hayne, JJ. ("The test to be applied [for summary judgment] has been expressed in various ways, but all ... are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way").

[163] *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 that none of the causes of action ... can succeed").

[164] *The Rules of the High Court*, H.C. Ordinance, c. 4, s. 54, Ord. 14, r. 1(1) ("the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ ... apply to the Court for judgment against that defendant").

[165] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) per White, J. ("[summary judgment is appropriate if the case is] so one-sided that one party must prevail at trial as a matter of law"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) per Rehnquist, J. ("[summary judgment may be granted to] dispose of factually unsupported claims or defenses") & *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) per Powell, J. ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'").

[166] Alta. Reg. 124/2010.

[167] Alberta Rules of Court Project, Summary Disposition of Actions (Consultation Memorandum No. 12.12), ¶ 80 (August 2004).

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the test for summary judgment … [should] remain as it is" and "that the current (or similar wording) of the test … [should] be retained".[168]

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[110] The Alberta Rules of Court Project produced no other material on this topic after it released Consultation Memorandum No. 12.12.

[111] On November 1, 2010 the current summary judgment rule came into force. Rule 7.3[169] reads, in part:

> 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 the claim … 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 ... .

[112] Rule 7.3 is substantially the same as its predecessor Rule 159.[170]

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[168] Id. ¶ 92.

[169] *Alberta Rules of Court* Alta. Reg. 124/2010 (emphasis added). Rule 7.3(1) of the *Alberta Rules of Court* bears a strong resemblance to the leading features of the summary judgment provisions in the California's *Code of Civil Procedure* (West's Ann. Cal. C.C.P., r. 437c(a)(1) and New York's *Civil Practise Law and Rules* (N.Y. Civ. Prac. Law (Consol.), c. 8, r. 3212(b)). Part of the California code states that "[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". The New York provision contains the same core components: "The affidavit shall … show that there is no defense to the cause of action or defense has no merit". See California Civil Courtroom Handbook and Desktop Reference § 22.49 (2020) ("A defendant moving for summary judgment bears the burden of persuasion that the cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action") & § 22.50 ("A plaintiff's motion for summary judgment ... bears the burden of persuasion that each element of the cause of action at issue has been proved, and as a result, there is no defense to the cause of action. ... The law no longer requires a plaintiff seeking summary judgment to affirmatively disprove any defense asserted by the defendant in addition to proving each element of its own cause of action").

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[113] First, both rules allow a court to grant summary judgment to either a plaintiff or a defendant.

[114] Second, both rules place no restriction on the kind of actions that may be subject of summary judgment.

[115] Third, both rules allow an applicant to file a summary judgment application very early in the civil process. Rule 7(2) states that an application may be made "at any time". Rule 159 stipulates that no application may be made until the defendant has filed a defence. This is not a significant difference.

[116] Both court rules utilize the same benchmark for identifying when summary judgment is appropriate.[171] Summary judgment is available if the action went to trial the result would not be in doubt.

[117] For some unknown reason, the new version deleted the central component of Rule 159. Gone was Rule 159(3), the provision that expressly stated the summary-judgment standard: "On hearing the motion, if a 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 defendant". The comparable component in California's *Code of Civil Procedure* declares that "[t]he 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 judgment as a matter of law".[172] A rule should state when a court may grant the relief that accounts for the existence of the rule. This is its most important element.

[118] The overall effect of rule 7.3 is that a court may grant summary judgment if there is no genuine issue to be tried, just as it could when Rule 159(3) was in force. There is no genuine issue to be tried if there is no defence to a claim or a claim has no merit.

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[170] *Alberta Rules of Court*, Alta. Reg. 390/68 (in force January 1, 1969).

[171] *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 10; 315 C.C.C. 3d 337, 356 ("the new Rule [7.3] has not substantively changed the test for summary judgment from that under former Rule 159(3) which spoke in terms of 'no genuine issue for trial'"); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, n. 2.; 564 A.R. 357, 388 n. 2 ("The test for summary judgment is the same under the new and old rules"); *Manson Insulation Products Ltd. v. Crossroads C & I Distributors,* 2011 ABQB 51, ¶ 31 ("There is no material difference between new rule 7.2(a) and former rule 162"); *Manufacturers Life Insurance Co. v. Executive Centre at Manulife Place Inc.*, 2011 ABQB 189, ¶ 11; [2011] 11 W.W.R. 833, 838 ("The parties agree that new Rule 7.3 has not amended the test developed in Alberta jurisprudence for summary judgment under old rule 159"); *Mraiche Investment Corp. v. Paul,* 2011 ABQB 164, ¶ 11 ("It is common ground between the parties that although this rule is worded slightly differently than the previous existing ... summary judgment [rule], previous authorities on the subject are still applicable"); *Kwan v. Superfly Inc.* , 2011 ABQB 343, ¶ 20 ("Rule 7.3 operates in the same manner and follows the same legal principles as its precursor") & *Encana Corp. v. ARC Resources Ltd.,* 2011 ABQB 431, ¶ 7 ("[t]he test for summary judgment under new rule 7.3 is the same as under the old rules"). The old rules were in force after January 1, 1969. Alta. Reg. 390/68.

[172] Cal. Civ. Proc. Code, r. 437c(c) (West).

[119] Most courts interpreting the Rule 159 standard concluded that there was no genuine issue to be tried if the outcome of the dispute had it gone to trial was never in doubt.[173]

[120] For roughly the first three years that rule 7.3 was in force Alberta courts consistently interpreted it this way.[174]

c. Post January 23, 2014

[121] But this consistency started to slip away after January 23, 2014, the date the Supreme Court of Canada released its judgment in *Hryniak v. Mauldin*.[175]

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[173] 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”); *Poliquin v. Devon Canada Corp.*, 2009 ABCA 216, ¶ 76; 45 A.R. 61, 81-82 per Fraser, C.J. (“on the uncontroverted evidence here, it is plain and obvious that Poliquin’s wrongful dismissal action cannot succeed. … Poliquin’s wrongful dismissal action is summarily dismissed”); *Stoddard v. Montague*, 2006 ABCA 109, ¶ 13; 412 A.R. 88, 91 (“In applications for summary dismissal, the moving party has the onus … to demonstrate the claims against him or her are hopeless and beyond doubt”); *Zebroski v. Jehovah’s Witnesses*, 1988 ABCA 256, ¶ 5; 87 A.R. 229, 232 (“We agree … that summary judgment is available to a defendant, where the material clearly demonstrates that the action is bound to fail”); *Kary Investment Corp. v. Tremblay*, 2003 ABQB 315, ¶ 26 (“summary judgment may only be granted where it is demonstrated that the outcome is virtually certain”); *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’”) & *Rencor Developments Inc. v. First Capital Realty Inc.*, 2009 ABQB 262, ¶ 8 (Master) (“An applicant for summary judgment or dismissal … must establish that it is ‘plain and obvious’ or ‘beyond a doubt’ that the action will not succeed”).

[174] *Another Look Ventures Inc. v. 642157 Alberta Ltd.*, 2012 ABCA 253, ¶ 8 (Costigan, Paperny & Slatter, JJ.A.) (“It is common ground that the ... correct test for summary judgment ... is whether 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 (Ritter, O’Brien & Bielby, JJ.A.) (“Summary judgment should only be granted if the matter is factually and legally beyond doubt”); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 61; 564 A.R. 357, 374 per Wakeling, 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”); *O’Hanlon Paving Ltd v. Serengetti Developments Ltd.*, 2013 ABQB 428, ¶ 12; 18 B.L.R. 5th 73, 80 per Wakeling, J. (“The plaintiffs are entitled to summary judgment. ... Their cases are so strong that the likelihood of success is very high. The defendants have no defence to the plaintiffs’ claims”) & *Deguire v. Burnett*, 2013 ABQB 488, ¶ 22; 36 R.P.R. 5th 60, 69 per Brown, J. (“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 ..., it also contains within it the rationale for granting summary judgment and thereby depriving a litigant of full access to all litigation tools. Accordingly, the question to be answered ... is whether the likelihood of the respective applicant’s success is very high, such that it is just to determine the parties’ dispute summarily”).

[122] *Hryniak* reminded Canadians that the cost of litigation is so high that it precludes an unacceptably large portion of the public from accessing judicial resolution of their disputes.[176] Justice Karakatsanis called for a "culture shift".[177] She urged those responsible for the administration of justice to "simplify ... pretrial procedures"[178] and make available procedural protocols that were suitable for less complicated disputes. Not all disputes require access to the full

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[175] 2014 SCC 7; [2014] 1 S.C.R. 87. *Hryniak* interpreted Ontario's new summary judgment rule. Rule 20.04(2)(a) of Ontario's *Rules of Civil Procedure*, in force before 2010, stated that "[t]he court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence". According to the Osborne Report, the bar seldom invoked rule 20.04(2). One reason was the governing standard – it was difficult to meet – and the other was the onerous cost consequences associated with a failed summary judgment application – rule 20.06. Mr. Osborne, Q.C. recommended that rule 20 be amended "to expressly confer on a motion judge or master the authority to weigh evidence, evaluate credibility and draw any reasonable inference from the evidence and documents filed". He did not recommend a change to the existing standard – "no genuine issue for trial". He also recommended a rule change to "to permit the court to direct a 'mini-trial' on one or more issues, with or without viva voce evidence, where the interests of justice require a brief trial to dispose of the summary judgment motion". He also supported the adoption of a "summary trial mechanism, similar to rule 18A in British Columbia". C. Osborne, Q.C., Summary of Findings and Recommendations of the Civil Justice Reform Project 42 (November 20, 2007). Ontario adopted some of Mr. Osborne's recommendations. Effective January 1, 2010 changes to rule 20.04 came into force. The key parts of the new rule now read this way:

> 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;
>
> ...
>
> (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.

[176] 2014 SCC 7, ¶ 1; [2014] 1 S.C.R. 87, 92.

[177] Id. at ¶ 2; [2014] 1 S.C.R. at 92. See *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings*, [1998] 2 All E.R. 181, 191 (C.A. 1997) per Lord Woolf, M.R. ("We think that the *change in culture* which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process") (emphasis added).

[178] Id. at ¶ 2; [2014] 1 S.C.R. at 92-93.

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spectrum of the civil process to be fairly and justly adjudicated. "[T]he best forum for resolving a dispute is not always that with the most painstaking procedure".[179]

[123] Professor Galanter, in his 2004 article, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", recorded the extent of the demise of the trial as a dispute resolution tool in the United States:[180]

> [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.

[124] We are satisfied that Professor Galanter's findings accurately describe the role of trials in Alberta.[181]

[125] *Hryniak*'s celebration of proportionality, expedition and economy squares with Alberta's foundational rules. Rule 1.2(2)(b) of the *Alberta Rules of Court*[182] states that "these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense". The same is true for Ontario's *Rules of Civil Procedure*:[183] "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".

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[179] Id. at ¶ 28; [2014] 1 S.C.R. at 99. Professor Bogart invited courts to come to this conclusion in a 1981 article: "[T]he courts must be persuaded to alter their position away from adherence to a philosophy which stipulates that, except in the clearest of cases, parties should have a right to a trial. The courts should recognize that the need to advance the administration of justice and to prevent the party moving for summary judgment from being subjected to the costs and delay of a full trial before the case is disposed of may outweigh, in some cases, the predilection to permit a full trial to dispose of a lawsuit". "Summary Judgment: A Comparative and Critical Analysis", 19 Osgoode Hall L.J. 552, 554 (1981).

[180] 1 J. Empirical Legal Stud. 459, 459-60 (2004).

[181] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, n. 118; 442 D.L.R. 4th 9, n. 118 per Wakeling, J.A. ("I suspect that the percentage of court files resolved by a conventional trial judgment in Alberta has been in decline for over sixty years"). See 1 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2019, at 7.14 (2019) ("Trial never was the ordinary or usual course") & Twohig, Baar, Meyers & Predko, "Empirical Analysis 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).

[182] Alta. Reg. 124/2010.

[183] R.R.O. 1990, Reg. 194, r. 1.04(1).

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[126] In 1985, Ontario adopted the core feature of Rule 56 of the *Federal Rules of Civil Procedure*[184] and stated in rule 20.04(2) that a court must grant summary judgment if "there is no genuine issue for trial with respect to a claim or defence". The Supreme Court of Canada, in *Hryniak*,[185] declared 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. 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.

[127] This new interpretation substituted a procedural – is the process fair to the parties – for a substantive test – an assessment of the merits of the moving and nonmoving parties' positions. The following extract supports this claim:[186]

> These principles ... all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows a judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a *process* that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute.

[128] After *Hryniak* some panels of this Court were convinced that the Supreme Court's strong endorsement of the merits of summary judgment compelled a new interpretation of the summary judgment rule.[187]

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[184] 28 U.S.C. *Federal Rules of Civil Procedure*.

[185] 2014 SCC 7, ¶ 49; [2014] 1 S.C.R. 87, 106.

[186] Id. at ¶ 50; [2014] 1 S.C.R. at 106-07.

[187] *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 that 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* 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

[129] *Windsor v. Canadian Pacific Railway*[188] was the first judgment that concluded *Hryniak v. Mauldin*[189] had this transformative effect. It appeared on March 9, 2014. The Court declared that "[s]ummary judgment is *now*[190] an appropriate procedure where there is no genuine issue requiring a trial ... [and that t]he 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".

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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 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").

[188] 2014 ABCA 108, ¶ 13; 371 D.L.R. 4th 339, 348 (emphasis added).

[189] 2014 SCC 7, ¶ 2; [2014] 1 S.C.R. 87, 92.

