HRYNIAK V. MAULDIN COMES TO ALBERTA: SUMMARY JUDGMENT, CULTURE SHIFT, AND THE FUTURE OF CIVIL TRIALS

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Alberta's law of civil procedure, and summary judgment in particular, has experienced a culture shift since the Supreme Court of Canada's ruling in Hryniak v. Mauldin. *This article asks whether litigation directed toward a conventional trial is now, or is soon to be, a thing of the past. Although intended to revive traditional trials as a realistic and timely resolution option, it is impossible to say yet if this will be* Hryniak*'s legacy in Alberta. Three things are clear in post-*Hryniak *Albertan jurisprudence, however: first, the* Hryniak *test governs the determination of summary judgment applications in Alberta; second, Alberta courts have embraced the call for proportionality in litigation procedure; and third, the* Hryniak *culture shift creates uncertainty for Alberta litigants.*

TABLE OF CONTENTS

I. INTRODUCTION

Is trial-based litigation alive and well in Alberta's post-*Hryniak* world? On 23 January 2014, the Supreme Court of Canada issued its ruling in *Hryniak v. Mauldin*[1] and provided a roadmap for the judicial consideration of summary judgment applications under Ontario's summary judgment rule. Noting that the time and cost of civil litigation impedes access to

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1 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*].

justice, the Supreme Court also expressly advocated for a culture shift in civil litigation. The proposed culture shift prioritizes proportionality in litigation procedures and acknowledges that a traditional civil trial (with full oral testimony and cross-examination) is no longer necessarily the best method of fairly and justly adjudicating civil claims. Just over a month after *Hryniak* was decided, Alberta courts began the process of determining the impact of the Supreme Court's decision on civil procedure in this province.

In this article, I examine the current state of Alberta's law of civil procedure regarding summary judgment in particular and litigation culture shift in general, in light of *Hryniak* and subsequent Alberta jurisprudence. In Part II, I set the stage for this analysis by summarizing the Supreme Court's ruling in *Hryniak*, including the Supreme Court's findings in relation to summary judgment as well as its comments about culture shift. In Part III, I discuss the development of Alberta law relating to summary judgment, both before and after *Hryniak*. In Part IV, I consider the impact of the Supreme Court's call for a culture shift on Alberta civil procedure more broadly. Finally, in Part V, I offer a brief critique of the changes which *Hryniak* has brought to the process of civil litigation in Alberta, and provide some thoughts on the future of civil procedure in Alberta. I conclude that, while offering a crucial reminder to Alberta litigants that rules of civil procedure should be applied functionally and not formally, the *Hryniak* case has increased uncertainty for Alberta litigants and their counsel about whether a court will approve of their litigation choices. Antithetical to the Supreme Court's intention in *Hryniak*, this uncertainty may increase litigation processes and costs.

II. *HRYNIAK V. MAULDIN*

Hryniak concerned a fraud claim arising from investments made by the plaintiffs with the defendant traders and their principals, including the defendant Robert Hryniak. In 2010, the Ontario Superior Court granted summary judgment against Hryniak.[2] This ruling was upheld by the Ontario Court of Appeal in 2011,[3] and by the Supreme Court of Canada in 2014.[4] At all court levels, the summary judgment question was decided on the basis of Ontario's modern summary judgment rule,[5] which was substantially revised in 2010,[6] following the recommendations of the 2007 Osborne Report on Civil Justice Reform.[7] In a unanimous judgment written by Justice Karakatsanis, the Supreme Court of Canada outlined the approach which courts should take in applying this rule and explained that this approach was

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2 *Bruno Appliance v Cassels Brock & Blackwell LLP*, 2010 ONSC 5490, 2010 ONSC 5490 (CanLII).

3 *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764, 108 OR (3d) 1.

4 *Hryniak*, *supra* note 1. At the same time, the Supreme Court issued its decision in the sister case *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8, [2014] 1 SCR 126. The Supreme Court's findings in this second case were based on the summary judgment standards articulated in *Hryniak*.

5 Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, r 20 [Ontario, *Rules*]. For the full text of Ontario's summary judgment rule, see Appendix A, below.

6 O Reg 438/08.

7 The Honourable Coulter A Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ministry of the Attorney General of Ontario, 2007), online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp> [Osborne, *Report*]. This report was the culmination of the Civil Justice Reform Project established by the Attorney General of Ontario and led by The Honourable Mr Coulter Osborne. The project mandate was "to review potential areas of reform and deliver recommendations for action to make the civil justice system more accessible and affordable for Ontarians" (*ibid*, Appendix A, online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/220_appendix-A.php>). For more on the history of the reform of Ontario's summary judgment rule, see *Pammett v Ashcroft*, 2014 ONSC 2447, 2014 ONSC 2447 (CanLII) at paras 20–21; *1214777 Alberta Ltd v 480955 Alberta Ltd*, 2014 ABQB 301, 2014 ABQB 301 (CanLII) at paras 9–11 [*1214777 Alberta*].

part of a "culture shift" needed to make the civil justice system more accessible and affordable.[8]

A. SUMMARY JUDGMENT

Prior to the 2010 amendments, Ontario's summary judgment rule provided that a court "shall" grant summary judgment if there is "no genuine issue *for* trial"[9] as determined solely on the basis of the affidavit evidence and written arguments submitted by the parties involved in the application. In contrast, the revised rule provides that the court "shall" grant summary judgment if "the court is satisfied that there is no genuine issue *requiring* a trial."[10] Additionally, the rule now makes expanded fact-finding powers available to a judge deciding the summary judgment question. Specifically, the rule states that, in order to determine whether there is a genuine issue requiring a trial, a judge may weigh evidence, evaluate a deponent's credibility, and draw reasonable inferences "unless it is in the interest of justice for such powers to be exercised only at a trial."[11] Further, for the purpose of exercising these evidentiary powers, a judge can admit oral evidence.[12]

In *Hryniak*, Justice Karakatsanis outlined a "Roadmap"[13] for the judicial consideration of summary judgment applications under the revised Ontario rule. The Roadmap is summarized as follows:

Step 1: Determine whether there is a genuine issue requiring a trial.

Evidence Permitted:

At this stage, this question is determined solely on the basis of the evidence (affidavits and arguments) presented by the parties (in other words, without the court using the additional fact-finding powers).

Legal Standard:

There is no genuine issue requiring a trial if the judge is confident that: (1) the findings of fact and the application of the law necessary to resolve the dispute can be fairly and justly adjudicated on the basis of the evidence put forward in the application; and (2) the summary judgment process is "a timely, affordable and proportionate procedure"[14] for adjudicating the dispute.

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8 *Hryniak*, *supra* note 1 at para 2.
9 Ontario, *Rules*, *supra* note 5, as amended by O Reg 453/09, r 20.04(2) [emphasis added].
10 Ontario, *Rules*, *ibid*, r 20.04(2), as amended by O Reg 438/08, s 13(2) [emphasis added].
11 Ontario, *Rules*, *ibid*, r 20.04(2.1).
12 *Ibid*, r 20.04(2.2).
13 *Hryniak*, *supra* note 1 at para 111.
14 *Ibid* at para 66.

Outcome:

If there is no genuine issue requiring a trial, the judge *must* grant summary judgment. If there is a genuine issue requiring a trial, the judge proceeds to Step 2.

Standard of Review on Appeal:

The question of whether there is a genuine issue requiring a trial is a question of mixed fact and law which attracts deference (that is, it should not be overturned in the absence of palpable and overriding error), with the exception that the application of "an incorrect principle of law" or an error in respect of "a purely legal question" is reviewable on a correctness standard.[15]

Step 2: If there is a genuine issue requiring a trial, determine whether to use the expanded fact-finding powers.

Legal Standard:

In order to use the expanded fact-finding powers, the judge must be satisfied that: (1) the need for trial can be avoided by employing the expanded fact-finding powers; and (2) the use of these powers is not against the interest of justice.

The use of these powers is in the interests of justice if the judge is satisfied that employing these powers will: (1) "lead to a fair and just result";[16] and (2) "serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole."[17]

Outcome:

If the above requirements are met, the judge has discretion to use these powers to decide the summary judgment application in accordance with the legal standard set out in Step 1. If use of the expanded fact-finding powers is not in the interest of justice, the judge should not employ these powers and should not grant summary judgment.

Standard of Review on Appeal:

Whether use of the fact-finding powers is in the interests of justice is a question of mixed fact and law which attracts deference (that is, it should not be overturned in the absence of palpable and overriding error).

Because a judge's decision to exercise the expanded fact-finding powers is discretionary, the decision attracts deference and "should not be disturbed" unless the judge "misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice."[18]

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15 *Ibid* at para 84.
16 *Ibid* at para 66.
17 *Ibid*.
18 *Ibid* at para 83.

This Roadmap addresses the central issue in *Hryniak*: namely, what is the scope of a court's authority to decide a civil dispute by means of summary judgment rather than by a full trial? Historically, Ontario jurisprudence had narrowly defined a court's ability to grant summary judgment, permitting it to be issued in only the clearest of cases.[19] This was the approach applied by the Ontario Court of Appeal in *Hryniak*. The Roadmap outlined by Justice Karakatsanis, however, makes it clear that the old jurisprudence no longer applies. Her judgment reflects the Supreme Court of Canada's view that the revisions to Ontario's summary judgment rule were intended to "transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication."[20]

Thus, the essential conclusion to be drawn from Justice Karakatsanis' decision is that, whereas Ontario's previous summary judgment rule operated as a limited exception to the resolution of civil disputes by means of a full trial, under the revised rule "trial is not the default procedure."[21] Under the new regime, if a dispute can be fairly and justly decided by summary judgment, it should be, even if that requires a judge to determine the merits of the case by evaluating evidence outside of a conventional trial.[22] In brief, the test established by the Supreme Court in *Hryniak* (the *Hryniak* test) states that summary judgment should be granted where a judge concludes that there is no genuine issue requiring a trial because, on the basis of the evidence available, the judge is able to make the necessary determinations of fact and law to fairly and justly decide the matter.

B. "CULTURE SHIFT"

In *Hryniak*, Justice Karakatsanis expressed the Supreme Court's concern that, because of the time and expense involved in conventional civil trials (including the associated litigation steps), in many cases a traditional trial is no longer a practical means of resolving civil disputes.[23] The civil justice system's reliance on the conventional trial as the primary means

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19 As noted in Janet Walker et al, eds, *The Civil Litigation Process: Cases and Materials*, 8th ed (Toronto: Emond Montgomery, 2016) at 644:

> Until recently, in Ontario and other jurisdictions, courts have been loath to decide substantive issues in the form of an abbreviated or simplified trial, on the basis of affidavits and examination for discovery evidence and other paper-based evidence, instead of live witnesses at a conventional trial. Attempts by Ontario to reform its summary judgment rules to allow for earlier and less expensive determination of disputes largely failed, with courts clinging to the traditional notion that due process in the civil context required a trial wherever there are issues that require the assessment of credibility or the weighing of evidence.

20 *Hryniak*, *supra* note 1 at para 45. This is undoubtedly a correct interpretation of the intention of the revised rule, as evidenced by the following excerpt from Osborne, *Report*, *supra* note 7, which recommended enhanced fact-finding powers for the summary judgment rule as follows:

> If the objective is to provide an effective mechanism for the court to dispose of cases early where in the opinion of the court a trial is unnecessary after reviewing the best available evidence from the parties, then it seems to me to be preferable to provide the court with the express authority to do what some decisions of the Court of Appeal have said a motion judge or master cannot do. That is, permit the court on a summary judgment motion to weigh the evidence, draw inferences and evaluate credibility in appropriate cases. Therefore, any new rule 20 should provide a basis for the motion judge to determine whether such an assessment can safely be made on the motion, or whether the interests of justice require that the issue be determined by the trier of fact at trial (*ibid* at 35).

Interestingly, however, even with the advanced fact-finding powers available to a court under Ontario's rule, questions remain as to what evidence a court should admit for the purposes of the rule. See e.g. Matthew Diskin & Matthew Frontini, "Hearsay, Proportionality and Dispositive Motions: Toward a Principled Approach" (2016) 34:4 Adv J 22.

21 *Hryniak*, *ibid* at para 43.

