THE IMPACT OF HRYNIAK v. MAUDLIN ON SUMMARY JUDGMENTS IN CANADA ONE YEAR LATER

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In January 2014, the Supreme Court of Canada in *Hryniak v. Mauldin*[1] called for a "culture shift" requiring summary judgment rules to be interpreted broadly to favour "proportionality and fair access to the affordable, timely and just adjudication of claims".[2] In particular, the court held that summary judgment motions are "legitimate alternative means for adjudicating and resolving legal disputes", rather than just "highly restricted tools used to weed out clearly unmeritorious claims or defences".[3] One year after this landmark decision,[4] we examined the 460 reported Canadian decisions[5] that have cited *Hryniak* and conclude that a culture shift is indeed underway with close to 75% of summary judgments motions in Ontario being granted or upheld, with the impact outside of Ontario

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1. 2014 SCC 7, [2014] 1 S.C.R. 87, 366 D.L.R. (4th) 641 (S.C.C.) ("*Hryniak*").
2. *Ibid.* at para. 5.
3. *Ibid.* at para. 36.
4. The SCC decision has attracted a lot of attention. Some of the more recent journal articles commenting on the SCC decision include Peter E.J. Wells and Adrienne Boudreau, "Accessible, Proportionate, Timely and Affordable – The Supreme Court of Canada's Challenge to Bench and Bar in *Hryniak v. Mauldin*", Case Comment (2014), 42 Adv. Q. 456; Shantona Chaudhury, "*Hrnyiak v. Mauldin*: Has the Supreme Court Finally Provided us with Clear Guidance on Summary Judgment?" in *The Twelve-Minute Civil Litigator* (Toronto: Law Society of Upper Canada, 2014); Edward Bergeron and Kristin Muszynski, "*Hryniak*: The Road Less Travelled Gets Fresh Asphalt" in *1000 Islands Legal Conference 2014* (Kingston, ON: Frontenac Law Association, 2014); and Neil Finkelstein et al., "A New Paradigm for Summary Judgment: *Hryniak v. Mauldin*", Case Comment (2014), 42 Adv. Q. 489.
5. As part of this research, we used the one-year anniversary of the *Hryniak* decision – 23 January 2015 – and noted-up *Hryniak* on each of CanLII, WestlawNext Canada and LexisNexis Quicklaw to generate our list of 460 citing decisions (we conducted the final note-up on 30 January 2015, one week after the one-year anniversary to allow these three databases to be as up-to-date as possible with citing decisions).

being more diffuse due in part to differences to summary disposition regimes in these other jurisdictions.

In the first section of this article, we briefly discuss the recent history of summary judgments in Ontario, culminating in last year's ruling in *Hryniak*. We then focus specifically on the 299 Ontario decisions in the last year that have cited *Hryniak*, followed by our more general analysis of the 161 decisions outside of Ontario during the same period. We finish with practical tips and strategies for counsel bringing or opposing summary judgment motions and our predictions on the impact of *Hryniak* in the long term.

Recent history of summary judgment motions in Ontario

The recent history of summary judgment motions in Ontario has been well documented in the journal literature.[6] In simple terms, summary judgment rules in Ontario have been periodically amended in the last 25 years to attempt to encourage broader use of these procedures.[7] While courts appeared to interpret each round of amended summary judgment rules more broadly, this was followed by what has been called "interpretive erosion" where "initial wide and enthusiastic application of the newly revised rule gave way to increasingly narrow interpretation and consequent decreasing frequency of use".[8]

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6. For a good review of recent journal articles discussing pre-*Hryniak* summary judgment motions, see Peter E.J. Wells and Adrienne Boudreau, "It was *Deja Vu* all Over Again", Case Comment (2013), 42 Adv. Q. 86; Teresa Walsh and Lauren Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?" (2013), Ann. Rev. of Civil Lit. 421; Peter E.J. Wells et al., "A New Departure and a Fresh Approach", Case Comment (2012), 39 Adv. Q. 477; Emir Crowne et al., "'Fully Appreciating' the Ontario Court of Appeal's Views on the Summary Judgment Rule", Case Comment (2012), 39 Adv. Q. 397; and Janet Walker, "Summary Judgment has its Day in Court" (2012), 37 Queen's L.J. 697; Sebastian Winny, "Is Summary Judgment Available in the Ontario Small Claims Court?" (2009), 36 Adv. Q. 128; Guy Pratte et al., "Summary Judgment Motions: Recent Judicial Developments" (2008), 35 Adv. Q. 114; Rodney Hull, "The Jurisdiction of the Court to give Summary Judgment in Estate Matters Related to Rule 75 of the Rules" (2001), 38 E.T.R. (2d) 148; William Chalmers, "Summary Judgment Motions: Past, Present and Future" (2000), 18 Can J. Ins. L. 33; Kenneth Kelertas, "The Evolution of Summary Judgment in Ontario" (1999), 21 Adv. Q. 265; W.A. Bogart, "Summary Judgment: A Comparative and Critical Analysis" (1981), 19 Osgoode Hall L.J. 552; Martin Teplitsky, "Some Reflections on Summary Judgment Procedure in Mortgage Foreclosure Practice" (1977), 1 Adv. Q. 111.

7. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. All subsequent references to rules in this article are to these rules unless otherwise noted.

With the most recent amendments to the summary judgment rules in Ontario in 2010, judges were given broader powers to grant summary judgment in several areas:

- The test for granting summary judgment was changed from no "genuine issue for trial" to no "genuine issue *requiring* a trial".
- Judges were granted expanded powers under Rule 20.04(2.1) to weigh evidence, evaluate the credibility of a deponent and draft any reasonable inference from the evidence.
- Under rule 20.04(2.2), judges could also direct oral evidence at the summary judgment hearing.

Despite these broader powers and the hope for the liberalization of the granting of summary judgment by some commentators, it was noted that the 2010 amendments, as interpreted in *Combined Air Mechanical Services Inc. v. Flesch*[9] and other decisions, had "improved neither the availability nor the scope of summary judgment".[10] Despite the Court of Appeal for Ontario in *Combined Air* taking what it described as a "new departure and a fresh approach to the interpretation and application of the amended Rule 20"[11] with the "full appreciation" test,[12] their proposed fresh approach did not go far enough for the Supreme Court of Canada.

The ruling in Hryniak

In *Hryniak*,[13] the Supreme Court of Canada noted that trials were "increasingly expensive and protracted" and that "a culture shift is

8. Wells and Boudreau, *supra* note 6 at 86. This pattern was also commented on by Finkelstein et al., *supra* note 4 at 490.
9. 2011 ONCA 764, 344 D.L.R. (4th) 193, 93 B.L.R. (4th) 1 (Ont. C.A.), affd 2014 SCC 7, [2014] 1 S.C.R. 87, 366 D.L.R. (4th) 641 ("*Combined Air*").
10. See Wells and Boudreau, *supra* note 6 at 87. The authors also note on p. 87 that "the 'every person is entitled to their day in court' norm is deeply ingrained and sufficiently powerful to neutralize language plainly intended to increase the rates at which summary judgment is granted" and that this idea ought to be critically revisited".
11. *Supra* note 9 para. 35.
12. In *Combined Air*, the Ontario Court Appeal stated the full appreciation test in these terms (at para. 50):

    > In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

13. Note that *Hryniak* was one of only two cases decided in *Combined Air* to be

required in order to create an environment promoting timely and affordable access to the civil justice system".[14] As a result, the court concluded that "summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims".[15] In particular, the court held that summary judgment motions were now a "legitimate alternative means for adjudicating and resolving legal disputes", rather than just "highly restricted tools used to weed out clearly unmeritorious claims or defences".[16]

The court proposed a two-step process for evaluating whether a matter is amenable to summary judgment:

> **Step 1**: "On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a)."[17] However, if there is a genuine issue requiring a trial, the judge should consider the next step.
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> **Step 2**: "If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use 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."[18]

If there are genuine issues requiring a trial, the judge hearing the summary judgment motion should ordinarily be seized of the case for trial or otherwise issue directions for case management to minimize further costs and delays since "the involvement of a single judicial officer throughout saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case".[19] In addition, as a practical matter, counsel are also

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appealed to the Supreme Court. Along with its decision in *Hryniak*, the court released a companion decision in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, (*sub nom.* Bruno Appliance and Furniture Inc. v. Hryniak) [2014] 1 S.C.R. 126, 366 D.L.R. (4th) 671 (S.C.C.); however, the principled discussion of summary judgment is contained in *Hryniak* and is merely referenced and applied in *Bruno Appliance*.

14. *Supra* note 1 at paras. 1-2.
15. *Ibid.* at para. 5.
16. *Ibid.* at para. 36.
17. *Ibid.* at para. 66.
18. *Ibid.*

encouraged to bring a motion for directions *prior* to the summary judgment motion where the motion is complicated.[20]

If the court's message in *Hryniak* was to "demonstrate that trial is not the default procedure"[21] and to "transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication",[22] have they succeeded?

