Civil Procedure
Law 225

Fall 2018

Lecture Notes No. 5

SIMPLE MOTIONS

Please familiarize yourself with Rule 37 (procedure) and Rule 39 (evidence) in respect of pre-trial motions, particularly: jurisdiction, service, materials, motion records, and cross-examination on affidavits. The rules are straight-forward but please read the various provisions carefully.

Some common motions:	**Rule**
Extend or abridge time.	3.02
Joinder of claims.	5.02
Add parties	5.03
Correct a party's name	5.04
Consolidation	6.01
Appoint Litigation Guardian	7.02(1.1)
Appoint representative for unascertained party	10
Leave to intervene as a party	13.01
Extend time for service of pleadings	3.02
Validate service	16.08
Remove lawyer as solicitor of record	15.04(1)
Set aside order noting party in default	19.03
Set aside default judgment	19.08
Exempt the action from mandatory mediation	24.1.05
Provide particulars	25.10
Strike out all or part of pleadings	25.11
Amend pleadings	26.01
Summary judgment	20.01
Determine question of law	21
Inspection of documents	30.04(5)
Production of documents from non-party	30.10(1)
Inspection of property	32.01
Notice of examination	31.02
Compel Answers	34.10
Medical Examination of a party	33.03
Directions for oral examination of a party	34.14
Taking evidence before trial	35.06
Grant Certificate of Pending Litigation	42.01

A. JOINDER AND CONSOLIDATION

(i) Joinder

Rule 5

5.01 (1) A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party.

(2) A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding.

(3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding.

5.02 (1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,

(a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding; or

(c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

(2) Two or more persons may be joined as defendants or respondents where,

(a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding;

(c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;

(d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or

(e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

...

(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

...

(6) The court may by order relieve against the requirement of joinder under this rule.

...

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

(a) order separate hearings;

(b) require one or more of the claims to be asserted, if at all, in another proceeding;

(c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;

(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

(e) make such other order as is just.

Tanner v. McIlveen Estate
2012 ONSC 2983 (Ont. S.C.J.)

Two patients of the defendant physician sued for sexual assault and sought to join their claims and argue that each other's evidence was admissible in their trial as similar fact evidence. The defendant resisted and moved to sever the two trials under Rule 5.05.

Lederman J.:

[8] The Master found that the plaintiffs met the test for joinder. She found that the claims shared common issues of law and fact. The expert evidence necessary to establish the standard of care will be common to both plaintiffs' claims. The evaluation of the admissibility of similar fact evidence at trial is in and of itself an issue of mixed fact and law that is common to both plaintiffs. Moreover, multiplicity of proceedings which would unduly inconvenience the expert witnesses and possibly other witnesses at trial should be avoided.

[9] The Master found that, furthermore, if the plaintiffs' claims are severed, there could be different determinations reached by two different trial judges on the issue of the admissibility of similar fact evidence. As a result, the continued joinder of the plaintiffs' claims would allow for the efficient judicial determination of the admissibility question.

...

[21] Rulings on the admissibility of similar fact evidence are solely within the authority of the trial judge. Depending on such findings, the trial judge has the power to allow the action to proceed or to sever the claims into two trials in order to avoid prejudice. Moreover, in this way,

if the trial judge determines that the plaintiffs' evidence constitutes admissible similar fact evidence in support of each other's case, the trial judge can allow the action to proceed and thereby avoid the risk of inconsistent findings and verdicts that could arise if there were to be two trials; if the similar fact evidence is held to be inadmissible, the trial judge may order that there be two separate trials.

[22] In the end, the Master considered whether continued joinder would unduly complicate or delay or cause undue prejudice as is required by Rule 5.05 and reasonably exercised her discretion to conclude that, at this stage of the proceeding, severance was not appropriate.

[23] In doing so, the Master has made no error of law nor exercised her discretion on wrong principles and, accordingly, there is no basis to interfere with her decision.

[24] Having so found, it is unnecessary to consider whether the Master erred in concluding that joinder of the claims in the first instance was appropriate.

Buhlman v. Peoples Ministries Inc.
2009 CanLII 26918 (Ont. S.C.J.)

A school closed and 24 plaintiffs sued for wrongful dismissal. The school moved to separate the trials of the claims notwithstanding that all were represented by the same lawyer and that the actions were all against the same defendant.

Master Brott:

[7] The Statement of Claim identifies that each of the plaintiffs entered into a standard form employment agreement with the defendant which was renewed annually by the defendant. Peoples submits that the plaintiffs' claims for damages arise as a result of alleged breaches of contract arising from separate transactions. Peoples submits that there are only three common occurrences as follows:

(a) All plaintiffs were employed by the defendant;

(b) 21 of the 24 plaintiffs received Notices of Termination on the same day; and

(c) All of the plaintiffs had similar written employment contracts.

[8] The defendant asserts that what is at issue is whether the plaintiffs were wrongfully dismissed and that determination rests on whether or not they have been given improper notice. To determine notice, the court will look at the age, length of service, compensation and other relevant factors. It is the defendant's position that the factors relating to each plaintiff vary significantly.

...

[10] In assessing whether there are issues of fact or law common to the plaintiffs' claims in the context of multi-party litigation, the focus should be on whether there is a common issue of fact or law that bears sufficient importance in relation to the other facts or issues in the proceeding.

[11] The Statement of Claim sets out ten causes of action and of those, all plaintiffs share six of the ten causes of action. They include claims for wrongful dismissal, breach of contract, restoration of the salary freeze, performance bonus, punitive damages and retaliatory conduct.

[12] Peoples submits that the common issues of fact between the plaintiffs' claims (namely employment by Peoples and when notice was received) bear limited importance in relation to the other facts in the proceeding. It asserts that the plaintiffs were all employed in various capacities, they each had different circumstances of employment, (part-time, maternity leave, health issues et al), they each worked for the defendant for a different length of time, they each had different training and they each mitigated their damages differently.

[13] The defendant asserts that because there is no commonality between each of the plaintiffs, separate productions, examinations and expert evidence will be necessary because of the significantly different claims advanced by each of the plaintiffs.

