The trial and summary judgment: two solitudes, converging

Luisa Ritacca and Fredrick Schumann

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The trial and summary judgment: two solitudes, converging

- Before the 2010 Rules amendments and the Supreme Court of Canada's decision in *Hryniak v Mauldin*, summary judgment ("SJ") and the trial were seen as two solitudes.

The trial and summary judgment: two solitudes, converging

- Now, the two solitudes are converging
  - Enhanced powers and lower threshold for SJ are broadening and diversifying summary judgment
  - SJ is now seen as an entrée to judicial case management
  - At the same time, the defenders of trials are urging counsel and judges to conduct them more flexibly, rejecting a “one size fits all” model of trial practice

This presentation

- Part I: *Hryniak* itself
- Part II: Questioning the prevailing ideology of summary judgment, in light of subsequent application and interpretation
- Part III: Judicial Interpretation of *Hryniak*
- Part IV: Conclusions – What does this mean for LawPRO?

Part I: *Hryniak* itself

- Investment fraud case against multiple defendants
- The record on the motion was voluminous: "28 volumes of evidentiary material, along with transcripts of cross-examinations and rule 39.03 examinations involving 18 witnesses" (Court of Appeal judgment, para 3)
- Summary judgment granted only as against Robert Hryniak. He appealed to the Court of Appeal and then Supreme Court, arguing that summary judgment should not have been granted against him.

Hryniak in the Court of Appeal

- Court of Appeal's decision is known as *Combined Air* (after one of the companion appeals)
- Supreme Court says:
  - There should be a more liberal approach to SJ than the one selected by the Court of Appeal; and
  - The Court of Appeal privileged the trial as the reigning model of fair adjudication
- Let's see to what extent that is really true...

Hryniak in the Court of Appeal: when to grant SJ

- Grant SJ where
  - "by exercising the powers that are now available on a motion for summary judgment, there is no factual or legal issue … that requires a trial for its fair and just resolution" (para 37)
- Will the SJ process provide "a fair and just resolution of the dispute before the court"? (para 38)
- Can the "**full appreciation** of the evidence and issues that is required to make dispositive findings" be achieved in the SJ motion, or only in a trial? (para 50)
- Can the motion judge "accurately weigh and draw inferences … without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words and without the assistance of counsel as the judge examines the record in chambers"? (para 54)

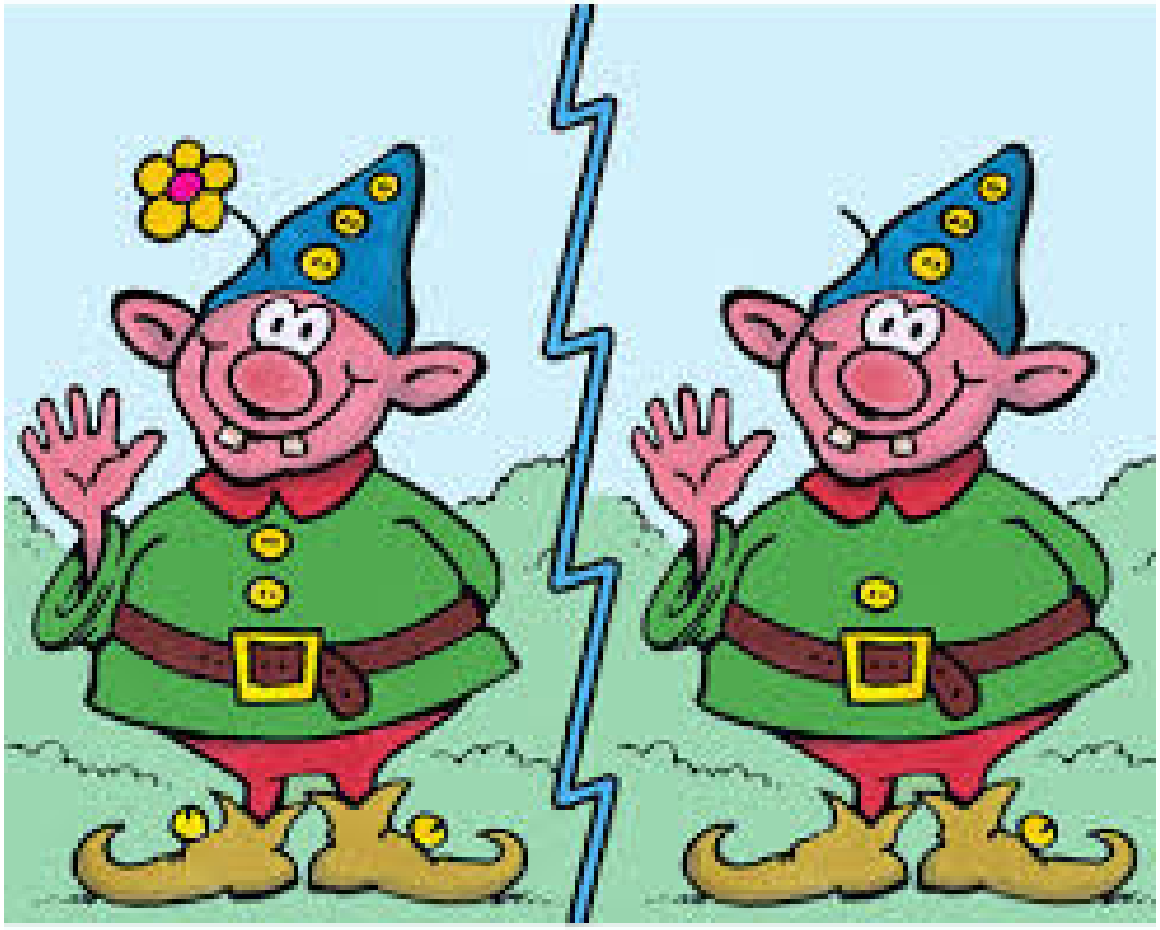
Hryniak in the Court of Appeal: power to hear oral evidence

