A Shift in Culture
Summary Judgment after *Hryniak v. Mauldin*

Roland Hung, Associate

Timothy Froese, Associate

"The plaintiff who treats a defence motion for summary judgment as a speed bump on the long highway to trial risks crashing its case in the deep ditch of dismissal."

- ***Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200**

Outline

- Hryniak v. Mauldin
- Rules of Civil Procedure: Alberta & Ontario
- Windsor v. Canadian Pacific Railway
- 1214777 Alberta Ltd. v 480955 Alberta Ltd.
- Hryniak and Windsor in Alberta: Case Examples
- Impact of Hryniak: Moving Forward

Hryniak v. Mauldin, 2014 SCC 7

- Facts
  - Group of Michigan investors led by Mr. Mauldin defrauded by Toronto-based trader, Mr. Hryniak
  - Mauldin Group joined with Bruno Appliance (another investor) in civil fraud action
  - Summary judgment based on Ontario *Rules of Court,* Rule 20.04(2)(a)

- Summary judgment granted at trial

Hryniak v. Mauldin, 2014 SCC 7

- Ontario Superior Court of Justice
  - Motion judge awarded summary judgment against Mr. Hryniak for more than $2 million in damages
  - First successful use of summary judgment procedure in a civil fraud case in Ontario
- Ontario Court of Appeal
  - “Full appreciation test” for summary judgment
  - Found issues too complex to be properly tried summarily

Hryniak v. Mauldin, 2014 SCC 7

- Supreme Court of Canada
  - ONCA's "full appreciation test" too stringent
  - Urges "Culture Shift"
  - New "Roadmap" for Summary Judgment Motions
  - Tools to Maximize the Efficiency of Summary Judgment Motions

Hryniak v. Mauldin, 2014 SCC 7

– Summary Judgment is available when it:

1. allows the judge to make the necessary findings of fact,
2. allows the judge to apply the law to the facts, and
3. is a proportionate, more expeditious and less expensive means to achieve a just result.

Hryniak Test

"The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to <u>both parties</u> can be made on the existing record. "

Hryniak Roadmap: Genuine Issue Requiring a Trial

- No genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits
- Judge must be confident that the process:
  1. Allows the judge to make the necessary findings of fact
  2. Allows the judge to apply the law to the facts
  3. Is a proportionate, more expeditious and less expensive means to achieve a just result

Hryniak Roadmap: The Interest of Justice

- The “interest of justice” inquiry considers the consequences of the motion in the context of the litigation as a whole

- This is a comparative inquiry, which assesses proportionality of summary judgment in relation to the full trial, including the cost and speed, and availability of both procedures, and the availability of evidence at the motion vs. trial

Alberta Rules of Court

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

(a) there is no defence to a claim or part of it;

(b) there is no merit to a claim or part of it;

(c) the only real issue is the amount to be awarded.

Ontario Rules of Court

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

Ontario Rules of Court

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

Ontario Rules of Court

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

Alberta vs Ontario Rules

Alberta	Ontario
Determine whether - There is no defence to a claim; - There is not merit to a claim; or - The only real issue is the amount.	Step 1 - Determine whether there is a genuine issue requiring a trial, based on available evidence.

There is no Step 2 in Alberta
 	
- **Summary judgment not granted where impossible to find necessary facts without weighing evidence or assessing credibility (i.e. if conflicting affidavits, no summary judgment)**
	Step 2
	- Determine whether the need for trial can be avoided by using the judge's enhanced fact-finding powers of:
	  - Weighing the evidence;
	  - Evaluating credibility of deponents;
	  - Drawing reasonable inferences; and
	  - Ordering that oral evidence be presented.

Windsor v. Canadian Pacific Railway

- Alberta Court of Queen's Bench
  - Certified class action with regard to an environmental contaminant
  - strict liability, negligence, trespass, and nuisance claims
  - Case management judge granted partial summary dismissal (dismissed trespass claim, and nuisance claim for certain class members)

Windsor v. Canadian Pacific Railway

- Alberta Court of Appeal
  - *Hryniak* principles are "consistent with modern Alberta summary judgment practice as set out in Alberta R. 7.3."
  - *Hryniak* confirms the "modern trend" toward summary judgment:

> ***"Modern civil procedure has come to recognize that a full trial is not always the sensible and proportionate way to resolve disputes."***

Windsor v. Canadian Pacific Railway

– Alberta Court of Appeal:

- ***"Hryniak v Mauldin refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure."***

- ***"Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication."***

Implications of *Windsor*

- “Myth of Trial” debunked
- Clear need for parties to put their “best foot forward”
- Potentially wide-ranging impact on settlement negotiations
- More streamlined, faster litigation? Costs savings? Or opening the floodgates to summary judgment motions?

