Stunning New S.C.C. Decision on Summary Judgement

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A Commentary on *Hryniak v. Mauldin*

On Jan. 23, 2014, in *Hryniak v. Mauldin*, 2014 SCC7 the Supreme Court of Canada delivered a breath-taking decision turning the world of summary judgement on its head and setting out the Court's vision for what may presage future major revisions to our judicial system. *Hyrniak* was one of a number of cases heard together by a five-member panel of the Ontario Court of Appeal which resulted in a decision in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 setting out that court's interpretation of the summary judgment rules in Ontario and how they are to be applied.

The Supreme Court of Canada has now reviewed this in its decision in *Hryniak* and explicitly held that the Ontario Court of Appeal's view of summary judgment was far too restrictive. The decision is so important and far-reaching that it is impossible not to succumb to the temptation to quote it at length. It represents a new vision of our court system in which full trials may become the exception rather than the rule for commercial civil litigation.

The Supreme Court set the stage for its decision in a philosophical discussion in the introductory three paragraphs in which it spoke of a "cultural shift" that will be required to move the courts to a more timely and less expensive manner of adjudicating civil disputes:

> [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.
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> [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.
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> [3] Summary judgment motions provide one such opportunity…

The Court then went on to state:

> [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. *[Emphasis added]*
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> [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.

The Court then spoke again at length of what it described as a "necessary culture shift" which must take place in our justice system. These sections may have ramifications far beyond summary judgment motions and show a desire by the court to make major changes to our judicial system:

> A. Access to Civil Justice: A Necessary Culture Shift
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> [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.
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> [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, ordinary Canadians cannot afford to access the adjudication of civil disputes.
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> [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.
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> [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.

The Court went on to consider the proportionality principle and again this may presage the Court's further use of this tool future cases. In particular the court is encouraging judges to become more interventionist in managing the legal process:

> [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.
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> [30] The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice…
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> [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).
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> [32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality…

The Court then considered the "genuine issue for trial" test and concluded as follows:

> [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
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> > (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.
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> [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.

The Court then concluded that the Ontario Court of Appeal had set the bar too high for summary judgment motions:

> [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).
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> …
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> [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 trial, 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. *[Emphasis added]*
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> [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. *[Emphasis added]*

As well as lowering the bar for summary judgment, the Court endorsed a far more active role for the judiciary in controlling the process at and after summary judgment motions.

The Court set out a "road map" pursuant to which a judge is first to determine whether whether a genuine issue for trial exists using only the materials before here. If the judge is unable to do so, the judge must then determine whether a trial can be avoided by using the fact finding powers (including mini-trials) pursuant to Rules 20.04(2.1) and (2.2). The Court went on to add (at Para. [67]) that "**these powers are presumptively available, rather than exceptional**, in line with the goal of proportionate, cost-effective and timely dispute resolution." *[Emphasis added]*

The Court also encouraged the practice of motions for direction under Rule 1.05 prior to summary judgment motions when the record would be complex or voluminous and warned of cost consequences for failing to do so. Moreover, it stated that the judge giving direction should then be seized of the motion.

If the summary judgment motion were to fail, the judge should vigorously exercise her authority under Rule 20.05 to make orders dealing with a variety of procedural remedies. The Court held the judge would even have the authority to order a summary trial even though that was not explicitly set out in the rules (Para. [77]). Further, the Court held that the motions court judge should then be seized of the ultimate trial, envisioning a single judge shepherding the action from the motion for direction all the way through to its ultimate conclusion (Para. [78]).

The Court further underlined its strong endorsement of the process by then raising the bar for appeals from summary judgment motions as follows:

> [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.
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> [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.
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> [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.

The importance of this case and the longterm ramifications cannot be overstated. The Court went well beyond where it need to go in order to determine the issues between the parties in this case, and in fact, much of the decision is technically *obiter*. It turns the world of summary judgment on its head. It lowers the bar for summary judgment motions, and at the same time raises the bar for appeals from such motions. It also envisions and encourage a much more active role by the judiciary in controlling the procedure of an action and presents a vision by the court of our judicial system which presages further major changes to be made by this Court when the opportunity arises.

The end result of this case and others that follow may be to make civil trials a rarity and make wholesale changes to our judicial system in order to enable the Court's vision of a more economical and efficient means of dispute resolution.

Finally, although I did not attend the hearing, I have a suspicion from reading the reasons, that a lot of credit is due the intervening counsel for the Canadian Bar Association and Ontario Government.

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