22 For example, without viva voce evidence and cross-examination.

23 *Hryniak*, *supra* note 1 at para 1.

of adjudicating civil disputes therefore poses a threat to effective access to civil justice for many Canadians. In view of this threat, Justice Karakatsanis suggested that Canada's civil justice system needs to undergo a "culture shift."[24] The shift requires litigants, counsel, and judges to recognize that a traditional trial, along with the attendant pretrial disclosure steps, is not always necessary to fairly and justly resolve a civil dispute. Accordingly, other less complex methods of adjudication should be embraced as viable alternatives to trial:

> [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.* The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.[25]

Here, it is important to note that Justice Karakatsanis was not calling for increased reliance on extra-judicial or private alternative dispute resolution (ADR) methods. In fact, she expressly identified the *public* adjudication of civil disputes as being essential to the development of the common law.[26] She also acknowledged that private ADR mechanisms are "more likely to produce fair and just results" if the parties know that court adjudication is a realistic alternative.[27] Further, she stated that, in implementing the culture shift, the premise that "the process of adjudication must be fair and just … cannot be compromised."[28] She described a "fair and just process" as one which "permit[s] a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found."[29] These comments indicate that the culture shift promoted by the Supreme Court maintains reliance on public judicial resolution as a primary means of resolving disputes, while simultaneously recognizing that, in some cases, this resolution can be fairly achieved by means of an abbreviated judicial process rather than a traditional trial.

In essence, the culture shift advocated by the Supreme Court is a demotion of the trial as the preferred means, or the gold standard, for the judicial resolution of civil claims. The goal of litigation procedures should not be to get to trial in order to have a dispute resolved. Instead, the litigation process should be aimed at achieving judicial resolution in a way that is proportional to the lawsuit at hand. As described by Justice Karakatsanis, "[t]he proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure."[30] So, if justice and fairness in the outcome of a civil claim can be equally achieved by a trial or by an alternate, more efficient route, the claim should be resolved by the alternate process.

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24 *Ibid* at para 2.

25 *Ibid* [emphasis added].

26 *Ibid* at para 1. See also *ibid* at para 26, where Justice Karakatsanis states: "In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined." Thus, the culture shift does not attract the criticism that it is anti-democratic because it is shielded from public scrutiny, which is an argument that has been raised in respect of privatized ADR mechanisms: see e.g. Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014).

27 *Hryniak*, *ibid* at para 24.

28 *Ibid* at para 23.

29 *Ibid* at para 28.

30 *Ibid*.

The Supreme Court's expanded approach to summary judgment (as outlined by the Roadmap and the *Hryniak* test) is an example of putting this culture shift into action. As noted by Justice Karakatsanis, summary judgment rules provide courts with an opportunity to implement the culture shift.[31] Therefore, these rules "must be interpreted broadly" so as to promote "proportionality and fair access to the affordable, timely and just adjudication of claims."[32] Further, this approach is not limited to summary judgment rules; the proportionality principle applies widely to civil dispute procedures. As stated by Justice Karakatsanis, "[e]ven where proportionality is not specifically codified, applying rules of court that involve discretion 'includes … an underlying principle of proportionality.'"[33]

Finally, as advocated by Justice Karakatsanis, the move toward proportionality and away from a traditional trial as the presumptive or preferred judicial resolution mechanism does not mean that a trial is never appropriate. In fact, in order to apply the principle of proportionality, the time, expense, and fact-finding capacity of alternate forms of judicial resolution must be measured against those of a full trial:

> A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.[34]

According to the Supreme Court of Canada, the burden of ensuring that adjudication is carried out in a proportionate fashion lies with both counsel and judges. The former are called upon to "consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result," while the latter should "actively manage the legal process in line with the principle of proportionality."[35]

III. MIGRATION OF THE *HRYNIAK* TEST: SUMMARY JUDGMENT IN ALBERTA

Although there have been numerous Alberta court rulings dealing with summary judgment applications since *Hryniak*, the development of Alberta's prevailing summary judgment law can be traced through a handful of post-*Hryniak* cases, which are discussed below. In order to fully appreciate the impact of this post-*Hryniak* jurisprudence, however, it is helpful to first briefly review the revisions to Alberta's summary judgment rule in 2010 and the summary judgment test employed by Alberta courts prior to *Hryniak*. Three distinct periods are relevant to this discussion: the time leading up to the 2010 rule revision, the time between the 2010 rule amendment and *Hryniak*, and the time since *Hryniak*.

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31 *Ibid* at para 3.
32 *Ibid* at para 5.
33 *Ibid* at para 31, citing *Szeto v Dwyer*, 2010 NLCA 36, 320 DLR (4th) 243 at para 53.
34 *Hryniak*, *ibid* at para 33.
35 *Ibid* at para 32.

A. ALBERTA'S SUMMARY JUDGMENT RULE

Like Ontario, Alberta substantially revised its rules of civil process in 2010.[36] Prior to these amendments, Alberta's summary judgment rule authorized a plaintiff to apply for summary judgment "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,"[37] and permitted a defendant to apply for summary judgment "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."[38] In either case, the rule required the application to be supported by an affidavit executed by a person who could "swear positively to the facts" and to the grounds of the application.[39] The rule further provided that: "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."[40] The 2010 amendments changed the rule so that it now provides as follows:

> 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.[41]

Clearly, Alberta's revised rule is not identical to its Ontario counterpart.[42] In particular, while Alberta's rule identifies the grounds upon which a summary judgment application can be brought, it does not specify the basis on which the application should be decided. This is in contrast to Ontario's current rule and to Alberta's pre-2010 rule, both of which expressly describe the test (no genuine issue requiring a trial and no genuine issue for trial, respectively)[43] to be applied by a court in evaluating a summary judgment application. Further, 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

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36 Alberta's revisions were based on a report by the Alberta Law Reform Institute, *Rules of Court Project: Final Report No 95* (Edmonton: ALRI, 2008), online: <https://www.alri.ualberta.ca/docs/fr095.pdf> [ALRI, *Rules of Court Project*]. For more on the process behind the 2010 revisions to the procedural rules in Ontario and in Alberta, see Barbara Billingsley & Joel Franz, "Revolution on the Path to Access to Justice? A Closer Look at the 2009 and 2010 Reforms to the Rules of Civil Procedure in Alberta, Nova Scotia, Ontario and British Columbia" (2015) 44:2 Adv Q 246.

37 Alberta, *Rules of Court*, Alta Reg 390/68, r 159(1) [Alberta, pre-2010 *Rules*].

38 *Ibid*, r 159(2).

39 *Ibid*, rr 159(1)–(2).

40 *Ibid*, r 159(3) [emphasis added].

41 Alberta, *Rules of Court*, Alta Reg 124/2010, r 7.3(1) [Alberta, 2010 *Rules*]. For the full text of Alberta's summary judgment rule, see Appendix B, below.

42 See Part II.A, above. For the full text of Ontario's rule, see Appendix A, below.

43 See *supra* notes 10, 40 and accompanying text.

court to weigh evidence in order to resolve disputed issues of fact.[44] This process contrasts with Alberta's *summary trial* rule, which is another mechanism for a court to dispose of a claim without a conventional trial, and which does expressly contemplate judicial fact-finding.[45] Moreover, although the *Rules* generally authorize a court to hear oral evidence in order to decide any application,[46] it is questionable whether this power can or should be used in the context of a summary judgment application. As stated by Justice Wakeling of the Alberta Court of Appeal in his concurring reasons in *Can v. Calgary (Police Service)*:

> Rule 6.11(1)(g) of the *Alberta Rules of Court* allows a motions court to hear "oral evidence … given in the same manner as a trial". While there is no provision in the *Alberta Rules of Court* which expressly precludes a motions court hearing a summary judgment application from invoking r. 6.11(1)(g), there are sound reasons to conclude that the *Alberta Rules of Court* do so by implication. And even if I am incorrect on this point, I believe that it would be imprudent to admit oral evidence in a summary judgment application.[47]

It is instructive to remember that the absence of an express standard for granting summary judgment, and the inclusion of a summary trial procedure in Alberta's revised *Rules*, were deliberate legislative choices based on the recommendations of the Alberta Law Reform Institute (ALRI).[48] ALRI acknowledged that, while the absence of a stated summary judgment test posed a risk of uncertainty for litigants, it also provided the benefit of flexibility in judicial decision-making, and ALRI consciously opted in favour of this trade-off.[49] ALRI also expressly noted that Alberta courts had traditionally applied the summary judgment rule restrictively, essentially requiring an applicant to prove "beyond a reasonable doubt" that the respondent's case will fail.[50] ALRI recommended continuing with this approach, relying on the summary trial procedure as a potential remedy for cases which did not meet the rigorous common law summary judgment standard:

> Although Alberta has the toughest test in Canada because it uses the highest standard of proof — "beyond a reasonable doubt," the Committee felt that the standard should be maintained. The standard should be higher in the earlier stage precisely because the matter is being decided on limited evidence, because the result of summary judgment is to deny a party the right to have the party's action heard in court. Summary judgment should be reserved for cases which clearly lack a triable issue. Other cases might proceed under the summary trial procedure.[51]

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44 Alberta, 2010 *Rules*, *supra* note 41, r 7.3(2) provides that a summary judgment application must be supported by an affidavit providing personal knowledge of one or more of the permitted grounds for the application.

45 *Ibid*, Part 7, Division 3, especially r 7.9(2)(b), which states that judgment following a summary trial cannot be issued if the judge is unable to find the necessary facts to decide the issues before the court. Notably, Ontario does not have a comparable summary trial mechanism, though it does have a simplified trial process which is applicable to particular types of cases. See Ontario, *Rules*, *supra* note 5, r 76.

46 Alberta, 2010 *Rules*, *ibid*, r 6.11(1)(g).

47 2014 ABCA 322, [2015] 2 WWR 695 at para 84 [footnote omitted]. The reasons provided by Justice Wakeling in support of this conclusion include: the distinction between Alberta's summary judgment procedure and summary trial, the "internal structure" of Alberta's summary judgment rule, the time taken up by a motions court hearing oral evidence, and the existence of other mechanisms in Alberta's *Rules* which serve as alternatives to a full trial (*ibid* at paras 85–97).

48 The 2010 revisions to Alberta's *Rules* were based on the recommendations of the Alberta *Rules of Court Project* undertaken by ALRI. For further information on this project, see ALRI, *Rules of Court Project*, *supra* note 36.

49 Alberta Law Reform Institute, "Alberta Rules of Court Project: Summary Disposition of Actions," Consultation Memorandum No 12.12 (Edmonton: ALRI, 2004) at paras 77–80, online: <https://www.alri.ualberta.ca/docs/cm01212.pdf>.

50 *Ibid* at para 80.

51 *Ibid*.

In short, the 2010 revisions to Alberta's summary judgment rule signify a legislative intent to maintain the province's long-standing strict standard for summary judgment applications.

B. PRE-*HRYNIAK* JURISPRUDENCE

Prior to the Supreme Court's ruling in *Hryniak*, but both before and after the reform of the rules in 2010, the courts strictly applied Alberta's summary judgment rule: "the established principles for the Rule on summary judgment did not change between the previous Rules of Court and the new."[52] The summary judgment test, however, was articulated by the courts in various ways, some of which, on their face, seem more stringent than others. For example, prior to 2010, the Alberta Court of Appeal stated on several occasions that summary judgment should be granted only where it is "plain and obvious"[53] that the action could not succeed, or where it is "beyond doubt"[54] that there is no genuine issue for trial. In 2008, however, in reference to Alberta's rule, the Supreme Court of Canada took a more generous approach and held that summary judgment should be granted where there is "no genuine issue of material fact *requiring* trial."[55] After the adoption of Alberta's revised rules in 2010, in the oft-cited *Beier v. Proper Cat Construction Ltd.*, Justice Wakeling of the Alberta Court of Queen's Bench (as he then was) offered yet another account of the summary judgment test:

> 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*.[56]

The common element among these varying descriptions of the summary judgment test is the idea that summary judgment should be granted only in cases where the outcome at trial can be predicted with a high degree of certainty. As summarized by Justice Brown of the Alberta Court of Queen's Bench (as he then was):

> [T]he various formulations [of Alberta's summary judgment test] included the threshold that it be "plain and obvious" that the claim or defence will fail; that the claim or defence must be "bound to fail" or have "no prospect of success" or have "no merit" or raise "no genuine issue for trial." They are … different ways of

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52 William A Stevenson & Jean E Côté, *Alberta Civil Procedure Handbook, 2017* (Edmonton: Juriliber, 2017), vol 1 at 7-20.

