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Fortune may Favour the Bold: Alberta Follows Suit after SCC Encourages Broad Interpretation of Summary Judgment Rules

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In its decision, Hryniak v. Mauldin, 2014 SCC 7, the Supreme Court of Canada encouraged the courts to interpret summary judgment rules "broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims." (at para. 5) Summary judgment allows a litigant to apply to the court and obtain judgment without having to go through a costly trial.

The court in Hryniak v. Mauldin considered Ontario's two-step approach to summary judgment (see Ontario's Rule 20.04). Upon hearing a summary judgment application, the first step for a judge in Ontario is to determine if there is a genuine issue requiring a trial based only on the evidence before the judge. Only if there appears to be a genuine issue requiring a trial must the judge proceed to the second step. The second step is to determine whether the need for a trial can be avoided by using the judge's enhanced fact-finding powers of (1) weighing the evidence, (2) evaluating the credibility of a deponent, (3) drawing any reasonable inference from the evidence, or (4) ordering that oral evidence be presented.

In that decision, the Supreme Court of Canada appears to have adopted the following test for summary judgment:

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

In Alberta, however, judges do not have the enhanced fact-finding powers as judges in Ontario to weigh evidence or evaluate credibility in the context of summary judgment applications. Where Ontario's second step begins, Alberta's current approach to summary judgment ends. Alberta's Rule 7.3(1) states:

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.

Accordingly, if it is not possible to find the necessary facts without weighing the evidence or evaluating

credibility (e.g. due to conflicting affidavits), summary judgment should not be granted in Alberta.

Notwithstanding the difference in approach to summary judgment between Ontario and Alberta, the Court of Appeal of Alberta followed the Supreme Court of Canada's lead in Hryniak v. Mauldin and confirmed in its recent decision, Windsor v. Canadian Pacific Railway Ltd., 2014 ABCA 108, that "[i] nterlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication." (at para. 15) With respect to interpreting Alberta's Rule 7.3, the court in Windsor v. Canadian Pacific Railway Ltd. provided the following direction:

"New Rule 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of a "genuine issue for trial" found in the previous rules... A party faced with an application for summary judgment must put its best foot forward, and present evidence to show sufficient "merit" to establish a genuine issue requiring a trial with respect to the outstanding issues..." (at paras. 14 and 21)

It will be interesting to see how judges in Alberta will apply the ratio in Windsor v. Canadian Pacific Railway Ltd. and, in particular, the standard to which a claim will have sufficient "merit" and the circumstances in which the record will permit a "fair and just adjudication" to warrant summary judgment.

Prior to Windsor v. Canadian Pacific Railway Ltd., the court in Whitecourt Power Limited Partnership v. Interpro Technical Services Ltd., 2014 ABQB 135, continued to apply the traditional test for summary judgment whereby it must be plain and obvious or beyond doubt that the claim cannot succeed. The court in Orr v. Fort McKay First Nation, 2014 ABQB 111, and Nipshank v. Trimble, 2014 ABQB 120, on the other hand, preferred the seemingly less onerous test for summary judgment that the evidence renders a claim or defence so compelling that the likelihood of success is very high.

Given the current trend, it is a fair wager that we can expect to see a lower threshold for summary judgment. To what extent is to be determined.

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