A Real "Culture Shift" Post-*Hryniak?*

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"A trial if necessary; but not necessarily a trial."

- Justice Myers

Anjum et al. v. Doe et al., 2015 ONSC 5501

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Overview

- A brief history of the summary judgment process
- The game changer: *Hryniak v Mauldin*
  - What is a genuine issue requiring a trial?
- Practical Strategies for Pursuing or Defending Motions for Summary Judgment Post-Hryniak:
  - The high onus of putting your "best foot forward"
  - Problems arising from multiple defendants
  - Right to a jury trial vs. summary judgment
- Statistical analysis of summary judgment decisions post-*Hryniak*: what trends are appearing?
- Do the Courts have the resources for the "culture shift" mandated by the Supreme Court?
- Practical tips for Civil Practice Court
- Conclusion

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A brief history of the summary judgment process in Ontario

- **1985:** previous iteration of the summary judgment rules was implemented
  - Drew a clear distinction between issues of law and issues of fact, which were not seen as appropriate for summary judgment
- **1990s:** There was a surge in the popularity of summary judgment motions.
  - The high watermark of this popularity was the Ontario Court of Appeal's decision in *Soper v. Southcott.*
- **Late-1990s:** Other decisions of the Ontario Court of Appeal eventually implemented a very narrow interpretation of the test on summary judgment:
  - Motion judges "were never to assess credibility, weigh evidence or make findings of fact"
  - Effectively limited summary judgment to strict questions of law, significantly handicapping its potential to facilitate access to justice

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A brief history of the summary judgment process in Ontario

- **Early-2000s:** Summary judgment falls into disfavour and disuse, due to the narrow functionality prescribed by the Courts.
- **2007:** The Osborne Report was commissioned by the Ontario government to address several accessibility and affordability problems in our civil justice system, including considering potential changes to summary judgment.
  - The resulting report included 8 detailed recommendations on how to improve the summary judgment process.

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A brief history of the summary judgment process in Ontario

- **2010:** Many of the recommendations made by the Osborne Report were eventually incorporated in one form or the other, by way of changes to the *Rules of Civil Procedure* that were implemented in January of 2010. These changes included:
  - A change in the wording of the test, from "a genuine issue for trial" to "a genuine issue **requiring** a trial";
  - Providing the new powers granted to judges to weigh evidence, evaluate credibility and draw inferences, as well as call oral evidence; and
  - Providing broad discretion to impose directions and trial management orders where a trial is necessary, pursuant to rule 20.05, including: evidence by affidavit, time limits on examinations, and expert meetings to narrow issues ("hot-tubbing").

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Hryniak v Mauldin

- One of the first summary judgment motions brought after the 2010 changes to the *Rules*.
- This case arose from a civil fraud action against an alleged fraudster (Hryniak), as well as his lawyer and the lawyer's former law firm.
- The plaintiffs brought a motion for summary judgment against all three defendants.
- Summary judgment was granted against Hryniak, and refused against the other two defendants.

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Hryniak at the Ontario Court of Appeal

- Unanimous panel of five judges, heard *Hryniak v. Mauldin* alongside four other appeals, in order to provide guidance on the new summary judgment process.
- The Court of Appeal implemented the "full appreciation" test:
  - The new powers available under rule 20.04 were only to be used only at trial, "unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings".
  - This relatively narrow interpretation of the new powers available under the *Rules* may have returned summary judgment to the very narrow function it served leading up to the 2010 amendments.
- Unusually, the Ontario Court of Appeal concluded that *Hryniak v Mauldin* was not an appropriate case for summary judgment; however, on the record before it, the Court of Appeal was satisfied that Hryniak had committed civil fraud, and therefore dismissed his appeal in the *Mauldin* action and granted summary judgment.

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Supreme Court of Canada's decision in *Hryniak*; the context:

- The opening paragraph of the Supreme Court's decision in *Hryniak* defines the problem and foreshadows the proposed solution: a robust summary judgment mechanism in Ontario and beyond.
  - "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."

