Civil Procedure
Winter Term 2025

LECTURE NOTES NO. 14

X. DISPOSITION WITHOUT TRIAL

1. VEXATIOUS LITIGANTS

Rule 2.1.01

> 2.1.01 (1) The court may make an order staying or dismissing a proceeding that appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.
>
> (2) The court may make a determination under subrule (1) in a summary manner, subject to the procedures set out in this rule.
>
> On Own Initiative or On Request
>
> (3) An order under subrule (1) may be made by the court on its own initiative or on the request of a party to the proceeding under subrule (4).
>
> ...

2. DEFAULT JUDGMENT

Rule 19

> **19.01 (1) Where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01 (2), require the registrar to note the defendant in default.**
>
> (1.1) Revoked.
>
> (2) Where the statement of defence of a defendant has been struck out,
>
> (a) without leave to deliver another; or
>
> (b) with leave to deliver another, and the defendant has failed to deliver another within the time allowed,

the plaintiff may, on filing a copy of the order striking out the statement of defence, require the registrar to note the defendant in default.

…

19.02 (1) A defendant who has been noted in default,

(a) is deemed to admit the truth of all allegations of fact made in the statement of claim; and

(b) shall not deliver a statement of defence or take any other step in the action, other than a motion to set aside the noting of default or any judgment obtained by reason of the default, except with leave of the court or the consent of the plaintiff.

(2) Despite any other rule, where a defendant has been noted in default, any step in the action that requires the consent of a defendant may be taken without the consent of the defendant in default.

…

19.03 (1) The noting of default may be set aside by the court on such terms as are just.

(2) Where a defendant delivers a statement of defence with the consent of the plaintiff under clause 19.02 (1) (b), the noting of default against the defendant shall be deemed to have been set aside.

19.04 (1) Where a defendant has been noted in default, the plaintiff may require the registrar to sign judgment against the defendant in respect of a claim for,

(a) a debt or liquidated demand in money, including interest if claimed in the statement of claim (Form 19A);

(b) the recovery of possession of land (Form 19B);

(c) the recovery of possession of personal property (Form 19C); or

(d) foreclosure, sale or redemption of a mortgage (Forms 64B to 64D, 64G to 64K and 64M).

…

19.08 (1) A judgment against a defendant who has been noted in default

that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

(2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just.

(3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under rule 19.03.

…

3. ANTI-SLAPP

The *Protection of Public Participation Act* was introduced in Ontario following a process of study and review by an *Advisory Panel to the Attorney General*. The Panel's role was to advise the Attorney General on the potential content of legislation against SLAPPs, or *strategic litigation against public participation*. The Panel delivered its report to the Attorney General in 2010 and it founds its way into legislation in 2015 by adding ss. 137.1-137.5 to the *Courts of Justice Act*. The new legislation aims to combat litigation where the aim of the suing party includes any or all of the following:

1. Silencing their critics' public criticism;
2. Redirecting their critic's energy and finances into defending a lawsuit; and
3. Discouraging criticism from others.

SLAPPs are hard to identify as strategic litigants do not self-identify, or reveal their intentions. SLAPP is distinct from a lawsuit brought by a good faith claimant seeking to assert a claim, or from lawsuits brought for strategic reasons between equally sophisticated parties.

CJA, s. 137.1

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on

matters of public interest will be hampered by fear of legal action.

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

40 Days for Life v. Dietrich
2024 ONCA 599 (Ont. C.A.)

Per Curiam:

I. Overview

[1] The parties to this action disagree profoundly about the ethics of abortion and abortion protesting.

[2] 40 Days for Life ("40 Days") advocates for an end to abortion. As part of its efforts, it organizes semi-annual prayer vigils outside of hospitals that provide abortions. Brooke Dietrich is a person with a history of engagement in social justice issues, who strongly believes in protecting access to abortion.

[3] In October of 2021, when 40 Days was organizing its fall prayer vigil, Ms. Dietrich posted a series of fourteen videos on TikTok that are the focus of this litigation. In four of the videos, she encouraged people to sign up for 40 Days' vigils and to then not show up. In several other videos, she made negative comments about 40 Days and its activities, including by stating that 40 Days lied, spread "false health information", and engaged in "fearmongering" and harassment. In two additional videos, Ms. Dietrich posted contact information for two of 40 Days' employees. In another video, she encouraged people to abandon virtual shopping carts with merchandise on 40 Days' website.

