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Sentinels of the *Hryniak* Culture Shift: Four Years On

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“Would you tell me, please, which way I ought to go from here?”

*“That depends a good deal on where you want to get to”*²

I. INTRODUCTION

Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) (“*Hryniak*”) has been described as a “clarion call”³ and the decision that “rewrote the law on summary judgment”.⁴ Both the “reflections of modern reality”⁵ described, and the “culture shift”⁶ advocated by the Supreme Court of Canada in *Hryniak* have been considered in the courts in Canada.

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² Alice’s enquiry and the Cheshire Cat’s response, from *Alice’s Adventures in Wonderland*, Lewis Carrol, 1865, Macmillan.

³ Nova Scotia Court of Appeal in *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52 (C.A.) and Superior Court of Justice — Divisional Court in *Ipex Inc. v. Lubrizol Advanced Materials Canada*, 2015 ONSC 6580 (S.C.J.).

⁴ *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 (C.A.).

⁵ *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), released January 23, 2014., at para. 2.

⁶ *Ibid.* at para. 2 and 32. See also “shift in culture” at para. 28.

Hryniak is an *overture* to judges and counsel in all courts in Canada and not simply through its application by *stare decisis* in Ontario, and which concerns proportionality in civil litigation proceedings, and not only when the court and counsel are engaged in Ontario Rule 20 summary judgment motions. *Hryniak* is about access to justice and not just in the context of summary judgment motions, summary trials and preliminary determination.

The passage of four years following the decision of the Supreme Court of Canada in *Hryniak*⁷ has resulted in citations of *Hryniak* in over 2,571 reported case decisions of the courts in Canada and the provinces, with over 1,588 of those decisions made in the courts of Ontario. Appellate decision citations of *Hryniak* are over 286, rather more evenly spread across Canada, but over 98 appellate citations occurring in decisions in Ontario.⁸

1. Summary Proceedings

Has the call to accept the cultural shift away from a full appreciation of a case at trial, mandated by the Supreme Court of Canada's rejection of the "full appreciation test",⁹ of the Court of Appeal for Ontario in *Combined Air Mechanical Services Inc. v. Flesch*,¹⁰ been embraced by the appellate courts in favour of a just summary judgment adjudication? Is the landscape in civil litigation changing, or has it already changed?

This paper is a survey of the appellate decisions concerning summary proceedings of the last four years which cite *Hryniak*¹¹ and considers if, and to what extent, the courts in Canada have embraced the advocated culture shift in civil litigation through the simplification of pre-trial procedures and proportionality. Due to limitations of space, appellate decisions citing *Hryniak* solely with respect to the standard of appellate review, or regarding pre-trial procedures other than summary proceeding are not included. Decisions of Ontario Superior Court of Justice — Divisional Court ("Divisional Court") are included, since that court hears appeals of interlocutory orders, including orders dismissing motions for summary judgment.

⁷ *Ibid.*

⁸ Search performed on August 27, 2018, of the citations of "*Hryniak*" in all courts of Canada and its provinces on the Canadian Legal Information Institute website ("CanLII").

⁹ *Hryniak v. Mauldin*, *op. cit.* fn 5 at para. 4, 16, 53 and 54.

¹⁰ *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (C.A.) at paras. 50 through 58, additional reasons *Combined Air Mechanical Services Inc. v. Flesch*, 2013 CarswellOnt 5398 (C.A.), additional reasons *Combined Air Mechanical Services Inc. v. Flesch*, 2013 CarswellOnt 5399 (C.A.), leave to appeal refused *Combined Air Mechanical Services Inc. v. Flesch*, 2014 CarswellOnt 744 (S.C.C.), affirmed *Hryniak v. Mauldin*, 2014 CarswellOnt 640 (S.C.C.), affirmed *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 CarswellOnt 642 (S.C.C.).

¹¹ That are found in searches of the CanLII database — see *op. cit.* footnote 8.

Not surprisingly, the appellate courts address both the destination (the quality of the judgment) and the route taken to get there (the procedural process). *Hryniak* requires that summary judgment be a “just adjudication”,¹² a “just process”,¹³ a “just determination”,¹⁴ leading to a “just result”¹⁵ or “just resolution”.¹⁶ But the summary proceeding must also be fair, affordable and timely.

The results of appellate decisions canvassed in this paper, concerning summary proceedings, sorted by summary judgment, summary trial judgment, partial summary judgment, partial summary dismissal, summary dismissal, summary trial dismissal, and dismissal of *the motion* for summary, reviewed in this paper, are these: *Summary Judgment* — of the 55 appeals from summary judgments, 15 appeals were allowed (27%),¹⁷ while 40 (73%) were dismissed;¹⁸ *Summary Trial*

¹² *Hryniak v. Mauldin, op. cit.*, fn 5 at paras 2, 4, 5, 23, 28, 33, 50, 63 and 66.

¹³ *Ibid.* at paras 23 and 27.

¹⁴ *Ibid.* at paras 49, 51 and 94.

¹⁵ *Ibid.* at paras 4, 24, 29, 32, 49 and 66.

¹⁶ *Ibid.* at paras 24 and 65.

¹⁷ *Viczko v. Choquette*, 2016 SKCA 52 (C.A.); *Maple Ridge Community Management Ltd. v. Peel Condominium Corporation No. 231*, 2015 ONCA 520 (C.A.); *Royal Bank of Canada v. Hussain*, 2016 ONCA 637 (C.A.); *Turfpro Investments Inc. v. Heinrichs*, 2014 ONCA 502 (C.A.); *Lesenko v. Guerette*, 2017 ONCA 522 (C.A.); *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378 (C.A.); *Havenlee Farms Inc. v. HZPC Americas*, 2017 PECA 20 (C.A.); *Seif v. Toronto (City)*, 2015 ONCA 321 (C.A.); *McNally v. Health PEI*, 2018 PECA 14; *Canadian Broadcasting Corp. v. Whatcott*, 2016 SKCA 17, 2016 Carswell Sask 75; *Hamilton (City) v. Thier + Curran Architects Inc.*, 2015 ONCA 64, 2015 CarswellOnt 1222; *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63, 2015 CarswellOnt 1230; *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429, 2018, CarswellOnt 6978; 790668 *Ontario Inc. v. D’Andrea Management Inc.*, 2015 ONCA 557, 2015 CarswellOnt 11426; *Fontenelle v. Canada (Attorney General)*, 2018 ONCA, 475, 2018 Carswell Ont 7943.

¹⁸ *Kakoutis v. Bank of Nova Scotia*, 2015 ONCA 872 (C.A.), leave to appeal refused 2016 CarswellOnt 8663 (S.C.C.); *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215 (C.A.); *Heritage Electric Ltd. et al v. Sterling O G International Corporation et al*, 2017 MBCA 85 (C.A.); *Access Mortgage Corporation (2004) Limited v. Arres Capital Inc.*, 2014 ABCA 280 (C.A.); *Amack v. Wishewan*, 2015 ABCA 147 (C.A.); *Burns Bog Conservation Society v. Canada*, 2014 FCA 170 (F.C.A.); *Fernandes v. Carleton University*, 2016 ONCA 719 (C.A.); *Chao v. Chao*, 2017 ONCA 701 (C.A.); *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONCA 878 (C.A.), leave to appeal refused *Sweda Farms Ltd. v. Burnbrae Farms Ltd.*, 2015 CarswellOnt 10365 (S.C.C.); *First Contact Realty Ltd. (Royal LePage First Contact Realty) v. Prime Real Estate Holdings Corporation*, 2016 ONCA 156 (C.A.); *Condominium Corporation No 311443 v. Goertz*, 2016 ABCA 362 (C.A.), leave to appeal refused *Goertz v. Condominium Corp. No. 311443*, 2017 CarswellAlta 726 (S.C.C.); *Buffalo v. Canada*, 2016 FCA 223 (F.C.A.), leave to appeal refused *Ermineskin Indian Band v. Canada*, 2017 CarswellNat 665 (S.C.C.), reconsideration / rehearing refused *Chief John Ermineskin, et al. v. Her Majesty the Queen in Right of Canada, et al.*, 2017 CarswellAlta 1107 (S.C.C.), leave to appeal refused *Samson Indian Band v. Canada*, 2017 CarswellNat 667 (S.C.C.),

Judgment — of the six appeals from summary trial judgments, three (50%) appeals were allowed,¹⁹ while three (50%) were dismissed;²⁰ *Partial Summary Judgment* — of the 26 appeals from partial summary judgments, 12 (46%) appeals were allowed,²¹ while 14 (54%) were dismissed;²² *Partial Summary*

reconsideration / rehearing refused *Chief Victor Buffalo acting on his own behalf and on behalf of all the other members of the Samson Indian Nation and Band, et al. v. Her Majesty the Queen in Right of Canada, et al.*, 2017 CarswellAlta 1109 (S.C.C.); *Nordlund Family Retreat Inc. v. Plominski*, 2014 ONCA 444 (C.A.); *Winter v. Royal Trust Company*, 2014 ONCA 473 (C.A.); *Aylsworth v. The Law Office of Harvey Storm*, 2016 ONSC 3938 (Div. Ct.); *Northbridge General Insurance Corporation v. Langston Hall Development Corporation*, 2014 ONCA 551 (C.A.); *De Melo v. De Melo*, 2015 ONCA 598 (C.A.); *Nafie v. Badawy*, 2015 ABCA 36 (C.A.), leave to appeal refused *Badawy v. Nafie*, 2015 CarswellAlta 2052 (S.C.C.); *Mars Canada Inc. v. Bemco Cash Carry Inc.*, 2018 ONCA 239 (C.A.) and *22 King Street Inc. et al. v. The Bank of Nova Scotia*, 2018 NBCA 16 (C.A.); *Amik Oilfield Equipment Rentals Ltd. v. Beaumont Energy Inc.*, 2018 ABCA 88 (C.A.); *O'Toole v. Peterson*, 2018 NBCA 8 (C.A.); *Spookw v. Gitksan Treaty Society*, 2017 BCCA 16; *Brotherson v. Christiansen et al.*, 2018 MBCA 70; *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432; *P. (W.) v. Alberta*, 2014 ABCA 404, 2014 Carswell Alta 2152; *Joncas v. Joncas*, 2017 ABCA 50; *Winnitoway v. Winnitoway*, 2017 SKCA 12, 2017 Carswell Sask 52; *656340 N.B. Inc. v. 059143 N.B. Inc.*, 2014 NBCA 46; *Raymond v. Brauer*, 2015 NSCA 106, 2015 Carswell NS 924; *Condominium Corp. No. 311443 v. Goertz*, 2016 ABCA 362; *John Deere Financial Inc. v. 1232291 Ontario Inc.*, 2016 ONCA 838, 2016 CarswellOnt 17437, *CIBC Mortgages Inc. v. Mostafavi*, 2015 ONCA 363, 2015 CarswellOnt 7678, *Cosentino v. Sherwood Dash Inc.*, 2014 ONCA 843, 2014 CarswellOnt 16581; *Royal Bank v. Hejna*, 2014 ONCA 306, 2014 CarswellOnt 4949; *790668 Ontario Inc. v. D'Andrea Management Inc.*, 2015 ONCA 557, 2015 CarswellOnt 11426; *Yelda v. Vu*, 2014 ONCA 353, 2014 CarswellOnt 5697; *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2018 ONSC 2783 (Ont. Div. Ct.); *Alfano v. Canadian Imperial Bank of Commerce*, 2016 ONSC 1979 (Ont Div); *Canadian Imperial Bank of Commerce v. Berger*, 2015 ONSC 7728 (Ont Div).

¹⁹ *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502 (C.A.), additional reasons 2016 CarswellBC 1306 (C.A.); *Rubens v. Sansome*, 2017 NLCA 32 (C.A.); *Hellberg v. Netherclift*, 2017 BCCA 363 (C.A.).

²⁰ *Spring Hill Farms Limited Partnership v. Nose*, 2014 BCCA 66 (C.A.); *299 Burrard Management Ltd. v. The Owners, Strata Plan BCS 3699*, 2015 BCCA 313 (C.A.); *Crest Realty Westside Ltd. v. W W Parker Enterprises Ltd.*, 2015 BCCA 447 (C.A.).

²¹ *Janz et al v. Janz et al*, 2016 MBCA 39 (C.A.); *Hnidy v. Hnidy*, 2017 SKCA 44 (C.A.); *Wooddworks Design Ltd. v. Forzani*, 2016 ABCA 310 (C.A.); *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2 (C.A.); *Ashraf v. SNC Lavalin ATP Inc.*, 2017 ABCA 95 (C.A.); *Marsland Centre Limited v. Wellington Partners International Inc.*, 2017 ONCA 631 (C.A.); *Canaccord Genuity Corp. v. Pilot*, 2015 ONCA 716 (C.A.); *Actuate Canada Corp. v. Symcor Services Inc.*, 2016 ONCA 217, 2016 CarswellOnt 4105; *Barbieri v. Mastronardi*, 2014 ONCA 416, 2014 CarswellOnt 6617; *McGrail v. Phillips*, 2018 ONSC 3571 (Div. Ct.); *McGrail v. Phillips*, 2018 ONSC 3571 (Div. Ct.); *Toor v. Toor*, 2018 ONCA 621; *2212886 Ontario Inc. v. Obsidian Group Inc.*, 2018 ONCA 670.

²² *R D Partners v. Mediamix Interactive Inc.*, 2015 ONCA 284 (C.A.); *2329131 Ontario Inc. v. Carlyle Development Corp.*, 2014 ONCA 132 (C.A.); *Attila Dogan Construction*

Dismissal — of the seven appeals from partial summary dismissals, four (57%) appeals were allowed,²³ while three (43%) were dismissed;²⁴ *Summary Dismissal* — of the 51 appeals from summary dismissals, 18 (35%) appeals were allowed,²⁵ while 33 (65%) were dismissed;²⁶ *Summary Trial Dismissal* — of three appeals

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- and Installation Co. Inc. v. AMEC Americas Limited*, 2015 ABCA 406 (C.A.); *Dickson v. Di Michele*, 2014 ONSC 3043 (Div. Ct.); *Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc.*, 2015 ONCA 258 (C.A.); *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2015 ONCA 236 (C.A.); *NEP Canada ULC v. MEC Op LLC*, 2016 ABCA 201 (C.A.); *Goodswimmer v. Canada (Attorney General)*, 2017 ABCA 365 (C.A.); *SNMP Research International Inc. v. Nortel Networks Corp.*, 2016 ONCA 749, 2016 CarswellOnt 15976; *Actuate Canada Corp. v. Symcor Services Inc.*, 2016 ONCA 217, 2016 CarswellOnt 4105; *Goldentuler v. Mercedes-Benz Canada Inc.*, 2014 ONCA 361, 2014 CarswellOnt 5699; *Kadiri v. Southlake Regional Health Centre*, 2015 ONCA 847, 2212886; *Ontario Inc. v. Obsidian Group Inc.*, 2018 ONCA 670; *1353837 Ontario Inc. v. City of Stratford (Corporation)*, 2018 ONSC 71 (Div Ct).
- ²³ *Windsor v. Canadian Pacific Railway Ltd.*, 2014 ABCA 108 (C.A.); *Cook v. Joyce*, 2017 ONCA 49 (C.A.); *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 (C.A.); *Inuit of Nunavut v. Canada (Attorney General)*, 2014 NUCA 2.
- ²⁴ *Kolosov v. Lowe's Companies Inc.*, 2016 ONCA 973 (C.A.); *Miaskowski v. Persaud*, 2015 ONCA 758 (C.A.); *Lewis v. Lavern Haideman & Sons Ltd.*, 2016 ONSC 4017 (Ont Div).
- ²⁵ *Collins v. Cortez*, 2014 ONCA 685 (C.A.); *McQuaid v. Government of P.E.I. et al*, 2017 PECA 21 (C.A.); *Donovan v. QCRS*, 2016 PECA 1 (C.A.); *Bonello v. Gores Landing Marina (1986) Limited*, 2017 ONCA 632 (C.A.); *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61 (C.A.); *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450 (C.A.); *Trotter Estate*, 2014 ONCA 841 (C.A.); *Meehan v. Good*, 2017 ONCA 103 (C.A.); *Miller Group Inc. v. James*, 2014 ONCA 335 (C.A.); *Peters Estate v. Desjardin Securite Financiere*, 2016 ONCA 282 (C.A.); *Northern Industrial Services Group Inc. v. Duguay*, 2016 ONCA 539 (C.A.); *Petersen v. Matt*, 2014 ONSC 896 (Div. Ct.); and *Stefanyk v. Sobeys Capital Incorporated*, 2018 ABCA 125 (C.A.); *Arndt v. Banerji*, 2018 ABCA 176, 2018 Carswell Alta 890; *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 2017 CarswellOnt 202; *Longo v. Maclaren Art Centre Inc.*, 2014 ONCA 526, 2014 CarswellOnt 9192; *Khosa v. Homelife/United Realty Inc.*, 2016 ONCA 3, 2016 CarswellOnt 8; *O'Dowda v. Halpenny*, 2015 ONCA 22, 2015 CarswellOnt 367.
- ²⁶ *Stout v. Track*, 2015 ABCA 10 (C.A.); *Whitecourt Power Limited Partnership v. Elliott Turbomachinery Canada Inc.*, 2015 ABCA 252 (C.A.); *Grivicic v. Alberta Health Services (Tom Baker Cancer Centre)*, 2017 ABCA 246 (C.A.); *CCS Corporation v. Pembina Pipeline Corporation*, 2014 ABCA 390 (C.A.); *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375 (C.A.), leave to appeal refused *Lanny K. McDonald v. Brookfield Asset Management Inc., et al.*, 2017 CarswellAlta 947 (S.C.C.); *Cotter v. Point Grey Golf and Country Club*, 2016 BCCA 260 (C.A.), leave to appeal refused 2017 CarswellBC 197 (S.C.C.); *Lee v. Canada (Correctional Service)*, 2017 FCA 228 (F.C.A.); *WP v. Alberta*, 2014 ABCA 404 (C.A.), leave to appeal refused *R. v. P. (W.)*, 2015 CarswellAlta 757 (S.C.C.); *Kolosov v. Lowe's Companies Inc.*, 2016 ONCA 973 (C.A.); *Chernet v. RBC General Insurance Company*, 2017 ONCA 337 (C.A.); *Parsaei v. Toronto (Police Services Board)*, 2017 ONCA 512 (C.A.), additional reasons 2017 CarswellOnt 9675 (C.A.); *Fernandes v. Carleton University*, 2016 ONCA 719 (C.A.); *Nandlal v. Toronto Transit Commission*, 2015 ONCA 166 (C.A.); *Brown v. Wahl*, 2015

from summary trial dismissals, none were allowed, while three (100%) were dismissed;²⁷ and *Summary Judgment Motion Dismissed* — of the 47 appeals from the dismissal of summary judgment motions, 15 (32%) appeals were allowed,²⁸ while 32 (68%) were dismissed.²⁹

