SCC File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

GEOPHYSICAL SERVICE INCORPORATED

APPLICANT
(Appellant)

-and-

MURPHY OIL COMPANY LTD.

RESPONDENT
(Respondent)

AND BETWEEN:

GEOPHYSICAL SERVICE INCORPORATED

APPLICANT
(Appellant/Cross-Respondent)

-and-

ENCANA CORPORATION

RESPONDENT
(Respondent/Cross-Appellant)

APPLICATION FOR LEAVE TO APPEAL
(GEOPHYSICAL SERVICE INCORPORATED, APPLICANT)
(Pursuant to s.40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26)

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PART I – OVERVIEW & STATEMENT OF FACTS

Overview

1. These cases are about when it is necessary to have a trial to properly determine claims and when it is appropriate to summarily dismiss those claims. More specifically, they highlight the conflicting lines of law in Alberta on the test for summary judgment and raise issues about the ability of judges in a post-*Hryniak* era to "summarily dismiss summary proceedings"[1] and quickly move matters to trial.

2. Simply put, summary judgment may not be the most expeditious and/or fair way to decide a case. A culture which encourages parties to apply for summary judgment even where it is not appropriate creates the very mischief that this Honourable Court in *Hryniak* was trying to address. The problem is further exacerbated where it is unclear what test judges will apply and whether judges can dismiss summary proceedings thereby avoiding complex motions which further delay fulsome discovery and trial.

3. In *Geophysical Service Incorporated v Murphy Oil Company Ltd* ("*Murphy Oil*"), Murphy Oil successfully brought an application for summary dismissal.[2] The Court of Appeal dismissed the appeal. In *Geophysical Service Incorporated v Encana Corporation* ("*Encana*"), GSI applied for partial summary judgment for only one of its four claims and Encana responded by applying for summary dismissal of all of GSI's claims. The chambers judge granted GSI summary judgment on liability with damages remitted to trial, but summarily dismissed the other claims.[3] The Court of Appeal reversed that decision, summarily dismissing all of GSI's claims.

4. Justice O'Ferrall dissented in both the *Murphy Oil* and *Encana* decisions and was strongly of the view that neither case was amenable to summary judgment. The evidence was insufficient to summarily dismiss all of GSI's claims in a manner that was fair and just to the parties. A trial was necessary. Justice O'Ferrall summarized the problem faced by the chambers judge below and the larger issue afflicting the justice system:

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[1] *Geophysical Service Incorporated v Murphy Oil Company Ltd*, 2017 ABQB 464 at para 71.
[2] *GSI v Murphy Oil Company Ltd*, 2017 ABQB 464 at para 76.
[3] *GSI v Encana Corporation*, 2017 ABQB 466.

> …A disposition that was fair and just to both parties could not be made on the record before the chambers judge. And although hindsight is 20/20, summary judgment in this case did not prove to be the most expeditious way to decide the matters in issue. Had the parties cooperated in getting this matter on for trial at the outset, this matter might have been dealt with more quickly and at less expense. The chambers judge, faced with summary judgment and summary dismissal applications had little choice but to deal with them. But if this new, so-called modern approach to litigation is to work, chambers judges must be armed with the discretion to decline to even entertain such applications if they are of the view that a trial is likely the most expeditious and fair way of resolving the dispute. In other words, chambers judges must be armed with the authority to summarily dismiss summary proceedings without having to entertain them. It is not clear to me that Part 7 of the Rules of Court ("Resolving Claims Without a Full Trial") confers that discretion.[4]

5. The claims in both the present cases are founded in several causes of action including breach of contract, copyright infringement, breach of confidence, and unjust enrichment. Interpretation of the relevant agreements required a consideration of the context of the agreements as a whole and the entirety of the surrounding circumstances. There was also the added layer of determining who knew what and when for the purposes of limitation periods.

6. In *Murphy Oil*, there was no positive evidence establishing that there was no merit to the claims. Murphy Oil's affiants did not have knowledge of the circumstances surrounding the claim; they did not know one way or the other whether they had improperly disclosed licensed GSI data to others. By granting summary dismissal on this type of evidence, the chambers judge reversed the onus for summary dismissal and allowed a defendant to succeed on a bare denial. The dissenting judgment noted these frailties in the majority's decision.

7. In *Encana*, it was unclear (i) when the breach or non-performance actually took place, (ii) when that was discovered, and (iii) whether it engaged the agreements. The chambers judge found that a trial was required for one of the claims. The majority disagreed and found that GSI ought to have known it had a claim. The dissent found that GSI simply did not have enough information until there was an actionable breach. Whether GSI ought to have known *sooner* was an issue for trial and not one for the Court of Appeal to decide on the existing record which did not contain the relevant evidence for such a decision to be based upon.

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[4] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 71 [Emphasis added].

8. Both the majority and dissent in *Encana* agreed that the chambers judge's summary dismissal of one of the claims was based in part on a misreading of the agreement. For the majority this was of no consequence to the finding of summary dismissal, while the dissent found that "a summary dismissal of a breach of contract based on a misunderstanding of the contract fatally undermines the summary dismissal."[5]

9. Given the nature of the claims and disagreements between the chambers judge and appellate judges below, these two cases provide an opportunity to bring clarity as to when parties ought to be seeking summary judgment or summary dismissal, the proper tests as between the two, and when judges can move matters quickly to trial. Uncertainty has resulted in inconsistent decisions in Alberta and could have widespread effect given the similarities in rules regarding summary proceedings across Canada. Further, summary proceedings on contractual interpretation without relevant evidence that would be adduced at trial should be approached with caution, but the courts are unclear on how to ensure that.

