Access to Justice & Summary Judgment Post-Pandemic: A "Culture Shift" - At Long Last?

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June 2020

The Covid-19 pandemic looks set to be the impetus for much change in the world as we knew it, not least with respect to the administration of justice. The courts have recognized both the need to bring the Ontario judiciary into the virtual world and the benefits that could be derived from same when society emerges fully from these unprecedented times, including more timely and cost effective access to justice.

This is not the first "crisis" that has rallied a call for change in the courts' system. In 2014, the Supreme Court of Canada spoke of Ontario's "broken" civil justice system in the seminal case of *Hryniak v. Maudlin*[1].

Summary judgment was heralded as the way forward in increasing access to justice and promoting proportionality, expediency and affordability in the context of civil litigation.

The Supreme Court of Canada held that a "culture shift" was required to promote these goals, in particular by "moving the emphasis away from the conventional trial". In that way, summary judgment was primed as the catalyst for change in the administration of justice in Ontario and beyond.

While there were optimistic beginnings, the "culture shift" that was envisioned by the Supreme Court of Canada in theory has fallen far short in reality, particularly in certain practise areas, including personal injury and insurance law. The caselaw that has followed in the six (6) or more years since *Hryniak* reveals many reasons for same, including a scarcity of judicial resources and the impact of interpretative/judicial erosion.

[1] *Hryniak v. Maudlin,* 2014 SCC 7

Then, enter the Covid-19 pandemic, which served to ground an already "broken" system to a complete halt, albeit briefly, and from which we are now starting to emerge.

Looking Back to Look Forward

Over the past few months, we have seen the judiciary quickly and creatively respond to the challenges imposed by the Covid-19 pandemic. In this way, we have seen the makings of the "culture shift" called for by the Supreme Court in *Hryniak*, and the courts appear invigorated by the efficiencies that are already emerging.

Let's look back briefly to see past obstacles, and how the Ontario courts can move forward and renew its efforts to promote the efficiencies of summary judgment that the Supreme Court of Canada extolled in *Hryniak*, in the post-Covid-19 pandemic era.

Scarcity of Judicial Resources

In *Hryniak*, the Court noted 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".

There is a distinction between the courts being so prepared and having the necessary additional resources required to truly give full legal effect to the vision of the Supreme Court in *Hryniak*. This vision has, unfortunately, not come to pass, in part because of the scarcity of judicial resources, including the number of judges, and the lack of available government funding to facilitate such change.

Further, the courts were notoriously slow to embrace the digital age.

While the Covid-19 pandemic will unlikely serve to increase judicial resources and funding (in fact the opposite could be true), what it has done is force the courts to quickly adapt to more remote operations and, presumably, to find ways to reallocate the resources that are available in order to ensure ongoing access to justice.

Justice Edwards expressed this very sentiment in the recent case of *Blaese v. Metcalfe*[2] where he stated that "with the covid-19 pandemic, it has become increasingly apparent to the court that wherever possible, judicial economies of scale will have to be employed in the future to ensure that parties have access to our court system".

[2] *Blaese v. Metcalfe, 2020 ONSC 2432*

Equally, the cost benefits of summary judgment in the post-Covid-19 era can and should no longer be ignored as part of the conversation of preserving judicial economies of scale.

To date, however, summary judgment post-*Hryniak* has often been a cost prohibitive and ineffective process. There have been countless motions for summary judgment since *Hryniak* where bright and capable judicial officers have reviewed mountains of evidence and heard detailed submissions from counsel, but the motion was dismissed in favour of a full trial of the issues in dispute (a trial that rarely if ever actually happens).[3]

The time, money and energy of all involved is put to effective waste where more often than not, the motion is simply dismissed in favour of the mythical trial and the motion judge rarely remains seized or looks to make use of the evidence gathering process to date. It is the authors' view that this was an unfortunate development and one that must change in the post-Covid-19 pandemic era we are entering into.

Jury Trial is Not the Default

Despite *Hryniak*, it would appear that at least theoretically, the full jury trial remained the default in Ontario in the pre-pandemic era.

