Recent Developments on Summary Judgements in Canada

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I. Introduction

In the landmark 2014 Supreme Court of Canada decision *Hryniak v Mauldin* ("*Hryniak*"), Karakatsanis J., writing for a unanimous Court, observed:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.[2]

The Supreme Court held that:

> …a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims [emphasis added].[3]

The recent developments in Canada seek to use summary judgment as a tool to introduce proportionality into civil litigation.

II. Origins of Summary Judgment

Although the existence of summary procedures can be traced back to Roman law and the medieval period, the modern procedures for summary judgment are generally said to find their roots in the 1855 English

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[2] *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*] at para 1.
[3] *Hryniak* at paras 4-5.

statute known as the *Summary Procedure on Bills of Exchange*, or *Keating's Act*.[4] *Keating's Act* introduced a procedure for creditors to enforce promissory notes against debtors who delayed payment by raising frivolous defences.[5] Before this, there was a practice wherein debtors would raise false defences to discourage creditors with significant expense and delay, and to use the delay to raise money to meet the debt or to dissipate its assets prior to making an assignment into bankruptcy.[6] The statute therefore introduced a procedure requiring the plaintiff to obtain a writ informing the defendant that judgment would be entered unless the defendant obtained leave to appear and defend within twelve days after being served with the writ.[7]

The procedure established by *Keating's Act* was subsequently extended by statute in 1873 to other types of cases, including for debts and liquidated demands for money, landlord's actions for possession, actions for possession of chattel, actions for possession of collateral, and actions for specific performance of contracts for the purchase and sale of property.[8] The 1873 statute added the requirement that the plaintiff provide an affidavit to verify the claims and swear to the belief that there is no defence to the action.[9] Similarly, the defendant was able to provide an affidavit to contest the judgment on the whole or a portion of the case.[10] The procedure was eventually elevated to be available for all actions in the Queen's Bench division except limited classes of cases, being "actions for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and actions in which fraud is alleged…"[11]

Traces of the English model for summary judgment can be found in almost all legal jurisdictions that find their conception in English law. Canadian provinces (with the exception of Quebec, which models its expedited process after the French civil law) have all adopted summary judgment mechanisms similar to the English model at an early time.[12] In the United States, early attempts at a summary-type procedure

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[4] Robert Wyness Millar, "Three American Ventures in Summary Civil Procedure" (1928) 38 Yale LJ 193 at 193-194; WA Bogart, "Summary Judgment: A Comparative and Critical Analysis" (1981) 19 Osgoode Hall LJ 552 at 554-555; Ilana Haramati, "Procedural History: The Development of Summary Judgment as Rule 56" (2010) 5 NYUJL&L 173 at 175-177.

[5] Haramati at 177-178; John A Bauman, "The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating" (1956) 31:3 Indiana LJ 329 at 337-338.

[6] Bauman at 333-334.

[7] Bauman at 338-339.

[8] Bogart at 555; Bauman at 339; Haramati at 178.

[9] Bauman at FN 81; Haramati at 178-179.

[10] Haramati at 179.

[11] Bauman at 340.

[12] Bogart at 556; Charles E. Clark and Charles U. Samenow, "The Summary Judgment" (1929) 38 Yale LJ 423 at 439-440. See also the extensive considerations of Wakeling J.A. of the Court of Appeal of Alberta in *Stoney Tribal Council v Canadian Pacific Railway*, 2017 ABCA 432 [*Stoney Tribal*] at FN 68, which summarizes the summary judgment procedures of Canadian jurisdictions, reproduced as follows:

> *Supreme Court Rules*, B.C. Reg. 168/2009, R. 9-6(5) (a court may grant summary judgment if there is no "genuine issue for trial"); *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 7.3 (a court may grant summary judgment if a claim or defence has no merit); *The Queen's Bench Rules of Saskatchewan*, r. 7.5(1)(a)("The Court may grant summary judgment if ... the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence"); *Court of Queen's Bench Rules*, Man. Reg. 553/88, r. 20.03(1) (a court may grant summary judgment if there is no "genuine issue for trial with respect to a claim or defence"); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2) ("The court shall grant summary judgment if there is no genuine issue requiring a trial"); *Rules of Court*, N.B. Reg. 82-73, R. 22.04 ("The court shall grant summary

were found in several States throughout the eighteenth and nineteenth centuries.[13] One example is the summary proceeding developed in Virginia. Originally developed to address abuse of power by sheriffs and other state enforcement agents, the procedure used in Virginia was also expanded to be used in all actions at law, including those between private actors.[14] Incidentally, Virginia's summary proceeding was also one of the few that survived Reconstruction into the nineteenth century.[15] For the most part, however, the summary judgment processes in the United States are modelled after the English statute.[16] Similar procedures can also be found in Australia,[17] New Zealand,[18] and Hong Kong.[19]

III. Summary Judgment in Canada

A. Pre-*Hryniak*: A Stringent Standard

Prior to *Hryniak*, summary judgment was primarily used to weed out claims or defences that had no chance of success. One of the often cited decisions from the pre-*Hryniak* era is the Supreme Court of Canada's decision in *Canada (Attorney General) v Lameman* ("*Lameman*").[20] A decision arising out of the province of Alberta, *Lameman* considered the chambers judge's dismissal of claims brought by the Papaschase Band against the Crown for breach of fiduciary, fraudulent and malicious behaviour, and treaty breach in relation to an agreement concerning the surrender of the Band's interest in a reserve. The Crown brought a successful application for summary dismissal on the basis that the claim was barred by the applicable limitations statute. In upholding the chambers judge's summary dismissal of the claim, the Supreme Court reiterated that the burden for summary judgment was high:

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial.

judgment if there is no genuine issue requiring a trial with respect to a claim or defence"); Nova Scotia's *Civil Procedure Rules*, r. 13.04(2) ("When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted"); Prince Edward Island's *Rules of Civil Procedure*, R. 20.04 (a court may grant summary judgment if there is no "genuine issue for trial"); *Rules of the Supreme Court*, *1986*, S.N.L., 1986, c. 42, Sch. D, r. 17.01 (a court may grant summary judgment to a plaintiff if the "defendant has no defence to a claim"); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 176(2) ("Where the court is satisfied that there is no genuine issue for trial with respect to a claim or a defence, the Court shall grant summary judgment accordingly"); *Rules of Court for the Supreme Court of Yukon*, R. 18(1)("the plaintiff, on the ground that there is no defence to the whole or part of a claim ... may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount") & *Federal Court Rules*, SOR/98-106, r. 215 (1) ("If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly").

[13] Haramati at 175-177.
[14] Haramati at 176; Clark and Samenow at 463.
[15] Haramati at 177.
[16] Haramati at 177.
[17] Clark and Samenow at 440. See also Wakeling J.A.'s summary of the Australian approach in *Stoney Tribal* at FN 70.
[18] See Wakeling J.A.'s summary of the procedure in New Zealand in *Stoney Tribal* at FN 71.
[19] See Wakeling J.A.'s summary of the procedure in Hong Kong in *Stoney Tribal* at FN 72.
[20] *Canada (Attorney General) v Lameman*, 2008 SCC 14 [*Lameman*].

> Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial [emphasis added].[21]

Accordingly, the Supreme Court recognized that "the bar on a motion for summary judgment is high".[22] The applicant bears the evidentiary burden of demonstrating a "genuine issue of material fact requiring trial" or, for summary dismissal, the lack thereof.[23] The applicant cannot simply rely on mere allegations or the pleadings. Instead, each side must "put its best foot forward" with respect to whether there are material issues to be tried.[24] If the applicant is able to satisfy the evidentiary burden, the respondent must refute or counter such evidence, or the application would be granted.[25] In assessing whether the evidentiary burden has been met, the chambers judge may draw factual inferences based on undisputed facts if such inferences are "strongly supported by the facts".[26]

The standard for use of summary judgment was high. In Alberta, for example, case law set a high standard of proof for summary judgment to be granted, using language such as "plain and obvious", "bar to summary judgment is high", "clearest of cases", "beyond doubt", and "unassailable".

