Tuesday, February 4, 2014

Faster Lawsuits: Summary Judgment Motions Clarified > Court Has Broad Responsibility and Power to Narrow Issues and Simplify Actions

An important Supreme Court of Canada ("SCC") decision on the issue of Ontario summary judgment motions had been rendered: **Hryniak v. Mauldin, 2014 SCC 7 (CanLII)**

This decision provides clarity as to the powers and responsibilities of the Court, and parties, in respect of summary judgment motions. It further clarifies the law after the Ontario Court of Appeal decisions in **Combined Air Mechanical Services Inc. v. Flesch, 2011 ONCA 764 (CanLII)** – note that Hryniak was one of the five actions in the Ontario Court of Appeal's Combined Air decision.

Broadly speaking, parties must put their best foot forward on a summary judgment motion. There is no holding back, as the Court can and will make a final adjudication on issues, where appropriate.

Hryniak further clarifies that the Court is supposed to be proactive in managing the litigation where possible, including narrowing issues and providing direction as to further conduct of the action, to Trial. There is guidance on when the Court will require witnesses testify and provide oral evidence during a summary judgment motion.

This is part of the SCC's emphasis that "a shift in culture is required" in the manner in which we view summary judgment motions as part of a larger mechanism which encourages files to move to resolution. Summary judgment motions work in 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".*

Interestingly, Hryniak states that "in the absence of compelling reasons to the contrary", the summary judgment motion Judge will remained seized of the action for the Trial - i.e. the parties will know who their Trial Judge will be on the action and the Trial Judge's intimate knowledge of the case is not wasted. **Do not underestimate the effectiveness of this change,**

where counsel know who their Trial Judge will be about 1-2 years before Trial, towards encouraging informal resolution discussions.

Hryniak is a 'must read' for civil litigators in Canada.

Some highlights from the decision of Madam Justice Karakatsanis include:

> *[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 (CanLII), 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.

[6] As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

…

IV. Analysis

A. 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] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] 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] 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 (CanLII), 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.*

For more information on summary judgment motions, read our historical blogs here:

- **January 6, 2014 - Summary Judgment Motion: Discoverability is Based on Knowledge and Defendants Have Responsibility to Act Promptly As Well**
- **January 2, 2014 - Summary Judgment Motion: Aggressive Liability Challenge in MVA Case (or "Always Sue Every Possible Tortfeasor")**

- **January 27, 2010 - Faster Lawsuits – Summary Judgment Motion Changes**
- **January 25, 2010 – Faster Lawsuits – Changes to Lawsuit Rules**
- **March 11, 2009 – Changing Ontario Court Rules – January, 2010**

Gregory Chang
Toronto Insurance and Personal Injury Lawyer