Background

10. GSI is a Canadian company involved in the acquisition, creation, production, reproduction, processing, reprocessing and storage of seismic data. GSI has invested hundreds of millions of dollars to create seismic data. As a result of the high cost of its acquisition, seismic data has always been treated as highly confidential and proprietary within the industry. GSI licenses its seismic data to oil and gas companies (average number of licensees per dataset is only about 10 entities) for substantial license fees commensurate with its significant investment in that data.[6]

11. In 1999 and 2002, GSI became increasingly concerned that exploration companies were accessing its data from government agencies and other parties without obtaining a license from GSI. As a result, GSI incorporated more prohibitive language into its data licenses.[7]

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[5] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 82.
[6] *GSI v Murphy Oil Company Ltd*, 2017 ABQB 464 at para. 4.
[7] *GSI v Murphy Oil Company Ltd*, 2017 ABQB 464 at paras. 5-6; *GSI v Encana Corporation*, 2017 ABQB 466 at paras. 4-5.

Procedural History

12. Despite the stricter agreements, companies were continuing to improperly use GSI's seismic data. GSI sued several companies and also challenged the regulatory regime facilitating the use and copying of its data. In what became known as the "Common Issues Decision", issues common to most of the actions were tried first. The trial judge confirmed that GSI has copyright in its seismic data. However, the government regulatory regime that governed the acquisition of the data was found to confiscate the exclusive copyright of GSI in its data for the purposes of that regime, essentially enabling access through government boards without infringement of GSI's copyright.[8] Claims against particular companies resulting from breaches of specific licencing agreements proceeded separately after the Common Issues Decision.

13. *Murphy Oil* and *Encana* licensed seismic data from GSI pursuant to multiple agreements. GSI filed its lawsuits against Encana on April 19, 2007 and Murphy Oil on Dec. 20, 2013 and proceedings continued against them after the Common Issues Decision. Murphy Oil applied for summary dismissal and was successful. The chambers judge dismissed GSI's claim because there were no "issues of merit on the record and in the pleadings that genuinely require a trial".[9] GSI appealed the summary dismissal of its claims because it has irrefutable evidence of breaches. The Court of Appeal dismissed GSI's appeal. Justice O'Ferrall in dissent would have allowed the appeal on the basis there was insufficient evidence to summarily dismiss all the claims.

14. In the *Encana* matter, GSI applied for partial summary judgment relating to only one of its claims and asked that two others go to trial. Encana responded and applied for summary dismissal of all of GSI's claims. The chambers judge granted GSI summary judgment of the liability portion of the Accessed Data Claim[10] but remitted the question of damages to trial.[11]

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[8] *GSI v Encana Corporation*, 2016 ABQB 230, aff'd 2017 ABCA 125, leave to appeal to SCC refused [2017] SCCA No 260 ("Common Issues Decision").
[9] *GSI v Murphy Oil Company Ltd*, 2017 ABQB 464 at para 76.
[10] Accessed Data Claim: GSI suffered an injury when Encana copied and possessed confidential seismic data that GSI had created without the required license from GSI.
[11] *GSI v Encana Corporation*, 2017 ABQB 466 at paras 19–61.

Encana succeeded in having the Submitted Data Claim,[12] the Exploration Group Claim[13] and any remaining claims summarily dismissed.[14]

15. GSI appealed the summary dismissal of its Submitted Data Claim, the Exploration Group Claim and the remaining claims and the decision to remit the issue of damages of the Accessed Data Claim to trial, instead asking that damages be assessed summarily. Encana cross-appealed the summary judgment which found it liable to GSI in respect of the Accessed Data Claim. The Court of Appeal dismissed GSI's appeal and allowed Encana's cross appeal.[15]

16. Justice O'Ferrall in dissent would have allowed GSI's appeal of the dismissal of its claims and also allowed Encana's appeal of the summary judgment granted on the liability portion of GSI's Accessed Data Claim, but would not have found the claim to have been statute-barred. Justice O'Ferrall found a trial was required to properly determine the GSI claims and Encana's liability in connection with GSI's Accessed Data Claim.[16]

PART II – QUESTIONS IN ISSUE

17. This Leave to Appeal raises the following issues of national and public importance:

Issue 1: **Summary Dismissal Test and Discretion to Move Quickly to Trial**

What is the proper test for summary dismissal and do judges have the discretion to decline to entertain summary proceedings applications in the post-*Hryniak* era?

Issue 2: **Appellate Review of Contractual Interpretation in the Summary Dismissal Context**

Where a chambers judge fundamentally misunderstands a contract, is summary dismissal still available? Is the summary dismissal of a breach of contract claim subject to appellate scrutiny in the same way any decision which finally determines substantive rights is subject to appellate review?

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[12] Submitted Data Claim: Encana had submitted GSI seismic data to a government agency without GSI's permission in breach of the parties' contract.

[13] Exploration Group Claim: Encana had obtained exploration leases with two other companies and its location required Encana to license that material from GSI pursuant to their contract.

