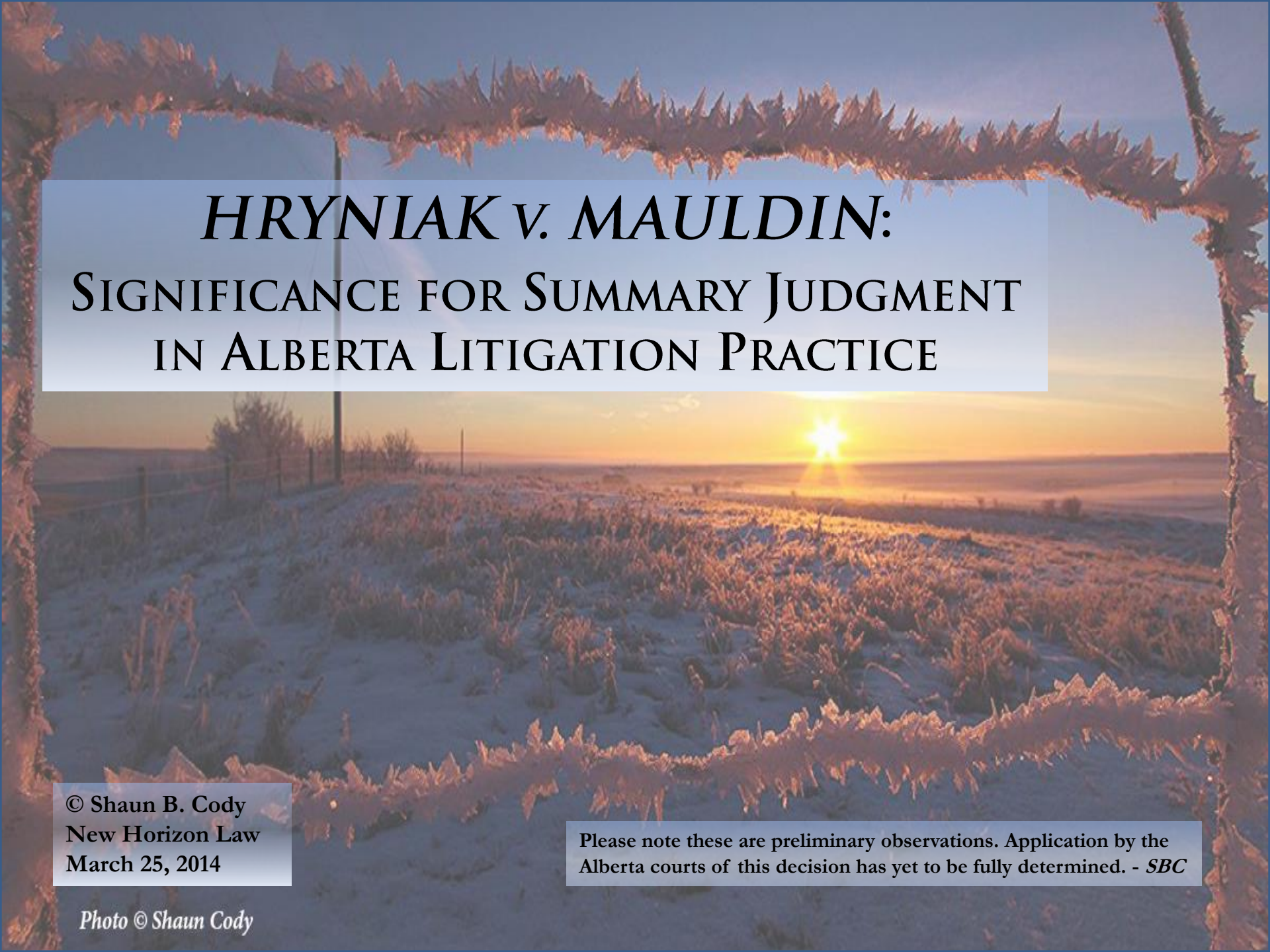

HRYNIAK v. MAULDIN:
Significance for Summary Judgment in Alberta Litigation Practice

New Horizon Law
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Please note these are preliminary observations. Application by the Alberta courts of this decision has yet to be fully determined. - ***SBC***

INTRODUCTION

The SCC decision in *Hryniak* has attracted attention in the profession, and in the media.