- Power does not make SJ a form of summary trial
- Motion judge, not counsel, controls the extent of evidence and the issues to which it relates
  - Parties cannot use oral evidence to supplement the record, or anticipate the motion judge directing the calling of oral evidence on the motion

Hryniak: Supreme Court's decision

- There is no genuine issue requiring a trial "when the judge is able to reach a fair and just determination on the merits" in an SJ motion.
- I.e. when SJ
  - (1) allows judge to make necessary findings of fact,
  - (2) allows him/her to apply law to facts, and
  - (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
- We say that there is not much difference from the Court of Appeal's approach
  - Any difference may only be in spirit and emphasis

Can you spot the difference?



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Hryniak: ultimate test is judicial "confidence"

- The three elements all seem to come down to judicial "***confidence***" in conclusions reached in SJ motion:
  - "[A] process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute." (para 50)
  - "[T]he evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute." (para 57)

Hryniak: the new powers

- (1) Without recourse to the new powers in sub-rules (2.1) and (2.2), decide whether there is a genuine issue requiring a trial. If no issue, grant S.J. (para. 66)
- (2) If there is a serious issue(s), use the new powers available,
  - if it is not against the interests of justice* (para. 66)

Hryniak: controlling the beast

- Supreme Court set out a series of "tools" to "control the scope" of an SJ motion:
  - Early judicial involvement e.g. motion for directions (paras 69-71)
  - Possible motion by respondent to stay or dismiss SJ motion because "premature or inappropriate" (para 72)
  - "Salvaging" a failed SJ motion by using the "insight" gained thereby to "craft a trial procedure … that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion." (para 77). SJ judges should seize themselves of the trial.
- If all these tools are necessary, is SJ really faster and cheaper?

Part II: what's so great about SJ?

- The conventional wisdom is that more SJ is the answer for the justice system.
  - "The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial." (*Hryniak* at para 34)

- Is this actually true – on a systemic level?
  - Not aware of any real data on the issue but there are a few points that suggest it may not be as simple as the Supreme Court says.

Summary judgment and “access to justice”

- Access to justice is the main rhetorical motivation for SJ reform* (para. 1)

- This raises a number of questions:
  - Have trials actually become more expensive and protracted? What are the reasons for this, and which ones does SJ actually address?
  - Was there really a time in the past when ordinary Canadians could afford to sue, defend against lawsuits, and “go to trial”?

The “conventional trial” vs “proportionality”

- *Hryniak* at para 2: “Culture shift” to promote “timely and affordable” access to justice. Simplify “pre-trial procedures” and move “emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case.”