[14] *GSI v Encana Corporation*, 2017 ABQB 466 at paras 62–97.
[15] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 5.
[16] *GSI v Encana Corporation*, 2018 ABCA 384 at paras. 68-70.

PART III – STATEMENT OF ARGUMENT

Issue 1: Summary Dismissal Test

Tip of the Iceberg

18. Much of the confusion as to when it is appropriate to grant summary judgment or summary dismissal stems from conflicting iterations of the test and modifications to the law following *Hryniak*. Many saw *Hryniak* as relaxing the high standard of proof previously required for summary judgment on the basis of emphasizing proportionality, timeliness and affordability.[17] As the decisions of the courts below demonstrate, it is unclear as to who has the onus and what each party is required to show in order to either obtain or resist summary judgment or summary dismissal, or whether those two proceedings are even governed by the same test. It is also unclear as to how much the standard of proof was relaxed and whether an incontrovertible factual foundation remains essential for summary adjudication.

19. Justice O'Ferrall's strong dissents in both Court of Appeal decisions below are not outliers, but instead are a result of an unresolved rift in the law of summary proceedings in Alberta. The rift is seen in *Stoney Tribal Council v Canadian Pacific Railway*, 2017 ABCA 432, where the Court of Appeal agreed on the outcome of an appeal of an order granting summary judgment, but could not agree on the proper test. Justice Paperny for the majority wrote:

> [1] I have had the benefit of reading the reasons for judgment of my colleague, Justice Wakeling. I agree with his disposition of the appeal, namely that the Stoney Tribal Council's appeal of the order granting summary judgment in favour of the Canadian Pacific Railway (CPR) should be dismissed. ….
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> [2] I do not agree, however, with all aspects of the approach taken by my colleague to the test for the granting of summary judgment under rule 7.3 of the Alberta Rules of Court. Although there have been several recent decisions from this Court that attempt to clarify that test, in my view they tend to have the opposite effect and muddy the waters. …[18]

20. There have been numerous other split decisions on appeals of summary judgment motions post-*Hryniak*:

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[17] *Hryniak v. Mauldin*, 2014 SCC 7 at para. 56; Emma L. Johnston, "Summary Judgment – Confusion in Alberta", June 18, 2018.

[18] *Stoney Tribal Council v Canadian Pacific Railway*, 2017 ABCA 432 at paras. 1-2 [Emphasis added].

a. *Matthew Sloboda Professional Corporation v Vincent Cairo Professional Corporation*, 2018 ABCA 405
b. *Whissell Contracting Ltd. v Calgary (City)*, 2018 ABCA 204
c. *Arndt v Banerji*, 2018 ABCA 176
d. *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2017 ABCA 378
e. *Wooddworks Design Ltd v Forzani*, 2016 ABCA 310
f. *Stout v Track*, 2015 ABCA 10.

21. A review of the summary judgment rule post-*Hryniak* in Alberta and the recent development of conflicting lines of authority makes it clear that parties to civil proceedings have no certainty with respect to what the law is or where it is going.

Tracing the Confusion

22. In *Windsor v. Canadian Pacific Railway Ltd*, 2014 ABCA 108, the Alberta Court of Appeal adopted *Hryniak* and found that Alberta's summary judgment rule "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."[19] Six months later, the Court of Appeal released *Access Mortgage Corporation (2004) Limited v Arres Capital Inc.*, 2014 ABCA 280 and expanded on its decision in *Windsor*.[20] The Court defined what it means for a case to be without "merit" by quoting from a pre-*Hryniak* decision:

> 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.[21]

23. Two other Court of Appeal decisions that same year – *Can v. Calgary (Police Service)*, 2014 ABCA 322 and *WP v. Alberta*, 2014 ABCA 404 – quote the same passage. The result was that the law in Alberta pursuant to the *Access Mortgage* line of cases required an applicant's case be "unassailable".

24. The Court of Appeal further modified the test for summary judgment earlier this year in *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125. In *Stefanyk*, a master granted

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[19] *Windsor v. Canadian Pacific Railway Ltd*, 2014 ABCA 108 at para. 14.
[20] CBA Alberta, "Summary Judgment in Alberta – Competing Lines of Authority from the Court of Appeal", *Law Matters*, November 13, 2018.
[21] *Access Mortgage Corporation (2004) Limited v Arres Capital Inc.*, 2014 ABCA 280 at para. 45 citing *Beier v. Proper Cat Construction*, 2013 ABQB 351 at para. 61.

summary judgment on the basis that it was extremely likely Sobeys would be successful at trial. A justice in chambers applied the *Access Mortgage* line of cases and found that the applicant's case was not "so compelling that the likelihood of success is so high that it should be determined summarily."[22] On appeal, the Court of Appeal departed from the *Access Mortgage* approach finding that the "reasons under appeal did not correctly state the test for summary dismissal".[23] The Court held as follows:

> [13] In this case the reasons under appeal stated the test for summary judgment as being whether the moving party's position was "unassailable", and stated it would be unassailable if it is so compelling that the "likelihood of success [at trial] is very high": …. This statement of the law was extracted from the concurring reasons in *Can v Calgary Police Service*, 2014 ABCA 322 (CanLII) at para. 20, 584 AR 147, which extracted that test from the earlier reasons of the author in *Beier v Proper Cat Construction Ltd*., 2013 ABQB 351 (CanLII) at para. 61, 564 AR 357. The *obiter dicta* in *Can* do not accurately state the law. Under the rules of *stare decisis*, decisions of the Court of Appeal reflect the law of the province. The binding *ratio decidendi* of a Court of Appeal decision, however, is to be found in the majority reasons. *Obiter dicta* in concurring and dissenting reasons do not reflect the law, and they should not be followed to the extent that they are inconsistent with binding authority.
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> …
>
> [17] Therefore, in this appeal the issue is not whether the appellant's position is "unassailable". The first question is whether the record is sufficient to decide if the appellant is liable for the plaintiff's injuries… In this case summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result, and therefore it is an appropriate procedure. The ultimate issue is whether the appellant has proven on a balance of probabilities that it is not liable for the plaintiff's injuries.[24]

25. While the Court of Appeal in *Stefanyk* refers to *Can* as it states the importance of *stare decisis*, it neglects to mention both the *Access Mortgage* and *WP* decisions. Unsurprisingly, the attempt to move away from the "unassailable" approach was short lived. Less than two months later, the Court of Appeal releases *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153 and *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204,[25] which apply the "unassailable" test, ignore *Stefanyk*, and continuing the *Access Mortgage* line of authority.

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[22] *Stefanyk v Stevens*, 2017 ABQB 402 at para. 28.
[23] *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125 at para. 34.
[24] *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125 at paras. 13, 17 [Emphasis added].
[25] See also *Composite Technologies Inc v Shawcor Ltd*, 2017 ABCA 160.

26. In *Whissell Contracting Ltd. v Calgary (City)*, 2018 ABCA 204, the majority summarizes its view of the test for summary judgment and standard of proof required to be established for the moving party to succeed on an application for summary judgment:

> [1] Modern civil procedure codes have a summary judgment protocol. They are designed to remove from the litigation stream proceedings the outcomes of which are obvious – they feature either unmeritorious claims or defences – and warrant allocation of minimal public and private resources.
>
> [2] Summary judgment may be appropriate "if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low". This is an onerous standard and rightly so. A grant of summary judgment ends a dispute without affording the litigants full access to the civil procedure spectrum.
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> [3] While summary judgment is a superb protocol for disputes if there is marked disparity in the strengths of the parties' cases, it is not the appropriate methodology for resolving disputes that do not display this feature. This may occur because the material facts are the subject of controversy. An incontrovertible factual foundation is an essential aspect of a controversy ripe for summary adjudication.[26]

27. Justice Schutz, in separate reasons concurring in the result, wrote:

> [16] I find myself unable to endorse, however, the dicta concerning the correct test for summary judgment, or the standard of proof required to be established for the moving party to succeed on an application for summary judgment. In particular, I decline to endorse paragraphs 2 and 3 (and related footnotes).
>
> [17] In my view, the proper test will have to be set when it is necessary to resolve the issue.[27]

28. Queen's Bench judges have grappled with the mixed signals. In *Nelson v. Grande Prairie (City)*, 2018 ABQB 537, the Court asked if there was "a middle way".[28] In *330626 Alberta Ltd v. Ho & Laviolette Engineering Ltd*, 2018 ABQB 478, the Court plainly stated that the issue needs to be definitively resolved.[29] The pleas of the lower courts have gone unaddressed and the back and forth continued with *Angus Partnership Inc. v Salvation Army (Governing Council)*, 2018 ABCA 206 in June 2018 applying *Stefanyk* and then *898294 Alberta Ltd. v. Riverside Quays*

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[26] *Whissell Contracting Ltd v Calgary (City)*, 2018 ABCA 204 at paras. 1-3, footnotes omitted.
[27] *Whissell Contracting Ltd v Calgary (City)*, 2018 ABCA 204 at paras. 15-17 [Emphasis added].
[28] *Nelson v Grande Prairie (City)*, 2018 ABQB 537 at para. 47.
[29] *330626 Alberta Ltd v Ho & Laviolette Engineering Ltd*, 2018 ABQB 478 at para. 41.

Limited Partnership, 2018 ABCA 281 in September 2018 returning to *Access Mortgage* and the "unassailable" test.

29. The current state of the law in Alberta has been described as follows: "These two lines of authority appear to be developing like two ships passing in the night."[30] With the decisions below, it is clear there are still two very different ships and that they continue to sail apart. Unfortunately, for parties going before the Alberta Court of Appeal on summary judgment appeals, it truly matters which judges are on the panel. That should never matter.

Fair and Just Decision

30. What is agreed upon in the case law is that the main principle is to determine whether a disposition that is fair and just to both parties can be made on the existing record.[31] In *Murphy Oil*, Justice O'Ferrall's approach makes it clear why such a disposition could not be made on the record before the chambers judge and the shortcomings of the approach of the majority.

31. First, rule 7.3(2) of the *Alberta Rules of Court* provides that an application for summary dismissal must be supported by positive evidence establishing that there is no merit to the claims. Such an affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit (r. 13.18(3)), akin to evidence that would be required at a trial of the matter.