53 *Murphy Oil Company Ltd v Predator Corporation Ltd*, 2006 ABCA 69, [2006] 5 WWR 385 at para 24.

54 *Ibid*; *Pioneer Exploration Inc (Trustee of) v Euro-Am Pacific Enterprises Ltd*, 2003 ABCA 298, 339 AR 165 at para 19 [*Pioneer Exploration*]. Note that the "beyond doubt" standard is not equivalent to the criminal law standard which requires proof "beyond a *reasonable* doubt." As stated by the Alberta Court of Appeal in *Pioneer Exploration*, in reference to suggestions that an applicant for summary judgment must establish a "*prima facie* case beyond a reasonable doubt": "These phrases are unfortunate. Neither '*prima facie*' nor 'reasonable doubt' is appropriate in the context of the standard of proof for summary judgment" (*ibid* at para 16).

55 *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372 at para 11 [*Lameman*] [emphasis added], citing *Guarantee Co of North America v Gordon Capital Corp*, [1999] 3 SCR 423 at para 27. Interestingly, this finding was made despite the fact that the pre-2010 Alberta summary judgment rule under consideration in *Lameman* expressly empowered a court to grant summary judgment if there was "no genuine issue *for* trial" (Alberta, pre-2010 *Rules*, *supra* note 37, r 159(3) [emphasis added]).

56 2013 ABQB 351, 564 AR 357 at para 61 [emphasis added].

> stating the same test … whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high.[57]

In *Lameman*, the Supreme Court of Canada justified this high threshold on the basis that the summary judgment process saves litigation expense by weeding out un-meritorious claims while simultaneously ensuring that potentially successful claims which disclose genuine issues can proceed to trial.[58] As evidence of this high standard, the Supreme Court identified the following common law principles in relation to the operation of summary judgment in Canada:

> The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial".… The defendant must prove this; it cannot rely on mere allegations or the pleadings.… If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal.… Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried.… The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts.[59]

C. POST-*HRYNIAK* JURISPRUDENCE

1. *ORR V. FORT MCKAY FIRST NATION*[60]

Justice Brown's 25 February 2014 ruling in *Orr* holds the distinction of being the first post-*Hryniak* summary judgment ruling issued by an Alberta court. It also marks a short-lived rejection of the *Hryniak* test in Alberta. The case involved a lawsuit brought by Mike Orr for payment of his salary, which had been withheld when he was suspended from his position as a band councillor with the Fort McKay First Nation. The application before Justice Brown was an appeal from a master's decision dismissing Orr's application for partial summary judgment against the defendant. The master's ruling, issued on 8 January 2014, predated the Supreme Court's judgment in *Hryniak*.[61] Accordingly, the issues on appeal to the Court of Queen's Bench in *Orr* included: (1) whether the deferential standard of review established in *Hryniak* applies in Alberta; and (2) whether the *Hryniak* test applies in Alberta.

The defendant conceded in oral argument that, notwithstanding the Supreme Court's comments in *Hryniak*, the relevant standard of review of a summary judgment ruling in Alberta remains one of correctness.[62] Justice Brown provided *obiter* commentary explaining the logic of this conclusion. First, he noted that the Supreme Court's application of a deferential standard of review in *Hryniak* "was in respect of the motions judge's *factual* determinations … which would have entailed the weighing of evidence."[63] Since, under

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57 *Orr v Fort McKay First Nation*, 2014 ABQB 111, 587 AR 16 at para 29 [*Orr*].
58 *Lameman*, *supra* note 55 at paras 10–11. See also *Orr*, *ibid*.
59 *Lameman*, *ibid* at para 11 [citations omitted].
60 *Supra* note 57.
61 *Orr v Fort McKay First Nation*, 2014 ABQB 19, 2014 ABQB 19 (CanLII).
62 *Orr*, *supra* note 57 at para 11.
63 *Ibid* at para 16 [citation omitted] [emphasis added].

Alberta legislation[64] and as a constitutional law imperative,[65] "masters may not weigh evidence to resolve disputed or contentious questions of fact,"[66] Justice Brown concluded that the deferential standard does not apply to a master's ruling. Second, Justice Brown noted that there are salient differences between the revised summary judgment rules of Ontario and Alberta. In particular, while the Osborne Report had "recommended the adoption of a summary trial procedure" in Ontario, "that particular recommendation was rejected out of a preference for expanding the availability of summary judgment."[67] So, when it comes to a court's authority to weigh evidence to determine points of fact, the Ontario summary judgment rule is more akin to Alberta's summary *trial* rule than to Alberta's summary *judgment* rule:

> Ontario's Rule 20.04(2.1) provides for a process that is broadly comparable to an application under Alberta's civil procedure *not* for summary *judgment* under Rule 7.3, but for judgment by way of summary *trial* under Rule 7.5. This is because Rule 7.3 confines the Court to granting summary judgment only where there is no defence or (conversely) merit to a claim or where the only issue to be determined is the amount to be awarded. This leave no room on a summary judgment application brought under Rule 7.3 for the weighing of evidence which Ontario's Rule 20.04(2.1) permits.[68]

Thus, Justice Brown concluded that in Alberta, *Hryniak*'s deferential standard of review "does not apply to first-instance decisions on applications for summary judgment … irrespective of whether that decision was taken by a master or a judge."[69]

In regards to the applicability of the *Hryniak* test, Justice Brown noted that summary judgment procedures play an important role in ensuring that litigation is proportional and that claims are "fairly and justly resolved in or by a court process in a timely and cost-effective manner," as per the stated objectives of Alberta's rules.[70] He further acknowledged that the Supreme Court's comments about summary judgment being a fair and proportional alternative to trial are generally applicable:

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64 *Court of Queen's Bench Act*, RSA 2000, c C-31, s 9(3)(b).

65 As stated by Justice Brown in *Orr*, *supra* note 57, the statutory restriction of a master's ability to weigh evidence and make findings of fact is "grounded upon masters being provincial appointees under Section 92(14) of the *Constitution Act, 1867*, 30 & 31 Vic, c 3 (UK). As such, they may not discharge a judicial function in a superior court comprising judges appointed by the Governor General under Section 96 of the *Constitution Act, 1867*" (*ibid* at para 16).

66 *Ibid* at para 18. On this point, Justice Brown noted that Alberta law creates a fine distinction between the weighing of evidence to determine facts (which a master cannot do) and the consideration of evidence to determine if a case is sufficiently conclusive to merit summary judgment (which a master must do when faced with a summary judgment application). However, he concluded that "[t]his conundrum need not be resolved here. It suffices for present purposes to reiterate that masters may not carry out the weighing of evidence contemplated in Ontario's Rule 20.04(2.1)" (*ibid* at para 18). This "conundrum" was subsequently addressed approximately six weeks later, however, in a written decision issued by Master Schlosser in *Schaffer v Lalonde*, 2014 ABQB 222, 587 AR 157. Master Schlosser contests the suggestion that masters are constitutionally prohibited from weighing affidavit evidence for the purposes of making a summary determination (*ibid* at para 17), states that masters have the authority do so if the parties agree (*ibid* at para 21), and suggests that liberal use of this authority is in keeping with the culture shift advocated by the Supreme Court of Canada in *Hryniak* (*ibid* at para 26). For more on the respective jurisdiction of a master and a justice to make findings of fact in the face of conflicting evidence at a summary judgment application in Alberta, see *776826 Alberta Ltd v Ostrowercha*, 2015 ABCA 49, 593 AR 391 [*Ostrowercha*].

67 *Orr*, *ibid* at para 14.

68 *Ibid* at para 19.

69 *Ibid* at para 20. In the same paragraph, Justice Brown went on to say that the deferential standard "does, however, apply to decisions on applications for judgment by way of a summary trial under Alberta's Rule 7.5 (which decisions must always be taken by a judge, and not a master)."

70 *Ibid* at para 27.

> *Hryniak v Mauldin* provides a salutary reminder that procedures used to adjudicate civil disputes must fit the nature of the claim; that a process which is disproportionate to the nature of the dispute and the interests involved will not achieve a fair and just result; and that, while summary judgment applications can save time and resources, they can also slow down the process if used inappropriately.[71]

Nevertheless, Justice Brown concluded that the *Hryniak* test for summary judgment did not apply in Alberta. As noted above, Justice Brown characterized this test as being predicated on the Supreme Court's direction that, in order to be fair and just, a judicial process — including summary judgment — must enable a judge to make the necessary findings of fact to resolve the claim. Again, although Alberta's summary trial rule authorizes a court to weigh evidence in order to make factual findings, this is not the case with Alberta's summary judgment rule. In short, Justice Brown concluded that the *Hryniak* test should not apply in Alberta because of the substantive differences regarding the evidentiary processes available under Alberta's summary judgment rule and those available under the corresponding Ontario rule.[72]

2. *WINDSOR V. CANADIAN PACIFIC RAILWAY LTD.*[73]

Issued on 19 March 2014, *Windsor* marks the first substantive consideration of the *Hryniak* test by the Alberta Court by Appeal.[74] This class action case concerned a claim brought on behalf of Ogden residential property owners against Canadian Pacific Railway Ltd. (CPR) to recover damages for diminished property values allegedly caused by ground water contamination flowing from the defendant's neighbouring locomotive repair facility. The claim was advanced on multiple grounds, including negligence, nuisance, trespass, and strict liability. CPR applied for summary judgment in relation to the strict liability and nuisance claims. The case management judge granted the application in part, issuing summary judgment in regards to the nuisance claims of some property owners.[75] The Alberta Court of Appeal allowed the appeal in part, summarily dismissing the strict liability claims. In making this finding, the appellate court relied on the standard of review identified in *Hryniak* and applied the *Hryniak* test.[76]

The Court of Appeal set out the relevant standard of review without any discussion. The Court simply stated that "[t]he legal test for summary dismissal is … subject to review for correctness."[77] Further, citing *Hryniak*, the Court stated that a judge's "assessment of the

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71 *Ibid* at para 24.

72 Taking a similar approach, the Nova Scotia Court of Appeal, in *Blunden Construction Ltd v Fougere*, 2014 NSCA 52, 345 NSR (2d) 385 at para 6, rejected the application of the *Hryniak* test in Nova Scotia because of the difference between the wording of the summary judgment rules in Nova Scotia and Ontario.

73 2014 ABCA 108, 371 DLR (4th) 339 [*Windsor*].

74 *Hryniak* was referenced by the Alberta Court of Appeal in *Dingwall v Dornan*, 2014 ABCA 89, 572 AR 106, a summary judgment ruling issued on 5 March 2014. However, in that case the Court of Appeal's citation of *Hryniak* was made without discussion and only in support of the standard of review: "Errors of mixed fact and law, and errors of fact alone are reviewed on the standard of palpable and overriding error, unless the error of mixed fact and law involves an error relating to an extricable principle of law, in which case the standard is one of correctness" (*ibid* at para 19). The applicability of the *Hryniak* test in Alberta was not discussed.

75 *Windsor*, *supra* note 73 at paras 4–8.

76 Interestingly, in its reasons for judgment, the Court of Appeal did not reference Justice Brown's decision in *Orr*, *supra* note 57.

