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QUESTIONING YOUR STANDARDS

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Introduction

The standard of review is the starting point for consideration of whether to appeal a lower court decision. The standard of review is one of the defining aspects which distinguishes trial advocacy from appellate advocacy. It determines the context within which an appellate court will review a lower court decision and potentially plays a large role in the final outcome of an appeal. Understanding the importance of the standard of review is often crucial to mounting a successful appeal. More specifically, understanding some of the intricacies and trends within the Courts' application of standard of review assists a lawyer to properly frame his or her argument and increase the prospect of the appellate court reaching the desired outcome.

This paper will briefly outline some basic principles of standard of review before taking a closer look at two issues related to the standard of review in greater detail. It must be emphasized at the outset that the following is a high level summary of the basic standard of review principles. It is not intended to be exhaustive. Rather than examine each aspect of the subject in detail, it is intended to give a sufficient overview to explore the two aforementioned issues of interest.

Revisiting the Basics

An appellate court's role is not to retry a case, but to determine whether there was a reviewable error made by the court below.[1] The nature of an alleged error will determine whether and how an appellate court is permitted to interfere with the lower court's decision. The "how" is the standard of review and the starting point of any appeal.

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[1] ***Housen v. Nikolaisen***, 2002 SCC 33 at paras 3-4.

Generally, there are four main types of errors which allow an appellate court to interfere with the decision of a lower court: (1) error of law; (2) error of fact; (3) error of mixed fact and law; and (4) error of exercising discretion.[2] The courts are required to apply a different standard of review to each of these errors.

Questions of law are questions that deal with the scope, effect, and application of a legal rule or test to be applied in determining the rights of the parties.[3] These questions will be reviewed by the Court of Appeal using the standard of review of "correctness".[4] That is to say, a lower court's order must be correct in law. Where a legal error can be demonstrated by an appellant, the Court of Appeal is "free to replace the opinion of the trial judge with its own".[5]

In contrast, questions of fact deal with what actually took place between the parties.[6] These questions will attract the standard of review of "palpable and overriding error". This accords a high standard of deference towards findings of the trial judge. An appellate court may only intervene on a question of fact where the error is obvious and had an effect on the outcome of the case. As Fish J. stated, the "palpable and overriding error" standard requires that "one must be able to 'put one's finger on' the crucial flaw, fallacy or mistake."[7]

Questions of mixed fact and law involve the application of a set of facts to a legal standard or principle.[8] By way of example, determining whether a defendant breached the standard of care in a negligence claim is a question of mixed fact and law.[9] It requires a trial judge to determine the appropriate standard, which is a question of law, and apply the particular facts of the case to that legal standard.

The appropriate standard of review for questions of mixed fact and law falls somewhere on a sliding scale between correctness on one end and palpable and overriding error on the other. Where upon the scale the standard of review falls depends upon whether the question is more legal or factual in nature and depends upon the particular circumstances. Where the question of law is extricable from the factual issues, an error on a question of mixed fact and law can amount to a pure question of law subject to the correctness standard.[10] Iacobucci J. provides the example in ***Canada (Director of Investigation and Research) v. Southam***, [1997] 1 S.C.R. 748, where a legal test requires the consideration of four different factors and a trial judge fails to consider one of the factors. By not considering the fourth factor, the trial judge has in effect applied the wrong

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[2] ***Housen***; see also Holly Brinton, ***Civil Appeal Handbook*** (Vancouver, CLEBC) (loose-leaf updated November 26, 2013) at 2.3. Note: the courts will also deal with issues of natural justice and jurisdiction on appeal. Such errors are beyond the scope of this paper.

[3] ***Canadian National Railway Co. v Bell Telephone Co.***, [1939] SCR 308; see also ***Canada v Southam***, [1997] 1 SCR 748 at para 35; and ***British Columbia v. Burlington Resources Canada Ltd.***, 2005 BCCA 72

[4] ***Bell v Bell***, 2001 BCCA 148 at para 11.

[5] ***Housen v. Nikolaisen***, 2002 SCC 33 at para 8.

[6] ***Canada v Southam***, [1997] 1 SCR 748 at para 35.

[7] ***H.L. v. Canada (Attorney General)***, 2005 SCC 25 at para 70.

[8] ***Housen*** at para 26

[9] ***D.M. Drugs (Harris Guardian Drugs) v. Barry Edward Bywater (Parkview Hotel)***, 2013 ONCA 356 at para 53.