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- ONCA 778 (C.A.); *Deren v. SaskPower*, 2017 SKCA 104 (C.A.); *Myers-Gordon v. Martin*, 2014 ONCA 767 (C.A.); *Bonaccorso v. Optimum Insurance Company Inc.*, 2016 ONCA 34 (C.A.); *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12 (C.A.); *Templanza v. Wolfman*, 2016 ABCA 1 (C.A.), leave to appeal refused 2016 CarswellAlta 1769 (S.C.C.); *Lenko v. The Government of Manitoba et al.*, 2016 MBCA 52 (C.A.) (part allowed, part dismissed); *Isaac Estate v. Matuszynska*, 2018 ONCA 177 (C.A.); *Kueber v. Royal Victoria Regional Health Centre*, 2018 ONCA 125 (C.A.); *Turtle Creek Landscape Inc. v. Summit Auto Brokers Inc.*, 2018 ONCA 95 (C.A.); *Tapak v. Non-Marine Underwriters, Lloyd's of London*, 2018 ONCA 168 (C.A.); *Grenier c. Attorney General of Quebec*, 2018 QCCA 266 (C.A.); *Can v. Calgary Police Services*, 2014 ABCA 322, 2014 Carswell 1836; *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124, 2016 Carswell Sask 616; *Tsatsi v. College of Physicians and Surgeons of Saskatchewan*, 2018 SKCA 53; *Slade v. Tanfi Ltd.*, 2016 ONCA 326, 2016 CarswellOnt 6726; *First Contact Realty Ltd. v. Prime Real Estate Holdings Corp.*, 2016 ONCA 156, 2016 CarswellOnt 2667; *Madder v. South Easthope Mutual Insurance Co.*, 2014 ONCA 714, 2014 CarswellOnt 14500; *Rajmohan v. Norman H. Solomon Family Trust*, 2014 ONCA 352, 2014 CarswellOnt 5804; *Broadgrain Commodities Inc. v. Continental Casualty Company (CAN Canada)*, 2018 ONCA 438, 2018 CarswellOnt 7194; *Sanofi Pasteur Ltd. v. UPS SCS, Inc.*, 2015 ONCA 88, 2015 CarswellOnt 1455.
- ²⁷ *Kemp v. Vancouver Coastal Health Authority Ltd.*, 2017 BCCA 229 (C.A.), leave to appeal refused *Brenlee Kemp on her own behalf and as Executrix of the Estate of Shannon Jean Kemp, deceased, et al. v. Vancouver Coastal Health Authority Ltd., dba Vancouver General Hospital, et al.*, 2018 CarswellBC 641 (S.C.C.); *Moon v. Ottawa*, 2015 ONCA 489 (C.A.); *Brissette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 (C.A.).
- ²⁸ *Lodge et al v. Red River Valley Mutual Insurance Company et al*, 2017 MBCA 76 (C.A.); *Forestell v. Carroll*, 2015 ONSC 5883 (Div. Ct.); *Cotnam v. The National Capital Commission*, 2014 ONSC 3614 (Div. Ct.); *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50 (C.A.); *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 (C.A.); *Biancanello v. DMCT LLP*, 2014 ONSC 5539 (Div. Ct.); *Deavitt v. Greenly, et al*, 2017 ONSC 5674 (Div. Ct.); *Compton v. State Farm Insurance Company of Canada*, 2014 ONSC 2260 (Div. Ct.); *C.H. Clément Construction v. Séguin Racine Architectes et Associés Inc.*, 2014 ONSC 6296 (S.C.J.), additional reasons *C.H. Clement Construction v. Seguin Racine Architectes et Associes Inc.*, 2014 CarswellOnt 16574 (S.C.J.); *Kokanee Mortgage M.I.C. Ltd. v. Burrell*, 2018 BCCA 151, 2018 CarswellBC 975; *Newman v. R.*, 2016 CAF 213, 2016 FCA 213; *Haztech Fire and Safety Services Inc. v. M. Thompson Holdings Ltd.*, 2017 SKCA 56, 2017 Carswell Sask 374; *1615540 Ontario Inc. v. Simon*, 2016 ONCA 966, 2016 CarswellOnt 20022.
- ²⁹ *Toronto (City) v. Maple-Crete Inc.*, 2014 ONSC 2371 (Div. Ct.); *Skunk v. Ketash*, 2016 ONCA 841 (C.A.); *Aiken v. Ottawa Police Services Board*, 2015 ONSC 3793 (Div. Ct.); *Talisman Energy Inc. v. Questerre Energy Corporation*, 2017 ABCA 218 (C.A.); 776826 *Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49 (C.A.); *Sokoloff Professional Corp. v. Mahoney*, 2015 ONSC 2007 (Div. Ct.); *Flue-Cured Tobacco Growers Marketing Board v. Rothmans, Benson Hedges, Inc.*, 2016 ONSC 3939 (Div. Ct.), additional reasons *Ontario*

Of the total, 148 appeals of judgments or dismissals (not simply of dismissed motions), 52 (35%) were allowed and 96 (65%) were dismissed.

2. Access to Justice — Pre-trial Procedures Other than Summary Proceedings

While *Hryniak* is generally regarded as “being about” summary proceedings, a moiety of the appellate cases citing *Hryniak* concern pre-trial procedures other than summary proceedings. *Hryniak* recognized proportionality “as an important legal principle”,³⁰ and the principle has since been described as the “touchstone”³¹ of modern civil justice and the “benchmark”³² for access to civil justice.

How have the appellate courts approached access to justice through proportionality in proceedings other than summary proceedings? Appellate

(*Flue-Cured Tobacco Growers' Marketing Board*) v. *Imperial Tobacco Canada Ltd.*, 2016 CarswellOnt 15053 (Div. Ct.), additional reasons *Ontario (Flue-Cured Tobacco Growers' Marketing Board)* v. *Rothmans, Benson Hedges, Inc.*, 2016 CarswellOnt 15054 (Div. Ct.), additional reasons *Ontario (Flue-Cured Tobacco Growers' Marketing Board)* v. *JTI-MacDonald Corp.*, 2016 CarswellOnt 15055 (Div. Ct.); *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52 (C.A.); *Fincantieri Cantieri Navali Italiani v. Anmar Energy Ltd.*, 2015 ONSC 7387 (S.C.J.); *Manitoba v. Canada*, 2015 FCA 57 (F.C.A.); *Lalonde-Paquette v. Freedman*, 2014 ONSC 1678 (S.C.J.); *Condominium Corporation No. 0321365 v. Cuthbert*, 2016 ABCA 46 (C.A.); *Abbey Lane Homes v. Cheema*, 2015 ABCA 173 (C.A.); *Carone v. Peel Condominium Corporation No. 766*, 2016 ONSC 7821 (Div. Ct.); *Canada (Prime Minister) v. Alani*, 2016 FCA 22 (F.C.A.); *Mortgage and Housing Corporation v. Pastoukhova*, 2014 ONSC 5731 (S.C.J.); *Lorence v. 115836 Ontario Limited*, 2016 ONSC 2880 (S.C.J.); *Henry v. Harvey*, 2015 ONSC 2135 (Div. Ct.); *Yusuf et al. v. Cooley et al.*, 2015 ONSC 3244 (Div. Ct.); *Donald William Hancock v. Michael Hancock*, 2014 ONSC 6702 (Div. Ct.); *Michael Wilson Partners, Ltd. v. Desirée Resources Inc.*, 2016 BCCA 296 (C.A.) (application for summary trial); *3Genius Corporation v. Locationary Inc.*, 2015 ONSC 4558 (Div. Ct.); *Kassian v. The Attorney General of Canada*, 2014 ONSC 844 (Div. Ct.), reversed *Kassian Estate v. Canada (Attorney General)*, 2015 CarswellOnt 10947 (C.A.); *Dang v. Anderson*, 2016 ONSC 7844 (S.C.J.), additional reasons 2017 CarswellOnt 198 (S.C.J.); and *Berscheid v. Federated Co-operatives et al.*, 2018 MBCA 27 (C.A.); *3746292 Manitoba Ltd et al v. Intact Insurance*, 2018 MBCA 59, 2018 CarswellMan 205; *Meridian Credit Union Ltd. v. Baig*, 2016 ONCA 150, 2016 CarswellOnt 2664; *Kassburg v. Sun Life Assurance Co. Of Canada*, 2014 ONCA 922, 2014 CarswellOnt 18278; *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.*, 2016 ONSC 4230 (Div Ct.); *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.*, 2016 ONSC 4230 (Div Ct.); *Korn/Ferry Canada Inc. v. Rosin*, 2016 ONSC 4535 (Div Ct.); *Daneluzzi v. 876336 Ontario Ltd.*, 2015 ONSC 229 (Div Ct).

³⁰ *Heritage Electric Ltd. et al v. Sterling O G International Corporation et al*, 2017 MBCA 85 (C.A.).

³¹ *Klippenstein v. Manitoba Ombudsman*, 2015 MBCA 15 (C.A.), leave to appeal refused 2015 CarswellMan 303 (S.C.C.).

³² *Burns Bog Conservation Society v. Canada*, 2014 FCA 170 (F.C.A.).

decisions citing *Hryniak* pertaining to procedures *other than summary proceedings* sorted by subject, are these: affidavits,³³ amendment of pleadings,³⁴ case management,³⁵ case-splitting,³⁶ class certification,³⁷ costs,³⁸ delay,³⁹ discovery and disclosure,⁴⁰ directions,⁴¹ estate proceedings,⁴² injunctions,⁴³ intervenor status,⁴⁴ joinder — adding parties,⁴⁵ leave to the

³³ *Abas Auto Inc. v. Superior General Partner Inc.*, 2015 MBCA 104 (C.A.); *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (C.A.); *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 CAF 128.

³⁴ *Condominium Corporation No. 0213028 v. HCI Architecture Inc.*, 2017 ABCA 375 (C.A.); *Vend-All Marketing Inc. v. Hunter et al.*, 2015 MBCA 10 (C.A.); *Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176 (F.C.A.)

³⁵ *Rochelle et al. v. The Rural Municipality of St. Clements et al.*, 2014 MBCA 102 (C.A.); *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, et al.*, 2018 ONSC 1289 (S.C.J.); *Uashaunuat (Innus of Uashat and Mani-Utenam) c. Quebec (Attorney General)*, 2014 QCCA 2193 (C.A.).

³⁶ *Klippenstein v. Manitoba Ombudsman*, 2015 MBCA 15 (C.A.), leave to appeal refused 2015 CarswellMan 303 (S.C.C.).

³⁷ *Jiang v. Peoples Trust Company*, 2017 BCCA 119 (C.A.); *Fehr v. Sun Life Assurance Company of Canada*, 2014 ONSC 3447 (Div. Ct.); *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2015 ONSC 1634 (Div. Ct.), reversed 2016 CarswellOnt 19121 (C.A.), leave to appeal refused *Schwartz Levitsky Feldman LLP v. Excalibur Special Opportunities LP*, 2017 CarswellOnt 8835 (S.C.C.); *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60; *Lockyer-Kash v. British Columbia (Workers' Compensation Board)*, 2015 BCCA 70.

³⁸ *1318847 Ontario Limited v. Laval Tool Mould Ltd.*, 2017 ONCA 184 (C.A.); *Marques v. Bambrick*, 2018 PECA 4.

³⁹ *Canada (Attorney General) v. Delorme*, 2016 ABCA 168 (C.A.); *Ursa Ventures Ltd. v. Edmonton (City)*, 2016 ABCA 135 (C.A.); *Humphreys v. Trebilcock*, 2017 ABCA 116 (C.A.), additional reasons 2017 CarswellAlta 1245 (C.A.), leave to appeal refused *V. Lorne Humphreys, et al. v. Barry Trebilcock, et al.*, 2017 CarswellAlta 2724 (S.C.C.); *Weaver v. Cherniawsky*, 2016 ABCA 152 (C.A.); *Carioca's Import Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592 (C.A.); *Sutherland v. Brown*, 2018 ABCA 123 (C.A.); *Iacolucci v. T.D. Water House Canada Inc.*, 2018 ONSC 1027 (Div. Ct.).

⁴⁰ *Johnson v. State Farm Fire and Casualty Company*, 2015 NBCA 4 (C.A.); *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 (F.C.A.); *McCabe v. Wawanese Mutual Insurance Company*, 2017 PECA 12 (C.A.); *Defence Construction Canada v. Canada (Office of the Information Commissioner)*, 2017 CAF 133; *Creighan v. MacPhee*, 2018 PECA 1.

⁴¹ *(National Revenue) v. McNally*, 2015 FCA 195 (F.C.A.);

⁴² *Beimler v. Kendall*, 2017 ABCA 117 (C.A.); *Kaphalakos v. Dayal*, 2016 ONSC 3559 (Div. Ct.).

⁴³ *Liu v. Hamptons Golf Course Ltd.*, 2017 ABCA 303 (C.A.).

⁴⁴ *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 (F.C.A.); *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (F.C.A.), followed in *ViiV Healthcare ULC v. Teva Canada Limited*, 2015 FCA 33 (F.C.A.); *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 CAF 102.

⁴⁵ *Liannu Limited Partnership v. Modspace Financial Services Canada Ltd.*, 2016 NLCA 15

Supreme Court of Canada,⁴⁶ medical examination,⁴⁷ mootness,⁴⁸ oppression,⁴⁹ prematurity,⁵⁰ settlement agreement,⁵¹ standing,⁵² stay of proceedings,⁵³ strike out,⁵⁴ summary judgment — other,⁵⁵ timetable and directions,⁵⁶ trial,⁵⁷

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- (C.A.); *Twinn v. Twinn*, 2017 ABCA 419 (C.A.); *Toronto-Dominion Bank v. Andral Holdings (Moncton) Ltd.*, 2017 CarswellNB 398 (C.A.); *Arcari v. Dawson*, 2016 ONCA 715 (C.A.), leave to appeal refused 2017 CarswellOnt 3137 (S.C.C.).
- ⁴⁶ *Young v. Noble*, 2017 NLCA 48 (C.A.); *Echino v. Munro*, 2014 ABCA 422.
- ⁴⁷ *Babcock v. Destefano*, 2017 ONSC 276 (Div. Ct.).
- ⁴⁸ *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 121 (F.C.A.).
- ⁴⁹ *Maurice v. Alles*, 2016 ONCA 287 (C.A.); *Castillo v. Xela Enterprises Ltd.*, 2016 ONSC 6088 (Div. Ct.); *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103 (C.A.).
- ⁵⁰ *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35 (F.C.A.).
- ⁵¹ *Talon International Inc. v. Far East Aluminium Work Canada, Court of Appeal for Ontario Corp.*, 2014 ONCA 539 (C.A.); *Sahota v. Sahota*, 2016 ONSC 314 (Div. Ct.); *MacKean v. Royal Sun Alliance Insurance Company of Canada*, 2015 NSCA 33 (C.A.); *Ambulance New Brunswick Inc. v. Province of New Brunswick*, 2017 CarswellNB 60 (C.A.).
- ⁵² *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80 (C.A.); *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 (S.C.C.).
- ⁵³ *Lavigne c. 6040993 Canada Inc.*, 2016 QCCA 1755 (C.A.); *Morrill v. Morrill*, 2016 MBCA 93.
- ⁵⁴ *HOOPP Realty Inc. v. The Guarantee Company of North America*, 2015 ABCA 336 (C.A.); *Gruman v. Canmore (Town)*, 2016 ABCA 392 (C.A.); *Amec Americas Limited v. HB Construction Company Ltd.*, 2015 CarswellNB 316 (C.A.); *Khan v. Lee*, 2014 ONCA 889 (C.A.); *O'Connor Associates Environmental Inc. v. MEC OP LLC*, 2014 ABCA 140 (C.A.); *National Concrete Accessories Canada Inc. v. AAA-Zaid*, 2017 MBCA 28 (C.A.); *Ernst v. Alberta Energy Regulator*, 2017 SCC 1; *Saleh v. Nebel*, 2018 ONSC 452 (Div. Ct.); *Resolute Forest Products Inc. v. 2471256 Canada Inc.*, 2016 ONSC 5398 (Div. Ct.); *Resolute Forest Products Inc. v. 2471256 Canada Inc.*, 2014 ONSC 3996 (Div. Ct.).
- ⁵⁵ *Reyes v. Esbin*, 2016 ONSC 7755 (S.C.J.) (description of summary judgment test); *Ramsahai-Whing v. Weenen*, 2017 ONSC 1091 (Div. Ct.) (motion for leave to appeal costs order on summary judgment motion); *Gatti v. Avramidis*, 2016 ONSC 606 (Div. Ct.) (appeal of order adjourning motion for summary judgment and refusal to be seized); *Loepky et al v. Taylor McCaffrey LLP*, 2015 MBCA 83 (C.A.) (appeal of direction that summary judgment motion be heard before discovery); *The Bank of Nova Scotia v. Russell*, 2016 ONSC 1829 (Div. Ct.) (whether jurisdiction to adjourn motion to hear evidence for summary judgment restricted by *Hryniak*); *Arminak Associates Inc. v. Apollo Health and Beauty Care*, 2014 ONSC 5806 (Div. Ct.) (motion for leave to appeal order adjourning motion for summary judgment with directions).
- ⁵⁶ *(National Revenue) v. McNally*, 2015 FCA 195 (F.C.A.).
- ⁵⁷ *Aquila v. Aquila*, 2016 MBCA 33 (C.A.); *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 (C.A.), additional reasons 2017 CarswellAlta 1462 (C.A.), leave to appeal refused *EnCana Midstream and Marketing, et al. v. IFP Technologies (Canada) Inc.*, 2018 CarswellAlta 665 (S.C.C.); *Harris v. Leikin Group Inc.*, 2014 ONCA 479 (C.A.); *Iannarella v. Corbett*, 2015 ONCA 110 (C.A.), additional reasons 2015 CarswellOnt 4876 (C.A.); *Canadian Union of Public Employees, Local 821 v. Vitalité Health Network (Zone 1B)*, 2015 NBCA 3 (C.A.); *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59; *Canadian National Railway v. Emerson Milling Inc.*, 2017 CAF 79.

vexatious litigant,⁵⁸ withdrawal of admissions,⁵⁹ and other.⁶⁰ Space considerations preclude inclusion of a discussion of those decisions, which will be included in a future paper.