77 *Windsor*, *supra* note 73 at para 10.

facts, his application of the law to those facts, and the ultimate determination on whether summary dismissal is appropriate are entitled to deference."[78]

The appellate Court's consideration of the substantive summary judgment test was more detailed. The Court noted that historically, "interlocutory procedures that denied any party its 'day in court' were strictly interpreted" because the common law justice system considered a viva voce trial to be "the default method for resolving [civil] disputes."[79] Under this strict approach, summary judgment was appropriate only "when it was 'plain and obvious', or 'clear' or 'beyond doubt' that there was no issue that should or could be put to trial."[80] The Court went on to explain, however, that the modern approach to civil justice, as reflected by *Hryniak* and other Supreme Court decisions, recognizes that "a full trial is not always the sensible and proportionate way to resolve disputes."[81] The Court of Appeal stated that "[s]ummary judgment is now an appropriate procedure where there is no genuine issue *requiring* a trial."[82] The Court then adopted the *Hryniak* test for determining whether this standard is met in a given case, holding that in Alberta, as in Ontario: "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."[83]

The Court of Appeal expressly rejected the argument that the *Hryniak* test does not apply in Alberta because it was developed in reference to Ontario's summary judgment rule. Instead, the Court held that the principles stated in *Hryniak* are "consistent with modern Alberta summary judgment practice" as laid out in Alberta's summary judgment rule.[84] In particular, comparing Alberta and Ontario's summary judgment rules, the Court stated:

> Ontario R. 20 and Alberta R. 7.3 are both procedures for resolving disputes *without* a trial (as compared with Alberta's summary trial procedure which is a form of trial). As in Ontario, *viva voce* evidence may exceptionally be allowed in chambers applications: R. 6.11(1)(g). New R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules.[85]

Thus, the Court of Appeal's finding that the *Hryniak* test applies in Alberta turns on the fact that the summary judgment rules in Ontario and Alberta serve the same essential purpose: to avoid unnecessary trials. This contrasts with Justice Brown's approach in *Orr*, which focused on the divergent processes set out in the respective provincial rules, rather than on their shared fundamental objective.

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78 *Ibid*.
79 *Ibid* at para 11.
80 *Ibid*.
81 *Ibid* at para 12. The other two Supreme Court of Canada cases referenced by the Court of Appeal in support of this proposition were *Lameman*, *supra* note 55 and *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*].
82 *Windsor*, *ibid* at para 13 [emphasis added].
83 *Ibid*.
84 *Ibid* at para 14.
85 *Ibid*.

3. ALBERTA JURISPRUDENCE SINCE *WINDSOR*

Since *Windsor*, the Alberta Court of Appeal has issued several rulings confirming that Alberta's summary judgment test has changed as a result of Alberta's revised summary judgment rule and the Supreme Court's ruling in *Hryniak*. As described above, Alberta courts formerly applied a strict test aimed at identifying the *existence* (or non-existence) of a triable issue. In contrast, the test articulated in *Hryniak*, *Windsor*, and subsequent decisions by the Alberta Court of Appeal focuses on determining whether a trial is *necessary* to fairly and justly resolve the dispute. In short, the pre-*Hryniak* test was whether the disputed issues warranted or *merited* a trial. Post-*Hryniak*, the test is whether a trial is *needed* to properly resolve the disputed issues.

Nonetheless, as with the pre-*Hryniak* test, the Alberta Court of Appeal has variously described the new approach. Moreover, these descriptions often harken back to the pre-*Hryniak* test. Some examples of how the Court has articulated the current test are as follows:

- 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.[86]

- Summary judgment is therefore no longer to be denied solely on the basis that the evidence discloses a triable issue. The question is whether there is in fact any issue of "merit" that *genuinely requires a trial*, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily.[87]

- [S]ummary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record.… *This does not, however, detract from the requirement that there be "no genuine issue for trial*."[88]

Further, in *Attila Dogan Construction and Installation Co. Inc. v. AMEC Americas Limited*, while noting that modern authorities provide that summary judgment can be granted "where there is 'no merit' to a claim or defence" and where "a disposition that is fair and just to both parties can be made on the existing record," the Court concluded that "[e]xamining 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."[89]

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86 *Maxwell v Wal-Mart*, 2014 ABCA 383, 588 AR 6 at para 12 [emphasis added].

87 *WP v Alberta*, 2014 ABCA 404, 378 DLR (4th) 629 at para 26 [emphasis added]. See also *Pyrrha Design Inc v Plum and Posey Inc*, 2016 ABCA 12, 2016 ABCA 12 (CanLII), where a majority of the Court of Appeal reasoned as follows in upholding the chamber justice's decision to grant summary judgment: "This is a prime example of a case with *no genuine issue requiring trial* because the summary process: (1) allowed the chambers judge to make the necessary findings of fact; (2) allowed the chambers judge to apply the law to the facts; and (3) was a proportionate, more expeditious and less expensive means to achieve a just result" (*ibid* at para 27 [emphasis added]).

88 *Amack v Wishewan*, 2015 ABCA 147, 602 AR 62 at para 26 [citations omitted] [emphasis added].

89 2015 ABCA 406, 609 AR 313 at para 15.

Almost a year after *Windsor*, the Alberta Court of Appeal in *Ostrowercha*[90] described the governing summary judgment test as comprising both procedural and substantive considerations. The Court stated that, as a matter of process, summary judgment can be rendered if a fair and just disposition can be made on the record before the chambers judge. As a matter of substance, summary judgment can be granted if the claim or defence of the non-moving party is without merit.[91] From the perspective of a party defending a summary judgment application, this means that:

> [I]n order for the non-moving party's case to have merit, there must be a genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the "fair and just process". The mere assertion of a position by the non-moving party in a pleading or otherwise, or the mere hope of the non-moving party that something will turn up at a trial, does not suffice. The key is whether the circumstances require … *viva voce* evidence in order to properly resolve the case.[92]

To this, the Court of Appeal recently added that: "Summary judgment is not possible if opposing parties' affidavits and evidence conflict on *material* facts because a chambers judge cannot weigh evidence or credibility on a summary judgment application."[93] And that: "Complex legal questions may be sufficient to deny summary judgment. A full trial is required when the summary record cannot be used to decide legal issues that are unsettled, complex or intertwined with facts.… A trial is also required when an applications judge is not satisfied she can fairly resolve the dispute on the record before her."[94]

D. WHERE ARE WE NOW?

Based on the foregoing, it is clear that the *Hryniak* test now applies in Alberta. This does not mean, however, that *Hryniak* and subsequent cases have fully elucidated the law relating to summary judgment applications in Alberta. On the contrary, it has been suggested that Alberta's summary judgment test "is now in flux."[95]

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90 *Supra* note 66. Interestingly, the panel deciding this case included Justice Brown who, while a Queen's Bench Justice, issued the finding in *Orr*, *supra* note 57.

91 *Ostrowercha*, *ibid* at paras 9–10.

92 *Ibid* at para 11. The two-part approach to the summary judgment test was also referenced by the Court of Appeal in *Whitecourt Power Limited Partnership v Elliott Turbomachinery Canada Inc*, 2015 ABCA 252, 389 DLR (4th) 111 at para 9.

93 *Condominium Corporation No 0321365 v Cuthbert*, 2016 ABCA 46, 612 AR 284 at para 28 [emphasis in original] [*Cuthbert*]. Generally, judicial authorities have concluded that masters cannot decide issues of fact on conflicting evidence in a summary judgment application, unless the parties agree. Justices can do so, but not with regard to central points of fact. See e.g. *Quinney v 1075398 Alberta Ltd*, 2015 ABQB 452, 24 Alta LR (6th) 202 at para 46 [*Quinney*]; *Jackson v Jackson 3 Farms Ltd*, 2015 ABQB 46, 608 AR 192 at paras 11–13; *Sherwood Steel Ltd v Odyssey Construction Inc*, 2014 ABCA 320, [2015] 3 WWR 582 at paras 7–8. Notably, in *Rai v 1294477 Alberta Ltd (Vinyl Retro Dance Lounge)*, 2015 ABQB 349, 618 AR 220 at paras 12–13, Master Schlosser suggested that a legislative change is needed to definitively permit adjudicators to decide questions of fact in the face of conflicting evidence at a summary judgment application.

94 *Cuthbert*, *ibid* at para 29 [citations omitted]. See also *Warman v Law Society of Alberta*, 2015 ABCA 368, [2016] 2 WWR 220, where the majority of the Court refused to grant summary judgment because the law applicable to the facts of the case was "unsettled," such that "[i]t is appropriate and important that the legal issues raised be dealt with by a court that has the benefit of a complete record" (*ibid* at para 1).

95 Stevenson & Côté, *supra* note 52 at 7-20.

The major point which our courts have drawn from *Hryniak* is the concept of proportionality, which "urges the court to give summary remedies where it can."[96] Alberta courts have concluded that summary judgment should be treated as a viable procedural alternative to a full trial, rather than as an exceptional method of disposition, as was the case prior to *Hryniak*. This shift in the overall approach to summary judgment is captured by the question which courts are now required to address when faced with a summary judgment application: can a fair and just disposition be made on the record before the court, or is a trial required to determine the issue(s)? In order to answer this question, "[t]he court is to look at the record and the dispute to decide whether it is essential to the resolution of the dispute that the court see the witnesses."[97] If it is necessary to see the witnesses in order to fairly and justly dispose of the case, then the lawsuit should not be decided by summary judgment. This encompasses situations where the parties' affidavits conflict on material facts, or where legal issues are especially complex or unsettled in law. What is less clear, however, is the standard which the court should apply in deciding these matters.

Prevailing post-*Hryniak* jurisprudence states that the appropriate test to apply at this stage of the analysis is, as stated in Rule 7.3 of Alberta's 2010 *Rules*,[98] whether there is any merit to the non-applicant's claim or defence (depending on which party is bringing the application). To apply this test, courts must evaluate the affidavit evidence provided by the parties.[99] The various descriptions of this evaluation by the Alberta Court of Appeal, both before and after *Hryniak*, suggest that much of this merit analysis is "not truly new," because the evidentiary burdens traditionally imposed on the applicant and the respondent in a summary judgment application have not changed: the onus of proof is on the moving party to establish that the responding party's case is without merit.[100] What remains elusive, however, is the measure to be applied in determining whether a claim or defence has the requisite merit to survive a summary judgment application.

The case authorities suggest that the relative merit of the applicant and respondent cases must be assessed, and that summary judgment should be granted where the respondent plaintiff fails to prove an element of the cause of action, or where the respondent defendant fails to establish a necessary element of the defence. But what measure applies in determining whether an applicant has established that the respondent's case has no merit? *Hryniak* did not deal with this issue,[101] and recent echoes of the old criteria (namely, of there being an issue "for trial" or of there being a high likelihood of the applicant succeeding at trial) in Alberta appellate jurisprudence only further confound the question. Does the *Hryniak* test operate on a balance of probabilities or on a higher standard? Far from resolving this issue, recent descriptions of the summary judgment test by the Alberta Court of Appeal

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96 *1214777 Alberta*, *supra* note 7 at para 18. See also Stevenson & Côté, *ibid* at 7-20 to 7-21.

97 *1214777 Alberta*, *ibid* at para 17.

98 *Supra* note 41.

99 For a discussion of the evidentiary issues which may be involved in this analysis, see Master Schlosser's comments in *1214777 Alberta*, *supra* note 7 at para 17.

100 *Ibid* at paras 18–19. See also *Quinney*, *supra* note 93 at para 42.

