ROGERS PARTNERS LLP

100 WELLINGTON STREET WEST, SUITE 500
P.O. BOX 255, TORONTO, ON M5K 1J5
WWW.ROGERSPARTNERS.COM
T. 416.594.4500 | F. 416.594.9100

A REAL "CULTURE SHIFT" POST-*HRYNIAK?*

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Stephen G. Ross

Nathaniel Dillon-Smith

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Introduction

Hearing from the Supreme Court of Canada that Ontario's civil justice system is broken is not an easy pill to swallow, especially given that many of us have spent our entire professional career as a key component of that system. Accepting that our system has been broken is perhaps made easier by the implicit knowledge that the Supreme Court is right.

Full trials on the merits of a case have become prohibitively expensive, time consuming and risky. Summary judgment was implemented as a rough and ready alternative: a means for securing some justice, where full justice between the parties was becoming all too rare. Unfortunately, summary judgment failed to live up to its true potential for several decades. In its recent ground-breaking decision of *Hryniak v Mauldin*,[1] Canada's top court has breathed new life into the summary judgment process, calling for a "culture shift", which reassuringly is now starting to take effect in an unprecedented way.

This paper will briefly review the history of summary judgment in Ontario, before turning to the *Hryniak* decision itself. Thereafter, trends that have arisen in the summary judgment jurisprudence post-*Hryniak* will be examined in detail. Finally, the authors will comment on several outstanding issues that arise in the context of summary judgment motions, and that remain to be tackled in the following months and years, as the culture shift mandated by the Supreme Court truly starts to take effect.

A Brief History of Summary Judgment in Ontario

The initial distinction between issues of law and issues of fact

The former iteration of Ontario's summary judgment rules came into effect in 1985. At that time, the Court had to determine whether there was a "genuine issue for Trial", and if there was no such issue, summary judgment would be granted. However, the Court could also resolve a genuine issue on a motion for summary judgment, so long as the issue

[1] *Hryniak v. Mauldin*, 2014 SCC 7, 2014 CarswellOnt 640, [2014] 1 S.C.R. 87 (S.C.C.)[*Hryniak*].

was limited to a question of law: thus this earlier iteration of the summary judgment process drew a clear distinction between issues of law and issues of fact.[2]

There was an initial surge of cases that utilized the 1985 rules to facilitate access to justice.[3] The high watermark of that initial push was the Ontario Court of Appeal's decision in *Soper (Guardian of) v. Southcott*, where the Court of Appeal upheld a defendant's motion to dismiss a medical malpractice action based on a limitation period defence, even though discoverability was an issue in dispute.[4] However, other decisions of the Court of Appeal in the late 1990s were much more restrictive, and made it clear that judges hearing motions for summary judgment "were never to assess credibility, weigh evidence or make findings of fact".[5]

By the mid-2000s, it was clear that the Court of Appeal's firm stance was too restrictive, and was not serving the interests of justice. This is particularly so as summary judgment was intended to have previously unadjudicated cases resolved on their merits, and yet it is a rare case indeed where there are no facts in dispute. Thus, a reconsideration of the summary judgment process was an important component of the 2007 Osborne Report, which was commissioned by the Ontario government to look at several issues in the civil justice system, in order to address issues of accessibility and affordability.[6]

Changes made following the Osborne Report

According to the Osborne Report, few summary judgment motions were brought at the time: "[i]n 2005-06, summary judgment motions were commenced in only 642 of Ontario's 63,251 Superior Court civil cases (1%)". In order to address the fact that summary judgment was not working as intended, the Osborne Report made a series of eight detailed

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[2] Janet Walker, *Summary Judgment Has its Day in Court*, Queen's Law Journal (2012, 37:2) at pages 696-697.
[3] See *Hryniak supra* note 1 at para 38, citing *Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242 (Ont. H.C.).
[4] *Soper (Guardian of) v. Southcott*, 1998 CanLII 5359, 39 O.R. (3d) 737 (Ont. C.A.).
[5] J. Walker *supra* note 3, citing *Aguonie v. Galion Solid Waste Material Inc.*, 1998 CanLII 954 (Ont. C.A.) and *Dawson v. Rexcraft Storage and Warehouse Inc.*, 1998 CanLII 4831 (Ont. C.A.).
[6] Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, November 2007) [the Osborne Report]. See also J. Walker, *ibid*.

recommendations with respect to the summary judgement process, many of which were eventually adopted in some form by Ontario's Civil Rules Committee, and the resulting changes to Rule 20 of the *Rules of Civil Procedure* coming into effect in January of 2010.

The 2010 amendments to Rule 20 of the *Rules* fundamentally changed the test on a motion for summary judgment. According to the Ontario Court of Appeal, these changes "were designed and implemented to improve access to justice by providing a mechanism to resolve issues more expeditiously than through a traditional trial".[7] The wording of the test was even changed from whether there is a "genuine issue for trial", to a consideration of whether there is a "genuine issue requiring a trial".[8]

New powers added by the 2010 changes to the *Rules*

However, the most significant changes implemented by the 2010 changes to Rule 20 were the new powers granted to judges by the new rules 20.04(2.1) and (2.2).

Rule 20.04(2.1) requires judges to consider the evidence submitted by the parties, and allows them, unless it is in the interest of justice to do so only at trial, to exercise the following powers: 1) weigh the evidence; 2) evaluate credibility of a deponent; and 3) draw reasonable inferences.[9] Furthermore, rule 20.04(2.2), entitled "Oral Evidence (Mini-Trial)", allows a judge to order oral evidence from one or more parties, for the purposes of exercising the powers set out in (2.1).[10]

It should be noted that although Masters can and still do hear motions for summary judgment,[11] it now appears that proceeding in front of a Master creates additional risk for the moving party, without any identifiable benefit. Masters can consider the evidence

[7] *Trotter v. Trotter*, 2014 ONCA 841, 2014 CarswellOnt 16579 (Ont. C.A.) at para 48 [*Trotter*].
[8] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, at rule 20.04(1) [*Rules*].
[9] *Ibid* at rule 20.04(2.1).
[10] *Ibid* at rule 20.04(2.2).
[11] Of the nearly three-hundred and fifty (350) post-H*yniak* summary judgment motions analyzed in the course of preparing this paper, only one case was located that was decided by a Master: *Pammett v. 1230174 Ontario Inc.*, 2014 ONSC 2447 (Ont. Master), in which Master MacLeod grants a defendant's motion for summary judgment on a limitation period issue, but also provides a very thorough discussion of summary judgment from the perspective of a Master.

submitted by the parties, but cannot avail themselves of the other fact-finding powers created by rule 20.04(2.1) and (2.2). Furthermore, where a motion for summary judgment is heard by a Master, the losing party may appeal on the basis that the Master not only considered the evidence, but also weighed it, evaluated credibility, or drew inferences.[12]

