SUMMARY JUDGMENT MOTIONS

Hryniak v. Mauldin Breathes New Life Into Summary Judgment Motions

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Introduction

The Supreme Court of Canada recently released its decision in *Hryniak v. Mauldin*,[1] breathing new life into summary judgment motions. Calling for a "shift in culture" toward increased access to justice, the Supreme Court held that "summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims."[2]

This decision sets out the application of the summary judgment rules and represents a major shift in how parties in civil matters may reach a fair resolution of their disputes.

Background

Hryniak involved the interpretation of the new summary judgment procedure governed by the Ontario *Rules of Civil Procedure*.[3] Summary judgment allows for the final resolution of litigation by way of a motion. It is intended to provide a timelier and more affordable alternative to a full trial.

Ontario's summary judgment procedure, found in Rule 20 of the Rules, was initially very limited in scope; the purpose of this procedure was to avoid the time and expense of trial for cases that clearly lacked merit. In 2008, the Supreme Court held in *Canada (Attorney General) v. Lameman*[4] that the bar on a motion for summary judgment was high, and that the purpose of such motions was solely to ensure that claims bound to fail were "weeded out" at a preliminary stage of the proceedings.[5]

On January 1, 2010, amendments to the Rules came into force. The amendments to Rule 20 changed the previous language that asked whether a case presented "a genuine issue for trial" to ask if there is a "genuine issue *requiring* a trial."[6] The amendments also provide for enhanced fact-finding powers, allowing a judge to weigh evidence, assess credibility and draw inferences.[7] The amendments appear to have been intended to make summary judgment more accessible and affordable and to make clear that a trial is not a necessary, or even preferred, procedural mechanism to resolve civil disputes.

Following the amendments, there was uncertainty about when and how a motion judge should grant summary judgment. In particular, there was a debate in early cases as to whether the amendments merely codified the existing threshold with some minor changes of judge's powers or whether the amendments were intended to increase the availability to grant final decisions on the merits of a case before a full trial.

In 2011, the Ontario Court of Appeal released its decision in *Combined Air Mechanical Services Inc. v. Flesch*.[8] In its decision, the Court of Appeal considered prior, competing decisions and created the "full appreciation test." The Court held that summary judgment should be granted in narrow circumstances and only where the judge can achieve a "full appreciation" of the evidence without the need for trial-like procedures, such as to hear and experience the fact-finding process first-hand.

Combined Air continued the view that a full trial was the preferred method of resolving disputes.

Supreme Court of Canada Decision

In *Hryniak*, the Supreme Court rejected the Court of Appeal's "full appreciation" test,

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[1] 2014 SCC 7 ("*Hryniak*").

[2] Ibid. at paragraph 5.

[3] R.R.O. 1990, Reg. 194 (the "*Rules*").

[4] 2008 SCC 14 ("*Lameman*").

[5] Ibid. at paragraph 10.

[6] Rule 20.04(2)(*a*) (emphasis added).

[7] Rule 20.04(2.1).

[8] 2011 ONCA 764 ("*Combined Air*").

stating that it placed "too high a premium on the ... evidence gained at a conventional trial."[9] The Supreme Court concluded that in order to favour proportionality and fair access to the timely, affordable, and just adjudication of claims, summary judgment rules must be interpreted broadly and be viewed as giving real and expanded powers to the motion judge.

Central to the Supreme Court's decision is the focus on the underlying values of Canada's civil justice system. The Supreme Court emphasized that the summary judgment procedure should facilitate a "shift in culture" towards timely and affordable access to justice and away from increasingly expensive and protracted trials.

Under the amended Rule 20, summary judgment must be granted where there is "no genuine issue requiring a trial."[10] The Supreme Court held that there will be no genuine issue requiring a trial when the summary judgment process:

1. allows the judge to make the necessary findings of fact;
2. allows the judge to apply the law to the facts; and
3. is a proportionate, more expeditious and less expensive means to achieve a just result.[11]

The Supreme Court stressed that these principles are interconnected and address whether summary judgment will result in a fair and just adjudication.