101 As noted by Master Schlosser in *1214777 Alberta*:

> The *Hryniak* case *suggests* that the threshold for granting summary judgment may be at the civil standard (balance of probability), rather than "plain and obvious", or "beyond doubt", which is closer to the criminal standard. The Supreme Court of Canada did not directly address this issue, or for that matter, any of the cases that establish the standard (*ibid* at para 21 [emphasis in original]).

demonstrate "a tension between the language used in the *Hryniak* case and the well established standard for granting summary remedies."[102]

Admittedly, there have been some attempts by Alberta courts to articulate a new standard for determining when summary judgment should be granted. To date, however, appellate judgments have not addressed this point directly and lower court rulings, taken as a whole, do not provide sufficient direction. Consider the following examples:

- In his concurring appellate judgment in *Stout v. Track*, Justice Wakeling proposed that summary judgment is appropriate where "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."[103] Justice Wakeling explained that this standard does not require the respondent's probability of success to be "close to zero"[104] in order for a summary judgment application to succeed, but it does require a likelihood of success which is more than "marginally stronger"[105] than that of the respondent. Thus, a 51 percent likelihood of success on the merits is not sufficient for summary judgment,[106] but an 80 percent likelihood of success would be.[107] The majority of the Court of Appeal refused to endorse this "mathematical formulas" approach, however, and held that, for the purposes of the case at bar, it was unnecessary to decide on the standard for evaluating the relative merits of the applicant and respondent cases.[108]

- In *AT Films Inc. v. AT Plastics Inc.*, Justice Burrows of the Alberta Court of Queen's Bench held that the Court of Appeal's formulation of the summary judgment test in *Windsor* applies "a less stringent test than the traditional 'plain and obvious or clear or beyond doubt' test."[109] According to Burrows, this means that a summary judgment application can be successfully resisted if the respondent shows

> the existence of evidence that could be sufficient to defeat the applicant at trial. The judge on the summary judgment application does not determine whether that party's evidence actually proves the fact sought to be proved. Such weighing of the evidence remains a trial function.[110]

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102 *Ibid* at at para 22.
103 2015 ABCA 10, 599 AR 98 at para 48, Wakeling JA.
104 *Ibid* at para 50.
105 *Ibid* at para 51.
106 *Ibid*.
107 *Ibid* at para 48, n 65.
108 *Ibid* at para 3.
109 2014 ABQB 422, 63 CPC (7th) 143 at para 22 [*AT Films*].
110 *Ibid*. This approach was subsequently endorsed by Justice Pentelechuk in *Bernum Petroleum Ltd v Birch Lake Energy Inc*, 2014 ABQB 652, 598 AR 172 [*Bernum Petroleum*]. Specifically, Justice Pentelechuk explained that unlike the traditional standard of "beyond doubt" or "plain and obvious," Justice Burrows' suggestion that since "the test for summary judgment is now less stringent, [it] best encapsulates the goals of proportionality, increased expediency and decreased cost *if* the matter can be determined on the existing record, in a manner that is fair and just to both parties" (*ibid* at paras 19–20 [emphasis in original]).

- In *M.D. of Opportunity No. 17 v. Gun-Shy Investments Inc.*, Master Schlosser described the standard as being

> quite high; not as high as the pre-*Hryniak* or pre-new-Rules standard; which approached the criminal standard, but in most cases it is higher than the balance of probabilities. Some cases have put the Summary Judgment figure at 80%, but what it really comes down to is a measure of the confidence the Court has in being able to dispose the matter on the factual record before the Court.[111]

- In *McDonald v. Brookfield Asset Management Inc.*, the Alberta Court of Appeal stated that the respondent in a summary judgment application "must provide some evidence of 'merit'" to its case, but "is not required, at this stage, to demonstrate that the action will succeed, or to show that there is merit on a balance of probabilities. The application for summary dismissal can successfully be resisted without proving the case to the normal civil standard."[112]

From these cases, and in the absence of explicit direction from the Alberta Court of Appeal, the best that can be said is that the standard currently applied by Alberta courts in determining the substance of a summary judgment application is less strict than the pre-*Hryniak* standard (that it be "plain and obvious" that the respondent's claim or defence cannot succeed) but is likely more strict than finding, on a simple balance of probabilities, that an issue requires a trial in order to be justly resolved. The absence of a clear standard provides the courts with considerable discretion in determining whether the *Hryniak* test is satisfied in a given instance, and this discretion may contribute to a court's ability to apply the principle of proportionality in managing litigation. However, because proportionality is a subjective and relative concept, the lack of a clear standard for the application of the *Hryniak* test leaves litigants with considerable uncertainty as to whether they are likely to succeed in bringing, or defending, a summary judgment application. This uncertainty, in turn, can prompt unnecessary summary judgment applications (including appeals from those applications) or stifle warranted applications, thereby increasing litigation time and expense, contrary to objectives of the culture shift championed by the Supreme Court in *Hryniak*.

IV. MIGRATION OF *HRYNIAK*'S "CULTURE SHIFT" TO ALBERTA

The influence of the *Hryniak* decision on Alberta procedural law has not been confined to summary judgment. Between 23 January 2014 (the date of the Supreme Court's ruling in *Hryniak*) and 30 September 2016, Alberta courts referenced the concept of litigation culture

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111 2016 ABQB 244, 2016 ABQB 244 (CanLII) at para 16. This is a shift from Master Schlosser's earlier statement in *1214777 Alberta*, *supra* note 7 that, until higher courts resolve the

> tension between the language used in the Hryniak case and the well established standard for granting summary remedies … when the court asks whether there is 'any issue of merit that genuinely requires a trial'… or whether a fair and just determination can be made on the merits, the threshold remains 'plain and obvious', 'or beyond doubt' (*ibid* at para 22 [citation omitted]).

Presumably, this shift reflects the intervening rulings of the Alberta Court of Queen's Bench in cases like *AT Films*, *supra* note 109 and *Bernum Petroleum*, *supra* note 110.

112 2016 ABCA 375, 2016 ABCA 375 (CanLII) at para 13.

shift in 77 reported cases,[113] all of which, in varying degrees, expressly or implicitly endorsed this change in litigation philosophy. Not surprisingly, the majority (44) of these cases discussed the culture shift in the context of summary judgment, however, a significant number of cases addressed the implications of the litigation culture shift with regard to other procedural issues[114] including, most notably, applications to strike a claim for significant deficiencies,[115] applications to strike a claim on the basis of delay,[116] the disclosure of information,[117] and the awarding of costs.[118] Below, I discuss the impact of the culture shift with regard to each of these issues and with respect to Alberta's litigation process in general. I begin, however, with a brief discussion of the rationale underlying the implementation of this culture shift by Alberta courts.

A. THE RATIONALE FOR CULTURE SHIFT IN ALBERTA

Following on the heels of the Supreme Court judgment in *Hryniak*, the findings of the Alberta courts in *Orr*[119] and *Windsor*[120] set the stage for the adoption of the litigation culture shift in Alberta outside of the summary judgment context. As discussed above, while refusing to apply the *Hryniak* test to decide the summary judgment application at issue in *Orr*, Justice Brown (as he then was) did reference *Hryniak* as a reminder that litigation procedures in general should be proportionate to the nature of the claim.[121] In *Windsor*, the Alberta Court of Appeal dug more deeply into this concept of proportionality, emphasizing *Hryniak*'s demotion of traditional trial as the default method for disposing of civil disputes and underscoring the value of interlocutory proceedings for achieving or promoting resolution without a conventional trial. In particular, noting that "[t]he theory that disputes eventually 'went to trial' was always something of a legal fiction," the Court expressly interpreted the Supreme Court's call for a culture shift as meaning that "the myth of trial should no longer govern civil procedure."[122] Corresponding to this downgrading of trial as the preferred method of judicial dispute resolution, the Court elevated the importance of interlocutory proceedings in preparing a case for resolution. In the words of the Court, "[i]t should be recognized that interlocutory proceedings are primarily to 'prepare an action for resolution', and only rarely do they actually involve 'preparing an action for trial.'"[123]

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113 This is based on a *Quicklaw* search of Alberta case law, as of 28 October 2016, using the search terms of "culture shift," "cultural shift," or "culture" accompanied by "shift" in the same paragraph. Note that this search did not look for specific references to *Hryniak* itself. The reported decisions are counted by case, not by level of court judgments, so appeal decisions are not counted separately even if culture shift is mentioned in both the lower court and appellate rulings. For a complete listing of the cases, see Appendix C, below.

114 See Appendix C, below.

115 Alberta, 2010 *Rules*, *supra* note 41, r 3.68.

116 *Ibid*, rr 4.31, 4.33.

117 *Ibid*, Part 5.

118 *Ibid*, Part 10, Division 2.

119 *Supra* note 57.

120 *Supra* note 73.

121 See *supra* note 71 and accompanying text. See also *Whitecourt Power Limited Partnership v Interpro Technical Services Ltd*, 2014 ABQB 135, 95 Alta LR (5th) 415 at paras 36–37, issued in the time period between *Orr* and *Windsor*.

122 *Windsor*, *supra* note 73 at para 15.

123 *Ibid*.

In *Orr* and in subsequent decisions,[124] Alberta courts have endorsed the culture shift on the basis of key similarities between the Supreme Court's description of the culture shift and the requirements of Foundational Rule 1.2 in Alberta's *Rules of Court*. This rule, which was implemented as part of the 2010 reforms, states that the overall "purpose of [the] 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,"[125] requires litigants to "facilitate the quickest means of resolving a claim at the least expense,"[126] and explicitly calls upon the court to exercise its discretion to grant a remedy or to impose a sanction in a manner which is "proportional to the reason for granting or imposing it."[127] Simply stated, Rule 1.2 reminds litigants, counsel, and the courts to utilize the rules of litigation procedure to achieve a fair resolution in a reasonable amount of time and in a cost-effective manner. Relying on this legislated emphasis of "resolution" rather than trial and expression of proportionality of process, Alberta courts have concluded that the culture shift called for by the Supreme Court is not new to Alberta, but is instead consistent with the approach already required by Alberta's rules. As explained by Justice Michalyshyn in *Sutherland*, "the proportionality principle on which [the culture shift] is grounded … has been the foundation of the new Alberta *Rules of Court* since 2010.… And it has been in the thinking of courts long before that."[128] Further, as recently described by the Alberta Court of Appeal, Rule 1.2 and the culture shift advocated by the Supreme Court translates to a functional, rather than formalistic, application of litigation procedures:

> Application of the *new Rules* requires a functional approach. Their purpose and intent, as emphasized in the foundational *rule 1.2*, is to provide fair and just resolution of claims in a timely and cost effective manner. The foundational rules parallel a cultural shift in litigation that deemphasises trial as the dominant mechanism for resolving civil disputes in favor of summary procedures and ADR.[129]

The courts have advocated a wide application of this philosophy, noting that the proportionality principle described by the Supreme Court's culture shift "should inform not merely this Court's interpretation of the specific rules under consideration but the overall approach to civil justice issues before the courts."[130]

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124 *Orr*, *supra* note 57 at para 27; *Sutherland v Encana Corporation*, 2014 ABQB 601, 597 AR 230 at para 62 [*Sutherland*]; *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289, 376 DLR (4th) 581 at para 5 [*ShawCor*]; *Nash v Snow*, 2014 ABQB 355, 590 AR 198 at paras 19, 33–35 [*Nash*]; *Echino v Munro*, 2015 ABQB 35, 22 CBR (6th) 157 at para 5; *Sweezey v Sweezey*, 2016 ABQB 131, [2016] 8 WWR 758 at para 40.

125 Alberta, 2010 *Rules*, *supra* note 41, r 1.2(1).

126 *Ibid*, r 1.2(2)(b).

127 *Ibid*, r 1.2(4).

128 *Sutherland*, *supra* note 124 at para 62 [citation omitted].

129 *Weaver v Cherniawsky*, 2016 ABCA 152, 38 Alta LR (6th) 39 at para 17 [*Weaver*]. See also *Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135, 406 DLR (4th) 22 at para 18 [*Ursa Ventures*] (majority reasons of Justice Rowbotham).

130 *ShawCor*, *supra* note 124 at para 5. The other cases cited at *supra* note 124 offer similar conclusions.

B. IMPACT OF THE CULTURE SHIFT

1. APPLICATIONS TO STRIKE PLEADINGS FOR SIGNIFICANT DEFICIENCIES

Alberta courts have expressly invoked the *Hryniak* culture shift in the context of applications to strike pleadings under Rule 3.68. For example, the Alberta Court of Appeal held that "[s]triking pleadings that have no reasonable prospect of success is consistent with this new culture,"[131] referencing in particular *Hryniak*'s call for a litigation culture which promotes timely and affordable access to the civil justice system, and which shifts the focus away from a conventional trial in favour of more proportional procedures. The Court further stated that, while "the courts must be careful not to inhibit the development of the common law by applying too strict a test to novel claims … the courts must resist the temptation to send every case to trial, even if some legal analysis is needed to determine if a claim has any reasonable prospect of success."[132]

Applying this approach, the current judicial trend seems to favour a broader application of the striking out rule than was the case prior to *Hryniak*. For instance, in *HOOPP Realty Inc. v. The Guarantee Company of North America*, a majority of the Court of Appeal held that, in determining whether a pleading discloses a cause of action or defence, courts can now look not only at the wording of the pleading, but to the "underlying litigation context," including "earlier reported decisions addressing aspects of the same claim" and "companion litigation which produces a complete defence to the action in question."[133] The Court justified this approach as follows: "To conclude otherwise where to do so could allow actions to continue that have no reasonable prospect of success would be to ignore the culture shift described in *Hryniak* … toward simplifying pre-trial procedures and promoting timely and affordable access to justice."[134]

Further, Justice Graesser of the Alberta Court of Queen's Bench recently relied on the culture shift to adopt a broader test for striking out a pleading for failing to disclose a reasonable cause of action or defence.[135] Whereas previous jurisprudence held that a pleading should only be struck out if it was obvious that the claim or defence would fail, Justice Graesser stated:

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131 *O'Connor Associates Environmental Inc v MEC OP LLC*, 2014 ABCA 140, [2014] 6 WWR 231 at para 14.