32. Second, the onus is on the applicant for summary dismissal to show that the plaintiff's claim has no merit.[32] It is at this point that Justice O'Ferrall (and the competing line of authority) departs from the majority:

> …The fact that the plaintiff's claim has no merit must be clear or obvious. On a summary dismissal application, the plaintiff is not required to prove its case on a balance of probabilities. Rather, the defendant must prove its defences on a balance of probabilities. A plaintiff can resist summary dismissal simply by demonstrating that the defendant has not adduced such proof (*McDonald v Brookfield Asset Management Inc.*, 2016 ABCA 375 (CanLII)). In *898294 Alberta Ltd v Riverside Quays Limited Partnership*, 2018 ABCA 281 (CanLII) this Court said:

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[30] CBA Alberta, "Summary Judgment in Alberta – Competing Lines of Authority from the Court of Appeal", *Law Matters*, November 13, 2018.
[31] *GSI v Murphy Oil Company Ltd*, 2017 ABQB 464 at para. 8; *Windsor v Canadian Pacific Railway Ltd*., 2014 ABCA 108 at para. 13.
[32] *GSI v Murphy Oil Company Ltd*, 2018 ABCA 380 at para. 98-99.

> Summary judgment is reserved for the resolution of disputes where the outcome of the contest is obvious (*Whissell Contracting Ltd. v Calgary (City)*, 2018 ABCA 204 (CanLII) at para 1). Is the "moving party's position ... unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success very low?" (*Composite Technologies Inc v Shawcor Ltd*, 2017 ABCA 160 (CanLII) at para 2, 51 Alta LR (6th) 91; See also *Rotzang v CIBC World Markets Inc*, 2018 ABCA 153 (CanLII) at para 15).

33. The advantages of this approach are that moving parties seeking summary judgment must satisfy a serious evidentiary burden. A respondent can successfully resist summary judgment without proving the case to the normal civil standard.[33]

34. The alternative, which is adopted by the chambers judge and majority, is that the onus on the summary dismissal application is reversed. The chambers judge states that it was up to GSI, in order to defend against summary dismissal, to prove that Murphy Oil had misused its seismic data. To succeed on its summary dismissal application, the majority found that it was sufficient that Murphy Oil put forward witnesses who simply denied GSI's claims but had no personal knowledge of the facts that they were swearing to,[34] ignoring the basic evidentiary requirements on this type of application.

35. Regardless of whether the term "unassailable" is employed in describing the moving party's position, should it be the case that a party can succeed by simply denying knowledge of matters it ought to have known and which could have either proved or disproved the plaintiff's claim? Should the onus be on the applicant to adduce evidence to prove the plaintiff's claim has no merit or should the plaintiff be forced to prove its claim simply to resist summary dismissal?

36. In the present case, the chambers judge excused Murphy Oil's deficient evidence because of the passage of time. However, does that not make it all the more important (and fair) to move this matter to trial rather than expending resources on conducting a summary dismissal application? The evidence must be weighed appropriately at a trial, not excused.

37. The *Encana* decision further demonstrates the shortcomings of the majority's approach to summary dismissal. The primary issue on one of the claims was determining when a clause in

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[33] *McDonald v Brookfield Asset Management Inc*., 2016 ABCA 375 at para. 13.
[34] *GSI v Murphy Oil Company Ltd*, 2018 ABCA 380 at para. 101-102.

the licensing agreement was breached or when there was non-performance of an obligation. The clause stated that if Encana was in possession of any seismic data owned by GSI, whether obtained from government or otherwise, it was obligated to either immediately destroy the data or license it by entering into an agreement with GSI and pay fees for that data.[35]

38. The evidentiary problem was that Encana had been accessing the data for years and at times when it was not subject to the clause in the license agreement. But Encana did have years of possession of said unlicensed data after the license agreement effective date and the license agreement required immediate license or destruction, on the date of the license agreement which destruction did not occur. Only after GSI demanded license fees, did Encana try to exercise the "immediate destruction" option after years of admitted extensive use and possession. Accordingly, Encana obtaining the data was not necessarily actionable and GSI learning that Encana had accessed (viewed) the data (without any evidence of copying or possession) was of no consequence in terms of triggering a limitation period. The data was only confirmed as having been copied and in the possession of Encana when Encana showed the data to GSI in 2006 when it asked for related tapes of the data (part of the unrefuted evidence), and GSI filed its claim within the limitation period now that it had actionable knowledge.

39. The chambers judge in fact correctly found on the existing record that GSI had not discovered anything actionable until much later. Whether GSI ought to have known sooner is, as Justice O'Ferrall notes, an issue for trial and not one for the Court of Appeal below to decide.[36]

40. Similarly, Justice O'Ferrall found that copyright infringement often requires more than mere possession of the copyrighted material. The existing record was insufficient to determine whether GSI ought to have known of any prohibited use of its data (as opposed to mere viewing).[37] Other significant shortcomings were identified regarding the dismissal of the other claims including the chambers judge misunderstanding the contract and lack of evidence regarding whether data was actually disclosed by Encana to third-parties in breach of the licensing agreement.[38]

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[35] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 74.
[36] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 77.
[37] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 81.
[38] *GSI v Encana Corporation*, 2018 ABCA 384 at paras. 82-93.

41. Regardless of the particular summary judgment test being applied, it is difficult to see how, given the extent of the problems with the record and unresolved issues, it can be said there was a "disposition that is fair and just to both parties", especially 10 years after the filed statement of claim and costly procedural steps and a "common issue trial". It remains the law, as stated in *Canada (Attorney General) v Lameman*, 2008 SCC 14, that a party that resists summary judgment must "put its best foot forward" and cannot rely on assertions that more or better evidence might turn up if the matter proceeded to trial.[39] However, even post-*Hryniak*, the party moving for summary dismissal still has the onus to show that the plaintiff's claim has no merit and shifting the onus ought to require significantly more than a bare denial.

