Is Partial Summary Judgment Dead

By Gavin J. Tighe and Stephen A. Thiele[1]

Introduction

Voltaire once said about the legal system, "I was never ruined but twice: once when I lost a lawsuit and once when I won one".

There can be little doubt that the cost and delay of litigation has caused more than one winning litigant to feel it to have been a pyrrhic endeavour once the final recovery and the costs are measured. This, of course, says nothing for the loser. Although litigants often do not understand the costs inherent even in a legal victory, lawyers from the outset are required to handicap their clients cases by assessing risks and costs within an adversarial justice system that has been designed to balance the due process rights of both plaintiffs and defendants. Ultimately the paradigm litigation analysis requires a lawyer to chart a route that optimizes recovery as economically as possible, while taking into account the likelihood and quantum of recovery for a client, both on the merits and in terms of collectability. This is not an easy task since the nature of the adversarial system permits some litigants to employ tactics that increase the costs of litigation and that promote delay when in their interests to do so. The cost and procedural delay of litigation are often used as bargaining chips to reduce the expectations of an opposite party and to grind them down to accept a resolution that in all of the circumstances is less than they actually deserve and are entitled to. This, while a stark reality, is not truly justice.

The ever-increasing costs of litigation and inefficiencies associated with the layers of process that can be utilized by a party to cause delay, not to mention the inherent risk in adversarial litigation, have in today's justice system led many litigants to resolve their disputes through mediation or arbitration or to

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seek more streamlined adjudication using the *Rules of Civil Procedure* in an effort to dispose of a case or issues at an earlier stage short of a full blown trial. Alternative dispute resolution or disposal of a case at an early stage preserves access to justice on a practical level.

Indeed, to accommodate the desire of litigants to avoid the inherent cost and delay of taking a matter through a trial while preserving the need for accessible justice, changes were made to the *Rules of Civil Procedure* in 2010. More specifically, Rule 20 was amended with the intent to allow a motions court judge to either in whole or in part dispose of matters short of a full-blown trial. This amendment was designed to signal a 'culture shift' in litigation away from trials being the be all and end all model of ideal adjudication of all issues in dispute in civil litigation.

In 2014, the Supreme Court of Canada's landmark decision in *Hyrniak*[2] accepted the "culture shift" that was required to take place in litigation and seemingly embraced the new powers given to Ontario motions court judges to deal with summary judgment motions and dispose of claims efficiently and proportionally. The Supreme Court recognized that without a meaningful 'short circuit', the civil justice system was collapsing under its own weight. In its quest for near perfect justice, the system was denying justice altogether as the cost and risk associated with civil litigation was well beyond the means and tolerance of average Canadians. A movement to a streamlined and efficient method to deal with claims through an abbreviated summary judgment process supplemented with the tools necessary to do justice in a particular matter was heralded as the means to clear the backlog in the Courts and re-open the civil justice system to the average citizen.

Less than 4 years later, however, the heralded culture shift promoted by Justice Karakatsanis and her colleagues is meeting obstacles, particularly where a party seeks partial summary judgment. Although there is a strong desire to avoid high costs in having a case or issues in a case go to a full trial, Ontario appellate courts in 2017 sent a strong message to the profession that partial summary judgment would

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[2] *Hyrniak v. Mauldin*, 2014 SCC 7, 2014 CarswellOnt 640.

only be granted in very rare cases and would, for the most part, not be granted at all. The risk of substantial adverse costs chilled attempts to extricate clients from lengthy and expensive litigation or to narrow issues through "partial" summary judgment. To many civil litigation lawyers, the message delivered by the Ontario appellate court was that partial summary judgment was dead and seeking same a fool's errand.

From a policy perspective, a court's resistance to granting partial summary judgment conforms to the old "gold standard" of adjudicating any civil litigation matter. In theory, any civil litigation matter will only be dealt with fully and accurately if it is allowed to advance to trial on a complete record. If partial summary judgment is granted somewhere along the way to dispose of an issue, a trial judge could arguably come to a different view of the matter once a more complete evidentiary picture is painted at trial. A motion judge on a motion for summary judgment could be left to make a decision on an incomplete understanding of a particular case. As the Courts have pointed out, this could lead to inconsistent findings and re-crimination of determinations made too hastily and at too early a stage before all of the evidence has been fully and contextually appreciated.

But gold standards in any field of endeavour are, as the name suggests, expensive. Justice is no exception.

Although ensuring that a case is disposed of on a complete record is laudable, the reality of hefty costs and lengthy delays in getting a matter to trial requires courts to be open and flexible to the need to grant partial summary judgment where the facts, evidence and the law demonstrate that a particular issue or matter or the continued involvement of a particular party does not require a trial. In today's litigation environment where high costs and the spread between expended costs and recoverable costs widen, expense denies ordinary people access to justice particularly when they are in the right. In such an environment there simply cannot be an absolute prohibition against granting partial summary judgment.

There is, in our respectful view, great utility, efficiency and economy in cutting a matter down to size by removing issues or parties at as early a stage as possible before sunk costs drive the matter.