The Interests of Justice

In its decision, the Supreme Court clearly changed the balance of factors that a court must consider when determining if a traditional trial is required. It did so by the way in which it addressed the interpretation of the "interest of justice" principle. The amendments to Rule 20 allow the motion judge to utilize enhanced fact-finding powers, unless it is in the "interest of justice" to only exercise these powers at trial. As the Supreme Court noted, there is no definition of "interest of justice" in the Rules.

The Supreme Court departed from the principles articulated by the Court of Appeal, which held that a "full appreciation of the evidence and issues" was required to determine if the interest of justice allowed for the use of these enhanced powers. The Supreme Court held that it is not necessary that the evidence on a summary judgment motion be equivalent to that at trial, but rather the motion judge must be confident that he or she can fairly resolve the dispute using the summary judgment procedure.

The Supreme Court emphasized that "proportionality" is a key factor when determining whether summary judgment should be granted. Proportionality involves a comparative analysis and may require the motion judge to assess the relative efficiencies of proceeding by summary judgment and not a full trial.

The amendments to Rule 20 also give the motion judge power to hear oral evidence in the fact-finding process. The Court of Appeal held that the motion judge should only hear oral evidence when such evidence: (1) can be obtained from a small number of witnesses in a manageable amount of time; (2) will impact whether the summary judgment motion is granted; and (3) regards an issue that is discrete and narrow.[12] Although the Supreme Court adopted these guidelines, it added that they are not absolute and the power to hear evidence should be employed when it would allow the judge to reach a fair and just result on the merits of the dispute.

Managing a Summary Judgment Motion

The Supreme Court supported the involvement of judges early in the life of a motion, as prescribed by Rule 1.05. Rule 1.05 allows for a motion for directions, which provides an opportunity for the parties to manage the time and cost of the summary judgment motion before it begins.

Procedural Roadmap to a Motion for Summary Judgement

The Supreme Court established a procedural roadmap when considering a summary judgment motion. The judge should first determine if there is a genuine issue requiring

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[9] *Hryniak*, supra note 1 at paragraph 4.

[10] Rule 20.04(2)(*a*).

[11] *Hryniak*, supra note 1 at paragraph 49.

[12] Ibid. at paragraph 2, quoting *Combined Air*, supra note 8 at paragraph 109.

a trial before him or her, without using the new fact-finding powers. If there is not a genuine issue requiring a trial, the motion judge may make a decision without engaging his or her new fact-finding powers. If there appears to be a genuine issue requiring a trial, the judge must then determine if the need for a trial can be avoided by using the new powers under Rule 20.04(2.1) and (2.2).

If the trial judge determines that using the new powers would still not result in a decision in which he or she had confidence, the matter should not be resolved on the summary judgment motion. If, however, the judge determines that using the new powers could resolve the dispute and would not be against the interest of justice, he or she has the discretion to decide the matter by engaging in a fact-finding exercise. The use of the new powers will not be against the interest of justice "if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole."[13]

Failed Summary Judgment Motions

The Supreme Court endorsed the use of Rule 20.05, which allows the motion judge to give directions regarding the conduct of the trial. The Supreme Court said that after hearing a failed summary judgment motion, the motion judge should attempt to use any understanding of the case that he or she has gained to craft a trial procedure that will resolve complex and important issues between the parties.

In another departure from past practice, the Supreme Court held that "where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge."[14]

Standard of Review

The Supreme Court reinforced the expansion of powers of motion judges by holding that the standard of review of a motion judge's use of the new summary judgment powers is one of deference. If it is not against the "interest of justice" for a motion judge to exercise his or her fact-finding powers, the judge's decision to then exercise his or her expanded powers under Rule 20 is discretionary.[15]

Accordingly, the Supreme Court held:

(i) determining whether there is a genuine issue requiring a trial is a mixed question of law and fact that is reviewable on a standard of deference; and

(ii) determining whether it would be in the "interest of justice" for the motion judge to exercise his or her fact-finding powers is also a mixed question of law and fact that is reviewable on a standard of deference.