132 *Ibid* at para 16, relying on the test for striking out pleadings established by the Supreme Court of Canada's judgment in *Imperial Tobacco*, *supra* note 81.

133 2015 ABCA 336, 607 AR 377 at paras 19–20.

134 *Ibid* at para 21 [citation omitted]. Note, however, that Justice Wakeling expressly took issue with this point in a separate concurring judgment:

> I do not share my colleagues' opinion that the Supreme Court of Canada's endorsement in *Hryniak v. Mauldin* of economical and expeditious dispute-resolution procedures supports their view that a motions court may take into account facts not set out in a commencement document, a position completely at odds with the settled law and inconsistent with the purpose of and fundamental premise underlying r. 3.68(2)(b) (*ibid* at para 30 [footnote omitted]).

135 This ruling was made under Alberta's *Class Proceedings Act*, SA 2003, c C-16.5, s 5(1)(a) which, for the purposes of a class action, operates like Alberta, 2010 *Rules*, *supra* note 41, r 3.68(2)(b) by permitting a pleading to be struck if it discloses no cause of action or defence.

> It is difficult to see that the "plain and obvious", "hopeless", or "bound to fail" tests from *Hunt v Carey* and other pre-*Hryniak* cases should still apply in light of changing times. A "chance of success" should no longer determine whether a lawsuit should proceed, especially in the context of class proceedings.
>
> …
>
> I am inclined to think that a more modern test for striking pleadings will involve an assessment of a reasonable likelihood of success, rather than a chance of success.
>
> This is, I believe, consistent with the approach taken by the Alberta Court of Appeal in *Windsor v Canadian Pacific Railway*.… As noted by HMQ in their argument, the tests of bound to fail or hopeless may have been replaced with a "reasonable prospect of success".
>
> Put another way, claims should not be allowed to proceed if there is no reasonable prospect of success.[136]

2. APPLICATIONS TO STRIKE ACTIONS FOR DELAY

Alberta courts appear to be applying the delay rules with renewed rigor, taking the view that "dismissing languishing litigation" pursuant to Alberta's delay rules[137] is "consistent with the shift towards simplifying proceedings as soon as it is fair and reasonable."[138] For example, the courts have held that litigation progress (and hence delay) should be evaluated with regard to the prospects for resolution of the claim and not with regard to the prospects for trial, as was previously the case:

> Slatter J.A. commented in *Windsor v Canadian Pacific Railway Ltd* … that "the myth of trial should no longer govern civil procedure". The culture shift called for in *Hryniak* and echoed in *Windsor* supports the Plaintiff's contention that the end goal of "significant advancements" under *Rule* 4.33 is not necessarily trial, but rather resolution. I agree.[139]

Under this approach, courts deciding a delay application focus on whether the respondent has been moving the action towards resolution, rather than on whether the respondent has been taking steps toward trial. This means that the courts now apply a functional and qualitative standard to determine whether a litigant is responsible for undue delay of the action. By this test, the completion of formal steps (that is, those required by the rules in order to prepare

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136 *LC v Alberta*, 2016 ABQB 151, 2016 ABQB 151 (CanLII) at paras 87–90 [citation omitted]. Note, this standard is consistent with what was established by the Supreme Court of Canada in *Imperial Tobacco*, *supra* note 81, in relation to the striking out of pleadings on a preliminary basis. See also *Goodswimmer v Canada (Attorney General)*, 2016 ABQB 384, 2016 ABQB 384 (CanLII) at paras 234–36 [*Goodswimmer*].

137 Alberta, 2010 *Rules*, *supra* note 41, rr 4.31–4.33.

138 *Nash*, *supra* note 124 at para 20.

139 *Ibid* at para 32 [citation omitted]. See also *Paquin v Whirlpool Canada LP*, 2016 ABQB 147, 2016 ABQB 147 (CanLII) at para 18. But see *Humphreys v Trebilcock*, 2017 ABCA 116, 2017 ABCA 116 (CanLII) at paras 173, 178 [*Humphreys*] where the Court of Appeal assessed the delay application with regard to when the claim might have reasonably been set for trial or prosecuted at trial.

a lawsuit for trial) may not be sufficient to withstand an application to strike an action for delay.[140] Alberta courts have described this new test as follows:

> [T]he court must view the whole picture of what transpired in the three-year period, framed by the real issues in dispute, and viewed through a lens trained on a qualitative assessment. This necessarily involves assessing various factors including, but not limited to, the nature, value and quality, genuineness, timing, and in certain circumstances, the outcome of what occurred.[141]

and

> Under the delay *Rules* the functional approach requires the chambers judge to determine whether the step said to be a "significant advance in an action" actually moves the lawsuit forward in a meaningful way considering its nature, value, importance and quality. The genuineness and the timing of the step are also relevant. The focus is on the substance of the step taken and its effect on the litigation, rather than on its form.[142]

3. PRETRIAL DISCLOSURE

The Alberta Court of Appeal has stated that the procedural rules regarding the pretrial disclosure of information must be read in light of the culture shift called for in *Hryniak*, in Foundational Rule 1.2, and in Rule 5.1 (which refines the requirements of Rule 1.2 in the context of the disclosure of information rules).[143] This means that the interpretation and application of the disclosure rules must reflect the fact that information disclosure is intended to simplify the litigation process and to facilitate resolution of the dispute, but not necessarily via a conventional trial. In the words of the Court:

> [T]he relevant Rules relating to disclosure and the content of affidavits of records must, like a provision in a statute, be read in their entire context.… That relevant context includes the culture shift endorsed in *Hryniak*, one objective of which is to simplify pre-trial procedures in the delivery of justice.
>
> …
>
> Thus, our interpretation of the *Rules* is informed by the foundational purpose in Rule 1.2, the stated purpose relating to disclosure contained in Rule 5.1, and the culture shift required to create a litigation environment that enhances, and does not obstruct, access to justice. All three encourage early disclosure and narrowing of the issues in dispute between parties. One objective is to facilitate a timely evaluation of the parties' respective positions with a view to achieving, if possible, a settlement without the need to resort to a trial.[144]

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140 See e.g. *Ursa Ventures*, *supra* note 129 at paras 19–23, Rowbotham JA, with regard to whether the required step of serving an affidavit of records is necessarily sufficient to successfully defend an application to strike on the basis of delay.

141 *Nash*, *supra* note 124 at para 30.

142 *Weaver*, *supra* note 129 at para 18. See also *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123, 400 DLR (4th) 512 at para 14; *Humphreys*, *supra* note 139 at paras 115–23 (delay is a relative term which should be assessed with regard to the nature of the case and the claims made).

143 In particular, Alberta, 2010 *Rules*, *supra* note 41, r 5.1(1) states that "[w]ithin the context of rule 1.2," the purpose of the disclosure obligations includes facilitating resolution of disputed issues (*ibid*, r 5.1(1)(d)) and discouraging unnecessary delay and litigation expense (*ibid*, r 5.1(1)(e)).

144 *ShawCor*, *supra* note 124 at paras 30, 34.

Again, this translates into a robust application of the procedural rules, where parties are required to fulfill their litigation obligations with a view toward resolving the claim as soon as possible, with or without a trial. This is in contrast to parties completing litigation steps, such as information disclosure, in a formalistic manner, merely "checking the boxes" without any purposeful advance toward resolution.

Applying this approach, the Court has held that a party must provide meaningful descriptions of privileged records in an affidavit of records in order to minimize disagreements over privilege and the need for judicial intervention, both of which slow the litigation process:

> Discovery should not be used to undermine legitimate spheres of privilege. At the same time, privilege should not be used to turn litigation into a game of hide and seek … with the seeker blindfolded.
>
> …
>
> Thus, the *Rules* should be interpreted in a manner that maximizes the ability of opposing counsel or parties to resolve disputes over privilege and minimizes the time and expense involved in further litigation steps or judicial intervention. Simply put, resort to the courts on privilege issues should not be the first stop on the litigation highway.[145]

Still, the courts have also cautioned against applying the efficiency concern central to the culture shift as a justification for disregarding the parameters of disclosure set out in the *Rules*. For example, in considering the culture shift in the context of the rules relating to the disclosure of information for the purposes of an independent medical examination, Master Smart stated:

> Despite the purported need for a cultural shift to speed along the litigation process in an environment of scarce judicial resources, Courts must not cast aside established procedures and practises expressly prescribed by the rules for the sake of expediency. Quicker access to justice must not mean accepting less stringent practises which diminish the quality of a judicial process such that fair and proper adjudication is, or is seen to be, compromised.[146]

4. COST AWARDS

The ability to award recoverable costs of litigation against a non-compliant party is a fundamental tool wielded by courts to enforce compliance with procedural rules. Accordingly, costs are also a critical element of the courts' ability to transform litigation culture. On pain of costs, courts can demand that parties prioritize early resolution and apply proportionality to litigation steps, as advocated by the Supreme Court in *Hryniak*.

Alberta courts have seized this opportunity, awarding increased costs or reducing recoverable costs where the court finds that parties have not acted in accordance with the

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145 *Ibid* at paras 6–7.
146 *Martin v Sievers*, 2014 ABQB 357, 2014 ABQB 357 (CanLII) at para 12.

culture shift. For example, in *Jivraj v. Jivraj*,[147] Justice Veit of the Alberta Court of Queen's Bench imposed accelerated costs against a litigant in a family proceeding who brought a court application in a non-emergency situation and with no real issue to be decided. In doing so, Justice Veit relied upon the Supreme Court of Canada's call for an increased culture of proportionality in litigation:

> [T]he Supreme Court of Canada reminded us that a shift in culture is required to ensure that the justice system be able to provide a fair and just process which is "proportionate, timely and affordable".
>
> …
>
> The courts and the bar must therefore discourage time and money consuming process which does not aid in achieving fair and just process and which may, in fact, be counter-productive to those ideals. This shift in culture must also affect the community at large; members of the community must come to realize that, not only for their own financial wellbeing, but also for the best use by the community of access to the justice system, courts are a last resort, not a first one, in solving minor disputes.[148]

Similarly, in *Alberta Health Services v. 1443028 Alberta Ltd. (Home Placement Systems)*, Justice Veit awarded costs against a litigant who brought proceedings to access a document which it knew was not necessary to resolve the dispute, reasoning that the culture shift called for in *Hryniak* means that unnecessary court applications should be avoided.[149] In *Sutherland*, Justice Michalyshyn of the Alberta Court of Queen's Bench reduced the plaintiff's recoverable costs award following a trial by 25 percent because the plaintiff had rejected the defendant's settlement offer on the eve of trial and, at trial, recovered just over 1 percent more than the defendant's offer.[150] Justice Michalyshyn referenced the "proportionality principle" and the need for courts to balance a party's right to access trial when necessary against the obligation of parties to resolve claims without trial when reasonable to do so, as per the culture shift advocated in *Hryniak*.[151] While acknowledging "the risk that a costs penalty to plaintiffs in the circumstances of this case may lead to a 'chill' deterring otherwise meritorious claims from proceeding to trial" and "concern for the 'stunting' of the development of the common law," Justice Michalyshyn concluded that "any chill here is outweighed by the need to address the defendants' liability for a claim for costs that is hugely out of proportion to the plaintiffs' gain, net of what was obviously a reasonable offer, though made on the eve of trial."[152]

5. OTHER PROCEDURAL ISSUES

In addition to the above, Alberta courts have relied on the Supreme Court's call for a litigation culture shift in a variety of procedural rulings, including decisions "encouraging" parties to develop an efficient litigation plan,[153] refusing amendments to pleadings,[154]