Various interpretations have hailed (or cautioned) that the decision represents a "cultural shift" for the profession.

As I will set out, I view the decision as a significant one in setting out the mindset of the Supreme Court, and in setting a policy direction. In terms of Alberta practice, and specifically summary judgment as set out in the Alberta *Rules of Court*, the Alberta Court of Queen's Bench has already suggested certain aspects of *Hryniak* are specific to the Ontario Rules.

WHAT DOES *HRYNIAK* SAY?

Significantly, the SCC comments that:

Paragraph 24 – Ordinary Canadians cannot afford access to the courts to adjudicate civil disputes. The notion of full trials for every dispute is illusory.

Paragraph 28 – A cultural shift is required.

Paragraph 30 – The foundational rules in the Ontario *Rules of Court* are discussed. While not identical, the same concepts are in the Alberta *Rules*.

Paragraph 49 – The complexity of the matter is not a barrier to summary judgment if the facts allow a decision on the merits. (The discussion about the fact finding and choosing between contending testimony is specific to the Ontario *Rules*.)

. . .

WHAT DOES *HRYNIAK* SAY? *CONTINUED*

Paragraph 57 – Ordering oral testimony to supplement the documentary record may be available in Ontario, but not under Alberta *Rules*.

Paragraph 60 – Even partial summary judgment on certain major aspects of a case may expedite trial.

Paragraph 67 – Significantly, the presumption should not be that summary judgment is exceptional, but rather it should be available. While summary judgment must be granted if there is no genuine issue for trial, the motions judge may dismiss the application if it is unmeritorious.

There is also a suggestion that since summary judgment (in Ontario) involves fact finding, the standard of review in respect of summary judgment decisions should be that of palpable and overriding error.

The Supreme Court upheld the decision granting summary judgment against Hryniak.

WHAT ABOUT ALBERTA?

The Ontario summary judgment rule is more like our summary trial rule.

In *Orr v. Fort McKay First Nation*, Justice Brown of the ABQB distinguished Rule 7.3 of the Alberta *Rules of Court* from *Hryniak*, noting that resolving disputed facts and the weighing of evidence is outside the jurisdiction of Masters in Alberta (who often hear summary judgment applications). (Paragraph 16)

Justice Brown analogizes the Ontario rule dealt with in *Hryniak* to the Alberta summary trial rule. (Paragraph 19)

The Court goes on to discuss the policy significance of *Hryniak*; refers to foundational rules in Alberta *Rules*. (Paragraph 27)

. . .

WHAT ABOUT ALBERTA? *CONTINUED*

In mid-March 2014, the ABCA released *Windsor v. Canadian Pacific Railway Ltd.* It involved an appeal from the refusal by Justice Rooke to strike portions of the Plaintiff's claim related to strict liability for the groundwater migration of a degreasing solvent (TCE) from the CP lands to neighbouring properties in Ogden.

Court of Appeal suggests that assessment of the facts, and application of the law to those facts, are entitled to deference, as per *Hryniak*. The ABCA (wrongly, in my view) analogizes Ontario Rule 20 to Alberta Rule 7.3.

ABCA does speak of "cultural shift," and the "myth of trial" (Paragraph 15). The need for proportionality is emphasized. The Court of Appeal found that, on the legal tests for strict liability, summary judgment was appropriate.

A MASTER'S VIEW

Whitecourt Power Limited Partnership v. Interpret Technical Services Ltd.

On March 11, 2014, Master Mason's decision in *Whitecourt Power* was released.

The matter before her was an application to set aside, or summarily dismiss, a third party claim.

At Paragraph 36 of the decision, the Master rejects the assertion that *Hryniak* represents a departure from the existing analysis applied by Alberta courts in summary judgment applications.