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Supreme Court of Canada's decision in *Hryniak v Mauldin*:

- Central themes include increasing access to justice, and promoting proportionality, expediency and affordability in civil litigation.
- The Supreme Court called for a "**culture shift**", including "moving the **emphasis away from the conventional trial**".
- The Court disposed of the "full appreciation" test implemented by the Ontario Court of Appeal.
- Established a two step road-map to summary judgment:
  1. First, the motion judge must determine whether there is a genuine issue **requiring** a trial, solely on the written record and without using the new powers under 20.04.
  2. If there appears to be a genuine issue requiring a trial, the motion judge must then determine whether the new powers under 20.04 could be used to fairly resolve the issues in dispute between the parties, without resorting to a full trial.

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What is a genuine issue requiring a trial?

- There is no genuine issue requiring a trial where the motion judge "is able to reach a fair and just determination on the merits".
- This will be the case where 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.
- The test implemented by the Supreme Court appears vague, as there is no clear mandate how the judge should decide whether there is a genuine issue requiring a trial.
- The Supreme Court rejected defining set categories of cases that were right and wrong for summary judgment; instead the Court purposefully left the test vague, to allow the summary judgment process to "evolve organically".

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What is a genuine issue requiring a trial?

- Practically, there appears to be a dividing line based on the number of potential witnesses (particularly if the evidence is conflicting or contradictory) and the complexity of the factual issues in dispute:
  - Appropriate for summary judgment: cases that are document driven with few factual issues in dispute and limited witnesses.
  - Not appropriate for summary judgment: cases with significant conflicting evidence from several witnesses, where the ultimate resolution will likely depend on the witnesses' credibility.

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What is a genuine issue requiring a trial?

- Length and complexity alone should not be sufficient to dismiss a motion for summary judgment: the goal is to find the most expeditious method to reach a determination on the merits.
  - The Supreme Court in *Hryniak* requires a comparison to the alternative of a trial.
  - Even if the motion is long and complex, since the trial may be larger and more complex, a summary judgment motion may still be the more appropriate process to expeditiously and fairly determine some or all of the issues in dispute.

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What is a genuine issue requiring a trial?

- Post-*Hryniak*, the Ontario Court of Appeal has said that a case is appropriate for summary judgment where:
  - There is "a narrow and discrete issue involving oral evidence from a small number of witnesses that can be gathered in a manageable period of time"; and
  - The evidence so gathered "is likely to have a significant impact on whether summary judgment is warranted".
  - (*James v. Miller Group Inc.*, 2014 ONCA 335)

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Practical Strategies for Pursuing or Defending Motions for Summary Judgment Post-*Hryniak*

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The high onus of putting your "best foot forward":

- It is now well established that on summary judgment, the responding party must "put their best foot forward" and "lead trump or risk losing".
  - These principles create an onus on the responding party to submit affidavit or other evidence of the specific facts showing that there is a genuine issue requiring a trial.
- It is not sufficient to take the position that further and better evidence will be available at trial.
  - In *Paramandham v. Holmes* , 2015, the plaintiff relied solely on two lawyer's affidavits, with no affidavit from the plaintiff himself, but still tried to argue that more evidence was required from several additional witnesses.
  - The Court held: "Counsel for the plaintiff made strategic choices, perhaps cost based, or not, as to how to respond to this motion. The court will hold parties to those choices."

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The high onus of putting your "best foot forward":

- This onus appears to be applied even more strictly post-*Hryniak*. Even where a motion for SJ is refused, the Court is to consider what if any **trial management orders** to make, in order to set appropriate directions for the proper handling of the trial.
  - In *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014, the Court held: "on an unsuccessful motion for summary judgment, the court will now rely on the record before it to decide **what further steps will be necessary** to bring the matter to a conclusion."

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The high onus of putting your "best foot forward":

- In other words, the onus to put your best foot forward may not just assist in responding to the motion for summary judgment itself, but will also better position the responding party with respect to the nature of the directions and trial management terms that can be ordered by the motion judge, if the motion for summary judgment is refused.

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Problems arising from multiple defendants:

- Problems can arise in motions for summary judgment in cases with multiple defendants, including the following:
  - Where a trial between the other parties is necessary in any event, this affects whether a motion for summary judgment is the more proportionate, more **expeditious** and less expensive means to resolve the issues in dispute.
  - There is a potential for **inconsistent findings** between the motion hearing and the trial, especially where the motion **judge does not seize herself** of the trial.
  - **Appeal routes and timing can result** in a party that was released from an action on summary judgment not participating in a trial, only to have the summary judgment decision successfully appealed subsequent to the trial.