[18] The pleadings and the evidence establish numerous facts and law which militate against severance. The claims of all of the plaintiffs arise from the same standard form employment contract. All plaintiffs were terminated at the same time. Many of the commonalities, which I accept for the purposes of this motion, are outlined at paragraphs 31 – 33 of the responding parties' factum. Further there is a good possibility that some of the plaintiffs will rely on the evidence of other plaintiffs at trial. Should the claims be severed, there would be an increase in cost and length of each trial.

[19] Although there are some differences with respect to the claims of each of the plaintiffs, I agree with Molloy, J in Suguitan v McLeod, [2002] O.J. No 878 (S.C.J.) that "the trial judge will easily be capable of sorting out which evidence relates to which plaintiff".

[20] On the issue of prejudice, I am not satisfied that the defendant has put forth a strong factual foundation of potential adverse consequences. The caselaw is clear that the court must consider what is fair and just, given the consequences of a joined or separate action on each of the parties. On the evidence before me, I find that if severance is granted, the plaintiffs will suffer great inconvenience, significant adverse financial challenges and delay. I am satisfied that the joinder of the plaintiffs' claims balances the interests of the administration of justice and fairness to reach the most expeditious and least expensive result.

(ii) Consolidation

> 6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,
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> (a) they have a question of law or fact in common;
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
> (c) for any other reason an order ought to be made under this rule,
> the court may order that,
> (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
> (e) any of the proceedings be,
> (i) stayed until after the determination of any other of them, or
> (ii) asserted by way of counterclaim in any other of them.
>
> ...

Soilmec North America Inc. v. D'Elia
2011 ONSC 5214 (Ont. S.C.J.)

The plaintiff sued one defendant for failing to pay on a lease of drilling equipment and retaining the equipment after the lease terminated. The plaintiff also sued the defendants' directors personally in a separate action. The plaintiff sought to consolidate the two actions.

Boswell J.

> [14] Orders to consolidate proceedings, or requiring that they be heard together, are discretionary. In exercising the discretion granted by Rule 6.01, courts have looked not only at the factors enumerated in the rule, but also whether the balance of convenience favours such an order...
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> [15] The purpose of consolidating proceedings is to save expense and to avoid a multiplicity of pleadings and proceedings, with the potential for inconsistent results...
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> [16] **Consolidation differs in significant ways from an order that matters be heard together... Consolidated actions proceed as one. They typically require parties to re-plead so that there is just one set of pleadings. There is one set of discoveries and one pre-trial. All issues are subsequently dealt with in one trial. Actions ordered heard together, however, maintain their distinct identities. But that said, the court maintains the discretion to order common discoveries and pre-trials. In other words, many of the same economies may be realized even though actions are not formally consolidated.**
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> **[17] Ultimately, in exercising the discretion under Rule 6.01, the court must be mindful of the direction in Rule 1.04(1) to interpret and**

apply the Rules so as to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

The Principles Applied to this Case

[18] In this instance, it is clear that the two proceedings – the KC Action and the Directors' Action – arise from the same transaction. In effect, the Plaintiff is seeking to impose personal liability on the Directors for any damages arising from KC's breach of the lease agreement. The breach of the lease by KC is an issue common to both proceedings.

[19] There are, however, significant differences between the two actions. For instance, the parties are different. There is an additional plaintiff in the KC Action. The Defendants are entirely different between the claims. More significant, however, are the differences in the issues to be determined. While KC's purported breach of the lease is an issue common to both proceedings, the issues are otherwise substantially different. The KC Action is essentially a claim for damages arising from a purported breach of contract. In the Directors' Action, the Plaintiff seeks to fix the individual Defendants with liability based on their roles as directors of KC. The claim is grounded, for the most part, in tort...

[20] In my view, **the most advantageous method of proceeding is to order the two matters heard one after the other, beginning with the KC Action. Essentially the Plaintiff asserts that KC breached the lease and should be responsible in damages. Further, that the Directors should be personally liable for their roles in causing KC to commit the alleged breaches. If the court determines in the KC Action that there has been no breach, or that no damages were suffered, then there really is no substance to the Directors' Action. If the same judge hears both actions, one after the other, then there is little risk of an `inconsistent finding regarding whether KC breached the lease or not.**

[21] In the meantime, both actions remain at the pleadings stage. Affidavits of Documents have not been exchanged and discoveries have not yet been held. The court has the discretion under Rule 6.01(2) to give directions regarding the process to be followed in the two proceedings to avoid unnecessary costs or delays. In my view, it makes sense that there be common discoveries and pre-trials in the actions. But the actions should otherwise be tried separately, with the Directors' Action to immediately follow the KC Action.

[22] One of the benefits of proceeding in the fashion I have outlined is that the trial judge will, pursuant to Rule 6.02, retain the discretion to order that the actions proceed other than as I have directed. It may be that, as a result of further developments in the actions, there is good reason to proceed in a manner other than what I have outlined. The trial judge will have the discretion to proceed as he or she sees fit, at the relevant time. Arguably, based on the wording of the rule, the same discretion is not retained if the actions are consolidated.

B. DETERMINE A POINT OF LAW UNDER RULE 21

21.01 (1) A party may move before a judge,
(a) **for the determination, before trial, of a question of law** raised by a pleading in an action **where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs**;

Gowling Lafleur Henderson v. Springer
2013 ONSC 923 (Ont. S.C.J.)

Per Himel J.

[20] In ***Toronto Dominion Bank v. Deloitte Haskins & Sells*, (1991) 5 O.R. (3d) 417(Gen. Div.)** at para. 3, R.A. Blair J. listed the following principles or tests to be applied on a motion under Rule 21.01(1) as follows:

(i) the allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven;

(ii) the moving party, in order to succeed, must show that it is plain, obvious, and beyond doubt the plaintiff could not succeed;

(iii) the novelty of the cause of action will not militate against the plaintiff; and,

(iv) the statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies.

[21] In *Toronto Dominion Bank*, he also wrote at para. 54: "I am of the view that these same principles or tests apply whether the motion is brought under rule 21.01(a) or (b). Both involve a consideration of legal principles applied to facts as set out in the pleadings."