In contrast, to embrace an absolute prohibition against partial summary judgment encourages litigants to bring unmeritorious actions against multiple defendants which can have and have had profound negative effects on our justice system. Indeed, the tactic of joining multiple defendants and seeking contribution from all of them is a tried and true method of coopering up settlement monies for a plaintiff. Such a tactic rarely considers the merits of the individual claims made. Defendants added to such multi-party, multi-issue claims are faced with the election of whether to pay their lawyer to defend a matter or simply contribute an equal or lesser amount to a global settlement to fully dispose of the matter. A great many defendants rightly choose the certainty and practicality of economic settlement in that situation rather than the risk and ongoing expense of defending a matter. This is particularly the case if a party believes they are in for the long haul and will be required to fund litigation through a trial against an impecunious plaintiff. In turn, the use of this tactic is encouraged and litigation multiplies. As a result, access to justice can be further hampered and litigants who might otherwise be able to narrow issues at an early stage of proceedings are now be required to either litigate all issues at a lengthy and costly trial, or fold their hand and capitulate on the harsh economies of unrecoverable costs.

As noted by the Supreme Court of Canada in *Hryniak*, the fact is that the monolithic nature of the process effectively deters many citizens from seeking justice and even more from staying in the battle until the end regardless of the correctness of their position. This stunts the advancement of the law and embitters the populous towards the justice system.

The recent decisions of Ontario's Court of Appeal on the ability of a litigant to obtain partial summary judgment has taken us to another important crossroad on the summary judgment highway. To understand how we have gotten here, we must carefully examine the Supreme Court of Canada's

judgment in *Hryniak*, recent Ontario Court of Appeal decisions which have rejected partial summary judgment and other recent appellate decisions in which partial summary judgment has been granted.

Through understanding the nuances of these various decisions, litigation lawyers will be able to fully advise clients on whether their case or issues therein are capable of disposition on a pre-trial partial summary judgment motion or whether the costs in time and money of a full blown trial are necessary. In addition, the harsh realities of modern litigation require both counsel and the courts to consider hybrid resolution mechanisms and use the 'toolbox' provided by the Rules where they can deliver justice more economically and efficiently.

Regardless of a client's particular circumstances, as recent cases have demonstrated, lawyers should realize that partial summary judgment can still be a powerful weapon in the litigator's arsenal.[3]

Rule 20 and *Hyrniak*

In *Hyrniak*, the Supreme Court of Canada was asked to determine the scope of the new powers introduced into Rule 20 of the *Rules of Civil Procedure*. At the outset, Justice Karakatsanis for a unanimous Supreme Court boldly asserted that ensuring access to justice is the greatest challenge to the rule of law in Canada today. She recognized that if Canadians are unable to afford trial due to the expense and delay, litigants will be forced to settle and the development of the common law will be stunted.

To remedy this issue, the Court called for a 'culture shift' on the basis that the full blown conventional trial no longer reflected modern reality. Justice Karakatsanis explained that the culture shift required judges to actively manage the legal process in line with the principle of proportionality and that Rule 20, with its enhanced fact-finding powers showed that a trial was not necessarily the archetypal

[3] Given the current debate, we suggest that it may worthy to amend the *Rules of Civil Procedure* in a way that would preserve a party's ability to obtain partial summary judgment even in the most difficult of case, while at the same time preserving the court's gatekeeping function. We suggest that like in construction lien litigation, the Rules could be amended to require leave of the Court to bring a partial summary judgment motion. This will be more fully discussed herein.

default procedure. The Court's recognition of a culture shift was seen by many practitioners and courtroom observers as beneficial to the justice system.

Civil justice is premised on fair and just adjudication, which is prevented by a focus on traditional trial processes resulting in a clogged system. What is just and fair is a proportionate, timely, and affordable system. Rule 20 offers a means to promote and achieve these principles as may be appropriate to each individual case.

The culture shift dictated by Justice Karakasantis' decision in *Hryniak* requires at its core a philosophical shift from a notion of cumbersome and rigid 'due process' to an analysis in a given matter of just how much 'process' is that matter actually 'due'. This is then combined with an ability on the part of the motion's judge to undertake that process in as efficient a method as possible while the matter is at bar.

Under Rule 20, the moving party must demonstrate to the presiding judge that there is no genuine issue requiring a trial. The judge will find in the moving party's favour if she is able to fairly and justly adjudicate the dispute on the merits using only the evidence presented on the motion, without any of the new fact-finding powers. If it appears on the evidence that there is a genuine issue requiring trial, the motion is no longer simply dismissed, as under the old Rule 20. Now, the judge is required to decide whether the matter can be dealt with using the 'toolbox' through the exercise of their discretion to weigh the evidence, evaluate credibility and draw reasonable inferences pursuant to Rules 20.04(2.1) and (2.2). This process will be just and fair if the judge can make findings of fact, apply the law to the facts and make an assessment in a more timely, affordable and proportionate manner in relation to a full trial.

The judge may choose not to invoke these powers if it is in the interest of justice to only exercise them at trial. But as explained by Justice Karakatsanis, whether it is against the interest of justice to use these powers will often coincide with whether there is a genuine issue requiring trial.[4]

If a judge, in using these fact-finding powers, can find the necessary facts to grant summary judgment in whole or in part, proceeding to trial would not be a cost-efficient, timely and proportionate method to resolve the dispute. Indeed it is unjust and unfair to compel a litigant to be put to the time and expense of a trial in such a circumstance.