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Problems arising from multiple defendants:

- Be aware this is a factor that the Court will consider; however, this issue should not be treated as dispositive:
  - It cannot be the case that every time there is more than one defendant, neither defendant is entitled to summary judgment because the action will still continue against the other defendant(s).
  - Recall that *Hryniak* itself was a case involving multiple defendants, where summary judgment was only granted against one defendant.

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Problems arising from multiple defendants:

- There must be **an appropriate balance** between the rights of the various parties and the process by which the dispute can be resolved on its merits in a proportionate and affordable manner:
  - On the one hand, where a summary judgment motion is brought on a **discrete** issue, **early enough** in the proceedings that **any appeals can be resolved** before the trial, the risks created by a potential division of the proceedings are minimal, even if there are multiple parties to the action.
  - However, where a summary judgment motion **is brought closer to trial**, and **there will be overlapping issues** in dispute that remain to be resolved at trial in any event, then the Court may be less inclined to grant summary judgment due to the inefficiencies and risks created, unless the motion should very clearly succeed.

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Problems arising from multiple defendants:

- In *Hryniak*, the Supreme Court noted that the finding against Hryniak on the motion for summary judgment did not rely upon nor was it inconsistent with a finding of liability on the other defendants.
- Based on the Supreme Court's approach, there can even be overlapping issues so long as a finding of liability on the motion does not preclude an independent analysis of the liability of the other defendant(s).
- In short, multiple defendants is a factor, but is not decisive.

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Right to a jury trial vs. summary judgment process:

- The summary judgment process is in potential conflict with a civil litigant's right to have issues of fact tried and/or damages assessed by a jury.
- Post-*Hryniak* decisions continue to view a Jury Notice as a relevant, but non-binding consideration on whether summary judgment is appropriate in a given case.
  - Some Courts have found it a more important factor than others.
- In my respectful submission, the presence of a Jury Notice should be a factor to consider, but it should not be a very important factor.

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Right to a jury trial vs. summary judgment process:

- Post-*Hryniak*, the question to ask is whether the issue brought before the Court is capable of being determined fairly without recourse to the full (jury) trial, which is no longer the default form of adjudication on the merits.
  - If the dispute can be resolved in that manner, then the Court should make that determination, as a trial is not necessary for a fair and just adjudication of the issues in dispute.
- This is not inconsistent with any party's right to a civil jury trial, because as noted by Justice Myers in *Anjum v Doe*, a party's substantive right to a civil jury trial is subject to the operation of the *Rules*, including, *inter alia*, the summary judgment process.

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Right to a jury trial vs. summary judgment process:

- It cannot be the case that the only thing needed to end the "culture shift" called for by the Supreme Court is the delivery of a Jury Notice.
  - As Justice Myers noted in his recent decision in *Anjum v Doe*, 2015, "…change of the magnitude of a "culture shift" is not business as usual."

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Has there been a "culture shift" post-*Hryniak*?

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Trends in summary judgment decisions released post-*Hryniak*

- In the course of preparing our paper, we reviewed 359 summary judgment motion decisions, 45 appeals from motions for summary judgment, and 11 leave to appeal decisions, released post-*Hryniak* (Ontario decisions only).
- The most interesting trends include the following:
  - A 23% increase in the volume of summary judgment motions determined in 2015, compared to 2014 (despite there being 2.5 months left in the year).
  - A 7% increase in the proportion of summary judgment motions that are granted in 2015, compared to 2014 (despite the higher volume of motions).
  - Post-*Hryniak* appeals from summary judgment motions have been allowed only 30% of the time, and dismissed 70% of the time.
  - Leave to appeal from refused summary judgment motions very rarely being granted by the Divisional Court post-*Hryniak* (1 of 11).