[190] The Supreme Court of Canada's endorsement of summary judgment as an important component of a modern civil procedure system was a position which lawyers and judges in Alberta had long ago adopted. Lawyers applied for summary judgment routinely. There are over 1000 reported summary judgments in the period commencing 1908 and ending January 31, 2014. *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ n. 61; 442 D.L.R. 4th 9, 88 n. 61. Summary judgment had been incorporated into the *Alberta Rules of Court* for a very long time. See 1 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2013-2014, at 7-12 (2014) ("This Rule is one of the most important and most heavily relied upon, in chambers. ... Summary judgment is important, and cases with no chance of success should be weeded out early"). Alberta judges promoted its use. E.g., *Beier v. Proper Cat Construction*, 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").

[130] Other panels of this Court that applied rule 7.3 in the post-*Hryniak v. Mauldin* era accorded *Hryniak v. Mauldin* no or marginal attention.[191] For these judges it was business as usual. In *Can v. Calgary Police Service*, in a concurring opinion, Justice Wakeling said this:[192]

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[191] *898294 Alberta Ltd. v. Riverside Quays Ltd. Partnership*, 2018 ABCA 281, ¶ 12 (Berger, O'Ferrall & Wakeling, JJ.A.) ("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 (O'Ferrall & Wakeling, JJ.A.) ("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 (Berger, O'Ferrall & Wakeling, JJ.A.) ("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 (Watson, Wakeling & Schutz, JJ.A.) ("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 (O'Ferrall, Veldhuis & Martin, JJ.A.) ("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 (McDonald, Schutz & Martin, JJ.A.) ("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 (Watson, Bielby & Wakeling, JJ.A.) ("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 (Paperny, Rowbotham & Veldhuis, JJ.A.) ("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'"); *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12, ¶ 19 (Berger, McDonald & Schutz, JJ.A.) (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 (Costigan, Watson & Brown JJ.A.) ("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 (Martin & Wakeling, JJ.A. & Nation, J.) ("The principles which govern summary judgment in Alberta after November 1, 2010 are distilled in *Beier v. Proper Cat Construction ...* : '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

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> 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.

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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 question 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 per Brown, J. ("the preferable formulation ... 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 per Brown, J. ("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 per Brown, J. ("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 & 35; 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").

[192] 2014 ABCA 322, ¶ 97; 315 C.C.C. 3d 337, 385.

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[131] Other provincial appeal courts[193] and the Federal Court of Appeal[194] shared this assessment of *Hryniak*'s impact on their summary judgment law.[195]

[132] Even though *Windsor v. Canadian Pacific Railway*[196] and *Can v. Calgary Police Service*[197] assessed the impact *Hryniak v. Mauldin* had on Part 7 of the *Alberta Rules of Court* differently the two judgments contained no doctrinal conflicts.[198]

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[193] *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") & *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"). See also *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"); *Green v. Tram*, 2015 MBCA 8, ¶ 2 ("The motions judge concluded that … the appellant's claims … must fail"); *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'"); *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, ¶ 59 ("In my view … Mr. Upham's claim against Shannex … has no real chance of success"); *Schram v. Nunavut*, 2014 NBCA 53, ¶ 8; 376 D.L.R. 4th 655, 661-62 ("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").

[194] *Manitoba v. Canada*, 2015 FCA 57, ¶ 17 per Stratas, J.A. ("Like the Alberta Court of Appeal in *Can v. Calgary Police Service* ..., I conclude that *Hryniak* does not change the substantive content of ... the *Federal Court Rules*") & *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").

[195] See Karabus & Tjaden, "The Impact of Hryniak v. Maudlin on Summary Judgments in Canada One Year Later", 44 Adv. Q. 85, 101-02 (2015) ("Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Prince Edward Island, Yukon and the Federal Court have a distinct summary *judgment* rule that generally decides the question whether there is a *bona fide* triable issue without any weighing of the facts, in addition to a summary or expedited *trial* rule under which the court actually tries the issues raised by the pleadings on affidavits, or in some cases, with the assistance of *viva voce* evidence") (emphasis added for non-Latin words).

[196] 2014 ABCA 108; 371 D.L.R. 4th 339.

[197] 2014 ABCA 322; 315 C.C.C. 3d 337.

[198] *Can v. Calgary Police Service*, 2014 ABCA 322, ¶¶ 98 & 100; 315 C.C.C. 3d 337, 385-86. ("*Windsor v. Canadian Pacific Railway* … does not stand for the proposition that *Hryniak v. Mauldin* jettisoned a made-in-Alberta summary judgment rule that was straightforward, simple and easy to apply and the progeny of the Supreme Court of Canada's judgment in *Canada v. Lameman* … . Rule 7.3 of the *Alberta Rules of Court* came into effect on November 1, 2010, literally on the heels of the Supreme Court of Canada's opinion in *Lameman*, interpreting the predecessor of r. 7.3. … Nothing in *Windsor v. Canadian Pacific Railway* is inconsistent with the theme of this part of … [my] judgment").

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[133] *Windsor* delivered two messages, neither of which was inconsistent in any way with preexisting generally accepted summary judgment principles.

[134] First, "summary judgment is an appropriate procedure when there is no genuine issue requiring a trial".[199] This is the same standard incorporated in Rule 159(3) of the previous version of *Alberta Rules of Court* in force from June 19, 1986 to October 31, 2010.[200] The Supreme Court, in *Canada v. Lameman*,[201] declared that "claims that have no chance of success [must] be weeded out at an early stage". Chief Justice Fraser, in *Poliquin v. Devon Canada Corp.*,[202] a 2009 decision that followed the release date of *Lameman*, asked whether "it is plain and obvious that … [the plaintiff's] wrongful dismissal action cannot succeed".

[135] Second, *Windsor* held that "[t]he modern test for summary judgment is … to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record".[203] This is not a controversial statement.[204] This has been the law since summary judgment became a fixture in sophisticated civil processes. Courts are not in the business of making orders that are unfair and unjust. A court must not grant summary judgment if it is not fair and just to do so. Historically, summary judgment courts have concluded that it is not fair and just to do so unless the facts are incontrovertible and the ultimate trial outcome is obvious.

[136] But the progeny of *Windsor* did introduce conflict with the preexisting principle that summary judgment was a prediction of the likely outcome if the matter went to trial.

[137] In *Stefanyk v. Sobeys Capital Inc.*[205] a panel of this Court presented a new standard – "The ultimate issue is whether the appellant has proven on a balance of probabilities that it is not liable for the plaintiff's injuries".[206]

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[199] 2014 ABCA 108, ¶ 13; 371 D.L.R. 4th 339, 348.

[200] See *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 434 ("The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial").

[201] 2008 SCC 14, ¶ 10; [2008] 1 S.C.R. 372, 378.

[202] 2009 ABCA 216, ¶ 76; 454 A.R. 61, 81-82.

[203] *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, ¶ 13; 371 D.L.R. 4th 339, 349.

[204] *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, ¶¶ 34 & 41; 18 B.L.R. 5th 73, 88 & 91 per Wakeling, J. ("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 when it is just to do so" & "the court must be satisfied that the determination of the dispute without making available to a party all stages of the litigation spectrum is just").

[205] 2018 ABCA 125, ¶ 13; [2018] 5 W.W.R. 654, 661. See also *Arndt v. Banerji*, 2018 ABCA 176, ¶ 36; 424 D.L.R. 4th 656, 679 ("if the moving party can prove on a balance of probabilities that it has proven the facts needed to support its claim or defence, it is entitled to summary disposition").

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[138] This is a trial standard. Justices Lederman, Bryant and Fuerst, writing extrajudicially, identified the civil trial standard in this sentence: “Simply put, the trier-of-fact must find that the existence of the contested fact is more probable than its non-existence”.[207]

[139] This formulation of the summary judgment test broke new ground in at least two respects.

[140] First, summary judgment was never before regarded as a trial. Common law judges sing from the same song sheet when the summary judgment tune comes up. Lord Woolf, M.R. in *Swain v. Hillman*[208] opined that “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 [summary judgment] provisions”. In *Weir-Jones*[209] Justice Slatter acknowledged that “[s]ummary disposition is a way of resolving disputes without a trial; a summary trial is a trial”. Justice Wakeling said the same thing in *Can v. Calgary Police Service*:[210] “Summary judgment disposes of a suit before trial and summary trial after trial”. The Australian High Court has observed that summary judgment allows for the “summary determination of a proceeding without trial”.[211] It is also gospel in the United States. Justice White in *Anderson v. Liberty Lobby, Inc*.[212] opined that “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”.

[141] Second, *Stefanyk* contemplates the summary judgment adjudicator resolving material facts in dispute if the record allows it. That used to be the exclusive responsibility of a trial judge.[213]

[142] The Chief Justice of Alberta convened a five-judge panel to hear the appeal in *Weir-Jones Technical Services v. Purolator Courier Ltd.* and to determine the law of summary judgment in Alberta post *Hryniak v. Mauldin*.

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[206] 2018 ABCA 125, ¶ 17; [2018] 5 W.W.R. 654, 662.

[207] S. Lederman, A. Bryant & M. Fuerst, The Law of Evidence in Canada 221 (5th ed. 2018).

[208] [2001] 1 All E.R. 91, 95 (C.A. 1999).

[209] 2019 ABCA 49, ¶ 18; 449 D.L.R. 4th 9, 40 (emphasis omitted).

[210] 2014 ABCA 322, ¶ 87; 315 C.C.C. 3d 337, 380.

[211] *Jackamarra v. Krakouer*, [1998] HCA 27; 195 C.L.R. 516, 528 (1998).

[212] 477 U.S. 242, 249 (1986).

[213] *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, ¶ 16; 37 1 D.L.R. 4th 339, 350 (“Trials are for determining facts”). See Billingsley, “*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials”, 55 Alta. L. Rev. 1, 8-9 (2017) (“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”).

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[143] The pivotal issue presented to the five-judge panel was the impact *Hryniak v. Mauldin* had on rule 7.3 of the *Alberta Rules of Court*. The *Stefanyk*[214] school of thought was that the 2014 Supreme Court judgment was a game changer. The *Can v. Calgary Police Service*[215] view was that it had no impact whatsoever on the summary judgment law in Alberta.[216]

[144] The *Stefanyk* school of thought carried the day:[217]

> [T]here has been a paradigm shift in the approach to summary judgment since the decision in *Hryniak v Mauldin* in 2014. …
>
> Prior to … *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. …
>
> 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. …
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> …

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[214] 2018 ABCA 125; [2018] 5 W.W.R. 654.

[215] 2014 ABCA 322; 315 C.C.C. 3d 337.

[216] Other courts that have considered this issue aligned with the view expressed in *Can v. Calgary Police Service*. *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") & *Manitoba v. Canada*, 2015 FCA 57, ¶ 17 per Stratas, J.A. ("like the Alberta Court of Appeal in *Can v. Calgary Police Service* ..., I conclude that *Hryniak* does not change the substantive content of ... [the *Federal Court Rules*]").

[217] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶¶ 13-15 & 23; 442 D.L.R. 4th 9, 38-39 & 42.

… Historical analyses are not determinative given the call for a "shift in culture". Decisions of the Supreme Court of Canada prevail.

[145] Justice Slatter summarized the governing principles:[218]

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 <u>facts</u> 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.

[146] There are a number of points that merit emphasis.

[147] First, this interpretation allows a summary judgment court to make contested findings of material facts. This is corollary of Justice Slatter's statement that "[s]ummary judgment is not limited to cases where the facts are not in dispute".[219] This is a departure from the traditional understanding that a dispute about a material fact disqualifies an action from the summary judgment process.[220]

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[218] Id. at ¶ 47; 442 D.L.R. 4th at 50.

[219] Id. at ¶ 21; 442 D.L.R. 4th at 41.

[220] *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 aspect 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 *vive voce* evidence is needed, where the judge is

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[148] Second, summary judgment courts should not be reluctant to make material fact findings:[221] Justice Slatter encouraged summary judgment adjudication to hear oral testimony: "[W]here possible findings of fact can and should be made on a summary disposition application".[222]

[149] Third, before a summary judgment court resolves a material factual dispute, it should ask if it constitutes a genuine issue requiring a trial. Justice Slatter explained it this way:[223] "A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial".

[150] Fourth, the moving party must prove the facts on which it relies on a balance of probabilities.[224] This is consistent with the general trial principle that the plaintiff must prove the facts on a balance of probabilities that establish the elements of the action.

[151] Fifth, "if there is a genuine issue requiring a trial, summary disposition is not available".

[152] What does "genuine issue requiring a trial" mean in this context?

[153] Does it mean what the United States Supreme Court said it means when interpreting the "genuine issue" concept incorporated in rule 56(c) of the *Federal Rules of Civil Procedure*?[225]

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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 <u>material</u> 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 plaintiffs rely are incontrovertible").

[221] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 36; 442 D.L.R. 4th 9, 46.

[222] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 16; 442 D.L.R. 4th 9, 40 ("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"). See *Can v. Calgary Police Service*, 2014 ABCA 322, ¶¶ 85-96; 315 C.C.C. 3d 337, 379-85 per Wakeling, J.A. ("Four reasons explain my opposition to the use of oral evidence in a summary judgment application. First, summary judgment serves a completely different purpose than summary trial. ... Summary judgment disposes of a suit before trial and summary trial after trial. ... Third, the motions court may have to invest a significant amount of time to hear oral evidence") & *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, ¶ 16; 371 D.L.R. 4th 339, 350 ("Trials are for determining facts").

[223] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 35; 442 D.L.R. 4th 9, 46.

[224] Id. at ¶ 47; 442 D.L.R. 4th at 50.

[225] Justice White, in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986), opined that summary judgment is appropriate if the dispute is "so one-sided that one party must prevail as a matter of law". Justice Powell, for the majority in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), concluded that a

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[154] Does it mean what our Court said it means when interpreting Rule 159(3) of the *Alberta Rules of Court*,[226] in force from June 19, 1986 to October 31, 2010? Rule 159(3) provided that "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 the defendant".[227]

[155] Or does it mean something else?

