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Clearing the Path – The Availability of Summary Judgment Following the Decision of *Hryniak v. Mauldin*

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Background

Summary judgment is a tool provided under the *Rules of Civil Procedure*[1] (the "*Rules*") that allow the court to, on a motion, make a judgment on an action without a full trial. It can be used to determine the entire action or to determine discrete issues within an action. The *Rules*, as they once were, specified that summary judgment was available where the court was satisfied that there was "no genuine issue for a trial".

Rule 20 is the rule that governs summary judgment motions. The rule was added with the hopes that, in certain cases, it could serve to avoid expensive and lengthy litigation.

Summary judgment was always available to the Plaintiff once a Defendant had served a Statement of Defence or a Notice of Motion. The *Rules* allow for a Plaintiff to serve a Notice of Motion with the Statement of Claim, where "special urgency is shown"[2]. A Defendant has the opportunity to move for summary judgment after delivering the Statement of Defence.

The courts and the *Rules* require a party moving for summary judgment to put their "best foot forward". For example, rule 20.02(1) allows the court to draw an adverse inference for the failure of a party to put forth evidence of any person who may have personal knowledge of the contested facts. Further, factums are required.

Although on paper the summary judgment rule seemed to be an excellent tool for parties to shorten and effectively cost manage litigation, in practice, it seemed the bench was reluctant to grant summary judgment in anything but the most straight forward of matters. And, given the requirement of the *Rules* that the costs of the motion be awarded against the unsuccessful party on a substantial indemnity basis, counsel was reluctant to recommend this step.

2010 Amendments

Based on recommendations of the Honourable Coulter Osborne in his 2007 report entitled "*Civil Justice Reform Project: Summary of Findings and Recommendations"*, the legislature attempted to change the state of summary judgment motions and give the rule more teeth.

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[1] R.R.O. 1990, Reg. 194
[2] Rule 20.01(2)

First, the test for summary judgment changed from requiring the court to consider whether there was a "genuine issue for trial" to whether there was a "genuine issue requiring trial". Further, the changes implemented allowed judges, among other powers, to conduct "mini-trials", hear oral evidence, weigh evidence, evaluate credibility and "draw any reasonable inference from the evidence"[3]. The amended rule also allowed the court to provide directions and terms on a matter, essentially narrowing the issues, where summary judgment was refused or only granted in part. These permissible terms and/or directions included timing for affidavits of documents, requiring the parties to file a statement setting out what material facts were not in dispute, limiting the scope of oral discovery, limiting oral evidence at trial and more.

One of the most significant of the changes that came into effective on January 1, 2010, was the change to the cost consequences of a summary judgment motion. Whereas before the changes, the court was obligated to order substantial indemnity costs against the unsuccessful party, the rule was amended to allow the court discretion in fixing costs. Specifically, the rule was changed to state that the court "may" fix and order costs against a party on a substantial indemnity basis if the party "acted unreasonably by making or responding to the motion" or "acted in bad faith for the purpose of delay". Costs were now available against either party, successful or not.

Despite the significant changes in widening the powers of the court to hear and rule on summary judgment motions, it seemed that the bench was reluctant in exercising these broadened powers.

Hryniak v. Mauldin

However, the Supreme Court of Canada, in its recent decision of *Hryniak v. Mauldin*[4], has fully endorsed the courts employing the full summary judgment rule.

The case of the *Mauldin v. Hryniak* (and its companion action of *Bruno Appliance and Furniture Inc. v. Hryniak*[5]) was a civil fraud case relating to the loss of $2.2 million of investors' money. The Plaintiffs moved for summary judgment in both matters. The lower court used the new rules to grant summary judgment in both matters in favour of the Plaintiffs against one Defendant but ruled that a full trial was needed to determine the claim against another. Both decisions were appealed to the Ontario Court of Appeal.

The Court of Appeal issued a decision on five cases relating to the application of the summary judgment rule including the decision in *Hryniak* (indexed as *Combined Air Mechanical Services Inc. v. Flesch*[6]). In their decision, the Court of Appeal seemed to interpret the new rule 20 in a restrictive manner. The Court of Appeal outlined its 'full appreciation test" stating that summary judgment would be rejected where a judge had concluded that only a full trial could deliver a "full appreciation of the evidence and

[3] Rule 20.04(2.1)
[4] 2014 SCC 7 ("*Hryniak*")
[5] 2014 SCC 8
[6] 2011 ONCA 764

issues". The Court of Appeal found that the *Mauldin v. Hryniak* case was significantly complex that it should have been done by full trial but, as there was a strong enough case, the judgment could be upheld. With respect to *Bruno v. Hryniak,* the court found that there was a genuine issue requiring a trial and overturned that judgment.

Both matters were then appealed to the Supreme Court of Canada. While the Court of Appeal's decision in both matters were upheld, the Court, in its unanimous decision, was somewhat critical of the "full appreciation test", stating that it was too high of threshold. Justice Karakatanis, in writing for the majority, states:

> In interpreting these provisions [Rule 20], 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[7].

In discussing the purpose of summary judgment and the January 2010 changes to the *Rules*, the Court recognized the difficulty litigants face in getting their day in court. Justice Karakatanis writes:

> Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when the 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[8].
> …
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> 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.
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> 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 –

[7] *Hryniak*, *supra* note 4, at para. 4
[8] *Ibid,* at para. 25

> proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedures[9].

The Court found that the Court of Appeal placed too much emphasis on what type of evidence could be led at trial rather than whether a trial is "required". While, in most cases, a trial will obviously provide the fullest picture, the "interest of justice" requires an assessment of proportionality, weighed with the potential "efficiencies" of summary judgment.

The Court also goes on the record to support the tools set out in the *Rules*, including the power to hear oral evidence and narrowing the issues or fixing trial management orders should the summary judgment motion fail. Further, the Court also recommended that "in the absence of compelling reasons to the contrary", a judge hearing an unsuccessful summary judgment motion, should make himself or herself seized of the matter as trial judge. This would obviously serve to decrease the time a judge would need to gain a full understanding of the matter.

Finally, beyond their endorsement of the tools that can be used by the lower level courts in hearing summary judgment motions, the Court also provided that the decisions by the lower courts in hearing summary judgment motions should be shown deference by the higher courts.

Conclusion

Most counsel would agree that this recent decision of the Supreme Court of Canada represents a lowering of the bar for access to summary judgment. Although it is still early days in the post-*Hryniak* world, given the increasing costs of litigation, parties should consider strongly embracing these new expanded powers in streamlining the ever extending litigation process.

RULE 20 SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

[9] *Ibid,* at para. 27

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

EVIDENCE ON MOTION

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

FACTUMS REQUIRED

20.03 (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked: O. Reg. 394/09, s. 4.

DISPOSITION OF MOTION

General

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(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.

Powers

(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.

Oral Evidence (Mini-Trial)

(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.

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

WHERE TRIAL IS NECESSARY

Powers of Court

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.

Directions and Terms

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

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

Specified Facts

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

Order re Affidavit Evidence

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

Order re Experts, Costs

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs.

Failure to Comply with Order

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

COSTS SANCTIONS FOR IMPROPER USE OF RULE

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

EFFECT OF SUMMARY JUDGMENT

20.07 A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

STAY OF EXECUTION

20.08 Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

20.09 Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.