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147 2014 ABQB 307, 46 RFL (7th) 159.
148 *Ibid* at paras 16–17.
149 2016 ABQB 308, 2016 ABQB 308 (CanLII) at para 54.
150 *Sutherland*, *supra* note 124 at para 64.
151 *Ibid* at para 62.
152 *Ibid* at para 63.
153 *Gilks v Green Clean Squad Inc*, 2015 ABQB 83, 610 AR 186 at para 32.
154 *Goodswimmer*, *supra* note 136 at para 579.

severing actions,[155] and admitting viva voce evidence at a hearing in order to avoid the necessity of proceeding to trial.[156] However, the courts have also noted that the promotion of litigation efficiency, as mandated by the culture shift, should not mean jettisoning established standards and processes in circumstances where they are needed for fair and proper adjudication. As stated by the Alberta Court of Appeal:

> Courts must not cast aside established procedures and practises expressly prescribed by the rules for the sake of expediency. Quicker access to justice must not mean accepting less stringent practises which diminish the quality of a judicial process such that fair and proper adjudication is, or is seen to be, compromised.[157]

Further, the Alberta Court of Appeal has recognized that, while implementing the culture shift means that "[t]he cost and time demands of each route to resolution of a dispute must be taken into consideration in choosing that route,"[158] this approach "does not favour the most expeditious route to solution in every situation."[159]

C. WHERE ARE WE NOW?

Proportionality was recognized as a foundational principle of litigation when Alberta's rules were reformed in 2010. The Supreme Court's promotion of a litigation culture shift in *Hryniak* has clearly invigorated Alberta courts in their application of this principle. To the extent that rules alone "are not enough to achieve proportionality,"[160] the Supreme Court's call for a culture shift has provided Alberta courts with both the motivation and the justification necessary to ensure that all of the procedural rules (not just the summary judgment rule) are applied for the purpose of achieving a fair, efficient, and cost-effective resolution. The *Hryniak* case has emboldened Alberta courts to demand that litigants and counsel comply with Rule 1.2 by focusing on the function of litigation procedures in achieving an end to the dispute, rather than emphasizing the formalities of litigation process.[161]

This judicial enforcement of the culture shift is a good thing if it helps litigants and counsel to "exercise more rigorous judgment about how much procedure is actually needed

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155 *NEP Canada ULC v MEC Op LLC*, 2016 ABCA 201, 90 CPC (7th) 274 at para 31 [*NEP Canada ULC*].

156 *Lopushinsky Estate (Re)*, 2015 ABQB 63, 610 AR 26 at para 6, outcome on costs aff'd 2016 ABCA 102, 2016 ABCA 102 (CanLII). See also *Shefsky v California Gold Mining Inc*, 2014 ABQB 730, 2014 ABQB 730 (CanLII), aff'd 2016 ABCA 103, 399 DLR (4th) 290 (Court of Queen's Bench agreed to decide an oppression remedy case by application because the parties chose the procedure knowing the limits of affidavit evidence).

157 *Nafie v Badawy*, 2015 ABCA 36, 381 DLR (4th) 208 at para 104.

158 *NEP Canada ULC*, *supra* note 155 at para 31.

159 *Ibid* at para 32.

160 The Honourable Colin L Campbell, "What Is Proportionality, Anyway?" (2015) 34:3 Adv J 26 at 26 [Campbell, "Proportionality"].

161 The broad application of the culture shift, beyond summary judgment, is consistent with the Supreme Court's message in *Hryniak*, which has been interpreted as being intended "not only to reform the specific mechanism of summary judgment, but also to trumpet the message of proportionality, efficiency and the need for a 'culture shift' in a manner that would reverberate across the board of civil adjudication" (Shantona Chaudhury, "Hryniak v. Mauldin: The Supreme Court Issues a Clarion Call for Civil Justice Reform" (2014) 33:3 Adv J 8 at 16). This broad approach also echoes the litigation culture shift recommended by the Canadian Forum on Civil Justice, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013), online: <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> ("[t]o improve the system, we need a new way of thinking that concentrates on simplicity, coherence, proportionality and sustainability at every stage of the [litigation] process" at 8).

in an individual case,"[162] and if it reduces unnecessary costs and delay resulting from "[b]oilerplate pleadings, requests for every document under the sun and the inability of lawyers to focus their case in trial."[163] The abuse of litigation processes — for example, by using procedure for its own sake, as a means of winning the lawsuit by attrition, or purely for strategic advantage — is obviously inappropriate and should be deterred by the courts.[164] As with summary judgment, however, the problem with the judicial implementation of the culture shift is that it is fraught with uncertainty for litigants and their counsel. Generally, proportionality means employing the most efficient and cost effective litigation process possible without sacrificing a fair resolution of the dispute. Because litigation procedures are time consuming and expensive, this means that proportionality calls for litigation processes to be minimized or used only as needed in order to achieve a just resolution of the dispute. However, as noted by Colin Campbell, the difficulty is that "no objective standard exists for its application in a particular situation: Given the same set of facts, people will apply the principle of proportionality in various ways."[165] As explained below, the subjectivity (and hence uncertainty) inherent in the doctrine of proportionality is exacerbated by the Alberta Court of Appeal's conclusion that the litigation culture shift means that "the myth of trial should no longer govern civil procedure" and that "[i]t should be recognized that interlocutory proceedings are primarily to 'prepare an action for resolution.'"[166]

Litigants have always confronted a measure of uncertainty as to whether their litigation strategies or procedural choices will be supported or rejected by a court. Courts have long had the authority to strike pleadings or to impose costs or other sanctions where they conclude that litigation processes have been used unnecessarily or inappropriately. Traditionally, however, the presumption that a matter would be decided via trial has served as a measure for evaluating a litigant's procedural choices and obligations, even if, in reality, the matter was unlikely to proceed to trial. Procedural issues such as the duration and extent of pretrial questioning, the timing and disclosure of expert reports, or the need for a medical examination of a party often turn on what issues will be argued at trial and what evidence each party will require to prove its case at trial. Conversely, what issues will remain in dispute at trial is determined, in part, by the information obtained by each party during the pretrial litigation process. This is because the procedures set out in the rules are *pretrial* procedures, even though they may not necessarily result in a trial in most cases. So how can the proportionality — the reasonability — of a litigant's procedural choices be evaluated if the culture shift eliminates the trial as a standard of evaluation?

The resolution options advocated by the culture shift cover a wide scope, including, for example, preliminary dismissal, settlement, summary judgment, summary trial, and conventional trial. It is one thing to say that the method of judicial resolution — for instance, the choice between a summary judgment or a viva voce trial — should be proportional to the case at hand. It is an entirely different exercise, however, to identify the procedural steps

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162 Allan Rouben, "Minimalism: An Approach to Advocacy for Our Times" (2015) 34:1 Adv J 35 at 35.

163 *Ibid* at 35.

164 In this context, the culture shift is "a revolutionary call to arms against the scourge of protracted litigation and unnecessary expense" (Chaudhury, *supra* note 158 at 10). Of course, such conduct is also likely to be a breach of a lawyer's professional obligations. See e.g. The Law Society of Alberta, *Code of Conduct*, Edmonton: Law Society of Alberta, 2017, ch 5.1-2.

165 Campbell, "Proportionality," *supra* note 160 at 26.

166 *Windsor*, *supra* note 73 at para 15.

which are proportional to resolution when the resolution options themselves vary widely. Without a clear resolution target, reasonability and proportionality of process can only be determined, if at all, after the fact. This leaves litigants and counsel with little guidance, at the time when procedural decisions must be made, as to whether their procedural choices will satisfy the culture shift requirement of proportionality. It has been said that "[c]osts can only police litigation behavior effectively if they are levied predictably—in other words, if it is made clear to the players in the system what behavior will attract sanctions, and what those sanctions are likely to be."[167] The same statement can be made with regard to the judicial enforcement of the litigation culture shift.

V. CONCLUSION

The question I posed at the outset of this article asks about the impact of the Supreme Court of Canada's decision in *Hryniak* on trial-based litigation in Alberta. The essence of this query is whether the Supreme Court's demotion of the conventional trial from its traditional status as the preferred method of resolving civil disputes, along with the Supreme Court's acceptance of summary judgment as an alternate means of substantively resolving civil disputes, means that litigation directed toward a conventional trial is now, or is soon to be, a thing of the past. I am not the first to ask this question. Many commentators have concluded that, rather than marking the death of traditional civil trials as dispute resolution mechanisms, the *Hryniak* case may serve to revive traditional trials as a realistic and timely resolution option by clearing from the court calendar cases which can be appropriately resolved by other mechanisms of judicial resolution.[168] This is no doubt the intention of the Supreme Court of Canada, but it is too soon to say whether this will, in fact, be *Hryniak*'s legacy in Alberta. It is possible, instead, that the lack of certainty may have a chilling effect on the willingness of litigants and counsel to proceed to a conventional trial, even where a trial is warranted. Further, the availability of trial dates may be further reduced as court resources become occupied with summary judgment and other pretrial applications by litigants testing the requirements of the litigation culture shift.

At present, however, three things are clear from the post-*Hryniak* jurisprudence which I have reviewed in this article. First, notwithstanding the difference in the wording of the summary judgment rules in Ontario and Alberta, the *Hryniak* test currently governs the determination of summary judgment applications in both provinces. Second, Alberta courts have embraced the Supreme Court's call for a culture of proportionality in litigation procedure to replace the presumption that civil disputes will be resolved by a conventional trial. Along with the 2010 changes to Alberta's *Rules*, the Supreme Court's comments about culture shift in *Hryniak* have encouraged Alberta courts to rigorously apply the *Rules* with a view to ensuring that litigation proceeds fairly and efficiently and that disputed issues are

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167 Erik S Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36:1 Queen's LJ 113 at 144.

168 See e.g. Chaudhury, *supra* note 161 at 16; Jonathan Lisus, "Hryniak: Requiem for the Vanishing Trial, or Brave New World?" (2014) 33:1 Adv J 6 at 9–10. See also The Honourable Colin L Campbell, "Reflections on Proportionality and Legal Culture" (2010) 28:4 Adv J 4 (considering the concept of a proportionality culture shift prior to *Hryniak*, a culture shift which required parties to "focus early on a resolution process that suits their dispute" would permit "trial where appropriate, with a known time and affordable cost, [which] is preferable to a concerning trend of a war of attrition or an improvident settlement" at 7).

resolved, where possible, without the expense and time of a conventional trial. Third, the policing of the culture shift by the courts, and in particular, the adoption of the *Hryniak* test for summary judgment applications, creates uncertainty for Alberta litigants and their counsel. In respect of summary judgment, there is uncertainty about the standard which litigants should apply in assessing the likelihood of successfully advancing or defending a summary judgment application. In the absence of the traditional understanding that summary judgment is an exceptional remedy, rather than an equal but alternative remedy to a conventional trial, the question of whether a dispute should be resolved at trial depends heavily on the subjective analysis of the decision-maker. More generally, because proportionality is an inherently relative and subjective concept, uncertainty likewise exists for litigants attempting to determine *ex ante* whether a court will view their litigation choices as complying with the new culture of proportionality. Uncertainty in respect of process and outcome has always been a part of litigation, but historically, trial has served as the yardstick for identifying the litigation steps required as well as the time and the level of detail required in pursuing those steps.

Both the *Hryniak* test and the culture shift toward proportionality serve as crucial reminders that litigation procedures should be applied functionally, rather than formally. It is equally important, however, for litigants and their counsel to be able to reasonably predict whether their litigation choices are likely to be found to be consistent with judicial expectations. While the 2010 legislative reforms to Alberta's rules of procedure championed the notion of proportionality, the adoption of *Hryniak* by Alberta courts removed the goal of a conventional trial as the basis for assessing the proportionality of litigation steps. Although imperfect in many ways, historically the spectre of a conventional trial was a reliable motivator and a touchstone by which parties could plan and evaluate their litigation strategies. The new approach to summary judgment and to proportionality has displaced this touchstone and, to date, Alberta law has not replaced it with a tangible alternative.

APPENDIX A: ONTARIO'S SUMMARY JUDGMENT RULE

RULE 20 SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

EVIDENCE ON MOTION

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. O. Reg. 438/08, s. 12.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. O. Reg. 438/08, s. 12.