In *Anjum v. Doe*[4], Justice Myers held that if all it takes to resist the progress made in *Hryniak* is the filing of a jury notice, the advances seeded by the *Rules* change in 2010, and magnified by the Supreme Court in *Hryniak,* would be undone.

Despite same, the presence of a jury notice has persisted as a basis for not granting summary judgment.

In *Brown v. Dalessandro*[5]*,* despite an abundance of evidence available to decide the issue summarily, the Court still required the "jury" to assess credibility at trial. As the parties were presumptively entitled to a trial by jury, the Court refused to even open the "tool box" and/or to conduct a mini-trial or other bifurcated process.

Similarly, in *Wettlaufer v. K2D2 Investments Inc.*[6], the Court did not wish to usurp the role of the jury and stated that since both parties elected to have their dispute tried by a jury, including the party seeking summary judgment, they should have the issue so decided.

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[3] *A Real Culture Shift Post-Hryniak?,* Stephen G. Ross and Nathaniel Dillon-Smith, Osgoode Professional Development, October 13, 2014, "11th Annual Update – Personal Injury Law & Practice" at pg. 26
[4] *Anjum et al. v. Doe et al*, 2015 ONSC 5501
[5] *Brown v. Dalessandro,* 2016 ONSC 1724

[6] *Wettlaufer v. K2D2 Investments Inc.*, 2018 ONSC 408

As indicated, more often than not, we know (at least statistically speaking) that that theoretical trial on the merits rarely occurs, as full trials have become prohibitively expensive, time-consuming and risky. This is particularly so where the parties have already been though an expensive and time-consuming summary judgment motion process.

Further, and looking forward once full operations are resumed, the courts face a significant challenge to deal with the already back-logged trial list in all areas of the court's responsibility, particularly in Toronto.

In *MacPherson v. Samuel*[7], Justice Kimmel cited a host of cases which concluded that the existence of a jury notice is not relevant to the determination of the question of whether there is a genuine issue requiring a trial on a summary judgment motion.

Indeed, now more than ever, a jury trial should no longer be the default in cases otherwise appropriate for disposition by summary judgment.

Interpretive Erosion

The success of summary judgment post-*Hryniak* has been further hindered by what is commonly known as interpretive erosion.[8]

The onus on motion for summary judgment is that each party put its "best foot forward" and "lead trump or risk losing". The motions judge is entitled to assume s/he has all the evidence that would be available at trial.[9]

This presumption has also often been honoured in the breach post-*Hryniak* (and pre-pandemic) since, at least in the area of personal injury law and insurance law, parties are often given a second or even third kick of the can.

Oftentimes, "missing" evidence has been the basis for which the Ontario courts have declined to order summary judgment.

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[7] *MacPherson v. Samuel*, 2020 ONSC 2849 at para. 43

[8] *Effecting a Culture Shift – An Empirical Review of Ontario's Summary Judgment Reforms*, Brooke MacKenzie, (2017) 54 Osgoode Hall Law Journal

[9] *A Real Culture Shift Post-Hryniak?*, Stephen G. Ross and Nathaniel Dillon-Smith, Osgoode Professional Development, October 13, 2014, "11th Annual Update – Personal Injury Law & Practice" at pg. 17

In *Cartini v. Square One Ltd.*[10], the defendant landlord moved for summary judgment with expert evidence that the parking lot was safe and in compliance with all legal requirements. The plaintiff elicited no expert evidence and despite the urging of the judge, did not amend the claim to particularize her alternative "unsafe shopping cart" theory.

At the second attendance, the plaintiff, who led no evidence on the theory, was given a third kick at the can to present a case that there was a triable issue with respect to her still unparticularized "unsafe shopping cart" theory. The matter was sent back to pleadings stage on that issue and the summary judgment motion was dismissed.

In *Efremova v. Spadaccini*[11], the plaintiff was found to be in "bare compliance" with her duty to put her best foot forward but when she pointed to "missing" evidence, in the form of a "doggy DNA test" to identify the dog that had bit her, the defendant's motion for summary judgment was dismissed citing a genuine issue for trial.

In *Rego v. Walmart*[12], the defendant moved for summary judgment and tendered video evidence of the plaintiff's fall. Dozens of people were seen walking over the impugned area of the floor both before and after the fall. Three (3) employees swore affidavits to establish that there was nothing on the floor where the plaintiff fell. The plaintiff conducted no cross-examinations of those witnesses.

