DOLDEN WALLACE FOLICK LLP

February 22, 2019

INSURE UPDATES

Contents

IN THIS ISSUE

18th FLOOR – 609 GRANVILLE ST
VANCOUVER, BC. V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777
E-mail: info@dolden.com

302-590 KLO RD,
KELOWNA, BC. V1Y 7S2
Tel: 1.855.980.5580
Fax: 604.689.3777
E-mail: info@dolden.com

850 – 355 4th AVE SW
CALGARY, AB. T2P 0H9
Tel: 1.587.480.4000
Fax: 1.587.475.2083
E-mail: info@dolden.com

14th FLOOR –20 ADELAIDE ST E
TORONTO, ON. M5C 2T6
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free:1.855.360.8331
E-mail: info@dolden.com

Ok, Now It Is a "Balance of Probabilities" Standard on Summary Judgment Applications: The Court of Appeal of Alberta's Decision in *Weir-Jones Technical Services v Purolator Courier Ltd.*

By Justin Brunette, *DWF Calgary,*
E-mail: jbrunette@dolden.com

And by Vik Mall, *DWF Calgary*,
E-mail: vmall@dolden.com

The Court of Appeal of Alberta recently resolved the question over the standard of proof to be applied in an application for summary judgment. The majority of the five-member panel in *Weir-Jones Technical Services v Purolator Courier Ltd*[1] confirmed that there is only one standard of proof in civil law: proof on a balance of probabilities.

Summary Judgment

Summary judgment is a procedural tool available to parties in a civil action that allows them, at any point in that action, to obtain a final decision on the action (either for or against it) without any further steps.

The Supreme Court of Canada, in the landmark decision *Hryniak v Mauldin*[2], advocated a "*culture shift*" in favour of summary

[1] 2019 ABCA 49.
[2] 2014 SCC 7.

judgment. The Court emphasized that the summary judgment motion is an important tool for enhancing access to justice, because it can provide a cheaper, faster alternative to a full trial. If the record allows the judge to make the necessary findings of fact and apply the law, then the summary procedure should be used, unless it would not achieve a just result.

In *Whissell Contracting Ltd. v Calgary (City)*[3], a recent 2018 decision, the majority of the Court of Appeal of Alberta held that summary judgment will be granted if the position of the moving party is "*unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low*'." This is contrary to the "*balance of probabilities*" test that is standard in civil actions.

In *Weir-Jones Technical Services v Purolator Courier Ltd*[4], the Court of Appeal of Alberta decided to set the record straight. The majority of the Court of Appeal rejected that an "*unassailable*" and "*very high likelihood of success*" standard of proof applied to summary disposition. The Court of Appeal confirmed that the only standard of proof in civil law is proof on a balance of probabilities. The Court differentiates this from the *burden* of proof - the moving party also has to prove that there is no issue requiring trial.

The majority of the Court of Appeal in *Weir-Jones Technical Services* concludes their analysis by highlighting four key considerations to guide summary dispositions[5]:

1. Is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

2. Has the moving party met the burden on it to show that there is either "*no merit*" or "*no defence*" and that there is no genuine issue requiring a trial?

[3] 2018 ABCA 204.
[4] *Weir-Jones Technical Services v Purolator Courier Ltd*, 2019 ABCA 49.
[5] *Ibid.*, at para 47.

3. If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial;

4. In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

Take Away

The majority of the Court of Appeal of Alberta correctly rejected the "*unassailable*" and "*very high likelihood of success*" standard of proof in summary judgment applications. Courts in Alberta will have to apply the "*balance of probabilities*" standard. At the same time, the Court of Appeal has provided the Alberta bar with a clearer roadmap of the considerations to address in order to have the best chance of success in obtaining cost-effective relief for their clients.

EDITOR

Chris Stribopoulos
Tel: 647 798 0605
Email: cstribopoulos@dolden.com

Please contact the editor if you would like others in your organization to receive this publication.