The impact of Hryniak in Ontario

In the first year since the release of *Hryniak*, it has been cited in 299 Ontario decisions. Of these 299 Ontario decisions citing *Hryniak*, here are some initial statistics:

- Decisions by court level:
  - Court of Appeal: 30
  - Divisional Court: 20
  - Superior Court of Justice: 237
  - Ontario Court of Justice: 7
  - Tribunals: 5
- Of the 299 Ontario decisions citing *Hryniak*, only 217 decisions involved actual summary judgment motions (with the remaining 82 Ontario decisions citing *Hryniak* in passing, most often in reference to the need for proportionality and the high costs of litigation in the context of other non-summary judgment motions).[23]
- Of the 217 Ontario decisions at all levels of court involving summary judgment motions (or appeals), partial summary judgment was granted or confirmed in 21 decisions (9.7%) and full summary judgment was granted or confirmed in

19. *Ibid.* at para. 78, citing the *Osborne Report*, *infra* note 93.
20. *Ibid.* at para. 71.
21. *Ibid.* at para. 39.
22. *Ibid.* at para. 45.
23. For example, in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees) v. SNC-Lavalin Group Inc.*, 2014 ONSC 660, 2014 CarswellOnt 1103 (Ont. S.C.J.) – which involved in part a motion to set a discovery plan – Justice Perell took a pragmatic approach to the scope of discovery by in part citing to the proportionality language in *Hryniak* as an example of a need for a culture shift when it comes to discovery. In addition, in a few of the non-summary judgment post-SCC-*Hryniak* decisions in Ontario, *Hryniak* is also being cited for its definition at para. 87 of the elements of pleading civil fraud, as was done in *Royal Bank of Canada v. Boussoulas*, 2014 ONSC 2367, 13 C.B.R. (6th) 45 (Ont. S.C.J.) at para. 69; and *Holley v. Northern Trust Co., Canada*, 2014 ONSC 889, 10 C.B.R. (6th) 1, [2014] O.J. No. 651 (Ont. S.C.J.) at para. 112, affirmed 2014 ONCA 719, 18 C.B.R. (6th) 162, 14 C.C.P.B. (2nd) 161 (Ont. C.A.).

140 decisions (64.5%), resulting in 74.2% of Ontario decisions in the past year allowing full or partial summary judgment. In 56 decisions (25.8%), the court held that the matter was not appropriate for summary judgment due to genuine issues requiring a trial.

Since close to 75% of Ontario decisions granted full or partial summary judgment in the one year since *Hryniak*, a culture shift toward summary judgment being more broadly utilized by courts appears to be underway. This is particularly so when compared to statistics gathered by Wells and Boudreau suggesting that the combined success rate on summary judgment motions (including partial summary judgment) between 2009 and 2012 was in the range of only 65%.[24] This is significant even when compared to the success rate of 71% calculated by Bergeron and Muszynski in the seven months following the release of *Hryniak*,[25] and brings the success-failure ratio for appeals from summary judgment motions exactly in line with civil appeals generally.[26]

A number of early trends are apparent:

- **Use of Rule 20.05 "Directions and Terms" and Having the Judge Staying Seized of the Matter When Summary Judgment not Granted**: Despite an increase in the number of successful summary judgment motions in the past year in Ontario, judges appear to be slower in fully embracing the suggestion by the court in *Hryniak* for judges to be creative in salvaging failed summary judgment motions by staying seized or giving directions or imposing terms under rule 20.05 for specific trial management orders.[27]

  For example, in the past year in the Ontario Superior Court in the 69 decisions in which a motion for summary judgment was dismissed (due to there being genuine issues) or only partial summary judgment was granted, the motions judge did not address whether he or she would be seized of the remaining issues in 31 of those decisions (45%) or decided to not be seized in 10 decisions (15%) (most often due to the judge being "on circuit" or not having gained any particular knowledge of the matter), with trial judges being seized in only 28 decisions (40%). Likewise, some form of case

24. Wells and Boudreau, *supra* note 6, at 96.
25. See Bergeron and Muszynski, *supra* note 4 at 7.
26. Court of Appeal for Ontario, "Annual Report 2013" at 30. Available online: www.ontariocourts.ca/coa/en/ps/annualreport/2013.pdf.
27. *Supra* note 1 at paras. 74-79.

management or directions was given in only 29 decisions (42%) or was decided as being unnecessary in four decisions (6%), meaning that in 36 decisions (52%), the motions judge was silent on case-managing the remaining issues or providing directions to counsel and the litigants.

- **Appellate views**: Forty Ontario decisions involving summary judgment citing *Hryniak* were appellate decisions, either by the Court of Appeal, the Divisional Court, or a superior court judge sitting on appeal. From these appellate decisions, three trends are noted:
    - *Deference to trial judges?* Early indications suggest that summary judgment rulings will be upheld and difficult to overturn on appeal. Of the 26 decisions by the Court of Appeal for Ontario in the past year deciding whether to reverse the trial judge's summary judgment ruling, 19 of those appellate decisions upheld and seven decisions reversed the lower court (representing close to 75% of decisions being upheld on appeal).[28] Of the five decisions of the Divisional Court ruling on summary judgment motions in the past year, three of those decisions were upheld and two were reversed. Of the eight decisions involving leave to appeal to the Divisional Court, leave was refused in six decisions[29] with leave being granted in only two decisions.[30] Finally, in the single appeal from the

28. Of the seven decisions from the Court of Appeal for Ontario reversing the trial judgment's summary judgment ruling, the errors often related to there being genuine issues over factual issues that would require a full trial regarding limitation periods, as was the situation in *O'Dowda v. Halpenny*, 2015 ONCA 22, 2015 CarswellOnt 367 (Ont. C.A.), *Collins v. Cortez*, 2014 ONCA 685, 2014 CarswellOnt 13872 (Ont. C.A.), *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, 323 O.A.C. 246, [2014] O.J. No. 3242 (Ont. C.A.), and *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, 322 O.A.C. 322 (Ont. C.A.).

29. See *Daneluzzi v. 876336 Ontario Ltd.*, 2015 ONSC 229, 2015 CarswellOnt 109 (Ont. Div. Ct.); *Hancock v. Hancock*, 2014 ONSC 6702, 2014 CarswellOnt 16573 (Ont. Div. Ct.); *Canadian National Railway v. Holmes*, 2014 ONSC 6390, 2014 CarswellOnt 15429 (Ont. S.C.J.); *Canada Mortgage and Housing Corp. v. Pastoukhova*, 2014 ONSC 5731, 2014 CarswellOnt 13717 (Ont. S.C.J.); *Lalonde-Paquette v. Freedman*, 2014 ONSC 1678, 2014 CarswellOnt 4710 (Ont. S.C.J.); *Toronto (City) v. Maple-Crete Inc.*, 2014 ONSC 2371, 22 M.P.L.R. (5th) 211 (Ont. Div. Ct.).

30. See *C.H. Clement Construction v. Seguin Racine Architectes et Associes Inc.*, 2014 ONSC 6296, 2014 CarswellOnt 15468 (Ont. S.C.J.); and *Biancaniello v. DMCT LLP*, 2014 ONSC 5539, 2014 CarswellOnt 13836 (Ont. Div. Ct.).

decision of a master to a superior court judge, the master's decision was upheld.[31]

- *Instructions to trial judges*: In several appellate decisions in the past year, guidance has been given to lower courts in a number of decisions where the trial judge failed to adequately articulate his or her reasons in deciding if genuine issues exist, especially where there is conflicting evidence on factual matters.[32]
- *Standard of review on appeal*: In *Hryniak*, the court clearly explains the standard of review on appeal of a summary judgment motion: the decisions of trial judges will be shown deference on factual determinations as will the exercise of the broader fact-finding powers; legal questions, on the other hand, such as whether there is a genuine issue requiring a trial or applying legal principles such as the elements of a cause of action, will be reviewed on a correctness standard.[33] It is therefore not too surprising that Ontario courts have consistently applied the standard of review test in the past year.[34]

- **Types of decisions where summary judgment was granted**: Although the court in *Hryniak* cautioned against categorizing the types of cases where summary judgment is appropriate,[35] we consider it useful in this article to look at the types of cases where summary judgment was granted. As might be expected, in those decisions where summary judgment was held to be appropriate, the legal or factual issues tended to be straightforward.

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31. *Petersen v. Matt*, 2014 ONSC 896, 2014 CarswellOnt 1868 (Ont. Div. Ct.).
32. See *Trotter v. Trotter*, 2014 ONCA 841, 122 O.R. (3d) 625, 2 E.T.R. (4th) 1 (Ont. C.A.) at para. 78; *Baywood Homes Partnership v. Haditaghi*, *supra* note 28 at para. 44; *Barbieri v. Mastronardi*, 2014 ONCA 416, [2014] O.J. No. 2419 (Ont. C.A.); and *James v. Miller Group Inc.*, 2014 ONCA 335, 120 O.R. (3d) 155 (Ont. C.A.) at para. 9.
33. *Supra* note 1 at paras. 80-84.
34. See *Kassian Estate v. Canada (Attorney General)*, 2014 ONSC 844, 320 O.A.C. 200, 11 C.C.L.T. (4th) 205 (Ont. Div. Ct.) at paras. 367-68; *1634584 Ontario Inc. v. Canada (Attorney General)*, 2014 ONCA 465, 22 B.L.R. (5th) 118 (Ont. C.A.) at para. 5; *Baywood Homes Partnership v. Haditaghi*, *supra* note 28 at para. 30; *Minkofski v. Dost Estate*, 2014 ONSC 1904, 99 E.T.R. (3d) 154, 321 O.A.C. 38 (Ont. Div. Ct.) at paras. 33-35.
35. *Supra* note 1 at paras. 47 and 48.

