Can Summary Judgment Backfire?

A Commentary on *King Lofts v. Emmonds*

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On March 21, 2014, the Ontario Court of Appeal released its decision in *King Lofts v. Emmonds*, 2014 ONCA 215.

This was a claim for solicitor's negligence. The defendants brought a motion for summary judgment to dismiss the claim. The motions court judge not only dismissed the motion but awarded summary judgment to the plaintiffs subject to an assessment of damages.

The defendants appealed on the basis that, among other grounds, the plaintiffs had not brought a cross-motion for summary judgment in their favour and the motions court judge was therefore precluded from granting that remedy.

The Ontario Court of Appeal dealt with this issue somewhat summarily as follows:

> [14] In oral argument, the appellant added a new ground of appeal: that the motion judge erred in granting judgment in favour of a party who had not given advance notice of a claim for summary judgment. There are two points in response to this:
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> 1) The appellant did not request an adjournment at the time; and
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> 2) The Supreme Court of Canada in *Hryniak v. Mauldin* 2014 SCC 7, has approved a "culture shift" requiring judges to manage the process in line with the principle of proportionality in the application of Rule 20.
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> [15] This action involves a claim for $106,000 arising out of a multi-million dollar transaction. The principles of proportionality and sensible management of the court process support the motion judge's ruling.

Oddly enough, the Court of Appeal did not refer to several cases that could have more directly supported its position, in particular, *Manulife Bank of Canada v. Conlin,* [1996] 3 SCR 415, *Whalen v. Hillier*, (2001) 143 OAC 320, and *Vytlingam v. Farmer, (2005) 199 OAC 136*, all of which are referred to in an excellent article by Matthew Diskin entitled "Beware the Backfire" in the November 28, 2011 Canadian Lawyer Magazine.

As well as providing a useful reminder to counsel of the potential dangers of a summary judgment motion which can potentially backfire, this case illustrates that the Ontario Court of Appeal intends to take the "cultural shift" referred to in the decision of *Hryniak v. Mauldin* and run with it, so we can expect that in the future courts will be much more willing to grant summary judgment motions than in the past.

UPDATE: See our Dec. 29, 2014 *Commentary on Kassburg v. Sun Life Assurance Company of Canada* on our website.