[4] 40 Days alleges that its website and prayer vigils were subsequently disrupted by false sign-ups and that its volunteers and employees were harassed through online communications and phone calls. It says its ability to schedule its volunteers was disrupted and it had to dedicate time and money to restore the functionality of its online scheduling system. 40 Days obtained an injunction against Ms. Dietrich and other unnamed defendants and brought proceedings seeking damages for defamation, internet harassment, fraud, breach of contract, inducing breach of contract, and civil conspiracy.

[5] Ms. Dietrich then brought a motion to have the proceeding dismissed under s. 137.1 of the Courts of Justice Act, R.S.O. 1990, c. C. 43 (the "CJA"). The motion judge dismissed the motion and concluded that there were grounds to believe that the proceeding had substantial merit, that the appellant had no valid defence, and that the public interest in permitting the proceeding to continue outweighed the public interest in protecting Ms. Dietrich's expression.

[6] The appellant contests these findings. In essence, she asks this court to consider the motion afresh. That is not the role of this court. The appellant's task is to establish a basis that would permit this court to intervene. She has not done so, and accordingly we dismiss the appeal.

…

VIII. Analysis

[38] Section 137.1 is intended to provide a remedy against a particular form of abuse of process: "the practice of initiating lawsuits not to vindicate bona fide claims, but rather to deter a party from expressing a position on a matter of public interest or otherwise participating in public affairs": Volpe v. Wong-Tam, 2023 ONCA 680, 487 D.L.R. (4th) 158, at para. 2, leave to appeal refused, [2023] S.C.C.A. No. 516. It is intended to weed out strategic or abusive claims at an early stage.

[39] Accordingly, the burdens s. 137.1 imposes on plaintiffs are unlike those that plaintiffs are required to satisfy in the trial of an action. As this court explained in Mondal v. Kirkconnell, 2023 ONCA 523, 485 D.L.R. (4th) 90, at the merits-based hurdle "the plaintiff need establish only grounds to believe – 'a basis in the record and the law' – for finding that the proceeding has substantial merit or that the defendant has no valid defence to the underlying proceeding": at para. 30. Similarly, at the public interest hurdle "the plaintiff need not prove harm or causation; the court is tasked at this stage with drawing inferences of likelihood in respect of the existence of harm, its magnitude, and the relevant causal link": Mondal, at para. 30, citing 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22, [2020] 2 S.C.R. 587, at paras. 70-71.

…

(a) The Merits-Based Hurdle – s. 137.1(4)(a)

[43] The merits-based hurdle is a preliminary assessment of the claims advanced and the defences to them. It is intended to provide an overall assessment of the prospects of success of the action: Pointes, at para. 59. As the motion judge noted, the respondent bears the onus of establishing that there are "grounds to believe" that the proceeding has substantial merit, and that the defendant has no valid defence. This court has on several occasions cautioned against setting the bar higher at the merits-based hurdle than s. 137.1 requires, but it bears repeating: the plaintiff is not required to establish that the defendant has no valid defence, only that there are grounds to believe that there is no valid defence. The standard is less than a balance of probabilities. This burden is satisfied where there is a basis in the record and the law for concluding that the defences asserted will not succeed: Mondal, at paras. 50-51; Bent, at para. 103; and Subway Franchise Systems of Canada Inc. v. Canadian Broadcasting Corporation, 2021 ONCA 26, 455 D.L.R. (4th) 525, at paras. 66-68, leave to appeal refused, [2021] S.C.C.A. No. 87.

…

(b) The Public Interest Hurdle – s. 137.1(4)(b)

[61] The final step in the s. 137.1 analysis is the determination of whether the harm likely to have been suffered by 40 Days as a result of Ms. Dietrich's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[62] This final weighing is the crux of the analysis under s. 137.1: Pointes,

at para. 18. It is well established that even technically meritorious claims may be dismissed at this stage if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue: Pointes, at para. 62; The Catalyst Capital Group Inc. v. West Face Capital Inc., 2023 ONCA 381, leave to appeal refused, [2023] S.C.C.A. No. 337. This weighing exercise is guided by "proportionality as the paramount consideration in determining whether a lawsuit should be dismissed" and is meant to provide motion judges with a "robust backstop to protect freedom of expression": Pointes, at paras. 53 and 63.