[10] ***Housen*** at para 27 quoting ***Canada (Director of Investigation and Research v. Southam***, [1997] 1 S.C.R. 748.

legal test and the result is an error of law. This error would of course attract the correctness standard of review.[11]

Where a question of mixed fact and law does not amount to an error of law, a higher standard of deference is mandated.[12] The BC Court of Appeal has stated that unless there is such a clearly identifiable or extricable error of law, then a lower court's order should be reviewed with deference.[13]

Finally, questions involving the exercise of discretion are described in R.P. Kerans' book, ***Standards of Review Employed by Appellate Courts***, (Edmonton: Juriliber Limited, 1994) at 124-126:

> One can lump the "discretion" cases roughly into two sub-groups: the first are those cases involving the management of the trial and the pre-trial process; the second are those where the rule of law governing the case makes many factors relevant, and requires the decision-maker to weigh and balance them.

Questions that appear discretionary can actually be questions of law. In ***British Columbia (Minister of Forests) v. Okanagan Indian Band***, 2003 SCC 71, LeBel J. states that "the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review."

Where an appeal addresses an order which is clearly discretionary, a highly deferential standard of review is mandated. As Gonthier J. stated, "Courts of Appeal should be highly reluctant to interfere with the exercise of a trial judge's discretion."[14] Generally, appellate courts will only interfere with a lower court's decision where the trial judge has incorrectly applied a legal principle or the decision is so clearly wrong that it amounts to an injustice.[15]

While these basic principles are not overly complex, determining the applicable standard of review can present pitfalls to lawyers who do not take the time to explore subtle issues with the application of various standards or to stay apprised of appellate trends. The balance of this paper will move from the high level concepts to a closer look at two such issues. First, it will explore a distinction in the standard of review between two statutory provisions which appear to demand a similar standard. Second, it will explore the evolution of the standard of review for summary trials.

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[11] See also ***Shiokawa v Pacific Coast Savings Credit Union***, 2005 BCCA 95 at para 46.

[12] ***Housen*** at para 28.

[13] ***Keefer Laundry Ltd v Pellerin Milnor Corp***, 2009 BCCA 273 at para 60.

[14] ***Elsom v. Elsom***, [1989] 1 SCR 1367.

[15] ***Elsom*** at 1375; see also ***Kedia International Inc. v. Royal Bank***, 2007 BCCA 47 at para. 22.

Standard to Strike vs. Standard to Certify

The difference in the standard of review between an order to strike pleadings under Rule 9-5(1) of the ***Supreme Court Civil Rules***[16] (the "***BC Rules***") and an order to certify a class action under section 4(1)(a) of the ***Class Proceedings Act***[17] (the "***CPA***") should serve as a red flag to any lawyer looking to gloss over their standard of review analysis when preparing an appeal. Each of these statutory provisions requires the trial judge to determine whether a cause of action is disclosed in the pleadings. One would expect that these two provisions would attract the same standard of review on appeal, but the case law thus far bears out a different story.

Section 4(1) of the ***CPA***, lays out five requirements for class certification, including that the pleadings disclose a cause of action under clause (a):

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> …

The question of whether pleadings disclose a cause of action has been held by the courts to be a question of law attracting the correctness standard of review. This principle has been expressly articulated by the BC Court of Appeal in ***Wells Cartage Ltd. v. Goodyear Aerospace Corp.***, 1987 CanLII 2625 (BCCA), where Esson J.A. stated that "[t]he question whether a new cause of action was raised is, of course, not essentially a matter of discretion, but rather one of law."[18]

Accordingly, it is not surprising then that the BC Court of Appeal has applied the correctness standard to section 4(1)(a) of the ***CPA***. In ***Koubi v. Mazda Canada Inc.***, 2012 BCCA 310 ("***Koubi***"), Neilson J.A. stated:

> [15] The question of whether Ms. Koubi's pleadings disclose a cause of action as required by s. 4(1)(a) of the *Class Proceedings Act* is a question of law, reviewable on a standard of correctness. The threshold is not high, however, and a pleading will be struck only if it is plain and obvious that it discloses no reasonable cause of action and cannot succeed: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 (CanLII), 2011 SCC 24 at para. 20, 2011 SCC 24 (CanLII), [2011] 2 S.C.R. 261.[19]

Section 4 also expressly limits the discretion of the court in ordering certification since an action "must" be certified where the necessary criteria are established.[20] The Court of Appeal has found that the inverse is true as well. Where no cause of action is established, the court will refuse certification without even considering the other factors set out in section 4(1) of the ***CPA***. This point is illustrated by Levine J.A. in ***MacFarlane v. United Parcel Service Canada Ltd.***, 2010 BCCA 171:

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[16] BC Reg 168/2009.