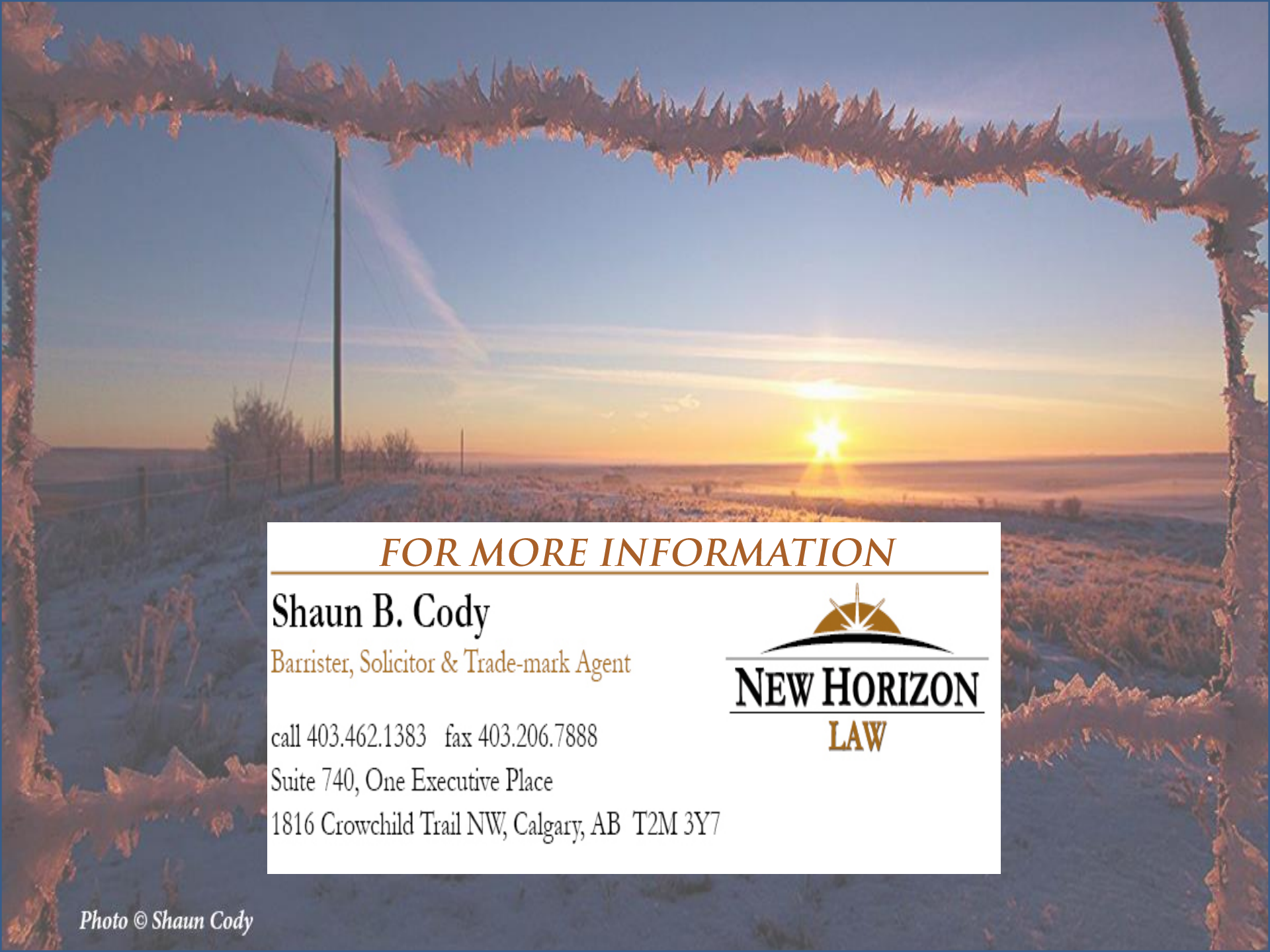
Master Mason also agrees with *Orr v. Fort McKay First Nation* that Rule 7.3 of the Alberta *Rules of Court* does not contemplate the court weighing evidence to resolve disputed questions of fact. It cannot be given if opposing affidavits clash on relevant facts. (Paragraphs 31, 34, 35)

SUMMARY

The Supreme Court has emphasized a need for quicker adjudication of civil disputes.

Alberta courts have repeatedly noted the need for proportionality.

The basic concepts of summary judgment in Alberta remain unchanged: You cannot apply under Rule 7.3 to have the court resolve disputed facts to reach a decision.



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