[156] American and Canadian courts have occupied common ground and interpreted this standard to mean that summary judgment may only be granted if the ultimate disposition is not in doubt.

[157] But Justice Slatter expressly rejected this interpretation of "no genuine issue": "Imposing standards like 'high likelihood of success', 'obvious', or 'unassailable' is ... unjustified. A disposition does not have to be 'obvious', 'beyond doubt' or 'highly unlikely' to be fair".[228]

[158] So what does "genuine issue requiring a trial" mean?

[159] In *Hryniak* the Supreme Court of Canada adopted this definition of "no genuine issue requiring a trial", the language in rule 20.04(2) of the Ontario *Rules of Civil Procedure*:[229]

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. 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.

[160] This Court, in *North Bank Potato Farms Ltd. v. Canadian Food Inspection Agency*, [230] adopted the Supreme Court's position.

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summary disposition is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party".

[226] *Rules to Amend the Alberta Rules of Court*, Alta. Reg. 216/86.

[227] The Supreme Court of Canada in *Canada v. Lameman*, 2008 SCC 14, ¶ 10; [2008] 1 S.C.R. 372, 378, was also adamant that summary judgment not be granted unless a claim has "no chance of success". Chief Justice Fraser said the same in *Poliquin v. Devon Canada Corp.*, 2009 ABCA 216, ¶ 76; 454 A.R. 61, 81-82: "I have concluded that there is no genuine issue of material fact requiring trial. On the uncontroverted evidence here, it is plain and obvious that Poliquin's wrongful dismissal action cannot succeed".

[228] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 33; 442 D.L.R. 4th 9, 45. See also *Guarantee Co. of North American v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 434 ("The appropriate test to be applied on a motion for summary judgment is satisfied when there is no genuine issue of material fact requiring trial").

[229] R.R.O. 1990, Reg. 194.

[230] 2019 ABCA 344, ¶ 28.

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[161] The "no genuine issue" concept no longer measures the merits of the parties' positions. It now concentrates on procedural fairness.

C. The Practical Implications of the New Way

[162] We have reviewed all the reported and some unreported cases in the roughly 530-day period following the release of *Weir-Jones* on February 6, 2019 and the roughly 530-day period preceding the release of *Weir-Jones* – over 1000 days – in order to gain some insights into the impact *Weir-Jones* has had on how primary adjudicators actually decide summary judgment applications.

[163] This review supports a number of conclusions.

[164] First, defendants are more likely to bring a summary judgment application than plaintiffs. In the 1,000-day period defendants were the moving party in over sixty percent of the cases. In America, summary judgment is regarded as a device that primarily benefits defendants.[231] According to Professors Eisenberg and Clermont, "[t]he much ballyhooed Supreme Court cases on summary judgment … had palpably negative effects on plaintiffs".[232]

[165] Second, most courts have no appetite for resolving contests on disputed material facts[233] – those essential to the establishment of a claim or a defence.[234] We do not recall a single case in our

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[231] Denlow, "Boon or Burden?", 37 Judges' Journal 26, 27 (1998) ("the [Rule 56 summary judgment] motion has largely become a defendant's weapon"); Haramati, "Procedural History: The Development of Summary Judgment as Rule 56", 5 N.Y.U.J.L. & Liberty 173, 174 (2010) ("Although summary judgment is now most commonly used to aid defendants, it was initially devised and developed as a plaintiffs' remedy") & Cecil, Eyre, Miletich & Rindskopf, "A Quarter Century of Summary Judgment Practice in Six Federal District Courts", 4 J. Empirical L. Stud. 861, 886 (2007) ("Defendants' motions for summary judgment are far more common than plaintiffs' motions. ... [T]here were 2,526 motions by defendants [72%], and only 967 motions by plaintiffs [28%]").

[232] "Plaintiphobia in the Supreme Court", 100 Cornell L. Rev. 193, 193 (2014).

[233] E.g., *DH v. Woodson*, 2020 ABQB 367, ¶ 93 ("in applications that involve different factual questions, 51% should not carry the day. In those cases, a finding that there is a 'genuine issue requiring a trial' is appropriate even if the moving party has met the threshold burden of proof"); *Costello v. Redcity Creative Agency Inc.*, 2019 ABQB 600, ¶ 91 ("I am not satisfied that the August 30th Parlee Letter engaged the Shotgun Provisions of the Final USA. Further evidence is required on several points. First, additional evidence is required proving whether Costello was operating under the Draft USA"); *Condominium Plan No. 0213028 v. Pasera Corp.*, 2019 ABQB 485, ¶ 17 ("when the application for summary judgment is made on the basis of the expiration of a limitation period, the Court must be satisfied that the facts are not 'seriously in dispute, and the real question is how the law applies to those facts'"); *Cole v. Martin-Morrison*, 2019 ABQB 311, ¶ 22 ("The plaintiffs signed at least some documents acknowledging duties to seek legal and accounting advice and risk. All of that needs [to be] weighed. Consideration of issues such as those, and no doubt many others, require a complete factual matrix with *viva voce* evidence in order to deal with them fairly and justly"); *Allnut v. Hudsons South Common Ltd.*, 2019 ABQB 143, ¶ 25 (Master Smart) ("There are uncertainties in the facts and record provided by both parties. In sum, I do not have a sufficient measure of confidence in the state of the record such that I am prepared to exercise my judicial discretion to make a summary determination in favour of either

review of summary judgment decisions issued in the 1,000-day period in which an adjudicator heard oral testimony.[235] Adjudicators do not invite the parties to introduce oral evidence, as Justice Verville did in *Valard Construction Ltd. v. Bird Construction Co.*[236]

[166] Third, adjudicators are most comfortable working with material facts that are not the subject of controversy. This is the flip side of the first conclusion. The presence of uncontested material facts increases the likelihood significantly that a court will grant summary judgment.[237]

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party") & *von der Ohe v. Porsche Cars Canada Ltd.*, 2019 ABPC 46, ¶ 72 ("the record is not sufficient for me to make the necessary findings of fact, on a balance of probabilities, to determine the key legal issues").

[234] E.g., *Plesa v. Richardson*, 2019 ABCA 264, ¶ 40 ("the state of the record was not one which afforded sufficient confidence to exercise judicial discretion to summarily resolve the dispute"); *Rudichuk v. Genesis Land Development Corp.*, 2020 ABCA 42, ¶ 32 ("The plaintiffs have not demonstrated that the chambers judge made a reviewable error in concluding that there was a credibility contest that needed to be determined at trial and that she was unable to make a just determination on the record"); *SSC North America, LLC v. Federkiewicz*, 2020 ABQB 176, ¶ 81 ("In short, a trial is required to sift through the extrinsic evidence and resolve the credibility issues and conflicting assertions"); *Malkhassian Estate v. Scotia Life Insurance Co.*, 2020 ABQB 173, ¶ 77 ("The conflicting information in the hospital records and in the ME certificate about the cause of death does not permit me to find the necessary facts to interpret the wording of the [accidental death insurance] Policy to make those decisions. The record is not sufficient for me to decide this application in a fair and just manner to both parties"); *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*, 2020 ABQB 6, ¶ 98 ("the determination of the 'arm's length issue' will turn on the credibility of witnesses who were directly involved in the negotiation of the Asset Transaction. ... I find that the cogency of the evidence does not allow me to conclude that it is more probable than not that the Purchaser Team had the degree of 'influence' that would be necessary for me [to] conclude that they exercised the prerequisite control"); *Nelson & Nelson v. Condominium Corp. No. 0013187*, 2019 ABQB 426, ¶ 24 ("There are simply too many disputed material facts and issues requiring a determination of credibility to place enough confidence in this record to say that Nelson has no possible liability for his handling of these funds"); *Freeman v. Kooiman*, 2019 ABQB 857, ¶ 9 ("this dispute is not appropriate for summary determination. The issues raised by the pleadings are the subject of competing evidence that cannot be fairly and justly resolved in chambers on this record"); *Lynk v. Co-Operators General Insurance Co.*, 2019 ABQB 417, ¶ 24 ("Having regard to the state of the record and uncertainties in the facts, it is not possible to resolve DHI's actual or apparent authority to bind Co-Operators contractually on a summary basis") & *Superior Energies Insulation Group Canada Inc. v. Aluma Systems Inc.*, 2019 ABQB 166, ¶ 6 ("To fairly and justly resolve the issues in dispute, the Court needs a better evidentiary record, and that can be reasonably expected to be created by a trial").

[235] See Schedules A and B of this opinion. A master has no authority to hear oral evidence. *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 9(3)(b).

[236] 2015 ABQB 141, ¶ 7; 41 C.L.R. 4th 51, 55 ("This matter was set down for trial in May of 2014. 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 to testify and their combined testimony took less than a day").

[237] E.g., *Wage v. Canadian Direct Insurance Inc.*, 2020 ABCA 49, ¶ 13 ("Here, the material facts are not in dispute. Selecting the correct interpretation of the policy and SEF Endorsement 44 is well-suited to summary disposition"); *Kostic v. Thom*, 2020 ABQB 324, ¶ 15 ("Having regard to the state of the record and the issues, I conclude that this Action ... should ... be resolved on a summary basis. There are no material facts in dispute"); *County of Vulcan v. Genesis Reciprocal Insurance Exchange*, 2020 ABQB 93, ¶ 155 ("This is not a 'close call' on the evidence. There is no evidence admissible on these applications to the contrary"); *Westpoint Capital Corp. v. Black & Assoc. Appraisal*

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Adjudicators who are uncomfortable resolving contested material facts are likely to conclude that the record does not allow for a fair and just determination and decline to award summary judgment.[238]

[167] Fourth, most adjudicators grant summary judgment only if they have no doubt about the correct disposition.[239] They are reluctant to resolve disputes the outcome of which is unclear.[240]

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Inc., 2019 Carswell Alta. 1166, ¶ 6 (Master) ("There's no great dispute over any of the facts giving rise to an assessment of the limitation period question, and the parties simply do not agree on when the limitation period ought to start"); *Dezotell Holdings Ltd. v. St. Jean*, 2019 ABQB 286, ¶ 71 ("This is not a case that features conflicting evidence on matters of significance. There is no need for *viva voce* evidence so that credibility assessments may be undertaken"); *Columbus v. QuinnCorp. Holdings Inc.*, 2019 ABQB 853, ¶ 75 (Master) ("I am able to find the necessary facts and apply the law on this record, and it is fair and just to do so in the circumstances"); *Gill v. Singh*, 2019 ABQB 819, ¶ 15 ("This case is ... appropriate ... for summary judgment. Its resolution depends solely on the interpretation of the Agreement ... . In light of facts not contested ... , the answer to this dispute lies within the Agreement itself"); *Kozina v. Redlick*, 2019 ABQB 749, ¶ 72 (Master Smart) ("there are sufficient uncertainties in the facts and the law that it would be inappropriate for me to resolve the dispute on a summary basis. ... I do not have confidence in the state of the record to exercise my discretion to summarily resolve the dispute"); *Grainger v. Pentagon Farm Centre Ltd.*, 2019 ABQB 445, ¶ 36 (Master Schulz) ("this question is suitable for summary judgment. There is no conflict on the evidence ...; the interpretation of documents is 'ideally suited to summary judgment' ... . Further, the law is relatively clear and appropriate to apply to these facts"); *Scotia Mortgage Corp. v. Meshkati*, 2019 ABQB 267, ¶ 37 ("This case is appropriate for summary judgment. There is no material dispute between the parties on the central facts") & *HPWC 9707 110 Street Ltd. Partnership v. Funds Administrative Service Inc.*, 2019 ABQB 167, ¶ 25 ("Although details were contested between the parties, the facts are not seriously in dispute ... . As such, this case is ideally situated for summary disposition").

[238] E.g., *Love v. Generoux*, 2020 ABQB 71, ¶ 8 ("Both *Hryniak v. Mauldin* ... and *Weir-Jones* ... stress the importance ... of being able to have confidence in the result based upon the nature of the record before the Court. This is not a case where I can have that confidence"); *Agrium Inc. v. Colt Engineering Corp.*, 2019 ABQB 978, ¶ 32 (Master Prowse) ("I am not sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial"); *102 Street Developments Ltd. v. Derk's Formals Ltd.*, 2019 ABQB 781, ¶ 42 ("the Appellant has not satisfied the Court on appeal that there is no real issue between the parties, given the contradictory evidence on material issues. ... The Court is unable to apply the several legal elements in this action for negligent misrepresentation to a sufficiently settled factual matrix. Summary disposition ... would not be a means to achieve a just result and the issues must proceed to a trial"); *Sonny's Trucking Ltd. v. Edmonton Kenworth Ltd*., 2019 ABQB 696, ¶ 50 ("I am not satisfied ... that I have sufficient confidence in the record presently before the Court to dispose of this summarily"); *Clifton Assoc. Ltd. v. Shelbra International Ltd.*, 2019 ABQB 536, ¶ 37 ("the Master's Order under appeal does not satisfy the *Weir-Jones* criteria ... where the overall considerations of fairness and the ability to achieve a just result are not met") & *Andersen v. Canadian Western Trust Co.*, 2019 ABQB 413, ¶¶ 52 & 54 ("I am not confident that this record would permit me to determine that the Applicants probably did not owe such a duty of care to any of their plaintiff clients. ... I therefore agree with CWT that the record does not permit a fair and just determination of these issues").