3. Structure

This paper has the following structure concerning summary proceedings: 1. Categorization, 2. Weeding Out Unmeritorious Claims, 3. Partial Summary Judgment, 4. Fact-finding, 5. Existing Record, 6. New Powers, 7. Evaluating Credibility, 8. Drawing Inferences, 9. Weighing Evidence, 10. Oral Evidence on

⁵⁸ *Olumide v. Canada*, 2016 FCA 287 (F.C.A.), leave to appeal refused *Ade Olumidel. v. Her Majesty the Queen in Right of Canada, et al.*, 2017 CarswellNat 6251 (S.C.C.); *Tupper v. Nova Scotia (Attorney General)*, 2015 NSCA 92 (C.A.), leave to appeal refused 2016 CarswellNS 137 (S.C.C.); *Canada v. Olumide*, 2017 FCA 42.

⁵⁹ *Northrup v. Windsor Energy Inc. et al.*, 2017 NBCA 37 (C.A.).

⁶⁰ *Dorman Roberts Ltd. v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2017 NLCA 42 (C.A.) (appeal of order granting a license despite objection); *The Minister of Transportation and the Province of New Brunswick v. Carter's Country Store (1996) Ltd.*, 2017 NBCA 23 (C.A.), reasons in full 2017 CarswellNB 318 (C.A.) (appeal and cross-appeal whether a rule for advance payment can be invoked); *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47 (C.A.) (comment on conduct); *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, 2014 ONCA 855 (C.A.), additional reasons *Orr v. Metropolitan Toronto Condominium Corp. No. 1056*, 2015 CarswellOnt 8414 (C.A.) (hearing of grouped appeals); *Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 (C.A.), leave to appeal refused *Siri Guru Nanak Sikh Gurdwara of Alberta v. Sandhu*, 2015 CarswellAlta 1535 (S.C.C.) (appeal decision of conduct in membership); *Allen v. Alberta*, 2015 ABCA 277 (C.A.), leave to appeal refused 2016 CarswellAlta 203 (S.C.C.) (whether appellant using proper procedure for constitutional challenge); *Warman v. Law Society of Alberta*, 2015 ABCA 368 (C.A.) (appeal re: standing to challenge a committee decision); *Gates v. The Humane Society of Canada for The Protection of Animals and the Environment carrying on business as The Humane Society of Canada*, 2016 ONSC 5345 (Div. Ct.), additional reasons *Gates v. Humane Society of Canada for the Protection of Animals and the Environment*, 2016 CarswellOnt 14820 (S.C.J.) (appeal of Small Claims procedure); *Lelond v. The Park West School Division*, 2015 MBCA 116 (C.A.) (appeal of dismissed motion to quash); *JEKE Enterprises Ltd. v. Philip K. Matkin Professional Corp.*, 2014 BCCA 227 (C.A.) (appeal decision that question before the court was not appropriate for a special case); *Pacer Construction Holdings Corporation v. Pacer Promec Energy Corporation*, 2018 ABCA 113 (C.A.); *Charland c. Lessard*, 2016 QCCA 452 (C.A.); *Trackcom Systems Inc. c. Trackcom Systems International Inc.*, 2015 QCCA 1257 (C.A.); *McGill University c. Ong*, 2014 QCCA 458 (C.A.); *Lapointe Rosenstein Marchand Melancon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, *High-Crest Enterprises Ltd. v. R.*, 2017 CAF 99, 2017 FCA 88; *CUPE Local 821 v. Vitale Health Network*, 2015 NBCA 3; *Wang v. Lin*, 2016 ONSC 3967 (Div Ct.); *Holmes v. White*, 2014 ONSC 5809 (Div Ct); *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 and *Al-omani v. Bird*, 2016 ONSC 5779 (Div. Ct.).

Summary Judgment, 11. Salvaging a Failed Motion, 12. Applications, and in section III. Conclusions.

II. SUMMARY JUDGMENT

1. Categorization

Karakatsanis J., writing for the Court in *Hryniak* said that in determining whether there is a genuine issue requiring a trial, the focus should be on the goals and principles that underlie whether to grant motions for summary judgment, and not categorization, stating, “Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system’s transformation by discouraging the use of summary judgment.”⁶¹

The Court of Appeal for Ontario in *Combined Air Mechanical Services Inc. v. Flesch*⁶² suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. Karakatsanis J. responded in *Hryniak*, “These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.”⁶³

Hryniak does not purport to set down criteria guiding the appropriateness of a summary trial in case-specific contexts, and this was recognized by the Court of Appeal for Ontario in *Kakoutis v. Bank of Nova Scotia*.⁶⁴

⁶¹ *Hryniak v. Mauldin*, *op. cit.* fn 5, at para. 47.

⁶² *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (C.A.), additional reasons *Combined Air Mechanical Services Inc. v. Flesch*, 2013 CarswellOnt 5398 (C.A.), additional reasons *Combined Air Mechanical Services Inc. v. Flesch*, 2013 CarswellOnt 5399 (C.A.), leave to appeal refused *Combined Air Mechanical Services Inc. v. Flesch*, 2014 CarswellOnt 744 (S.C.C.), affirmed *Hryniak v. Mauldin*, 2014 CarswellOnt 640 (S.C.C.), affirmed *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 CarswellOnt 642 (S.C.C.).

⁶³ *Hryniak v. Mauldin*, *op. cit.* fn 5, at para. 48.

⁶⁴ *Kakoutis v. Bank of Nova Scotia*, 2015 ONCA 872 (C.A.), leave to appeal refused 2016 CarswellOnt 8663 (S.C.C.) As stated in *Haztech Fire and Safety Services Inc. v. M. Thompson Holdings Ltd*, 2017 SKCA 56, 2017 Carswell Sask 374, at paragraph 31, the new summary judgment rules read alongside *Hryniak v. Mauldin* significantly expanded the summary judgment process in Saskatchewan. (see also *Hryniak*, para. 1).

(a) No categories

(i) *Not categorize principles (they will develop in time)*

In Nova Scotia the Court of Appeal in *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*⁶⁵ allowed an appeal from a dismissal of the defendant's summary judgment motion to dismiss the plaintiff's claim stating, "This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6) (a). Those principles will develop over time."

(ii) *Case-specific inquiry*

In *Hellberg v. Netherclift*⁶⁶ an appeal of a child custody order following a summary trial, the Court of Appeal for British Columbia held, "At the end of the day, the suitability of a matter for determination by way of summary trial is a case-specific inquiry."⁶⁷

(iii) *No firm categories*

The Court of Appeal for Ontario in *Chao v. Chao*⁶⁸ dismissed the appeal of a summary judgment granted in a motion in matrimonial proceedings for payment of an equalization payment and other relief, despite appellant's argument, *inter alia*, that summary judgment is most often appropriate in document driven cases, with few witnesses and limited contentious factual issues.

(b) Unexplored and unsettled areas of law

(i) *Summary dismissal — unexplored area of law*

Whilst in *Isaac Estate v. Matuszynska*⁶⁹ the majority of the Court of Appeal for Ontario upheld the summary dismissal of an action, based upon a record comprised of several affidavits from a defendant's lawyer, a statement of fact of a defendant's investigator, an affidavit of a witness and the transcript of her cross-examination, the dissenting reasons of Pepall J.A. set out why the development of summary judgment law in Ontario may need to pause to

⁶⁵ *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50 (C.A.) (see also *Hryniak*, para. 31).

⁶⁶ *Hellberg v. Netherclift*, 2017 BCCA 363 (C.A.) (see also *Hryniak*, para. 1).

⁶⁷ *Ibid.* at para. 102.

⁶⁸ *Chao v. Chao*, 2017 ONCA 701 (C.A.) (see also *Hryniak*, para. 49). See also *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63, where the Court found that the appropriateness for bringing a summary judgment must be assessed in the particular circumstances of each case, but that a straight-forward claim for wrongful dismissal is usually amenable to a summary judgment motion.

⁶⁹ *Isaac Estate v. Matuszynska*, 2018 ONCA 177 (C.A.) (see also *Hryniak*, para. 1).

consider interests other than access to justice, as when the issue involves a largely unexplored area of law, in this instance, the doctrine of emergency in tort law.

Pepall J.A., dissenting, stated “. . . A major goal of summary judgment is costs savings. However, the goal is not summary judgment at all costs. There will still be some cases that ought to go to trial. Some caution must be used. This is particularly so in a case such as this that involves a largely unexplored area of the law and which would benefit from the full record that a trial provides.”⁷⁰

(ii) Legal issues — unsettled, complex or intertwined with the facts

The Court of Appeal of Alberta in *Templanza v. Wolfman*⁷¹ dismissed an appeal of a chambers judge’s order dismissing an appeal from a Master’s order which summarily dismissed *Templanza*’s action, concluding that: “A full trial will still be required where a summary record cannot fairly be used to decide legal issues which are unsettled, complex or intertwined with the facts . . .” which it held is consistent with the principle set out in *Hryniak* that summary judgment is appropriate where the motion judge is confident that he or she can fairly resolve the dispute”.⁷²

(c) Complexity

(i) Complicated factual and legal issues — requires trial narrative

The Divisional Court in *Fincantieri Cantieri Navali Italiani v. Anmar Energy Ltd.*⁷³ heard the defendant’s motion seeking leave to appeal the dismissal of its motion for summary judgment. P. Smith J. stated, “Sometimes justice requires that the case unfold by way of the trial narrative with oral testimony and cross-examination in the presence of the trier-of-fact. The case raises complicated factual and legal issues. Credibility will be a significant factor. The monetary value of the respondents’ claim is not yet clear but will likely be substantial. This is not a case where the proportionality doctrine elevates the need for summary disposition . . .”⁷⁴

⁷⁰ *Ibid.* at para. 93. See also: *Longo v. Maclaren Art Centre Inc.*, 2014 ONCA 536, where the Ontario Court of Appeal states that the issues in the case could only be determined with the benefit of a fuller evidentiary record at trial.

⁷¹ *Templanza v. Wolfman*, 2016 ABCA 1 (C.A.), leave to appeal refused 2016 CarswellAlta 1769 (S.C.C.) (see also *Hryniak*, para. 50).

⁷² *Ibid.* at para. 20. See also *Arndt v. Banerji*, 2018 ABCA 176, paragraph 47, that states, there are cases where the legal issues are complex and intertwined with the facts, in which event a trial may still be necessary.

⁷³ *Fincantieri Cantieri Navali Italiani v. Anmar Energy Ltd.*, 2015 ONSC 7387 (S.C.J.) (see also *Hryniak*, para. 33).

⁷⁴ *Ibid.* at para. 54.

(ii) *Nature and complexity of litigation*

In *Young v. Noble*,⁷⁵ White J.A., writing for the Court of Appeal of Newfoundland and Labrador, stated, “From another perspective, the discretion to rehear must be exercised in light of “an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation . . .”⁷⁶

(iii) *Fact intensive, complex claims, complex matter, several parties, many causes of action*

The Court of Appeal for British Columbia in *Morin v. 0865580 B.C. Ltd.*⁷⁷ allowed the appeal from a judgment given after a one-day summary trial in a fact-intensive and complex matter involving several parties and many causes of action and ordered that the case be remitted back to the Supreme Court of British Columbia for a full trial. Newbury J.A. quoted *Lougheed v. Wilson*⁷⁸ in the balance in determining the suitability of summary judgment: “Nevertheless, it is important to recognize that the Court in *Hryniak* affirmed that the trial judge, in undertaking the suitability determination, must always balance proportionality and efficiency with the necessity of ensuring a fair and just process. The *Hryniak* decision recognized that a summary process which does not lend a trial judge confidence in his or her conclusions can never be viewed as proportionate. Moreover, the Court cautioned that the adjudication of complex claims may not be amenable to summary procedures.”⁷⁹

(iv) *Complexity / importance of the case*

Though not a summary judgment case, the Court of Appeal of New Brunswick in *Amec Americas Limited v. HB Construction Company Ltd.*⁸⁰ denied an appeal from an order on a motion to strike out parts of the amended statement of claim for failing to disclose a reasonable cause of action and/or, in the alternative, for a determination of certain questions of law raised in the amended statement of claim. Richard J.A. stated “. . . I come to the conclusion that the stakes, the complexity and the importance of this case are better addressed by denying leave to appeal and allowing the matter to move forward toward resolution at trial.

⁷⁵ *Young v. Noble*, 2017 NLCA 48 (C.A.) (see also *Hryniak*, para. 31).

⁷⁶ *Ibid.* at para. 32.

⁷⁷ *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502 (C.A.), additional reasons 2016 CarswellBC 1306 (C.A.) (see also *Hryniak*, para. 33).

⁷⁸ *Lougheed v. Wilson*, 2014 BCSC 2073 (S.C.).

⁷⁹ *Ibid.* at para. 31.

⁸⁰ *Amec Americas Limited v. HB Construction Company Ltd.*, 2015 CarswellNB 316 (C.A.) (see also *Hryniak*, para. 49).

(v) *Credibility and difficult issues of fact and law*

The Court of Appeal of Alberta in *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*⁸¹ allowed the appeal and set aside the summary judgment granted the plaintiff on a summary judgment application made for unpaid fees for drilling three wells. The majority of the Court said that Rule 7.3 of the *Alberta Rules of Court* must be considered in light of the modern approach⁸² to summary judgment as laid out in *Hryniak* and was confirmed by the Alberta Court of Appeal in *Windsor v. Canadian Pacific Railway Ltd.* While holding that the appellant did not put its “best foot forward” the Alberta Court of Appeal said, “that given the allegations, credibility will be a particularly important assessment and found that there “is sufficient evidence on the record to establish that there are difficult questions of fact or law that cannot fairly be resolved summarily.” *3746292 Manitoba Ltd et al v. Intact Insurance*, at paragraph 30, echoed this sentiment as it stated that litigants are required to put their best foot forward [. . .] the complexity of the case is not an excuse to depart from either of these expected standards.⁸³

(vi) *Legal issues that are unsettled, complex or intertwined with fact*

Similarly, the Court of Appeal of Alberta in *Condominium Corporation No. 0321365 v. Cuthbert*⁸⁴ dismissed two appeals from a case management judge’s refusal to grant two summary dismissal applications. While endorsing the cultural shift identified in *Hryniak*, the application of paragraph 49 of *Hryniak* in various Alberta appellate decisions “Complex legal questions may be sufficient to deny summary judgment. A full trial is required when the summary record cannot be used to decide legal issues that are unsettled, complex or intertwined with facts . . .”⁸⁵

(vii) *Important and complex issue*

The Federal Court of Appeal in *Canada (Prime Minister) v. Alani*⁸⁶ rejected an appeal that the motions judge erred in concluding that it was not plain and obvious that Mr. Alani’s application was bound to fail. Pelletier J.A. stated,

⁸¹ *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378 (C.A.) (see also *Hryniak*, para. 49).

⁸² See also *Ursa Ventures Ltd. v. Edmonton (City)*, 2016 ABCA 135 (C.A.) on the “modern approach to litigation” in an appeal concerning the “drop dead” rule. (see also *Hryniak*, para. 49).

⁸³ *Precision*, *op. cit.* at footnote 299 at para. 26; *3746292 Manitoba Ltd et al v. Intact Insurance*, 2018 MBCA 59.

⁸⁴ *Condominium Corporation No. 0321365 v. Cuthbert*, 2016 ABCA 46 (C.A.) (see also *Hryniak*, para. 49).

⁸⁵ *Ibid.* at para. 29.

⁸⁶ *Canada (Prime Minister) v. Alani*, 2016 FCA 22 (F.C.A.) (see also *Hryniak*, para. 57).

