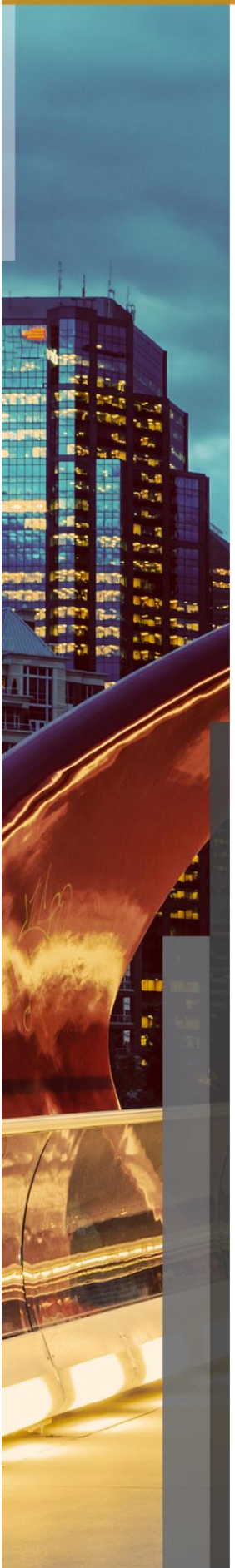

The Court clarifies the "unassailable" standard for Summary Judgment in *O'Chiese Energy Limited Partnership v Bellatrix Exploration Ltd*.

By Kylan Kidd and Seamus White (Student at Law)

On January 25, 2019, Master J. Farrington of the Alberta Court of Queen's Bench released his decision in *O'Chiese Energy Limited Partnership v Bellatrix Exploration Ltd*, 2019 ABQB 53.

Doug McGillivray Q.C., James Murphy and Craig Alcock represented Bellatrix Exploration Ltd. (**Bellatrix**) in its successful summary dismissal application against O'Chiese Energy Limited Partnership (**O'Chiese**). The application considered whether O'Chiese was entitled to a 15% working interest in oil and gas processing facilities located off of the O'Chiese First Nation reserve (the **Disputed Facilities**). O'Chiese argued that it was entitled to a working interest pursuant to the terms of three joint venture agreements entered into between the parties (the **Agreements**).

The Court granted Bellatrix's summary dismissal application and dismissed O'Chiese's claim to a 15% working interest in the Disputed Facilities. In making his determination, Master Farrington adopted Bellatrix's proposed test for the definition of a "facility" and applied the principles of contractual interpretation to find that the wording of the Agreements was "insufficient to give rise to the broad off reserve interest in facilities" that O'Chiese had claimed.

Further, the Court ruled that O'Chiese's position was untenable because it "lacked commercial certainty, clarity and business efficacy," and would require a complex and uncertain analysis for every facility on an ongoing basis. The Court found that such an interpretation could not be what the parties had objectively contemplated at the time they executed the Agreements.

The Court Followed the "Unassailable" Standard for Summary Judgment

In granting Bellatrix's application, the Court was required to navigate the current uncertainty with respect to the standard of proof for summary judgment in Alberta. While Master Farrington stated that his ruling would be the same regardless of which test is applied, he emphasized the need for a higher standard of proof in summary judgment and concluded that the appropriate standard should be unassailability. What remains to be seen—and perhaps will only be resolved by the five court panel at the Alberta Court of Appeal—is whether the Court's position in this case can be reconciled with the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7 (***Hryniak***).

In granting summary dismissal, the Court acknowledged the Alberta Court of Appeal's recent divergence on the standard of proof required in summary judgment applications. In *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125, the Court of Appeal applied the balance of probabilities standard of proof. In the subsequent decisions of *Rotzang v CIBC World Markets Inc*, 2018 ABCA 153, and *Whissell Contracting Ltd v Calgary (Cit*y), 2018 ABCA 204, the Court of Appeal stated that for summary judgment, the moving party's position must be "unassailable or so compelling that its likelihood of success is very high and the non-moving party's likelihood of success is very low".

In finding that the "unassailable" standard is the appropriate threshold for summary judgment in Alberta, the Court found that there would be a risk that cases with a significant chance of success at trial would be defeated at the summary judgment stage if a balance of probabilities standard was sufficient. Master Farrington held that this is because the balance of probabilities standard does not require the court to determine that one party would win every time if the trial was run again, but

merely requires the court to determine that one party would win slightly more than half of the time. Due to the uncertainties inherent in the litigation process and because a summary judgment application is not a trial, Master Farrington held that the standard of proof should reflect the possibility for divergence in the final result.

Finally, Master Farrington concluded that because the nature of summary judgment is "different" than the nature of a trial or a summary trial, "different considerations" must apply. He made this finding based on his determination that trials and summary trials are meant to provide a final disposition of a dispute, whereas summary judgment applications only provide a "one sided remedy". Summary judgment may conclude the matter for, but not against, the applicant.

While the Court's articulation of the "unassailable" standard of proof provides clarity on the rationale for this proposed standard of proof, Master Farrington's finding that summary judgment is somehow lesser than or distinct from a conventional or summary trial may be at odds with the Supreme Court of Canada's (SCC) decision in *Hryniak*. Justice Karakatsanis, on behalf of a unanimous panel in *Hryniak*, demanded a "culture shift" in Canada to ensure timely and affordable access to justice, including allowing access to summary procedures where conventional trials are not required to ensure a fair process. The Court noted that the conventional trial process no longer reflects modern reality and, as such, summary judgment should be the preferred means of resolving disputes, provided that:

a) the process will allow the judge to make the necessary findings of fact and apply the law to those facts; and

b) it is a proportionate, quicker, less expensive alternative to a full trial.

Justice Karakatsanis declared that summary judgment is a legitimate means of adjudication no longer reserved for the purposes of weeding out obviously unmeritorious claims, but is a model of adjudication *no less legitimate* than the conventional trial. As such, it would seem that the SCC has ruled that summary judgment is not necessarily "something different" from a conventional or summary trial. The Court in *Hyrniak* seems to have determined that summary judgment is merely an alternative method of adjudicating a dispute that may be used where it is fair and just—no more, and no less.

It is difficult to square these comments with the unassailable standard adopted by Master Farrington, which seems to contemplate summary judgment as a lesser proceeding than a trial. However, while the Court of Appeal deliberates on what should be the proper standard, this case provides one of the most cogent rationales for the unassailable standard.