[239] E.g., *Fitzpatrick v. College of Physical Therapists of Alberta*, 2020 ABCA 164, ¶ 40 ("It is clear and obvious there is no merit to the claim advanced by Ms. Fitzpatrick and no genuine issue requiring a trial"); *Smith v. John Doe*, 2020 ABQB 59, ¶ 33 ("the evidence falls short of establishing that Dr. Miller should immediately have sent ... [the plaintiff] out for a referral in order to have ... [met] the standard of care"); *Urban Square Holdings Ltd. v. Governali*, 2020 ABQB 240, ¶ 57 ("there is no merit to this claim under any analysis"); *TA v. Alberta*, 2020 ABQB 97, ¶ 91 ("The plaintiff has not presented responding evidence or suggested that evidence may exist which contradicts that presented by the defendants [who seek summary dismissal]. There are no obvious issues requiring a full trial"); *Scherle v. Treadz*

[168] Fifth, most of the time the result would be the same regardless of which summary judgment test is applied.[241]

Auto Group Inc., 2019 ABQB 987, ¶ 84 ("the Action against AMVIC and Service Alberta is well-suited for a summary dismissal judgment. There are no material facts seriously in dispute and there is no need for the full machinery of a trial to conclude that there is no private law duty of care owed in the circumstances here and that AMVIC, in any event, is immune from liability under the ... [*Fair Trading Act*]"); *Goodvin v. Penson*, 2019 ABQB 867, ¶¶ 14-15 (Master Schlosser) ("The law is well settled. ... Russell and Shelley Penson's defence has merit. The claim against them is dismissed"); *LaPrairie Works Inc. v. Ledcor Alberta Ltd.*, 2019 ABQB 701, ¶ 3 ("this is an appropriate issue for summary-dismissal resolution and there is no genuine issue about the existence of the asserted contract: it is plain that no such contract existed here"); *Farm Credit Canada v. Pacific Rockyview Enterprises Inc.*, 2020 ABQB 357, ¶ 162 ("I have sufficient confidence in the state of the record and exercise my discretion and judgment to resolve this lawsuit by granting summary judgment to FCC in the sum owing under the guarantees"); *Condominium Corp. No. 0613782 v. Country Hills Landing Ltd. Partnership*, 2020 ABQB 36, ¶ 45 (Master Robertson) ("If the facts are clear, and the issues are amenable to summary disposition, a decision should be made"); *Mehak Holdings Ltd. v. BBQ To-Night Ltd.*, 2019 ABQB 556, ¶ 16 ("Reena has met the onus on it to prove that there is no merit to the claim. In fact, ... Reena has achieved the higher 'pre-[*Hryniak*]' threshold of showing that the claim against it is hopeless"); *Collins v. Pearce*, 2019 ABQB 868, ¶ 77 ("summary adjudication in this case is possible on the extensive record that was entered into evidence. In my view, there are no genuine issues left for trial as against the Applicant Defendants"); *Mudrick Capital Management LP v. Wright*, 2019 ABQB 662, ¶ 128 ("The claims of breach of duty and misrepresentation are also bound to fail as against the other directors and officers for the same basic reason; there is no evidence suggesting that they did anything wrong"); *Minex Minerals Ltd. v. Walker*, 2019 ABQB 460, ¶ 179 (Master Hanebury) ("There is no actual evidence that supports Minex' allegations of a plan or common intention by the Tattersall companies and Mr. Clark to lure Mr. Clark's investment away from Minex or to interfere with economic relations"); *Simmie v. JRJ Concrete Ltd.*, 2019 ABQB 409, ¶ 80 ("the documentary evidence ... clearly corroborates the evidence of ... [the plaintiffs] that they loaned money to JRJ Concrete at Carlos' request. The only evidence the Respondent has been able to provide in support of its assertion that the money ... was loaned to Carlos in his personal capacity is evidence rendered irrelevant by the 'indoor management rule'"); *Smith v. Uhersky*, 2019 ABQB 761, ¶¶ 84 & 86 ("it is clear that the promissory notes are enforceable and there has only been one payment. ... I declare the defendants to be liable on the promissory notes that they signed"); *Muirfield Village Ltd. v. Borsuk*, 2019 ABQB 160, ¶ 122 (Master Robertson) (the court summarily dismissed the claim against the lawyers: "The evidence is clear that the agreement drafted was the agreement ... [Muirfield Village Ltd.] wanted"); *Ethos Engineering Inc. v. Fortis LGS Structures Inc.*, 2019 ABQB 141, ¶ 14 ("[the evidence] will not get better at trial and there is no genuine issue requiring a trial. It is fair and just to all the parties to resolve this matter in a summary manner"); *Alberta v. M.L.*, 2020 ABPC 28, ¶ 38 ("there is no defence to the application of the Director. There is no chance of success that the child could be returned to his mother in a reasonable time"); *Kayler v. GEF Seniors Housing Greater Edmonton Foundation*, 2019 ABPC 323, ¶ 25 ("The Plaintiff's claim has no chance of success if it proceeds to trial") & *James L. Dixon Professional Corp. v. Amundsen*, 2019 ABPC 35, ¶ 29 ("The Plaintiff's claim is clearly statute barred. There is no genuine issue to be tried").

[240] R. Susskind, Online Courts and the Future of Justice 4 (2019) ("By disposition, ... [lawyers and judges] are often conservative and risk-averse").

[241] E.g., *Roman Catholic Bishop of the Diocese of Calgary v. Schuster*, 2019 ABCA 64, ¶ 7 ("While the appropriate test for summary judgment remains unsettled, we conclude that on either test, the appeal must be dismissed. Under both tests, a controversy over relevant facts or an inadequate factual record precludes the issuance of summary judgment"); *Roberts v. Edmonton Northlands*, 2019 ABQB 9, ¶ 23 ("the result ... does not turn on the test to be applied for summary judgment. Under either test articulated by the Alberta Court of Appeal ..., the Defendants have not proved that the defamation and constructive claims have no merit."); *Schell v. Schell*, 2018 ABQB 991, ¶ 90 ("A trial is necessary to determine the truth. On either of the tests currently promulgated by the Court of Appeal, the application

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[169] Sixth, while the *Weir-Jones* summary judgment test is more conducive to the granting of summary judgment than the traditional summary judgment standard, the data recorded in Schedule C shows only a modest upward adjustment to the success rate for summary judgment applications – from forty-eight percent in the pre *Weir-Jones* period to fifty-seven percent in the post *Weir-Jones* period. We would have expected a much higher success rate if summary judgment adjudicators were actually resolving factual disputes and deciding doubtful cases. Data from Ontario in a one-year period following the release of *Hryniak* showed that "close to 75% of Ontario decisions granted full or partial summary judgment".[242] This is in the range we anticipated. We are also mindful of the data Professor Galanter produced. In the period from 1986, the year of the American summary judgment trilogy, to 2004 "the number of trials in federal court … dropped by more than 60 percent and the portion of cases disposed of by trial has fallen from 4.7 percent to 1.8 percent".[243]

[170] Seventh, the new summary judgment regime resembles the summary trial process that has been part of the *Alberta Rules of Court* since September 1, 1998.[244]

[171] The *Weir-Jones* summary judgment model fares extremely well under the scoring system we have employed. Again, like the English and American methodologies, either a plaintiff or a defendant may apply for and be granted summary judgment. And like Rule 56 of the *Federal Rules of Civil Procedure*, the *Weir-Jones* test features no subject matter limitations. Like both the English and American versions an Alberta applicant can apply for summary judgment very early in the civil process. Summary judgment adjudication is very easy to access. The most noteworthy difference between the *Weir-Jones* protocol and the English and American summary judgment rules is the applicable test for granting summary judgment. An Alberta court may grant summary judgment even if the applicant has not convinced the court that the strength of the applicant's case is so much greater than the respondents that the ultimate trial outcome is obvious. *Weir-Jones* allows the summary judgment adjudicator to make contested finding of facts on a balance of probabilities when it is fair and just to do so. There are no special appeal rules in Alberta that detract from the effectiveness of *Weir-Jones*. The losing party may appeal whether or not the losing side wishes to contest the grant of summary judgment or its denial.[245]

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for summary dismissal ... fails.") & *Stackard v. 1256009 Alberta Ltd.*, 2018 ABQB 924, ¶ 28 ("Irrespective of how the issue is resolved, it will not affect my decision. Nora has failed to prove on the existing record that there is no genuine issue requiring a trial, either to the lower standard in *Stefanyk* or the higher standard in *Whissell*").

[242] Karabus & Tjaden, "The Impact of Hryniak v. Maudlin on Summary Judgment in Canada One Year Later", 44 Advoc. Q. 85, 90 (2015).

[243] Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 461 (2004).

[244] *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 152/98.

[245] It is important to keep in mind that with the enactment the *Alberta Rules of Court Amendment* (Alta. Reg. 41/2014) there were new appeal rules in force September 1, 2014. Rule 14.5(1)(b) provides that a party could only appeal a

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D. The Future of Part 7 of the *Alberta Rules of Court*

[172] The Rules of Court Committee has indicated that it is considering Division 3 of Part 7 of the *Alberta Rules of Court* – summary trials – so that this option may become "a more efficient way of resolving disputes".[246]

[173] This is a timely and worthwhile project.

[174] In discharging this task, the Rules of Court Committee will, no doubt, take into account the enhanced role *Weir-Jones* assigns to the summary judgment protocol – Division 2 of Part 7.

[175] The current summary judgment protocol now shares one of the key components of a trial. A summary judgment adjudication may determine contested material facts. Justice Slatter, in *Weir-Jones*, held that "[s]ummary judgment is not limited to cases where the [material] facts are not in dispute" and invited adjudicators to "hear ... oral testimony" and decide factual controversies on a balance of probabilities.[247]

[176] At the same time, our review of the several hundred summary judgment cases decided in the 1,000-day period commencing August 20, 2017 – Schedules A and B – suggests that the inherent conservatism of most adjudicators makes them reluctant to resolve disputes that contain contested material facts.[248] Not one judge heard oral testimony. And many expressly declared that the absence of an incontrovertible factual foundation precluded them from resolving the dispute.[249]

[177] The Rules of Court Committee may wish to keep this on-the-ground reality in mind when considering the framework for an effective nonstandard trial protocol.[250]

"pre-trial decision directing adjournments, time periods or time limits" with permission. An order dismissing a summary judgment application, while a pre-trial decision, is not a decision relating to "adjournment, time periods or time limits". It follows that a party wishing to appeal an order dismissing a summary judgment application does not need permission to appeal. A party whose interests were adversely affected by summary judgment has a right to appeal under rule 14.4(1) of the *Alberta Rules of Court*: "Except as otherwise provided, an appeal lies to the Court of Appeal from the whole or any party of a decision of a Court of Queen's Bench judge sitting in court or chambers ...".

[246] Rules of Court Committee, Request for Comments 2020-1 Summary Trials 1 (2020).

[247] 2019 ABCA 49, ¶¶ 16, 21 & 47; 442 D.L.R. 4th 9, 40, 41 & 50.

[248] R. Susskind, Online Courts and the Future of Justice 4 (2019) ("By disposition, ... [lawyers and judges] are often conservative and risk-averse").

[249] Supra notes 234 & 238.

[250] See Heise, "Following Data and a Giant: Remembering Ted Eisenberg", 100 Cornell L. Rev. 8, 9 (2014) ("Ted [Professor Eisenberg of Cornell Law School] ... encouraged me to continue to 'trust and follow the data, wherever they might lead you'. He went on to note that 'quality data, careful methods, and an appropriate research design will invariably yield an interesting paper'. The key, Ted repeated for emphasis was 'to simply follow the data'").

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[178] We agree that Part 7 has great potential and present our views on the practical consequences of the resistance of summary judgment adjudicators to resolve factual controversies.

[179] In short, for Part 7 to achieve its full potential, Division 3 – summary trials – must be an attractive option from the perspective of both litigants[251] and judges.

[180] Part 7 of the *Alberta Rules of Court* presents three separate protocols – trial of a question or issue, summary judgment, and summary trial – that are designed to reduce the amount of time and cost needed to resolve a proceeding commenced under the *Alberta Rules of Court*.

[181] The underlying premise of Part 7 is that the features a dispute displays may determine the parts of the litigation spectrum that must be accessed to fairly and accurately resolve it.[252] The corollary of this is that some disputes may be fairly and accurately adjudicated without accessing all the discrete stages of the procedural spectrum[253] or limiting the use a party may make of a discrete litigation stage. An example of the latter condition is a time limit on the questioning process.[254]

[182] A large number of commercial disputes are resolved by private arbitrators in an abbreviated dispute resolution process. This dispute resolution process accords the parties little more than an opportunity to present witnesses and cross-examine their adversaries' witnesses and make written or oral argument or both.[255] And this system works. The disputants, as a rule, are

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[251] Rules of Court Committee, Request for Comments 2020-1 Summary Trials 2 ("Lawyers are not in the habit of holding summary trials").

[252] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 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"). See R. Susskind, Online Courts and the Future of Justice 6 (2019) ("Online judging is not appropriate for all cases but its advocates claim it is well-suited to many low value disputes that current courts struggle to handle efficiently").

[253] *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 56; 35 R.P.R. 5th 105, 126 ("Most legal systems recognize that there is no reason to accord every party to an action full access to all stages of the litigation spectrum".); *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") & *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 27; 587 A.R. 16, 26 ("the purpose of the *Rules of Court* is to provide a means by which claims can be fairly and justly resolved ... by a court process in a timely and cost effective manner").

[254] See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 76.04(1) ("The following are not permitted in an action under this Rule: 1. Examination for discovery by written questions and answers under Rule 35").

