Trial or Summary Judgment?

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INTRODUCTION

Summary judgment motions have undergone a sea change in the past six years. First there was the Rule 20 amendment in 2010. these followed following the recommendations of a groundbreaking 2007 report from the Honourable Coulter A. Osborne, Q.C.[1]. The hope was to give litigants a more efficient, judicious process.

Then, in 2014, the Supreme Court of Canada released the gravity-altering *Hryniak v Mauldin*[2] decision. The unanimous Court issued a clarion call for a cultural shift in Rule 20 summary judgments, a change in perspective.

Where does this leave us today? The Rule 20 amendment brought with it an increased volume of motions for summary judgment.[3] *Hryniak* laid down clear law on when they should be granted. Yet, it still remains challenging for lawyers to judge whether a matter should proceed by trial or by summary judgment.

This paper will look at the common law that has developed post-*Hryniak* and offer some tips to help ease the lawyer's task in deciding whether to move for summary judgment or go to trial.

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[1] "Civil Justice Reform Project: Findings & Recommendations" (November 2007), online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp> [*Osborne Report*].
[2] 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*].
[3] See Brooke MacKenzie, *Effecting a Culture Shift – An Empirical Review of Ontario's Summary Judgment Reforms* (LLM Thesis, University of Toronto Faculty of Law 2016) [unpublished].

SUMMARY JUDGMENT: RISKS & BENEFITS

Trials and summary judgment motions both carry potential benefits and risks. There is, as ever, no certainty of result and no one has yet to come up with a fixed formula for success. The decision on how a matter ought to proceed entails a risk analysis. Lawyers assess the possible outcomes, from worst to best. Then, applying experience and knowledge, they choose the option that they believe is most beneficial to the client.

In determining whether summary judgment is the best way to proceed, there are three critical factors that must be considered by lawyers:

(a) cost and efficiency;

(b) judicial oversight; and

(c) potential outcomes.

A) Cost and Efficiency

One would be hard pressed to find anything written about the summary judgment procedure which does not discuss its potential cost and time savings.[4]

As in all summary judgment matters since 2013, one begins with *Hryniak.* Already in its introductory paragraphs, Karakatsanis J. depicts summary judgment motions as the answer for litigants

[4] See e.g. Jonathan Lisus, "Hryniak: Requiem for the vanishing trial, or brave new world?" (2014) 33 Adv J No 1, 6-10 (QL); Shantona Chaudhury, "Hryniak v. Mauldin: The Supreme Court issues a clarion call for civil justice reform" (2014) 33 Adv J No 3, 8-16 (QL); *Keswick Presbyterian Church v Ontario (Environment and Climate Change),* [2016] OERTD No 35, 2016 CanLII 63127; *Zitia Investments Inc v Brant County Concrete Limited et al*, 2016 ONSC 5826, [2016] OJ No 5427; *1353837 Ontario Incorporated v Stratford (City),* 2016 CanLII 69891 (ON OMB).

who cannot afford the ever-increasing cost and time commitment of trials.[5] This is a clear wakeup call to both the Bar and the Bench to see summary judgments as one means of increased access to justice.

Trials are arduous. They are taxing. They are… *trying*. The economy and efficiency of summary judgments can, at their best, often reduce the financial, physical and emotional toll on litigants.

Rule 20.01[6] allows any party to move for summary judgment after a statement of defence has been delivered *or* after a notice of motion has been served. If initiated at an early stage of an action, a party can avoid the expense of examinations for discoveries, mediation, and interlocutory motions. In other words, an early summary judgment motion can avoid the ongoing costs that accumulate while a matter remains active.[7] Closure can be speedy.

Of course, these rosy benefits are predicated on a motion's success and this can never be guaranteed. A dismissed summary judgment motion can end up adding unnecessary expense. It can delay resolving the action. It can slow the action's progress to trial. The Supreme Court was alive to this concern in *Hryniak*. Karakatsanis J. looks to the Bench to avoid waste: "judges can mitigate such risks by making use of their powers to manage and focus the process…".[8]

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[5] *Supra* note 2 at paras 1-5.
[6] *Rules of Civil Procedure*, RRO 1990, Reg 194.
[7] In 1995, the Ontario Ministry of the Attorney General published on its website that an average civil litigation file from start to finish would cost a client approximately $38,200.00 (based on an hourly rate of $200.00) (see "Cost and Value of Justice" (March 1995), online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/cost.php>.). In 2015, Canadian Lawyer published an article by Michael McKiernan entitled "*The Going Rate*" which stated that a two-day trial alone would cost a client over $30,000.00 (see Michael Geist, "The Going Rate", *Canadian Lawyer* (June 2015) 33, online: <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf>).
[8] *Supra* note 2 at para 8.