  - Claim: we can determine cases fairly and accurately while spending less time and money.

The evil trial

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The evil trial

- Contemporary cases often heap scorn on the trial
  - "...the default setting for litigation should not be a full trial with all of its ponderous procedures and complex rules that encourage tactical manoeuvres, but rather what is just and swift in the circumstances of each case" (*Danos v BMW* at para 15)

- However the trial has its defenders

Is SJ any use for “ordinary Canadians”?

- Anyone who has any exposure to self-represented litigants knows that they do not bring SJ motions.
  - No procedural knowledge to do so
  - Can’t afford a lawyer to assist
  - They just want a judge to hear their story and make a fair decision.
- Rather, where SJ is in play, self-represented litigants are invariably the *targets* of the motion.
- More SJ will not “fix” the access to justice problem for ordinary Canadians.

Is “cheaper” always “better value”?

- Even if SJ is cheaper than a trial, litigants and the system don’t get as much in return.
- A trial results in a final determination of the case 100% of the time. A SJ motion only results in a final determination if it succeeds.
  - Suppose that a SJ motion has a 50% chance of success and costs $20,000. Any trial costing $40,000 or less would represent a better “final determination” value.
- “Bluntly put, if … expending two weeks of judicial time … might not result in a final adjudication of the action on the merits, what is the benefit to the justice system … ?” (*Sobey’s*, infra at para 14)

The value of being heard, even if you lose

- If a party ends up on the wrong end of a trial decision, at least they know that they had the opportunity to tell their story directly to the judge, and to hear and confront the other side's witnesses before the judge.
  - Sometimes losing litigants will say, "No matter how this turns out, I'm glad that I was heard."

- The losing party where SJ is granted does not have that comfort.

Does SJ save judicial resources?

- SJ motions may use up less court time than trials do, but be aware of the time that the judge has to spend out of court reading affidavits and cross-examination transcripts:
  - "[T]he judge must read the entire record, just as a trial judge must listen to and read all evidence placed before him or her. … So, while counsel might view a two-day summary judgment as simply a two day affair for a judge, in reality a judge usually will have to devote the better part of two weeks to preparing, hearing, considering and deciding such a motion." (*Sobey's*, *infra* at para 12)

Different kinds of SJ

- "Discrete Issue" versus "Whole Case"

- Pre-Discovery versus Post-Discovery
  - *1318214 Ontario Ltd v Sobeys Capital Inc*

Cost advantage of oral vs written evidence

- Using written evidence may be cheaper for the justice system but not necessarily for the litigants
  - Preparing affidavits may take just as long as preparing and conducting examinations-in-chief.
  - Out-of-court cross-examinations may take just as long as those done in court – maybe even longer if there is not a judge there to rule on objections and restrict their length.
- Written evidence may not even be cheaper for the justice system, as David Brown J has pointed out in *Sobey's*, *supra*.

Cases slosh towards SJ and away from trial

- Counsel and litigants seem to prefer SJ to trial
  - Why? Maybe risk-aversion: a moving party losing SJ does not lose the case, whereas losing at trial means losing the case, for either side. (With one caveat – see below.)
  - The savvy and wealthy litigants who employ SJ feel that bringing an SJ motion presents no risk, but a trial does.
- D.M. Brown J wrote in *Sobey's*, *supra*: in summer 2011, there was a 7-8 month delay for one-day SJ motions, but trials of less than 2 weeks could be had within 6-8 weeks:
  - "I dealt with roughly 30 to 40 requests for full day summary judgment motions. When offered an earlier trial date, only one set of litigants accepted. I was stunned. There is something fundamentally wrong with a litigation culture which prefers the delay and uncertainties associated with long summary judgment motions over the availability and adjudicative certainty of a trial. This cultural problem must be fixed."