Import of Hryniak

The Supreme Court's decision introduces an enhanced role for judges in assessing what procedures will fairly resolve the dispute between the parties. Many judges already grant various procedural directions in complex matters through, for example, hands-on case management and protocol orders. This enhanced role will change the binary analysis on a summary judgment motion – trial or no trial – into a more nuanced analysis of how a particular matter can be fairly and justly determined based on its own unique circumstances.

The decision in *Hryniak* creates new challenges and opportunities for counsel to manage the litigation process. Counsel must give serious consideration as to whether summary judgment is an appropriate way to resolve matters for their clients. Indeed, in cases with limited credibility issues and few witnesses, counsel must give more consideration to whether a motion for summary judgment may determine the whole matter or result in the resolution of a number of the issues. This is particularly the case in corporate and commercial litigation where much of the case often turns on the documentary record. Even resolving some issues early in the proceeding will make trials shorter and more cost-efficient.

While it may be too early to tell, it appears that the *Hryniak* decision will result in a number of changes to the civil litigation process in Ontario. Some of those changes may be:

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[13] *Hryniak*, supra note 1 at paragraph 66.

[14] Ibid. at paragraph 78.

[15] Ibid. at paragraphs 80-83.

- *Reduced Costs* – there is a potential that costs will decrease for litigants because more cases, or parts of them, are likely to be determined on a summary judgment basis. Costs savings will also result if judges use failed summary judgment motions as an opportunity to design a more efficient procedure to resolve the dispute.
- *Case Law Developments* – an enhanced ability to have cases decided on summary motions means courts will render more decisions on the merits in civil disputes. More decisions may result in case law developing more quickly in a wide variety of areas.
- *Earlier Settlement Discussions* – the prospect of a court making a final decision at the summary judgment stage may force parties into earlier settlements, as the proverbial "courtroom steps" may be approached much earlier in the litigation process.
- *Higher Stakes for the Parties* – summary judgment motions may require much more preparation than previously. Responding parties will no longer be able to simply show up and employ tactics that may have previously been successful in defeating a motion for summary judgment. A judge empowered to find facts and make decisions earlier in the proceedings will mean that counsel must be prepared to present facts and argue the case earlier. Counsel for both sides must have a full understanding of the evidence and be prepared to argue the facts of the case. This includes understanding the documentary record and ascertaining potential witnesses and what they will say. The pressure on counsel to have a case fully prepared is only furthered by the high level of deference that a motion judge's decision will be subject to on appeal.
- *Narrowing of Claims* – the greater availability of summary judgment motions may cause counsel who are designing a claim to give more thought to the content of the claim they advance. Advancing a narrower claim at the outset of a case may make that claim better suited for summary judgment. Similar to "cutting your losses" on certain amounts to bring a matter under simplified procedure or small claims, counsel may advise clients to cut their losses and avoid unnecessarily complicating a claim so that the claim has a better chance of success on a summary judgment motion.
- *Changing the Nature of Trials* – the nature of trials could change as judges use Rule 20.05 to craft focussed and effective trial procedures following a failed summary judgment motion, particularly where the motion judge will be the trial judge. The Supreme Court's decision invites judges to take a more active role in shaping the procedure that will be used to decide issues that remain in dispute following a summary judgement motion. The result may be shorter, more focussed trials based on narrow issues, guidelines as to evidence to be called, and other abridged or amended trial procedures.

Undoubtedly, there will be some growing pains while counsel inevitably rush to bring more summary judgment motions in a system that is already backlogged in many areas. Counsel and courts will struggle to figure out what disputes are appropriate for summary judgement motions, and which are not. However, following the initial surge, there is a reasonable prospect that the enhanced summary judgment procedure will result in fewer backlogs and more resolutions. Hopefully, this will result in clients having better access to justice and their day in court.