There are also cost consequences. If the Court finds the motion to have been improper, or a party to have been unreasonable, or in bad faith in order to delay the proceedings, rule 20.06 invites the Court to make a substantial indemnity costs order. The Courts have invoked this power on repeated occasions.[9]

In sum, the Rule 20 procedure has the potential to be more affordable and expedient than a trial. But it has the opposite potential as well. The Court of Appeal has recently affirmed that on a Rule 20 motion the judge may grant judgment in favour of a responding party, even in the absence of a cross-motion.[10] Moving parties may find themselves on the wrong end of a judgment that the responding party has not sought.

Proportionality is another important principle to consider in deciding whether summary judgment or trial is appropriate. "A motion for summary judgment will not always be the most proportionate way to dispose of an action... Counsel should always be mindful of the most proportionate procedure for their client and the case."[11] This will be discussed in greater detail below.

The litigator's job, then, is to weigh the competing potential outcomes and, being as reasonably prudent as possible but as bold as necessary, advise the client accordingly.

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[9] See e.g. *Ledore Investments Ltd v Murray*, [2002] OJ No 1073, 58 OR (3d) 627 (ONSC); *Smyth v Waterfall*, [2000] OJ No 3493, 50 OR (3d) 481 (ONCA); *Innovative Automation Inc v Candea Inc*, [1995] OJ No 2197, 24 OR (3d) 639 (Ont Gen Div).

[10] See *Singh v. Trump*, 2016 ONCA 747 at para 147, referencing *Baig v. Meridian Credit Union*, 2016 ONCA 150 at para 17, 394 DLR (4th) 601 ; *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215 at paras 14-16, 40 RPR (5th) 26; *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONCA 922 at paras 50-52, 124 OR (3d) 171.

[11] *Supra* note 2 at para 73.

B) "The judge ...should generally be seized"

Hryniak establishes the principle of judges being seized of a matter as a pathway to judicial efficacy.[12] Karakatsanis J. – in the context of a failed summary judgment motion - cites the Osborne Report on this point[13]:

> I agree with the Osborne Report that the involvement of a single judicial officer throughout
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> > saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

Before a motion, directions may be appropriate in order to streamline or organize a complex matter. In the event of a failed summary judgment motion, a trial or mini-trial will not require a new judge to repeat the familiarization process with the case. The costs associated with counsel to having to redo what has already been done are saved. The seized judge can reduce the time needed to complete a trial, given their knowledge of the facts and issues.

Counsel should take advantage of the continuity a seized judge offers. How? Begin with the motion record. A long established principle of summary judgment motions is that a party must put their best foot forward.[14] In the seminal 1990 decision, *Pizza Pizza Ltd. v. Gillespie*[15], Justice Henry, referring to the then "new" Rules of Civil Procedure, introduced in 1985, held:

> [...] *the rule now contemplates that the motions judge will have before him sworn testimony in the affidavits and other material required by the rule in which the parties put their best foot*

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[12] *Ibid* at paras 6, 71, 78.
[13] *Ibid* at para 78.
[14] *Combined Air Mechanical Services Inc v Flesh,* 2011 ONCA 764, [2011] OJ No 5431.
[15] 75 O.R. (2d) 225 (G.D.), [1990] OJ No 2011

> *forward.* The motions judge, therefore, is expected to be able to assess the nature and quality of the evidence supporting "a genuine issue for trial"; the test is not whether the plaintiff cannot possibly succeed at trial; the test is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; if so then the parties "should be spared the agony and expense of a long and expensive trial after some indeterminate wait"

That principle has consistently been applied, even as the law of summary judgment motions has evolved[16].

The best evidence must be marshalled. The key issues must be identified. They must be articulated with maximum clarity. The law must be researched and mastered. The result should be an optimal "best foot" record for the judge seized (or to be seized) of the summary judgment motion.

Counsel should *always* deliver such an optimal record. It will serve you well on the motion. And in the event the motion turns out to be a journey and not an event, it will give the seized judge a strong, ongoing foundation on which to adjudicate. It will give counsel a firm ongoing basis on which to advocate. It will spare the judge from having to impose ongoing procedural correctives. It will also, by its optimized form, reflect well on the content of your case.