[17] RSBC 1996, c 50.

[18] ***Wells Cartage v. Goodyear Aerospace Corp.***, 1987 CanLII 2625 (BCCA) at para 19; see also ***Rhodes Estate v. Canadian National Railway***, 1990 CanLII 5401 (BCCA) at para 5.

[19] See also ***Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.***, 2014 BCCA 36 at para 8.

[20] ***Thorburn v. British Columbia (Public Safety and Solicitor General)***, 2013 BCCA 480 at para 32.

> [21] […] As the court noted in any event, the burden is on the plaintiff to show that the pleadings disclose a cause of action. If, on the pleadings, there is no legal claim, then, as the chambers judge found here, there is no utility in a class (or any) proceeding. Nor can there be any utility in the court hearing the application for certification considering the other factors set out in s. 4(1) of the Class Proceedings Act, such as whether there are common issues, or whether a class proceeding is the preferable procedure.

However, these principles do not entirely preclude the exercise of discretion under section 4 of the ***CPA***. A judge has some measure of discretion in assessing the circumstances relevant to the certification criteria.[21] In particular, considerable discretion is granted to the question of whether a class proceeding is the preferable procedure under clause (d).[22]

Following ***Koubi***, this discretion does not extend to the question of whether a cause of action has been disclosed in the pleadings. Further, appellate intervention is warranted where the Court of Appeal is persuaded that, in exercising his or her discretion of whether to certify, the certification judge erred in principle or was clearly wrong.[23]

Rule 9-5(1)(a) of the ***BC Rules*** contains a similar provision to section 4 of the ***CPA***, outlining when it is appropriate for a trial judge to strike pleadings:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> …
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

In spite of the fact that the Court of Appeal has repeatedly held that the correctness standard applies to the question of whether a cause of action was raised, recent reasons from the Court of Appeal suggest that a different standard *may* apply to appeals from a decision pursuant to Rule 9-5(1)(a). In ***Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)***, 2013 BCCA 24 ("***Timberwolf***"), D. Smith J.A. outlined the standard of review which applies to the entirety of Rule 9-5(1):

> [19] It should also be noted that an order under R. 9-5(1) is a discretionary order for which deference must be given absent an error of law or principle or a failure of the judge to consider or weigh all of the relevant circumstances. The standard of review for discretionary orders was summarized by Chief Justice Finch in *Stone v. Ellerman*, 2009 BCCA 294 (CanLII), 2009 BCCA 294, 92 B.C.L.R. (4th) 203, leave to appeal ref'd [2009] S.C.C.A. No. 364 in this manner:
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> > [94] Discretionary powers must be exercised in accordance with what the judge thinks the justice of the situation requires. Judicial discretion is constrained by factors or principles that must be weighed and balanced as between the competing interests, but no rule of law

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[21] ***Pro-Sys Consultants Ltd. v. Infineon Technologies AG***, 2009 BCCA 503 at para 28; see also ***Campbell v. Flexwatt Corp.*** 1997 CanLII 4111 (BCCA) at para 25.

[22] ***Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.***, 2014 BCCA 36 at para 8.

[23] ***Thorburn v. British Columbia (Public Safety and Solicitor General)***, 2013 BCCA 480 at para 30, quoting ***Pro-Sys Consultants Ltd. v. Infineon Technologies AG***, 2009 BCCA 503 with approval.

> dictates the result. Accordingly, an appellate court will not interfere with an exercise of judicial discretion unless it can come to the clear conclusion that it was wrongly exercised in that no weight or insufficient weight has been given to relevant considerations (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3 at 76-77, 88 D.L.R. (4th) 1, [1992] 2 W.W.R. 193) or that on other grounds it appears that the decision may result in injustice (*Taylor v. Vancouver General Hospital*, [1945] 4 D.L.R. 737 at 743, [1945] 3 W.W.R. 510, 62 B.C.R. 42 at 50 (C.A.)).

In ***British Columbia (Director of Civil Forfeiture) v. Flynn***, 2013 BCCA 91 ("***Flynn***"), the Court of Appeal applied this principle to a case dealing with whether the pleadings properly disclosed a cause of action pursuant to Rule 9-5(1)(a). In that case, Frankel J.A., citing ***Timberwolf***, stated that "a decision made on a pre-trial application to strike pleadings is entitled to deference as it involves the exercise of judicial discretion".