[255] J. Casey, Arbitration Law of Canada: Practice and Procedure 237 (3d ed. 2017) ("The strength of the arbitral process is the ability to tailor the procedure to the dispute at hand. A skilled arbitrator can … help the parties devise a process that cuts to the core of the dispute, but maintains the essential elements of fairness and due process") & D. Sutton, J. Gill, Q.C., & M. Gearing, Q.C., Russell on Arbitration 242-43 (24th ed. 2015) ("The parties may prefer a quick and cheap resolution of their dispute to a slow, expensive solution, and may be prepared, up to a point, to bear any consequent cutting down of the opportunities to put their case across. At one extreme, the procedure in an

satisfied that they are fairly heard and accept the outcome as the product of a rational process. The fact that they are willing to return to the private forum is the best proof that they are satisfied with the protocol.

[183] But some disputes are of such a nature that the parties must be allowed to access every procedural stage that the civil process offers and make unlimited use of it to ensure that justice is done. Disputes on complex material facts and those in which one or both of the parties do not abide by the rules or court orders[256] are two obvious examples of this type of dispute.

[184] The crucial questions are these.

[185] What are the stages of the civil process that a dispute must pass through to be fairly and accurately assessed?

[186] Who is entitled to make that decision? The litigators or the courts?

[187] And when should that decision be made?

[188] Historically, litigants made most of the important litigation decisions and determined individually the stages of the civil process that a litigant would utilize and when.[257]

[189] That is not the case anymore.

[190] Our *Alberta Rules of Court*[258] now assign the courts a major role in determining the pace of litigation and the stages of the litigation process that a party may access.[259]

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arbitration may be very similar to that applicable to proceedings in the larger and more complex cases that come before the court, with full oral hearings, strict adherence to the rules of evidence, pleadings, extensive disclosure of documents, and factual and expert witnesses. At the other extreme, it may be agreed that the tribunal should decide the dispute on the basis of a limited range of documents, with no hearings, pleadings or submissions (oral or written). Between these extremes procedures may be modified or mixed as desired").

[256] E.g., *Dreco Energy Services Ltd. v. Wenzel*, 2006 ABQB 356, ¶ 41; 399 A.R. 166, 177 ("I conclude ... that the destruction of these computer files was intentional and deliberate. The Defendants gave undertakings to provide computer records. There was a Court Order ... that required these records be produced by May 12, 2004. The records were not produced. Instead, they were destroyed when, after February 27, 2004 the assets of KW Downhole Tools Inc. were sold to Wenzel Downhole Tools Ltd. ... . I find that the purpose for their destruction was to destroy evidence which would have been relevant and admissible in these proceedings").

[257] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 91; 91 C.P.C. 7th 73, 111 per Wakeling, J.A. ("Common law civil procedure is based on the adversarial system that places some limits on the role of the judiciary and values party autonomy. Under traditional common law regimes, the parties make many important litigation decisions").

[258] Alta. Reg. 124/2010.

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[191] We are satisfied that many of the important procedural decisions should be made at the outset of the litigation. Part 4 of the *Alberta Rules of Court* deals with the management of litigation and provides a mechanism for the creation of litigation plans.

[192] Parties to a complex case must have a litigation plan. If they cannot agree on its components, the court may stipulate them.[260] In the absence of a compelling reason, courts should construct one when asked to do so.

[193] While the parties to a standard case are not obliged to work under the terms of a litigation plan, they have the option to construct one or ask a court to do it for them if they cannot agree.[261] Again, a court should have a very good reason before declining to accede to such a request.

[194] In our opinion, a robust case management system is the protocol that has the greatest potential to generate resolutions at the earliest possible stage of the litigation spectrum and at the lowest possible cost.[262] We are familiar with other jurisdictions that have authorized courts to compel litigants to move through the litigation process at a stipulated rate and reaped the benefits associated with close control of the process.[263]

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[259] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 99; [2017] 7 W.W.R. 343, 372 ("The court has the jurisdiction to ensure that litigants do not abuse their rights and unjustifiably adversely affect the interests of their adversaries") & *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 92; 91 C.P.C. 7th 73, 111-12 ("The judicial branch, as the steward of valuable public resources, attempts to put those resources to their highest and best use. They should not be squandered on actions that are not moved along in accordance with the rules of court or court order").

[260] *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 4.5 & 4.6.

[261] Id. r. 4.4.

[262] See *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 1.4(1) & (2) (U.K.) ("(1) The court must further the overriding objective by actively managing cases ... (2) Active case management includes ... (g) fixing time tables or otherwise controlling progress of the cases"); A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 19 (3d ed. 2013) ("The court is entrusted with the task of actively managing cases"); *Department of Transport v. Chris Smaller (Transport) Ltd.*, [1989] 1 All E.R. 897, 903 (H.L.) per Lord Griffiths ("I ... recommend a radical overhaul of the whole civil procedural process and the introduction of court controlled case management techniques designed to ensure ... [that litigation] proceeds in accordance with a timetable as prescribed by rules of court or as modified by a judge"); *Trial Court Delay Reduction Act*, Cal. Government Code § 68607 (West 2018) ("In accordance with this article and consistent with statute, judges shall have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action") & Superior Court of California, County of Santa Clara, 2018-2019 Annual Report 12 ("Santa Clara County Superior Court's complex civil litigation program manages complex cases more efficiently and effectively. Complex cases benefit from specialized and long-term case management techniques, including identification of discrete issues for discovery. The Court uses issue-related and phased discovery, identification of discrete issues for resolution through dispositive motions or bifurcated trials, and settlement techniques").

[263] E.g., Judicial Council of California, 2019 Court Statistics Report Statewide Caseload Trends 2008-09 Through 2017-18, Appendix F.

[195] A modern civil procedure model must offer a variety of dispute resolution options to its users and adjudicators.

[196] This is the role Part 7 of the *Alberta Rules of Court* plays.

[197] It features three distinct protocols that if used effectively will achieve the goals set out in the foundational rules – the prompt resolution of disputes at the least expense in a fair manner.

[198] The first is a trial of a particular question or issue.

[199] Part of rule 7.1(1) follows:

> 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 a determination of a question or issue substantially disposes of a claim or makes the trial of an issue unnecessary, it may
>
> …
>
> (b) give judgment on all or part of a claim and make any order it considers necessary,
>
> (c) make a determination on a question of law, or
>
> (d) make a finding of fact.

[200] We are content with one observation.

[201] This provision is invoked less frequently than it should be.

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[202] *Gablehouse v. Borza*,[264] a personal injury action, demonstrates the rule's utility.

[203] A Dodge van driven by an employee of the van's lessee collided with the plaintiff causing the plaintiff catastrophic injuries. Derrick Dodge Ltd. was the lessor. Just before the collision the lessee had mailed to the lessor a cheque that once processed would oblige the lessor to transfer title to the lessee. The lease provided that title to the van would not pass to the lessee until the lessee paid the purchase price in full. The plaintiff sued Derrick Dodge, the van's lessor and owner, the lessee and the employee of the lessee. Invoking the postal acceptance rule, Derrick Dodge took the position that it was not the van's owner at the time of the collision. Was it the owner and vicariously responsible for the negligence of the lesses's employee? Counsel for the plaintiff and Derrick Dodge asked the Court of Queen's Bench, in a pre-trial application, to determine whether Derrick Dodge was the van's owner at the time of collision. The Court of Queen's Bench found that Derrick Dodge was the van's owner and the Court of Appeal dismissed Derrick Dodge's appeal. This process brought the case to a close, as Justice Côté explained:[265]

> Just before the trial date, all parties in the suit limited its issues to one. They asked the Court to rule on that one issue in special chambers. The question is whether the lease by the appellant to the employer was still in force at the time of the collision, and whether the appellant lessor was still the owner or deemed owner of the van. A Pierringer settlement also agreed that the driver and employer were negligent and responsible for the collision, and would pay the injured respondent $1,000,000. If found still the van owner, the appellant lessor agreed then to pay an additional $900,000 to the respondent.

[204] The summary trial portion of Part 7 also has great potential. But unless the impediments that currently dissuade lawyers from utilizing it[266] are either ameliorated or removed, its potential will never be achieved.

[205] An ideal summary trial model allows a case management judge to select from a list of options those that are suitable for a particular dispute. The menu may consist of specific limitations on the questioning stage, the mode for the presentation of evidence and the time allotted for the presentation of evidence and oral argument.

[206] The Ontario *Rules of Civil Procedure* contains a simplified procedure for a class of stipulated claims – generally under $100,000 – that incorporates limitations on the normal civil process that may be desirable if adopted in a modified form.

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[264] *Gablehouse v. Borza,* 2011 ABCA 102; 333 D.L.R. 4th 689, aff'd, 2010 ABQB 294; 72 B.L.R. 4th 198.

[265] 2011 ABCA 102, ¶5; 333 D.L.R. 4th 689, 691-92.

[266] Rules of Court Committee, Request for Comments 2020-1 Summary Trials 2 (2020) ("Lawyers are not in the habit of holding summary trials").

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[207] If the rulemakers build a new summary trial procedure that is attractive to litigants, they, no doubt, will use it. It will save them money and conclude actions earlier than otherwise would be the case.

[208] A revitalized summary trial protocol may cause the Rules of Court Committee to reconsider the features of summary judgment. It would not make a lot of sense to have two components of Part 7 that are virtually the same.

E. Application of the Governing Principles to this Case

[209] The chambers judge decided this case on December 7, 2018.

[210] He did not have the benefit of the *Weir-Jones* judgment and did not apply the *Weir-Jones* standard. Instead of asking whether he could decide the facts on a balance of probabilities, he considered whether the ultimate disposition if there was a trial was obvious. The chambers judge said it was not obvious: "I cannot agree that a finding of no negligence on the part of the defendant is so simple, so direct and so straight forward".[267]

[211] It is "possible to fairly resolve the dispute on a summary basis".[268]

[212] The facts and the law are incontrovertible.

[213] A trial will not produce a more complete factual record than already exists. Counsel for the Medicine Hat School District conceded for the purpose of this application that the sidewalk was slippery before the school custodian sanded it.

[214] The unfortunate accident occurred at around 8:45 a.m. A chinook was blowing in. The air temperature was around the freezing point and warming. The sidewalk was slippery. The custodian sanded it while Ms. Hannam was walking behind him. She slipped.

[215] Under the circumstances, there is nothing more the Medicine Hat School District could or should have done to make the sidewalk any safer for Ms. Hannam and other sidewalk users.[269]

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[267] Appeal Record F5: 34-35.

[268] *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2019 ABCA 49, ¶ 47; 442 D.L.R. 4th 9, 50. The chambers judge decided this case on December 7, 2018, before the Court of Appeal released *Weir-Jones*. He did not apply the *Weir-Jones* test.

[269] See *Rogal v. Stonefield (Fort Saskatchewan) Gp Ltd.*, 2018 ABQB 270, ¶ 15 (Master Schlosser) ("There is nothing on the record to show that the defendants were negligent or breached their duty under the *Occupiers' Liability Act*. In fact, the accident is equally well explained, or perhaps better explained, by momentary inattention on the part of the Plaintiff").

[216] The Medicine Hat School District was neither negligent nor in breach of its duty under the *Occupiers' Liability Act*.[270]

[217] Ms. Hannam's case has no merit. Summary judgment is the appropriate remedy.

VII. Conclusion

[218] The appeal is allowed. The defendant's application for summary dismissal is granted.

Appeal heard on September 12, 2019

Memorandum filed at Calgary, Alberta
this day of September, 2020

Wakeling J.A.

Feehan J.A.

[270] R.S.A. 2000, c. O-4.

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Schedule A[271]
Final Summary Judgment Dispositions
in the pre *Weir-Jones* Period Commencing
August 20, 2017 and Ending February 5, 2019[272]

No.	Case	Application	Provincial Court	Master[273]	Queen's Bench[274]	Court of Appeal
1	*1336868 Alberta Ltd. v. Romspen Investment Corp.*	dismissal		granted 2018 ABQB 824		
2	*1402445 Alberta Ltd. v. 1722353 Alberta Ltd.*	judgment		denied unreported	denied 2018 ABQB 546	
3	*1808882 Alberta Ltd. v Moderno Ventures Ltd.*	judgment		denied unreported	granted 2018 ABQB 885	
4	*330626 Alberta Ltd. v. Ho & Laviolette Engineering Ltd.*	dismissal			denied 2018 ABQB 478	
5	*898294 Alberta Ltd. v. Riverside Quays Limited Partnership*	judgment			denied unreported	granted 2018 ABCA 281
6	*Aircraft Finance Services Inc. v. Miller*	dismissal		denied 2018 ABQB 1005		
7	*Alberta Finance & Mortgage Corp. v. Prasad*	judgment		granted unreported	denied 2018 ABQB 453	denied 2019 ABCA 4
8	*Alberta Finance & Mortgage Corp. v. Bruce Steel Erectors*	judgment		granted unreported	denied 2018 ABQB 453	
9	*Amik Oilfield Equipment & Rentals Ltd. v. Beaumont Energy Inc.*	judgment		granted 2016 ABQB 192	granted 2017 ABQB 427	granted 2018 ABCA 88

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[271] This schedule is organized alphabetically.

[272] This period covers 536 days.

[273] There are undoubtedly unreported decisions of which we are not aware.

[274] There are undoubtedly unreported decisions of which we are not aware.