Some cases have multiple issues or multiple parties and there is economy and efficiency in cutting the larger matter down to size. Certainly for a party who seeks to extricate themselves from a larger lawsuit involving multiple other parties, there is great benefit to that particular litigation in being released. Again it is unjust and unfair to keep such an extricable party in the larger claim. Partial summary judgment may be the disposition of a claim as against the moving party in an action with multiple parties, allowing for the rest of the action to continue, or it could determine some of the issues but not dispose of the whole action. This also has clear and distinct benefit and utility to the other remaining parties as this is one less party in the lawsuit and therefore one less case to go in at trial, and one less set of cross-examinations etc. at trial. Similarly, reducing issues shortens the trial process. The evidence on the motion need not be as exhaustive as at trial, but it must be such that the judge is confident that she can find the necessary facts and legal principles to fairly resolve the dispute or part thereof.

If a judge is not confident to decide and dismisses a motion for summary judgment, the Supreme Court of Canada has strongly recommended that the judge should seize herself of the matter as the trial judge.[5]

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[4] *Ibid*, at para. 59.
[5] *Ibid*, at para. 71.

The Rule 20 analysis encourages the culture shift that is necessary to rectify and in fact rescue a justice system collapsing under its own weight and ensure access to justice to litigants.

However, Justice Karakatsanis' decision cautioned that despite the culture shift that was necessary to promote access to justice and alternative efficient adjudication of disputes, the enhanced fact-finding powers could not be used if it was in the "interest of justice" for them to be exercised only at trial. Although as noted above Her Honour acknowledged that whether it was against the "interest of justice" to use the new fact-finding powers would often coincide with whether there was a "genuine issue requiring a trial", the "interest of justice" also required a judge to consider the consequences of the motion in the context of the litigation as a whole.

Justice Karakatsanis explained:

> For example, if some of the claims against some of the parties will be in the interest of justice to use the new fact finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interests of justice.[6]

This statement essentially left a crack open in the doorway for courts to reject motions for summary judgment or partial summary judgment and maintain the *status quo* which had existed prior to the amendment of Rule 20. Before the amendment, parties were essentially discouraged from seeking summary judgment except in the absolute clearest of cases. Costs sanctions were severe for those who guessed wrong.

This statement from Justice Karakatsanis' decision has put us at another crossroads on the summary judgment highway, where, as discussed more fully below, the Ontario Court of Appeal as early as the Court of Appeal's decision in *Baywood*[7] in 2014, and more recently in *Butera*[8] in 2017 refused to

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[6] *Hryniak, supra*, para. 60.
[7] *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450 (*Baywood*).
[8] *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 (Ont. C.A.) (*Butera*).

grant partial summary judgment and eventually comment that the granting of partial summary judgment would be a rare remedy.

Partial Summary Judgment at the Ontario Court of Appeal

Despite the fact that *Hyrniak* heralded a culture shift and called for Rule 20 as an alternative mode of adjudication, the Ontario Court of Appeal in *Baywood* set parameters for motion judges by seizing upon paragraph 60 of *Hyrniak* and requiring judges to "assess the advisability of the summary judgment process in the context of the litigation as a whole"[9] when dealing with a partial summary judgment motion.

In *Baywood*, the court had been asked by the defendant to dismiss the plaintiffs' action, which had alleged fraud and other impropriety, on the grounds that the action was precluded by the terms of a Release executed by the plaintiffs. The defendant had also asked that his counterclaim on two Promissory Notes signed by the plaintiffs be granted. While the motion judge granted the defendant's motion to dismiss the plaintiffs' action, he refused to give the defendant judgment on his counterclaim. As a result, the motion judge effectively granted the defendant partial summary judgment.

The motion judge's grant of partial summary judgment was reversed by the Court of Appeal on the grounds that in the circumstances partial judgment risked inconsistent findings and would lead to substantive injustice to the parties in relation to the surviving issues. More specifically, the Court of Appeal reasoned that the Release and two Promissory Notes had formed part of the same series of transactions, and thus could not easily be bifurcated from one another. Arguments related to the validity and enforceability of the Promissory Notes on the basis that they did not reflect the true state of affairs between the parties could, theoretically, apply to the Release, thereby resulting in potentially inconsistent decisions if the motions judge's decision finding the Release to be valid was upheld. The risk of

[9] *Baywood*, at para. 33.

inconsistent findings gave rise to the potential for substantive injustice, requiring the motions judge's decision to grant partial summary judgment to be reversed.

The Court of Appeal similarly determined in *Hamilton (City) v. Thier + Curran Architects Inc.*[10] that "a summary judgment motion judge commits an error in principle when he or she fails to assess the advisability of the summary judgment process in the context of the litigation as a whole."[11] In this case, the City of Hamilton and its general contractor commenced an action against an architecture firm which had been hired in connection with the reconstruction and redevelopment of a lodge in Hamilton. Various difficulties had been encountered in the reconstruction and redevelopment work. In turn, the architecture firm commenced third party proceedings for contribution and indemnity against the project's mechanical sub-contractor and its electrical sub-contractor. The third parties successfully sought summary judgment. However, on appeal, it was found that issues related to project delays and the third parties' potential responsibility for them remained a live issue for the trial of lien claims and related actions that still had to be litigated. Indeed, it had been alleged that the third parties had breached their sub-contracts by failing to adhere to the construction schedule, failing to provide sufficient numbers of qualified workers to complete work properly and causing a number of the delays on the project.