“We further add that, notwithstanding the Supreme Court’s decision in *Hryniak v. Maudlin* . . . it is preferable that the important and complex issues raised by the application, if they are to be decided, be decided on as complete a record as possible.”⁸⁷

(viii) *Not complex, amount not significant, not great deal of conflict in evidence*

The Court of Appeal for Saskatchewan in *Viczko v. Choquette*⁸⁸ heard an appeal of whether the chambers judge, finding that the claim was not particularly complex, that the amount in issue was not significant, and that there was not a great deal of conflict in the evidence, that proceeding by summary judgment would be relatively inexpensive and speedy as compared to a full trial and could resolve most of the issues between the parties, erred in relying solely on affidavit evidence in resolving a dispute pursuant to the summary judgment procedure rules of the *Queen’s Bench Rules*, where issues of good faith and credibility were at play; should this action be disposed of by an application for summary judgment or proceed to trial.⁸⁹

The court also has the discretion to permit a party to present oral evidence pursuant to Rule 7-5(3) if it would allow the court to reach a fair and just adjudication on the merits and is the proportionate course of action (*Hryniak*, para. 63). The Court of Appeal suggested the motion judge should only exercise this power when: (1) oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) any such issue is narrow and discrete — i.e., the issue can be separately decided and is not enmeshed with other issues on the motion.

(ix) *Factual complexity*

In *Berscheid v. Federated Co-operatives et al.*,⁹⁰ Steel J.A., writing for the Court of Appeal of Manitoba, said, “However, proportionality can cut both ways in these types of proceedings. *Hryniak* made clear that, “While summary

⁸⁷ *Ibid.* at para. 2.

⁸⁸ *Viczko v. Choquette*, 2016 SKCA 52 (C.A.) See also: *Tsatsi v. College of Physicians and Surgeons of Saskatchewan*, 2018 SKCA 53, where the Queen’s Bench Rule 7-5(1) works in conjunction with *Hryniak v. Maudlin*. (see also *Hryniak*, para. 66).

⁸⁹ See also the decision of the Court of Appeal for Ontario in *Northbridge General Insurance Corporation v. Langston Hall Development Corporation*, 2014 ONCA 551 (C.A.) where the Court dismissed an appeal, agreeing for the reasons given by the motion judge, that there is no genuine issue requiring a trial in respect of Northbridge’s entitlement to payment confirming the discretion of the motion judge. (see also *Hryniak*, para. 68).

⁹⁰ *Berscheid v. Federated Co-operatives et al.*, 2018 MBCA 27 (C.A.).

judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately” (at para. 32). This is exactly what happened in this case.”⁹¹ “Although complexity in and of itself will not necessarily preclude the possibility of summary judgment, cases which are factually complex, with conflicting evidence from a number of witnesses and a voluminous record, are not generally well-suited to determination on a summary basis.”⁹²

(d) Amount at stake

(i) *Amount in dispute relative to size of related transaction*

The amount in dispute relative to the size of the related transaction factored in proportionality considerations of the failure to provide notice of a claim for summary judgment in the decision of the Court of Appeal for Ontario in *King Lofts Toronto I Ltd. v. Emmons*.⁹³

(ii) *Expense and delay*

In Saskatchewan the balancing act of the access to justice concern was recognized by the Court of Appeal in a child support case, *Hnidy v. Hnidy*⁹⁴ where Wilkinson J., writing for the Court, stated, “Further, summary determinations of this nature heed the Supreme Court of Canada’s call in *Hryniak v Mauldin* . . . for a cultural shift in judicial approach, with a view to avoiding the expense and delay inherent in processes that are disproportionate to the nature of the case and the issues.”⁹⁵

⁹¹ *Ibid.* at para. 33.

⁹² *Ibid.* at para. 34. However, *Korn/Ferry Canada Inc. v. Rosin*, 2016 ONSC 4535 (Div Ct.), stated that while legally and factually complex issues may be determined on summary judgment, it does not require a court to do so, which highlights a certain level of flexibility afforded to judges in this regard.

⁹³ *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215 (C.A.) (see also *Hryniak*, para. 2); see also the decision of the Divisional Court in *Gnys v. Narbutt*, 2016 ONSC 2594 (Div. Ct.) (see also *Hryniak*, para. 49) which allowed an appeal and set aside a summary judgment that dismissed the action. In discussing the test for summary judgment Thorburn J. (Mew J. concurring), writing for the majority of the Court, said “. . . Although the Appellant did not bring a cross-motion for summary judgment, given our findings as well as the fact of repayment of the principal by the Appellant, there is nothing left of the Respondent’s action. It should therefore be dismissed.”

⁹⁴ *Hnidy v. Hnidy*, 2017 SKCA 44 (C.A.) (see also *Hryniak*, para. 2).

⁹⁵ *Ibid.* at para. 123.

(e) Documents case

(i) *Full appreciation test*

The Court of Appeal for Ontario in *Turfpro Investments Inc. v. Heinrichs*⁹⁶ allowed an appeal from a summary judgment heard after the Court of Appeal decision in *Combined Air Mechanical Services Inc. v. Flesch*, but before the Supreme Court's decision in *Hryniak*. Accordingly, the motion judge applied the full appreciation test from *Combined Air*, observed that this was a documents case and there was no real conflict in the evidence. However, the Court of Appeal held that the motion judge failed to consider the factual matrix underlying the arrangements; and failed to consider the totality of the evidence that supported the appellants' position.

See also *22 King Street Inc. et al. v. The Bank of Nova Scotia*⁹⁷ in which the Court of Appeal of New Brunswick said that the motion judge "found nothing in the "factual matrix" that necessitated a trial. Based on the evidence before him, the judge found there was no genuine issue requiring a trial."⁹⁸

(ii) *Thinness of documentary issues — significant credibility disputes on material issues*

The thinness of a documentary record usually prompts a more cautious approach to fact-finding by civil appellate courts. In *Cook v. Joyce*⁹⁹ the plaintiff and defendant each appealed to the Court of Appeal for Ontario, respectively, the partial summary judgment on the motion for summary judgment brought by the defendant. The Court considered the significant credibility issues on material issues required a trial.

Despite *Hryniak*'s mandated culture shift, the Court of Appeal was not prepared to substitute its decision on matters of credibility. Brown J.A. stated, "But, appeal courts are not trial courts — our relationship to the evidentiary record differs markedly from that of courts of first instance . . . By contrast, the existence of credibility issues or the thinness of the documentary record usually prompts a more cautious approach to fact-finding by civil appellate courts . . ."¹⁰⁰

⁹⁶ *Turfpro Investments Inc. v. Heinrichs*, 2014 ONCA 502 (C.A.) (see also *Hryniak*, para. 43).

⁹⁷ *22 King Street Inc. et al. v. The Bank of Nova Scotia*, 2018 NBCA 16 (C.A.).

⁹⁸ *Ibid.* at para. 14.

⁹⁹ *Cook v. Joyce*, 2017 ONCA 49 (C.A.) (see also *Hryniak*, para. 57).

¹⁰⁰ *Ibid.* at para. 79 to 81.

(f) Duty of care and standard of care cases

(i) *Standard of care case*

The Court of Appeal of Alberta in *Stefanyk v. Sobeys Capital Incorporated*¹⁰¹ allowed an appeal by the defendant, Sobeys, from the dismissal of its application for summary dismissal by the judge in chambers on the basis that summary dismissal was not appropriate, because there was a triable issue as to a) whether Sobeys was or was not an “occupier”, and b) whether Sobeys owed a common law duty of care. The chambers judge did not deal with the third argument, namely, that even if a duty of care was owed, Sobeys had not been negligent. Sobeys appealed that decision. The Court of Appeal said that “No expert evidence has been introduced on the standard of care called for in the circumstances. That, however, does not preclude summary disposition of the claim. The summary dismissal judge can make findings of fact from the evidence on the record . . . The parties are expected to put their “best foot forward” on summary judgment applications, and in the absence of expert evidence the court is entitled to determine if there is a breach of the standard of care with respect to matters within common experience.”¹⁰²

¹⁰¹ *Stefanyk v. Sobeys Capital Incorporated*, 2018 ABCA 125 (C.A.).

¹⁰² See also regarding establishing duty of care on motion for summary judgment, the decision of the Supreme Court of Newfoundland and Labrador Court of Appeal in *Rubens v. Sansome*, 2017 NLCA 32 (C.A.) where it allowed in part the appeal by the defendant in a summary trial, upholding the finding of a duty of care and a breach of that duty of care, but vacating the finding of negligence and remitted the matter to the Trial Division for continuation of the trial (either a full trial or a summary trial with respect of causation and assessment of damages if causation is established), without reconsideration of the existing findings of the existence and breach of duty of care. Hoegg J.A., writing in majority reasons, after referring to paragraph 9 of *Hryniak*, held that the Judge decided that the tendered evidence and the law enabled him to decide the matter in summary proceedings. See also *Kassburg v. Sun Life Assurance Co. Of Canada*, 2014 ONCA 922. See also *Barbieri v. Mastronardi*, 2014 ONCA 416, where the Ontario Court of Appeal allowed the appeal. (see also *Hryniak*, para. 49); see also regarding establishing duty of care the decision of the Court of Appeal for Ontario in *Meehan v. Good*, 2017 ONCA 103 (C.A.) which allowed the appeal from the dismissal of the claims of the appellant against their former lawyer on motion for summary judgment. In her reasons the motion judge said “[w]hile the evidence supports the likelihood that Cardill informed the plaintiffs of the limitation period, I do not need to find that he did so in reaching my conclusion that he did not owe them a duty of care to advise them further regarding their possible claims in negligence.” For the purposes of appellate review, the Court of Appeal stated, “If the motion judge in the present case was confident that the record would enable her to decide whether Mr. Cardill had told the appellants about the limitation period, such a determination would have proved most valuable on appellate review.” (see also *Hryniak*, para. 50).

(ii) *Need to articulate conclusions on foreseeable harm and causation analysis*

The Court of Appeal for Ontario in *Turcotte v. Lewis*¹⁰³ allowed an appeal of the plaintiffs whose action had been dismissed on each of two motions for summary judgment brought by two groups of defendants, and directed that the matter proceed to trial. The appellants' principal submissions were, firstly, that the summary judgment motions were premature, since *inter alia*, expert's reports on standard of care have not been filed, and were inappropriate because a paper record was unsuitable for the resolution of credibility issues; and secondly, that the motion judge's duty of care analysis was flawed. On the latter grounds, Strathy C.J.O., writing for the Court held that the motion judge did not refine the standard of care beyond the general statement that the standard of care was that of an ordinary, reasonable and prudent bus driver and security guard, in the circumstances of the case, stating further, "Nor did she define what the standard required in the circumstances as they unfolded . . . Nor did she articulate her conclusions on the likelihood of foreseeable harm, the gravity of the harm or the reasonableness of measures that could be taken to prevent it. These factors inform the standard of reasonableness."¹⁰⁴ Strathy C.J.O. further stated his conclusions aforesaid, ". . . truncated the standard of care analysis"¹⁰⁵ and that "The motion judge's conclusions with respect to the standard of care meant that she did not proceed with a causation analysis."¹⁰⁶

(g) Limitations defence

(i) *Limitations defence (one issue, one defendant)*

The Court of Appeal of Manitoba in *Abas Auto Inc. v. Superior General Partner Inc.*¹⁰⁷ dismissed the defendant's appeals from an endorsement order with respect to the expungement of portions of an affidavit filed by Abas Auto Inc., in support of a motion seeking to strike the plaintiff's claim for failing to disclose a reasonable cause of action, and directed the parties to forego the hearing of the substantive motion and to proceed either by summary judgment or by trial of an issue to a determination of the limitation defence, failing which the parties should proceed to trial on any outstanding issue. The Court of Appeal stated, "Given the inevitability of the dismissal of the plaintiff's motion, in the interests of justice, and in an effort to advance the proceedings and

¹⁰³ *Turcotte v. Lewis*, 2018 ONCA 359 (C.A.).

¹⁰⁴ *Ibid.* at para. 47.

¹⁰⁵ *Ibid.* at para. 49.

¹⁰⁶ *Ibid.* at para. 63.

¹⁰⁷ *Abas Auto Inc. v. Superior General Partner Inc.*, 2015 MBCA 104 (C.A.) (see also *Hryniak*, para. 32).

preserve judicial resources, we direct that the motion not proceed and that the defendant, if it wishes to have this matter determined before trial, do so on a summary judgment motion or trial of an issue . . .”¹⁰⁸

(ii) *No facts in dispute — limitations defence*

In *Bonaccorso v. Optimum Insurance Company Inc.*,¹⁰⁹ the Court of Appeal for Ontario held that “There were no facts in dispute. The motion judge had sufficient material before him to make a decision on the merits of the claim, and in particular on the defence that the claim was statute-barred.” The Court of Appeal for Ontario in *Miaskowski v. Persaud*¹¹⁰ dismissed an appeal of a summary judgment, the partial summary judgment of claims against one defendant was time-barred. Cronk J.A. concluded that there was no genuine issue requiring a trial concerning the question whether the action as against one defendant was statute-barred.

2. Weeding Out Unmeritorious Claims

Hryniak is said not to be just about weeding out claims with no chance of success. It’s about identifying the type of case that summary judgment is designed to address, so as to avoid putting the parties to the time and expense of a “full-blown trial”¹¹¹

Before *Hryniak*, summary proceedings were used to weed out clearly unmeritorious claims or defences. Following 1985 reforms in Ontario, appellate jurisprudence still limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: “claims that have no chance of success [are] weeded out at an early stage”.¹¹² Further amendments to *Rule 20* in Ontario in 2010 “embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.”¹¹³

¹⁰⁸ *Ibid.* at para. 12. See also: *Crombie Property Holdings Ltd. v. McColl-Frantenac Inc.*, 2017 ONCA 16.

¹⁰⁹ *Bonaccorso v. Optimum Insurance Company Inc.*, 2016 ONCA 34 (C.A.); see also *Tapak v. Non-Marine Underwriters, Lloyd’s of London*, 2018 ONCA 168 (C.A.). In *P. (W.) v. Alberta*, 2014 ABCA 404, 2014 Carswell Alta 2152, the Alberta Court of Appeal, at paragraph 19, stated that the case law demonstrates that it is not the case that limitations issues are overwhelmingly decided by a full trial.

¹¹⁰ *Miaskowski v. Persaud*, 2015 ONCA 758 (C.A.) (see also *Hryniak*, para. 60).

¹¹¹ The Court of Appeal for Ontario in *Kueber v. Royal Victoria Regional Health Centre*, 2018 ONCA 125 (C.A.) dismissed (with stated amendment to the judgment) a summary dismissal, with the court stating “In our view, this is precisely the type of case that summary judgment is designed to address so as to avoid putting the parties to the time and expense of a full blown trial” (see also *Hryniak*, para. 67).

¹¹² *Hryniak v. Mauldin*, *op. cit.* fn 5, at para. 38.

¹¹³ *Ibid.* at para. 36.

The following post-*Hryniak* decisions from appellate courts other than Ontario illustrate the approach to meritless claims or defences, when the motion judge is not operating under Ontario Rule 20 or a similar rule.

(a) Most of the essential facts not in dispute

Summary proceedings have been identified as the key remedy to access to justice concerns. *Spring Hill Farms Limited Partnership v. Nose*,¹¹⁴ a decision of Court of Appeal for British Columbia, upheld a summary trial judgment despite conflicts within the evidence, where most of the essential facts were not in dispute and the summary trial judge ordered cross-examination before her.

(i) Weed out meritless claims and then decide if can proceed as application

Nova Scotia weeds out meritless actions, and then decides if they can proceed as applications. Saunders, J.A., commenting on *Hryniak*, in reasons delivered in the Court of Appeal in *Blunden Construction Ltd. v. Fougere*¹¹⁵ stated, “In our respectful view, the recent decision of the Supreme Court of Canada in *Hryniak v. Mauldin* . . . has little bearing upon the circumstances, analysis, reasoning or result in this case . . . Those powers are foreign to the well-established procedures and settled law which operates in Nova Scotia.”¹¹⁶ Commenting on Nova Scotia procedural alternatives, Saunders, J.A. stated, “In our view the wise and creative application of CPR 13.07 in conjunction with CPRs 5 and 6 will offer judges the necessary flexibility to decide which cases need to be weeded out because the claim or the defence is doomed to fail, and then go on to decide whether those cases which deserve to be heard on their merits ought to be adjudicated in the abbreviated, less rigorous process of an application, or should instead be reserved for the more traditional trial by action format.”¹¹⁷

(ii) Clearly unmeritorious cases

The Federal Court of Appeal in *Forner v. Professional Institute of the Public Service of Canada*¹¹⁸ granted the respondent’s motion to strike out the judicial review application on the ground that it is premature. In doing so Stratas J.A., writing for the Court, referred to *Hryniak*, stating, “This underscores the important role that motions to strike can play in removing clearly unmeritorious cases from the court system. This case is a good example.”¹¹⁹

¹¹⁴ *Spring Hill Farms Limited Partnership v. Nose*, 2014 BCCA 66 (C.A.) (see also *Hryniak*, para. 1). See also *Kadiri v. Southlake Regional Health Centre*, 2015 ONCA 847, where access to justice stemming from *Hryniak* was discussed at paragraph 62 of the decision.

¹¹⁵ *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52 (C.A.) (see also *Hryniak*, para. 28).

¹¹⁶ *Ibid.* at para. 6.

¹¹⁷ *Ibid.* at para. 19.