No.	Case	Application	Provincial Court	Master[273]	Queen's Bench[274]	Court of Appeal
10	*Angus Partnership Inc v. Salvation Army (Governing Council)*	dismissal		denied unreported	denied 2017 ABQB 568	granted 2018 ABCA 206
11	*Arc Line Construction Ltd. v. Smith Trucking Services (1976) Ltd.*	judgment		denied 2018 ABQB 448		
12	*Arc Line Construction Ltd. v. Smith Trucking Services (1976) Ltd.*	dismissal		denied 2018 ABQB 448		
13	*Armstrong v. United Alarm Systems Inc.*	dismissal	granted 2017 ABPC 242			
14	*Armstrong v. United Alarm Systems Inc.*	judgment	granted 2017 ABPC 242			
15	*Arndt v. Banerji*	dismissal			granted unreported	granted 2018 ABCA 176
16	*Ashlar Developments Inc. v. Barakat Industries Ltd.*	judgment		denied 2018 ABQB 67		
17	*Ashlar Developments Inc. v. Barakat Industries Ltd.*	dismissal		denied 2018 ABQB 67		
18	*ATM Cash Systems (Canada) Ltd v. Vanshaw Enterprises Ltd.*	judgment		denied 2017 ABQB 622		
19	*Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*	judgment		denied unreported	denied 2018 ABQB 626	
20	*Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*	dismissal		denied unreported	denied 2018 ABQB 626	
21	*Bacexha Ltd v. Karam*	dismissal		granted 2018 ABQB 1020		
22	*Bank of Nova Scotia v. Graves*	judgment		granted 2018 ABQB 107		
23	*Barrie v. Quickwrap Canada Ltd.*	dismissal	denied 2018 ABPC 205			
24	*Beal v. Vermillion-River (Municipality)*	dismissal		denied 2017 ABQB 437	denied 2018 ABQB 435	

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No.	Case	Application	Provincial Court	Master[273]	Queen's Bench[274]	Court of Appeal
25	*Biocomposites Group Inc. v. 0975138 BC Ltd. (DH Manufacturing)*	judgment			denied 2018 ABQB 63	
26	*Birss v. Tien Lung Taekwon-Do Club*	dismissal		denied 2017 ABQB 518		
27	*Brio-Tech Inc. v. Western Pressure Controls (2005) Ltd.*	judgment			denied 2018 ABQB 500	
28	*Brio-Tech Inc. v. Western Pressure Controls (2005) Ltd.*	judgment			granted 2018 ABQB 500	
29	*Brio-Tech Inc. v. Western Pressure Controls (2005) Ltd.*	judgment			denied 2018 ABQB 500	
30	*Bussey Seed Farms Ltd v. DBC Contractors*	judgment		granted 2017 ABQB 598		
31	*Cardinal v. Alberta Motor Association Insurance Co.*	dismissal		granted unreported	denied 2017 ABQB 487	granted 2018 ABCA 69
32	*Caryk v. Alberta*	dismissal		granted 2017 ABQB 737		
33	*CCS Corp. v. Secure Energy Services Inc.*	dismissal			granted 2016 ABQB 582	
34	*CCS Corp. v. Secure Energy Services Inc.*	dismissal			denied 2016 ABQB 582	
35	*Champagne v. Sidorsky*	dismissal			granted 2017 ABQB 557	granted 2018 ABCA 394
36	*Clover Four Farm Ltd. v. Alberta Turkey Producers*	dismissal	granted 2018 ABPC 103			
37	*Coffey v. Nine Energy Canada Inc.*	judgment		denied 2017 ABQB 417	denied 2018 ABQB 898	
38	*Coffey v. Nine Energy Canada Inc.*	judgment			denied 2018 ABQB 898	

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No.	Case	Application	Provincial Court	Master[273]	Queen's Bench[274]	Court of Appeal
39	*Cole v. Brower*	dismissal			granted 2017 ABQB 766	
40	*Cole v. Brower*	dismissal			granted 2017 ABQB 766	
41	*Correa v. 368753 Alberta Ltd.*	dismissal		denied unreported	denied 2018 ABQB 938	
42	*Da Silva v. River Run Vistas Corp.*	dismissal			granted 2018 ABQB 869	
43	*Dion v. Security National Insurance Co.*	dismissal	denied 2018 ABPC 242			
44	*Dion v. Security National Insurance Co.*	dismissal	granted 2018 ABPC 242			
45	*Eberle v. Sunhills Mining Ltd. Partnership*	judgment		granted 2018 ABQB 389		
46	*Edmonton Kenworth Ltd. v. Kos*	judgment			denied 2018 ABQB 439	
47	*Edmonton Kenworth Ltd. v. Kos*	dismissal			denied 2018 ABQB 439	
48	*Ens v. Evans*	dismissal		granted 2018 ABQB 139		
49	*Environmental Refuelling Systems Inc. v. Dougan*	judgment			granted 2018 ABQB 208, ¶ 74	
50	*Environmental Refuelling Systems Inc. v. Dougan*	judgment			denied 2018 ABQB 208, ¶ 74	
51	*Factors Western Inc v. Point Design Homes Ltd.*	judgment		denied 2018 ABQB 1004		
52	*Fyffe v. Wadhwa*	dismissal		denied unreported	denied 2018 ABQB 919	

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No.	Case	Application	Provincial Court	Master[273]	Queen's Bench[274]	Court of Appeal
53	*Geophysical Service Incorporated v. Murphy Oil Co.*	dismissal			granted 2017 ABQB 464	granted 2018 ABCA 380
54	*Geophysical Service Inc. v. Encana Corp.*	judgment			granted 2017 ABQB 466, ¶ 62	denied 2018 ABCA 384
55	*Geophysical Service Inc. v. Encana Corp.*	judgment			denied 2017 ABQB 466	denied 2018 ABCA 384
56	*Geophysical Service Inc. v. Encana Corp.*	dismissed			granted 2017 ABQB 466, ¶¶ 89 & 96	granted 2018 ABCA 384
57	*Intact Insurance Co. v. NCC Dowland Construction Ltd.*	judgment		granted unreported	granted 2018 ABQB 381	
58	*Chevalier Estate v. Chevalier Geo-Con Ltd.*	dismissal			denied 2019 ABQB 190	
59	*Chevalier Estate v. Chevalier Geo-Con Ltd.*	judgment			denied 2019 ABQB 190	
60	*JS v. Alberta*	dismissal		denied 2017 ABQB 231	granted 2018 ABQB 129	
61	*Karagic v. Rajan*	dismissal			denied 2018 ABQB 910	
62	*Kelro Pump and Mechanical Ltd. v. Aqua Terra Water Management Inc.*	Judgment		granted 2018 ABQB 515		
63	*Khalil v. Durant*	judgment		granted 2018 ABQB 17	granted 2018 ABQB 473	
64	*Lay v. Lay*	dismissal			granted 2017 ABQB 29	granted 2019 ABCA 21
65	*Lee v. Hache*	dismissal		granted 2018 ABQB 88		
66	*LNR v. Moutview Pharma Corp.*	dismissal		denied 2017 ABQB 137	denied 2017 ABQB 730	

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No.	Case	Application	Provincial Court	Master[273]	Queen's Bench[274]	Court of Appeal
67	*Montague v. Pelletier*	dismissal			denied 2018 ABQB 1047	
68	*Mulholland v. Rensonnet*	judgment			denied unreported	denied 2018 ABCA 24
69	*Nelson v. City of Grande Prairie*	dismissal		denied 2018 ABQB 537		
70	*O'Brien v. Akita Drilling Ltd.*	judgment			denied 2018 ABQB 1062	
71	*O'Brien v. Akita Drilling Ltd.*	dismissal			denied 2018 ABQB 1062	
72	*O'Chiese Energy Ltd. Partnership v. Bellatrix Exploration Ltd.*	dismissal		granted 2019 ABQB 53		
73	*Omnus Investments Ltd. v. Rethink and Diversify Securities Inc.*	judgment		granted 2018 ABQB 868		
74	*Paraniuk v. Pierce*	dismissal			granted 2018 ABQB 1015	
75	*Parent v. Northbridge General Insurance Corp.*	judgment		denied unreported	denied 2018 ABQB 263	
76	*Precision Drilling Canada Ltd. Partnership v. Yongarra Resources Ltd.*	judgment		granted 2015 ABQB 433	granted 2016 ABQB 365	denied 2017 ABCA 378
77	*Prestige Granite & Marble Inc. v. Maillot Homes Inc.*	judgment		denied unreported	denied 2018 ABQB 1040	
78	*Prestige Granite & Marble Inc. v. Maillot Homes Inc.*	dismissal		granted unreported	denied 2018 ABQB 1040	
79	*Rahall v. Intact Insurance Co.*	dismissal	granted 2019 ABPC 11			
80	*Rainmakers Marketing Group Inc. v. AS America, Inc.*	judgment		granted		
81	*Rainmakers Marketing Group Inc. v. AS America, Inc.*	dismissal		denied 2017 ABQB 624		

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No.	Case	Application	Provincial Court	Master[273]	Queen's Bench[274]	Court of Appeal
82	*Rajotte v. National Bank Financial Inc.*	judgment		granted 2017 ABQB 697		
83	*Rajotte v. National Bank Financial Inc.*	dismissal		denied 2017 ABQB 697		
84	*Remple v. Shawcross*	dismissal		denied unreported	granted 2018 ABQB 582	
85	*Rogal v. Stonefield (Fort Saskatchewan) Gp Ltd.*	dismissal		granted 2018 ABQB 270		
86	*Roman Catholic Bishop of the Diocese of Calgary v. Schuster*	judgment		denied 2017 ABQB 230	denied 2018 ABQB 372	denied 2019 ABCA 64
87	*Schell v. Schell*	dismissal			denied 2018 ABQB 991	
88	*Snyder v. Snyder*	judgment			granted 2018 ABQB 318	
89	*SSQ Insurance Company Inc. v. Sutherland*	judgment		denied 2018 ABQB 934		
90	*Stackard v. 1256009 Alberta Ltd.*	judgment			denied 2018 ABQB 924	
91	*Steer v. Mawji*	judgment		denied 2017 ABQB 762		
92	*Stefanyk v. Sobeys Capital Inc.*	dismissal		granted unreported	denied 2017 ABQB 402	granted 2018 ABCA 125
93	*Stoney Tribal Council v. Canadian Pacific Railway*	dismissal			granted 2016 ABQB 193	granted 2017 ABCA 432
94	*Templanza v. Ford*	dismissal			granted 2018 ABQB 168	
95	*Terry v. Knysh*	judgment		denied 2017 ABQB 716		

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No.	Case	Application	Provincial Court	Master[273]	Queen's Bench[274]	Court of Appeal
96	*Tesla Exploration Ltd. v. Encana Corp.*	judgment		granted 2018 ABQB 286		
97	*Tesla Exploration Ltd. v. Encana Corp.*	dismissal		denied 2018 ABQB 286		
98	*Tesla Exploration Ltd. v. Encana Corp.*	judgment		denied 2018 ABQB 286		
99	*Toole v. Northern Blizzard Resources Inc.*	judgment		granted 2017 ABQB 760		
100	*University of Lethbridge v. University of Lethbridge Faculty Ass'n*	dismissal			granted 2017 ABQB 556	
101	*Valayati v. Cheema*	dismissal		granted unreported	granted 2018 ABQB 1014	
102	*Valayati v. Cheema*	dismissal		denied unreported	denied 2018 ABQB 1014	
103	*Whissell Contracting Ltd. v. Calgary (City)*	judgment			denied 2017 ABQB 644	denied 2018 ABCA 204
104	*Woitas v. Tremblay*	dismissal		granted 2018 ABQB 588		
105	*Yuill v. Workers' Compensation Appeals Comm'n*	dismissal			granted 2017 ABQB 523	

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Schedule B[275]
Final Summary Judgment Dispositions
in the Post *Weir-Jones* Period Commencing
February 6, 2019 and Ending July 23, 2020[276]

No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
1	*102 Street Developments Ltd. v. Derk's Formals Ltd.*	dismissal		denied unreported	denied 2019 ABQB 781	
2	*1332721 Alberta Inc v. Jenkins & Associates*	dismissal		denied unreported	denied 2020 ABQB 8	
3	*1490703 Alberta Ltd. v. Chahal*	dismissal		granted 2020 ABQB 33		
4	*Acden Environment Ltd. Partnership v. Environmental Metal Works Ltd.*	judgment		granted 2019 ABQB 659		
5	*Agriculture Financial Services Corp. v. Optilume Inc.*	judgment		denied unreported	denied 2020 ABQB 340	
6	*Agrium Inc v. Colt Engineering Corp.*	dismissal		denied 2019 ABQB 978		
7	*Alberta v. M.L.*	judgment	granted 2020 ABPC 28			
8	*Alberta v. Bassett*	dismissal			granted 2019 ABQB 759	
9	*Alberta v. Bassett*	dismissal			denied 2019 ABQB 759	

[275] This schedule was organized alphabetically. It includes decisions that were issued before February 6, 2019 if the ultimate decision is issued on or after February 6, 2019.

[276] This period covers 533 days.

[277] There are undoubtedly unreported decisions of which we are not aware.

[278] There are undoubtedly unreported decisions of which we are not aware.