…

[86] 40 Days did not take issue with Ms. Dietrich's pro-choice expression or her stance against abortion protests at hospitals – it only raised concerns with the obstruction of its own operations. Indeed, the motion judge found that:

The primary purpose of 40 Days commencing its action does not appear to be to silence Ms. Dietrich or the other Defendants on their pro-choice views. Rather, the main motivation of 40 Days appears to be to protect its ability to organize its prayer vigils without undue disruption, to carry on its organizational activities without undue harassment, and to protect its reputation.

This was a factual finding that is owed deference.

[87] A further argument advanced by Ms. Dietrich is that because her expression is aligned with the "Charter protected right to choose to have an abortion" it is therefore a valuable counter to the threat to Charter rights posed by 40 Days' own expression. She argues that her expression should be valued for its defence of the constitutional rights of others as against those who would impede the exercise of those rights.

[88] The invocation of the Charter in this context cannot do the work Ms. Dietrich requires because, again, her speech does more than express an opinion about abortion or 40 Days' activities and strategies. As found by the motion judge, it seeks to interfere with 40 Days' ability to express its views and carry out its activities.

[89] Even assuming Ms. Dietrich's interpretation of the Charter to be uncontroversial, it would not follow that expression premised on a different interpretation of the Charter would inherently be of lesser value. A free and democratic society is one that is committed to permitting everyone to speak what they understand to be the truth about the most profound questions of being and flourishing, and to advocate for laws and policies that reflect this.

[90] Finally, and as noted above, the motion judge found as a fact that the impugned expressions were not focused on the broader debate over the propriety of anti-abortion protests. Rather, they were "focussed on actively disrupting and impeding 40 Days in its anti-abortion activities." Accordingly, the motion judge did not commit any reviewable error in concluding that Ms. Dietrich's expression was of comparatively low value.

[91] The Canadian Civil Liberties Association (the "CCLA") was permitted to intervene in order to make submissions intended to assist the court with the weighing analysis in s. 137.1, and in particular, in appropriately characterizing the value of online expression. However, the CCLA's submissions addressed a factual matrix very different from the one developed in the record before the court. Its submissions were accordingly not useful in deciding this appeal.

(iii) Overall weighing – what is really going on?

[92] It is important to remember that the purpose of s. 137.1 is to weed out strategic and abusive proceedings that have been initiated to silence defendants, preventing them from speaking out on matters of public interest. It aims to encourage and maintain a strong public culture of free expression. The foregoing steps in the analysis are intended to put the motion judge in a position to understand and evaluate the expression involved in the action, and determine whether the plaintiff, who has likely suffered some damage as a result of the defendant's actions, ought to be permitted to hold the defendant to account for those actions. Or, whether the plaintiff is using the litigation not for a bona fide purpose of vindicating any actual loss but in order to silence the defendant for a collateral purpose.

[93] What is required in the final weighing, as this court pointed out in Mondal, at paras. 68-70, is not a literal weighing of harms. Weighing and balancing are metaphors for a structured evaluation of competing interests. The "weighing" is a matter of reasoning towards a conclusion about whether the litigation is being genuinely pursued to remedy a legal wrong.

[94] The motion judge found that 40 Days had met its onus of establishing grounds to believe it had suffered harm as a result of Ms. Dietrich's actions. She found reasons to believe that at least some of Ms. Dietrich's expressions, particularly those that were invitations to others to harass and obstruct 40 Days, were malicious and of low value. She found that 40 Days had suffered damages as a result of these expressions and that these damages were sufficiently serious

> **to outweigh the low value of Ms. Dietrich's impugned expressions. She did not accept that 40 Days was pursuing the litigation for abusive reasons. Accordingly, she concluded that the motion should be dismissed.**
>
> **[95] We are not persuaded that the motion judge made any reviewable error in this analysis. At root, the expressions did not involve an effort to counter speech with speech. Instead, Ms. Dietrich is alleged to have led a campaign to prevent 40 Days from organizing and expressing its views. This is not the type of expression s. 137.1 of the CJA is meant to protect. These issues should go to trial on a full record, after which the court below will decide whether 40 Days has made out its claims against Ms. Dietrich.**
>
> **[96] In addition, although there is a clear disparity in resources between the parties – and in some contexts that may be an indicium of an abusive proceeding – this does not lead inevitably to the conclusion that a proceeding is abusive or strategic litigation designed to interfere with freedom of expression. It is only one factor to consider in the weighing mandated by s. 137.1.**
>
> **[97] The motion judge made no reviewable error in the overall weighing. We therefore dismiss the appeal.**

Clearly these provisions are controversial, and one expects to see much development in the law going forward.