¹¹⁸ *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35 (F.C.A.) (see also *Hryniak*, para. 28).

Recognizing that Alberta is a place where demand for legal and judicial resources far exceeds the supply¹²⁰ and the cost of litigation is high, Wakeling J.A., in concurring reasons, in the Court of Appeal in *Stout v. Track*¹²¹ said that summary judgment is an important protocol in a modern civil procedure system, and quoted from *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* (2013), 91 Alta. L.R. (5th) 1 (Q.B.) at page 16 that “A litigant whose claim or defence is so weak that its chance of succeeding is very low cannot reasonably expect the state to make available all parts of a publicly funded judicial process.”¹²²

The Federal Court of Appeal in *Lee v. Canada (Correctional Service)*¹²³ dismissed the appeal of an inmate in a federal penitentiary, who alleged that the Federal Court overlooked his amended judicial review application. The respondents filed evidence that the Federal Court never had an amended notice of application before it. Stratas J.A. stated, “the case law of this Court shows that summary dismissals of appeals in circumstances similar to these have been allowed at this early stage”¹²⁴

The Court of Appeal of Alberta in *WP v. Alberta*,¹²⁵ commenting on *Hryniak*, said “Trying unmeritorious claims is *per se* unreasonable, because it imposes an unnecessary and often onerous burden upon parties and our system of civil justice . . .”¹²⁶

(iii) *No defence to claim*

The Court of Appeal of Alberta in *Access Mortgage Corporation (2004) Limited v. Arres Capital Inc.*,¹²⁷ held that the summary judgment order made in a debt action was an appropriate disposition. The Court stated that Rule

¹¹⁹ *Ibid.* at para. 10.

¹²⁰ See also the Court of Appeal of Alberta in *NEP Canada ULC v. MEC Op LLC*, 2016 ABCA 201 (C.A.), described that the order under appeal sprung from the delays currently being experienced in obtaining trial time due to a shortage of judges in that court and that those delays lead to the judge who was case managing both actions making the order under appeal which directs an issue be tried in advance of other issues in one action and orders that issue be set for trial. The majority reasons stated “. . . The cost and time demands of each route to resolution of a dispute must be taken into consideration in choosing that route.” (see also *Hryniak*, para. 28).

¹²¹ *Stout v. Track*, 2015 ABCA 10 (C.A.); see also the decision of the Court of Appeal of Alberta in *Talisman Energy Inc. v. Questerre Energy Corporation*, 2017 ABCA 218 (C.A.) allowing an appeal of the plaintiff from the decision dismissing its claim for summary judgment without prejudice to a further application for summary judgment. (see also *Hryniak*, para. 2).

¹²² *Ibid.* at para. 50.

¹²³ *Lee v. Canada (Correctional Service)*, 2017 FCA 228 (F.C.A.) (see also *Hryniak*, para. 24).

¹²⁴ *Ibid.* at para. 5.

¹²⁵ *WP v. Alberta*, 2014 ABCA 404 (C.A.), leave to appeal refused *R. v. P. (W.)*, 2015 CarswellAlta 757 (S.C.C.) (see also *Hryniak*, para. 28).

¹²⁶ *Ibid.* at para. 18.

7.3(1)(a) of the *Alberta Rules of Court* states that summary judgment may be granted if “there is no defence to a claim”. The appellant was found to have no defence to the respondent’s claim.

(iv) *No merit on existing record*

The Court of Appeal of Alberta in *Amack v. Wishewan*¹²⁸ heard three appeals involving many overlapping and legal issues. The test on a motion for summary judgment was described by the Court. “Rule 7.3(1) (b) allows a court to grant summary judgment to a defendant where there is “no merit” to a claim.

(v) *No contentious facts — failed to establish essential elements*

The Federal Court of Appeal in *Burns Bog Conservation Society v. Canada*¹²⁹ rejected an appeal from the judgment granting the respondent’s motion for summary judgment pursuant to section 215 of the Federal Courts Rules, and dismissing the action against the respondent. The Judge concluded that the matter is appropriate for summary judgment as there are no contested facts which need to be resolved in order to determine whether the appellant’s claim has any chance of success. Gauthier J.A. stated, “I agree with the Judge that this is a clear case where the appellant’s claim must be weeded out because it is bound to fail. I agree with the Judge substantially for the reasons he gave that the appellant has failed to establish the essential elements of a trust or fiduciary relationship.”¹³⁰ The Court of Appeal noted that “Swift judicial resolution of a legal dispute allows individuals to get on with their lives.”

3. Partial Summary Judgment

*Hryniak*¹³¹ addresses partial summary judgment by considering the consequences of the motion in the context of the litigation as a whole, and illustrates that analysis through two examples: firstly, a motion to grant summary judgment against a single defendant, where claims against the other parties will proceed to trial, and where it may not be in the interest of justice to use the new fact-finding powers because such partial summary judgment may run the risk of duplicative proceedings and inconsistent finding of fact; and secondly, by way of contrast, the resolution of an important claim against a key party that could significantly advance access to justice, and be the most proportionate, timely and cost effective.

¹²⁷ *Access Mortgage Corporation (2004) Limited v. Arres Capital Inc.*, 2014 ABCA 280 (C.A.) (see also *Hryniak*, para. 34).

¹²⁸ *Amack v. Wishewan*, 2015 ABCA 147 (C.A.) (see also *Hryniak*, para. 34).

¹²⁹ *Burns Bog Conservation Society v. Canada*, 2014 FCA 170 (F.C.A.) (see also *Hryniak*, para. 34).

¹³⁰ *Ibid.* at para. 43.

¹³¹ *Hryniak v. Mauldin*, *op. cit.* fn 5 at para. 60.

Below is a review of appellate decisions arising from partial summary proceedings, which address the factors considered in a variety of partial determinations, including those concerning one issue, including bifurcations, or against one defendant, followed by a more detailed consideration of a decision of the Court of Appeal for Ontario, which discourages the use of partial summary judgment.

(a) One issue

(i) *Discrete and severable issues of liability or inextricably bound up*

The Court of Appeal for Ontario in *Kolosov v. Lowe's Companies Inc.*¹³² dismissed an appeal from a summary judgment dismissing an action. The Court of Appeal stated that the motion judge “. . . further concluded that the issues relating to the liability of the Belleville respondents were discrete and severable from the issues involving the liability of the other respondents.”¹³³ The Court of Appeal gave deference to, and found there was no error in, the motion judge's conclusions and stated that “He was alive to the appellants' argument to the effect that the liability of the Belleville respondents was “inextricably bound up” with that of the other respondents — and he rejected that argument . . . He concluded, accordingly, that it was unnecessary to determine the liability of the others before deciding that of the Belleville respondents.”¹³⁴

(ii) *No significant contentious facts — decide one issue*

The Court of Appeal for Ontario in *Myers-Gordon v. Martin*¹³⁵ dismissed an appeal from a summary judgment dismissing this action as against a respondent. The Court of Appeal stated the motion judge “. . . noted that the case did not involve “significant contentious facts”, and that the moving party relied on the evidence of three parties, all of whom had been examined for discovery. He noted that none of the responding parties, of which only State Farm appeals to this court, had added any evidence. In the circumstances, he was satisfied that he could decide the issue of implied consent on the motion for summary judgment.”¹³⁶

(iii) *Discrete but central issue — rescission — partial summary judgment — important claim against a key party*

The Court of Appeal for Ontario in *Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc.*¹³⁷ upheld the motion judge's discretionary decision to

¹³² *Kolosov v. Lowe's Companies Inc.*, 2016 ONCA 973 (C.A.) (see also *Hryniak*, para. 34).

¹³³ *Ibid.* at para. 13.

¹³⁴ *Ibid.* at para. 14.

¹³⁵ *Myers-Gordon v. Martin*, 2014 ONCA 767 (C.A.) (see also *Hryniak*, para. 50).

¹³⁶ *Ibid.* at para. 16.

determine the discrete issue of rescission¹³⁸ by way of summary judgment. Epstein J.A. stated, “I also agree with the motion judge that using the summary judgment mechanism to deal with the discrete matter of the franchisees’ right to rescission was an expeditious and effective approach to resolving an important issue . . . As the Supreme Court noted in *Hryniak*, at para. 60, “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.”¹³⁹

(iv) *Discreet but central issue — consent to drive car — schedule brief appearance of witnesses if need oral evidence — partial summary judgment*

The Divisional Court in *Forestall v. Carroll*¹⁴⁰ granted leave to appeal the dismissal of a motion for summary judgment, finding that the issue on the

¹³⁷ *Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc.*, 2015 ONCA 258 (C.A.) (see also *Hryniak*, para. 60).

¹³⁸ See also the earlier Ontario Court of Appeal decision in *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2015 ONCA 236 (C.A.) dismissing an appeal where the motion judge granted partial summary judgment declaring that the disclosure document did not comply with the statutory requirements and that the franchise agreement documents were validly rescinded, and the appellants were liable for damages in an amount to be determined by a Master, in accordance with the parties’ agreement. Epstein J.A., writing for the Court stated at para. 10, “While there was a conflict in the evidence as to the nature and contents of the Disclosure Document, that conflict was immaterial because the motion judge found that the respondents were entitled to rescission based on the appellants’ own evidence concerning the nature and extent of the disclosure they provided the respondents . . .” at para. 33. “Neither the respondents’ damages claim nor the appellants’ subsequent counterclaim detract from my conclusion that dealing with the issue of whether the respondents were entitled to rescission by way of partial summary judgment was appropriate.” And at para. 35, “Moreover, dealing with the discrete matter of the respondents’ right to rescission by way of summary judgment allowed the motion judge to expeditiously resolve an important issue, thereby benefiting the parties by narrowing their dispute and potentially paving the way to settlement on the remaining issues. This approach resonates with the spirit of *Hryniak*: see especially para. 60.” (see also *Hryniak*, para. 60). See also *2212886 Ontario Inc. v. Obsidian Group Inc.*, 2018 ONCA 670, for a contrasting outcome where the appeal from a partial summary judgment involving rescission was allowed in part.

¹³⁹ *Ibid.* at para. 46; see also the decision of the Court of Appeal for Ontario in *R D Partners v. Mediamix Interactive Inc.*, 2015 ONCA 284 (C.A.), rejecting the appeal of a partial summary judgment which was granted by the motion judge, where the action was commenced as a simplified proceeding on grounds that it was not: “. . . an efficient and proportionate way to deal with the issues in dispute between the parties. The Court of Appeal noted, at para. 3, that “. . . there is nothing to prevent a partial summary judgment motion in a simplified proceeding in a proper case. Indeed, in *Combined Air Mechanical Services Inc. v. Flesch* . . . this court expressly recognized that summary judgment motions may be appropriate in some Rule 76 actions. The Supreme Court’s decision in *Hryniak v. Mauldin* . . . does not deviate from that proposition.” (see also *Hryniak*, para. 60).

motion for summary judgment was a discrete but central issue in these proceedings. Corbett J. stated, “The issue before the motions judge was focused. Its resolution will surely speed resolution of this entire, longstanding, legal proceeding . . . If the motions judge concluded that he needed to hear oral evidence from . . . in order to arrive at a fair and just decision, it should have been easy to schedule a brief appearance, perhaps for half a day, to hear that evidence. This testimony aside, I see no reason why the case, as presented to the motions judge, will be any different to a trial judge on this central issue. It seems to me an ideal case for the application of *Hryniak*¹⁴¹ to arrive at a final disposition of the issue of . . . permission to drive the car.”¹⁴²

(v) *Coverage issues — partial summary judgment — important and difficult issue*

The Court of Appeal of Manitoba in *Lodge et al v. Red River Valley Mutual Insurance Company et al*¹⁴³ allowed an appeal of the order dismissing a motion for summary judgment on the basis that the insurance policy did not provide coverage, and held that the motion judge erred when he dismissed the motion on the basis that a trial judge hearing the claim against a co-defendant also would have to decide the coverage issue but would be stuck with his decision. Burnett J.A., writing for the Court, stated, “. . . As noted in *Hryniak*, there are undoubtedly circumstances where it would not be in the interests of justice to decide a summary judgment motion, but this is not one of them. If it could be done, resolution of the coverage issue would either resolve the entire claim (if there is coverage for the losses) or would result in a much shorter and focused trial of the Wallis claim (if there is no coverage) . . . To the contrary, judges are encouraged to deal with important and sometimes difficult issues at an early stage in the proceedings.”¹⁴⁴

¹⁴⁰ *Forestall v. Carroll*, 2015 ONSC 5883 (Div. Ct.) (see also *Hryniak*, para. 60).

¹⁴¹ The importance of the issue was highlighted by Corbett J., stating at para. 19 of *Forestall v. Carroll*, “It is a rare case where leave to appeal will be granted from a dismissal of a motion for summary judgment, since the moving party lives to fight the issues on the merits again, on another day. For me, this is that rare case. I see good reason to doubt the motions judge’s evidentiary rulings, and I conclude that it is a matter of general importance to the administration of justice to consider whether the approach taken by the learned motions court judge is consistent with the principles set out in *Hryniak v. Mauldin*”.

¹⁴² *Ibid.* at para. 18.

¹⁴³ *Lodge et al v. Red River Valley Mutual Insurance Company et al*, 2017 MBCA 76 (C.A.) (see also *Hryniak*, para. 60).

¹⁴⁴ *Ibid.* at para. 61; see also regarding early determination, the decision of the Court of Appeal of Manitoba in *Loepky et al v. Taylor McCaffrey LLP* which heard an appeal of a discretionary order which directed that the defendants’ motions for summary judgment would be heard before examinations for discovery are conducted. Burnett J.A., writing for the Court, provided the following guidance to counsel on the appeal

(vi) *Narrow and discreet — small number of witnesses, gathered in manageable time — significant impact*

The Court of Appeal for Ontario in *Miller Group Inc. v. James*¹⁴⁵ allowed the appeal from the order dismissing the Miller Group’s cross-claim, and dismissing the Miller Group’s motion for summary judgment to dismiss the Jameses’ claim, and to remit the matter to the Superior Court for determination of the issue of whether the Miller Group has a contractual right of indemnity against the Sernoskies and left the details of how best to schedule this motion in relation to the trial entirely in the discretion of the Superior Court of Justice. Addressing oral evidence on a motion for summary judgment, Sharpe J.A. stated, “. . . The issue of whether the Miller Group can establish an implied oral agreement with the Sernoskies for indemnification is one that can and should be determined, if necessary, pursuant to the procedure contemplated by rule 20.04 (2.2). This is a narrow and discrete issue involving oral evidence from a small number of witnesses that can be gathered in a manageable period of time and in which evidence is likely to have a significant impact on whether summary judgment is warranted . . .”¹⁴⁶

(vii) *Narrow, and not resolving the entire dispute*

The Court of Appeal of Nunavut in *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*¹⁴⁷ set aside a partial summary judgment relating to a breach of an agreement regarding the implementation of an informational monitoring plan since it was brought on one very narrow aspect of the dispute and had no prospect of resolving the entire dispute between these parties.

(b) One party

(i) *One defendant*

In British Columbia the Court of Appeal in *Kemp v. Vancouver Coastal Health Authority Ltd.*¹⁴⁸ deterred “litigating in slices”. The trial judge had decided that the case against all but one defendant physician was suitable for

such orders “counsel should carefully consider the wisdom of appealing interlocutory procedural orders that are primarily concerned with management of the civil litigation process. Rarely will such appeals be successful.”

¹⁴⁵ *Miller Group Inc. v. James*, 2014 ONCA 335 (C.A.) 450 (see also *Hryniak*, para. 65).

¹⁴⁶ *Ibid.* at para. 11.

¹⁴⁷ *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2 (C.A.) (see also *Hryniak*, para. 28).

¹⁴⁸ *Kemp v. Vancouver Coastal Health Authority Ltd.*, 2017 BCCA 229 (C.A.), leave to appeal refused *Brenlee Kemp on her own behalf and as Executrix of the Estate of Shannon Jean Kemp, deceased, et al. v. Vancouver Coastal Health Authority Ltd., dba Vancouver General Hospital, et al.*, 2018 CarswellBC 641 (S.C.C.) (see also *Hryniak*, para. 4).

summary trial, and ordered the summary dismissal. In *CCS Corporation v. Pembina Pipeline Corporation*¹⁴⁹ the Court of Appeal heard an appeal concerning, *inter alia*, whether most of the appellant's lawsuit against one of the defendants should be summarily dismissed. The majority reasons stated that "Locking in someone peripherally involved in other people's suits is very disproportionate, and awarding party-party costs years later would be a poor remedy."¹⁵⁰

(ii) *Important claim of key party — partial summary judgment*

The Court of Appeal for Ontario in *Winter v. Royal Trust Company*¹⁵¹ dismissed an appeal of summary judgment holding that Royal Trust could not be liable for breach of fiduciary duty or negligence and was a partial summary judgment that resolved an important claim of a key party.¹⁵²

(c) Bifurcation

(i) *Bifurcated liability and reference as to damages on summary judgment motion*

In *Mars Canada Inc. v. Bemco Cash & Carry Inc.*,¹⁵³ Strathy C.J.O., writing for the Court of Appeal for Ontario, distinguishes *Bondy Bondy-Rafael v. Potrebic*, on the dismissal of an appeal from the order of the motion judge, on a motion for summary judgment, ordering a reference to determine damages, held that on a motion for summary judgment the court's jurisdiction is governed by r. 20.04(3) — *Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount*, and rejected the appellants submission that the court's jurisdiction is restricted by r. 6.1.01: — *With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages, applies to motions for summary judgment*, stating that the argument ". . . is

¹⁴⁹ *CCS Corporation v. Pembina Pipeline Corporation*, 2014 ABCA 390 (C.A.) (see also *Hryniak*, para. 5).