Examples of where summary judgment was granted include a fairly diverse range of claims:

- Summary determination of occupier's liability for slip and fall accidents[36]
- Summary determination of professional negligence claims, including legal malpractice[37] and medical malpractice[38]
- Liability for motor vehicle accidents[39]

36. *Nandlal v. Toronto Transit Commission*, 2014 ONSC 4760, [2014] O.J. No. 3781 (Ont. S.C.J.); *Cotnam v. National Capital Commission*, 2014 ONSC 3614, 121 O.R. (3d) 794 (Ont. Div. Ct.); *Hoang v. 909984 Ontario Inc.*, 2014 ONSC 749, 2014 CarswellOnt 1225 (Ont. S.C.J.). But summary judgment was refused in the following slip and fall decisions due to the existence of genuine issues: *Toronto (City) v. Maple-Crete Inc.*, 2014 ONSC 2371, 22 M.P.L.R. (5th) 211 (Ont. Div. Ct.); *MacFadyen (Litigation guardian of) v. MacFadyen*, 2014 ONSC 6589, 2014 CarswellOnt 16168 (Ont. S.C.J.); *Wiseman v. Carleton Place Oil Inc.*, 2014 ONSC 1987, 2014 CarswellOnt 3835 (Ont. S.C.J.) (as against one defendant).

37. *Chand Morningside Plaza Inc. v. Badhawar*, 2015 ONSC 293, 2015 CarswellOnt 432 (Ont. S.C.J.); *Mirkais Investments Inc. v. Klotz*, 2014 ONSC 6907, 2014 CarswellOnt 16767 (Ont. S.C.J.); *Stewart v. Hosack*, 2014 ONSC 5693, 2014 CarswellOnt 13553 (Ont. S.C.J.), 2014 CarswellOnt 15787 (Ont. S.C.J.); *Huang v. Aviva Insurance Co. of Canada*, 2014 ONSC 4361, 2014 CarswellOnt 9978 (Ont. S.C.J.); *790668 Ontario Inc. v. D'Andrea*, 2014 ONSC 3312, 98 E.T.R. (3d) 306 (Ont. S.C.J.); *Baines v. Linett & Timmis Barristers & Solicitors*, 2014 ONSC 2348, 33 C.C.L.I. (5th) 128 (Ont. S.C.J.), affirmed 2014 ONCA 888, 2014 CarswellOnt 17295 (Ont. C.A.); *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215, 40 R.P.R. (5th) 26 (Ont. C.A.). But the lawyer's summary judgment motion to dismiss the claim was refused due to genuine issues in *Ghaeinizadeh (Litigation guardian of) v. Garfinkle, Biderman LLP*, 2014 ONSC 4994, 2014 CarswellOnt 12614 (Ont. S.C.J.) at para. 26:

> Given the material facts in dispute and credibility issues arising therefrom, and given the complex legal issues raised in this action, including scope of the retainer, whether [the lawyer] owed a fiduciary duty or any duty to the investor plaintiffs or any of them, the accepted standard of practice in the circumstances of these transactions, whether there was a conflict of interest which existed, whether [the lawyer] failed to appropriately warn his clients of particular legal risks, and whether there was any actual knowledge on the part of those plaintiffs relying on his advice, are all issues that involve complex legal and factual evidence, and are not appropriately determined on a summary judgment motion.

38. *Kobilke v. Jeffries*, 2014 ONSC 1786, 2014 CarswellOnt 5962 (Ont. S.C.J.); *Guerrero v. Trillium Dental Centre*, 2014 ONSC 3871, 11 C.C.L.T. (4th) 169 (Ont. S.C.J.) (partial summary judgment on one issue). But summary judgment motions were dismissed in *Kristensen v. Schisler*, 2014 ONSC 1976, 61 C.P.C. (7th) 91 (Ont. S.C.J.) and *Legendre v. Crittendon Hospital Medical Center*, 2014 ONSC 6556, 2014 CarswellOnt 15940 (Ont. S.C.J.), due to genuine issues being raised.

- Insurance coverage issues[40]
- Interpretation of a construction law contract or construction lien issues[41]

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39. *Ferreira v. Cardenas*, 2014 ONSC 7119, 2014 CarswellOnt 17280 (Ont. S.C.J.); *Mostarac v. Jane Doe*, 2014 ONSC 6622, 2014 CarswellOnt 16080 (Ont. S.C.J.); *Maguire v. Padt*, 2014 ONSC 6099, 71 M.V.R. (6th) 98, 122 O.R. (3d) 443 (Ont. S.C.J.) (partial summary judgment); *Grewal v. Handa*, 2014 ONSC 5911, 2014 CarswellOnt 14107 (S.C.J.); *Fiddler v. Vasilakos*, 2014 ONSC 5774, 2014 CarswellOnt 13757 (S.C.J.); *Swain v. Gorman*, 2014 ONSC 4686, 2014 CarswellOnt 11266 (Ont. S.C.J.); *Madhai v. Cox*, 2014 ONSC 3274, 2014 CarswellOnt 7256 (S.C.J.); *Belbas v. Greyhound Canada Transportation ULC*, 2014 ONSC 5739, [2014] I.L.R. I-5658 (Ont. S.C.J.). But genuine issues requiring a trial were found in the following MVA summary judgment motions: *Gon (Litigation guardian of) v. Bianco*, 2014 ONSC 7086, 71 M.V.R. (6th) 254 (Ont. S.C.J.); *Ashim v. Zia*, 2014 ONSC 6460, 2014 CarswellOnt 16136 (Ont. S.C.J.); *Yusuf (Litigation guardian of) v. Cooley*, 2014 ONSC 6501, 2014 CarswellOnt 16148 (Ont. S.C.J.); *Azzopardi v. John Doe*, 2014 ONSC 4685, 2014 CarswellOnt 11121 (S.C.J.); *Gluchowski v. Lister*, 2014 ONSC 2190, 33 C.C.L.I. (5th) 184, [2014] I.L.R. I-5613 (Ont. S.C.J.); *Grosbeck v. Abram Estate*, 2014 ONSC 1674, 2014 CarswellOnt 5851 (Ont. S.C.J.).
40. *Gardiner v. MacDonald Estate* (2015), 2014 ONSC 227, 2015 CarswellOnt 226 (Ont. S.C.J.); *MacDonald v. Chicago Title Insurance Co. of Canada*, 2014 ONSC 7457, 2014 CarswellOnt 18249 (Ont. S.C.J.); *Myers-Gordon (Litigation Guardian of) v. Martin*, 2014 ONCA 767, 69 M.V.R. (6th) 1 (Ont. C.A.); *Fernandes v. Araujo*, 2014 ONSC 6432, 2014 CarswellOnt 15548 (Ont. S.C.J.); *Madder v. South Easthope Mutual Insurance Co.*, 2014 ONCA 714, 123 O.R. (3d) 120 (Ont. C.A.); *Singh v. Sangha*, 2014 ONSC 5147, [2014] I.L.R. I-5654 (Ont. S.C.J.) (partial summary judgment); *Mississippi River Power Corp. v. Municipal Electric Assn. Reciprocal Insurance Exchange*, 2014 ONSC 3784, 36 C.C.L.I. (5th) 317 (Ont. S.C.J.); *Sanofi Pasteur Ltd. v. UPS SCS, Inc.*, 2014 ONSC 2695, 33 C.C.L.I. (5th) 77 (Ont. S.C.J.), affirmed 2015 ONCA 88, 2015 CarswellOnt 1455 (Ont. C.A.); *Garneau v. Industrial Alliance Insurance and Financial Services Inc.*, 2014 ONSC 1495, [2014] I.L.R. I-5572 (Ont. S.C.J.). But genuine issues were found in the following decisions regarding insurance coverage: *Willoughby v. Dominion of Canada General Insurance Co.*, 2014 ONSC 1136, 32 C.C.L.I. (5th) 58, 119 O.R. (3d) 133 (Ont. S.C.J.); *Anand v. Rumpal*, 2014 ONSC 6030, 2014 CarswellOnt 17297 (Ont. S.C.J.); *Brown v. Williamson*, 2014 ONSC 5487, [2014] I.L.R. I-5657 (Ont. S.C.J.); *Douglas v. Stan Ferguson Fuels Ltd.*, 2014 ONSC 4709, 35 C.C.L.I. (5th) 331 (Ont. S.C.J.), leave to appeal allowed 2015 ONSC 65, 2015 CarswellOnt 29 (S.C.J.); *Pinto v. Kaur*, 2014 ONSC 5329, 2014 CarswellOnt 12687 (S.C.J.).
41. *Tarion Warranty Corp. v. Latreille*, 2014 ONSC 3628, 2014 CarswellOnt 8022 (Ont. S.C.J.) (partial summary judgment); *1634584 Ontario Inc. v. Canada (Attorney General)*, 2014 ONCA 465, 22 B.L.R. (5th) 118 (Ont. C.A.); *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, 2014 ONSC 918, 36 C.L.R. (4th) 126, [2014] I.L.R. I-5595 (Ont. S.C.J.) (partial summary judgment); *Kieswetter Demolition (1992) Inc. v. Traugott Building Contractors Inc.*, 2014 ONSC 1397, 30 C.L.R. (4th) 59 (Ont. S.C.J.) (partial summary judgment); *Magine Construction Inc. v. Moro Group Builders Inc.*, 2014 ONSC

- Enforcement of a foreign judgment[42] or debt or bank loan[43]
- Crown guardianship[44] or child custody or support[45]

1024, 33 C.L.R. (4th) 163 (Ont. S.C.J.), affirmed 2014 ONCA 663, 2014 CarswellOnt 12937 (Ont. C.A.). However, genuine issues in the following construction disputes resulted in summary judgment motions being dismissed: *Govan Brown & Associates Ltd. v. Equinox 199 Bay Street Co.*, 2014 ONSC 3924, 33 C.L.R. (4th) 78 (Ont. S.C.J.) (as to date of substantial completion); *1614216 Ontario Inc. v. Ryan*, 2014 ONSC 2500, [2014] O.J. No. 3628 (Ont. S.C.J.); *Boyd v. Ashgrove Lane Properties Ltd.*, 2014 ONSC 3037, 2014 CarswellOnt 6590 (Ont. S.C.J.); *KWH Pipe (Canada) Ltd. v. Corix Water Products (East) Inc.*, 2014 ONSC 1443, 2014 CarswellOnt 3318 (Ont. S.C.J.) (partial summary judgment on some issues).