Part III: interpretation of *Hryniak*

- *Sweda Farms*: SJ granted to dismiss claim against one defendant
- Large economic tort action
- Heard before *Hryniak* but decided after
  - Corbett J would have granted SJ on either test
  - "However, while the language of 'full appreciation' may no longer govern the test for summary judgment, in order to achieve a 'fair and just adjudication' of Sweda's claims, I have proceeded on the basis that I should dismiss them only if I am satisfied that Sweda's claims against Burnbrae cannot succeed at trial". (para 14)

Sweda: “best foot forward”

- Ultimately Corbett J decides that the plaintiff failed to put its best foot forward and that there was no evidence of a number of its allegations
  - “Best foot forward” “even more important after *Hryniak*”
  - Although not all documents produced, “I am not prepared to infer that the ‘missing production’ ... would establish anything material not already in evidence.” (para 31)
  - “The plaintiff who treats a defence motion as a speed bump on the long highway to trial risks crashing its case in the deep ditch of dismissal.” (para 201)
- Lesson: in a large and (on the surface) complex case, SJ can be granted, even without “complete” discovery

The *Sweda* framework

- *Sweda* set out another framework for SJ (at para 33):
  - Court assumes parties have placed before it, in some form, all the evidence that would be available for trial
  - Court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits, on that record
  - If not, the court should
    - Decide those issues that can be decided
    - Identify what additional steps are required to complete the record to enable the court to decide the remaining issues
    - Seize itself of the further steps required, absent compelling reason not to do so

Sweda framework: comments

- Adopted in other cases (e.g. *Danos v BMW*)
- Eliminates Supreme Court's (perhaps superfluous) two-step inquiry
- Assuming that the parties have put before the court all the evidence that would be available at trial is perhaps problematic given the admitted shortcomings of the summary judgment process compared to trial. It is especially awkward if discovery is incomplete.

Baywood Homes: background

- Defendant's motion for SJ against the plaintiff's claim (on the basis of a release) and for its own counterclaim (on two promissory notes)
- Motion judge grants SJ on the release issue but, after holding a mini-trial, refuses SJ on the promissory note issue
- Court of Appeal reverses decision to grant SJ on the release issue – both issues should go to trial
  - Is the Court of Appeal subtly reintroducing the spirit of its decision in *Hryniak*?

Baywood Homes: court's decision

- Motion judge erred in failing to assess advisability of SJ process in context of litigation as a whole
  - Meaning that the promissory notes and the releases were part of the same series of transactions that the plaintiff challenged
  - If one was questionable, then both were
  - Letting one, and not the other, go to trial would risk inconsistent verdicts
  - The motion judge also misapprehended the plaintiff's admissions. A written record can lead a judge astray (para 45)
  - Court also pointed out that SJ not always faster and cheaper (para 44)

Now SJ is a two-way street

- One might assume that only moving parties can obtain SJ.
- Now, SJ can be granted to the responding party, *even without a cross-motion*.
- Perell J did this in *King Lofts* (paras 86-87). It was upheld by the Court of Appeal because "[*Hryniak*] has approved a 'culture shift' requiring judges to manage the process in line with the principle of proportionality" (para 14).
- Perell J did the same thing in *Landrie*.
- Perhaps most suited for "either-or" issues such as can arise with limitation periods or contract interpretation. In such cases, victory for the responding party is a mere reflex or "by-product" of the failure of the moving party.

SJ moves closer to the trial model

- The Rule 20 amendments, as interpreted in *Hryniak*, have moved SJ closer to the trial model:
  - "Genuine issue requiring a trial" rather than "genuine issue for trial" – issues that are "for trial" can now be dealt with via SJ, and only issues that *require* a trial must be left for that venue.
  - The Court of Appeal in *Combined Air* failed to move SJ far enough towards the trial model: "… 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" (*Hryniak* at para 4)
  - "[T]he amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication." (*Hryniak* at para 45)

SJ moves closer to the trial model

- Traditionally, SJ had to be decided on a paper record with out-of-court cross-examinations
- Now SJ judge can hear extensive oral evidence, customizing the procedure as he or she goes:
  - "[T]here will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure." (*Hryniak* at para 63)

And trial moves towards SJ

- The defenders of the trial and critics of SJ point out that trial model is not actually monolithic
- Rather, trial procedure can be flexibly designed to be proportionate to the claims
- The implication is usually that, as with SJ, judges will be involved in case-managing trials
- E.g. D. M. Brown J in *George Weston* at paras 35 and 37

Summary judgment breeds its own sub-motions

- The complexity of summary judgment under Rule 20 has given rise to several species of sub-motions:
  - The motion to strike, quash, or stay a motion for summary judgment (see *Combined Air (Ont CA)* at para 58; *George Weston*)
  - The motion for directions in respect of a motion for summary judgment (*Hryniak* at paras 69-72).
- Perhaps we are not talking about summary judgment anymore but really introducing intensive judicial case-management in civil actions.
  - "This culture shift requires judges to actively manage the legal process in line with the principle of proportionality." (*Hryniak* at para 32)*

What about Rule 21 and 22?