Accordingly, the Court of Appeal stated that the motion judge's dismissal of the third party actions created a risk of inconsistent findings of fact, leading to disproportionate means to achieve a final just result. Fundamentally, the lack of proportionality flowed from the fact that there was going to be a trial in any event with its attendant consumption of scarce judicial resources so there was no real savings to the justice system in granting the motion.

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[10] 2015 ONCA 64 (*Hamilton*).
[11] *Hamilton*, at para. 22.

These decisions were followed in *Canadian Imperial Bank of Commerce v. Deloitte & Touche*[12], where the Court of Appeal once again overturned a motion judge's partial summary judgment of a claim. Here, a company became insolvent following an accounting fraud that took place in 1998. The company's lenders and its receiver claimed that the defendant auditors were responsible for losses suffered by the company and sued them for breach of contract and professional negligence. On a motion for summary judgment, the auditors were successful in having the claim for professional negligence dismissed even though the claim for breach of contract, which consisted of misrepresentation, remained. According to the motion judge, the breach of contract, including the reckless or fraudulent misrepresentation claim of the company's lenders and receiver, did not involve establishing a duty of care. Thus, the motion judge was satisfied that there was no risk of duplicative findings on material issues. The motion judge reasoned that reducing the number of issues would result in a shorter, more focused and therefore, less expensive trial.

The Court of Appeal disagreed. In the Court of Appeal's view, the facts found by the motion judge were likely to be at issue at the trial of the claim for misrepresentation, meaning there was a real risk of duplicative or inconsistent findings at trial. Accordingly, the Court of Appeal effectively solidified its prior precedents that partial summary judgment should only be granted where there is absolutely no risk of duplicative or inconsistent findings at trial and where it is advisable in the context of the litigation as a whole.

In 2017, the Court of Appeal, in *Butera*, again warned of the danger of inconsistent and duplicative findings as considered in *Baywood*, *Hamilton* and *CIBC*, but went one step further in resisting the use of Rule 20 to secure partial summary judgment. In this very significant decision, the Court of Appeal identified four problems with partial summary judgment that are contrary to the efficiency and proportionality principles raised in *Hyrniak*. The identification of these four problems solidified the Court's resolve to take a narrow and restrictive stance in connection with a motion judge's ability to grant

[12] 2016 ONCA 922 (CIBC).

partial summary judgment. In their view: "A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner."[13]

By reaching this decision, the Court effectively revived the pre-*Hyrniak* state of the law, which cautions that partial summary judgment should only be used in "the clearest of cases where the issue on which judgment is sought is clearly severable from the balance of the case."[14] To the legal profession, this statement signalled a death knell to the partial summary judgment motion.

However, as explained below, the four problems in connection with partial summary judgment identified by the Court in *Butera* are by no means insurmountable and can be countered. Partial summary judgment is far from dead.

(1) Delay

According to the Court of Appeal, partial summary judgments are not necessarily a good thing because such a motion might cause delay in the ultimate resolution of an action. More specifically, such a motion might simply be brought as a delay tactic that would ultimately only increase the cost and time of an action.[15]

Although we agree that some parties tactically use interlocutory motions to cause delay and increase costs, by raising these concerns in connection with partial summary judgment motions, the Court overlooked the fact that where a summary judgment motion is brought in good faith, it would not be fair, just and proportionate to the moving party to be dragged along to a full trial. This is particularly so where the claim at issue can be resolved at a summary judgment hearing with the available record. Therefore,

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[13] *Butera*, at para 34.
[14] *Gold Chance International Ltd. v Daigle & Hancock*, 2001 CarswellOnt 899.
[15] *Butera*, at para. 30.

these *bona fide* litigants should not be categorically precluded from bringing summary judgment motions only because some may use partial summary judgment motions as delay tactics.

In any event, *Hynriak* addressed this exact issue and provided that the risk of unmeritorious motions brought as delay tactics will continue to exist and in those cases the motion judge can decline to exercise his or her discretion to dismiss the motion without engaging in a full inquiry.[16] Therefore, the mere concern of unmeritorious motions should not deter litigants from bringing, and judges from hearing, partial summary judgment motions. It is the function of the motion judge to discern the true purpose behind the motion.

(2) Expense

The Court in *Butera* warned that a summary and partial summary judgment motion may become very expensive and that absent a presumptive cost award provision under the Rule, the parties are encouraged to bring these motions.[17]

While this concern also has merit, it significantly downplays *Hyrniak*'s proposition that "the resolution of an important claim against a key party could significantly advance access to justice and be the most proportionate, timely and cost effective approach."[18] In short, the motion may save more than it expends and in that sense is clearly economical, efficient and proportional. Again, the motion judge must undertake this analysis in determining the motion.

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[16] *Hyrniak*, at para. 68.
[17] *Butera*, at para. 31.
[18] *Hyrniak*, at para. 60.