[22] The test to be applied on a motion to strike a pleading under Rule 21 is, assuming that the facts as stated in the statement of claim can be proven, whether it is "plain and obvious" that the pleading discloses no reasonable cause of action : see Hunt v. Carey, [1990] 2 S.C.R. 959 at para. 33. Only if the action is certain to fail because it contains a radical defect should it be struck (*Hunt* at para. 33). On such a motion, no evidence is admissible. The motions judge is to read the pleadings generously with allowance for inadequacies due to drafting deficiencies...

[23] **Rule 21.01(1)(a) is designed to shorten proceedings by determining legal issues before trial where the law is clear, the law is not hypothetical, the law is not dependent upon disputed facts and the legal conclusion is plain and obvious. The court should not at this stage of**

proceedings dispose of matters of law that are not fully settled in the jurisprudence...

C. DISMISSAL FOR DELAY

48.14 (1) Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances, subject to subrules (4) to (8):

1. The action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action.

2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off.

Exceptions

(1.1) Subrule (1) does not apply to,

(a) actions placed on the Commercial List established by practice direction in the Toronto Region; and

(b) actions under the Class Proceedings Act, 1992. O. Reg. 487/16, s. 8 (2).

…

Order to Client

(3) A lawyer who is served with an order made under subrule (1) shall promptly give a copy of the order to his or her client. O. Reg. 170/14, s. 10.

Timetable

(4) Subrule (1) does not apply if, at least 30 days before the expiry of the applicable period referred to in that subrule, a party files the following documents:

1. A timetable, signed by all the parties, that,
   i. identifies the steps to be completed before the action may be set down for trial or restored to a trial list, as the case may be,

   ii. shows the date or dates by which the steps will be completed, and

iii. shows a date, which shall be no more than two years after the day the applicable period referred to in subrule (1) expires, before which the action shall be set down for trial or restored to a trial list.

2. A draft order establishing the timetable.

Status Hearing

(5) If the parties do not consent to a timetable under subrule (4), any party may, before the expiry of the applicable period referred to in subrule (1), bring a motion for a status hearing.

(6) For the purposes of subrule (5), the hearing of the motion shall be convened as a status hearing.

(7) At a status hearing, the plaintiff shall show cause why the action should not be dismissed for delay, and the court may,

(a) dismiss the action for delay; or

(b) if the court is satisfied that the action should proceed,

(i) set deadlines for the completion of the remaining steps necessary to have the action set down for trial or restored to a trial list, as the case may be, and order that it be set down for trial or restored to a trial list within a specified time,

(ii) adjourn the status hearing on such terms as are just,

(iii) if Rule 77 may apply to the action, assign the action for case management under that Rule, subject to the direction of the regional senior judge, or

(iv) make such other order as is just.

Party Under Disability

(8) Subrule (1) does not apply if, at the time the registrar would otherwise be required under that subrule to dismiss an action for delay, the plaintiff is under a disability.

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Labelle v. Canada (Border Services Agency)
2016 ONCA 187 (Ont. C.A.)

L.B. Roberts J.A.:

What is the standard of review?

[21] The decision of a motion judge made pursuant to r. 37.14 is discretionary, and entitled to deference on appeal. That decision, however, may be set aside if the motion judge proceeded on an erroneous legal principle, made a palpable and overriding error as to the facts, or gave no or insufficient weight to relevant factors: H.B. Fuller Company v. Rogers (Rogers Law Office), 2015 ONCA 173 (CanLII), 330 O.A.C. 378, at para. 19.

Did the motion judge err in finding that the appellants' delay caused substantial prejudice to the respondents?

[22] In my view, the motion judge erred in finding that the appellants' delay caused substantial prejudice to the respondents. This finding was central to her decision not to grant the appellants' motion.

(a) The assessment of prejudice

[23] In starting this analysis, it is important to recall the general principle that only prejudice to the respondents caused by the appellants' delay in these proceedings is a relevant factor in determining whether the registrar's dismissal order should be set aside: Habib v. Tunaj, 2012 ONCA 880 (CanLII), at para. 5. Prejudice to the defence that exists regardless of the appellants' delay is not relevant: Chiarelli, at para. 16. Further, as noted by this court in Chiarelli, at para. 15, "[T]he defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done", such as interviewing witnesses, conducting surveillance, or otherwise preserving relevant evidence.

[24] The motion judge's findings of prejudice to the respondents, however, did not arise from the appellants' delay but from factors either pre-dating any delay or stemming from the respondents' failure to take appropriate steps to alleviate the prejudice that they now assert.

[25] First, the respondents' inability without leave to pursue crossclaims or third party claims against Abitibi and International Bridge arose from those parties' insolvencies and not from the appellants' delay. Abitibi and International Bridge were under CCAA protection by April 2009, prior to the issuance of the appellants' statement of claim in December 2009. By the time the respondents served their statement of defence and crossclaim against Abitibi in May 2010, their crossclaim under s. 6 of the Customs Act was already automatically stayed by the CCAA proceedings.

[26] Second, the respondents failed to take any steps to preserve or pursue any claims that they may have had against Abitibi or International Bridge in the CCAA proceedings. While the CCAA order required any claims to be filed by November 13, 2009, prior to the service of the appellants' statement of claim, it also provided for the discretionary consideration of any claims filed after that deadline and up to the date of the implementation of the plan of arrangement on December 9, 2010. After that deadline, leave to pursue a claim could be sought from the Superior Court of Quebec, however the process was costly and the likelihood of any recovery from Abitibi or International Bridge was doubtful.

[27] Third, the unavailability of evidence related to maintenance of the premises in issue was not a product of the appellants' delay but arose because of the insolvency of Abitibi and International Bridge and the failure of the respondents to preserve such evidence once they became aware that Abitibi and International Bridge were under a CCAA order.

[28] The respondents were made aware of Ms. Labelle's claim as early as April 2008, prior to the April 2009 effective date of the CCAA protective order. However, there is no evidence that they took any steps to investigate Ms. Labelle's claim or preserve relevant evidence until after the effective date of the CCAA order.

(b) The effect of the error

[29] The motion judge's error concerning prejudice went to the heart of her decision to refuse to set aside the registrar's dismissal order. It played an essential part in the reasoning process that led to her dismissal of the appellants' motion.