Hryniak and *Windsor* in Alberta: The Future of Litigation?

- 26 out of the 49 Alberta reported summary judgment decisions were successful in 2014
- Out of the 26 cases:
  - 18 successful (were defendants)
  - 8 successful (were plaintiffs)

1214777 Alberta Ltd. v 480955 Alberta Ltd.

- Clarified analytical process in wake of *Windsor*
- Recent developments in summary judgment principles do not impact the well-established legal burdens

- Starting point:

To examine the record to see if a disposition that is fair and just to both parties can be made on the existing record

- Followed by 6-step process

1214777 Alberta Ltd. v 480955 Alberta Ltd.

1. Presume best evidence is before the court; parties must put “best foot forward”
2. Determine whether a negative inference can be drawn from absence of evidence on certain points
3. Consider complete package and ask whether all the evidence is admissible
4. Determine whether there is a conflict in the evidence; if so, whether it can be resolved on cross-examination
5. Examine the evidence
6. Determine whether plaintiff can prove all elements of the cause of action; and defendant either has no defence, or is missing critical elements of proof

Amack v. Wishewan

- Facts
  - Plaintiff Amack sought to be reinstated as director and shareholder of defendant, Frozen Canuck Import Corp.
  - Alleged wrongful retention of shares, conversion, detinue, unjust enrichment and oppressive conduct
  - Defendants brought summary dismissal application on basis that claim statute-barred; expiry of limitation period

Amack v. Wishewan

- **Summary judgment denied**
  - Claim was too complex
  - Certain claims may have been statute-barred due to limitation period, but potential remedy for acts of oppression or damages arising within the limitation period

"In this case I find that the issues surrounding the different limitation period issues cannot be fairly and justly adjudicated on the evidentiary record."

Emile Labby Trucking Ltd v. Option Inc.

- Facts
  - Labby contracted to haul fill material to construction site for Option
  - Option only paid for portion of the fill material; summary judgment application brought for the balance
  - Conflicting affidavit evidence
    - Option submitted there was a cap on the amount of fill material to be delivered

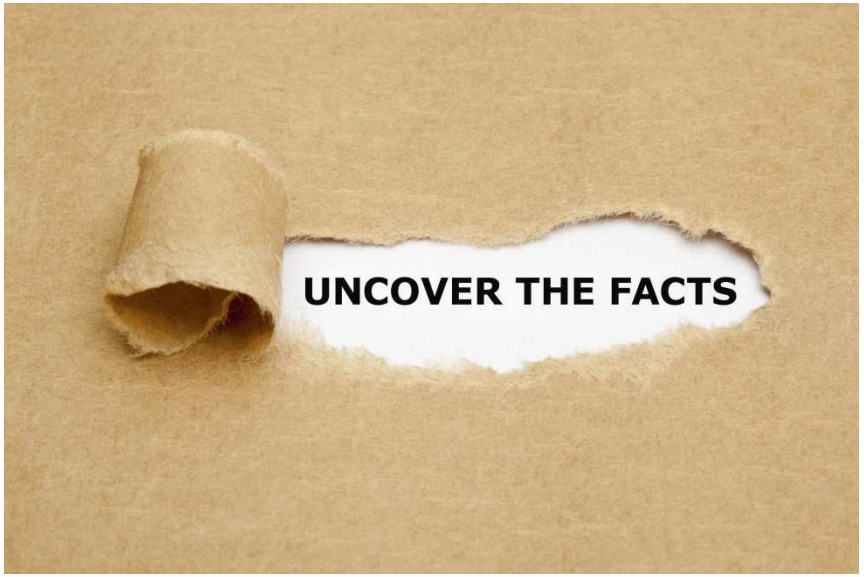
Emile Labby Trucking Ltd v. Option Inc.

- **Summary judgment granted**

- Reasons
  - Option attempted to convert its initial request into a cap
  - Option's self-serving evidence to that effect was contradicted by other evidence, such as Labby's affidavit evidence and invoices

Emile Labby Trucking Ltd v. Option Inc.

"I have no doubt that a fair and just disposition of this case can be made on the existing record and that a trial would be an extravagant waste of judicial resources. The best available evidence from the parties is now before the Court."