42. *Kavoussi v. Moos*, 2014 ONSC 2612, 2014 CarswellOnt 6044 (Ont. S.C.J.).
43. *H.S.C. Aggregates Ltd. v. McCallum*, 2014 ONSC 6214, 2014 CarswellOnt 15209 (Ont. S.C.J.); *1000728 Ontario Ltd. v. 1394183 Ontario Inc.*, 2014 ONSC 5659, 2014 CarswellOnt 13503 (Ont. S.C.J.); *Farm Credit Canada v. Pratas*, 2014 ONSC 5592, 2014 CarswellOnt 16138 (Ont. S.C.J.); *O'Laughlin v. Byers*, 2014 ONSC 5253 (Ont. S.C.J.); *Toronto-Dominion Bank v. Island Heat Tanning Centres Inc.*, 2014 ONSC 4333, 2014 CarswellOnt 9981 (Ont. S.C.J.); *MNP LLP v. Migao Corp.*, 2014 ONSC 4106, 2014 CarswellOnt 13753 (Ont. S.C.J.); *Canaccord Genuity Corp. v. Sammy*, 2014 ONSC 3691, [2014] O.J. No. 2923 (Ont. S.C.J.); *Bank of Montreal v. Durham Foods Ltd.*, 2014 ONSC 3608, 2014 CarswellOnt 12693 (Ont. S.C.J.); *Eckert v. U.S. Trust Corp. II*, 2014 ONSC 3357, 28 B.L.R. (5th) 321 (Ont. S.C.J.); *Royal Bank of Canada v. Dhupar*, 2014 ONSC 3342, 2014 CarswellOnt 7281 (Ont. S.C.J.); *Deposit Insurance Corp. of Ontario v. Malette*, 2014 ONSC 2845, 2014 CarswellOnt 5909 (Ont. S.C.J.); *Bank of Nova Scotia v. 124155 Canada Inc.*, 2014 ONSC 2666, 2014 CarswellOnt 5590 (Ont. S.C.J.); *Canadian Broadcasting Corp. v. iSport Media and Management Ltd.*, 2014 ONSC 1905, 23 B.L.R. (5th) 155, 119 O.R. (3d) 211 (Ont. S.C.J.) (partial summary judgment). However, genuine issues existed in *Irani v. Cheung*, 2014 ONSC 3232, 2014 CarswellOnt 7254 (Ont. S.C.J.).
44. Summary judgment was granted in the following Crown guardianship decisions: *Catholic Children's Aid Society v. L. (M.)*, 2014 ONCJ 691, 2014 CarswellOnt 18005 (C.J.); *Children's Aid Society of London & Middlesex v. L. (H.B.)*, 2014 ONSC 6291, 2014 CarswellOnt 15115 (Ont. S.C.J.); *Catholic Children's Aid Society of Hamilton v. S. (B.L.)*, 2014 ONSC 5513, 2014 CarswellOnt 12921 (Ont. S.C.J.); *Children's Aid Society of Toronto v. T. (A.)*, 2014 ONCJ 385, 2014 CarswellOnt 11631 (Ont. C.J.); *Children's Aid Society, Region of Halton v. L. (K.C.)*, 2014 ONCJ 168, 2014 CarswellOnt 4387 (Ont. C.J.); *Children's Aid Society of Ottawa v. T. (R.N.)*, 2014 ONSC 916, 2014 CarswellOnt 4195 (S.C.J.) (partial summary judgment). However, summary judgment was partially refused in *Children's Aid Society of London and Middlesex v. T. (R.L.)*, 2014 ONSC 5974, 2014 CarswellOnt 14929 (Ont. S.C.J.), due to genuine issues requiring a trial. An issue remains whether the expanded powers in Rule 20.04 (2.1) are available on a summary judgment motion under Rule 16 of the *Family Law Rules*, O. Reg. 114/99, pending an anticipated amendment to the *Family Law Rules* to allow those expanded powers. For a good summary of the conflicting case law on this point, see

- Summary determination of wrongful dismissal or damages arising from a wrongful dismissal[46]
- Estate litigation[47]
- Landlord and tenant disputes[48]
- Franchise disputes[49]

Abdollahpour v. Banifatemi, 2014 ONSC 7273, 2014 CarswellOnt 18296 (Ont. S.C.J.) at paras. 32-44 where the court ruled it could exercise the expanded powers (dealing with a division of family property).

45. *deMelo v. deMelo* (2014), 246 A.C.W.S. (3d) 619, 2014 CarswellOnt 14861 (Ont. S.C.J.); *B. (G.T.) v. B. (Z.B.)*, 2014 ONCJ 382, 2014 CarswellOnt 11486 (Ont. C.J.); *Jassa v. Davidson*, 2014 ONCJ 698, 2014 CarswellOnt 18001 (Ont. C.J.); *Mason v. Blanchard*, 2014 ONCJ 697, 2014 CarswellOnt 18006 (Ont. C.J.). But genuine issues existed in *Rotondi v. Rotondi*, 2014 ONSC 1520, [2014] O.J. No. 1142 (S.C.J.), as to the father's income.

46. *Hillman v. Bedford Consulting Group Inc.*, 2015 ONSC 210, 2015 CarswellOnt 198 (Ont. S.C.J.); *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONSC 15, 2015 CarswellOnt 252 (Ont. S.C.J.); *Gill v. CPNI Inc.*, 2014 ONSC 6500, 2014 CarswellOnt 15782 (Ont. S.C.J.); *Arnone v. Best Theratronics Ltd.*, 2014 ONSC 4216, 19 C.C.E.L. (4th) 334, 2014 CarswellOnt 11225 (Ont. S.C.J.), appeal allowed in part on damages 2015 ONCA 63, 2015 CarswellOnt 1230 (Ont. C.A.); *ThyssenKrupp Elevator (Canada) Ltd. v. Amos*, 2014 ONSC 3910, 16 C.C.E.L. (4th) 313 (Ont. S.C.J.); *Beatty v. Best Theratronics Ltd.*, 2014 ONSC 3376, 18 C.C.E.L. (4th) 64 (Ont. S.C.J.); *Smith v. Diversity Technologies Corp.*, 2014 ONSC 2460, 2014 C.L.L.C. 210-033 (Ont. S.C.J.); *Wellman v. Herjavec Group Inc.*, 2014 ONSC 2039, 2014 C.L.L.C. 210-031 (Ont. S.C.J.); *Ho v. WFG Securities of Canada Inc.*, 2014 ONSC 1791, 2014 CarswellOnt 3516 (Ont. S.C.J.), affirmed 2014 ONCA 832, 2014 CarswellOnt 16396 (Ont. C.A.); *BlackBerry Ltd. v. Marineau-Mes*, 2014 ONSC 1790, 2014 C.L.L.C. 210-030, 18 C.C.E.L. (4th) 51 (Ont. S.C.J.). However, genuine issues existed in the following employment-related summary judgment motions: *Chapman v. GPM Investment Management*, 2014 ONSC 4452, 2014 CarswellOnt 10278 (Ont. S.C.J.); *O'Reilly v. Purolator Courier Ltd.*, 2014 ONSC 3266, 2014 CarswellOnt 9529 (Ont. S.C.J.); *Kimball v. Windsor Raceway Inc.*, 2014 ONSC 3286, 2014 C.L.L.C. 210-043 (Ont. S.C.J.); *Amonite v. A.P. Plasman Corp.*, 2014 ONSC 1705, 2014 CarswellOnt 5907 (S.C.J.).

47. *Disera v. Bernardi* (2014), 243 A.C.W.S. (3d) 600, 2014 CarswellOnt 10314 (Ont. S.C.J.) (partial summary judgment); *Minkofski v. Dost Estate*, 2014 ONSC 1904, 99 E.T.R. (3d) 154 (Ont. Div. Ct.); *Columbos v. Columbos*, 2014 ONSC 1342, 99 E.T.R. (3d) 180 (Ont. S.C.J.); *Ziomek v. Miokovic*, 2014 ONSC 5126, 2014 CarswellOnt 12550 (Ont. S.C.J.). Genuine issues existed in *Fergueson v. Martin*, 2014 ONSC 2154, 98 E.T.R. (3d) 146, 119 O.R. (3d) 380 (Ont. S.C.J. [Estates List]), where a mini hybrid trial was instead ordered.

48. *2249740 Ontario Inc. v. Morguard Elgin Ltd.*, 2015 ONSC 299, 2015 CarswellOnt 596 (S.C.J.); *Orion Interiors Inc. v. State Farm Fire and Casualty Co.*, 2015 ONSC 248, 2015 CarswellOnt 58 (Ont. S.C.J.); *Gross Realty Group v. Shoppers Realty Inc.*, 2014 ONSC 6855, 2014 CarswellOnt 16632 (Ont. S.C.J.); *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2014 ONSC 5148, 2014 CarswellOnt 12201 (Ont. S.C.J.); *Kiden Used Furniture, Clothing & Household Goods Inc. v. Pearson*, 2014 ONSC 4625, 2014 CarswellOnt 10948 (Ont. S.C.J.); *Ramnarace v. Home Trust Co.*, 2014 ONSC 3289, 2014

- Summary dismissal of an action due to the claim being statute-barred (or confirmation that the claim was not statute-barred). In fact, one of the larger category of cases where summary judgment was granted involved determination of limitation periods (where there were no serious discoverability issues).[50]

- **Types of decisions where summary judgment was refused**: As might be expected, there were a number of Ontario decisions where summary judgment was not granted due to there being genuine issues requiring a trial. In fact, in 25% of the decisions involving summary judgment since *Hryniak*, summary judgment was denied due to the existence of genuine issues where the matter was either dismissed with no

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CarswellOnt 7381 (S.C.J.); *Pickering Square Inc. v. Trillium College Inc.*, 2014 ONSC 2629, 44 R.P.R. (5th) 251 (S.C.J.).