[30] The motion judge's focus on prejudice to the respondents is consistent with the approach suggested by this court in Scaini, at para. 25: "It may be that in a particular case, one factor on which the appellant comes up short is of such importance that, taken together with the other factors, the appellant must fail. What is important is that the analysis be contextual to permit the court to make the order that is just."

[31] The importance in the contextual analysis of the factor of prejudice to a defendant's ability to defend the action was summarized most recently by this court in MDM Plastics Limited v. Vincor International Inc., 2015 ONCA 28 (CanLII), 124 O.R. (3d) 420, at para. 24:

> The issue of prejudice "invariably is a key consideration on a motion to set aside a dismissal order": Finlay v. Van Paassen, 2010 ONCA 204 (CanLII), 101 O.R. (3d) 390, at para. 28. While an action may be dismissed even in the absence of prejudice (see 1196158 Ontario Inc. v. 6274013 Canada Ltd., 2012 ONCA 544 (CanLII), 112 O.R. (3d) 67, at para. 32), in most cases, the question of prejudice figures largely in determining whether to set aside a dismissal for delay.

[32] However, the motion judge's error that the appellants' delay caused prejudice to the respondents was fundamental to her decision. Without the finding of prejudice to the respondents, a contextual analysis results in the conclusion that the order be set aside.

[33] The factor of delay by itself was not sufficient in the circumstances of this case to deny the appellants' request to reinstate their action. Certainly, if appellants' counsel had promptly followed through on the proposed motion to set aside the registrar's dismissal order, the motion would likely have been granted at that time.

[34] Moreover, there is no evidence that the appellants' delay was the product of a deliberate decision not to take any steps in these proceedings. According to the motion judge's findings in the present case, the main reason for the delay was because of appellants' counsel not knowing what to do about the CCAA status of Abitibi and International Bridge. Given that Abitibi and International Bridge were defendants to these proceedings, the delay related to sorting out their status and the effect of their insolvency on the appellants' claim was not wholly unrelated to this action.

[35] As such, this case is distinguishable from the circumstances of Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd., 2007 ONCA 695 (CanLII), 87 O.R. (3d) 660, where the plaintiffs' solicitors had deliberately put the file in abeyance because there was no money in the file.

[36] Moreover, the inadvertent failure of appellants' counsel to request a status hearing favours the reinstatement of the appellants' action. The appellants should not suffer the "irrevocable loss of the right to proceed by reason of the inadvertence of [their] solicitor": Marché, at para. 28; Finlay, at para. 33.

[37] The motion judge properly considered the significant public interest in the finality of the proceedings: Habib, at para. 10; Marché, at para. 25. As Sharpe J.A. noted in Marché, at para. 38, "[E]ven when the party relying on the order could still defend itself despite the delay … at some point the interest in finality must trump the opposite party's plea for an indulgence."

[38] However, the present case is not an instance where finality must trump the preference of having the action heard on its merits. The respondents suffered no prejudice from the delay and did not rely on the finality of the dismissal order. While the appellants have the responsibility of moving the action along, the respondents' lack of display of any sense of urgency undercuts the claim of prejudice: H.B. Fuller Company, at para. 42.

[39] First, the fact that the respondents indicated that they would not oppose the appellants' setting aside of the dismissal order suggests that there was no actual prejudice to their ability to defend the action at that point as a result of the delay or the dismissal.

[40] Further, respondents' counsel never indicated that their position had changed until receipt of the appellants' notice of motion. Although the appellants should have brought their motion more promptly, the lack of any warning by the respondents that their position had changed also belies any presumption of prejudice to them or their reliance on the dismissal of the action.

[41] There is no suggestion that the motion judge viewed the litigation delay as a sufficient basis in itself for refusing to set aside the dismissal order. Inadvertence in missing the deadline was conceded. In the absence of any actual or presumed prejudice to the respondents or their reliance on the dismissal order as final, the justice of the case requires that the dismissal order be set aside and the action reinstated.

> [42] That being said, the appellants are being granted an indulgence. They must complete the outstanding steps in this action and then set it down for trial without further delay.

D. SUMMARY JUDGMENT

Civil litigation is changing in Ontario. There is widespread recognition that access to justice is impaired due to the high cost of litigation. There is less unanimity on the reasons for this; cumbersome or inappropriate procedures, the relatively slow incorporation of innovative technologies, the lack of sufficient judicial resources, and professional custom all play a part. Hence the commission of *Civil Justice Reform Project* in 2006 to consider changes to civil litigation procedures in Ontario. One of the most important changes to the Rules is in respect of summary judgment.

(i) Background:

Honourable Coulter A. Osborne, Q.C., *Summary of Finding and Recommendations of the Civil Justice Reform Project* (November, 2007)

> There was general agreement that rule 20 is not working as intended. Both lawyers and Superior Court judges said that the Court of Appeal's view of the scope of motion judges' authority is too narrow. Whether this view is correct can be debated. Whether it exists is beyond debate. The cost consequences from a failed summary judgment motion have also been said to be too onerous, deterring many litigants and their counsel from using rule 20.
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> **The bar reported, and ministry statistics confirm, that few summary judgment motions are brought today. A subcommittee of the Civil Rules Committee has proposed to replace the current "no genuine issue for trial" test to expand the application of rule 20. Several suggested that it is not the test itself, but the court's interpretation of it, that has limited rule 20's effectiveness.** Both judges and lawyers noted that responding parties to a summary judgment motion may put facts in dispute if only to present the motion judge with an issue of credibility and to argue that, as a result, a trial is required. I was told that judges might be reluctant to grant summary judgment given the Court of Appeal decisions that say the court's role in determining such motions is narrowly defined.
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> …
>
> **If the objective is to provide an effective mechanism for the court to dispose of cases early where in the opinion of the court a trial is unnecessary after reviewing the best available evidence from the parties, then it seems to me to be preferable to provide the court with the express authority to do what some decisions of the Court of Appeal have said a motion judge or master cannot do. That is, permit the court on a summary judgment motion to weigh the evidence, draw inferences and**

evaluate credibility in appropriate cases. Therefore, any new rule 20 should provide a basis for the motion judge to determine whether such an assessment can safely be made on the motion, or whether the interests of justice require that the issue be determined by the trier of fact at trial.