¹⁵⁰ *Ibid.* at para. 76.

¹⁵¹ *Winter v. Royal Trust Company*, 2014 ONCA 473 (C.A.) (see also *Hryniak*, para. 60).

¹⁵² See also the decision of the Divisional Court in *Mortgage and Housing Corporation v. Pastoukhova*, 2014 ONSC 5731 (S.C.J.) at para. 6, Then J. stated "... this was an entirely appropriate case for summary judgment. As the Supreme Court of Canada said in *Hryniak v. Mauldin* ... at para. 60, even "if some of the claims against some of the parties will proceed to trial", in appropriate circumstances "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." That is the case with the claims at issue here." See also: *Raymond v. Brauer*, 2015 NSCA 106. (see also *Hryniak*, para. 60).

¹⁵³ *Mars Canada Inc. v. Bemco Cash Carry Inc.*, 2018 ONCA 239 (C.A.).

inconsistent with r. 20.04(3) and the underlying philosophy of the summary judgment process, described in *Hryniak v. Mauldin* . . . Its application would gut the efficacy of summary judgment . . .”¹⁵⁴ Strathy C.J.O. further states “It is conceivable that a judge hearing a summary judgment motion could decline to determine liability and order a reference as to damages because of a risk of inconsistent findings on liability and damages. This is not such a case.”¹⁵⁵

See also *Ramsahai-Whing v. Weenen*¹⁵⁶ where bifurcation of determination of cause of action and appropriate remedy has been upheld.

(ii) *Bifurcation of appeals*

The culture shift extends to appellate practice, as demonstrated by the decision of the Court of Appeal for Ontario in *Bonello v. Gores Landing Marina (1986) Limited*¹⁵⁷ which declined to bifurcate appeals. Lauwers J.A., writing for the court, stated that such an approach would risk unduly complicating the appeal process from a summary judgment and that “The culture shift” called for by the Supreme Court requires courts to promote more efficient and less expensive access to justice, and seeks to avoid placing expensive roadblocks in the way of litigants.”¹⁵⁸

(d) Duplicative and inconsistent finding

(i) *Risk of duplicative proceeding and inconsistent finding*

The Court of Appeal for Ontario in *Canaccord Genuity Corp. v. Pilot*¹⁵⁹ allowed an appeal and set aside summary judgment in favour of Canaccord against two defendants for the outstanding balance of one defendant’s loan. Colosimo had pleaded equitable set-off and a counterclaim. Weiler J.A. stated, “If a trial is necessary for some of the claims against some parties in any event, it may not be in the interest of justice to use these fact-finding powers to grant summary judgment against a single defendant because of the risk of duplicative proceedings or inconsistent findings of fact . . . On the other hand, the most proportionate, timely and cost-effective approach may be to grant summary judgment against a key party: paras. 60, 66 and 68.”¹⁶⁰ The fact that there was no motion for summary judgment on the counterclaim was held not to relieve the motion judge from her obligation to assess whether, as a defence, equitable

¹⁵⁴ *Ibid.* at para. 36.

¹⁵⁵ *Ibid.* at para. 38.

¹⁵⁶ *Ramsahai-Whing v. Weenen*, 2017 ONSC 1091 (Div. Ct.), where the issue was the timing of the award of cost. (see also *Hryniak*, para. 49).

¹⁵⁷ *Bonello v. Gores Landing Marina (1986) Limited*, 2017 ONCA 632 (C.A.) (see also *Hryniak*, para. 2).

¹⁵⁸ *Ibid.* at paras. 15 and 15.

¹⁵⁹ *Canaccord Genuity Corp. v. Pilot*, 2015 ONCA 716 (C.A.) (see also *Hryniak*, para. 66).

¹⁶⁰ *Ibid.* at para. 31.

set-off raised a genuine issue requiring a trial, since the motion judge commented that “*viva voce* evidence and assessments of credibility were required to sufficiently deal with the merits of the counterclaim; the same is true to sufficiently assess equitable set-off as a defence. Canaccord’s claim for repayment of the loan is intertwined with Colosimo’s defence of equitable set-off . . .”¹⁶¹

(ii) *Motion for partial summary judgment — rare procedure*

The Court of Appeal for Ontario in *Butera v. Chown, Cairns LLP*¹⁶² allowed an appeal of a partial summary judgment dismissing that portion of the

¹⁶¹ *Ibid.* at para. 58; see also the Divisional Court decision in *Lorence v. 115836 Ontario Limited*, 2016 ONSC 2880 (S.C.J.) where it heard a motion by the defendants for leave to appeal an order dismissing the plaintiffs’ motion for partial summary judgment on the issue of liability, but did not summarily dismiss the plaintiffs’ action. Henderson J. stated at para. 14, “Regarding the first ground, the Hryniak process does not require a motions judge to resolve all issues that may be before him/her on a motion for summary judgment. The process remains discretionary.” And at para. 17 “. . . I accept that there is some conflict in the law as to whether a formal defence cross-motion for summary dismissal is required in these circumstances. However, in his reasons, the motions judge stated that a cross-motion by the defendants was a matter of fairness to the plaintiffs. That is, a defence cross-motion would have permitted the plaintiffs a chance to provide a considered response to the request of the defendants. On that basis, the motions judge determined that a cross-motion was necessary in this particular case. As a corollary, in his reasons the motions judge directed that he would be seized of the matter if and when The Keg brought a formal motion for summary dismissal. This was an acceptable way to deal with The Keg’s request.” (see also *Hryniak*, para. 66); and see also *Gruman v. Canmore (Town)*, 2016 ABCA 392 (C.A.) where the Court of Appeal of Alberta allowed an appeal of an interlocutory order which struck out some portions of his application for judicial review on the basis of a cross-application heard at the same time as the stay application, stating at para. 4, “The deciding point is that forms of summary dismissal are valuable processes, so long as a disposition that is fair and just to both parties can be made on the existing record: *Hryniak v Mauldin* . . . The appellant argues he was taken by surprise when the chambers judge went beyond the stay application and decided the last four issues, because he had not made his full argument on those points. For that reason the appeal should be allowed, and all the issues should be sent for determination . . .” *Slade v. Tanfi Ltd.*, 2016 ONCA 326, 2016 CarswellOnt 6726 had an interesting underlying factual matrix whereby the Ontario Court of Appeal stated, at paragraph 5, that the motion judge did not violate the principle of *res judicata*, and that although it is probably unusual to have two motions for summary judgment in the same case, there is no reason in logic or in policy to preclude such a possibility in an appropriate case. This case demonstrates the Ontario Court of Appeal etching out new boundaries within the summary judgment regime, though instances where this would apply would certainly be rare in nature. (see also *Hryniak*, para. 66).

¹⁶² *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 (C.A.) (see also *Hryniak*, para. 60). In *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432 the Alberta Court of Appeal, at paragraph 21, stated that in some circumstances summary judgment may not be a just and fair resolution where complex, multi-party litigation can be more fairly and

plaintiffs claim alleging misrepresentation in an action by the plaintiffs against their former solicitors. Pepall J.A., writing for the Court, stated, “. . . Karakatsanis J. observed that it may not be in the interests of justice to use the new fact-finding powers to grant summary judgment against a single defendant if the claims against other parties will proceed to trial in any event. Such partial summary judgment runs the risk of duplicative proceedings or inconsistent facts. On the other hand, Karakatsanis J. noted 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.”¹⁶³ Pepall J.A. also stated: “In addition to the danger of duplicative or inconsistent findings considered in *Baywood* and *CIBC*, partial summary judgment raises further problems that are anathema to the stated objectives underlying *Hryniak*”.¹⁶⁴

Pepall J.A. described the further problems as: (1) they cause the resolution of the main action to be delayed, they may be used for tactical delay, (2) they may be very expensive, (3) judges already facing significant responsibility to address the increase in summary judgment motions are required to spend time hearing partial summary judgment motions and writing reasons that do not dispose of an action, and (4) the record available at the partial summary judgment motion may not be as expansive as the record at trial, thereby increasing the danger of inconsistent findings. Pepall J.A. concluded: “When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. 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 . . .”¹⁶⁵

expeditiously resolved by having all the parties remain in the litigation in order to avoid the possibility of duplicative proceedings or inconsistent findings.

¹⁶³ *Ibid.* at para. 25.

¹⁶⁴ *Ibid.* at para. 29. See also: *Madder v. South Easthope Mutual Insurance Co.*, 2014 ONCA 714 for a case where an appeal of an order dismissing the motion for partial summary judgment was dismissed. See also: *Lewis v. Lavern Haideman & Sons Ltd.*, 2016 ONSC 4017 (Ont Div), where the Divisional Court upheld the motion judge’s decision because despite the fact that summary judgments are often used in wrongful dismissal cases, there were factual disputes on multiple issues which will require a trial for their resolution, and the motion was just concerned about the possibility of duplicative proceedings and/or possible inconsistent findings which were considered appropriate considerations.

¹⁶⁵ *Ibid.* at para. 34. In *Brotherson v. Christiansen et al*, 2018 MBCA 70, the Manitoba Court of Appeal outlines the Queen’s Bench rule 20.08(1) – A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief and against any other defendant for the same or any other relief. This unique rule may allow summary judgments to proceed that may not in other jurisdictions due to concerns of inconsistent

(e) Other

(i) *Same number of witnesses, same facts*

The Divisional Court in *Dickson v. Di Michele*,¹⁶⁶ dismissed an application for leave to appeal the dismissal of a motion for leave to have a partial summary judgment motion heard for the reason that the motion judge was correct in concluding that a summary judgment motion would not produce any cost savings in this proceeding since the same number of witnesses and the same facts would be required to be considered at trial, even if a determination of liability were to be made on a summary judgment motion.

4. Fact Finding

(a) Approach to fact finding

(i) *Causation — factual enquiry*

Causation, a factual enquiry, was found by the Court of Appeal of Alberta, to be an appropriate issue for trial in *Grivicic v. Alberta Health Services (Tom Baker Cancer Centre)*.¹⁶⁷

(ii) *Civil trials still important medium in search for truth*

The Divisional Court in *Kassian v. The Attorney General of Canada*¹⁶⁸ heard an appeal of the decision denying their summary judgment motion to dismiss the action brought against them for vicarious liability. The majority stated, “Civil trials must still be an important medium in the search for truth . . .”¹⁶⁹

(iii) *The myth of the trial*

In Alberta, the “fiction” or “myth” of a trial is exposed by the Court of Appeal in *Windsor v. Canadian Pacific Railway Ltd.*¹⁷⁰ The Court described the

findings. See also: *Toor v. Toor*, 2018 ONCA 621, where the appeal to set aside the partial summary judgment was allowed.

¹⁶⁶ *Dickson v. Di Michele*, 2014 ONSC 3043 (Div. Ct.) (see also *Hryniak*, para. 60). See also *1353837 Ontario Inc. v. City of Stratford (Corporation)*, 2018 ONSC 71 (Div Ct), where the Divisional Court dismissed an appeal of a decision where the Ontario Municipal Board granted partial summary judgment.

¹⁶⁷ *Grivicic v. Alberta Health Services (Tom Baker Cancer Centre)*, 2017 ABCA 246 (C.A.) (see also *Hryniak*, para. 4).

¹⁶⁸ *Kassian v. The Attorney General of Canada*, 2014 ONSC 844 (Div. Ct.), reversed *Kassian Estate v. Canada (Attorney General)*, 2015 CarswellOnt 10947 (C.A.).

¹⁶⁹ *Ibid.* at para. 194.

¹⁷⁰ *Windsor v. Canadian Pacific Railway Ltd.*, 2014 ABCA 108 (C.A.) (see also *Hryniak*, para. 5).

traditional culture, before *Hryniak*: “Under the common law system, the default method for resolving disputes is the *viva voce* trial. Traditionally, interlocutory procedures that denied any party its “day in court” were strictly interpreted. When summary judgment procedures were first introduced, they were only considered appropriate when it was ‘plain and obvious’, or ‘clear’ or ‘beyond doubt’ that there was no issue that should or could be put to trial. Likewise, the procedure for striking proceedings that did not disclose a cause of action was narrowly applied.”¹⁷¹ But that culture was based on a myth, says the Court of Appeal, stating that “The theory that disputes eventually ‘went to trial’ was always something of a legal fiction.

Even when the court implied that a trial was called for, and declined to grant summary judgment, or declined to strike pleadings, it was well known that trials were a rarity. *Hryniak v. Mauldin* refers several times to the need for a change in culture. In other words, the myth of the trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to “prepare an action for resolution”, and only rarely do they actually involve “preparing an action for trial”. Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication.”¹⁷²

(iv) *Emphasis away from conventional trials*

In Prince Edward Island, Mitchell, J.A., writing for the Court of Appeal in *McQuaid v. Government of P.E.I. et al*¹⁷³ recognized that the *Hryniak* culture shift of moving the emphasis away from conventional trials in favor of proportional proceedings serve the “goal of providing timely and affordable justice.”¹⁷⁴

¹⁷¹ *Ibid.* at para. 11.

¹⁷² *Ibid.* at para. 15.

¹⁷³ *McQuaid v. Government of P.E.I. et al*, 2017 PECA 21 (C.A.) (see also *Hryniak*, para. 1).

¹⁷⁴ *Ibid.* at para. 10; see also *Gates v. The Humane Society of Canada for The Protection of Animals and the Environment carrying on business as The Humane Society of Canada*, 2016 ONSC 5345 (Div. Ct.), additional reasons *Gates v. Humane Society of Canada for the Protection of Animals and the Environment*, 2016 CarswellOnt 14820 (S.C.J.) (see also *Hryniak*, para. 5) where the Divisional Court confirmed the legitimacy of quick, limited and simplified proceedings, and upheld Small Claims Court orders. C. Horkins J., writing for the Court, cited Myers J., in *Raji*, at para. 8, “. . . [i]mposing a quick and limited written process that provides one opportunity to the plaintiff to show why the claim should not be dismissed is an important advance toward meeting the goals of efficiency, affordability, and proportionality in the civil justice system.” Also see: *Condominium Corp. No. 311443 v. Goertz*, 2016 ABCA 362.

(b) What facts in dispute — *quantitative* approach

(i) *Substantial dispute of fact*

The Court of Appeal of Manitoba in *Janz et al v. Janz et al*¹⁷⁵ heard an appeal of an order of the motion judge granting and directing the trial of four specified issues. Beard J.A. said it “requires that a court take a hard look at the evidence that is presented to ensure that it discloses a substantial dispute of fact before directing a trial of an issue . . . If every minor dispute of fact requires that an issue be directed for trial, the rule will not fulfil the ultimate goals of reducing cost and delay and thereby increasing access to justice. That said, once a substantial dispute of fact is identified, that dispute is not to be resolved by the motion judge but is to be referred for trial.”¹⁷⁶

(ii) *Most of the essential facts not in dispute*

Spring Hill Farms Limited Partnership v. Nose,¹⁷⁷ a decision of the Court of Appeal for British Columbia, upheld a summary trial judgment despite conflicts within the evidence, where most of the essential facts were not in dispute and the summary trial judge ordered cross-examination before her. Harriss J.A said that the judge’s decision to proceed with a summary trial “exemplifies the principles justifying the importance of summary determination as a tool to improve access to justice.”¹⁷⁸

(iii) *No contentious facts — failed to establish essential elements*

The Federal Court of Appeal in *Burns Bog Conservation Society v. Canada*¹⁷⁹ rejected an appeal from the judgment granting the respondent’s motion for summary judgment pursuant to section 215 of the Federal Courts Rules, and dismissing the action against the respondent. The Judge concluded that the matter is appropriate for summary judgment as there are no contested facts which need to be resolved in order to determine whether the appellant’s claim has any chance of success. Gauthier J.A. stated “I agree with the Judge that this is a clear case where the appellant’s claim must be weeded out because it is bound to fail. I agree with the Judge substantially for the reasons he gave that the appellant has failed to establish the essential elements of a trust or fiduciary relationship.”¹⁸⁰

¹⁷⁵ *Janz et al v. Janz et al*, 2016 MBCA 39 (C.A.) (see also *Hryniak*, para. 5).

¹⁷⁶ *Ibid.* at para. 49.

¹⁷⁷ *Spring Hill Farms Limited Partnership v. Nose*, 2014 BCCA 66 (C.A.) (see also *Hryniak*, para. 1).

¹⁷⁸ *Ibid.* para. 21.

¹⁷⁹ *Burns Bog Conservation Society v. Canada*, 2014 FCA 170 (F.C.A.) (see also *Hryniak*, para. 34).

¹⁸⁰ *Ibid.* at para. 43.