FACTUMS REQUIRED

20.03 (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 14.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 4.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 4.

(4) REVOKED: O. Reg. 394/09, s. 4.

DISPOSITION OF MOTION

General

20.04 (1) REVOKED: O. Reg. 438/08, s. 13 (1).

(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. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(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. O. Reg. 438/08, s. 13 (3).

Oral Evidence (Mini-Trial)

(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. O. Reg. 438/08, s. 13 (3).

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount. R.R.O. 1990, Reg. 194, r. 20.04 (3); O. Reg. 438/08, s. 13 (4).

Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge. R.R.O. 1990, Reg. 194, r. 20.04 (4); O. Reg. 438/08, s. 13 (4).

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts. R.R.O. 1990, Reg. 194, r. 20.04 (5).

WHERE TRIAL IS NECESSARY

Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. O. Reg. 438/08, s. 14.

Directions and Terms

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs. O. Reg. 438/08, s. 14.

Specified Facts

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice. O. Reg. 438/08, s. 14.

Order re Affidavit Evidence

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration. O. Reg. 438/08, s. 14.

Order re Experts, Costs

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs. O. Reg. 438/08, s. 14.

Failure to Comply with Order

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just. O. Reg. 438/08, s. 14.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default. O. Reg. 438/08, s. 14.

COSTS SANCTIONS FOR IMPROPER USE OF RULE

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay. O. Reg. 438/08, s. 14.

EFFECT OF SUMMARY JUDGMENT

20.07 A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief. R.R.O. 1990, Reg. 194, r. 20.07.

STAY OF EXECUTION

20.08 Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just. R.R.O. 1990, Reg. 194, r. 20.08.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

20.09 Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims. R.R.O. 1990, Reg. 194, r. 20.09.

APPENDIX B:
ALBERTA'S SUMMARY JUDGMENT RULE

Summary Judgment

Application for judgment

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

(a) admissions of fact are made in a pleading or otherwise, or

(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.

Application and decision

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.

Proceedings after summary judgment against party

7.4 If summary judgment is given against one or more defendants or plaintiffs, the action may be continued by or with respect to any plaintiff or defendant not bound by the judgment.

APPENDIX C: ALBERTA CASES ON CULTURE SHIFT[169]

Case Name	Neutral Citation	Date	Issue
Al-Ghamdi v. Telus Communication Company	**2016 ABPC 200**	**12 September 2016**	**Summary Judgment**
Goodswimmer v. Canada (Attorney General)	**2016 ABQB 384**	**8 July 2016**	**Strike Out / Summary**
Stackard v. Harrington	2016 ABQB 357	27 June 2016	Delay
NEP Canada ULC v. MEC Op LLC	2016 ABCA 201	27 June 2016	Severance
Alberta Health Services v. 1443028 Alberta Ltd. (Home Placement Systems)	2016 ABQB 308	1 June 2016	Costs
Ursa Ventures Ltd. v. Edmonton (City)	2016 ABCA 135, affirming 2015 ABQB 438	11 May 2016 (QB 7 July 2015)	Delay
Sprague Rosser Contracting Co. Ltd. v. E.O.S. Pipeline & Facilities Inc.	**2016 ABQB 231**	**26 April 2016**	**Summary Judgment**
Haji Holdings Inc. v. 1194038 Alberta Ltd.	**2016 ABQB 233**	**21 April 2016**	**Summary Judgment**
Feldman v. Bendle Glass Co. (1975) Ltd.	**2016 ABQB 219**	**14 April 2016**	**Summary Judgment**
Weatherford Canada Partnership v. Addie	**2016 ABQB 188**	**6 April 2016**	**Summary Judgment**
Stangenberg v. Bellamy Software	**2016 ABQB 160**	**18 March 2016**	**Summary Judgment**
Genworth Financial Mortgage Insurance Company Canada v. Casuga	**2016 ABQB 155**	**15 March 2016**	**Summary Judgment**
Paquin v. Whirlpool Canada LP	2016 ABQB 147	14 March 2016	Delay
L.C. v. Alberta	2016 ABQB 151	14 March 2016	Striking Out

[169] *Supra* note 113. The cases, which span from 23 January 2014 to 30 September 2016, are cited from most to least recent. Bolded rows are cases that dealt with a summary judgment issue.

Case Name	Neutral Citation	Date	Issue
Sweezey v. Sweezey	2016 ABQB 131	7 March 2016	Other
Condominium Corporation No. 0321365 v. Cuthbert	**2016 ABCA 46**	**24 February 2016**	**Summary Judgment**
McKenzie v. Smith	**2016 ABQB 114**	**24 February 2016**	**Summary Judgment**
Pyrrha Design Inc. v. Plum and Posey Inc.	**2016 ABCA 12**	**9 February 2016**	**Summary Judgment**
Infante v. Dzogov	**2016 ABQB 41**	**20 January 2016**	**Summary Judgment**
Bilg v. Unifund Assurance Company	**2015 ABQB 779**	**8 December 2015**	**Summary Judgment**
Wenzel v. Nenshi	**2015 ABQB 742**	**24 November 2015**	**Summary Judgment**
HOOPP Realty Inc. v. The Guarantee Company of North America	2015 ABCA 336	3 November 2015	Striking Out
Dornan (Re)	2015 ABQB 647	14 October 2015	Other
Alberta (Child Youth and Family Enhancement Act, Director) v. A.B.	**2015 ABPC 206**	**28 September 2015**	**Summary Judgment**
N.J.B. (Re)	2015 ABQB 597	23 September 2015	Other
Whitecourt Power Limited Partnership v. Elliott Turbomachinery Canada Inc.	**2015 ABCA 252**	**24 July 2015**	**Summary Judgment**
Quinney v. 1075398 Alberta Ltd.	**2015 ABQB 452**	**13 July 2015**	**Summary Judgment**
Milavsky v. Milavsky	**2015 ABQB 395**	**19 June 2015**	**Summary Judgment**
Sikora Estate (Re)	2015 ABQB 374	11 June 2015	Other
Rai v. 1294477 Alberta Ltd. (Vinyl Retro Dance Lounge)	**2015 ABQB 349**	**2 June 2015**	**Summary Judgment**
Rodd v. Alberta Health Services	2015 ABQB 320	22 May 2015	Striking Out
Mackey v. Squair	**2015 ABQB 329**	**21 May 2015**	**Summary Judgment**
Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.	2015 ABQB 300, rev'd 2016 ABCA 123	11 May 2015 (CA 22 April 2016)	Delay

Case Name	Neutral Citation	Date	Issue
McDonald v. Brookfield Asset Management Inc.	**2015 ABQB 281**	**30 April 2015**	**Summary Judgment**
Kahlon v. Cheecham	2015 ABQB 203	25 March 2015	Delay
Weaver v. Cherniawsky	2015 ABQB 157, aff'd 2016 ABCA 152 (no CA culture shift mention)	6 March 2015 (CA 13 May 2016)	Delay
Pannu v. Urbia Venture Capital Ltd.	**2015 ABQB 150**	**5 March 2015**	**Summary Judgment**
Fink v. Trakware Systems Inc.	**2015 ABQB 133**	**27 February 2015**	**Summary Judgment**
Attila Dogan Construction v. AMEC Americas Limited	**2015 ABQB 120**	**18 February 2015**	**Summary Judgment**
Stout v. Track	**2015 ABCA 10**	**5 February 2015**	**Summary Judgment**
776826 Alberta Ltd. v. Ostrowercha	**2015 ABCA 49**	**4 February 2015**	**Summary Judgment**
Gilks v. Green Clean Squad Inc.	2015 ABQB 83	3 February 2015	Other
S & K Restoration Inc. v. 1389978 Alberta Ltd. (Prime School of Music)	**2015 ABQB 73**	**30 January 2015**	**Summary Judgment**
Lopushinsky Estate (Re); Holowaychuk v. Lopushinsky (CA)	2015 ABQB 63, aff'd 2016 ABCA 102 (no CA culture shift mention)	27 January 2015 (CA 8 April 2016)	Other
Nafie v. Badawy	2015 ABCA 36	27 January 2015	Other
A.J.U. v. G.S.U.	2015 ABQB 6	22 January 2015	Other
Jackson v. Jackson 3 Farms Ltd.	**2015 ABQB 46**	**16 January 2015**	**Summary Relief**
Echino v. Munro	2015 ABQB 35	14 January 2015	Costs
Robb (Re)	2015 ABQB 34	13 January 2015	Other
Bank of Montreal v. Rogozinsky	2014 ABQB 771	16 December 2014	Striking Out

Case Name	**Neutral Citation**	**Date**	**Issue**
Shefsky v. California Gold Mining Inc.	2014 ABQB 730, aff'd 2016 ABCA 103	28 November 2014 (CA 14 April 2016)	Other
644036 Alberta Ltd. v. Morbank Financial Inc.	**2014 ABQB 681**	**10 November 2014**	**Strike Out / Summary Judgment**
Ernst v. EnCana Corporation	**2014 ABQB 672**	**7 November 2014**	**Summary Judgment**
Bernum Petroleum Ltd. v. Birch Lake Energy Inc.	**2014 ABQB 652**	**28 October 2014**	**Summary Judgment**
Amack v. Wishewan	**2014 ABQB 613**	**24 October 2014**	**Summary Judgment**
Munro (Re); *Echino v. Munro* (CA)	2014 ABQB 636, leave to appeal ref'd 2014 ABCA 422	20 October 2014 (CA 11 December 2014)	Other
Can v. Calgary (Police Service)	**2014 ABCA 322**	**10 October 2014**	**Summary Judgment**
Sutherland v. Encana Corporation	2014 ABQB 601	1 October 2014	Costs
Canadian Natural Resources Limited v. ShawCor Ltd.	2014 ABCA 289	15 September 2014	Part V Disclosure
Huerto v. Canniff	2014 ABQB 534, aff'd 2015 ABCA 316 (no CA culture shift mention)	2 September 2014 (CA 14 October 2015)	Delay
Solis v. del Rosario; ***Solis v. Workers' Compensation Board (Millard Health)*** **(CA)**	**2014 ABQB 475, aff'd 2015 ABCA 227 (no CA culture shift mention)**	**31 July 2014 (CA 30 June 2015)**	**Summary Judgment**
1400467 Alberta Ltd. v. Adderley	2014 ABQB 439	21 July 2014	Costs (Security)
Bank of Montreal v. Rajakaruna	**2014 ABQB 415**	**10 July 2014**	**Summary Judgment**
Stoney First Nation v. Imperial Oil Resources Limited	**2014 ABQB 408**	**7 July 2014**	**Summary Judgment**
Kulaga v. First National Financial GP Corporation	**2014 ABQB 400**	**27 June 2014**	**Summary Judgment**
Prue (Re)	2014 ABQB 363	13 June 2014	Other

Case Name	**Neutral Citation**	**Date**	**Issue**
Martin v. Sievers	2014 ABQB 357	12 June 2014	Part V Disclosure
Nash v. Snow	2014 ABQB 355	12 June 2014	Delay
1214934 Alberta Ltd. v. Clean Cut Ltd.	**2014 ABQB 330**	**2 June 2014**	**Summary Judgment**
Jivraj v. Jivraj	2014 ABQB 307	23 May 2014	Costs
1214777 Alberta Ltd. v. 480955 Alberta Ltd.	**2014 ABQB 301**	**15 May 2014**	**Summary Judgment**
O'Connor Associates Environmental Inc. v. MEC OP LLC	2014 ABCA 140	29 April 2014	Striking Out
Emile Labby Trucking Ltd. v. Option Inc.	**2014 ABQB 248**	**24 April 2014**	**Summary Judgment**
Schaffer v. Lalonde	**2014 ABQB 222**	**10 April 2014**	**Summary Judgment**
Windsor v. Canadian Pacific Railway Ltd.	**2014 ABCA 108**	**19 March 2014**	**Summary Judgment**
Whitecourt Power Limited Partnership v. Interpro Technical Services Ltd.	**2014 ABQB 135**	**11 March 2014**	**Summary Judgment**
Orr v. Fort McKay First Nation	**2014 ABQB 111**	**25 February 2014**	**Summary Judgment**

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