Moreover, it has been held that as a practical matter, appellate Courts do not have access to the same tools available to a summary judgment motion judge. In the case of *Seif v Toronto (City)*, the motion judge granted summary judgment against the plaintiff on a preliminary issue, and thus did not make findings of fact on a second disputed issue.[13] The Ontario Court of Appeal unanimously overturned the motion judge on the first issue, but the majority held that the second issue raised a genuine issue requiring a trial, and further that the Court of Appeal was realistically limited to a review of the written record.[14]

The game changer: *Hryniak v Mauldin*

i. The decisions below

The *Hryniak* decision involved a civil fraud action arising from a failed investment scheme, whereby millions of dollars of the plaintiffs' money disappeared while in the possession of Mr. Hryniak's company. The plaintiffs' action named as defendants Mr. Hryniak, as well as a lawyer and the lawyer's former law firm, who were involved in the transaction. On the plaintiffs' motion for summary judgment, Justice Grace used the new powers available under rule 20.04(2.1). In the result, summary judgment was granted against Mr. Hryniak, but refused against the lawyer and the lawyer's former law firm.

Somewhat unusually, although the Court of Appeal in *Hryniak* determined that this case was not an appropriate candidate for summary judgment, it was nevertheless satisfied

[12] However, it is unclear whether such an appeal is likely to be allowed, so long as the Master acknowledges that they are aware of the limitations they face when hearing a motion for summary judgment. See *Minkofski v. Dost Estate*, 2014 ONSC 1904, 2014 CarswellOnt 3806 (Ont. Div. Ct.), and *Globalive Wireless Management Corp. v. Selectcore Ltd.*, 2015 ONSC 507, 2015 CarswellOnt 846 (Ont. Div. Ct.) at para 6.
[13] *Seif v. Toronto (City)*, 2015 ONCA 321, 2015 CarswellOnt 7170 (Ont. C.A.) [*Seif*] at paras 1 and 47.
[14] *Ibid* at paras 51 and 52. The dissent held that a determination on the merits could be reached on that record.

on the record before it that Mr. Hryniak had committed a civil fraud, and therefore dismissed his appeal. The most important determination reached by the Ontario Court of Appeal in *Hryniak* was its implementation of the "full appreciation" of evidence test, which certainly set the bar for summary judgment very high.[15] This threshold test limited when a judge could use the new powers found in rule 20.04(2.1) and (2.2), and threatened the potential usefulness of the 2010 amendments, leading the Supreme Court to intervene.

ii. Supreme Court of Canada's decision in *Hryniak*

Central themes of the Supreme Court's decision are increasing access to justice and promoting proportionality, expediency and affordability, in the context of civil litigation. The Court held that a "culture shift" is required to promote these goals, in particular by "moving the emphasis away from the conventional trial".[16]

The Supreme Court modified the test on summary judgment adopted by the Ontario Court of Appeal, doing away with the "full appreciation" test, thereby lowering the bar and making summary judgment more readily available.[17] Implicitly, summary judgment is now available where a "*full* appreciation" of the evidence and issues in dispute are not necessarily available to the motion judge on the record before them.

The Supreme Court established a two-step "roadmap" to be followed on motions for summary judgment. Firstly, the motion judge is to determine whether there is a genuine issue requiring a trial, solely on the written record filed by the parties and without using the new fact-finding powers under rules 20.04(2.1) and (2.2).[18] Where there is no such genuine issue requiring a trial for its adjudication, summary judgment should be granted.

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[15] *Hryniak supra* note 1 at para 56. Under the "full appreciation" test, "the "interest of justice" requires that the new powers be exercised only at trial, unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings"; see para 16.
[16] *Ibis* at para 2 and 28. Although they reinterpreted the test on summary judgment, the Supreme Court in fact agreed with the Court of Appeal's disposition in *Hryniak*, and dismissed the appeal.
[17] *Ibid*. See also *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450 (Ont.C.A.) [*Baywood*] at para 31, and *Density Group Ltd. v. HK Hotels LLC*, 2014 ONCA 605 (Ont. C.A.) at para 53 [*Destiny Group*].
[18] *Hryniak supra* note 1 at para 66.

Secondly, even if there is a genuine issue requiring a trial, the motion judge should then determine whether something less than a full trial addressing all of the issues in dispute between the parties might be appropriate, if the judge were to make use of the new powers under rules 20.04(2.1) and (2.2). *Hryniak* made it clear that these new fact-finding powers are discretionary and presumptively available to judges: "they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial".[19] Although a judge exercising their new powers under the second step is discretionary, following the two-step process and at least commenting on the use of those powers would appear to be mandatory (where summary judgment has not been granted on the written record alone).[20]

Hryniak went further than the 2010 amendments to the *Rules*, to the extent that it mandated a "culture shift" that promoted access to justice, affordability, expediency, and proportionality, in particular with respect to a broad interpretation of rule 20, as amended. Importantly, this is the first example in recent history where there has been a robust change to the *Rules of Civil Procedure*, followed by a comprehensive Supreme Court of Canada decision that carried those recent changes even further than the plain language of the *Rules*.

Judicial Treatment of *Hryniak*

It should be noted that the statistical analysis set out in the following sections is based on a review of lower court and appellant decisions in Ontario that cited the Supreme Court of Canada's decision in *Hryniak*. This methodology has the obvious limitation of excluding motions and appeals that are currently before the Courts, unreported decisions or decisions without reasons, and perhaps most significantly, decisions that do not cite the Supreme Court's decision in *Hryniak*. This methodology was considered necessary given the large volume of case law at issue.

[19] *Ibid* at para 45 and *Destiny Group supra* note 17 at para 54.
[20] See *Hryniak supra* note 1 at para 66, and *Trotter supra* note 7 at para 72.

i. Trends in Lower Court Decisions post-*Hryniak*

More summary judgment motions are being brought in the post-*Hryniak* environment. Based on the parameters noted above, there were 161 summary judgment motion decisions released in 2014 (after the release of *Hryniak*, on January 23, 2014). In contrast to that figure, 198 summary judgment motions have already decided in 2015, with almost three months to go.

Importantly, not only are more summary judgment motions being brought and heard by Ontario judges, but on a higher proportion of those motions, summary judgment is being granted.

Overall, considering all motions for summary judgment decisions released post-*Hryniak* (359), the resulting decisions can be broken down as follows: summary judgment granted (57% or 205 cases); partial summary judgment granted (9% or 33 cases); motion refused (33% or 118 cases); and "reverse" summary judgment granted (1% or 3 cases).