(iv) *No significant contentious facts — decide one issue*

The Court of Appeal for Ontario in *Myers-Gordon v. Martin*¹⁸¹ dismissed an appeal from a summary judgment dismissing this action as against a respondent, stating, “The motion judge noted that the case did not involve “significant contentious facts”, and that the moving party relied on the evidence of three parties, all of whom had been examined for discovery. He noted that none of the responding parties, of which only State Farm appeals to this court, had added any evidence. In the circumstances, he was satisfied that he could decide the issue of implied consent on the motion for summary judgment.”¹⁸²

(v) *Highly contested facts — no credibility analysis*

The Court of Appeal for Ontario in *Trotter Estate*¹⁸³ allowed an appeal of, and set aside, a summary judgment dismissing the appellant’s actions. The appeal concerned the process by which the motion judge determined there was no genuine issue requiring a trial in the face of highly contested facts and held that the failure to make a credibility finding on conflicting evidence resulted in a conclusion that is fundamentally flawed. Benotto J.A., writing for the Court, stated, “. . . the motion judge’s approach to her conclusion was fundamentally flawed. She made palpable and overriding errors in relation to her analysis of the evidence, erred in her conclusion regarding the legal requirements for undue influence and made conclusory determinations on important factual and legal issues in dispute without conducting a credibility analysis.”¹⁸⁴ The process the motion judge engaged attracted this statement by Benotto J.A., “In the present case, the motion judge recited the evidence but did not weigh it, evaluate it or make findings of credibility. Thus, even on the lower threshold of *Hryniak*, the approach was flawed.”¹⁸⁵ Regarding credibility findings Benotto J.A. stated “It is not always a simple task to assess credibility on a written record. If it cannot be done, that should be a sign that oral evidence or a trial is required. The motion judge did not engage in a credibility analysis or attempt to provide conclusions on credibility. Where important issues turn on credibility, failure to make credibility findings amounts to reversible error.”¹⁸⁶

¹⁸¹ *Myers-Gordon v. Martin*, 2014 ONCA 767 (C.A.) (see also *Hryniak*, para. 50).

¹⁸² *Ibid.* at para. 16.

¹⁸³ *Trotter Estate*, 2014 ONCA 841 (C.A.) (see also *Hryniak*, para. 49).

¹⁸⁴ *Ibid.* at para. 45.

¹⁸⁵ *Ibid.* at para. 76.

¹⁸⁶ *Ibid.* at para. 55. In *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429, there was highly contested evidence was such that the motion judge could not make the necessary findings of fact or apply legal principles to reach a just and fair determination.

(c) Difficult and unique facts — the *qualitative* approach

(i) *Unique facts (important benefit of complete record)*

The majority of the Court of Appeal of Alberta in *Warman v. Law Society of Alberta*¹⁸⁷ denied an appeal on the issue of standing to challenge the decision of [the Conduct Committee]. “The respondents’ position is not so devoid of merit that it should be foreclosed by summary judgment. The law as it relates to the unique facts of this appeal is unsettled. It is appropriate and important that the legal issues raised be dealt with by a court that has the benefit of a complete record.”¹⁸⁸ The majority of the Court of Appeal described the intention of the modern test for summary judgment as “not to summarily prevent novel arguments on unsettled law from going forward.”¹⁸⁹ In dissenting reasons, Wakeling J.A. stated that “This Court . . . and other courts (citing *Hryniak*) have strongly endorsed the proposition that speedy resolution of meritless claims or defences is in the public interest.”¹⁹⁰

¹⁸⁷ *Warman v. Law Society of Alberta*, 2015 ABCA 368 (C.A.) (see also *Hryniak*, para. 5); see also *Allen v. Alberta*, 2015 ABCA 277 (C.A.), leave to appeal refused 2016 CarswellAlta 203 (S.C.C.), where the Court of Appeal of Alberta heard an appeal concerning whether the appellant created the proper procedural and evidentiary platform to decide the constitutionality of a section of an Alberta statute, found that the appellant attempted to shortcut the normal procedures followed in constitutional challenges, undoubtedly in an effort to preserve resources and time. Slatter J.A. in separate reasons stated, at para. 21 “Summary dispositions of legal disputes are available, but only if on the existing record that alternative method for adjudication is fair and just to all interested parties, and appropriate to the issue being raised: *Hryniak v Mauldin* . . . at paras. 4, 29 . . . This litigation raises evidentiary and legal issues about health care policy choices that raise genuine issues requiring a trial.” and see *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103 (C.A.) where the majority of Court of Appeal of Alberta dismissed an appeal from the dismissal of the appellants’ oppression application. Upholding the application judge, it stated that, at para. 9, “After citing the culture shift embedded in *Hryniak v Mauldin* . . . at para. 2, . . . the chambers judge noted that the parties chose a chambers procedure knowing the limitations of affidavit evidence, and were aware of the implications of such a decision. Further, the chambers judge noted that the parties expressed a desire to avoid the expense and complication of trial if possible because most, if not all, of the witnesses were in Ontario, some of the lawyers are from Ontario, and because matters in issue were relatively time-sensitive.” (see also *Hryniak*, para. 5).

¹⁸⁸ *Ibid.* at para. 1. Also see: *Hamilton (City) v. Their + Curran Architects Inc.*, 2015 ONCA 64 as an example of the Ontario Court of Appeal responding to unique facts by not permitting a summary judgment, where the third party claims were inextricably linked to the issues in the main action.

¹⁸⁹ *Ibid.* at para. 6.

¹⁹⁰ *Ibid.* at para. 28.

(ii) *Fact intensive, complex claims, complex matter, several parties, many causes of action*

The Court of Appeal for British Columbia in *Morin v. 0865580 B.C. Ltd.*¹⁹¹ allowed the appeal from a judgment given after a one-day summary trial in a fact-intensive and complex matter involving several parties and many causes of action and ordered that the case be remitted back to the Supreme Court of British Columbia for a full trial. The Court cautioned that the adjudication of complex claims may not be amenable to summary procedures . . .”¹⁹²

(iii) *Difficult issues of fact and law*

The Court of Appeal of Alberta in *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*¹⁹³ allowed the appeal and set aside the summary judgment granted the plaintiff on a summary judgment application made for unpaid fees for drilling wells. While holding that the appellant did not put its “best foot forward” the Alberta Court of Appeal said that given the allegations, credibility will be a particularly important assessment and found that there “is sufficient evidence on the record to establish that there are difficult questions of fact or law that cannot fairly be resolved summarily.”¹⁹⁴

(iv) *Legal issues that are unsettled, complex or intertwined with fact*

The Court of Appeal of Alberta in *Condominium Corporation No. 0321365 v. Cuthbert*¹⁹⁵ dismissed two appeals of a case management judge’s refusal to grant two summary dismissal applications. While endorsing the cultural shift identified in *Hryniak* and the application of paragraph 49 of *Hryniak* in various Alberta appellate decisions, the Court stated, “Summary judgment is not possible if opposing parties’ affidavits and evidence conflict on material facts because a chambers judge cannot weigh evidence or credibility on a summary judgment application . . .”¹⁹⁶ and “Complex legal questions may be sufficient to deny summary judgment. A full trial is required when the summary record cannot be used to decide legal issues that are unsettled, complex or intertwined with facts . . .”¹⁹⁷

¹⁹¹ *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502 (C.A.), additional reasons 2016 CarswellBC 1306 (C.A.) (see also *Hryniak*, para. 33).

¹⁹² *Ibid.* at para. 31.

¹⁹³ *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378 (C.A.) (see also *Hryniak*, para. 49).

¹⁹⁴ *Precision*, *op. cit.* at footnote 299 at para. 26.

¹⁹⁵ *Condominium Corporation No. 0321365 v. Cuthbert*, 2016 ABCA 46 (C.A.) (see also *Hryniak*, para. 49).

¹⁹⁶ *Ibid.* at para. 28.

¹⁹⁷ *Ibid.* at para. 29.

The Court of Appeal of Alberta in *Templanza v. Wolfman*¹⁹⁸ dismissed an appeal of a chambers judge's order dismissing an appeal from a Master's order which summarily dismissed Templanza's action, concluding that: "A full trial will still be required where a summary record cannot fairly be used to decide legal issues which are unsettled, complex or intertwined with the facts . . . This is consistent with the principle set out in *Hryniak* that summary judgment is appropriate where the motion judge is confident that he or she can fairly resolve the dispute . . . If not so confident, then a trial is in order."¹⁹⁹

(d) Severable facts

(i) *Discrete and severable issues of liability or inextricably bound up*

The Court of Appeal for Ontario in *Kolosov v. Lowe's Companies Inc.*²⁰⁰ dismissed an appeal from a summary judgment dismissing an action. The Court of Appeal stated, "The motion judge began his analysis with a consideration of the law as it relates to summary judgment motions and was guided by the judgment of the Supreme Court of Canada in *Hryniak v. Mauldin* . . . He further concluded that the issues relating to the liability of the Belleville respondents were discrete and severable from the issues involving the liability of the other respondents."²⁰¹ The Court of Appeal gave deference to, and found there was no error in, the motion judge's conclusions and stated that: "He was alive to the appellants' argument to the effect that the liability of the Belleville respondents was "inextricably bound up" with that of the other respondents — and he rejected that argument . . . He concluded, accordingly, that it was unnecessary to determine the liability of the others before deciding that of the Belleville respondents."²⁰²

(e) The factual matrix

(i) *Full appreciation test*

The Court of Appeal for Ontario in *Turfpro Investments Inc. v. Heinrichs*²⁰³ allowed an appeal from a summary judgment. The two appellants guaranteed a

¹⁹⁸ *Templanza v. Wolfman*, 2016 ABCA 1 (C.A.), leave to appeal refused 2016 CarswellAlta 1769 (S.C.C.) (see also *Hryniak*, para. 50).

¹⁹⁹ *Ibid.* at para. 20.

²⁰⁰ *Kolosov v. Lowe's Companies Inc.*, 2016 ONCA 973 (C.A.) (see also *Hryniak*, para. 34).

²⁰¹ *Ibid.* at para. 13.

²⁰² *Ibid.* at para. 14.

²⁰³ *Turfpro Investments Inc. v. Heinrichs*, 2014 ONCA 502 (C.A.) (see also *Hryniak*, para. 43). In *Sanofi Pasteur Ltd. v. UPS SCS Inc.*, 2015 ONCA 88, the Ontario Court of Appeal clarified what is and is not part of the factual matrix by stating, at paragraph 9, that, "The facts surrounding the alleged loss were not known by both parties at the time the MSA was executed. Accordingly, these facts are not part of the factual matrix and

loan made by the respondent, Turfpro Investments Inc. that was due in 2007. The respondent demanded payment on the guarantee in 2012, subsequently sued the appellants and then brought a motion for summary judgment, which was heard after the Court of Appeal decision in *Combined Air Mechanical Services Inc. v. Flesch*, but before the Supreme Court's decision in *Hryniak*. Accordingly, the motion judge applied the full appreciation test from *Combined Air*. The Court of Appeal held that the motion judge failed to consider the factual matrix underlying the arrangements, failed to consider the totality of the evidence that supported the appellants' position that there were material alterations to the loan agreement with respect to the repayment date and the alleged forbearance agreement.

(ii) *Credibility much in play — not use factual matrix*

The Prince Edward Island Court of Appeal in *Havenlee Farms Inc. v. HZPC Americas*²⁰⁴ allowed an appeal and set aside a summary judgment order, on the grounds that the determination of the motion judge on the nature of the contract between the parties was made without taking into account material terms of the agreement pleaded and signed. The motions judge viewed credibility “as very much in play . . .” Jenkins J.A. stated, “In summary, my assessment is that the motions judge made an error of law in his determination of the nature of the agreement the parties made by not applying accepted principles of contractual interpretation and thereby not taking essential evidence into account. Specifically, the primary evidence that was essential to the determination in any exercise of contractual interpretation, namely the terms of contract that are stated in the Agency agreement, page one, was not considered and instead the issue was decided by looking only at the factual matrix.”²⁰⁵

were not relevant to the interpretation of the Agreement.” See also: *Ermineskin Indian Band v. Canada*, 2016 CAF 223 at paragraph 45. In *Canadian Imperial Bank of Commerce v. Berger*, 2015 ONSC 7728 (Ont Div), even despite not citing *Hryniak v. Mauldin*, the motion judge was deemed to have not made an error as there can be no question that the motion judge was fully aware of [. . . *Hryniak v. Mauldin*]. His decision is in conformity with *Hryniak* regardless of whether he specifically cited it.

²⁰⁴ *Havenlee Farms Inc. v. HZPC Americas*, 2017 PECA 20 (C.A.) (see also *Hryniak*, para. 49).

²⁰⁵ *Ibid.* at para. 35. Interestingly, in *Kokanee Mortgage M.I.C. Ltd. v. Burrell*, 2018 BCCA 151, 2018 CarswellBC 975, the Court of Appeal of British Columbia found that the motion judge erred by failing to analyze, on the uncontested evidence before her, whether Kokanee's reliance could be reasonable. This means that even if there is no credibility contest, the evaluation of credibility may still need to occur.

5. Existing Record

(a) Existing record approach / examine the record

The Court of Appeal in *776826 Alberta Ltd. v. Ostrowercha*²⁰⁶ on appeal of an order that the judge was not persuaded that there was no genuine issue of material facts to be tried on the subjects of breach of standard of care or causation or that the summary judgment procedure could fairly and justly resolve those issues of material fact even if genuine, stated, “from the process perspective, summary judgment can be given if a disposition that is fair and just to both parties can be made on the existing record by using that alternative method for adjudication . . .”²⁰⁷

(b) Existing record

The Court of Appeal for Alberta in *Pyrrha Design Inc. v. Plum and Posey Inc.*²⁰⁸ dismissed an appeal from a chambers judge’s summary dismissal of a claim involving the interpretation of a settlement agreement between the parties. The majority of the Court stated, “This is a prime example of a case with no genuine issue requiring trial . . . The chambers judge in this case was confident that a summary determination on the existing record allowed for a fair and just adjudication . . .”²⁰⁹

The lengthy history of the use of the summary trial in British Columbia, and the effect of *Hryniak* on that practice was described by Tysoe J., writing for the Court of Appeal for British Columbia, in *Brissette v. Cactus Club Cabaret Ltd.*²¹⁰ “The summary trial procedure has served the British Columbia judicial system well over the past 34 years. Its use should continue to be encouraged, and trial judges should not be timid in considering its suitability to decide the action or issues within the action. This is particularly so in light of two developments in the past number of years relating to the concept of proportionality . . . The second development was the decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, containing comments of general application that are germane to British Columbia. The decision related to Ontario’s summary judgment rule (the equivalent in name of the summary judgment rule contained in Rule 9-6 of the Supreme Court Civil Rules, but with the additional recent powers given to Ontario judges of weighing evidence and evaluating credibility)”²¹¹

²⁰⁶ *776826 Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49 (C.A.) (see also *Hryniak*, para. 2).

²⁰⁷ *Ibid.* at para. 9.

²⁰⁸ *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12 (C.A.) (see also *Hryniak*, para. 50).

²⁰⁹ *Ibid.* at para. 27.

²¹⁰ *Brissette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 (C.A.) (see also *Hryniak*, para. 28).

(c) Sufficient evidence

The Court of Appeal of Alberta in *McDonald v. Brookfield Asset Management Inc.*²¹² dismissed the plaintiff's appeal of the summary dismissal of the action, for a proposed shareholders' class-action from a failed investment, and found that the chambers judge correctly concluded that the appellant failed to adduce sufficient evidence of the claims, that there was no merit to the proposed claim and that the Court could reach a fair and just determination on the merits of the motion for summary judgment, endorsing *Hryniak*.

6. New Powers

(a) Fact-finding powers are discretionary

The Court of Appeal for Ontario in *First Contact Realty Ltd. (Royal LePage First Contact Realty) v. Prime Real Estate Holdings Corporation*²¹³ dismissed an appeal of a summary judgment against the defendant corporation, confirming that there is discretion in the use by the motion judge of the fact-finding powers, if it is not against the interest of justice.

The Court of Appeal for Ontario in *Density Group Limited v. HK Hotels LLC*²¹⁴ upheld a summary judgment dismissing the breach of fiduciary duty and the inducing breach of trust, breach of fiduciary duty and breach of contract claims, holding that the summary judgment process was available to the motion judge and was appropriately used by her on the record before her. On the availability of the new fact-finding powers MacFarland J.A. stated, "The decision makes it clear that the new fact-finding powers available to judges under Rules 20.04 (2.1) and (2.2) are discretionary and presumptively available: para. 45."²¹⁵

The Divisional Court in *Donald William Hancock v. Michael Hancock*²¹⁶ heard a motion for leave to appeal an order dismissing the defendants' motion for summary judgment. Morawetz, R.S.J. stated, "The motion judge adopted a

²¹¹ *Ibid.* at paras 22,23 and 24.

²¹² *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375 (C.A.), leave to appeal refused *Lanny K. McDonald v. Brookfield Asset Management Inc., et al*, 2017 CarswellAlta 947 (S.C.C.); see also *Amik Oilfield Equipment Rentals Ltd. v. Beaumont Energy Inc.*, 2018 ABCA 88 (C.A.); (see also *Hryniak*, para. 49).

²¹³ *First Contact Realty Ltd. (Royal LePage First Contact Realty) v. Prime Real Estate Holdings Corporation*, 2016 ONCA 156 (C.A.) (see also *Hryniak*, para. 66). The Ontario Court of Appeal in *Cosentino v. Sherwood Dash Inc.*, 2014 ONCA 843, 2014 CarswellOnt 16581, stated, at paragraph 7, that, provided the motion judge had the confidence that he could find the necessary facts and apply relevant legal principles to resolve the dispute, it is appropriate for him to do so.

²¹⁴ *Density Group Limited v. HK Hotels LLC*, 2014 ONCA 605 (C.A.) (see also *Hryniak*, para. 45).