In 2007, the Ontario government commissioned the *Civil Justice Reform Project: Summary of Findings and Recommendations* (the "Osborne Report"), which canvassed several issues relating to access to justice in the civil system.[27] Among other things, the Osborne Report recommended broader utilisation of the summary judgment process and the adoption of a summary trial mechanism in Ontario. The recommendations in the Osborne Report ultimately led to the 2010 amendments to Ontario's *Rules of Civil Procedure*.[28] Among other things, the 2010 amendments included: (1) changing the applicable test from "no genuine issue for trial" to "no genuine issue requiring a trial"; (2) granting the judge with authority to weigh evidence, evaluate credibility, draw factual inferences and order *viva voce* evidence; and (3) permitting the judge to exercise broad discretion to make orders for directions when trial is necessary, including imposing deadlines and requiring expert meetings to narrow issues.[29] Please see Appendix A for the full text of Rule 20 of the Ontario *Rules of Civil Procedure*.[30]

B. *Hryniak*: A Culture Shift

When the Supreme Court returned to the question of summary judgment in *Hryniak*, Ontario's *Rules of Civil Procedure* had been amended. *Hryniak* was the first decision from Canada's highest court to consider the post-amendment summary judgment mechanism. In *Hryniak*, the Supreme Court of Canada called for

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[21] *Lameman* at para 10.
[22] *Lameman* at para 11.
[23] *Lameman* at para 11.
[24] *Lameman* at para 11.
[25] *Lameman* at para 11.
[26] *Lameman* at para 11.
[27] The Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings and Recommendations* (November 2007), online: < https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>.
[28] ON, *Rules of Civil Procedure*, RRO1 990, Reg 194 [*Rules of Civil Procedure*].
[29] *Rules of Civil Procedure*, r 20.04.
[30] *Rules of Civil Procedure*, r 76.02, 76.12.

a "culture shift" for the expanded use of summary judgment.[31] Coupled with this culture shift is the concept of proportionality – "whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication".[32] Proportionality is thus a comparative exercise involving the assessment of the relative benefits of proceeding with a summary process as opposed to a full trial.

The Supreme Court found that, under Ontario's *Rules of Civil Procedure*, there is no genuine issue requiring trial "when the judge is able to reach a fair and just determination on the merits". This will be the case 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.[33] Thus, the court's assessment involves an evidentiary inquiry of the existing record to determine whether it can make the necessary findings of fact to which the law may be applied to permit fair and just adjudication.

The court's assessment is therefore a multi-step analysis. The court must first determine whether there is an issue requiring a trial based on the existing record. If there is no genuine issue requiring a trial, summary judgment is granted on the merits of the case. However, if there appears to be a genuine issue requiring a trial, the court should next consider whether to exercise its discretion and use its enhanced fact-finding powers or its ability to call oral evidence. This decision falls entirely within the chambers judge's discretion.

While the Supreme Court of Canada has made clear that summary judgment ought to be more broadly embraced, its decision in *Hryniak* did not give an express pronouncement as to the applicable standard of proof. Further, while the Supreme Court's decision in *Hryniak* may provide clarity for summary judgment in Ontario's civil procedure, it was unclear how other Canadian jurisdictions – some of which have separate and distinct mechanisms of summary judgment and summary trial – may apply the principles described in *Hryniak*.