Discretion to Decline to Entertain Summary Proceedings

42. In addition to the issues regarding the differing burdens of proof for summary judgment and summary dismissal, Justice O'Ferrall raised a serious practical concern with respect to the powers of judges on summary proceedings:

> The chambers judge, faced with summary judgment and summary dismissal applications had little choice but to deal with them. But if this new, so-called modern approach to litigation is to work, chambers judges must be armed with the discretion to decline to even entertain such applications if they are of the view that a trial is likely the most expeditious and fair way of resolving the dispute. In other words, chambers judges must be armed with the authority to summarily dismiss summary proceedings without having to entertain them. It is not clear to me that Part 7 of the Rules of Court ("Resolving Claims Without a Full Trial") confers that discretion.[40]

43. While summary judgment is one tool that may provide a proportionate, more expeditious and less expensive means to achieve a just result than going to trial, it may not always be the appropriate tool in the circumstances. Sometimes a trial is the most appropriate tool and encouraging parties to first go through extensive summary proceedings simply does not make sense. Judges ought to be encouraged to exercise their discretion to summarily dismiss summary proceedings. [41]

44. Uncertainty on this point is concerning because it works at cross-purposes with the goals of summary proceedings and is applicable to all courts determining matters without a full trial.

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[39] *Canada (Attorney General) v Lameman*, 2008 SCC 14 at paras 11, 19.
[40] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 71 [Emphasis added].
[41] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 71.

Parties should not simply ‘give summary proceedings a shot’ in circumstances where it is not suitable as it ultimately results in wasted resources. Providing clarity on the ability of judges to expedite or avoid summary judgment proceedings where it is clear a trial would be more suitable promotes the objectives outlined in *Hryniak*.

Widespread Application

45. The decisions at issue involve the *Alberta Rules of Court*; however, as noted in *Hryniak*, which dealt with Ontario’s Rule 20, the values and principles underlying the interpretation of summary judgment rules are of general application.[42] The current law in Canada is set out by this Honourable Court in *Canada (Attorney General) v Lameman*, 2008 SCC 14 and *Hryniak v. Mauldin*, 2014 SCC 7, and most jurisdictions in Canada have similar summary judgment rules:

a. B.C.: *Supreme Court Rules*, B.C. Reg. 168/2009, R. 9-6(5) (a court may grant summary judgment if there is no “genuine issue for trial”);
b. Alberta: *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 7.3 (a court may grant summary judgment if a claim or defence has no merit);
c. Saskatchewan: *The Queen’s Bench Rules of Saskatchewan*, r. 7.5(1)(a) (“The Court may grant summary judgment if ... the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence”);
d. Manitoba: *Court of Queen’s Bench Rules*, Man. Reg. 553/88, r. 20.03(1) (a court may grant summary judgment if there is no “genuine issue for trial with respect to a claim or defence”);
e. Ontario: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2) (“The court shall grant summary judgment if there is no genuine issue requiring a trial”);
f. New Brunswick: *Rules of Court*, N.B. Reg. 82-73, R. 22.04 (“The court shall grant summary judgment if there is no genuine issue requiring a trial with respect to a claim or defence”);
g. Nova Scotia: *Civil Procedure Rules*, r. 13.04(2) (“When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted”);

[42] *Hryniak v. Mauldin*, 2014 SCC 7 at para. 35.

h. Prince Edward Island: *Rules of Civil Procedure*, R. 20.04 (a court may grant summary judgment if there is no "genuine issue for trial");

i. Newfoundland: *Rules of the Supreme Court, 1986*, S.N.L., 1986, c. 42, Sch. D, r. 17.01 (a court may grant summary judgment to a plaintiff if the "defendant has no defence to a claim");

j. Northwest Territories: *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 176(2) ("Where the court is satisfied that there is no genuine issue for trial with respect to a claim or a defence, the Court shall grant summary judgment accordingly");

k. Yukon: *Rules of Court for the Supreme Court of Yukon*, R. 18(1) ("the plaintiff, on the ground that there is no defence to the whole or part of a claim ... may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount")

l. Federal: *Federal Court Rules*, SOR/98-106, r. 215 (1) ("If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly").

46. As a result, the resolution of this issue with respect to the law in Alberta will likely impact other jurisdictions.

<u>Issue 2</u>: Appellate Review of Contractual Interpretation in the Summary Dismissal Context

Murphy Oil: Incomplete Factual Matrix

47. The principles of contractual interpretation applicable in this case are briefly discussed in the Court of Queen's Bench decision by way of reference to a decision in the sister application *Geophysical Service Incorporated v Plains Midstream Canada ULC*, 2017 ABQB 462:

> [20] The modern law of contractual interpretation, until recently, was relatively well settled. Cases such as *Consolidated Bathurst Export Ltd. v Mutual Boiler & Machinery Insurance Co*., 1979 CanLII 10 (SCC), [1980] 1 SCR 888 have long established that the text of the relevant contractual clauses must be considered within the context of the contract as a whole. The court must search for an interpretation that, from the whole of the contract, promotes or advances the true