As rule 20 matters now stand, the result of a rule 20 motion is binary: the motion is granted and the action ends, or it is dismissed and the parties are on the way to full trial. In my view, there should be more flexibility in the system. Where the court is unable to determine the motion without hearing viva voce evidence on discrete issues, the rules should provide for a mini-trial where witnesses can testify on these issues in a summary fashion, without having to wait for a full trial. This can be done in British Columbia through rule 18A. It could be done in Ontario through a similar rule, i.e., by amending rule 20.

…

British Columbia's rule 18A allows a court to grant judgment in cases where there is an issue on the merits "unless the court is unable, on the whole of the evidence before it, to find the facts necessary to decide the issues of fact or law" or unless "the court is of the opinion that it would be unjust to decide the issues on the application." Affidavit and other documentary evidence, including evidence taken on an examination for discovery and written statements of an expert's opinion, may be used. The court may, at a preliminary hearing for directions, order cross-examination on affidavit evidence "either before the court or before another person as the court directs."

If the court is unable to grant judgment at the summary trial on the affidavit and documentary evidence alone, it may make a variety of orders to expedite the trial of the case (e.g., interlocutory applications to be brought within a fixed time, agreed statement of facts to be filed within a fixed time, a discovery plan with fixed timelines, and fixed duration of examinations for discovery). The court also has the power to adjourn or dismiss the summary trial application, before or at the hearing of the application, where "the issues raised are not suitable for disposition under this rule" or "the summary trial will not assist the efficient resolution of the action."

British Columbia's rule 18A has been very well received and is said to be successful. As noted by one commentator in British Columbia, "[N]ot since the introduction of the summary trial under rule 18A has such a versatile and useful tool been placed in the hands of litigators wishing to have a civil dispute of modest dimensions adjudicated in a speedy, comparatively inexpensive, yet just manner….When Rule 18A was first introduced, no one could have imagined the way, and the extent to which, it would change (for the good) the practice of civil litigation in the province." Indeed, the British Columbia rule is being employed in 60% of cases; however, a similar rule in Alberta is not yet widely used.

(ii) The 'New Rule 20'

The principal change in respect of summary judgment is conceptual: changing the task of

the judge on the Rule 20 motion from determining whether there is 'no genuine issue for trial' to determining whether genuine issues *require a trial* to achieve a just result. To achieve the goal of increasing early dispositions, Judges (but not Masters) now have the power to assess credibility, weigh the evidence and draw inferences, unless it is in 'the interest of justice' that such powers only be exercised at a trial. The previous practice disallowed the motions court acting as it could under the new form of the Rule; *see Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 38 O.R. (3d) 161 (C.A.).

Thus the Rules now provide:

> **Rule 20.04**
>
> (2) The court **shall** grant summary judgment if,
>
> (a) the court is satisfied that there is **no genuine issue requiring a trial** with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, **unless it is in the interest of justice for such powers to be exercised only at a trial**:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.
>
> **(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.**
>
> **...**
>
> 20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.
>
> [emphasis added.]

The summary judgment motion judge has wide powers to craft a combination of procedures that would allow for a more expedient process given that the overarching goal of the reforms seems to be ensuring proportionality, streamlining the process, and cutting expense - but in some cases a full trial will still be required.

(iii) A Step Backward: (The Now-Discredited) 'Full Appreciation' Test…

Combined Air Mechanical Services Inc. v. Flesch
2011 ONCA 764
(*sub nom. Hryniak v. Mauldin)*

A five-member panel of the Court of Appeal heard conjoined appeals from summary judgments dispositions in five cases. The essence of the judgment is that summary judgment is available in three types of cases:

- Where both parties submit that summary judgment is the appropriate way to determine an action;

- Where a motion judge determines that a claim or defence has no chance of success; and

- Where a motion judge is satisfied that the trial process is not required in the "interest of justice".

In the last category, we focus on whether the motions judge has a 'full appreciation' of the evidence sufficient to dispose of the case without a proper trial.

By The Court:

> 2. The Types of Cases that are Amenable to Summary Judgment
>
> [40] Speaking generally, and without attempting to be exhaustive, there are three types of cases that are amenable to summary judgment. The first two types of cases also existed under the former Rule 20, while the third class of case was added by the amended rule.
>
> [41] The first type of case is where the parties agree that it is appropriate to determine an action by way of a motion for summary judgment. Rule 20.04(2)(b) permits the parties to jointly move for summary judgment where they agree "to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment." We note, however, that the latter wording – "the court is satisfied" – affirms that the court maintains its discretion to refuse summary judgment where the test for summary judgment is not met, notwithstanding the agreement of the parties.
>
> [42] The second type of case encompasses those claims or defences that are shown to be without merit. The elimination of these cases from the civil justice system is a long-standing purpose well served by the summary judgment rule. As stated by the Supreme Court of Canada in *Canada (A.G.) v. Lameman*, 2008 SCC 14 (CanLII), 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 10:
>
> > The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes

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

[43] As we shall discuss further below, the amended Rule 20 has given the motion judge additional tools to assess whether a claim or defence has no chance of success at trial.

[44] Moreover, the amended Rule 20 now permits a third type of case to be decided summarily. The rule provides for the summary disposition of cases other than by way of agreement or where there is "no chance of success". The prior wording of Rule 20, whether there was a "genuine issue for trial", was replaced by "genuine issue requiring a trial". This change in language is more than mere semantics. The prior wording served mainly to winnow out plainly unmeritorious litigation. The amended wording, coupled with the enhanced powers under rules 20.04(2.1) and (2.2), now permit the motion judge to dispose of cases on the merits where the trial process is not required in the "interest of justice".

[45] The threshold issue in understanding the application of the powers granted to the motion judge by rule 20.04(2.1) is the meaning to be attributed to the phrase "interest of justice". This phrase operates as the limiting language that guides the determination whether a motion judge should exercise the powers to weigh evidence, evaluate credibility, and draw reasonable inferences from the evidence on a motion for summary judgment, or if these powers should be exercised only at a trial. The phrase reflects that the aim of the civil justice system is to provide a just result in disputed matters through a fair process. The amended rule recognizes that while there is a role for an expanded summary judgment procedure, a trial is essential in certain circumstances if the "interest of justice" is to be served.