A judge who is seized of a summary judgment proceeding is more alive to the nuances of the case. She or he is more comfortable with the complexities. As with an old friend or spouse, much background and explanation can be skipped over. Counsel is wise to take advantage of this case-specific knowledge to best position and move a case along.

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[16] Over 500 Ontario judgments have affirmed this principle. See e.g. *Tran v Chung,* 2016 ONCA 378 at para 65, [2016] OJ No 2855 (the Court of Appeal stated "BMO was required to put its best foot forward on the summary judgment motion; however, it failed to raise this argument").

There are potential drawbacks. The appointment of a summary judgment judge can be a double edged sword. For example, a seized judge may become locked into an unshakeable predisposition about a case. Counsel may face an uphill battle in overcoming it.

The expediency a seized judge offers can , frankly speaking, be a disadvantage. Some clients and cases benefit from delay. The speed and efficiency may result in the client facing a final decision before they are ready. Also, while a seized judge will become familiar with the facts and the issues, one risks a weak or questionable position being exposed in the summary judgment process. This may produce an unfavourable result. In some cases, counsel may want to avoid summary judgment to avoid any such exposure.

For example, counsel may want to avoid summary judgment where a limitation period that is uncertain, i.e., it is not clear when the limitation period was discoverable. A summary judgment motion judge will decide that issue. Counsel may be better off leaving the issue undecided. Instead of summary judgment, the client may be better off attending a mediation and a pretrial, with a view to achieving a settlement while the issue remains unresolved.

Of course, the counter argument is that summary judgment can bring finality to an uncertain issue like discoverability. It can end costly litigation earlier. More about this below.

None of these factors are unique to summary judgment situations. If counsel treats the presence of a seized judge as an opportunity, and the Rule 20 procedure as an advantage, the client stands to be best served.

C) Potential Outcomes

Summary judgment is not necessarily an all-chips-on-red, win or lose process. Both Rule 20 and *Hryniak* provide for a spectrum of outcomes between the extremes of "allowed' and "dismissed". These can be used strategically to aid the client. These outcomes include:

1. minimization or elimination of factual disputes;
2. narrowing or settling legal issues;
3. completing production;
4. achieving partial trial preparation, if the motion is dismissed;
5. establishing a framework for possible early case resolution.

These potential outcomes are not exclusively judge-dependent. Counsel have the power to achieve them. They may do so through consent. They may do so through cooperation. Or they may rely on the judge to exercise the wide powers under Rule 20, whose use *Hryniak* encourages.

These benefits flow to both parties equally. Summary judgment will educate the opposing party about your evidence and strategy. You tip your hand when you move for summary judgment. Opposing counsel can formulate counter-positions. They can prepare responsive evidence. They can identify and exploit your case's weaknesses. Then again, so can you.

Finally, summary judgment motions can hold surprises. Every seasoned litigator knows to expect the unexpected at trial. It is no different with summary judgment.

In *Meridian Credit Union Limited v Baig*[17], the Court of Appeal upheld a partial summary judgment granted to a responding party who had not cross-motioned for summary judgment . The Court held:

[17] 2016 ONCA 150 at para 17, [2016] OJ No 947 affirming 2014 ONSC 4717, [2014] OJ No 3811 [*Baig*].

> I pause to note that Meridian had not brought a cross-motion asking for summary judgment in its favour. However, the motion judge did not err by granting summary judgment. Counsel for the appellant submitted that all of the relevant evidence was before the court and explicitly invited the motion judge to render a decision in favour of either party. Two recent decisions from this court make it clear that it is permissible for a motion judge to grant judgment in favour of the responding party, even in the absence of a cross-motion for such relief: *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215, 40 R.P.R. (5th) 26, at paras. 14-15; and *Kassburg v. Sun Life Assurance Company of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171, at paras. 50-52.

Baig illustrates the breadth of summary judgment motions for another reason. The Court found that, in addition to the moving party being subject to a judgment for fraud, a non-party law firm was the subject of an adverse judgment as well. The law firm was found to have committed fraud, despite its being neither a party to the proceeding, nor present during the summary judgment motion.[18] The Court of Appeal held[19]:

> Non-parties should not be able to lurk in the shadows and then spring up to challenge a decision whenever the outcome - or findings of fact - may affect them in some manner they do not like. In my view, the statement of claim in the appellant's action is the only notice to which the interveners were entitled. Once they were served with the claim, they knew about this action and had an option to intervene as a party.