(3) Judicial Resources

The third problem addressed by the Court related to the heavy workload of judges resulting from the overflow of summary and partial judgment motions post-*Hyrniak*. In particular, judges are now required to hear motions and provide elaborate reasons on issues that do not dispose of the actions.[19]

We certainly sympathize with this reasoning.

The inescapable fact is that a motion for summary judgment downloads a significant amount of work onto the motion judge. The judge is required to read the evidentiary record rather than hear the evidence at a trial. While a judge may deal with one trial in a given, month a judge might theoretically hear numerous motions for summary judgment. The one trial requires a judge to write one judgment whereas a judge hearing multiple summary judgment motions is required to write reasons in each case.

However, the legitimate concern about judicial workload overlooks the following two realities:

First, the increase in the number of summary motions is only transient and is a result of the justice system going through a transitional period to achieve the culture shift proposed by *Hyrniak*. In the short term, the effect may seem as though the courts are congested with summary judgment motions. This is because of the backlog of proceedings built up by the inefficiently slavish adherence to over burdensome due process. But, in the longer term, both the justice system and the litigants will benefit from the certainty and efficiency that flow from the summary disposition of claims and actions.

Second, the purpose of the justice system is to serve the litigants. As such, the concern that summary judgment motions increase judicial workload, although valid, should not act as a deterrent for judges to hear these motions and as a roadblock for the litigants in bringing them. The culture shift heralded and indeed dictated by *Hyrniak* is required to achieve access to justice. It will not be realized

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[19] *Butera*, at para. 32.

unless all of the participants in the justice system, including judges, lawyers, court staff and litigants are receptive to make the requisite adjustments and break through the log jam. As with a blocked river, when the dam is broken there is a torrent but as the water abates the flow becomes far more regular and manageable.

(4) Inconsistent Findings

The fourth and final problem identified in *Butera* is that the available record at the hearing of a summary and partial summary judgment motion is not as expansive as the trial record, which increases the risk of inconsistent findings.[20] We agree that inconsistent findings ought to be avoided. We also agree that the record on a motion is generally smaller than that at a trial. Frankly this is precisely the point. If a matter can be determined on a smaller more efficient record, it should be.

The concern of the Court fails, in our view, to fully take into account the flexibility provided with the new fact-finding powers of a motion judge under Rule 20.04(2.1). These fact-finding powers when read in conjunction with the analytical roadmap approach set out in *Hyrniak* provides that even if the motion judge determines that a more expansive record is needed as a result of a genuine issue requiring trial, she may use her fact-finding powers by requiring the parties to provide that evidence. Simply put, if the judge believes the record is deficient the question then is can it be made sufficient through the use of the powers set out in the tool box, including the ability to hear *viva voce* evidence? The point of the toolbox is that it accommodates those cases between a clear cut case for judgment on a motion and those requiring a full blown trial. The toolbox provides the means to deal efficiently and economically with the vast majority of cases in the middle. These rules effectively allow a judge to exercise her discretion in making the record as expansive as necessary for a confident conclusion on the motion, provided that the exercise of those powers is not against the interest of justice. As explained in *Hyrniak*, the interest of justice in this context means determining whether the use of the new fact-finding powers should only be

[20] *Butera*, at para. 33.

exercised at trial or can also be used in a summary motion in order to allow for a fair and expeditious resolution of a matter.

The Ongoing Culture Shift

Butera has, in the minds of many lawyers, dampened the development of law in relation to partial summary judgment motions in post-*Hyrniak* cases by viewing these motions as a strain on the justice system and only available in rare circumstances where claims are easily bifurcated from the rest of the action. Lawyers and their clients should not, however, despair, because there remains an ongoing culture shift in respect of summary judgment, including partial summary judgment motions.

Evidence of signs of life in partial summary judgment can be seen in the Court of Appeal's ruling in *Keuber v. Royal Victoria Regional Health Centre*[21] where an order granting a partial summary judgment was upheld.

Rather than following the narrow approach of reserving partial summary judgments for rare circumstances where the issues are discrete and easily bifurcated from the main action as strongly recommended in *Butera*, the Court of Appeal in *Keuber* applied the proportionality approach set forth in *Hyrniak* and recognized that partial summary judgments are intended for cases where the judge has confidence in making fair decisions with respect to claims against certain parties, so as to avoid subjecting those parties to the time and expense of a full trial.

The approach taken in *Kueber* influenced Justice Myer's decision in *Mason v. Perras Mongenais*[22]. In *Mason*, Justice Myers attempted to reconcile the various approaches by the Court of Appeal and provided a comprehensive overview of the law with respect to partial summary judgments. This decision reminds judges to follow *Hyrniak*'s precedent and to base their summary and partial

[21] 2018 ONCA 125 (*Keuber*).
[22] 2018 ONSC 1477 (*Mason*).

summary judgment decisions on the merits and circumstances of each individual case. To that end, Justice Myers recommended that summary judgment motion judges should undertake a comparative analysis with respect to what the claim and the action as a whole will look like if a partial summary judgment is granted. In other words, if it is determined that the interests of the parties can be fairly, confidently and adequately addressed in a partial summary judgment, judges should proceed as such. It would be unfair and unjust to do otherwise.