It is useful to compare these results to research conducted earlier this year by Gord McGuire, a lawyer with Adair Barristers LLP in Toronto.[21] Mr. McGuire, who compared cases decided in the year before and the year after the Supreme Court's decision in January of 2014, concluded that the odds of success were virtually identical:

- **12 months pre-*Hryniak*:** summary judgment granted (54%); partial summary judgment granted (10%); and motion refused (36%).
- **12 months post-*Hryniak*:** summary judgment granted (55%); partial summary judgment granted (9%); and motion refused (36%).[22]

[21] Drew Hasselback, *Where's that flood of summary judgment motions*, Financial Post, February 11, 2015 (retrieved on September 15, 2015); and Julius Melnitzer, *Hryniak fallout: Is summary Judgment appropriate for class actions?*, Law Times, April 20, 2015 (retrieved on September 15, 2015).

[22] These results prompted Mr. McGuire to comment that "[he] had a hunch that in this case, all the hullabaloo about *Hryniak* might have been overblown"; *ibid*.

Mr. McGuire had found 166 summary judgment decisions in the 12 months leading up to *Hryniak*, which is consistent with the total number of decisions for 2014 (161) analyzed by this paper.[23]

Perhaps most importantly, the trend towards more summary judgment motions being granted is amplified, when only decisions released in 2015 are considered. Of the 359 motions for summary judgment reviewed for this paper, the following trends appear:

- **2014 (161 cases):** summary judgment granted (53%); partial summary judgment granted (11%); motion refused (35%); and reverse summary judgment granted (1%).
- **2015 (198 cases, so far):** summary judgment granted (60%); partial summary judgment granted (8%); motion refused (31%); and reverse summary judgment granted (1%).

Thus, although the effects of *Hryniak* may have taken some time to sink in, it now appears that summary judgment is in fact more often granted than before *Hryniak*, which the authors suggest is evidence of the beginning of a "culture shift".

Furthermore, the increased volume of summary judgment motions in 2015 implies that riskier, less-traditional types of summary judgment motions are being brought. Many are likely motions that would have never been brought pre-*Hryniak*.[24] Consequently, the relatively modest increase in frequency of summary judgment being granted (53% in 2014 vs. 60% in 2015) is all the more significant.

[23] It should be noted that Mr. McGuire found only 145 summary judgment motions in the twelve months following *Hryniak*. This could be as a result of differing methodologies, or alternatively due to the delay in released decisions being reported on services such as QuickLaw and WestLaw.

[24] An example of this is perhaps *Nandlal v. Toronto Transit Commission*, 2014 ONSC 4760, 2014 CarswellOnt 11129 (Ont. S.C.J.), affirmed on appeal 2015 ONCA 166, 2015 CarswellOnt 3228 (Ont. C.A.), where the TCC successfully argued that based principally on the plaintiff's own uncontradicted evidence, she would fail to establish any liability, as she could not identify the hazard that had allegedly caused her trip and fall.

ii. Trends in Appellant Court Decisions post-*Hryniak*

Based on the parameters noted above, 45 appeal decisions addressing motions for summary judgment were reviewed. There were also 11 decisions of the Divisional Court, deciding motions for leave to appeal the refusal of a motion for summary judgment.

Of the forty-five appeal decisions considered, approximately 70% of the appeals were dismissed, whereas 30% of the appeals were allowed. Although anecdotal, in the experience of the authors, this represents a tamer and less interventionist Court of Appeal than before the Supreme Court's decision in *Hryniak*.

This perhaps results from the fact that the Supreme Court held in *Hryniak* that a motion judge's exercise of the new fact-finding powers attracts deference. Where they exercise those powers and determine there is a genuine issue requiring trial, that decision is a question of mixed law and fact.[25] Although significant deference is owed to the motion judge on a motion for summary judgment, traditional grounds for appeal, including insufficient reasons being provided, can undermine that level of deference.[26]

Furthermore, plaintiffs and defendants faired equally well on appeal.[27] However, there was a very strong trend of defendants attempting to appeal motions for summary judgment that were refused, and failing to obtain leave: of the eleven post-*Hryniak* decisions on motions for leave to appeal, ten (10) were brought by defendants. All but one of the motions for leave to appeal have been refused by the Divisional Court.[28]

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[25] *Hryniak supra* note 1 at para 81: "Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned, absent palpable and overriding error".

[26] See for example *Barbieri v. Mastronardi*, 2014 ONCA 416, 2014 CarswellOnt 6617 (Ont. C.A.) where the Ontario Court of Appeal allowed an appeal of a partial summary judgment, on the basis that "there cannot be deference in circumstances where the appellate court cannot understand the legal basis for the decision or the factual finding made in support thereof".

[27] Collectively, plaintiffs and defendants each had sixteen (16) appeals dismissed and seven (7) appeals allowed. This also meant that plaintiffs and defendants shared equally in the number of appeals actually heard, although attempts to appeal refused summary judgment motions were almost exclusively by defendants, meaning that defendants attempted to appeal more often than plaintiffs (59% vs. 41%).

[28] See *Biancaniello v. DMCT LLP*, 2014 ONSC 5539 (Ont. Div. Ct.); although leave to appeal was granted, it does not appear that said appeal was in fact heard.

Thus, where a motion for summary judgment is refused, it appears to be especially difficult to obtain leave to appeal that decision. As an interlocutory decision, the finding that there is a genuine issue requiring a trial does not dispose of the merits of the case and may not even involve a binding determination of substantive law in dispute.[29] In such circumstances, it can be very difficult to meet the test for leave to appeal. Finally, as a determination that there is a genuine issue requiring a trial is almost certainly based on the particular facts of a case, it is unlikely that there will be any conflicting case law, even where other decisions have resolved a similar legal issue on summary judgment.[30]

Likely because leave to appeal is an additional hurdle facing a moving party who loses their motion for summary judgment (and a significant hurdle at that), the vast majority of appeal decisions deal with motions where summary judgment was granted, either in whole or in part (36 out of 45 appeals overall).

The remaining appeal decisions include the following: two hybrid trials, both of which were upheld; two decisions granting reverse summary judgment, both of which were upheld; and three appeals from motions for summary judgement that were initially refused (all of which were granted leave to appeal prior to the Supreme Court's decision in *Hryniak*).

Interestingly, all three appeals from refused motions for summary judgment were eventually allowed, and summary judgment was granted by the appellate Court in each case.[31] Thus, although the odds appear to be remote, where leave to appeal from a refused

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[29] See for example *Sweet v. H. Hennink Construction Ltd.*, 2015 ONSC 2571, 2015 CarswellOnt 5585 (Ont. Div. Ct.) [*Sweet*] at para 7. Molloy J refused leave to appeal a rejected motion for summary judgment, finding that he did not need to consider whether there was reason to doubt the correctness of the motion judge, in part because the motion judge "made no final determination as to the law" on the main issue in dispute.

[30] See *Genius Corp. v. Ritchie*, 2015 ONSC 4558, 2015 CarswellOnt 10871 (Ont. Div. Ct.) at para 16: "to the extent that the motion judge's decision "conflicts" with other decisions, it is not a conflict on an issue of principle; it is a conflict arising from the application of the same set of legal principles to a different factual record." Similarly, see *Sweet ibid* at para 6.