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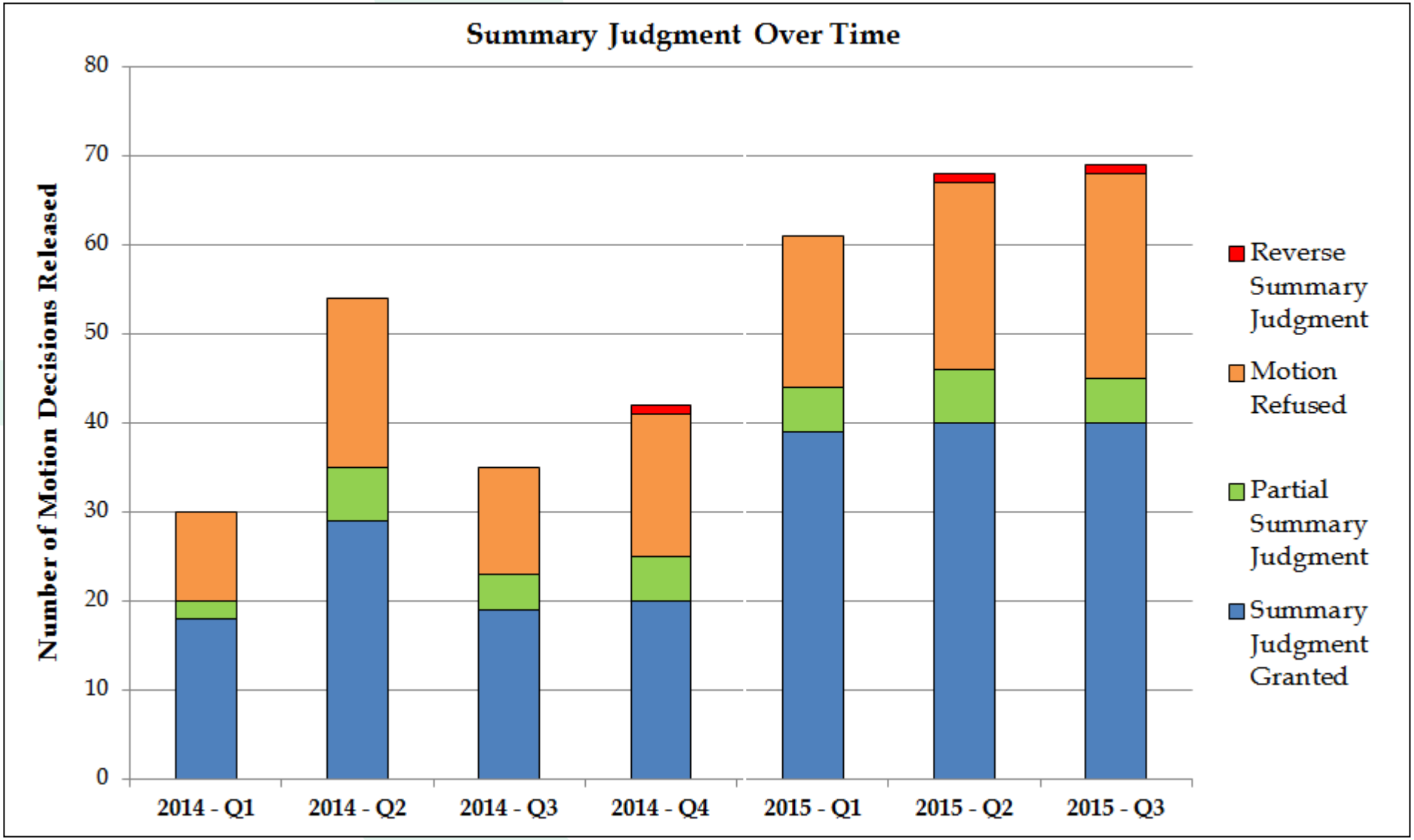
A 23% increase in the volume of summary judgment motions determined in 2015, compared to 2014 (despite there being 2.5 months left in the year):