> intent of the parties. The interpretation must give practical effect, and in commercial settings, give commercial or business efficacy, to the parties' agreement. As such, interpretations that result in absurd or unworkable consequences should be avoided.
>
> [21] Recently, the Supreme Court has emphasised that a trial judge has a duty to consider the relevant contractual matrix for the contract even absent ambiguity. Nonetheless, the circumstances surrounding the creation of the contract must be used only to deepen the court's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract: *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 (CanLII) at para 57. …[43]

48. The majority of the Court of Appeal in *Murphy Oil* states that a "complete answer" to the contractual interpretation dispute (i.e. interpretation of the words "supersede" and "prior data licenses") is to be reviewed on "the deferential standard of review".[44] This raises the issue of the amount of deference contractual interpretation attracts in the summary judgment context. Is the summary dismissal of a breach of contract claim subject to appellate scrutiny in the same way that any decision which finally determines substantive rights is subject to appellate review?

49. Although the chambers judge considers the "context of the agreement as a whole and the entirety of the surrounding circumstances" and the factual matrix, her interpretation is hampered by the fact that it is based on incomplete evidence. Justice O'Ferrall notes the obvious shortcomings of the decision:

> Depending on how the circumstances surrounding all of this evidence unfold, it may be shown that sharing took place of licensed seismic data. Or, the evidence may support an inference of sharing. Only after a trial will it become clear whether there is, in fact, an evidentiary lacunae requiring inferences to be drawn. But on a summary dismissal application, inferences ought not to be drawn in the absence of positive evidence one way or the other. A trial is required when there is an evidentiary basis for suspicion that the defendant breached a contract or a duty owed to the plaintiff. ….[45]

50. Only a trial would resolve these evidentiary shortfalls, of which shortfalls do not lend themselves to proving the matter on a balance of probabilities in either direction.

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[43] *GSI v Murphy Oil Company Ltd*, 2017 ABQB 464 at para. 11 citing *GSI v Plains Midstream Canada ULC*, 2017 ABQB 462 at paras. 20-21.
[44] *GSI v Murphy Oil Company Ltd*, 2018 ABCA 380 at para. 42.
[45] *GSI v Murphy Oil Company Ltd*, 2018 ABCA 380 at para. 104.

Encana: Purpose of Licence Agreements and Misunderstanding the Contract

51. The Accessed Data Claim in the *Encana* proceeding raised the issue of determining when the agreement was breached (i.e. when did non-performance of the obligation take place as that determines when the limitation period began to run). Clause 6.3(f)(iii) provided that if Encana was in possession of any seismic data owned by GSI, whether obtained from government or otherwise, it was obligated to either immediately destroy the data or license it by entering into a license agreement with GSI and pay GSI's current licensing fee for that data.[46]

52. The chambers judge found that GSI's mere knowledge that Encana had accessed (viewed) its data would not have led GSI to know that Encana was in breach of the licensing agreements. GSI knew it may have suffered an injury, but did not know the injury engaged the licensing agreements. As a result, the chambers judge was not prepared on the record before her, and on a summary dismissal application, to accept that GSI's knowledge that Encana had accessed (viewed) the seismic data extended to knowledge of its copying and continued possession of it. She could not determine the issue without a trial.[47] The whole Encana issue is further complicated by the fact the NEB created a unique access process "loaning out materials" so the NEB had no knowledge or records of copying as contrasted to the practices of the CNLOPB and CNSOPB where these boards never parted with control of the data (so they had records of copying that they provided GSI almost a decade after the 2003 court order), so this evidence of copying by Encana was not available to GSI from the NEB due to their unique practices. Only Encana had this evidence and knowledge.

53. However, the majority, in reviewing her decision, made a contrary finding because if GSI knew Encana had accessed its data then it "could have assumed that such access likely included copying." The majority added, "This should have been the end of the inquiry."[48] The majority circumvents the chambers judge's interpretation by arguing a distinction between "injury" and "cause of action" for *Limitations Act* purposes. Justice O'Ferrall, in dissent, notes the problem with this argument:

a. the cause of action of was a breach of contract;

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[46] *GSI v Encana Corporation*, 2018 ABCA 384 at paras. 73-74.
[47] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 30.
[48] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 29.

b. injury is defined in the *Limitations Act* as including non-performance of a contractual obligation; and

c. the cause of action and the injury are one and the same in the context of this case.[49]

54. The evidence showed that GSI did not know until 2006 that Encana had seismic data in its possession that it had to either immediately destroy or license, at the time of the execution of the October 3, 2002 license agreement, in order to not be in breach of the contract. Encana did neither. If 2006 is the material date, then the claim was brought in a timely fashion. As highlighted by the dissenting judge's reasons, the chambers judge had good reason for finding that a trial would be required:

> [77] …Whether GSI ought to have known sooner is an issue for trial, not for this Court to decide on the existing record.
>
> [78] The chambers judge was not prepared to accept that GSI's knowledge that Encana had accessed the seismic data extended to knowledge of its continued possession of it. A trial may lead to a different finding; but this Court is not in a position to make a contrary finding. One of the chambers judge's reasons for her reluctance to find that GSI knew Encana continued to possess the seismic data it obtained from the energy board was that GSI was entitled to assume, until it had reason to believe otherwise, that Encana had honoured the covenant it made in the Master Seismic Data License Agreement to destroy or license any unlicensed GSI seismic data it discovered in its possession. A trial may demonstrate that GSI had reason to believe otherwise. In the meantime, the fact that GSI became aware in 2003 that PanCanadian/Encana had accessed its data from the energy board in 1999 would not, without more, make GSI's reliance on Encana's covenant unreasonable. Parties are ordinarily entitled to rely on contractual covenants.[50]