[31] *Compton v. State Farm Insurance Co. of Canada*, 2014 ONSC 2260 (Ont. Div. Ct.); *Kassian Estate v. Canada (Attorney General),* 2014 ONSC 844 (Ont. Div. Ct.); and *Cotnam v. National Capital Commission*, 2014 ONSC 3614 (Ont. Div. Ct.). Note that in *Kassian*, the Divisional Court initially dismissed the appeal (with a dissent), but that was overturned by the Ontario Court of Appeal, who allowed summary judgment; see 2015 ONCA 544.

summary judgment motion is successfully obtained, on the appeal itself the most likely result is summary judgment being granted for the moving party/appellant. However, for the appellate Court to make a finding that there is "no genuine issue requiring a trial", it must be able to satisfy the first branch of the test set out by the Supreme Court in *Hryniak* within the constraints of the appellate review process and, as discussed above, without using the new tools at the disposal of a summary judgment motion judge.[32]

Commentary and Discussion

Despite the trends discussed above, which show the first signs of the "culture shift" mandated by the Supreme Court, there remain a number of contentious issues that need to be tackled, if the summary judgment process is going to reach its full potential. These various issues will be discussed in the following sections.

What is a genuine issue requiring a trial?

The Supreme Court of Canada elucidated the test for what will be considered a "genuine issue requiring a trial" as follows:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the 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]

The above requirements relate to determining whether summary judgment will provide a "fair and just adjudication".[34] The Supreme Court emphasised that "the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute".[35]

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[32] *Seif supra* note 13 at para 51 and 52.
[33] *Hryniak supra* note 1 at para 50.
[34] *Ibid*.
[35] *Ibid*.

However, as a practical matter, there appears to be a dividing line depending on the number of witnesses involved and the complexity of the evidentiary issues in dispute. This can be considered as a spectrum of what can potentially be dealt with on a written record of evidence alone. On the one end of the spectrum, it goes without saying that summary judgment is particularly appropriate where there is little, if any, conflicting evidence, limited witnesses, and the case is primarily document driven, with oral evidence from all persons involved not being necessary to reach a determination on the merits.[36]

In *James v. Miller Group Inc.*, the Ontario Court of Appeal allowed an appeal by the Miller Group, a defendant which had lost on the initial summary judgment motion, and remitted the matter to be determined on summary judgment by the Superior Court.[37] The Court of Appeal held that the Miller Group had raised a significant threshold issue as to its liability (whether it could establish an implied oral agreement with a co-defendant), and further that it was entitled to have that threshold issue determine on summary judgment, if necessary using the new powers under rule 20.04 (2.2). The Court of Appeal found the Miller Group's entitlement to this relief was based on the following circumstances:

> This 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 in which evidence is likely to have a significant impact on whether summary judgment is warranted. [Emphasis added; citation removed][38]

Conversely, on the other end of the spectrum, summary judgement is less appropriate where there is significant conflicting evidence from witnesses, especially where the credibility of multiple affiants is in dispute. Since "[i]t is not always a simple task to assess credibility on a written record", where credibility is in dispute, it is more likely that oral evidence (by way of a "mini-trial") or a trial itself will be required.[39] That being said, the authors note briefly that judges across Ontario, in the context of judicial pre-trial

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[36] *1634584 Ontario Inc. v. Canada (Attorney General)*, 2013 ONSC 6664, 2013 CarswellOnt 18889 (Ont. S.C.J.) at paras 41 and 42, those paragraphs being adopted with approval by the Court of Appeal; 2014 ONCA 465.
[37] *James v. Miller Group Inc.*, 2014 ONCA 335, 2014 CarswellOnt 5507 (Ont. C.A.) at para 11.
[38] *Ibid*.
[39] *Trotter supra* note 7, at para 55. Where important issues turn on the credibility, a judge's failure to make credibility findings can amount to a reversible error.

conferences, often appear to have little or no reservations about assessing evidence and suggesting how the case will turn out at trial, solely based on the written materials before them and the submissions of counsel.

Arguably, in certain key respects the test created by the Supreme Court is too vague, as it does not provide a clear mandate on how the summary judgment motion judge should substantively decide the issue of whether there is a genuine issue requiring a trial. This leaves motion judges with very broad discretion, which when coupled with a high level of deference shown on appeal, has the potential to result in motions for summary judgment being decided somewhat arbitrarily. In particular, a review of the motions for summary judgment decided post-*Hryniak* suggests that there may be little predictability or certainty in the outcome reached in an individual case, with the result potentially turning on the particular views on summary judgment held by the judge drawn to hear the motion.[40]

Division of proceedings

There is a recurrent struggle, both before and after *Hryniak*, between the summary judgment process and proceedings involving multiple parties and/or several discrete issues. This struggle is premised on two themes: 1) that a full trial may be necessary in any event, to resolve issues or claims between parties that are not resolved by the summary judgment motion; and 2) that summary judgment on one issue, where other issues or parties continue to trial, creates the potential for inconsistent findings. A further potential complication arises where a successful summary judgment motion might be successfully appealed, while in the interim the remaining litigants have proceeded to trial.

[40] The 13 most prolific summary judgment motion judges were examined in the course of preparing this paper (predictably, 12 of them were located in Toronto). Of the three judges that appeared (at least statistically) most favourably inclined towards summary judgment, one granted summary judgment 100% of the time (10/10), and the next two each granted summary judgment in 86% of their respective decisions (6/7 and 6/7). Conversely, looking at the three judges that appear (at least statistically) the least favourably inclined towards summary judgment, the first only granted summary judgment 22% of the time (2/9), and the next two had only granted summary judgment in 46% of their respective decisions (6/13 and 6/13), as well as each authoring a "reverse" summary judgment decision.

As a result of these potential complications, it is now necessary for a judge hearing a motion for summary judgment "to assess the advisability of the summary judgment process in the context of the litigation as a whole".[41] Furthermore, failing to do so would appear to be an appealable "material error in principle".

In the case of *Baywood Homes Partnership v. Haditaghi*, partial summary judgment was granted by the motion judge, and the plaintiffs' action was dismissed.[42] However, summary judgment was refused with respect to the defendants' counterclaim, as determining the validity of two promissory notes, the basis of the counterclaims, was held to require a trial. The motion judge had reached this conclusion after conducting a "half-day mini-trial" using the new fact-finding powers under 20.04(2.2), a process that the Court of Appeal would later refer to as a "staged" summary judgment motion.