As with everything in litigation, the spectrum of potential outcomes entails risk. And as with everything in litigation, clients must be made aware of the risks so that their expectations are properly managed.

TO MOVE OR NOT TO MOVE FOR SUMMARY JUDGMENT?

Having weighed the risks and benefits, counsel then must determine whether it is in the client's best interest to take the summary judgment route. Below are factors that lawyers should consider before deciding.

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[18] Two of these writers (Davis and Davis) were counsel on *Baig*. See also *Landrie v Congregation of the Most Holy Redeemer*, 2014 ONSC 4008, [2014] OJ No 3132; *King Lofts Toronto I Ltd v Emmons*, 2014 ONCA 215, 40 RPR (5th) 26.
[19] *Supra* note 17 at para 56.

A) Complete versus Partial Summary Judgment

In most cases, clients are best served when litigation is brought to a definitive conclusion. So, full scope, "do or die" summary judgment motions are normally most advantageous.

However, Rule 20.01 allows for partial summary judgments. In most cases, a partial judgment will result in little or no gain. The matter will still have to proceed to trial. There will be few or no cost and efficiency benefits. Money and time will have been wasted.

Partial summary judgment may also have a negative impact on the ultimate trial. Presumably, counsel will succeed on the strongest elements of the case. This leaves the weaker elements to be put before the trial judge. The prospects for success are weakened. The prospects for adverse findings of fact and cost orders against the client are heightened.

On the other hand, *res judicata* and issue estoppel ensure that opposing counsel will not be at liberty to challenge the strong points on which partial judgment was granted. Nevertheless, the dialectic will often favour waiting for trial.

A possible exception is where cash flow or other strategic considerations do not tie the stronger portions of the case to the weaker parts of the claim. In *Poss Design Limited v. Beograd Machine & Tools Co. Ltd.*[20] the plaintiffs claimed damages for, *inter al.,* breach of copyright and trademark and breach of confidence. The defendant counterclaimed for $449,420 in unpaid invoices as well as for other relief, including the termination without notice of a long term supplier and customer relationship. The

[20] 2014 ONSC 3051 aff'd 2015 ONCA 74.

defendant had testified to having cash flow problems because of the unpaid invoices. It moved for partial summary judgment seeking payment of the invoices only, and succeeded. The court found there was no arguable issue regarding the unpaid invoices. The result worked to the defendant's benefit, with no negative consequence for the remainder of the action.

Still, where there is a single strong element to a party's case, counsel may be wise to refrain from moving for summary judgment. The client may be better served by requiring the case to go to trial on multiple issues, assured of likely success on at least one.

B) Quality of Your Witnesses

A summary judgment motion is typically a paper based trial. Affidavits and transcripts are often the only evidence.[21]

Counsel should consider the quality of the available witnesses. Some people make excellent *viva voce* witnesses. Some do not. Some witnesses look bad on paper. Some look better. If a key witness presents badly in person, summary judgment may be preferable. If they are sympathetic or compelling in person, not prone to endless ramblings and able to answer questions in a straightforward way, a trial may lead to a more favorable outcome.

However, counsel who do proceed to a motion because of a weak witness are not wholly insulated. Rule 20 allows a motion judge to order a mini-trial.[22] The witness may be subject to an in court cross-examination regardless of the summary judgment motion. All the more reason to make sure

[21] *Supra* note 6 at R 20.02, 20.03 and 39.
[22] See *supra* note 6 at R 20.04(2.2); *Supra* note 2 at paras 61-65.

that the written evidence is optimally drafted. It not only helps make the case if there is no *viva voce* evidence, but it helps if there is *viva voce* evidence which does not go in well.

The mini-trial provision can also work to a party's benefit. Take a case where there are two witnesses, but only one who presents especially well. Counsel may consider relying on paper testimony from the first, and moving for a mini-trial with evidence from the stronger witness.

C) Number of Witnesses

If your case relies on the evidence of multiple witnesses, possibly including experts, a motion for summary judgment is typically not recommended.

Motion judges confronted with long and detailed affidavits, from different factual witnesses or experts, will normally find it difficult to find that there is no issue requiring a trial. [23] The party resisting the motion will usually find it easier to persuade the judge that a trial is necessary if there is a thicket of testimony and opinion.