C. After *Hryniak*: Confusion in the Law

After *Hryniak* was issued, courts in other Canadian jurisdictions had to contend with what this landmark decision meant for their respective civil procedure rules. The Supreme Court in *Hryniak* was live to the jurisdictional and statutory differences in how the summary judgment procedure is articulated, stating that "[w]hile Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application."[34] In Alberta, *Hryniak* was quickly adopted by the Court of Appeal of Alberta in its decision in *Windsor v Canadian Pacific Railway Ltd* ("*Windsor*").[35]

In *Windsor*, the Court of Appeal held that both Alberta's and Ontario's summary judgment rules were "procedures for resolving disputes without a trial (as compared with Alberta's summary trial procedure which is a form of trial)."[36] The Court of Appeal affirmed the three principles identified in *Hryniak* as being applicable to finding that a fair and just determination can be made on summary judgment, stating that

[31] *Hryniak* at paras 2, 32.
[32] *Hryniak* at paras 32-33.
[33] *Hryniak* at paras 49-50.
[34] *Hryniak* at para 35.
[35] *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108 [*Windsor*].
[36] *Windsor* at para 14.

"[t]he modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record."[37]

Although the Court of Appeal in *Windsor* clearly intended to adopt the arguably lower threshold of the summary judgment test described in *Hryniak*, the Court's formulation of the test as an assessment of "a genuine issue *requiring* trial" did not appear to account for the fact that the newly amended *Alberta Rules of Court* did not make reference to a genuine issue either *for* or *requiring* trial.[38] Instead, Alberta's Rule 7.3 simply referred to the existence of merit or defence to a claim. This lack of reference to the statutory language would become a source of disagreement between the justices in articulating the applicable test for summary judgment. Please see Appendix B for the full text of Rule 7.3 of the *Alberta Rules of Court*.

After *Windsor*, the Court of Appeal of Alberta went on to consider a number of summary judgment decisions. A divergence in law soon became apparent as courts used different language to describe the standard of proof required for summary judgment applications. The divergence is demonstrated by comparing the Court of Appeal's decisions in two decisions, as follows:

1. In *Can v Calgary Police Service*, the test was described as:

> Summary judgment is appropriate if the nonmoving party's position is without merit. "A party's position is without merit if the facts and law make the moving party's position unassailable… A party's position is unassailable if it is so compelling that the likelihood of success is very high" [emphasis added].[39]

2. In *Stefanyk v Sobeys Capital Incorporated*, the test was described as:

> [T]he issue is not whether the appellant's position is "unassailable". The first question is whether the record is sufficient to decide if the appellant is liable for the plaintiff's injuries. There are no material facts in dispute, no overwhelming issues of credibility, and the court is able to apply the law to the facts. It is unlikely that the cost and expense of a trial is justified because of an expectation of a significantly better record. In this case summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result, and therefore it is an appropriate procedure. The ultimate issue is whether the appellant has proven on a balance of probabilities that it is not liable for the plaintiff's injuries [emphasis added].[40]

3. In *Whissell Contracting Ltd v Calgary (City),* the Court of Appeal agreed on the result but were split on the test. O'Ferrall and Wakeling JJ.A. stated:

> Modern civil procedure codes have a summary judgment protocol. They are designed to remove from the litigation stream proceedings the outcomes of which are obvious — they feature either unmeritorious

[37] *Windsor* at para 13.
[38] *Alberta Rules of Court*, AR 120/2010.
[39] *Can v Calgary Police Service*, 2014 ABCA 322 at para 20.
[40] *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125 at para 17.

> claims or defences — and warrant allocation of minimal public and private resources.[41]

Justice Schutz wrote a concurring decision. She agreed with the result but said that the test had to be resolved when it was necessary to decide the issue. Justice Schutz explained:

> I have had the benefit of reading the majority opinion. I agree with the outcome; it is correct.
>
> I find myself unable to endorse, however, the dicta concerning the correct test for summary judgment, or the standard of proof required to be established for the moving party to succeed on an application for summary judgment. In particular, I decline to endorse paragraphs 2 and 3 (and related footnotes).
>
> In my view, the proper test will have to be set when it is necessary to resolve the issue.[42]

In *330626 Alberta Ltd v Ho & Laviolette Engineering Ltd*, Feehan J. stated, "It would be helpful if the Court of Appeal could definitively resolve this issue with a five person panel in the near future."[43]

D. *Weir-Jones*: Summary Judgment in Alberta

The Alberta Court of Appeal sat as a five person panel in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.* ("*Weir-Jones*") to clarify the test for summary judgment.[44] At issue in *Weir-Jones* was the application of Alberta's limitation statute in the context of ongoing contract performance.