So how is it that the Court seems to apply a separate standard of review under Rule 9-5 of the ***BC Rules*** and section 4(1) of the ***CPA*** when addressing the question of whether a cause of action has been raised? There are two possible answers to this question. First, the Court may be making an implicit and subtle distinction between the permissive language of Rule 9-5 of the ***BC Rules*** and the compulsory language of section 4(1) of the ***CPA***, although this distinction does not appear to be explicitly addressed in any of the Court's reasons. Second, the Court in ***Flynn*** may have overextended a broad application of the deferential standard to Rule 9-5, to which clause (a) should stand as an exception.

Looking first at the permissive language of Rule 9-5 as applied to clause (a), the provision clearly states that the court "may" order pleadings to be struck where no reasonable claim is raised. This language underscores the possibility that the legal question of whether a cause of action is disclosed can be separated out from the discretionary question of whether the pleadings are to be struck in whole or in part. Where the chambers judge finds that a cause of action is disclosed, the discretionary decision to strike would not be engaged. But where no cause of action is disclosed, the chambers judge would have the discretion to strike the pleadings or allow the case to proceed based upon the preamble to the section.

This principle was applied in ***Hunt v. T & N***, 1991 CanLII 1121 (BCCA), albeit in application of a different provision. In that case, the Workers' Compensation Board applied to strike out third party notices of certain defendants pursuant to Rule 9-6 (then Rule 18(6)). The applicable test was that the proceedings would not be struck out unless they were bound to fail. The chambers judge dismissed the application, holding that the third party claims were at least arguable. On appeal, Lambert J.A. addressed the appropriate standard of review:

> Chief Justice Esson decided that the third party proceedings against the Workers' Compensation Board were not bound to fail. In my opinion, that was a correct decision on a question of law. It was not an exercise of his discretion. If he had decided that they were bound to fail he might nonetheless have permitted them to go ahead. In those circumstances what he would have done would have been, in my opinion, an exercise of discretion. However, that was not what he did in this case.

Applied to Rule 9-5, it is possible that the court is able to use its discretion and permit an action to proceed even where there is no genuine cause of action raised.

Conversely, section 4(1) of the ***CPA*** contains obligatory language that expressly precludes separating a discretionary decision from the question of law as to whether a cause of action was raised. Since an action that meets the enumerated criteria "must" be certified, the certification judge is not statutorily permitted any discretion upon finding that a cause of action was raised (assuming that all of the other criteria are also met). Similarly, as the case law has developed, there does not appear to be any discretion to certify where no cause of action is disclosed.

However, relying on the distinction between the permissive and obligatory language of the two statutes does not reconcile Rule 9-5 of the ***BC Rules*** with the extensive case law that suggests that whether a cause of action has been raised is a question of law. Further, any legislative intent to provide judicial discretion on this point would undermine the principle of proportionality at the core of the ***BC Rules***. Where no reasonable cause of action is raised, the Court must at least consider the principle of proportionality in allowing proceedings to continue notwithstanding the potential cost, stress, and personal hardship. It should, in the writer's view, be a rare case where the Court would allow a matter that has no prospect of success at trial to proceed.

A more reasonable explanation may simply be that the Court's discretion under 9-5 is more appropriately applied to the other clauses, namely that a pleading can be struck where it is "unnecessary, scandalous, frivolous or vexatious", "may prejudice, embarrass or delay the fair trial or hearing", or is "otherwise an abuse of the process of the court". Judicial discretion would perhaps be more appropriately applied in such scenarios where the rights of the parties must be weighed to determine whether the plaintiff's rights should be constrained or even taken away where their assertion would bring adverse effects against other parties or the administration of justice, but where their claim has a reasonable prospect of success at trial.

Accepting this, the Court in ***Flynn*** appears to have overextended the application of discretion under Rule 9-5. While it could be argued that ***Timberwolf*** was intended to apply to Rule 9-5 generally, it did not expressly deal with clause (a). Further, in ***Timberwolf***, D. Smith J.A. expressly stated that discretion is only accorded "absent an error of law or principle or a failure of the judge to consider or weigh all of the relevant circumstances", arguably supporting an exception to a discretionary standard with respect to findings of whether a cause of action has been raised.

Admittedly, this approach is not without its problems as well. Beyond calling into question the decision in ***Flynn***, it would run afoul of basic principles of statutory interpretation. Had the legislature intended the courts to be constrained when assessing whether a cause of action had been raised, clause (a) could have been separated from the other triggers under Rule 9-5.