- Cooling in the shadow of Rule 20 are rules 21-22, which can also be invoked to minimize the need for a full blown trial

- Each of these Rules require their own assessment and analysis, but in brief:

Rule 21

- Rule 21: Determination of an issue before trial
  - 21.01(1)(a) – determination of question of law raised by pleadings (evidence only with leave or on consent)
  - (1)(b) – strike out a pleading – discloses no reasonable cause of action or defence (evidence never admissible)
  - “Plain and obvious” test applies to both prongs of (1)
  - (3) – stay or dismiss action because of (a) lack of jurisdiction over subject matter; (b) lack of legal capacity of plaintiff or defendant; (c) another proceeding pending; (d) frivolous, vexatious, or otherwise abuse of process.
  - Rule 21 motions must be made “promptly” (21.02)

Rule 22

- 22.01(1): Parties concur in stating question of law in form of a special case for opinion of court …
- (2): Where the judge is satisfied that the determination of the question of law may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, the judge may hear and determine the special case.
  - Requires both consent and judicial approval
- 22.03(1): Court of Appeal can grant leave to hear the special case itself in the first instance
  - See *Taylor v Canada (AG)*, 2012 ONCA 479 – will be rare
- 22.04: special case can contain agreed statement of fact, and copy documents
- By contrast, 21.01(1)(a) requires the question of law to arise "from the pleadings" and generally precludes evidence

Part IV: impact for LawPRO and conclusion

- Impact of *Hryniak* so far is unclear
- Few SJ motions before 2010 amendments
  - At the time of the Osborne report, “the bar reported, and ministry statistics confirm, that few summary judgment motions are brought today”.
- No data on how many are being brought now, but the clear intent of the Rules amendments and of *Hryniak* is to make them more common and to make the “full-blown trial” less common

Impact for LawPRO

- If there are more SJ motions, it is not clear whether litigation expenses over LawPRO's portfolio will increase or decrease.
- When and how to bring SJ is a sensitive issue that demands careful advice and work from counsel – may lead to more malpractice claims?
- Fewer trials means even less trial experience for young counsel – which may also mean more malpractice claims?
- In LawPRO-covered malpractice cases, LawPRO counsel will need to be informed and involved in decisions about launching SJ motions.
  - Often some or all of the SJ record will be "recycled" for use at trial if the SJ motion fails, so it is important to get it right (see rule 20.05(2)(f))

Conclusion

- It is unknown whether SJ amendments have had any impact on access to justice.
- The law of SJ is undeniably complex.
- The trend is towards custom-designed procedure and aggressive judicial case-management.
- These may be desirable in a certain sense, but they produce more “litigation points”, and, thus, may demand more private and public resources. Clear procedural rules have their own attraction.

Cases (page 1)

- *Hryniak v Mauldin*, 2014 SCC 7
- *George Weston Ltd v Domtar Inc*, 2012 ONSC 5001, 112 OR (3d) 190 (Sup Ct J)
- *1318214 Ontario Ltd v Sobeys Capital Inc*, 2012 ONSC 2784
- *Combined Air Mechanical Services v Flesch*, 2011 ONCA 764
- *King Lofts Toronto I Ltd v Emmons*, 2013 ONSC 6113, aff'd 2014 ONCA 215
- *Danos v BMW Group Financial Services Canada*, 2014 ONSC 2060
- *Landrie v Congregation of the Most Holy Redeemer*, 2014 ONSC 4008

Cases (page 2)

- *Sweda Farms Ltd v Egg Farmers of Ontario*, 2014 ONSC 1200
- *Baywood Homes Partnership v Haditaghi*, 2014 ONCA 450
- *Stever v Rainbow International Carpet Dyeing & Cleaning Company*, 2013 ONSC 241, 114 OR (3d) 473