49. *France v. Kumon Canada Inc.*, 2014 ONSC 5890, 2014 CarswellOnt 17050 (Ont. S.C.J.) (partial summary judgment); *2147191 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2014 ONSC 3442, affirmed 2015 ONCA 116, 2015 CarswellOnt 2261 (Ont. C.A.); *Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc.*, 2014 ONSC 2133, 25 B.L.R. (5th) 159 (Ont. S.C.J.); *France v. Kumon Canada Inc.*, 2014 ONSC 7181, 2014 CarswellOnt 17335 (S.C.J.).

50. *Petersen v. Matt*, 2014 ONSC 896, 2014 CarswellOnt 1868 (Ont. Div. Ct.); *Hennes v. Brampton (City)*, 2014 ONSC 1116, 20 M.P.L.R. (5th) 163 (S.C.J.); *Kim v. Manufacturers Life Insurance Co.*, 2014 ONSC 1205, 31 C.C.L.I. (5th) 252 (Ont. S.C.J.), affirmed 2014 ONCA 658, 2014 CarswellOnt 12892 (Ont. C.A.); *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONSC 1523, 32 C.C.L.I. (5th) 127 (Ont. S.C.J.), affirmed 2014 ONCA 922, 379 D.L.R. (4th) 665 (Ont. C.A.); *Johnson v. Studley*, 2014 ONSC 1732, [2014] O.J. No. 1232 (S.C.J.); *Barry (Litigation guardian of) v. Pye*, 2014 ONSC 1937, [2014] O.J. No. 1542 (S.C.J.); *Roger v. Personal Insurance Co. of Canada*, 2014 ONSC 1964, 34 C.C.L.I. (5th) 117 (Ont. S.C.J.); *DiBiase v. Spensieri Estate*, 2014 ONSC 2149, [2014] O.J. No. 1625 (Ont. S.C.J.), affirmed 2014 ONCA 913, 2014 CarswellOnt 17830 (Ont. C.A.); *Zabanah v. Capital Direct Lending Corp.*, 2014 ONSC 2219, 33 C.C.L.I. (5th) 14 (Ont. S.C.J.), affirmed 2014 ONCA 872, 2014 CarswellOnt 17096 (Ont. C.A.); *Compton v. State Farm Insurance Co. of Canada*, 2014 ONSC 2260, 34 C.C.L.I. (5th) 14 (Ont. Div. Ct.); *Pammett v. 1230174 Ontario Inc.*, 2014 ONSC 2447, 2014 CarswellOnt 5313 (Ont. S.C.J.); *Seif v. Toronto (City)*, 2014 ONSC 2983, 23 M.P.L.R. (5th) 337 (Ont. S.C.J.); *Slack v. Bednar*, 2014 ONSC 3672, 120 O.R. (3d) 689 (Ont. S.C.J.); *Thompson v. Ontario (Attorney General)*, 2014 ONSC 3458, 2014 CarswellOnt 8158 (Ont. S.C.J.); *Oakley v. Guirguis*, 2014 ONSC 5007, 12 C.C.L.T. (4th) 319 (Ont. S.C.J.); *Nguyen v. SSQ Life Insurance Co.*, 2014 ONSC 6405, [2014] O.J. No. 5253 (Ont. S.C.J.); *Barbu v. MMM Group Ltd.*, 2014 ONSC 6727, 2014 CarswellOnt 16867 (Ont. S.C.J.); *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONCA 922, 379 D.L.R. (4th) 665, [2014] O.J. No. 6222 (Ont. C.A.); *Zhu v. Matadar*, 2015 ONSC 178, 2015 CarswellOnt 90 (Ont. S.C.J.).

further directions, was referred to a full trial, or had trial management directions and terms imposed to resolve the remaining issues through mini-trials or other procedural techniques.

- **Examples of cases where summary judgment was refused include situations with the following evidentiary challenges:**
  - Complexity of facts/witness credibility: Genuine issues requiring a full trial were found in a number of decisions involving complex, contradictory or incomplete factual evidence.[51]
  - Discoverability issues involving limitation periods: A more specific sub-set of the types of cases involving factual issues requiring a full trial related to limitation period claims involving factual discoverability or other issues that could not be resolved on a paper record.[52]
  - Risk of inconsistent verdicts if the matter is decided partly on summary judgment and partly at a full trial: In *Hryniak*, the SCC suggests that it may not be in the interests of justice to decide an issue summarily where other issues would likely require a full trial and there is

51. See, for example, *Kassian Estate v. Canada (Attorney General)*, *supra*, note 34; *Grosbeck v. Abram Estate*, *supra* note 39; *Grenier v. Algonquin College of Applied Arts and Technology*, 2014 ONSC 1984, 2014 CarswellOnt 6576 (S.C.J.); *Toronto (City) v. Maple-Crete Inc.*, 2014 ONSC 2371, 22 M.P.L.R. (5th) 211, 2014 CarswellOnt 4875 (Ont. Div. Ct.); *O'Reilly v. Purolator Courier Ltd.*, 2014 ONSC 3266, 2014 CarswellOnt 9529 (Ont. S.C.J.); *Govan Brown & Associates Ltd. v. Equinox 199 Bay Street Co.*, 2014 ONSC 3924, 33 C.L.R. (4th) 78 (Ont. S.C.J.); *Bakverdi v. 2221465 Ontario Inc.*, 2014 ONSC 4322, 2014 CarswellOnt 9892 (Ont. S.C.J.); *Azzopardi v. John Doe*, 2014 ONSC 4685, 2014 CarswellOnt 11121 (Ont. S.C.J.); *Miletic v. Jaksic*, 2014 ONSC 5043, 2014 CarswellOnt 11942 (Ont. S.C.J.); *Pinto v. Kaur*, 2014 ONSC 5329, 2014 CarswellOnt 12687 (Ont. S.C.J.).

52. *Huang v. Mai*, 2014 ONSC 1156, 32 C.C.L.I. (5th) 81, [2014] O.J. No. 889 (Ont. S.C.J.), additional reasons 2014 ONSC 2444, 32 C.C.L.I. (5th) 94 (Ont. S.C.J.); *Lavergne v. Dominion Citrus Ltd.*, 2014 ONSC 1836, 2014 CarswellOnt 4934 (Ont. S.C.J.); *Gluchowski v. Lister*, 2014 ONSC 2190, 33 C.C.L.I. (5th) 184 (Ont. S.C.J.); *Amelin Engineering Ltd. v. Steam-Eng Inc.*, 2014 ONSC 2499, 2014 CarswellOnt 6974 (Ont. S.C.J.); *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, 323 O.A.C. 246 (Ont. C.A.); *Ontario Flue-Cured Tobacco Growers' Marketing Board v. Rothmans, Benson & Hedges, Inc.*, 2014 ONSC 3469, 2014 CarswellOnt 8932 (Ont. S.C.J.); *Leda Furniture Ltd. v. Akzo Nobel Wood Coatings Ltd.*, 2014 ONSC 4312, 2014 CarswellOnt 10260 (Ont. S.C.J.); *Dube v. RBC Life Insurance Co.*, 2015 ONSC 77, 2015 CarswellOnt 69 (Ont. S.C.J.).

a risk of inconsistent findings of fact.[53] This was one of the concerns raised in several decisions in deciding that summary judgment was not appropriate.[54] The risk of inconsistent findings of fact was also identified in *Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc.*,[55] but in that decision the court was of the view that deciding one of the issues on summary judgment would simplify the trial and the risk of inconsistency was small since the remaining issues to be decided at a full trial related to different topics.

- Where summary judgment does not save time or money: Summary judgment was also refused in a number of decisions where the court was not convinced the summary judgment process would save time or money.[56]

- **Party responding to a summary judgment motion must still "lead trumps" or risk losing:** In *Sweda Farms v. Egg Farmers of Ontario*,[57] the plaintiff alleged that two of the defendants conspired to sabotage its egg business by supplying deficient eggs that did not pass inspection or were the wrong grade. In granting the motion for summary judgment brought by one of those defendants to dismiss the claim, the court noted that the plaintiff was obliged to "put its best foot forward" but (fatally, as it turned out) chose not to lead relevant evidence on the motion:

> Sweda has not proved those aspects of its claim within its own knowledge. It has not shown that it was damaged by specific events complained of in the claim. It has not shown a decline in its business fortunes that explains its decision to close its core business and sell assets. Through its witnesses on this motion, Sweda has failed to show that Burnbrae acted inappropriately in respect to Sweda's producers or customers. Sweda has shown that it received some substandard deliveries from Burnbrae in

53. *Supra* note 1 at para. 60.
54. *Baywood Homes Partnership v. Haditaghi*, *supra* note 28 at paras. 37-38; *Lavergne v. Dominion Citrus Ltd.*, *supra* note 52 at para. 42; *Yusuf (Litigation guardian of) v. Cooley*, *supra* note 39 at para. 25.
55. *Supra*, note 39 at paras. 47-48. See also *Kimball v. Windsor Raceway Inc.*, 2014 ONSC 3286, 2014 C.L.L.C. 210-043 (Ont. S.C.J.) at paras. 25-26.
56. *Dickson v. Di Michele*, 2014 ONSC 3043, [2014] O.J. No. 2369 (Ont. Div. Ct.) at para. 43; *Chapman v. GPM Investment Management*, *supra* note 46 at para. 18; *Vieira v. Breg Trading Ltd.*, 2014 ONSC 4570, 2014 CarswellOnt 11611 (Ont. S.C.J.) at para. 41.
57. 2014 ONSC 1200, [2014] O.J. No. 851 (Ont. S.C.J.), affirmed 2014 ONCA 878, 2014 CarswellOnt 17095 (Ont. C.A.) ("*Sweda Farms*").