Mason discussed a spectrum on which different claims fall as a result of the comparative proportionality analysis. On one end of this spectrum are cases where the comparative analysis favours the option of deferring the disposition of all of the claims to a full trial with the rest of the action. In these cases, to fairly and adequately decide on the merits of the claim at issue, the same parties and witnesses will eventually have to go to trial and the same facts will be at issue at both trial and the summary judgment hearing, maximizing the risk of duplicity and inconsistency. The question really is: will an issue survive a motion for summary judgment and is there a possibility that such issue will be decided differently following a trial? It is not in the interest of justice, in these types of cases, for any of the parties to spend the required resources on summarily deciding a claim.[23]

On the opposite end of the spectrum are claims that pertain to issues that can easily be bifurcated from the remainder of the action, such as claims that are statute-barred.[24] In *Mason* Justice Myers pointed out that although these cases are the most efficient if decided summarily, *Hyrniak* extended the availability of partial summary judgments to claims that fall in the middle of the spectrum. As such, the culture shift in *Hyrniak* requires that judges find the most proportionate process for resolution on a case-by-case basis. This means that where the matter can be resolved confidently and fairly by way of a partial summary judgment, this should be preferred as proportionate in relation to the traditional lengthy civil trial.

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[23] *Mason*, at para. 32.
[24] *Ibid.*

Two Lines of Authority Have Emerged

The contrasting approaches discussed in the foregoing cases has led to the development of two lines of authority when considering partial summary judgment motions. These two lines of authority are: (i) *Hyrniak* and cases flowing from its principles such as *Mason*; and (ii) the cases flowing from the principles discussed in *Baywood, CIBC* and *Butera*.

What seems to be driving the line of cases a given judge chooses to adhere to in a given matter is their subjective view of proportionality. Rather than considering proportionality in light of all viewpoints in the justice system, some judges (perhaps subconsciously) tend to give more weight, in our respectful view, to the perspective of the system in which they themselves operate. *Mason*'s spectrum is skewed where a judge views an issue as not easily bifurcated and dismisses a motion accordingly, instead of invoking her fact finding powers to more meaningfully determine if an issue or claim may be disposed of. The latter approach is almost invariably more time consuming in that very instant on the motion, but in the context of the litigation as a whole, it can be substantially more efficient to the litigants and the overall action.

Mason is an important case that reconciles the uncertainties in the law after *Butera*. It is respectfully submitted that *Mason* accurately reflects the spirit of the new Rule 20 and *Hyrniak*.

In *Larizza v. Fasken Martineau DuMoulin LLP*[25], the Defendant, Fasken Martineau Dumoulin LLP (**"Faskens"**) and a co-defendant, Minto Group were granted summary judgment by the motion judge. This was in the face of the fact that the action continued against a number of other defendants. The Court of Appeal upheld the decision but in doing so did not mention *Mason* in its decision upholding the grant of partial summary judgment in favour of the respondents. The Court of Appeal considered *Butera* and found that this case was distinguishable.

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[25]2018 ONCA 632.

After analyzing a series of the causes of action pleaded against the moving party respondents a unanimous Court of Appeal found that the dangers outlined in *Butera* did not present themselves in *Larizza* ruling: "The claims against Faskens are standalone and limited in nature. There is no real concern about duplicative or inconsistent findings arising with respect to the claims asserted against the remaining defendants."[26] The Court of Appeal analyzed that the "…claims against Faskens were readily separable from the balance of the case".[27]

In a recent decision which involved a motion for partial summary judgment in a construction lien matter, Justice Di Luca considered the Court of Appeal's ruling in *Larizza* and noted:

> The caution against partial summary judgment sounded in *Butera v. Chown, Cairns LLP*, does not mean that partial summary judgment is never appropriate. Indeed, in cases where a discrete legal and factual issue can be readily ascertained and determined so as to avoid the risk of inconsistent findings and duplicative proceedings, partial summary judgment motions remain an appropriate vehicle; see *Larizza v. Royal Bank,* 2018 ONCA 632, *Sirois v. Weston,* 2017 ONCA 1002, and *Mason v. Perras Mongenais,* 2018 ONSC 1477. Even in cases where the issue is not entirely discrete, the courts have granted partial summary judgment where summary judgment was determined to otherwise be a fair, proportionate and just means of resolving the action; *see Kueber v. Royal Victoria Regional Health Centre,* 2018 ONCA 215, and *Mason v. Perras Mongenais* at paras. 24-33.[28]

Of note, the Court refused to grant partial summary judgment in this case on the basis that the nature and extent of the lien deficiencies was a genuine issue requiring a trial.