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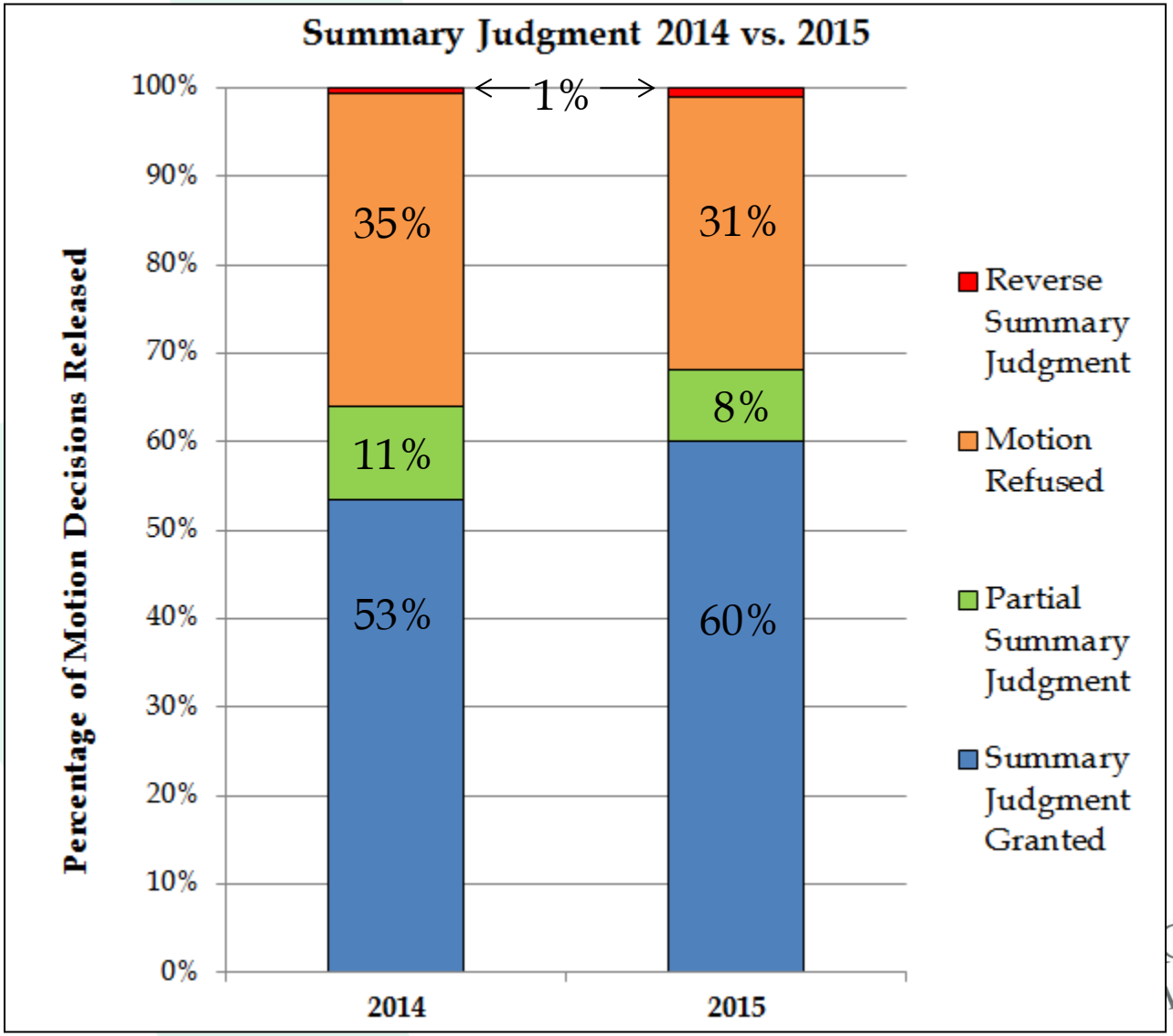

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Do the Courts have the resources for the "culture shift" mandated by the SCC?

- According to the Supreme Court, where a motion is brought for directions regarding an SJ motion, the judge should remain seized of the matter.
- Similarly, where a motion for summary judgment is refused, "in the absence of **compelling reasons** to the contrary, [the motion judge] should also seize herself of the matter as the trial judge".
- To date, where judges have refused to seize themselves of the SJ motion or the trial (which occurs in a majority of cases), the reasons generally fall into two categories:
  1. The Court's current scheduling process prevents them from seizing themselves of the trial in a reasonable fashion; or
  2. Despite reading all of the materials filed on the motion and hearing the submissions of counsel, the motion judge has not reached any findings that would allow for material economies or savings to be had.
- With respect to the first issue, the **Supreme Court** explicitly stated that **where the Courts' scheduling practices conflict** with the goals set by *Hryniak*, the Courts should be prepared to **change those practices**.
- It has even been suggested, albeit in *obiter*, that where a judge refuses a motion for summary judgment, **failing to seize themselves** or **provide adequate directions** for the trial might be an appealable error of principle (*Maria-Antony v. Selliah*, 2015, Ont. Div. Ct.).

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Do the Courts have the resources for the "culture shift" mandated by the SCC?