In *Baywood*, the Ontario Court of Appeal allowed the plaintiffs' appeal, ordering both the main claim and the defendant's counterclaim to proceed to trial. The Court of Appeal explained the problems associated with division of proceedings, especially where the credibility of witnesses is a live issue, as follows:

> What happened here illustrates one of the problems that can arise with a staged summary judgment process in an action where credibility is important. Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all. [Emphasis added][43]

Another context where the problem of division of proceedings often arises is where motions for summary judgment are brought by third parties.

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[41] *Baywood supra* note 17, at paras 33 to 35; see also *Hryniak supra* note 1 at para 60, and *Hamilton (City) v. Thier + Curran Architects Inc.*, 2015 ONCA 64, 2015 CarswellOnt 1222 (Ont. C.A.) [*Hamilton (City)*] at para 22.
[42] *Baywood Homes Partnership v. Haditaghi*, 2013 ONSC 2145, 2013 CarswellOnt 4509 (Ont. S.C.J.), reversed by the Ontario Court of Appeal in *Baywood supra* note 17.
[43] *Baywood supra* note 17 at para 44.

According to the Court of Appeal, summary judgment will not permit a fair and just determination of Third Party Claims where the issues raised by those claims "are inextricably linked to the issues in the main actions".[44] Although the Court of Appeal confirmed that summary judgment is available in the case of a Third Party Claim, it concluded that it was not appropriate in that case, as the issues raised in the Third Party Claims would not be put to rest on the motion, and would still need to be dealt with at the trial of the main actions and other related actions.[45]

Similarly, in the case of *Toronto (City) v. Maple-Crete Inc.*, the Divisional Court upheld the motion judge's refusal to grant summary judgment dismissing the Third Party Claims.[46] Rather, it was held to be unfair and against the goals of timeliness, affordability and proportionality to allow the Third Party Claims to be resolved by way of summary judgment. In particular, the Divisional Court held that allowing the third party to obtain summary judgment "would compel the [defendant] City to prove the claim it is defending in the main action with the prospect that the result of the Third Party Claim may be inconsistent with the outcome of the main action when it is tried".[47]

All of that being said, it is important to note that the Supreme Court of Canada explicitly addressed the issue of division of proceedings. In fact, *Hryniak* itself involved only certain claims being allowed on summary judgment, with other claims to proceed in the normal course. Thus, even "if some of the claims against some of the parties will proceed to trial in any event", it would appear that summary judgment, including the use of the new fact-finding powers, is still appropriate where "the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach".[48]

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[44] *Hamilton (City) supra* note 41 at para 3.
[45] *Ibid* at paras 18 and 23.
[46] *Toronto (City) v. Maple-Crete Inc.*, 2014 ONSC 2371, 2014 CarswellOnt 4875 (Ont. Div. Ct.).
[47] *Ibid* at para 39.
[48] *Hryniak supra* note 1 at para 60. See also the Ontario Court of Appeal's adoption and application of that principle in *Winter v. Royal Trust Co.*, 2014 ONCA 473, 2014 CarswellOnt 8043 (Ont. C.A.) at para 6.

Finally, it appears that an individual litigant, attempting to extract themselves from complicated and expensive litigation, may have a better chance on summary judgment than a large corporate party. In the case of *Density Group Ltd. v. HK Hotels LLC*, an individual defendant who was sued as a company's president and owner, Mr. Kallan, sought to have the action dismissed against him on summary judgment.[49] His motion was granted, and on appeal the plaintiff argued that summary judgment was not in the "interest of justice", because a full trial would be necessary against the defendant company on virtually the same issues.

However, in upholding the motion judge's decision, one consideration relied on by the Court of Appeal was that the motion resolved Mr. Kallan's personal liability, for claims against him in excess of ten million dollars, the threat of which "may well have an impact on his ability to carry on his business affairs".[50]

Onus of putting "best foot forward"

It is now trite law that a party responding to a motion for summary judgment is obligated to "put his or her best foot forward" and to "lead trump or risk losing". These common idioms are in part an implementation of rule 20.02(2), which puts an onus on a party responding to a motion for summary judgment to set out in affidavit material or other evidence the specific facts showing that there is a genuine issue requiring a trial.[51]

In this context, a common sense corollary is that a party who relies solely on a lawyer's affidavit, without putting forward the evidence of the party themselves, runs a serious risk.[52] In particular, the Court is empowered by rule 20.02(1) to, "if appropriate,

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[49] *Density Group Ltd. v. HK Hotels LLC*, 2012 ONSC 3294, 2012 CarswellOnt 9115 (Ont. S.C.J.), affirmed on appeal *Destiny Group supra* note 17.
[50] *Destiny Group* supra note 17, at para 60. In perhaps the judicial understatement of the year, MacFarland J.A. writing for the Court of Appeal observed that "I am sure that to him, having his personal liability determined at this stage is preferable…".
[51] *Rules* at rule 20.02(2).
[52] *Paramandham v. Holmes*, 2015 ONSC 1903, 2015 CarswellOnt 3971 (Ont. S.C.J.) at para 37 [*Paramandham*].

draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts".[53]

In short, where a party makes a strategic decision on how to respond to a motion for summary judgment, even where that decision is based on the costs of responding, the Court will hold the party to that decision.[54] This obviously includes failing to cross-examine an affiant on his or her affidavit, which is routinely held against parties that subsequently attempt to appeal a motion for summary judgment.[55] Furthermore, where a party believes that another party has not complied with their documentary production obligations, there is an onus to take steps to compel production in advance of the motion for summary judgment.[56]

The onus on a party to put his or her best foot forward has been, at times, set quite high. For example, in *Northbridge General Insurance Corp. v. Langston Hall Development Corp.*, it was held against the appellant that they had taken no steps to cross examine on a reply affidavit that was served just over two weeks before the motion for summary judgment was scheduled to be heard, but instead requested an adjournment to allow the cross-examination (which was refused by the motion judge).[57]

It has also been suggested that the onus for a party to put his or her best foot forward is even higher in the post-*Hryniak* environment, because following a refused motion for summary judgment, "the court will now rely on the record before it to decide

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[53] *Rules* at rule 20.02(1).
[54] *Paramandham supra* note 52 at para 40, citing *ThyssenKrupp Elevator v. Amos*, 2014 ONSC 3910 (Ont. S.C.J.).
[55] See for example *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONCA 922 (Ont. C.A.) at para 52.
[56] See *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONCA 878, 2014 CarswellOnt 17095 (Ont. C.A.), where the appellant's complained that the respondent had not complied with its disclosure obligations. The Court of Appeal rejected this argument, citing that the appellants had not moved on the issue in the 17 months between receiving the Affidavit of Documents and the motion, and thus had not put their best foot forward.
[57] See *Northbridge General Insurance Corp. v. Langston Hall Development Corp.*, 2014 ONCA 551, 2014 CarswellOnt 9734 (Ont. C.A.), upholding the motion judge's decision. However, it should be noted that the cross-examination was completed after the motion hearing, followed by written submissions on the issue.

what further steps will be necessary to bring the matter to a conclusion".[58] Properly determining how to efficiently move a failed summary judgment motion to trial requires the parties to have their evidence and arguments on material points before the Court.