The structure of a construction lien partial summary judgment motion, however, poses an interesting paradigm that might be considered to be adopted more generally to partial summary judgment motions in all civil litigation matters. Under s. 13 of the new *Construction Act*,[29] leave must be sought in order to bring an interlocutory motion such as a partial summary judgment motion. As set out by Justice Perrell in his consideration of the similar leave requirement under s. 67(2) of the former *Construction Lien Act*, leave to bring a partial judgment motion was required which leave was to be granted if "… the

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[26] *Ibid*, at para. 40.
[27] *Ibid*, at para. 40.
[28] *Concord Plumbing & Heating Ltd. v. Canadian Tire Real Estate Ltd.*, 2018 ONSC 6361.
[29] R.S.O. 1990, c. C-30.

motion is necessary or will expedite the resolution of the issues in dispute".[30] . In considering this preliminary issue Justice Perrell noted: "…the purpose of Rule 20 is to dispose of claims, or defences which do not raise a genuine issue for trial early in a proceeding…".[31] Partial summary judgment arguably advances the interests of proportionality and efficiency and cuts cases down to size making them more manageable and economic.

The concept of a preliminary leave requirement for motions for partial summary judgment, it is respectfully submitted, has some obvious benefits. Firstly, it limits motions for partial summary judgment and reduces their costs. The test for leave would require the moving party to demonstrate on the face of the pleadings alone that there was the type of "standalone and limited" issue that was amenable to discrete adjudication and that the adjudication of that issue would advance the efficiency of the conduct of the proceeding as a whole. Seeking leave is obviously a far less onerous or expensive proposition than preparing and responding to full blown motion records and taking up Court time arguing a full motion. If a motion for partial summary judgment is ultimately to be dismissed on the basis that the issue sought to be determined is not sufficiently discrete to avoid the issues identified by the Court of Appeal in *Butera*, then it makes good sense to identify that at the outset of the motion process rather than at the end of it.

On a practical level, judges at Toronto's Civil Practice Court have effectively been exercising this very function. Moving parties are required to obtain a date for the hearing of proposed motions and particularly summary judgment motions. CPC Judges have routinely refused to give dates for partial summary judgment motions unless the moving party can persuade them that the issue is of the nature identified by the Court of Appeal in *Larizza*. Effectively, CPC Judges in Toronto are acting in a *de facto* leave granting capacity already. While moving parties may be frustrated with this practice it is not in any client's legitimate interest to bring a motion for summary judgment which is doomed to failure from the

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[30] *Industrial Refrigerated Systems Inc. v. Quality Meat Packers Ltd.*, 2015 ONSC 4545, at para. 72.
[31] *Ibid*, at para. 74, quoting Justice Borins in *Michaels Engineering Consultants Canada Inc. v. 961111 Ontario Ltd.* (1996), 29 O.R. (3d) 273 (Ont. Div. Ct.), at para. 8

outset. Thus, a potential solution to the current partial summary judgment quandary may be an amendment to the Rules which requires leave to be sought for such a motion where it is obvious that the action will not be fully disposed of and the dangers warned of in *Butera* are present. This may be preferable to what currently occurs.

Hyrniak stated that if a motion for summary or partial summary judgment is dismissed, the judge rendering that decision should carry the case to trial.[32] The purpose of this, as stated by the Court, is mainly to prevent the motion judge's knowledge of the case as developed in hearing the motion from going to waste. In addition, while we are certain this rarely if ever occurs, forcing a motion judge to 'carry the can' on a dismissed motion for summary judgment will, theoretically, deter judges from the temptation or appearance that they are flippantly dismissing motions and kicking the ball down the field to have another trial judge deal with it. A motion judge may not be motivated to take the time necessary to adequately exercise the discretion given for a more efficient process by invoking the powers in the toolbox to decide the issue(s), but this ignores the perspectives of all shareholders in the litigation process and the consideration of proportionality for an overall efficient system. Beyond the incentive embedded in recommending that the motion judge seize herself of the matter as a trial judge, the benefits of doing so include saving judicial resources, as a new judge will now not have to get up to speed. This also allows litigants to have expectations of how issues may be decided since they will be familiar with the judge and tailor their expectations and settlement offers accordingly. Unfortunately, many judges simply have not seized themselves of the matter upon dismissing a summary judgment motion as strongly suggested by the Supreme Court. This evidences that the culture shift is difficult to embrace for judges, who not only are extremely busy, but are also perhaps unwilling to decide cases summarily for fear that a traditional full record at trial is still the most important key to justice. However, 'justice' and 'fairness' are predicated on far more than a full evidentiary record. Fairness and effectiveness are key components of

[32] *Hyrniak*, at para. 71.

real access to justice and advancement of the common law, even though some judges may still be too narrowly focused on the illusion that trial is always superior.

Summary and Partial Summary Judgment in Practice

In practice, if judges take the *Baywood*, *CIBC* and *Butera* approach and only grant summary or partial summary judgment in limited circumstances found on the far end of the *Mason* spectrum, litigants will be deterred once again from bringing Rule 20 motions. Since trial is so time-consuming and costly, settlement may be the most efficient and affordable option. We find ourselves once again in the very situation feared by the Court in *Hyrniak* – access to justice is obstructed, and the development of the common law is threatened. Once we come to terms with this, it is plain to see that in relation to trial, summary and partial summary judgment as a new form of adjudication is fair, efficient and proportional for everyone involved in the system. That being said, this culture shift depends on judges acknowledging the longer term judicial economy in exercising their discretion in summary procedures.