The Court of Appeal's decision emphasized the paradigm shift introduced by *Hryniak*, which "must be applied having regard to the specific wording of the *Alberta Rules of Court*."[45] The fact that Rule 7.3 of the *Alberta Rules of Court* refers to "no merit" and "no defence" cannot be interpreted to mean a "complete absence", as it would introduce an improper high standard of proof to the test; instead, these phrases are to be interpreted in the context of there being "no real issue".[46] Further, the Court clarified that the "proof" discussed was the proper standard of proof for the underlying facts, being the only standard of proof in civil law: proof on a balance of probabilities.[47] As the Court described: "[t]he standard of proof applies only to findings of fact. It does not apply to whether, at the end of the day, it is possible to achieve a fair and just adjudication on a summary basis."[48] The former was an exercise in weighing the evidence, and the latter was an exercise of judicial discretion.[49] Phrases such as "obvious", "unassailable" and "clearest of cases" were no longer appropriate.

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[41] *Whissell Contracting Ltd. v Calgary (City),* 2018 ABCA 204 at para 1 [*Whissell*].
[42] *Whissell* at paras 15-17.
[43] *330626 Alberta Ltd. v Ho & Laviolette Engineering Ltd.*, 2018 ABQB 478 at para 41.
[44] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 [*Weir-Jones*].
[45] *Weir-Jones* at para 31.
[46] *Weir-Jones* at para 31.
[47] *Weir-Jones* at para 28.
[48] *Weir-Jones* at para 29 [Emphasis in original].
[49] *Weir-Jones* at para 29.

The distinction between fact-finding and judicial discretion is critical. The applicant must establish the factual record of their case on a balance of probabilities but that is not itself sufficient for summary judgment. It must be followed by the motion judge being able to conclude that there is no genuine issue requiring a trial.[50] If the applicant is able to discharge its burden of demonstrating, in light of the facts, the record and the law, that it is entitled to summary judgment on the merits and there is no genuine issue for trial, the respondent has an evidentiary burden to challenge such entitlement by showing gaps in the facts, the record or the law, or by raising a positive defence.[51]

The Court of Appeal succinctly summarized the applicable test as involving four considerations:

a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.[52]

Justice Wakeling, who sat on a number of summary judgment appeals, issued a concurring opinion, taking the position that *Hryniak* has not modified existing jurisprudence in Alberta. While *Hryniak* has endorsed summary judgment as a beneficial tool in civil law, it could not alter the text of the *Alberta Rules of Court*, which has been interpreted as requiring a high standard on the basis of requiring "no merit" or "no defence" to a claim.[53] In this respect, Wakeling J.A. viewed *Hryniak* as having limited precedential value in Alberta and was critical of interpreting *Hryniak* as amending the text of the *Alberta Rules of Court*. The appropriate approach was to assess the disparity between the strengths of the parties' positions. If the disparity is "so marked that the likelihood the court will adopt the moving party's position is very high – the outcome is obvious", the court may grant summary judgment.[54]

[50] *Weir-Jones* at para 30.
[51] *Weir-Jones* at para 35.
[52] *Weir-Jones* at para 47.
[53] *Weir-Jones* at paras 193-197.
[54] *Weir-Jones* at para 200.

IV. Conclusion

Given the foregoing, it is clear that courts in Canada are lowering the standard for summary judgment. There is a call for a culture shift in litigation to use summary judgment more liberally as an alternative means of deciding disputes. The full extent to which this new test does so will need to be determined as it is applied to future cases.

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