Substantive right to a civil jury trial

Another issue that is in a perpetual struggle with the summary judgment process is a civil litigant's right to have issues of fact tried and/or damages assessed by a jury.[59] It is well established by the Ontario Court of Appeal that "the right to a jury trial is a substantive right that cannot be lightly interfered with unless there exist cogent reasons to do so".[60] This principle has been used in support for not granting a motion for summary judgment in numerous cases.

In the recent case of *McDonald v. Doe*, Justice Dunphy considered the existence of a jury notice to be a relevant, but not a conclusive factor on a motion for summary judgment.[61] Although he did not conclude that the existence of a jury notice was a bar to the use of the new powers found in rule 20.04(2.1), Justice Dunphy refrained from exercising those new powers, even though he earlier held that "[t]his court might conceivably be able to resolve [the motion] by employing the "toolbox" of Rule 20.04(2.1) of the *Rules of Civil Procedure* to draw inferences or make findings of credibility".[62] Thus, this decision is arguably inconsistent with the Supreme Court's mandate in *Hryniak*.

Further, in the case of *Yusuf (Litigation guardian of) v. Cooley*, in dismissing a motion for summary judgment, Justice Lederer held that "it cannot be that a mini-trial is to be used to have a factual issue, integral to an understanding of the case as a whole, decided by a

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[58] *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, 2014 CarswellOnt 2149 (Ont. S.C.J.) at para 32. Later, at para 201, Justice Corbett observed that "[t]he plaintiff who treats a defence motion for summary judgment as a speed bump on the long highway to trial risks crashing its case in the deep ditch of dismissal."
[59] *Courts of Justice Act*, R.S.O. 1990, c. C.43, at section 108(1).
[60] *Cowles v. Balac*, 2006 CanLII 34916, 83 OR (3d) 660 (Ont. C.A.) at paras 36 and 154.
[61] M*cDonald v John/Jane Doe,* 2015 ONSC 2607 (Ont. S.C.J.) at para 42.
[62] *Ibid* at paras 40, 45 and 46.

judge with the remainder of the findings of fact being left to a jury".[63] The motion judge held that such a hybrid procedure would be contrary to the "interests of justice".

However, contrast the above cases to Justice Myers' recent decision in *Anjum v. Doe,* where he stressed the importance of summary judgment being a separate dispute resolution process from the traditional trial.[64] Albeit in *obiter*, as there was no binding determination made on the decision in *Anjum*, Justice Myers observed rightly that "[p]arties' entitlements to a trial or to a jury trial are subject to the terms of the statutes and rules under which these processes are created and governed".[65]

By operation of the *Rules*, a party can lose their entitlement to a jury trial on the merits of a case in several ways, including failing to plead any reasonable cause of action or defence, failing to comply with their discovery obligations, and failing to progress the action in a timely fashion. How then, is it any different to allow a party to lose their right to a jury trial, if they are unable to comply with the summary judgment procedure established by the *Rules* and *Hryniak*?

Perhaps more to the point, the mandate in *Hryniak* is for a culture shift. As pointed out by Justice Myers in *Anjum*, "change of the magnitude of a "culture shift" is not business as usual".[66] If all it takes to resist the progress made towards facilitating access to justice in a proportionate, expedient, and affordable way is the filing of a Jury Notice, the advances seeded by the amendments to the *Rules* in 2010 and magnified by *Hryniak* will be undone.

In light of *Hryniak*, the question to ask appears to be whether the issue brought before the Court is capable of being determined fairly without recourse to a full jury trial, which is no longer to be considered the default form of adjudication on the merits.[67] If it

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[63] *Yusuf (Litigation guardian of) v. Cooley*, 2014 ONSC 6501, 2014 CarswellOnt 16148 (Ont. S.C.J.) at para 27, leave to appeal refused; 2015 ONSC 3244 (Ont. Div. Ct.).
[64] *Anjum et al. v Doe et al.*, 2015 ONSC 5501 (Ont. S.C.J.) [*Anjum*].
[65] *Ibid* at para 12.
[66] *Ibid* at para 28.
[67] *Hryniak supra* note 1 at para 43: "The new rule, with its enhanced fact‑finding powers, demonstrates that a trial is not the default procedure."

can be so determined it should be, as the Court will have found pursuant to the directive in the *Rules* and *Hryniak* that a full jury trial was not necessary for a fair and just adjudication.

Pre-emptory motion to dispense with the summary judgment process

Responding to a motion for summary judgment can impose an expensive burden on the party that is dragged into the process. Particularly where a party may be funding their own litigation, or in cases involving an individual litigant facing off against a large sophisticated corporation, there is a real risk that summary judgment might be used as a tactic to bully the smaller litigant into abandoning an otherwise meritorious claim.

So what is a responding party left to do, when faced with a protracted and expensive motion for summary judgment, where every affidavit is likely to be subject to cross-examination, and the hearing could be booked for multiple days?

One potential option, endorsed by the Supreme Court of Canada in *Hryniak*, is for the responding party to bring a pre-emptory motion pursuant to rule 1.05, either seeking directions for the conduct of the summary judgment motion, or even seeking "an order to stay or dismiss a premature or improper motion for summary judgment". [68]

According to the Supreme Court, a motion for directions is warranted where it is "evident that the record would be complex or voluminous".[69] Further, a motion for a stay or dismissal of a summary judgment motion "may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability."[70]

Importantly, where a motion for directions is to be brought, it should be done promptly. In *R & D Partners v. Mediamix Interactive Inc.*, the defendant responding to a motion for summary judgment brought a motion for directions shortly before the motion

[68] *Hryniak supra* note 1 at paras 70 to 73.
[69] *Ibid* at para 71.
[70] *Ibid* at para 72.

for summary judgment, returnable at the same time as the motion, without filing any responding motion materials.[71] Perhaps predictably, the responding party's motion for directions was dismissed and summary judgment was granted.

Furthermore, where a party has not brought a motion for directions under rule 1.05, it may be held against that party, if they attempt to argue that summary judgment was inappropriate due to the number of witnesses required and lack of discoveries.[72]

In Toronto, preliminary issues surrounding motions for summary judgment often come to a head at the newly implemented Civil Practice Court, which has been operating to some extent as a gate-keeper for summary judgment motions. The case of *Anjum v. Doe* was in fact decided following an attendance at Civil Practice Court and a subsequent Case Conference. *Anjum* thoroughly addresses several procedural arguments raised by the parties, including the following: the distinction between summary judgment and bifurcation under rule 6.1; the entitlement of a party to a trial or a jury trial; and the process for the making of case management directions on a summary judgment motion.[73] The decision is a must read for civil litigators who will no doubt enjoy the passionate and compelling prose of the Court, even if not fully agreeing with all of the reasoning or the outcome (as presumably the plaintiff did not).