[46] What is it about the trial process that certain types of cases require a trial for their fair and just resolution? In *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), 2002 SCC 33, [2002] 2 S.C.R. 235, the majority decision of Iacobucci and Major JJ., at para. 14, quotes a passage from R.D. Gibbens in "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q*. 445, at p. 446, which refers to the trial judge's "expertise in assessing and weighing the facts developed at trial". The quoted passage states: "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence." The passage further notes that the trial judge gains insight by living with the case for days, weeks or even months. At para. 18, Iacobucci and Major JJ. go on to observe that it is the trial judge's "extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole" that enables him or her to gain the level of appreciation of the issues and the evidence that is required to make dispositive findings.

[47] As these passages reflect, the trial judge is a trier of fact who participates in the dynamic of a trial, sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and thrust of the adversaries, and hears the evidence in the words of the witnesses. As expressed by the majority in *Housen*, at para. 25, the trial judge is in a "privileged position". The trial judge's role as a participant in the unfolding of the evidence at trial provides a greater assurance of fairness in the process for resolving the dispute. The nature of the process is such that it is unlikely that the judge will overlook evidence as it is adduced into the record in his or her presence.

[48] The trial dynamic also affords the parties the opportunity to present their case in the manner of their choice. Advocates acknowledge that the order in which witnesses are called, the manner in which they are examined and cross-examined, and how the introduction of documents is interspersed with and explained by the oral evidence, is of significance. This "trial narrative" may have an impact on the outcome. Indeed, entire books have been written on this topic, including the classic by Frederic John Wrottesley, *The Examination of Witnesses in Court* (London: Sweet and Maxwell, 1915). As the author instructs counsel, at p. 63:

> It is, perhaps, almost an impertinence to tell you that you are by no means bound to call the witnesses in the order in which they are placed in the brief.
>
> It will be your task, when reading and noting up your case, to marshall your witnesses in the order in which they will best support your case, as you have determined to submit it to the [trier of fact].

[49] In contrast, a summary judgment motion is decided primarily on a written record. The deponents swear to affidavits typically drafted by counsel and do not speak in their own words. Although they are cross-examined and transcripts of these examinations are before the court, the motion judge is not present to observe the witnesses during their testimony. Rather, the motion judge is working from transcripts. The record does not take the form of a trial narrative. The parties do not review the entire record with the motion judge. Any fulsome review of the record by the motion judge takes place in chambers.

[50] We find that the passages set out above from *Housen*, at paras. 14 and 18, such as "total familiarity with the evidence", "extensive exposure to the evidence", and "familiarity with the case as a whole", provide guidance as to when it is appropriate for the motion judge to exercise the powers in rule 20.04(2.1). In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

[51] We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that

call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.

…

8. Summary

[72] We have described three types of cases where summary judgment may be granted. The first is where the parties agree to submit their dispute to resolution by way of summary judgment.

[73] The second class of case is where the claim or defence has no chance of success. As will be illustrated below, at paras. 101-111, a judge may use the powers provided by rules 20.04(2.1) and (2.2) to be satisfied that a claim or defence has no chance of success. The availability of these enhanced powers to determine if a claim or defence has no chance of success will permit more actions to be weeded out through the mechanism of summary judgment. However, before the motion judge decides to weigh evidence, evaluate credibility, or draw reasonable inferences from the evidence, the motion judge must apply the full appreciation test.

[74] The amended rule also now permits the summary disposition of a third type of case, namely, those where the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1). In deciding whether to exercise these powers, the judge is to assess whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record – as may be supplemented by oral evidence under rule 20.04(2.2) – or if the attributes and advantages of the trial process require that these powers only be exercised at a trial.

[75] Finally, we observe that it is not necessary for a motion judge to try to categorize the type of case in question. In particular, the latter two classes of cases we described are not to be viewed as discrete compartments. For example, a statement of claim may include a cause of action that the motion judge finds has no chance of success with or without using the powers in rule 20.04(2.1). And the same claim may assert another cause of action that the motion judge is satisfied raises issues that can safely be decided using the rule 20.04(2.1) powers because the full appreciation test is met. The important element of the analysis under the amended Rule 20 is that, before using the powers in rule 20.04(2.1) to weigh evidence, evaluate credibility, and draw reasonable inferences, the motion judge must apply the full appreciation test in order to be satisfied that the interest of justice does not require that these powers be exercised only at a trial.

(iv) … and two steps forward.

Hryniak v. Mauldin
2014 SCC 7

On further appeal, the restrictive approach set out by the Court of Appeal was *decisively* rejected by a unanimous panel in the Supreme Court of Canada. Rather than a restrictive approach, an expansive one is to be favoured – one that allows a Motions Judge to determine in a more creative and functional way how the proceedings should be conducted to achieve efficiency and a fair result. It is a very welcome departure from what was an arid approach.

Per Karakatsanis J:

> 1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> 2 **Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.**
>
> 3 Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (*Ontario Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, address the proper interpretation of the amended Rule 20 (summary judgment motion).
>
> 4 In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> **5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the** affordable, timely and just adjudication of claims.

…

Analysis
Access to Civil Justice: A Necessary Culture Shift

23 This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

24 However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,[1] [omitted] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] [omitted] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

25 Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

26 In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle

means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

29 There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

30 The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] [omitted] For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

31 Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes ... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53).

32 This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

33 A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

Summary Judgment Motions

34 The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary

judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

35 Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

36 Rule 20 was amended in 2010, following the recommendations of the Osborne Report, to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.

37 Early summary judgment rules were quite limited in scope and were available only to plaintiffs with claims based on debt or liquidated damages, where no real defence existed.[5] [omitted] Summary judgment existed to avoid the waste of a full trial in a clear case.