In any event, until the courts clarify this apparent discrepancy, it should serve as a warning to appellate lawyers.

The Evolving Standard of Review on Summary Judgment

While the prior issue highlighted the need for lawyers to pay attention to the intricacies of determining the appropriate standard of review, this issue highlights the need for lawyers to monitor how the application of standards of review can change over time.

In its recent decision, ***Hryniak v. Mauldin***, 2014 SCC 7 ("***Hryniak***"), the Supreme Court of Canada revisited the scope of summary judgment procedures as applied to the amended ***Rules of Civil Procedure***, R.R.O. 1990, Reg. 194 in Ontario (the "***Ontario Rules***"). Ontario amended its rules in 2010 in an effort to increase access to justice by removing various financial and procedural barriers. These changes were embodied in the proportionality principle which seeks to provide the best forum to resolve a dispute efficiently and cost effectively.[24] The principle of proportionality is captured in Rule 1.04 of the ***Ontario Rules***, which states:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> 1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

With respect to summary judgment, the amended ***Ontario Rules*** changed the test for summary judgment from asking whether the claim demonstrates "a genuine issue for trial" to asking whether the there is a "genuine issue requiring trial".[25] Further, the amended rules provided for expanded fact-finding powers of the trial judge:

> 20.04 . . .
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> (2) [General] The court shall grant summary judgment if,
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> (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.
>
> (2.1) [Powers] 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:
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> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) [Oral Evidence (Mini-Trial)] 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.

These two changes operate in concert to provide the court with a wider array of tools to adjudicate more cases using the summary judgment process, expanding the number of cases where there will be no genuine issue requiring trial. As Karakatsanis J. stated, the cumulative effect of these changes was to "embody the evolution of summary judgment rules from highly

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[24] ***Hryniak*** at paras 28-33.

[25] See Rule 20.04 of the ***Ontario Rules***; see also ***Hyrniak*** at para 43.

restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes."[26]

Consistent with the efforts to attain proportionality through procedure, Karakatsanis J. applied a highly deferential standard of review to appeals under the new summary judgment rule. The Ontario Court of Appeal found that the correctness standard applied to the question of whether there is a genuine issue requiring a trial, and that a deferential standard applied to factual determinations. Karakatsanis J. did not adopt this approach, stating:

> [81] In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned, absent palpable and overriding error, *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

Karakatsanis J. went on to apply the same standard of deference to the motion judge's decision to exercise the new fact-finding powers:

> [82] Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.
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> [83] Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

This shift in the standard of review for summary judgment matters is particularly relevant to BC. Much like the recent amendments to the ***Ontario Rules***, BC overhauled the ***BC Rules*** in 2009 with a focus on improving access to justice. Indeed, the proportionality rules incorporated into the ***Ontario Rules*** bear a strong resemblance to those found in Rule 1-3 of the ***BC Rules***:

> **Object**
>
> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> **Proportionality**
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

[26] ***Hyrniak*** at para 36.

It remains to be seen how the BC courts will apply the Supreme Court of Canada's decision in ***Hryniak*** since the ***BC Rules*** provide an added consideration with the ability to seek a determination using the summary trial rules which do not have an equivalent under the ***Ontario Rules***. While the ***Ontario Rules*** did not adopt a summary trial procedure similar to that employed in BC[27], Karakatsanis J. found that the summary trial procedures were available under the simplified rules, by consent, or through the broad powers granted under Rule 20.05(2), which states (subsection (1) included for context):

> 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.
>
> (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 . . .

Prior to ***Hryniak***, on appeals from summary trials, the BC Court of Appeal sometimes applied what appears to be a lower deferential standard than the "palpable and overriding error" standard articulated by Karakatsanis J. A number of BC Court of Appeal decisions held that the appropriate standard of review on summary trial is that the summary trial determinations of fact "are not to be disturbed in this court unless it is shown that they cannot reasonably be supported on the basis of the material before the trial judge"[28] (emphasis added). As Finch J.A. summarized in ***Rootman (Trustee of) v. British Columbia (Public Trustee)***, 1998 CanLII 6484 (BCCA):

> The standard of review on questions of fact being appealed from summary judgments is whether the conclusions of the summary trial judge can reasonably be supported by the evidence, as set out in *Orangeville Raceway Ltd. v. Wood Gundy Inc.* 1995 CanLII 2663 (BC CA), (1995), 6 B.C.L.R. (3d) 391 (C.A.) at 400:
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> > It has been said that an appellate court is in as good a position to draw inferences from proven facts as the trial judge. But this states only half the equation. The appellate court may be in as good a position but the burden is still on the appellant to demonstrate error, that is to say, that the position reached below after a summary trial cannot reasonably be supported.[29]