Appealing orders for directions and other procedural matters

As discussed above, the motion judge hearing a summary judgment motion should be given significant deference. This appears to be particularly true in cases where appeals are launched attacking the procedural handling of the motion, or the manner in which oral or other evidence was allowed to be heard on the motion.[74]

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[71] *R & D Partners v. Mediamix Interactive Inc.*, 2015 ONCA 284, 2015 CarswellOnt 5578 (Ont. C.A.) at para 4.
[72] *Paramandham supra* note 52 at para 38.
[73] *Anjum supra* note 64.
[74] See for example *Northbridge supra* note 57. See also *Fehr v. Sun Life Assurance Co. of Canada*, 2014 ONSC 3447, 2014 CarswellOnt 8152 (Ont. Div. Ct.) at paras 11 and 12, discussing the high deference to be afforded to the

A somewhat peculiar example of this deference is the case of *Arminak & Associates Inc. v. Apollo Health and Beauty Care*.[75] The motions judge, Corbett J., at the hearing of a motion for summary judgment, ordered an adjournment, seized himself of the motion, and made directions for the delivery of further evidence to be filed for his consideration. Neither party had asked for that relief. Apparently dissatisfied with those directions, the moving party brought a motion for leave to appeal Corbett J.'s interlocutory decision.

In rejecting leave to appeal, the Divisional Court found that the appeal was premature and denounced the moving party's conduct in the following terms:

> To countenance such types of appeals in summary judgment motions would open up a Pandora's box of intra-hearing motions for leave to appeal, work great mischief and seriously offend the fundamental principle set out in Rule 1.04(1) that courts must act to secure the fair, timely and cost-effective determination of civil proceedings on their merits.[76]

The Court's comments were likely a backlash against the culture of motions widely said to exist in Toronto.[77] In any event, it would appear that in light of the above, where decisions are made during the course of a motion for summary judgment, either on a motion for directions, during a case conference, or during Civil Practice Court, that intra-hearing decision will be shown significant deference, so long as it is procedural in nature and does not reach a final disposition on any substantive issue.

Post-motion handling of the trial by the motion judge

In discussing the extensive trial-management procedures available after a failed motion for summary judgment,[78] the Supreme Court held that "[w]here a motion judge

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discretionary decision made at a case management conference, requiring the parties to proceed to motions for summary judgment and class certification, without being obliged to exchange Affidavits of Documents.

[75] *Arminak & Associates Inc. v. Apollo Health and Beauty Care*, 2014 ONSC 5806, 2014 CarswellOnt 13852 (Ont. Div. Ct.).

[76] *Ibid* at para 12.

[77] Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region, Effective July 1, 2015, Superior Court of Justice. Civil Practice Court was in fact instituted, in part, "[t]o curtail the motions culture in Toronto…".

[78] Rule 20.05 of the *Rules* sets out the procedure to be followed where summary judgment is refused, and 20.05(2) in particular states that, if the Court held that certain material facts are not in dispute and defined the

dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge."[79]

Where a motion for summary judgment is refused, and the motion judge does not seize themselves of the trial or provide other directions on the handling of the matter, there is authority to support that a judge of the Divisional Court hearing a motion for leave to appeal the initial decision can make such directions and even order a summary trial.

In *Wendy Sokoloff Professional Assn. v. Mahoney*, the Divisional Court refused leave to appeal a motion refusing to grant summary judgment. However, "to try to recoup the lost costs in a failed summary judgment motion" the matter was ordered to be set down for a summary trial on the contested limitation period issue, using the written record that was filed on the motion, supplemented by oral evidence as necessary.[80]

Furthermore, albeit in *obiter*, it has also been suggested that where a judge refuses a motion for summary judgment, a subsequent failure to address the issues of seizing themselves of the trial or providing other directions might be an appealable error of principle:

> The motions judge did not seize himself of the remaining steps in this case, nor did he provide a timetable for completion of the case. Neither did he provide reasons for not doing these things. This, arguably, is an error in principle in failing to follow the direction of the Supreme Court of Canada in *Hryniak v. Mauldin* and could form a basis for granting leave to appeal. However, this was not the basis advanced on this motion.[81]

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issues to be tried, "the court may give such directions or impose such terms as are just". The rule also sets out a laundry list of potential directions and terms. Importantly, pursuant to recent amendments to Rule 50, the judge or case management master hearing a pre-trial conference can make such orders as are considered necessary or advisable, "including any order under subrule 20.05 (1) or (2)"; see rule 50.07. Combined with the Court's new ability to convene a pre-trial at any time, at a judge's direction (see rule 50.02(3)), the Courts now have an unprecedented ability to conduct case management.

[79] *Hryniak supra* note 1 at para 78.

[80] See *Wendy Sokoloff Professional Assn. v. Mahoney*, 2015 ONSC 2007, 2015 CarswellOnt 4213 (Ont. Div. Ct.) at pars 17 to 18.

[81] *Maria-Antony v. Selliah*, 2015 ONSC 2951, 2015 CarswellOnt 6741 (Ont. Div. Ct.) at para 4.

That being said, for the seizing of a trial to become the norm following a failed motion for summary judgment, Ontario's Courts may well need to significantly change their current procedures for the scheduling of both motions and trials. It remains to be seen whether Ontario Courts can or will implement the changes necessary to: a) have sufficient judicial resources available for the increasing volume of motions for summary judgment; and b) allow sufficient flexibility for judges to comply with the Supreme Court's mandate that, in the normal course, a summary judgment motion judge should seize themselves of the trial, if one is necessary.

This mandate is often not followed, with judges regularly citing scheduling problems, including "as a result of the manner of judicial assignment in [the Toronto] region".[82] Alternatively, judges may make the dismissive and thinly veiled comment that, despite reading the volumes of materials put before them and hearing the submissions of counsel, they did not make any findings on the evidence that would allow for material economies or savings of Court resources to be achieved, should they remain seized of the trial.[83]

Importantly, the Supreme Court of Canada noted in *Hryniak* that "to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices".[84] One wonders if the government is fully aware of this issue, or is prepared to devote the additional necessary resources required to truly give full legal effect to the visionary mandate given to the bench, the bar, and our very profession in *Hryniak*.

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[82] *Anjum supra* note 64 at para 43.
[83] See for example, *Canaccord Genuity Corp. v D'Ambrosi*, 2015 ONSC 1344 (Ont. S.C.J.) at para 26; *3 Genius Corp. v Locationary Inc. et al.*, 2015 ONSC 1439 (Ont. S.C.J.) at para 23; or *Foster v. Wood*, 2015 ONSC 1099 (Ont. S.C.J.) at para 11.
[84] *Hryniak supra* note 1 at para 79.