38 In 1985, the then new Rule 20 extended the availability of summary judgement to both plaintiffs and defendants and broadened the scope of cases that could be disposed of on such a motion. The rules were initially interpreted expansively, in line with the purposes of the rule changes.[6] However, appellate jurisprudence limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: "claims that have no chance of success [are] weeded out at an early stage".[7] [omitted]

39 The Ontario Government commissioned former Ontario Associate Chief Justice Coulter Osborne Q.C., to consider reforms to make the Ontario civil justice system more accessible and affordable, leading to the report of the Civil Justice Reform Project (the Osborne Report). The Osborne Report concluded that few summary judgment motions were being brought and, if the summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed (p. 35). Among other things, it recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented (pp. 35-36).

40 The report also recommended the adoption of a summary trial procedure similar to that employed in British Columbia (p. 37). This particular recommendation was not adopted, and the legislature made the choice to maintain summary judgment as the accessible procedure.

41 Many of the Osborne Report's recommendations were taken up and implemented in 2010. As noted above, the amendments codify the proportionality principle and provide for efficient adjudication when a conventional trial is not required. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment

motions and attenuate the risks when such motions do not resolve the entire case.

42 Rule 20.04 now reads in part:[8] [omitted]

20.04 ...

(2) [General] The court shall grant summary judgment if,

the court is satisfied that there is no genuine issue requiring

a trial with respect to a claim or defence; or

the parties agree to have all or part of the claim determined

by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

Weighing the evidence.
Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

43 The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

44 The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.[9]

45 These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus,

the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

46 I will first consider when summary judgment can be granted on the basis that there is "no genuine issue requiring a trial" (Rule 20.04(2)(a)). Second, I will discuss when it is against the "interest of justice" for the new fact-finding powers in Rule 20.04(2.1) to be used on a summary judgment motion. Third, I will consider the power to call oral evidence and, finally, I will lay out the process to be followed on a motion for summary judgment.

When is There no Genuine Issue Requiring a Trial?

47 Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

48 The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

49 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.

50 These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating 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.

51 Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

The Interest of Justice

52 The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

53 To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself, "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

54 The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

55 The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

56 While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a t2rial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers -- and the purpose of the amendments -- would be frustrated.

57 On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and 20.04(2.2) can provide an equally valid, if less extensive, manner of fact finding.

58 This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

59 In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

60 The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, 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.

The Power to Hear Oral Evidence

61 Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

62 The Court of Appeal suggested the motion judge should only exercise this power when (1) oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) Any such issue is narrow and discrete -- *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

This is useful guidance to ensure that the hearing of oral evidence does not become unmanageable; however, as the Court of Appeal recognized, these are not absolute rules.

63 This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

64 Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

65 Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

The Roadmap/Approach to a Motion for Summary Judgment

66 On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

67 Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

68 While summary judgment *must* be granted if there is no genuine issue requiring a trial,[10] [omitted] **the decision to use either the expanded**

fact-finding powers or to call oral evidence is discretionary.[11] The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

Tools to Maximize the Efficiency of a Summary Judgment Motion

Controlling the Scope of a Summary Judgment Motion

69 The *Ontario Rules* and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

70 The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

71 Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

72 I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This 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.

73 A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

Salvaging a Failed Summary Judgment Motion

74 Failed, or even partially successful, summary judgment motions add -- sometimes astronomically -- to costs and delay. However, this risk

can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction.

75 Rule 20.05(1) and (2) provides in part:

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just ...

76 Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

77 These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent. In my view, the summary trial model would also be available further to the broad powers granted a judge under Rule 20.05(2).

78 Where a motion judge 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. I agree with the Osborne Report that the involvement of a single judicial officer throughout

saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

79 While such an approach may complicate scheduling, 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 in order to facilitate access to justice.

Standard of Review

80 The Court of Appeal concluded that determining the appropriate test for summary judgment -- whether there is a genuine issue requiring a trial -- is a legal question, reviewable on a correctness standard, while any factual determinations made by the motions judge will attract deference.

81 In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned, absent palpable and overriding error, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

82 Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.

83 Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

84 Of course, where the motion judge applies an incorrect principle of law, or errs with regard to a purely legal question, such as the elements that must be proved for the plaintiff to make out her cause of action, the decision will be reviewed on a correctness standard (*Housen v. Nikolaisen*, at para. 8).

Maurice v. Alles
2016 ONCA 287 (Ont. C.A.)

Hourigan JA:

Summary Judgment in an Application

[24] Counsel for the appellant raised with the panel at the hearing of the appeal the issue of whether a motion for summary judgment is an available procedure in the context of an application. He admitted that this was an issue that came to him shortly before the hearing of the appeal and that it was not raised before the motion judge or in the materials originally filed on this appeal.

[25] Generally, a party who has participated in a process in the court below without complaint cannot object to that process on appeal: Harris v. Leikin Group Inc., 2014 ONCA 479 (CanLII), 120 O.R. (3d) 508, at para. 53; see also Marshall v. Watson Wyatt & Co. (2002), 2002 CanLII 13354 (ON CA), 57 O.R. (3d) 813 (C.A.), at paras. 14-15. I nonetheless think it is important to address the issue of the availability of a summary judgment motion on an application under Rule 14, especially given the increased prevalence and importance of summary judgment motions since the Supreme Court of Canada's decision in Hryniak v. Mauldin, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87.

[26] The parties have brought one relevant decision to our attention. In Essex Condominium Corp. No. 5 v. Rose-ville Community Center Assn. (2007), 51 C.P.C. (6th) 89 (Ont. S.C.), Pomerance J. held that summary judgment was not available in the context of an application to wind up a corporation under the Corporations Act, R.S.O. 1990, c. C.38.

[27] Similarly, in Ravikovich v. College of Physicians & Surgeons (Ontario), 2010 CarswellOnt 6643 (S.C.), Ferrier J. concluded that summary judgment is not available in a judicial review application because the remedy is only available for actions and an action is a proceeding that is not an application.

[28] I agree with the analysis of the issue in both cases, although I reach a different result on the facts of this case.

[29] The starting point in the analysis is the language of Rule 20. It is clear that the rule contemplates that it will be used in the context of an action and not an application. The rule specifies that a motion for summary judgment is available to a "plaintiff" after the delivery of the "statement of defence" on all or part of the claim in the "statement of claim". Similarly, a "defendant" may move for summary judgment to dismiss all or part of the claim in the "statement of claim".