55. One is left to wonder what the point was of the GSI licencing agreements if GSI could not expect a party would uphold its obligations pursuant to it. The same chambers judge also decided *Geophysical Service Incorporated v 612469 Alberta Limited (CalWest Printing & Reproductions)*, 2016 ABQB 356, which held that the seismic data is confidential. This finding was in part on the basis that the data is regularly kept confidential by GSI because it maintains licensing agreements with very restrictive clauses to maintain that confidentiality.[51] Although the

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[49] *GSI v Encana Corporation*, 2018 ABCA 384 at para. 73.
[50] *GSI v Encana Corporation*, 2018 ABCA 384 at paras. 77-78.
[51] *GSI v 612469 Alberta Limited (CalWest Printing & Reproductions)*, 2016 ABQB 356 at para. 27.

purpose for the licensing agreements was recognized in *Canwest*, it is being ignored by these more recent *Encana* and *Murphy Oil* decisions.

56. One of the primary purposes of any license agreement is to maintain confidentiality and non-disclosure thereby protecting the intellectual property business of the licensee. In the present case, despite the license agreements, the exact opposite has happened and the majority of the Court of Appeal below has effectively sanctioned it.

57. With respect to the Submitted Data Claim, as noted above, both the majority and dissent identified that the chambers judge misunderstood the contract. In addition to extensive license clauses requiring adherence to copyright laws, non-disclosure, and maintaining confidentiality, GSI also has prior agreements prohibiting any disclosure let alone conversion. Where a chambers judge fundamentally misunderstands a contract, how can summary dismissal still be available? This fundamental concept of any license agreement, again to protect confidentiality and prohibit disclosure has been swept away, an issue of national importance for all licensed materials.

Conclusion

58. Justice O'Ferrall's in dissent in the *Murphy Oil* decision summed up the importance of exercising discretion as to whether to proceed summarily:

> The decision to decide a case summarily is discretionary. But sometimes, as in this case, the decision is made only after entertaining the summary dismissal application, including a lengthy hearing of its merits and consideration of affidavits and examinations thereon. I have commented in *Geophysical Services Incorporated v EnCana Corporation*, 2018 ABCA 384 (CanLII) on the importance of empowering a chambers judge to be able to summarily dismiss summary dismissal applications, without even entertaining them, when the chambers judge, in his or her discretion, is of the view that allowing the application to proceed is not likely to be a good use of court resources.[52]

59. It should not be the case that judges are encouraged to always entertain a summary judgment. However, that appears to be the message from the majority below. Justice Paperny described the changing approach in dissenting reasons in *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2017 ABCA 378: "Courts have more recently been encouraged to embrace summary judgment purposively; to focus on whether it would be fair and just to both sides to determine an issue on the record before the court on the summary judgment

[52] *GSI v Murphy Oil Company Ltd*, 2018 ABCA 380 at para. 95.

application."[53] Similarly in *Arndt v Banerji*, 2018 ABCA 176, Justices Paperny and Slatter wrote: "Summary judgment procedures should increasingly be used, and the previous habit of routinely referring any contentious matter to trial should end…"[54]

60. While judges should not routinely refer matters to trial, should it not also be the case that summary proceedings are entertained only when suitable?

PART IV – SUBMISSIONS CONCERNING COSTS

61. The Applicant requests costs in the cause.

PART V – ORDERS SOUGHT

62. The Applicant requests that the application for leave to appeal be allowed, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of January, 2019

R.J. Daniel Gilborn & Timothy Platnich
Counsel for the Applicant

[53] *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2017 ABCA 378 at para. 65.
[54] *Arndt v Banerji*, 2018 ABCA 176 at para. 34.

PART VI – TABLE OF AUTHORITIES

Cases **at Para.**

Other

PART VII – STATUTES, REGULATIONS, RULES, ETC.

B.C.: *Supreme Court Rules*, B.C. Reg. 168/2009, R. 9-6(5)

Alberta Rules of Court, Alta. Reg. 124/2010, r. 7.3

Saskatchewan: *The Queen's Bench Rules of Saskatchewan*, r. 7.5(1)(a)

Ontario: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2)

Règles de Procédure Civile, RRO 1990, Règl 194, r. 20.04(2)

New Brunswick: *Rules of Court*, N.B. Reg. 82-73, R. 22.04

Nova Scotia: *Civil Procedure Rules*, r. 13.04(2)

Prince Edward Island: *Rules of Civil Procedure*, R. 20.04

Newfoundland: *Rules of the Supreme Court, 1986*, S.N.L., 1986, c. 42, Sch. D, r. 17.01

Northwest Territories: *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 176(2)

Règles de la Cour suprême des Territoires du Nord-Ouest, Règl des TN-O 010-96, r. 176(2)

Yukon: *Rules of Court for the Supreme Court of Yukon*, R. 18(1)

Règles de procédure et formules du Yukon, R. 18(1)

Federal: *Federal Court Rules*, SOR/98-106, r. 215 (1)

Règles des Cours fédérales (DORS/98-106), r. 215(1)