Conclusion

The authors respectfully suggest that a summary judgment motion should, more often than not, lead to a decision on the merits, one way or the other. When both parties go to the time and expense of putting their best foot forward, including the best evidence and best legal argument, motion judges should be very reluctant to fail to reach a conclusion on the issues before them.

Furthermore, when the bright and capable judges of Ontario take the time and effort to hear a motion for summary judgment, including reading all of the material and hearing the arguments, that expenditure of scarce public resources should, wherever possible, not go to waste.

Where a summary judgment motion fails, some parties may not have the appetite to expend further resources (money, time and energy) to take the case to trial. One of the prime risks faced by a moving party is that they will expend significant time and expense, and after having no determination on the merits reached, end up exactly where they started. Where this happens, losing the motion often becomes tantamount to losing the case, and clients become more eager to settle, sometimes regardless of the merits of the claim. The hypothetical trial of the "genuine issue requiring a trial" that could not be resolved by the motion judge rarely happens in practice.[85]

Although entirely anecdotal, the authors can advise that based on a fair amount of experience losing summary judgment motions pre-*Hryniak* in favour of a full trial to determine the issue in dispute, no such trial(s) ever actually happened. To a certain extent, both parties shot their proverbial judicial hearing bullet on the summary judgment motion.

Particularly in light of the additional powers now available to the motions judge, where possible, the matter at issue on the motion should be resolved, either for or against

[85] *Hryniak supra* note 1 at para 4: a conventional trial "is not a realistic alternative for most litigants".

the moving party, even if further additional evidence (in a variety of potential forms) may be necessary for the Court to be able to reach a fair and just adjudication of the issue.

A particularly concerning decision in this respect is the case of *Daneluzzi v. 876336 Ontario Ltd.*, where the plaintiffs brought a motion for summary judgment and in response, the defendants requested that the plaintiff's action be dismissed.[86] In other words, both parties agreed that the issues in dispute could be resolved based on the record placed before the Court, although they obviously differed on the proper result. Notwithstanding, the motion judge dismissed the plaintiffs' motion and refused the defendants' request to reach the opposite finding, essentially because both parties failed to provide expert evidence on the main issue in dispute.[87] Furthermore, when both parties sought leave to appeal from the Divisional Court, both motions for leave to appeal were denied.[88]

One wonders if the trial the court has said is necessary in this case will actually happen given the time, energy and resources spent by both parties on the summary judgment motion and the motions for leave to appeal. An unhappy compromise appears a more likely outcome for most litigants in similar situations.

Both decisions in *Daneluzzi* are likely a result of the particular facts of that case. However, certainly as a general rule, where two parties both ask the Court to reach a determination on the merits of the case, based on the written record before it, the Court should be inclined to oblige and grant a summary disposition for one party or the other. Importantly, the wording of rule 20.04(2)(b) suggests that summary judgment should be more readily granted where the parties agree to have all or part of the claim determined summarily.[89]

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[86] *Daneluzzi v. 876336 Ontario Ltd.*, 2015 ONSC 229, 2015 CarswellOnt 109 (Ont. Div. Ct.) [*Daneluzzi*]. Note: this is the decision of Justice KcKelvey on the motions for leave to appeal; the first instance motion decision of Justice Corkery does not appear to have been reported.
[87] *Ibid* at paras 2, 13-14 and 21.
[88] *Ibid* at para 25.
[89] *Rules* at rule 20.04(2)(b), which is an alternative to (a), and does require the Court to find that there is no genuine issue requiring a trial; rather, where the parties agree to proceed summarily, the court must be satisfied that it is appropriate to grant summary judgment. This should certainly be an even lower threshold.

Even where only partial summary judgment is granted, or one defendant is released from the action, but other defendants remain, so long as the key issue that separates the parties can be resolved on its merits, the remaining issues or the remaining parties may be more likely to reach an appropriate settlement.[90]

If it is truly preferable to have a decision on the merits, rather than no determination at all, then it is respectfully suggested that judges should also be more inclined to grant "reverse" summary judgment. "Reverse" summary judgment is where an issue is determined on the merits, but against the interest of the party that moved for summary judgment. In two different cases, the Ontario Court of Appeal has explicitly held that reverse summary judgment is open to a motions judge, rejecting the appellants' arguments that it was an error for the motion's judge to grant summary judgment in favour of the party that had not sought it.[91] Incidentally, it can be difficult for a moving party to oppose a finding of "reverse" summary judgment, at least on procedural grounds, as their motion is inherently premised on the argument that one or more of the issues in dispute can and should be dealt with summarily.

However, it is acknowledged that although some sort of determination on the merits should be preferred on most motions for summary judgment, there will inevitably be cases where that is truly not possible. In *Baywood Homes Partnership v. Haditaghi*, the Ontario Court of Appeal explained the risk that nothing productive might come from an expensive and protracted motion for summary judgment as follows:

> Lawyer time is expensive, whether it is spent in court or in lengthy and nuanced drafting sessions. I note that sometimes, as in this case, it will simply not be possible

[90] For example, see *Argante v. Munro*, 2014 ONSC 3626, 2014 CarswellOnt 11623 (Ont. S.C.J.), where the moving defendant driver was successful in having the action and crossclaim dismissed as against her on grounds that there was no implied consent for possession of a motor vehicle. The determination of this key issue and removal of the defendant driver allowed the remaining parties to settle the case.

[91] See *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215, 2014 CarswellOnt 3328 (Ont. C.A.) at para 14, and *Kassburg supra* note 55 at para 52. Based on the Court of Appeal's decision in *King Lofts*, where reverse summary judgment appears probable during a hearing, it may be appropriate to request an adjournment to properly address the issue, as the appellant's failure to request an adjournment at the time of the motion hearing was held against them on the appeal.

> to salvage something dispositive from an expensive and time-consuming, but eventually abortive, summary judgment process. That is the risk, and is consequently the difficult nettle that motion judges must be prepared to grasp, if the summary judgment process is to operate fairly. [Emphasis added][92]

However, in light of the trends and issues discussed above, the authors are cautiously optimistic that a culture shift has at least begun. It is hoped that this trend can and will continue. If additional court resources and changes to the current scheduling system(s) are required, as would appear to be the case, it is also hoped that those resources and changes will be forthcoming.

If not, it is feared that the gains made to date will eventually be lost and the repairs needed to a system of justice that is acknowledged to be broken will not be carried out. This would be an unwelcome outcome, particularly when it would seem that the problem has been identified and the solution crafted. Now, it is suggested that the solution just needs to be adequately supported. Canadian civil litigants certainly deserves as much.

[92] *Baywood supra* note 17 at para 45. It should be noted that the cited paragraph is preceded by a suggestion that judges are aware that motions for summary judgment will not necessarily be cheaper than an ordinary discovery and trial process. With respect, the authors have some doubt about the accuracy of this suggestion.