> 2008-09, but it has not shown that Sweda lost a single sale or suffered any damage as a result. It has not shown a conspiracy involving Burnbrae. There is "no reason to think better evidence would be available at trial".
>
> Sweda has provided no expert evidence to put its case into context, or to provide analysis necessary to make out the claims of anti-competitive conduct over a ten year period. It has not provided legal analysis and industry evidence to place the activities of Burnbrae and itself within the context of a supply managed industry.
>
> . . . . .
>
> On a motion for summary judgment, a responding party must lead trumps or risk losing. Sweda did not lead trumps. It tried a deep finesse. The finesse failed. And now Sweda has no hand. Its case is dismissed as against Burnbrae.[58]

- **Scheduling motions for directions under rule 1.05 prior to the summary judgment motion**: In *Hryniak*, the SCC raised the possibility of the parties bringing a motion for directions prior to the hearing of complex motions for summary judgment to allow the judge to manage the time and cost of the motion or to allow the responding party to object to that motion.[59]

  In *1318214 Ontario Ltd. v. Sobeys Capital Inc.*,[60] a decision from 2012 prior to *Hrnyiak*, Justice Brown provided guidance on seeking motions for directions prior to motions for summary judgment in complex matters. In that decision, Justice Brown called on counsel to provide at scheduling appointments "detailed, focused and reasoned (*i.e.*, not speculative) information"[61] to allow the court a more realistic picture of the costs/benefits of proceeding by way of summary judgment motion. The information to be provided would deal with the proposed length of motion, issues, affiants, documents, experts, prior examinations and legal arguments compared to if the matter proceeded to a full trial. Counsel were also encouraged to answer the following question in detail: If full or partial summary judgment were granted, what amount of pre-trial preparation and trial time would be saved?[62]

58. *Ibid.* at paras. 203-04, 206 (citations omitted).
59. *Supra* note 1 at paras. 70-72.
60. 2012 ONSC 2784, 40 C.P.C. (7th) 331 (Ont. S.C.J. [Commercial List]).
61. *Ibid.* at para. 17.
62. *Ibid.* at paras. 18-21.

In *Farrell v. Kavanagh*[63] Justice Brown issued the following case management directions post-*Hryniak* specific to summary judgment motions, referring back to his earlier 137-paragraph pre-*Hryniak* decision in *George Weston Limited v. Domtar Inc*:[64]

> *Summary judgment motions*
> When requesting a date for a summary judgment motion, counsel must demonstrate that they have engaged in the discussions contemplated by paragraph 73 of the decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7:
> A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.
> In *Hryniak* the Supreme Court of Canada stated that the summary judgment process would enable a judge to reach a fair and just determination on the merits when, *inter alia*, the process "is a proportionate, more expeditious and less expensive means to achieve a just result" (para 49). Consequently:
> (i) A party seeking a date for a summary judgment motion should file, in advance of the request, a copy of the proposed notice of motion together with the information to perform the sort of cost/benefit or proportionality analysis described in Schedule "A" to *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001;
> (ii) A party which opposes the setting of a summary judgment motion date must file a brief letter proposing a means by which to determine the case on the merits which would be more proportionate, expeditious and less expensive than a summary judgment motion.[65]

Given the directions by the court in *Hryniak* for a culture shift in how we approach summary judgments, counsel, in Ontario at least, must seriously consider the pre-motion approach advocated by Mr. Justice Brown.

The impact of Hryniak outside of Ontario

The call for a culture shift in *Hryniak* has been applied more variably outside of Ontario. Compared with Rule 20 in Ontario, the other common law jurisdictions and the Federal Court have markedly different rules pertaining to the summary disposition of disputes. In particular, Alberta,[66] British Columbia,[67] Manitoba,[68]

63. 2014 ONSC 905, 2014 CarswellOnt 1477 (Ont. S.C.J. [Commercial List]).
64. 2012 ONSC 5001, 354 D.L.R. (4th) 121 (Ont. S.C.J. [Commercial List]).
65. *Ibid.* at paras. 16-17.

Newfoundland and Labrador,[69] Prince Edward Island,[70] Yukon[71] and the Federal Court[72] have a distinct summary *judgment* rule that generally decides the question whether there is a *bona fide* triable issue without any weighing of the facts, in addition to a summary or expedited *trial* rule under which the court actually tries the issues raised by the pleadings on affidavits, or in some cases, with the assistance of *viva voce* evidence. New Brunswick,[73] Nova Scotia,[74] Nunavut and the Northwest Territories[75] have a summary judgment rule but no procedure for summary trials, although a summary judgment motions judge may, where he or she is of the view that a trial is necessary, impose directions when ordering the matter to proceed to trial. Saskatchewan's Rules 7 and 8 establish a procedure that is virtually identical to Ontario's Rule 20.[76]

The Ontario "summary judgment" Rule 20 has been called a "blend" of the separate summary judgment and summary trial rules that exist in other provinces.[77] While the textual differences between Rule 20 and the rules in those jurisdictions should not be ignored,[78] courts where separate procedures are available for summary judgment and summary trial have acknowledged a cross over between

66. *Alberta Rules of Court*, Alta. Reg. 124/2010, Rules 7.2-7.4 and 7.5-7.11.
67. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rules 9-6 and 9-7.
68. *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rules 20.01-20.05 and 20.06-20.07. In 1988, the *Queen's Bench Rules* underwent major revision and were modeled largely after the Ontario *Rules of Civil Procedure* then in place. They also incorporated certain provisions from the British Columbia *Supreme Court Rules*.
69. *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, Rules 17.01-17.06 and 17A.01-17A.09.
70. In 1990, Prince Edward Island adopted the Ontario *Rules of Civil Procedure* then in place.
71. *Rules of Court*, YOIC 2009/65, Rules 18 and 19.
72. *Federal Courts Rules*, SOR/98-106, Rules 213-218.
73. *Rules of Court of New Brunswick*, N.B. Reg. 82-73, Rules 22.01-22.08.
74. *Nova Scotia Civil Procedure Rules*, Royal Gaz. (November 19, 2008), Rules 13.01-13.07.
75. *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, Rules 174-184.
76. *Queen's Bench Rules*, Sask. Gaz. (December 27, 2013), 2684.
77. *Strata Plan BCS 1348 v. Travelers Guarantee Co. of Canada*, 2014 BCSC 1468, 2014 CarswellBC 2320 (B.C. S.C.). See also *Ryan v. Canadian Farm Insurance Corp.* (2014), 2014 MBQB 178, [2014] I.L.R. I-5651 (Man. Q.B.) at para. 26.
78. For instance Rule 20.04(2)(a) of the Ontario *Rules of Civil Procedure* states "The court shall grant summary judgment if, the court is satisfied that there is no genuine issue requiring a trial", whereas Rule 9-7(15) of the *Supreme Court Civil Rules* in British Columbia uses the permissive "may" rather than the mandatory "shall".

their "summary judgment" process and Ontario's rule 20.04(2) analysis (Step 1 in the *Hryniak* analysis) and their "summary trial" process and Ontario's rules 20.04(2.1) and 20.04(2.2) analysis (Step 2 in the *Hryniak* analysis).[79]

The *Hryniak* decision has been received with varying degrees of enthusiasm in jurisdictions outside Ontario. In Manitoba[80] and Nunavut[81] there are decisions that relied on *Hryniak* but only to the extent that it mandates a robust application of the rules of summary judgment. There were various decisions in New Brunswick, Newfoundland and Labrador, Yukon and at the Federal level that cited *Hryniak* in the past year but did not do so in any depth. In Saskatchewan, the decision has been keenly received, with an emphasis on the flexibility it gives judges, [82] but little has been added to the analysis of Justice Karakatsanis. In Nova Scotia, the summary judgment rule is a mix of a motion to strike and summary judgment on the merits and is limited to weeding out clearly unmeritorious claims. There, the courts have recognized the importance stressed in *Hryniak* of interpreting summary judgment rules broadly as a matter of principle, but have otherwise rejected the application of *Hryniak*'s view on the mechanics of summary judgment as being wholly inap-

79. *Canada (Minister of Citizenship and Immigration) v. Zakaria*, 2014 FC 864, 2014 CarswellNat 3670 (F.C.) at para. 38; *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, 371 D.L.R. (4th) 339 (Alta. C.A.) at para. 14; *Whitecourt Power Limited Partnership v. Interpro Technical Services Ltd.*, 2014 ABQB 135, 95 Alta. L.R. (5th) 415 (Alta. Q.B.) at para. 35.

80. *Pine Falls Development Corp. v. Alexander (Rural Municipality)*, 2014 MBQB 163, 88 C.E.L.R. (3d) 213 (Man. Q.B.) at para. 19; *Ryan v. Canadian Farm Insurance Corp. supra* note 77 at para. 28; *Ancast Industries Ltd. v. Air Unlimited Inc.*, 2014 MBQB 168, [2014] 12 W.W.R. 714 (Man. Q.B.) at paras. 74-77; *Nandwani v. Nandwani*, 2014 MBQB 216, 2 E.T.R. (4th) 253 (Man. Q.B.) at paras. 10-12.