In recent cases, *Butera*'s proposition that granting partial summary judgment will be "rare" has not been sweepingly accepted. Motion judges have recognized that they must consider if the net result of the partial summary judgment process is an overall increase in efficiency in adjudicating the case. More specifically, the *Butera* line of reasoning is put against the *Mason* line of reasoning in a balancing exercise to determine if the risk of duplicative or inconsistent findings outweighs the benefits of summary resolution, thereby precluding summary decisions as being proportionate.[33] While the case law appears to be settling into some consistency with the balancing approach, it remains uncertain how a given judge might react to a motion for summary or partial summary judgment in a given matter in the face of the current debate. Judges must be courageous for the culture shift to occur.

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[33] *York Regional Standard Condominium Corporation No. 1206 v. 520 Steeles Developments Inc.*, 2018 ONSC 3766 at para. 94 (*York Condominium*); *The Bank Of Nova Scotia V. 1736223 Ontario Limited*, 2018 ONSC 4449, at para. 28; *Service Mold + Aerospace Inc. v. Khalaf*, 2018 ONSC 5345 at para. 52; *N.K.P. Painting Inc. v. Jasper Construction Corp*., 2018 ONSC 5692 at para. 38.

For the lawyer, however, careful consideration of the following two factors may help guide a decision on whether a summary judgment motion will be appropriate and strong even where a judge might be initially disinclined to embrace the culture shift.

First, since a judge must be confident in deciding the factual and legal issues summarily, an ample record is needed. Although *Hyrniak* told us that a full trial-like record is not necessary, parties still must put their best foot forward.[34] In *York Regional Standard Condominium Corporation No. 1206 v. 520 Steeles Developments Inc.*, the judge denied summary and partial summary judgment because he was not satisfied that sufficient evidence had been presented on the relevant points to allow him to confidently make the determinations necessary with the discretionary powers under Rule 20. [35] Without a sufficient evidentiary record, the "application of the tools set out in Rule 20.04(2.1) will not allow for a just and fair determination of the genuine issues that have been identified."[36] It is therefore wise to put forth a comprehensive motion record to allow the judge to be confident.

Of course what is comprehensive in a given case is in the eyes of the beholder. For some, the record will never be comprehensive enough and there will always be a possibility that there will be another stone somewhere down the road which, when overturned, will possibly change the evidentiary narrative. That is, however, as true for a trial as it is for a motion. There always remains the possibility at a trial that after the trial is completed and the decision rendered some new fact of piece of evidence will be uncovered. At some point it has to be game day and the never ending possibility that something might come up in the future needs to finally end. This requires judges to have courage and strength of conviction instead of simply deciding not to decide.

Second, the more discrete and easily bifurcated the issues, the more likely the motion will be granted. Where facts and evidence in support of the partial summary judgment motion are so intertwined

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[34] *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200 (Ont. S.C.J.), at para. 26, aff'd 2014 ONCA 878 (Ont. C.A.), leave to appeal to SCC refused, [2015] S.C.C.A. No. 97 (S.C.C.).
[35] *York Condominium*, at para. 80.
[36] *Ibid*, at para. 86.

with the issues and evidence that will carry forth to trial, partial dismissal will not be proportionate in the context of the litigation as a whole. Judges look for issues that are distinct from those that will remain in the action.[37] For example, the Court of Appeal has accepted that limitation period issues are distinct and readily bifurcated.[38] In short, it is clearly wise to put forth evidence that demonstrates the issue to be discarded and determined is discrete.

Conclusion

The "culture shift" required to accomplish a fair, just and proportionate system is dependent on judges readily accepting their added responsibilities and powers on Rule 20 motions, and acknowledging that a traditional civil trial is no longer necessarily the most appropriate and certainly not the most functional means of achieving justice. By judges exercising their discretion to decide cases and issues summarily and seizing themselves of matters they do not dispose of, the result will be judicial economy and litigation efficacy that permits a new and necessary form of adjudication and access to justice. Proportionality means fairness and justice to everyone in the system.

Until this is fully comprehended, the system will remain inconsistent and ineffective, and the debate over whether the granting of partial summary judgment should only rarely be granted will continue at the potential expense of access to justice for the average Canadian litigant. Unless the ever increasing log jam of a bloated system is relieved its banks will soon burst.

It is for this reason that we have suggested that there might be another process worthy of pursuit that could potentially assist the Court and the parties in weeding out partial summary judgments with no real chance of success if a Court adheres strictly to the prohibitions in *Butera*. As mentioned in this paper, it may be worthy to impose a leave requirement for motions for partial summary judgment which will not dispose of the entire action but which will dispose of issues, claims or defences which do not raise a

[37] *Mason*, at para. 21.
[38] *Sirois v. Weston*, 2017 ONCA 1002.

genuine issue for trial or for the dismissal of claims against individual defendants or for individual plaintiffs in cases against numerous defendants or involving multiple plaintiffs. Such a requirement would allow the Court to control such motions at an early stage before both the parties and the judicial system expend significant resources adjudicating such matters. Requiring moving parties to establish such a threshold at the outset of the motion process preserves the value of partial summary judgment while limiting or potentially eliminating the waste and risk of unsuccessful partial summary judgment motions. This gatekeeping function may allow more efficient and cost-effective delivery of justice to litigants Perhaps this route will move litigants and lawyers beyond the current crossroad and remains true to the culture shift strongly recommended by *Hyrniak*.