Counsel should keep in mind the purpose of the summary judgment: to proceed *summarily.* [24] It should be rapid and concise. Multiple witnesses will likely mean that it makes more sense to hold a "regular" trial.

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[23] See e.g. *Ghaeinizadeh v Garfinkle, Biderman LLP*, 2014 ONSC 4994, [2014] OJ No 4278.
[24] *Optech Inc v Sharma*, 2011 ONSC 680 at para 45, [2011] OJ No 377.

D) Clear Facts, Issues and Technical Defences

The cases that are best suited for summary judgment motions are the ones in which material facts are not seriously in dispute, and the issues are well-defined.

For example, in employment law cases, employees' counsel are increasingly using summary judgment motions to resolve the narrow issue of severance in a timely and cost effective way.[25] Collection and mortgage enforcement cases also lend themselves to the summary judgment process. The claims and defences in both are normally clear and straightforward.[26]

Cases with technical legal issues can also fit well within the summary judgment framework. For example, actions with a defence under the *Limitations Act, 2002*[27] can often be decided by summary judgment motion.[28] Limitation defences are typically based on a single issue readily addressed by way of affidavit evidence. This can be true even where there is an otherwise complex fact scenario. In *Sutton v. Balinsky et al.*[29], Dunphy J. cut through an involved set of facts to find that the plaintiff in a negligence action against three separate professionals, had brought her claim past the limitation period. His Honour dismissed the claim for being statute barred (as well as for abuse of process).

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[25] See e.g. *Di Tomaso v Crown Metal Packaging Canada LP*, 2011 ONCA 469, 282 OAC 132; *Johar v Best Buy Canada*, 2016 ONSC 5287, [2015] OJ No 4540; *Arnone v Best Theratronics Ltd*, 2015 ONCA 63, 329 OAC 284.
[26] See e.g. *Raji v TD Bank Financial Group*, 2015 ONSC 3530, [2015] OJ No 2794; *Tribecca Finance Corporation v Tabrizi*, 2015 ONCA 748, 48 CLR (4th) 181.
[27] SO 2002, c 24, Sched B.
[28] See e.g. *Compton v State Farm Insurance Company of Canada*, 2014 ONSC 2260, [2014] OJ No 1868.
[29] 2015 ONSC 3081, [2015] OJ No 3935.

E) Damages Should Be Certain

Plaintiffs should be cautious about bringing summary judgments motions when the damages have yet to crystallize. A premature motion for judgment will not allow the time needed to establish an evidentiary basis for future losses.[30]

Motions for summary judgment where damages are unresolved may only delay proceedings, and result in a negative disposition due to an inadequate damages award.

F) Proportionality

One principle that the court in *Hryniak* favourably highlighted is the relatively new one of proportionality.

Introduced in Rule 1.04(1.1), the principle directs courts to make orders and give directions that are "proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding". This serves a good guide to counsel in deciding whether to bring a motion for summary judgment.

Under the banner of proportionality, modest claims are ideal candidates for summary judgment, if success is reasonably likely. The expense of a traditional trial for smaller matters makes no sense.

Similarly, individual or smaller corporate plaintiffs and defendants are best suited for summary judgment motions. They are more vulnerable to the economic and other risks of trials. A twenty day trial for, say, two neighbours fighting over an easement reeks of disproportionality.

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[30] See e.g. *Duggan v Lakeridge Health Corporation et al*, 2016 ONSC 5106, [2016] OJ No 4388.

We might paraphrase Mr. Micawber's famous speech from Dickens' *David Copperfield* to illustrate proportionality as a decision heuristic for summary judgment motions:

> Potential damages award twenty pounds, probable motion costs nineteen pounds, nineteen shillings and sixpence, result happiness. Potential damages award twenty pounds, probable motion costs twenty pounds ought and six shillings, result misery.

That is proportionality in a nutshell.

CONCLUSION

Every case, it need hardly be said, depends on the facts and underlying circumstances. Determining whether to proceed by summary judgment motion requires a thorough analysis of the facts and circumstances. It requires an understanding of who your client is and whether this process is best suited for them.

Ultimately, asking and answering these six questions may assist in the decision to move for summary judgment or go to trial:

1. Is the file complete and organized enough to put the client's "best foot forward"?
2. Is the client fully aware of the risks and benefits of summary judgment?
3. Are the facts and issues relatively straightforward, clear and defined?
4. Are the potential costs and time savings real or illusory?
5. Will summary judgment bring the case to an end, or will it end up at trial regardless?

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