- Although based on several assumptions, our calculations suggest that, if the "culture shift" is going to continue at its current pace, additional judges will be required, solely to deal with the increased number of civil motions for summary judgment.
  - Using the present increase in summary judgment motions and projecting into the future (potentially 100 more summary judgment motions per year, compared to the pre-*Hryniak* environment), and making certain assumptions concerning the number of Court hours/days required by a judge in the summary judgment process, Ontario will require at least 2-3 more full-time judges, just to handle the increased volume of summary judgment motions.
  - It is submitted that access to justice has a price: the price is likely the need for more judges in Ontario.

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Practical Tips for the new Civil Practice Court

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Civil Practice Court: the basics

- Civil Practice Court started in November of 2014 as a Toronto Region Pilot Practice Advisory (i.e. notice to the profession).
- It was then incorporated into **Toronto's Consolidated Practice Direction for Civil Actions**, Applications, Motions and Procedural Matters, effective July 1, 2015.
- Civil Practice Court is a form of hearing before a judge, which **replaces Motion Scheduling Court**.
- Civil Practice Court has been implemented to address scheduling issues with long motions, long applications, and motions for summary judgment **before a judge**.
- The stated goals of Civil Practice Court include curtailing the "motions culture" in Toronto, as well as identifying motions, at any stage, that would benefit from case management.
- Motions, including motions for summary judgment, will only be booked at Civil Practice Court if the return date is **within 100 days.**

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Civil Practice Court: practical tips for moving and responding parties

- Moving parties:
  - Be prepared to **defend the merits of your motion** for summary judgment, even without written evidence being before the Court.
  - Serve the **Motion Record prior to the first attendance at Civil Practice Court**, in order to increase the likelihood that the motion can be scheduled within 100 days, **avoiding a second attendance**.
  - Ensure that **all parties to the motion will be present** at Civil Practice Court, or have provided their position (otherwise, you will likely be asked to stand the matter down and call opposing counsel).

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Civil Practice Court: practical tips for moving and responding parties

- Responding parties:
  - If appropriate, consider **requesting** that the **Court not schedule the motion** for summary judgment, on the basis that it is not and appropriate case for such a motion to be heard.
  - In the alternative, **request a case conference** or other case management following the Civil Practice Court attendance, **to address in more detail** whether the issues in dispute are appropriate for summary judgment.
  - Potentially **bring a motion for directions**, **or a motion to stay** or dismiss the moving party's motion for summary judgment, in accordance with rule 1.05 and the Supreme Court's comments in *Hryniak* endorsing this type of pre-emptory motion in the appropriate circumstances.

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Conclusion

- We are seeing the very beginning of the "culture shift" called for by the Supreme Court in *Hryniak*.
- This trend will hopefully continue to develop, despite the various issues and hurdles that remain, both for the Courts and for litigants contemplating a motion for summary judgment.
- The current trends are both desirable and necessary, as full trials have become prohibitively expensive, time consuming and risky.
- Thus, where a summary judgment motion is brought, some determination on the merits, even if it is against the interests of the moving party, is from the perspective of the justice system, generally preferable to referring the matter to a trial.
- This is especially the case, because that trial of the genuine issue realistically never, or almost never, happens.

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Conclusion

- Having been involved or aware of countless motions for summary judgment (most pre-*Hryniak*), a majority of those motions were dismissed either at first instance or on appeal, even after many bright and capable judicial officers had reviewed mountains of evidence and heard detailed submissions from counsel.
- However, although these motions for summary judgment were dismissed in favour of a full trial of the issues in dispute, **that theoretical trial on the merits has never happened.**
- After the time, money and energy required for the summary judgment motion has been spent, the parties shot their judicial hearing bullet on the motion, and so the trial that Court concluded was required, never actually goes ahead.
- In my experience, an unhappy compromise is reached (for all of the parties involved), and the civil justice system is worse off as a result.

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Conclusion

- That being said, there will ultimately always be cases that are not appropriate for the summary judgment process.
- However, it is hoped that in the post-*Hryniak* environment, such cases will be far less common **and a far greater percentage of civil litigation matters can be resolved by a judicial determination on the merits**, rather than an unhappy compromise forced by the economics of going to trial.

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"…change of the magnitude of a "culture shift" is not business as usual."

- Justice Myers

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Questions?

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