4. SUMMARY JUDGMENT

There is widespread recognition that access to justice is impaired due to the high cost of litigation in Ontario. 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.

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.

…

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 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 (Ont. C.A.).
(*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 (S.C.C.)

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 Motion 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.

…

43 The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue <u>for</u> 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.

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

Hourigan J.A.:

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:

[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.

[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.

[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.

[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*.

[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.

[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**.

[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.

[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.**

[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.

Moffitt v. TD Canada Trust
2023 ONCA 349 (Ont. C.A.)

Brown J.A.:

> **Summary judgment motions in civil jury actions**
>
> [34] The appellants properly acknowledge that the delivery of a jury notice does not preclude a court from granting summary judgment in an action. Their acknowledgment is proper for two main reasons.
>
> [35] First, the plain language of r. 20.01 permits either party in any civil action to move for summary judgment following the delivery of a statement of defence. The rule does not carve out from its reach actions in which a party has served a jury notice.
>
> [36] Second, under Ontario law a court may interfere with a party's election of a jury trial for "just cause or compelling reasons." Rule 20 provides such a compelling reason. As explained in Hryniak, at para. 45, the amendments implemented to r. 20 in 2010 were designed to transform the rule "from a means to weed out unmeritorious claims to a significant alternative model of adjudication." A motion under r. 20 prompts an evidence-focused assessment of the claims or defences raised in an action. Such a motion requires the judge to ask: Do the claims or defences give rise to a genuine issue requiring a trial? If, on a consideration of the evidentiary record, a court concludes that no genuine issue requiring a trial exists, the absence of such a genuine issue is a compelling reason why the action should not proceed to trial, including where one party has elected a jury trial.
>
> [37] The critical examination of the evidentiary record conducted by a court on a r. 20 motion offers the prospect, but not the certainty, of a final adjudication of a claim or defence on the merits without going to trial. Where a genuine issue requiring a trial exists, the motion will be dismissed and a trial will ensue. Conversely, however, r. 20.04(2)(a) requires that a 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." (Emphasis added).

…

[42] At the conceptual level, r. 20 concerns itself with a simple question: Does a specific action require a trial for its fair and just determination on the merits? Rule 20 is not concerned with who should act as the trier of fact in the event it is found that a trial is required; its focus is on whether a trial is required.[5] In light of r. 20's focus on whether an action requires a trial for resolution, not on who should act as the trier of fact at a trial, Hryniak's test and methodology apply equally to civil jury actions and to actions that contemplate a trial by judge alone.

[43] It follows that I do not accept the appellants' submission that summary judgment motions in a civil jury action should apply the special test spelled out in Roy, at para. 38, namely that summary judgment should only be granted in a civil jury action where the evidence is such that no reasonable jury properly instructed could find for the plaintiff. I am not persuaded by the appellants' submission for several reasons.

[44] First, adopting a special summary judgment test for civil jury actions would create two categories of summary judgment motions – those brought in civil jury actions and those brought in all others – a distinction that finds no support in the language of r. 20.

[45] Second, the creation of two categories of summary judgment motions would undermine the needed culture shift directed in Hryniak by impeding the development of adjudication models that offer timely and cost-effective alternatives to conventional trials, whether judge alone or with a judge and jury. As the Supreme Court made clear in Hryniak, at para. 43, the 2010 amendments implemented to r. 20 demonstrate that "a trial is not the default procedure" for adjudicating a civil dispute. The goal of Hryniak's culture shift is to strike a proper balance between procedure and access in the civil justice system by recognizing that simplified and proportionate procedures for adjudication can be fair and just, without the expense and delay of a trial: at paras. 2 and 27. As the Supreme Court confirmed, alternative models of adjudication are no less legitimate than the conventional trial.

[46] In Cowles v. Balac, this court stated, at para. 38, that "It makes sense that neither party should have an unfettered right to determine the mode of trial." So, too, neither party should have a right to carve-out its civil action from the application of Hryniak's principles.

[47] Third, the appellants' proposed special test essentially would replace the Hryniak test and methodology with the much narrower test used for a directed verdict in a civil trial.[6] The appellants' proposed special test would

eliminate the role of the broad fact-finding powers introduced into r. 20 in 2010 and throw out the proportionality factor that plays such a critical role in Hryniak's r. 20 test. By so doing, the special test would effectively immunize actions with jury notices from the pre-trial scrutiny enacted by the 2010 amendments to r. 20.