This standard is arguably lower than that articulated by Karakatsansis J. in ***Hryniak***. In ***Hua v. Optimum West Insurance Co.***, 2005 BCCA 123 Rowles J.A. noted this and alluded to the possibility that more deference is owed when reviewing summary judgments:

> [24] Finally, I would add that there may well be an argument, based on the reasoning in Housen, supra, that the standard of review on a summary trial under Rule 18A ought to be the same as that on a conventional trial, that is, palpable and overriding error rather than a "cannot reasonably be supported by the evidence" standard. However, the question of which standard ought to be applied was not argued before us and, for that reason, I prefer not to express an opinion on the matter. I simply note that if the standard that ought to be applied is that of "palpable and overriding error", it would obviously not assist the appellant.

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[27] ***Hyrniak*** at para 40.

[28] ***Canadian Western Bank v. Hanson***, 1995 CanLII 2569 (BCCA).

[29] See also ***Colliers Macaulay Nicolls Inc. v. Clark***, [1989] BCJ No. 2445 (CA) at para. 13; ***Placer Development Limited v. Skyline Explorations Limited*** (1985), 67 BCLR 367 (CA) at 389; ***Chretien v. Jensen***, 1998 CanLII 4512 (BCCA) at para 23; and ***Orangeville Raceway Ltd. v. Wood Gundy Inc.***, 1995 CanLII 2663 (BCCA).

With the BC courts' apparent awareness of the need for greater deference on summary matters and the Supreme Court of Canada's reasons in ***Hryniak***, one might expect that the BC courts will adopt a higher deferential standard on summary matters. Indeed, Harris J.A. provided an indication of the likely direction of BC courts in ***Spring Hill Farms Limited Partnership v. Nose***, 2014 BCCA 66. In dismissing an appeal from a summary trial awarding damages for breach of settlement agreement, Harris J.A. cited the approach in ***Hryniak*** with approval:

> [21] If [the appellant] had any additional evidence he ought to have brought it forward in an affidavit and, if it gave rise to a conflict in the evidence sufficient to raise a legitimate question about the suitability of a summary determination, the summary trial judge would have then been in the position to deal with the issue. The trial judge, in fact, gave an opportunity to adduce additional evidence. That opportunity was not taken. As it is, the decision of the summary trial judge to proceed to deal with this matter on a summary basis exemplifies the principles justifying the importance of summary determination as a tool to improve access to justice that was recently discussed by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7 (CanLII), 2014 SCC 7.

The decision did not deal directly with the appropriate appellate standard of review, but the deferential standard applied in ***Hryniak*** appears to be a likely next step. At the very least, it is a possible trend that appellate lawyers will want to monitor closely as the drive for access to justice continues to shape the policy underlying our legal system, including the applicable standard of review.

Conclusion

The standard of review is an important first step for consideration in determining whether or not to pursue an appeal from a lower court decision. If the appeal is really one from a finding of fact, or even mixed fact and law, the appeal may be more difficult and advising clients of the differing standards is important so that they understand their prospects of success on appeal.

Further, the standard or review is too often viewed by lawyers as a procedural step with a cookie cutter application. While this can certainly be true on certain appeals, lawyers still need to be vigilant when framing the appropriate standard of review on an appeal. Whether at common law or by statute, subtle variations to the applicable standard may arise on certain facts and seemingly obvious standards may not apply. Similarly, standards of review are not static and can shift with social policy over time. Being aware of these shifts allows lawyers to press the boundaries for their clients and improve their chances on appeal.

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Tracey Cohen is a partner and a member of the Commercial Litigation and Dispute Resolution Group. She joined the firm in 1992 after clerking for the British Columbia Court of Appeal. Tracey has an impressive depth of knowledge and experience in resolving business disputes using the most effective means possible - litigation, negotiation, mediation, and arbitration. Tracey has appeared before all levels of Court in British Columbia and as counsel in numerous arbitrations and mediations,

Tracey has attained a BV rating ("high to very high legal ability") by the Martindale-Hubbell legal rating service, indicating the high level of respect which she has earned from her peers and senior members of the bar. She is known for her pragmatic approach and ability and dedication in attempting to truly understand her clients' business and developing a strategy that reflects it.