

Summary Judgment Update

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Introduction

- One of the only certainties in litigation is cost: it is always expensive to take an action all the way to trial
- Attempt on the part of counsel to find ways of resolving matters at issue without having to go through the entire litigation process



- Summary judgment is one *possible* method of disposing of an action without the necessity of a trial (but may not always be a viable option)
- Provided for in Rule 20.01(1) of *Rules of Civil Procedure*

Summary Judgment Mechanism

Rules of Civil Procedure, Rule 20.01(1)-(3)

- (1) A plaintiff may, after the defendant has delivered a 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

- (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.

Types of Cases Amenable to SJ

1. Where parties agree to have issues determined by summary judgment
2. Where claim/defence appears to be without merit
3. Where the motions judge is satisfied that the issue can and should be determined on summary judgment motion

Rules of Civil Procedure, 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...

Rules of Civil Procedure, Rule 20.04(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 interests of justice for such powers to be exercised only at trial:
 1. Weighing the evidence;
 2. Evaluating the credibility of a deponent; and
 3. Drawing any reasonable inference from the evidence.



Combined Air Mechanical Services v. Flesch

Combined Air Mechanical Services v. Flesch, 2011 ONCA 764 (CanLII)

“FULL APPRECIATION” TEST

“In deciding if these powers [in rule 20.04] 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?”

Hryniak v. Mauldin

Hryniak v. Mauldin, 2014 SCC 7 (CanLII)

- Need change (“shift in culture”)
- Focus should be on proportionality principle: means best forum for resolving a dispute is not always with the most painstaking procedure
- Need options aside from conventional trials
- Need fair access to affordable, timely and just adjudication of claims

Hryniak v. Mauldin

Para. 66: The procedure on a motion for summary judgment requires the motions judge to first determine whether there is a genuine issue requiring a trial based only on the evidence before him or her, without using the fact-finding powers in Rules 20.04(2.1) and (2.2).

Para. 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. This is the case when:

- The process allows the judge to make the necessary findings of fact;
- The process allows the judge to apply the law to the facts; and
- The process is a proportionate, more expeditious and less expensive means to achieve a just result.



Hryniak v. Mauldin

Para. 66: If the motions judge determines that there appears to be a genuine issue requiring a trial, he or she is then required to determine if the need for a trial can be avoided by using the fact-finding powers under Rules 20.04(2.1) and (2.2), provided that their use is not against the interest of justice.

The powers in Rule 20.04(2.1) are discretionary and are presumptively available; they may be exercised unless it is in the interests of justice for them to be exercised only at a trial. When the use of the powers in Rule 20.04(2.1) and (2.2) would enable a judge to fairly and justly adjudicate a claim, and will serve the goals of timeliness, affordability, and proportionality, it will generally not be against the interest of justice to do so.

Hryniak v. Mauldin

- Where summary judgment motion fails, the motions judge should seize himself/herself of the matter (**para. 78**)
- Judge should craft a trial procedure that will resolve the dispute in a way that is sensitive to complexity and importance of the issues, the amount involved in the case and the effort expended on the motion (**para. 77**)

Summary judgment IS appropriate :

- even where there is a voluminous record, particularly where facts are straightforward (*Talon International Inc. v. Fair East Aluminium*, 2014 ONCA 539)
- to determine limitation period issues (*King Lofts Toronto I Ltd. V. Emmons*, 2014 ONCA 215; *Yelda v. Vu*, 2014 ONCA 353)

Post *Hryniak* Cases

- to determine a threshold issue (*Miller Group Inc. v. James*, 2014 ONCA 335)
- to determine a key issue in the litigation, even if some of the claims against some of the parties will proceed to trial (*Winter v. Royal Trust Company*, 2014 ONCA 473)

Where summary judgment may **NOT** be appropriate where:

- Case is factually complex AND
- Key facts are in dispute
- Key facts will have to be determined on *viva voce* evidence of witnesses/credibility of witnesses
- “Mini-trial” contemplated by Rules will not be sufficient/cost-effective (*Lavergne v. Dominion Citrus Limited*, 2014 ONSC 1836)

Post *Hryniak* Cases

- In respect of a claim where the counterclaim would still have to proceed to trial and might lead to inconsistent findings - consider “litigation as a whole”:
Baywood Homes v. Partnership v. Haditagli, 2014
ONCA 450

Best Practices/ Key Considerations

CONSIDER:

- Type of case

(Does claim or defence **clearly** appear to be without merit or will the judge likely have to use fact-finding powers in **Rule 20.02(2.1; 2.2.)** to determine if there no genuine issue requiring a trial?)

- What kind of evidence will you need in support of the motion?
- Is there likely to be *viva voce* evidence at the motion?
- What are the costs likely to be if *viva voce* evidence is required?
- What timing considerations are involved?
- What does the litigation look like “as a whole”? (Can you only move on some issues? If so, do you risk inconsistent findings?)

Summary Judgment

QUESTIONS
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