Agricultural Financial Services Corporation v. Felker

- Facts
  - Plaintiff sought summary judgment for a loan, in which a security interest was granted over a flock of sheep
  - Issue whether defendants were partners when the security was given

Agricultural Financial Services Corporation v. Felker

- **Summary judgment granted**

- Reasons
  - Evidence from affidavits of plaintiff and both defendants all supported finding that they were partners at the relevant time
  - One defendant argued no intention of carrying on a partnership, but no need to prove subjective intention, only objective

Agricultural Financial Services Corporation v. Felker

"[A] trial judge … would not be in a better position to assess the evidence in this case than a motions judge reviewing the extensive material filed. That material allows me to make the necessary findings of fact, to apply the law to those facts, and to determine that Rule 7.3 is the appropriate mechanism for a timely and just adjudication of this claim."

1126592 Alberta Ltd. v. Condominium Corporation No. 0425913 (New Cambridge Lofts)

- Facts
  - Plaintiff condo owners brought action against Defendant condo management company
  - Alleges damage to signage and façade of building in course of management
  - Negotiations occurred and settlement offer presented in January 2012

1126592 Alberta Ltd. v. Condominium Corporation No. 0425913 (New Cambridge Lofts)

- **Summary judgment granted**

- Reasons
  - Claim statute-barred
  - Clear that plaintiff knew/ought to have known that the injury warranted a proceeding in August 2011; limitation period runs from date of injury, not of settlement negotiations

1126592 Alberta Ltd. v. Condominium Corporation No. 0425913 (New Cambridge Lofts)

"[T]he Alberta Court of Appeal … has emphasized the importance of deciding limitation issues at an early stage rather than deferring them to trial. I believe this is in keeping with the Supreme Court of Canada's recent decision in Hyrniak v. Maudlin, and which has been adopted by the Alberta Court of Appeal in Windsor v. Canadian Pacific Railway."

Cases Amenable to Summary Judgment

Courts are willing to grant summary judgment in a variety of cases and causes of action. Examples:

- Real estate purchase and sale contract cases, with undisputed facts
- Where inferences drawn from facts do not materially affect outcome / outcome can be determined from undisputed facts
- Limitation Periods
  - Including discoverability issues
  - Including unusually short limitation periods
- Contract disputes, even if there is a an associated tort claim

Cases Not Amenable to Summary Judgment

- Applicant files inadequate motion materials (eg: lawyer's affidavit, no cross-examination on responding materials)
- Applicant fails to disclose key documents related to the key issues
- Court truly thinks it cannot fairly determine the issues without a full trial

Likely Implications of *Hryniak* in Alberta

- Apparent trend of increased availability of summary judgment
- More frequent attempts at summary judgment
- Greater involvement by judges in case management and earlier intervention by the courts

Implications Beyond Summary Judgment?

- Increased emphasis on system values of ***proportionality*** and ***access to justice***
- Greater use of practical, common sense solutions by the courts
- Streamlining of procedures
- Example: *Canadian Natural Resources Limited v. ShawCor Ltd.,* 2014 ABCA 289 and Munro (Re), 2014 ABQB 636

Munro (Re)

"Hryniak should inform the court's decision in this case even though this is not a summary judgment situation . That decision calls for a shift in the culture of civil litigation which has, in the past, allowed law suits to be prolonged on the understanding that litigants who acted unwisely would be punished in costs. Because of the increasing cost of litigation and the increasingly slow pace at which civil claims are resolved, the <u>former acceptance of a glacial and expensive process must change</u>."

Canadian Natural Resources Limited v. ShawCor Ltd.

"The Rules reflect the cultural shift identified in Hryniak … Accordingly, this shift should inform not merely this Court's interpretation of the specific rules under consideration but <u>the overall approach to civil justice issues before the courts</u>."

When Should You Consider Directing Counsel to Initiate Summary Proceedings?

- No contested material facts (or where you are willing to accept the opposing party's version of the facts)
- Case is document driven with no credibility issues
- Credibility issues can be isolated
- Few witnesses

Litigation Strategies

- Prepare evidence early
- Ensure pleadings are comprehensive and facts can be established through affidavit evidence
- Consider bringing summary judgment or dismissal applications early when no material facts are in dispute
- Consider bringing a partial summary judgment or dismissal application to narrow the issues and facilitate a negotiated settlement

Questions?