81. *Inuit of Nunavut v. Canada (Attorney General)*, 2014 NUCA 2, (*sub nom.* Nunavut Tunngavik Incorporated v. Canada (Attorney General)) [2014] 3 C.N.L.R. 193 (Nun. C.A.) at paras. 23, 128, 189-190; and *Nunavut (Director of Child and Family Services) v. S. (A.)*, 2014 NUCJ 13, 2014 CarswellNun 11 (Nun. C.J.) at paras. 75-76.

82. See, in particular, *Tchozewski v. Lamontagne*, 2014 SKQB 71, 24 B.L.R. (5th) 141, [2014] 7 W.W.R. 397 (Sask. Q.B.) at para. 32:

> Although Karakatsanis J. refers to the use of the similar Ontario powers (at para. 74 *et seq.*) under the heading 'Salvaging a Failed Summary Judgment Motion', they are also a means to design a proportionate process. The decision as to whether summary judgment should be granted, in other words, is not between deciding all issues raised by the application on the one hand, and business as usual on the other. It is between deciding none, some or all of the issues raised by the application, whether with or without the use of Rule 7-5(2)(b) powers and oral evidence, and if the court deems it appropriate, a process designed to meet the needs of the case.

propriate in the context of the Nova Scotia *Civil Procedure Rules*.[83]

Because courts in Alberta and British Columbia have cited *Hryniak* the most in the past year compared to other non-Ontario jurisdictions, we focus next in more detail on those two jurisdictions.

Alberta

There were 66 cases in Alberta that cited *Hryniak*. Forty-two decisions were summary disposition cases and the balance were non-summary cases that cited *Hryniak* with reference to the need for efficiency and proportionality in litigation. All of the 42 decisions were applications for summary judgment despite the provision for a summary trial process in Alberta. Of these, 14 were entirely unsuccessful, 27 entirely successful, and one successful on some points but not others.

After the decision in *Hryniak* was released, uncertainty emerged about the effect of *Hryniak* on summary judgment in Alberta in two areas: (i) the stringency of the summary judgment test in Alberta, and (ii) whether an Alberta court has expanded fact-finding powers on a summary judgment motion.[84] The first aspect of uncertainty, which emerged from the decision of the Court of Appeal in *Windsor v. Canadian Pacific Railway*,[85] was whether the traditional test that it be "plain and obvious" that the claim or defence will fail still applied after *Hryniak* or whether it just needed to be "fair and just" to both parties that a decision be made on the record.[86] The second aspect of

83. *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 1092 A.P.R. 385, 345 N.S.R. (2d) 385 (N.S. C.A.) at paras. 6-14; *Armoyan v. Armoyan*, 2014 NSSC 174, 345 N.S.R. (2d) 106 (N.S. S.C.) at paras. 19-20; *Masontech Inc. v. Aaffinity Contracting and Environmental Ltd.*, 2014 NSSC 164, 344 N.S.R. (2d) 292 (N.S. S.C.) at paras. 31-33; *Tarlton v. Jackson*, 2014 NSSC 231, 46 R.F.L. (7th) 388, 1095 A.P.R. 64 (N.S. S.C.) at paras. 9-13.

84. This might explain, in part, why there are twice as many summary judgment decisions in Alberta citing *Hryniak* than in the next province most often citing the case (British Columbia at 28).

85. 2014 ABCA 108, 371 D.L.R. (4th) 339 (Alta. C.A.) at paras. 11-14.

86. *1214934 Alberta Ltd. v. Clean Cut Ltd.*, 2014 ABQB 330, 25 B.L.R. (5th) 328 (Q.B.) at para. 24; *Prunkl v. Tammy Jean's Diner Ltd.*, 2014 ABQB 338, 2014 CarswellAlta 909 (Alta. Q.B.) at paras. 16, 53 and 55; *RBC Dominion Securities Inc. v. Compton Petroleum Corp.* (2014), 243 A.C.W.S. (3d) 77, 2014 CarswellAlta 1178 (Alta. Q.B.) at para. 3; *1356613 Alberta Ltd. v. 1313675 Alberta Ltd.*, 2014 ABQB 414, 2014 CarswellAlta 1148 (Alta. Q.B.) at para. 31; *Bank of Montreal v. Rajakaruna*, 2014 ABQB 415, 14 C.B.R. (6th) 220 (Alta. Q.B.) at para. 122; *AT Films Inc. v. AT Plastics Inc.*, 2014 ABQB 422, 2014 CarswellAlta 1151 (Alta. Q.B.) at para. 22. A further interpretation of the Alberta Court of Appeal's dictum in *Windsor v. Canadian Pacific Railways* was merely that the emphasis of the test had

the uncertainty was whether *Hryniak* had the effect of granting summary judgment motions judges in Alberta the power to exercise fact finding powers such as weighing evidence or assessing credibility.[87] Eventually, however, both questions were settled by the Alberta Court of Appeal in *Can v. Calgary (Police Service)*.[88] There, the court confirmed adherence to the traditional, higher threshold test for summary judgment,[89] and confirmed that judges and masters dealing with summary judgment motions under Rule 7-3 are not permitted to exercise extended fact-finding powers, explaining that this was precisely the purpose Alberta's summary *trial* provisions were meant to serve.[90]

British Columbia

The British Columbia *Supreme Court Civil Rules* provide for summary judgment in Rule 9-6 and summary trial in Rule 9-7 (formerly Rules 18 and 18A).[91] These Rules and related jurisprudence have established one of the most expansive summary disposition regimes in Canada.[92] It was in fact the recommendation of the *Civil Justice Reform Project: Summary of Findings and Recommendations* from 2007 in Ontario (from which the amended Rule 20 was introduced) that Ontario adopt the full text of British Columbia's rules dealing with summary judgment and summary trial.[93] It is perhaps for this reason that the SCC's decision in *Hryniak* has had a confirmatory [94]

changed rather than the test itself: *Solis v. del Rosario*, 2014 ABQB 475, 2014 CarswellAlta 1428 (Q.B.) at para. 19; *Wood Buffalo Housing & Development Corp. v. Flett*, 2014 ABQB 537, 58 C.P.C. (7th) 330 (Alta. Q.B.) at paras. 31 and 34; *Agricultural Financial Services Corp. v. Felker*, 2014 ABQB 587, 2014 CarswellAlta 1758 (Alta. Q.B.) at paras. 17-18.

87. *Orr v. Fort McKay First Nation*, 2014 ABQB 111, 6 Alta. L.R. (6th) 307 (Alta. Q.B.) at para. 19; *Whitecourt Power Limited Partnership v. Interpro Technical Services Ltd.*, 2014 ABQB 135, 95 Alta. L.R. (5th) 415 (Alta. Q.B.) at paras. 31, 35 and 36; *Stoney Tribal Council v. Imperial Oil Resources Ltd.*, 2014 ABQB 408, [2014] 9 W.W.R. 340 (Alta. Q.B.) at paras. 68-70; *1214777 Alberta Ltd. v. 480955 Alberta Ltd.*, 2014 ABQB 301, 2014 CarswellAlta 821 (Q.B.) at paras. 14-15; *AT Films Inc. v. AT Plastics Inc.*, *ibid.* at para. 22.
88. 2014 ABCA 322, 315 C.C.C. (3d) 337, [2014] A.J. No. 1112 (Alta. C.A.).
89. *Ibid.* at paras. 88 and 96.
90. *Ibid.* at paras. 84, 85, 89 and 90.
91. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, were introduced in July 2010, replacing *Supreme Court Rules*, B.C. Reg. 221/90.
92. David Crerar and Caitlin Ohama-Darcus, "Limitation Period Issues Determined by Summary Trial" (2014), 72 *Advocate* 841.
93. Hon. Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings and Recommendations* (November 2007), available at: www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/ (the "Osborne Report").

effect on the practice in summary disposition cases in British Columbia rather than imposing the "culture shift" Justice Karakatsanis spoke about.

Most post-*Hryniak* cases in British Columbia refer to the principles recognized in the seminal pre-*Hryniak* decision in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*[95] where the B.C. Court of Appeal identified a number of factors a court should consider when assessing a summary trial application. These factors include: the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, and the course of the proceedings. As the jurisprudence on this topic developed, additional factors have been identified, including the extensiveness of the litigation and the time involved to proceed summarily, whether credibility is a crucial issue, whether there is a risk of wasting time and effort, and whether or not to proceed summarily would constitute litigation in slices.[96]

However, it was not only this well-established framework for summary disposition of disputes that has led to a moderate reception of the *Hryniak* in B.C. courts. It was also the differences between the rules of court in Ontario and those of British Columbia that led the court in *J. (N.) v. Aitken Estate*,[97] one of the first B.C. cases to consider *Hryniak*, to find that *Hryniak* "does not change the law regarding summary trials in British Columbia, and does not render the jurisprudence from our Court of Appeal obsolete".

Nonetheless, the court went on to apply a number of principles from *Hryniak* as being consistent with the law in British Columbia relating to summary trials. These included the propositions that (i) not all claims are suitable for summary determination; (ii) judges should be wary of summary disposition giving rise to the danger of duplicative proceedings and inconsistent findings of fact; and (iii) judges should be wary of clearly unmeritorious motions for

94. In *Vedic Hindu Cultural Society v. Joshi*, 2014 BCSC 1070, 2014 CarswellBC 1703 (B.C. S.C.), it was said the principles of the court in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 C.P.C. (2d) 199, 36 B.C.L.R. (2d) 202 (B.C. C.A.) "are reflected in the recent decision of the Supreme Court of Canada in *Hryniak v Mauldin*". See also *Younger v. Canadian National Railway*, 2014 BCSC 1258, 2014 C.L.L.C. 210-046 (B.C. S.C.) at para. 12.