[30] The emphasized terms are defined in r. 1.03 and it is plain that they apply in the context of an action and not an application. A plaintiff is defined as "a person who commences an action" and a defendant is "a person against whom an action is commenced". An action is a proceeding that is not an application and includes a proceeding commenced by, among other things, a statement of claim.

[31] There is no reference in the text of Rule 20 to an "applicant", who is defined in r. 1.03 as "a person who makes an application" or to a "respondent" who is defined in r. 1.03 as "a person against whom an application is made or an appeal is brought, as the circumstances require". Nor does the summary judgment rule mention a "notice of application", which is the originating process for an application.

[32] The drafters of the summary judgment rule made a deliberate choice to restrict its availability to actions. There is a valid policy rationale for this restriction. Summary judgment is a simplified procedure, designed to determine all or part of an action in a summary manner, in order to reduce expense and preserve court resources. An application is also a summary process. Its use is restricted, pursuant to r. 14.05(3), to situations where an application is permitted under the Rules or in cases where certain enumerated relief is claimed. Evidence is generally supplied through affidavits and cross-examinations conducted out of court. Where there is conflicting evidence that requires credibility determinations on central issues, the application must be converted to an action: see Baker v. Chrysler Canada Ltd. (1998), 1998 CanLII 14672 (ON SC), 38 O.R. (3d) 729 (S.C.). If a proceeding is capable of being resolved as an application, it should be, as that is the most expeditious and least expensive determination of the proceeding on its merits. There is no utility in layering on to this summary process another summary process.

[33] This is not a situation, as the respondents submit, where there is a lacuna in the Rules and the court is required to utilize r. 1.04 to interpret Rule 20 as if it applied to applications under Rule 14. Rule 38.10(1)(b) empowers a judge to order that all or part of an application proceed to trial. Pursuant to rr. 38.10(2) and (3), where the application judge orders that all or part of an application should proceed to trial, the proceeding is thereafter treated as an action in respect of the issues to be tried subject to the directions in the order directing a trial. The practical effect of r. 38.10 is that the summary judgment vehicle in Rule 20 will be available to resolve the issues in a Rule 14 application after the application is converted by judicial order into an action.

[34] With this analysis in mind, I turn to a consideration of whether the summary judgment rule was available to the parties and the court below. Newbould J. made an order that the claims of oppression and breach of contract should be determined through a mini-trial. Although Newbould J.'s order did not explicitly direct that the application proceed to trial, he had authority to make such an order pursuant to r. 38.l0(1)(b).

[35] Considering that neither party objected to the use of the summary judgment procedure and that both fully participated in the motion, any error in disposing of the limitation period issue by way of a motion for summary judgment was merely a procedural defect that caused no prejudice to the parties. Thus, I would not interfere with the motion judge's decision on the procedural basis raised by the appellant in oral argument.

Butera v. Chown, Cairns LLP

2017 ONCA 783 (Ont. C.A.)

Under the new Rule 20, is partial summary judgment available?

Pepall J.A.:

> [26] The pre-*Hryniak* appellate jurisprudence on partial summary judgment limited its availability. At para. 3 of *Corchis v. KPMG Peat Marwick Thorne*, [2002] O.J. No. 1437 (C.A.), this court applied Gold Chance International Ltd. v. Daigle & Hancock, [2001] O.J. No. 1032 (S.C.J.) to state that:
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> [P]artial summary judgment ought only to be granted in the clearest of cases where the issue on which judgment is sought is clearly severable from the balance of the case. If this principle is not followed, there is a very real possibility of a trial result that is inconsistent with the result of the summary judgment motion on essentially the same claim.
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> [27] Since *Hryniak*, this court has considered partial summary judgment in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450 (CanLII), 120 O.R. (3d) 438 and in *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922 (CanLII), 133 O.R. (3d) 561. *Baywood* was decided in the context of a motion for summary judgment on all claims, but where only partial summary judgment was granted. *CIBC* involved a motion for partial summary judgment.
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> [28] In both *Baywood* and *CIBC*, the court analyzed the issue from the perspective of whether (i) there was a risk of duplicative or inconsistent findings at trial and whether (ii) granting partial summary judgment was advisable in the context of the litigation as a whole. In both cases, the court held that partial summary judgment was inadvisable in the circumstances.
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> [29] **The caution expressed pre-*Hryniak* in *Corchis* is equally applicable in the post-*Hryniak* world.** In addition to the danger of duplicative or inconsistent findings considered in *Baywood* and *CIBC*, partial summary judgment raises further problems that are anathema to the stated objectives underlying *Hryniak*.
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> [30] **First, such motions cause the resolution of the main action to be delayed.** Typically, an action does not progress in the face of a motion for partial summary judgment. A delay tactic, dressed as a request for partial summary judgment, may be used, albeit improperly, to cause an opposing party to expend time and legal fees on a motion that will not finally determine the action and, at best, will only resolve one element of the action. At worst, the result is only increased fees and delay. There is also always the possibility of an appeal.
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> [31] **Second, a motion for partial summary judgment may by very expensive. The provision for a presumptive cost award for an unsuccessful summary judgment motion that existed under the former summary judgment rule has been repealed, thereby removing a disincentive for bringing partial summary judgment motions.**

> [32] **Third, judges, who already face a significant responsibility addressing the increase in summary judgment motions that have flowed since Hryniak, are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action**.
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> [33] **Fourth, the record available at the hearing of a partial summary judgment motion will likely not be as expansive as the record at trial** therefore increasing the danger of inconsistent findings.
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> [34] When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. **A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner. Such an approach is consistent with the objectives described by the Supreme Court in *Hryniak* and with the direction that the Rules be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.**
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> [35] Lastly, I would observe the obvious, namely, that a motion for partial summary judgment differs from a motion for summary judgment. If the latter is granted, subject to appeals, it results in the disposal of the entire action. In addition, to the extent the motion judge considers it advisable, if the motion for summary judgment is not granted but is successful in part, partial summary judgment may be ordered in that context.

Partial summary judgment would clearly appear to be exceptional.