No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
10	*Al-Ghamdi v. College and Association of Registered Nurses of Alberta*	dismissal			granted 2017 ABQB 685	granted 2020 ABCA 81
11	*Allnut v. Hudsons South Common Ltd.*	judgment		denied 2019 ABQB 143		
12	*Allnut v. Hudsons South Common Ltd.*	dismissal		denied 2019 ABQB 143		
13	*Andersen v. Canadian Western Trust Co.*	dismissal			denied 2019 ABQB 413	
14	*ATB Financial v. Coredent Partnership*	judgment			granted 2019 ABQB 680	
15	*Barclay v. Kodiak Heating & Air Conditioning Ltd.*	dismissal	granted unreported		granted 2019 ABQB 850	
16	*Belanger v. Western Ventilation Products Ltd.*	judgment		denied 2019 ABQB 571		
17	*Belanger v. Western Ventilation Products Ltd.*	dismissal		granted 2019 ABQB 571		
18	*Bentley v. Hooton*	judgment		granted 2019 ABQB 822		
19	*BF v. BF*	dismissal			granted 2019 ABQB 102	
20	*Bilous v. Tkachuk*	dismissal	granted 2019 ABPC 241			
21	*Bilous v. Henderson*	dismissal	granted 2019 ABPC 241			

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No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
22	*Blicharz v. Alberta Motor Association Insurance Co.*	judgment	denied 2019 ABPC 112			
23	*Bragg Creek Community Ass'n v. Tyco Integrated Fire & Security Canada Inc.*	dismissal		granted 2019 ABQB 226		
24	*Calfrac Well Services Ltd. v. Wilks Bros., LLC*	judgment			denied 2019 ABQB 340	
25	*Calfrac Well Services Ltd. v. Wilks Bros., LLC*	dismissal			denied 2019 ABQB 340	
26	*Calgary Fleet Maintenance Ltd. v. 1330425 Alberta Ltd.*	dismissal		granted 2019 ABQB 518		
27	*Cancarb Ltd. v. Ace Ina Insurance*	dismissal		granted 2019 ABQB 258		
28	*Canterra Custom Homes Ltd. v. Curtis Engineering Assoc. Ltd.*	dismissal		denied unreported	denied 2019 ABQB 425	denied 2020 ABCA 115
29	*Canterra Custom Homes Ltd. v. Curtis Engineering Associates Ltd.*	dismissal		denied unreported	granted 2019 ABQB 425	
30	*Clark Builders v. GO Community Centre*	dismissal		denied unreported	granted 2019 ABQB 706	
31	*Clifton Associates Ltd. v. Shelbra International Ltd.*	judgment		granted unreported	denied 2019 ABQB 536	
32	*Colby v. Interior Lift Truck Services Inc.*	dismissal			granted 2019 ABQB 915	
33	*Cole v. Marten-Morrison*	judgment		denied 2019 ABQB 311		

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No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
34	*Collins v. Pearce*	dismissal			granted 2019 ABQB 868	
35	*Columbos v. QuinnCorp Holdings Inc.*	judgment		granted 2019 ABQB 853		
36	*Condominium Corp. No. 0613782 v. Country Hills Landing Ltd. Partnership*	dismissal		granted 2020 ABQB 36		
37	*Condominium Plan No. 0213028 v. Pasero Corp.*	dismissal			denied 2019 ABQB 485	
38	*Costello v. Redcity Creative Agency Inc.*	judgment			denied 2019 ABQB 600	
39	*County of Vulcan v. Genesis Reciprocal Insurance Exchange*	dismissal		denied unreported	granted 2020 ABQB 93	
40	*County of Vulcan v. Genesis Insurance Exchange*	judgment		denied	denied 2020 ABQB 93	
41	*Dezotell Holdings Ltd. v. St. Jean*	dismissal		granted unreported	granted 2019 ABQB 286	
42	*DH v. Woodson*	dismissal			denied 2020 ABQB 367	
43	*Ethos Engineering Inc. v. Fortis LGS Structures Inc.*	judgment		granted 2019 ABQB 141		
44	*Farm Credit Canada v. Pacific Rockyview Enterprises Inc.*	judgment		denied unreported	granted 2020 ABQB 357	
45	*Federowich v. Alberta Transportation*	dismissal	granted 2020 ABPC 63			

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No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
46	*Fitzpatrick v. College of Physical Therapists of Alberta*	dismissal		granted 2017 ABQB 453	granted 2018 ABQB 989	granted 2020 ABCA 164
47	*Fitzpatrick v. College of Physical Therapists of Alberta*	dismissal		denied 2017 ABQB 453	granted 2018 ABQB 989	granted 2020 ABCA 164
48	*Freeman v. Koolman*	judgment		denied 2019 ABQB 857		
49	*Freeman v. Koolman*	dismissal		denied 2019 ABQB 857		
50	*Geophysical Service Inc. v. Falkland Oil and Gas Ltd.*	dismissal			granted 2019 ABQB 162	granted 2020 ABCA 21
51	*Gill v. Singh*	judgment			granted 2019 ABQB 819	
52	*Goodvin v. Penson*	dismissal		granted 2019 ABQB 867		
53	*Gouthro v. Kubicki*	dismissal		denied 2020 ABQB 205		
54	*Grainger v. Pentagon Farm Centre Ltd..*	judgment		granted 2019 ABQB 445		
55	*H2S Solutions Ltd. v. Tourmaline Oil Corp.*	dismissal			granted unreported	granted 2019 ABCA 373
56	*Hierath v. Shock*	judgment		denied 2020 ABQB 35		
57	*HOOP Realty Inc. v. Emery Jamieson LLP*	dismissal		granted 2018 ABQB 276	granted unreported	granted 2020 ABCA 159
58	*HOOP Realty Inc. v. Dentons Canada*	dismissal		denied 2018 ABQB 276	denied unreported	denied 2020 ABCA 159

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No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
59	*HPWC 9707 110 Street Ltd. Partnership v. Funds Administrative Service Inc.*	judgment			granted 2019 ABQB 167	
60	*James L. Dixon Professional Corp. v. Amundsen*	dismissal	granted 2019 ABPC 35			
61	*Kayler v. GEF Seniors Housing of Greater Edmonton Foundation*	dismissal	granted 2019 ABPC 323			
62	*Kostic v. Thom*	dismissal			granted 2020 ABQB 324	
63	*Kozina v. Redlick*	dismissal		denied 2019 ABQB 749		
64	*Kuzoff v. Talisman Peru BV Sucursal del Peru*	dismissal		granted unreported	granted 2020 ABQB 111	
65	*L. Egoroff Transport Ltd. v. Green Leaf Fuel Distributors Inc.*	dismissal		granted 2020 ABQB 360		
66	*L. Egoroff Transport Ltd. v. Green Leaf Fuel Distributors Inc.*	dismissal		granted 2020 ABQB 360		
67	*Lam v. University of Calgary*	dismissal		granted 2019 ABQB 923		
68	*La Prairie Works Inc. v. Ledor Alberta Ltd.*	dismissal			granted 2019 ABQB 701	
69	*Lewandowska v. Vander Woude*	dismissal	granted 2019 ABPC 115			
70	*Love v. Generoux*	dismissal		denied 2020 ABQB 71		

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No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
71	*Love v. Generoux*	judgment		denied 2020 ABQB 71		
72	*Lovig v. Soost*	judgment			denied 2019 ABQB 498	denied 2020 ABCA 66
73	*Lynk v. Co-Operators General Insurance Co.*	dismissal			denied 2019 ABQB 417	
74	*Malkhassian Estate v. Scotia Life Insurance Co.*	judgment			denied 2020 ABQB 173	
75	*Malmberg v. Boyd Estate*	dismissal		granted 2020 ABQB 80		
76	*Malmberg v. Boyd Estate*	judgment		denied 2020 ABQB 80		
77	*Mehak Holdings Ltd. v. BBQ To-Night Ltd.*	dismissal		granted 2019 ABQB 556		
78	*Milota v. Momentive Speciality Chemicals Canada, Inc.*	dismissal		denied 2019 ABQB 117		
79	*Minex Minerals Ltd. v. Walker*	dismissal		granted 2019 ABQB 460		
80	*Moore's Industrial Service Ltd. v. Kugler*	dismissal			denied unreported	denied 2019 ABCA 178
81	*Mudrick Capital Management LP v. Wright*	dismissal			granted 2019 ABQB 662	
82	*Muirfield Village Ltd. v. Borsuk*	dismissal		granted 2019 ABQB 160		
83	*Muth Estate v. Liesch*	judgment			denied 2019 ABQB 922	

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No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
84	*Nadeau v. Neilson*	judgment		denied 2019 ABQB 810		
85	*Nelson & Nelson v. Condominium Corp. No. 0013187*	dismissal			denied 2019 ABQB 426	
86	*Nelson v. City of Grande Prairie*	dismissal		granted 2019 ABQB 897		
87	*North Bank Potato Farms Ltd. v. Canadian Food Inspection Agency*	dismissal		denied 2015 ABQB 653	granted 2018 ABQB 505	granted 2019 ABCA 344
88	*Ontrea Inc. v. De Beers Diamond Jewellers (Canada) Ltd.*	judgment		granted 2019 ABQB 926		
89	*Owners Condominium Plan No. 7721985 v. Breakwell*	judgment		denied unreported	granted 2019 ABQB 674	
90	*Owners Condominium Plan No. 7721985 v. Breakwell*	dismissal		granted unreported	denied 2019 ABQB 674	
91	*P & C Law Firm Management Inc. v. Sabourin*	judgment		granted unreported	denied 2019 ABQB 537	
92	*Panther Sports Medicine & Rehabilitation Centres Inc. v. Adrian G. Anderton Prof. Corp.*	judgment		denied 2019 ABQB 599	denied 2019 ABQB 973	
93	*Petrogas Energy Corp. v. ACCEL Energy Canada Ltd.*	dismissal		granted 2019 ABQB 427		
94	*Plesa v. Richardson*	dismissal		granted unreported	granted unreported	denied 2019 ABCA 264
95	*PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*	dismissal			denied 2020 ABQB 6, ¶ 101	

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No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
96	*PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*	dismissal			granted 2019 ABQB 6, ¶¶ 327 & 369	
97	*Proline Pipe Equipment Inc. v. Provincial Rentals Ltd.*	judgment			denied 2019 ABQB 983	
98	*Raun v. Shumborski*	dismissal		denied unreported	denied 2019 ABQB 823	
99	*Re Rifco Inc.*	judgment			denied 2020 ABQB 366	
100	*Roberts v. Edmonton Northlands*	dismissal			denied 2019 ABQB 9	denied 2019 ABCA 229
101	*Rockyview Enterprises Inc. v. Clean Team Property Services Ltd.*	dismissal		denied 2017 Carswell Alta 3033	granted 2019 ABQB 807	
102	*Royal Bank of Canada v. Warionmor*	judgment		granted 2019 ABQB 419		
103	*Royal Bank of Canada v. Warionmor*	judgment		denied 2019 ABQB 419		
104	*Royal Camp Services Ltd. v. Sunshine Oilsands Ltd.*	judgment		granted unreported	granted 2019 ABQB 911	
105	*Rudichuk v. Genesis Land Development Corp.*	judgment		granted 2017 ABQB 285	denied 2019 ABQB 133	denied 2020 ABCA 42
106	*Sangha v. Sintra Engineering Inc.*	dismissal		granted 2019 ABQB 924		
107	*Scherle v. Treadz Auto Group Inc.*	dismissal			granted 2019 ABQB 987	

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No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
108	*Scotia Mortgage Corp. v. Meshkati*	judgment		denied unreported	granted 2019 ABQB 267	
109	*Sehic v. National Home Warranty Group Inc.*	dismissal		granted unreported	denied 2019 ABQB 955	
110	*Sewak Gill Enterprises Inc. v. Bedaux Real Estate Inc.*	judgment			granted 2018 ABQB 823	denied 2020 ABCA 125
111	*Simmie v. JRJ Concrete Ltd.*	judgment		denied unreported	granted 2019 ABQB 409	
112	*Smith v. Grant MacEwan University*	dismissal	granted 2019 ABPC 303			
113	*Smith v. John Doe*	dismissal			granted 2020 ABQB 59	
114	*Smith v. Uhersky*	judgment		granted 2019 ABQB 761		
115	*Sobey's Capital Inc. v. Whitecourt Shopping Centre (GP) Ltd.*	judgment			granted 2018 ABQB 517	granted 2019 ABCA 367
116	*Sonny's Trucking Ltd. v. Edmonton Kenworth Ltd.*	dismissal		denied 2019 ABQB 696		
117	*SSAB Inc. v. Generation Steel Inc.*	judgment		granted 2019 ABQB 380	granted 2020 ABQB 44	
118	*SSAB Inc. v. Generation Steel Inc.*	judgment		granted 2019 ABQB 380	denied 2020 ABQB 44	
119	*SSC North America, LLC v. Federkiewicz*	judgment		granted 2019 ABQB 391	denied 2020 ABQB 176	
120	*Stankovic v. 1536679 Alberta Ltd.*	judgment		granted unreported	granted unreported	denied 2019 ABCA 187

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No.	Case	Application	Provincial Court	Master[277]	Queen's Bench[278]	Court of Appeal
121	*Steer v. Chicago Title Insurance Co.*	judgment		denied 2018 ABQB 28	denied 2019 ABQB 318, ¶ 52	
122	*Steer v. Chicago Title Insurance Co.*	dismissal			granted 2019 ABQB 318, ¶ 53	
123	*Superior Energies Insulation Group Canada Inc. v. Aluma Systems Inc.*	dismissal		denied unreported	denied 2019 ABQB 166	
124	*TA v. Alberta*	dismissal			granted 2020 ABQB 97	
125	*Urban Square Holdings Ltd. v. Governali*	dismissal		granted 2020 ABQB 240		
126	*von der Ohe v. Porsche Cars Canada Ltd.*	dismissal	denied 2019 ABPC 46			
127	*Wage v. Canadian Direct Insurance Inc.*	dismissal		granted 2018 ABQB 352	denied 2019 ABQB 303	granted 2020 ABCA 49
128	*Wasylynuk v. Bouma*	dismissal			granted 2018 ABQB 159	granted 2019 ABCA 234
129	*West Edmonton Mall Property Inc. v. Proctor*	judgment			granted 2020 ABQB 161	
130	*Westpoint Capital Corp. v. Black & Assoc. Appraisal Inc.*	dismissal		granted 2019 Carswell Alta 1166		

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Schedule C
Global Review of the Outcome of Applications
in the Pre and Post *Weir-Jones* Period

	Before *Weir-Jones*		After *Weir-Jones*		Before and After	
Applications by plaintiffs for judgment	48	46%	48	37%	96	41%
Successful	18	*38%*	20	*42%*	38	*40%*
Unsuccessful	30	*63%*	28	*58%*	58	*60%*
Applications by defendants for dismissal	57	54%	82	63%	139	59%
Successful	32	*56%*	54	*66%*	86	*61%*
Unsuccessful	25	*44%*	28	*34%*	53	*39%*
Total applications by both plaintiffs and defendants	105	100%	130	100%	235	100%
Successful	50	*48%*	74	*57%*	124	*53%*
Unsuccessful	55	*52%*	56	*43%*	111	*47%*

Schedule D[279]
Applications Heard by Each Court Level
in the Pre and Post *Weir-Jones* Period

	Before *Weir-Jones*		After *Weir-Jones*		Before and After	
Provincial Court	8	4%	10	7%	18	5%
Masters	90	46%	49	35%	139	41%
Court of Queen’s Bench	79	41%	62	44%	141	42%
Court of Appeal	18	9%	19	14%	37	11%
Total	195	100%	140	100%	335	100%

[279] The number of applications recorded in Schedule D exceeds the number of applications listed in Schedules A and B. This is because more than one court may have determined the same dispute.