At the motion, the plaintiff alleged that a trial was nevertheless necessary in part because the so-called "CCTV operator" was a relevant witness (missing evidence) whose evidence was "necessary" for proper adjudication. The motion was dismissed on the basis of this and other similar "missing" evidence. Leave to appeal was denied by the Divisional Court.

It is submitted that moving forward, the courts will need to take a distinct step back from providing parties multiple chances to remedy defects in the evidence. In the coming era of even far greater scarcity of judicial resources, the system may simply not be able to bear it.

It may well be necessary to give real and meaningful effect to the "lead trump or lose" principle and the presumption that the motion judge has all the evidence that will be

[10] *Cartini v. Square One Ltd.,* 2016 ONSC 8151

[11] *Efremova v. Spadaccinii,* 2016 ONSC 7848

[12] *Rego v. Walmart,* 2017 ONSC 2599

available at trial, if there is any hope to clear the judicial backlog and provide ongoing access to justice.

Covid-19: Not Business as Usual

In 2015, Justice Myers astutely opined in *Anjum*[13] that "change of the magnitude of a "culture shift" is not business as usual".

The wheels of justice move slowly and it is only now, over six (6) years later, and in response to a worldwide pandemic, that the Ontario courts appear ready to embrace the culture shift envisioned by the Supreme Court of Canada to fix Ontario's "broken" civil justice system.

The court has already seen the advantages of requiring litigants to use virtual means to comply with procedural timelines, produce documents, engage in examinations for discovery and cross-examinations, and attend pre-trials, case conferences, hearings, and even trials.

In fact, the court has encouragingly commented that "virtual hearings are likely to retain a permanent place in the judicial tool box"[14].

Notably, in *Arconti v. Smith*[15], Justice Myers opined that "in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts." Further, His Honour commented that "we now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back."

The court also now seems prepared to take the necessary steps to reduce its backlog and deliver timely access to justice. In *Blaese*, Justice Edwards indicated that an amendment to the *Rules of Civil Procedure*, giving the court the discretion to bifurcate issues of liability and damages absent the consent of the parties, is something that the Civil Rules Committee may wish to consider.

Moving forward, we are hopeful that in its evaluation of the tools and processes available to ensure access to justice, the courts will also breathe new life into the summary judgment process in the various ways described above. It is the authors' view that an

[13] *Supra* at para. 28
[14] *Scaffidi-Argentia v. Tega Homes Developments Inc2020 ONSC 3232* at para. 1
[15] *Arconti v. Smith,* 2020 ONSC 2782 at paras. 19 and 33

actual *Hryniak*-like summary judgment process should be added to the "judicial toolbox" to meet the challenges of the post-pandemic era.

The judiciary should now be encouraged, or even required, to embrace summary judgment in the manner they were asked to by the Supreme Court of Canada in 2015. We are optimistic this this will be the case as we this trend already emerging in the caselaw.

In *Scaffidi-Argentia v. Tega Homes Developments Inc.*[16], Justice MacLeod revisited his pre-pandemic refusal to schedule a motion for summary judgment and granted the scheduling request, given that the trial of the action would be at least a year away post-pandemic.

Justice Pazaratz reviewed the Superior Court Protocols and Notices to the Profession issued during the Covid-19 pandemic in *CCAS v. I.B. et al*[17], a child protection case. In ordering that a summary judgment motion proceed via video conference over two full days, His Honour dismissed concerns that the motion was too complicated to proceed by Zoom videoconference.[18]

As stated by Justice Myers in *Arconti* when addressing the use of technology, "we should not be going back"[19].

It is the authors' hope that when combined with the court's recent and ongoing technological revolution, a revamped summary judgment process can provide the courts with the "judicial toolbox" necessary to meet the coming challenges. Time will tell.

[16] *Scaffidi-Argentia v. Tega Homes Developments Inc2020 ONSC 3232* at para. 8
[17] *CCAS v. I.B. et al.,* 2020 ONSC 3220
[18] *Ibid* at para. 11
[19] *Supra* at para. 33