95. [1989] B.C.J. No. 1003, 36 C.P.C. (2d) 199, 36 B.C.L.R. (2d) 202 (C.A.).

96. *MacCarthy v. MacCarthy*, 2014 BCSC 2229, 2014 CarswellBC 3541 (B.C. S.C.) at paras. 78-79; *Younger v. Canadian National Railway*, 2014 BCSC 1258, 16 C.C.E.L. (4th) 272 (B.C. S.C.) at paras. 5-6.

97. 2014 BCSC 419, 2014 CarswellBC 670 (B.C. S.C.) at para. 33.

summary judgment being used tactically.[98] All the cases following *J. (N.) v. Aitken Estate*, which held that *Hryniak* does not displace the case law in British Columbia, similarly dealt with summary trials.[99] In addition, the "particular" reason for the court in *J. (N.) v. Aitken Estate* making this finding was the use of the mandatory language in Ontario rule 20.04(2)[100] to grant summary judgment when there was no genuine issue requiring a trial, as compared to British Columbia Rule 9-7, which is merely permissive.[101] However, unlike Rule 9-7 (which deals with summary trials), Rule 9-6 (which deals with summary judgment) *does* use mandatory language.[102] Thus, if the difference between the mandatory and permissive aspect of Rules 20.04(2) and Rule 9-7 was the primary impediment for a comprehensive application of *Hryniak* to summary trials in British Columbia, the absence of this difference when comparing Rule 20.04

98. *Ibid.* paras. 35-37.

99. *SmartCentres Inc. v. EBA Engineering Consultants Ltd.*, 2014 BCSC 2271, 2014 CarswellBC 3592 (B.C. S.C.) at para. 22; *MacCarthy v. MacCarthy*, *ibid.* at para. 81; *Morin v. 0865580 B.C. Ltd.*, 2014 BCSC 2110, 2014 CarswellBC 3330 (B.C. S.C.) at para. 83; *Milne Estate v. Milne*, 2014 BCSC 2112, 2014 CarswellBC 3334 (B.C. S.C.) at para. 15; *Lougheed Estate v. Wilson*, 2014 BCSC 2073, 2014 CarswellBC 3266 (B.C. S.C.) at para. 83; *M.G. Logging & Sons Ltd. v. British Columbia*, 2014 BCSC 1995, 2014 CarswellBC 3149 (S.C.) at para. 13; *Ahlwat v. Green*, 2014 BCSC 1865, 2014 CarswellBC 2911 (B.C. S.C.) at para. 10; *Strata Plan BCS 1348 v. Travelers Guarantee Co. of Canada*, 2014 BCSC 1468, 2014 CarswellBC 2320 (B.C. S.C.) at para. 62; *International Sausage House Ltd. v. Hammer Estate*, 2014 BCSC 1442, 2014 CarswellBC 2272 (B.C. S.C.) at para. 102; *Walker v. John Doe*, 2014 BCSC 746, 2014 CarswellBC 1157 (B.C. S.C.) at para. 16.

100. Ontario Rule 20.04(2) provides as follows (emphasis added):

> *The court shall* grant summary judgment if, (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.

101. British Columbia Rule 9-7(15), which deals with summary trials, provides as follows (emphasis added):

> On the hearing of a summary trial application, *the court may* (a) grant judgment in favour of any party, either on an issue or generally, unless (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or (ii) the court is of the opinion that it would be unjust to decide the issues on the application, (b) impose terms respecting enforcement of the judgment, including a stay of execution, and (c) award costs.

102. British Columbia Rule 9-6(5)(a), which deals with summary judgment, provides as follows (emphasis added): "On hearing an application under subrule (2) or (4), the court, (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, *must* pronounce judgment or dismiss the claim accordingly."

in Ontario to Rule 9-6 in B.C. would mean no such impediment exists with respect to summary judgment in British Columbia.

There has been only one case in British Columbia that has dealt with an application for summary judgment that has considered *Hryniak* under Rule 9-6 in the past year.[103] In *Century Services Inc. v. LeRoy*,[104] a textual difference between the Ontario and British Columbia Rules was again used as justification to limit the application of *Hryniak*. In that decision, the judge found that the question whether there is a "genuine issue *requiring* a trial" under rule 20.04(2) should be contrasted with the question under Rule 9-6 of whether there is a "genuine issue *for* trial", meaning whether there is an issue to be tried. Again, however, the court went on to reference *Hryniak* as confirming the principle in British Columbia summary judgment jurisprudence that judges should be wary of "litigating in slices";[105] that is, a determination of only part of a claim or defence giving rise to multiple appeals within one action, risking findings being made without the court being aware of the full factual context, and risking inconsistent findings at later stages of the litigation.

Thus, although we have found a fairly significant "culture shift" in Ontario courts in the past year towards a more liberal approach to granting summary judgment, the impact of *Hryniak* outside Ontario has been less straightforward due in part to the differences in court rules involving summary disposition in those other jurisdictions.

Practical tips for counsel bringing or opposing summary judgment motions

In Ontario, it has been noted that the success of the called-for culture shift will "depend on the willingness of the judiciary to actively manage Rule 20 motions and their wisdom in developing procedural alternatives to the trial process that are no less fair and just".[106] While our analysis shows that Ontario courts seem to be more willing to grant summary judgment since *Hryniak* (having determined it was appropriate in close to 75% of cases in the year following *Hryniak*), where summary judgment was not granted (or only partially granted), the motions judge did not address being seized in 45% of those decisions and was silent on addressing case management or issuing directions to the parties in 52% of those

103. In contrast, there were 18 cases that dealt with application for summary trial under Rule 9-7.

104. 2014 BCSC 702, 2014 CarswellBC 1099 (B.C. S.C.).

105. *Ibid.* paras. 89-90.

106. Finkelstein et al., *supra* note 4 at pp. 489-90.

decisions, a seemingly high number. However, in addition to judges needing to take part in this culture shift, there is also a role for counsel to play in being properly prepared and assessing the appropriateness of summary judgment for a particular dispute. Although our practical tips listed below are aimed at counsel in Ontario, these tips should also be considered outside of Ontario, with appropriate modification for local rules.

- Ask whether summary judgment is a proportionate response given the facts of a particular case and the evidence that will be probative of the issues in dispute.
- Ask whether, from the bench's point of view, summary judgment either with or without the enhanced fact-finding powers in 20.04(2.1) represents fair access to the affordable, timely and just adjudication of the dispute.
- What are the chances of success? What are the costs/benefits? The factors discussed above in the B.C. Court of Appeal decision in *Inspiration Management* may provide useful guidance for deciding whether summary judgment is appropriate.
- Communicate with co-counsel and the court: Be prepared to undertake the discussions and analysis advocated by Justice Brown in *Farrell v. Kavanagh*[107] regarding the merits, evidence, and alternatives to summary judgment or face adverse cost consequences if your position in bringing or opposing the summary judgment motion turns out to have been unreasonable. Take a considered position about anticipated timelines.
- Should you bring your motion before or after examinations for discovery? The answer to this question was not specifically addressed in *Hryniak* but will depend on the issues and factual complexity of the case. For example, if pre-motion examinations for discovery will help reduce the risk of the responding party raising genuine issues due to factual issues, then it may be advisable to hold examinations for discovery before bringing the summary judgment motion.[108]

107. *Supra* note 63.

108. For a good discussion of this issue, see Wells and Boudreau, *supra* note 6 at 88-91. However, in *Stantec Consulting Ltd. v. Altus Group Ltd.*, 2014 ONSC 6111, 2014 CarswellOnt 14842 (Ont. S.C.J.), the court did not order that discoveries take place prior to the summary judgment motion where the factual issues were not complicated. However, in *Bogatyreva v. Ricky3 Holdings Ltd.*, 2014 ONSC 3516, 2014 CarswellOnt 7866 (Ont. S.C.J.), the

- If you are the responding party, ensure that your client is "leading trumps" with sufficient evidence on the merits.[109] It is not sufficient for a responding party to attempt to buy more time through stalling and attempting to allege the spectre of genuine issues requiring a full trial without preparing a full response on the merits.
- Consider who the potential deponents are that you have available and whether you can prove your claim or defence based on their evidence alone. If not, consider who might be examined as a witness on a pending motion under Rule 39.03. In respect of any deponent or witness by examination, consider that their credibility might be tested by way of oral testimony at a later date.
- Either party must be willing to discuss with each other and the judge solutions if the motion is denied or only partially granted, including any case management directions or the judge being seized of the matter, showing the court your client's sensitivity to the need for proportionality and fair access to the affordable, timely and just adjudication of claims.

In the past year, *Hryniak* has obviously had an impact on the profession and the judiciary. Early indications suggest that this impact has been positive, at least in Ontario, and will result in summary judgments being granted more readily. In the next year, we anticipate an increase in the number of summary judgments that will result in a fine-tuning of when summary judgment will be granted and the scope of the new powers judges will be willing to exercise to balance the need for proportionality with fair access to the affordable, timely and just adjudication of claims.

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fact that discoveries did not take place prior to the summary judgment motion may have been a factor in the motion being dismissed due to complicated factual issues arising.

109. See the discussion above regarding *Sweda Farms* at note 57.