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Schedule E
Applications Heard by Provincial Court
in the Pre and Post *Weir-Jones* Period

Applications heard by Provincial Court	Before *Weir-Jones*		After *Weir-Jones*		Before and After	
By plaintiffs for judgment	1	13%	2	20%	3	17%
Successful	1	*100%*	1	*50%*	2	*67%*
Unsuccessful	0	*0%*	1	*50%*	1	*33%*
By defendants for dismissal	7	88%	8	80%	15	83%
Successful	5	*71%*	7	*88%*	12	*80%*
Unsuccessful	2	*29%*	1	*12%*	3	*20%*
Total	8	100%	10	100%	18	100%

Schedule F
Applications Heard by Masters
in the Pre and Post *Weir-Jones* Period

Applications heard by Masters	Before *Weir-Jones*		After *Weir-Jones*		Before and After	
By plaintiffs for judgment	42	47%	21	43%	63	45%
Successful	21	*50%*	10	*48%*	31	*49%*
Unsuccessful	21	*50%*	11	*52%*	32	*51%*
By defendants for dismissal	48	53%	28	57%	76	55%
Successful	19	*40%*	20	*71%*	39	*51%*
Unsuccessful	29	*60%*	8	*29%*	37	*49%*
Total	90	100%	49	100%	139	100%

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Schedule G
Applications Heard by the Court of Queen's Bench
in the Pre and Post *Weir-Jones* Period

Applications heard by Court of Queen's Bench	Before *Weir-Jones*		After *Weir-Jones*		Before and After	
By plaintiffs for judgment	32	41%	27	44%	59	42%
Successful	11	*34%*	11	*41%*	22	*37%*
Unsuccessful	21	*66%*	16	*59%*	37	*63%*
By defendants for dismissal	47	59%	35	56%	82	58%
Successful	25	*53%*	20	*57%*	45	*55%*
Unsuccessful	22	*47%*	15	*43%*	37	*45%*
Total	79	100%	62	100%	141	100%

Schedule H
Applications Heard by the Court of Appeal of Alberta
in the Pre and Post *Weir-Jones* Period

Applications heard by Court of Appeal	Before *Weir-Jones*		After *Weir-Jones*		Before and After	
By plaintiffs for judgment	9	50%	5	26%	14	38%
Successful	2	*22%*	1	*20%*	3	*21%*
Unsuccessful	7	*78%*	4	*80%*	11	*79%*
By defendants for dismissal	9	50%	14	74%	23	62%
Successful	9	*100%*	9	*64%*	18	*78%*
Unsuccessful	0	*0%*	5	*36%*	5	*22%*
Total	18	100%	19	100%	37	100%

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Schedule I
Review of Appeals
in the Pre and Post *Weir-Jones* Period

	Before *Weir-Jones*		After *Weir-Jones*		Before and After	
Applications with no appeals	143	73%	94	68%	237	71%
Applications with appeals	52	27%	46	32%	98	29%
To Court of Queen's Bench from Provincial Court	0	2%	1	2%	1	2%
Allowed	0	-	0	0%	0	0%
Dismissed	0	-	1	100%	1	100%
To Court of Queen's Bench from Master	34	65%	28	62%	62	64%
Allowed	11	32%	15	54%	26	42%
Dismissed	23	68%	13	46%	36	58%
To the Court of Appeal from Court of Queen's Bench	18[280]	35%	17[281]	38%	35	36%
Allowed	6	33%	4	24%	10	29%
Dismissed	12	67%	13	76%	25	71%
Total	195	100%	140	100%	335	100%

[280] This includes one decision confirming the Court of Queen's Bench of Alberta decision to allow an appeal against a decision of a Master (2019 ABCA 4), one decision denying an application after both the Court of Queen's Bench and a Master granted it (2017 ABCA 378), two decisions confirming the Master's decision after the Court of Queen's Bench set aside the Master's decision (2018 ABCA 69, 2018 ABCA 125), and two decisions dismissing the appeal and upholding the decision of both the Master and the Court of Queen's Bench (2018 ABCA 88 & 2019 ABCA 64).

[281] This includes three decisions confirming the Court of Queen's Bench of Alberta decision to allow an appeal against a decision of a Master (2019 ABCA 344, 2020 ABCA 42 & 2020 ABCA 164), one decision confirming the Master's decision after the Court of Queen's Bench set aside the Master's decision (2020 ABCA 125), two decisions denying an application after both the Court of Queen's Bench and a Master granted it (2019 ABCA 264 & 2019 ABCA 187), and four decisions dismissing the appeal and upholding the decision of both the Master and the Court of Queen's Bench (2020 ABCA 115, 2020 ABCA 159 for two applications & 2020 ABCA 164).

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O'Ferrall J.A. (dissenting):

[219] With respect, I would have dismissed the school district's appeal.

[220] I agree with much of what my colleagues have had to say about summary judgment in their well-reasoned, interesting and thoroughly-researched judgment but, strictly speaking, this case did not involve a summary judgment. It involved a denial of summary judgment where the governing principles may be nuanced.

[221] Rule 7.3(1)(a) of the *Alberta Rules of Court* provides that summary judgment may be given to a plaintiff when there is no defence to its claim. Rule 7.3(1)(b) provides that summary judgment may also be given to a defendant when there is no merit to the claim against it. This latter form of summary judgment is sometimes referred to as summary dismissal.

[222] In the case before us, there was no summary judgment as provided for in the *Rules*. There was a refusal to grant summary judgment to a defendant. That is, this case involved a refusal to summarily dismiss a claim. The significance of this is that the judgment appealed from was not a final judgment, summary or otherwise. It could be characterized as a non-decision. Such decisions, although appealable, do not lend themselves comfortably to appellate review. While the *Rules of Court* confer a right to appeal such decisions, such appeals often offer little to the appellate court to review because what is being reviewed is not a determination of a question of law or a finding of fact, but rather what is being reviewed is the trial judge's confidence level or level of satisfaction as to whether, on a balance of probabilities, and on the basis of a limited record, there is any merit to a claim.

[223] Before a trial judge may summarily dismiss a claim, he or she must be satisfied, on a balance of probabilities, that there is no merit to the claim. It is the trial judge who must be persuaded. It is not for this Court to tell the trial judge he or she ought to have been persuaded, except in the clearest of cases. This Court's jurisdiction to summarily dismiss a claim which has not been litigated and adjudicated ought to be limited to cases of patently obvious error.

[224] Appeals of refusals to grant a plaintiff summary judgment or to grant a defendant summary dismissal ought to be discouraged because they tend to be premature. No determination has been made. There is nothing to yet review: no decision and typically a sparse record. As this Court stated in *776826 Alberta Ltd v Ostrowercha*, 2015 ABCA 49 at paragraph 7, "appeals from denials of motions for summary judgment will be difficult to establish". *Ostrowercha* was a case in which the chambers judge declined to summarily dismiss a claim. This Court dismissed the defendant's appeal of that decision and said:

> While the culture shift in Canadian law towards using alternative but fair and just methods of adjudication is well established in Alberta, front line judges are entitled to deference on their decisions as to whether summary judgment under Rule 7.3 is a

> fair and appropriate means for adjudication in a given case: *W. P. v Alberta*, 2014 ABCA 404 at para 15.

Also, in *Mulholland v Rensonnet*, 2018 ABCA 24 at paragraph 3, this Court stated:

> A chambers judge is not required to grant summary judgment where he or she does not feel they can fairly and properly adjudicate the issue before them on the record presented.

[225] A summary dismissal of a claim gives this Court a final decision to assess. The merits of the dismissal can be assessed. A refusal to dismiss a claim on the basis that the chambers judge is not yet satisfied that the claim is without merit offers little to assess. There is little room for error because no disposition, one way or the other, has been made.

[226] A summary judgment in favour of a plaintiff also gives this Court something to review. A refusal to grant the plaintiff summary judgment on the basis that the trial judge is not yet satisfied that the claim has merit offers little for an appeal court to scrutinize. Again, there is little room for error because no decision has been made one way or the other.

[227] An appellate court does not ordinarily assess the merits of a claim until the trial judge has completed his or her assessment.

[228] The standard of review of decisions dismissing summary judgment or summary dismissal applications must be very deferential. The review should be limited to assessing whether the chambers judge was completely unreasonable in concluding that the court required more evidence or more fulsome argument in order for it to reach a conclusion on the merits of a claim.

[229] The so-called modern approach to summary judgment motions is intended to improve access to justice by empowering trial courts to adjudicate more cases through summary judgment motions, not by compelling them to do so when they find they are unable to make the necessary findings of fact without more evidence. The so-called modern approach is also not intended to empower appellate courts to decide the merits of claims at first instance which is what they are asked to do on appeals of decisions dismissing summary judgment applications or summary dismissal applications.

[230] Once a trial judge has summarily dismissed a claim or granted summary judgment to a plaintiff, this Court can then safely commence to assess the merits of the claim which has been summarily dismissed or allowed. But not until.

[231] This was a slip and fall case. It took place on a sidewalk at a school in Medicine Hat on a Thursday in January. The plaintiff was delivering her daughter to school. The time was roughly 8:45 a.m. and the school's custodian was busy spreading sand on the sidewalk when the plaintiff arrived with her daughter. The plaintiff slipped on a patch of ice, fell and hurt herself.

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[232] It was conceded that a duty of care was owed by the school district. The question was whether the duty of care was breached and that question engaged the issue of what standard of care was required to discharge the duty of care.

[233] That issue was never resolved. The school district argued that the standard of care had been discharged by the spreading of sand. However, the chambers judge was not so sure because the school itself had a policy with respect to snow and ice removal which stated that the removal of snow and ice should be completed by 8:00 a.m. The school district's policy also provided that although sanding was an option, every effort should be made to remove the ice, not just sand it, weather permitting. There was evidence that the ice had been on the sidewalks for several days prior to the slip and fall and had not been attended to.

[234] The chambers judge also found that there was conflicting evidence, as well as an issue as to whether certain photographs of the sidewalk, not taken on the day of the slip and fall, accurately depicted the state of the sidewalks the morning of the accident as claimed. The chambers judge was further of the view that a trial was needed to test the credibility of the defendant's witnesses who apparently did not impress him. He also thought a trial was needed to determine why the school district's own policy was not followed as there was no evidence of any effort that morning or earlier in the week to deal with the ice by either chipping or scraping it or putting de-icer on it.

[235] The chambers judge expressly recognized that the defendant school district was not an insurer and could not be held to a standard of perfection. He also acknowledged the merits of what he called "the trend towards summary resolution of matters either by way of summary dismissal or summary judgment". He nevertheless concluded, "I cannot agree that a finding of no negligence on the part of the defendant is so simple, so direct and so straightforward" as to make summary dismissal appropriate.

[236] It may be open to a chambers judge deciding a summary dismissal application to determine matters such as whether there has been a breach of the standard of care expected of a particular occupier as a matter of common experience. But what if the chambers judge is uncomfortable or lacks confidence that the common experience of which he is urged to take judicial notice of is reliable? Also, on a summary judgment application, such as in this case, the chambers judge may have doubts based on an absence of evidence. In those circumstances, is it the law that the chambers judge must summarily dismiss a claim as having no merit when he has doubts? I think not.

[237] If the test is one of whether the evidence adduced on the summary dismissal application permitted the chambers judge to make the necessary finding of fact and law to conclude that the claim had no merit, clearly the chambers judge's view was that the evidence did not permit that conclusion.

[238] I take from *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 the proposition that if the defendant is the moving party, it must prove that there is no

merit to the plaintiff's claim. The plaintiff need not prove the opposite. The plaintiff need only demonstrate that the defendant has failed to establish that there is no genuine issue requiring a trial (paras 32 and 33). The presiding judge is to consider whether the quality of the evidence is such that it is fair to conclusively adjudicate the action summarily (para 34). Considerations of fairness have not yet been eclipsed by expediency and economy. Fairness remains a factor in deciding whether summary dismissal is appropriate.

[239] In *Hryniak v Mauldin*, 2014 SCC 7, the Supreme Court stated that on a summary judgment motion, the evidence must be such that the judge is "confident" that he or she can fairly resolve the dispute without more (para 57). This dicta was echoed in *Weir-Jones* at paragraph 47 where this Court stated that the judge must be left with sufficient confidence in the state of the record that he or she is prepared to exercise judicial discretion to resolve the dispute. Having properly instructed himself, the chambers judge in this case did not have "sufficient confidence" to summarily dismiss the plaintiff's claim. I simply do not see on what basis this Court could allow an appeal of the chambers judge's confidence level. I would have dismissed it.

Appeal heard on September 12, 2019

Memorandum filed at Calgary, Alberta
this day of September, 2020

Authorized to sign for: O'Ferrall J.A.

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Appearances:

R.K. Fischer
for the Respondents

N. Peermohamed
for the Appellant

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