²¹⁵ *Ibid.* at para. 54.

two-step analysis. Step one: Are there genuine issues requiring a trial; and step two: Can the need for a trial be avoided using Rule 20.04 powers?”²¹⁷

(b) Not in Federal Court²¹⁸

The Federal Court of Appeal in *Manitoba v. Canada*²¹⁹ dismissed an appeal of the dismissal of a motion for summary judgment where it was found that there was a “genuine issue for trial” within the meaning of Rule 215(1) of the *Federal Courts Rules*. Stratas J.A. stated: “In my view, *Hryniak* does bear upon the summary judgment issues before us, but only in the sense of reminding us of certain principles resident in our Rules. It does not materially change the procedures or standards to be applied in summary judgment motions brought in the Federal Court under Rule 215(1).”²²⁰

“Under Rule 215(1) of the *Federal Courts Rules*, where there is “no genuine issue for trial” the Court “shall” grant summary judgment. The cases concerning

²¹⁶ *Donald William Hancock v. Michael Hancock*, 2014 ONSC 6702 (Div. Ct.) (see also *Hryniak*, para. 66).

²¹⁷ See the Divisional Court decision in *Compton v. State Farm Insurance Company of Canada*, 2014 ONSC 2260 (Div. Ct.) allowing an appeal from the dismissal of a motion for summary judgment brought by the Defendant, State Farm Automobile Insurance Company seeking a determination that the Plaintiff’s claim for an income replacement benefit was statutorily barred by a limitation period. At para. 34, Thomas J. writing for the Court stated, “For the reasons above, I conclude that the motion judge was wrong when he determined that he could not have a full appreciation of the issues related to the limitation period on the record before him. There was no genuine issue requiring a trial and in concluding otherwise he made an error in law.” (see also *Hryniak*, para. 66).

²¹⁸ See also re Manitoba: the Court of Appeal of Manitoba in *Lenko v. The Government of Manitoba et al*, 2016 MBCA 52 (C.A.) heard an appeal of summary judgment dismissing a claim for damages for negligent misrepresentation. The motion judge made it clear that he was only “provid[ing] direction on the summary judgment motion as it pertains to negligent misrepresentation”. The Court of Appeal accepted the direction in *Hryniak* that the courts should be more liberal in granting summary judgment motions, as Beard J.A., writing for the court, stated “. . . in the spirit of increasing access to justice”. However, Beard J.A. makes plain that *Hryniak* did not change the test to be applied on a motion for summary judgment in Manitoba stating that “The test remains whether the claim or defence raises a genuine issue for trial (r. 20.03(1)). If there is a genuine issue for trial, it is not for the motion court to resolve that issue; rather, the motion should be dismissed and the matter should proceed to trial.” “The situation is different in Ontario, where the summary judgment rules have been substantially amended to expand the role of the court in resolving claims without a trial. This difference must be kept in mind when applying *Hryniak* to a motion for summary judgment under the Manitoba rules”. (see also *Hryniak*, para. 32) and *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27 (C.A.) where Steel J.A., writing for the Court said, “The Supreme Court of Canada’s decision in *Hryniak* did not alter the basic test for summary judgment in Manitoba . . .”

²¹⁹ *Manitoba v. Canada*, 2015 FCA 57 (F.C.A.) (see also *Hryniak*, para. 44).

²²⁰ *Ibid.* at para. 11.

“no genuine issue for trial” in the Federal Courts system, informed as they are by the objectives of fairness, expeditiousness and cost-effectiveness in Rule 3, are consistent with the values and principles expressed in *Hryniak*. In the words of *Burns Bog Conservation Society v. Canada* . . . there is “no genuine issue” if there is “no legal basis” to the claim based on the law or the evidence brought forward (at paragraphs 35-36 . . . *Hryniak* also speaks of using “new powers” to assist in that determination (at paragraph 44). But under the text of the *Federal Courts Rules* those powers come to bear only later in the analysis, in Rule 216”.²²¹ “Where, as the Federal Court found here, there is a genuine issue of fact or law for trial, then the Court ‘may’ (i.e., as a matter of discretion), among other things, conduct a summary trial under Rule 216: Rule 215(3). As is evident from Rule 216, summary trials supply the sort of intensive procedures for pre-trial determinations that the Court in *Hryniak* (at paragraph 44) called “new powers” for the Ontario courts to exercise.”²²²

The Prince Edward Island Court of Appeal in *Deren v. SaskPower*²²³ dismissed the appeal seeking to set aside the decision of the chambers judge summarily dismissing the appellant’s claims. He found on the basis of the evidence and the statutory immunity that there was no genuine issue requiring a trial on the claim that the defendants were by reason of their operation of the dams and reservoirs liable for damages caused by the 2011 flooding. In determining whether this was an appropriate case for summary judgment, Caldwell J.A., writing for the Court, referred to paragraph 49 of *Hryniak* and the genuine issue test and stated, “In Saskatchewan, the Court of Queen’s Bench moved with prescience and then with alacrity in response to this call for a cultural shift in civil proceedings. In *Tchozewski v Lamontagne*, the Court observed (at para. 30) that the Supreme Court’s focus in *Hryniak* on a just but proportionate process “is both explicitly and implicitly reflected in the new Saskatchewan *Queen’s Bench Rules*”, which were adopted by that court on July 1, 2013, and include the new summary proceeding rules engaged in this case . . .”²²⁴

7. Evaluating Credibility

Karakatsanis J., in *Hryniak*, concerning determination of credibility, states, “Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach

²²¹ *Ibid.* at para. 15.

²²² *Ibid.* at para. 16.

²²³ *Deren v. SaskPower*, 2017 SKCA 104 (C.A.) (see also *Hryniak*, para. 49).

²²⁴ *Ibid.* at para. 55, see also *O’Toole v. Peterson*, 2018 NBCA 8 (C.A.) (Court of Appeal of New Brunswick on new powers on summary judgment).

a just and fair determination.”²²⁵ The following appellate decisions concern motions where: there are inherent contradictions in pleading and affidavit; affidavits which conflict on primary facts; cogency, significant of matters at issue and cost where there is a credibility contest; where credibility is a significant factor so that a trial narrative is required; or where there are difficult questions of fact or law. There also follow appellate decisions concerning the necessary credibility analysis and evaluation required by the motion judge, as well as appellate court warning against decontextualizing evidence by affidavit and transcript.

(a) Conflict — real or apparent

(i) *Credibility — inherent contradictions in pleading and affidavit*

The Court of Appeal for Ontario in *Nordlund Family Retreat Inc. v. Plominski*²²⁶ dismissed an appeal from a summary judgment that there was an agreement for an easement over the appellant’s lands, in directing specific enforcement of the agreement and in granting leave to amend the statement of claim. Van Rensburg J.A., writing for the Court, stated, following reference to paragraph 57 of *Hryniak*, that “The credibility of the appellant’s own position in this case was affected by the documents that were inconsistent with what he said in his affidavit about his intentions and whether an agreement existed. There were also inherent contradictions in the positions taken in his pleadings and affidavit that seriously undermined his account.”²²⁷ This, of course, differs from basing a summary judgment on the pleadings alone.

(ii) *Credibility — affidavits which conflict on primary facts*

In Alberta, not all conflicting affidavits mandate a trial. The Court of Appeal of Alberta in *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*²²⁸ heard an

²²⁵ *Hryniak v. Mauldin*, *op. cit.* fn 5 at para. 51.

²²⁶ *Nordlund Family Retreat Inc. v. Plominski*, 2014 ONCA 444 (C.A.) (see also *Hryniak*, para. 57).

²²⁷ *Ibid.* at para. 42.

²²⁸ *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 (C.A.), leave to appeal refused *Siri Guru Nanak Sikh Gurdwara of Alberta v. Sandhu*, 2015 CarswellAlta 1535 (S.C.C.); see also the decision of the Court of Appeal of Alberta in *Woodworks Design Ltd. v. Forzani*, 2016 ABCA 310 (C.A.) on the appeal of the order granting partial summary judgment to a contractor for part of its claim, holding at para. 5 that “The conflicting affidavits raise triable issues that preclude summary judgment on this record.” And O’Ferrall J.A. (dissent) stating at para. 21 that “. . . where some indebtedness is admitted, as it was here, it may no longer be acceptable to simply summarily dismiss the application because quantification of the indebtedness is problematic . . . So long as it has been proven on a balance of probabilities that there is no defence to at least an ascertainable part of the claim, the court hearing the summary judgment application should attempt to quantify the amount for which there is no

appeal from the decision that respondents had been the subject of oppressive conduct, and ordered the restructuring of the Society's process for approving applications for membership and amended its governing bylaws, on the grounds alleged that the chambers judge erred in making a determination on the basis of conflicting affidavit evidence. The Court of Appeal recognized both the narrow view that "Credibility cannot be tried "merely by reading affidavits which conflict on primary facts . . ." ²²⁹ but also the impact that *Hryniak* ". . . determined that the fact that some conflict exists in the affidavit evidence of opposing parties in an application for summary judgment does not mandate setting the matter for trial in every situation." ²³⁰ The Court of Appeal provided examples of conflicting affidavits evaluation *not* requiring a trial: "It may be that the conflicts do not arise on essential facts. It may be that analysis shows no factual conflict exists, but only a conflict of the litigants' separate opinions. It may be, as here, that one party relies on several affidavits, which contain internally conflicting evidence, including some evidence which agrees with or supports the evidence lead by the opposite party, and thus amount to admissions against interest. It may be that issues can be resolved on the basis of those portions of the affidavits which are not in dispute." ²³¹

(iii) *Credibility contest — cogency, significance of matters at issue and cost*

The Court of Appeal of Manitoba in *Heritage Electric Ltd. et al v. Sterling O & G International Corporation et al* ²³² dismissed an appeal from a decision granting a motion for summary judgment for the plaintiff and striking the counterclaim in its entirety. The appellants argued that a credibility contest should not be determined by a motion for summary judgment. Beard J.A., writing for the Court, stated that ". . . a court is still required to take a hard look at the evidence to see whether there is really an issue of credibility or whether the evidence is so overbalanced in one direction that the credibility issue evaporates. The cogency of the evidence that the parties provide must be considered in light of the significance of the matters at issue, the cost of litigation and the need for proportionality that was endorsed by the Supreme Court of Canada in *Hryniak v Mauldin* . . . and adopted by this Court . . ."; ²³³ Beard J.A. stated, "Finally, as stated earlier, the cogency of the evidence that is provided by the parties must be considered in the context of the issues in the case, the cost of a full trial and the

defence and give summary judgment for that part of the claim." (see also *Hryniak*, para. 5).

²²⁹ *Ibid.* at para. 78.

²³⁰ *Ibid.* at para. 79.

²³¹ *Ibid.* at para. 81.

²³² *Heritage Electric Ltd. et al v. Sterling O & G International Corporation et al*, 2017 MBCA 85 (C.A.) (see also *Hryniak*, para. 32).

²³³ *Ibid.* at para. 16.

need for proportionality, which was recognized as an important legal principle by the Supreme Court of Canada in *Hryniak*.²³⁴

(iv) Credibility a significant factor — trial narrative required

The Divisional Court in *Fincantieri Cantieri Navali Italiani v. Anmar Energy Ltd.*²³⁵ heard the defendant’s motion seeking leave to appeal the dismissal of its motion for summary judgment. P. Smith J. stated, “Sometimes justice requires that the case unfold by way of the trial narrative with oral testimony and cross-examination in the presence of the trier of fact. The case raises complicated factual and legal issues. Credibility will be a significant factor . . .”²³⁶

(v) Issues of credibility and weeding out claims

Hryniak is said not just to be about “weeding out claims with no chance of success”. In *Fernandes v. Carleton University*²³⁷ the Court of Appeal for Ontario dismissed an appeal by the plaintiff whose action had been dismissed on a motion for summary judgment. In addressing the appellant’s argument that the motion judge was not in a position to resolve issues of credibility, the Court said, citing *inter alia* paragraph 49 of *Hryniak*: “It is clear from *Hryniak* and the jurisprudence following it, however, that the Supreme Court of Canada has “broadened and liberalized” the availability of summary judgment and has encouraged the judiciary to resolve disputes in that fashion when judges can justly do so.”²³⁸

(vi) Credibility — where difficult questions of fact or law

The Court of Appeal of Alberta in *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*,²³⁹ while holding that the appellant did not put its “best foot forward” held “that given the allegations, credibility will be a particularly important assessment and found that there “is sufficient evidence on the record to establish that there are difficult questions of fact or law that cannot fairly be resolved summarily.”²⁴⁰

²³⁴ *Ibid.* at para. 21. In *656340 N.B. Inc. v. 059143 N.B. Inc.*, the New Brunswick Court of Appeal stated, at paragraph 10, that it is not appropriate to grant summary judgment where there is an unresolved genuine credibility conflict relating to a material question.

²³⁵ *Fincantieri Cantieri Navali Italiani v. Anmar Energy Ltd.*, 2015 ONSC 7387 (S.C.J.) (see also *Hryniak*, para. 33).

²³⁶ *Ibid.* at para. 54. See also *2212886 Ontario Inc. v. Obsidian Group Inc.*, 2018 ONCA 670, where the Ontario Court of Appeal allowed an appeal from a partial summary judgment due to the need for oral evidence to determine credibility issues.

²³⁷ *Fernandes v. Carleton University*, 2016 ONCA 719 (C.A.) (see also *Hryniak*, para. 49).

²³⁸ *Ibid.* at paras. 26 to 29.

²³⁹ *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378 (C.A.) (see also *Hryniak*, para. 49).

²⁴⁰ *Precision*, *op. cit.* at footnote 299 at para. 26.

(vii) *No credibility issues*

The Court of Appeal of Alberta in *Condominium Corporation No 311443 v. Goertz*²⁴¹ denied the defendant's appeal of the summary judgment on the plaintiff's claim and dismissal of the summary judgment motion on his counterclaim. The chambers judge concluded that she could grant summary judgment relating to the claim and summary dismissal of the counterclaim because she could make the necessary findings of fact, noting that there were no credibility issues, and that to do so would be clearly proportionate, more expeditious and less expensive to do so than proceeding to a full trial.

(b) Credibility analysis and evaluation

(i) *Necessary*

(A) Highly contested fact — no credibility analysis

The Court of Appeal for Ontario in *Trotter Estate*²⁴² allowed an appeal of, and set aside, a summary judgment dismissing the appellant's actions. Benotto J.A., writing for the Court, stated “. . . the motion judge's approach to her conclusion was fundamentally flawed. She made palpable and overriding errors in relation to her analysis of the evidence, erred in her conclusion regarding the legal requirements for undue influence and made conclusory determinations on important factual and legal issues in dispute without conducting a credibility analysis.”²⁴³ The process the motion judge engaged was the subject of this statement by Benotto J.A. “In the present case, the motion judge recited the evidence but did not weigh it, evaluate it or make findings of credibility. Thus, even on the lower threshold of *Hryniak*, the approach was flawed.”²⁴⁴ Regarding credibility findings Benotto J.A. stated, “It is not always a simple task to assess credibility on a written record. If it cannot be done, that should be a sign that oral evidence or a trial is required. The motion judge did not engage in a credibility analysis or attempt to provide conclusions on credibility. Where important issues turn on credibility, failure to make credibility findings amounts to reversible error.”²⁴⁵

²⁴¹ *Condominium Corporation No 311443 v. Goertz*, 2016 ABCA 362 (C.A.), leave to appeal refused *Goertz v. Condominium Corp. No. 311443*, 2017 CarswellAlta 726 (S.C.C.) (see also *Hryniak*, para. 49).

²⁴² *Trotter Estate*, 2014 ONCA 841 (C.A.) (see also *Hryniak*, para. 49).

²⁴³ *Ibid.* at para. 45.

²⁴⁴ *Ibid.* at para. 76.

²⁴⁵ *Ibid.* at para. 55.

(B) Cautious in face of motion record which raised real credibility concerns

The Divisional Court in *3Genius Corporation v. Locationary Inc.*²⁴⁶ dismissed a motion for leave to appeal the order dismissing the defendants' motion for summary judgment. Sachs J. stated, "The motion judge did not resolve the limitations period issue on any basis. "The motion judge's decision to be cautious in the face of a summary judgment motion record that raised real credibility concerns is consistent with the Court of Appeal's decision in *Baywood Homes Partnership v. Haditaghi* . . ." ²⁴⁷

(C) Conflict on evidence — picking one party's version

The Court of Appeal for Ontario in *Marsland Centre Limited v. Wellington Partners International Inc.*²⁴⁸ allowed an appeal of the order and declaration on a motion for partial summary judgment for a landlord in its action against the tenant under a commercial lease. Lauwers J.A., writing for the Court, found that "Instead of turning his mind to how the conflicts on the evidence were to be resolved, the motion judge simply picked one party's version over the other. While the respondent's version might well be more plausible or, as he put it, more in keeping with "common sense", that bald conclusion, standing alone, was not a proper basis on which to make a credibility finding in the circumstances of this case, where sworn statements were in conflict on a fundamental issue and where significant amounts of money were involved."²⁴⁹

(D) Factual underpinning of analysis unknown

The Court of Appeal for Ontario in *Turcotte v. Lewis*²⁵⁰ allowed an appeal of the plaintiffs whose action had been dismissed on each of two motions for summary judgment brought by two groups of defendants, and directed that the

²⁴⁶ *3Genius Corporation v. Locationary Inc.*, 2015 ONSC 4558 (Div. Ct.) (see also *Hryniak*, para. 68).

²⁴⁷ *Ibid.* at para. 14. See also *Newman v. R.*, 2016 CAF 213, 2016 FCA 213. This case, in the Federal Court of Appeal, highlights the limitations of summary judgments with respect to credibility analyses, thereby narrowing the scope of what is considered suitable for summary judgments.

²⁴⁸ *Marsland Centre Limited v. Wellington Partners International Inc.*, 2017 ONCA 631 (C.A.) Similarly in *1615540 Ontario Inc. v. Simon*, 2016 ONCA 966, 2016 CarswellOnt 20022, the Ontario Court of Appeal found that when resolution depends on credibility, there must be a credibility analysis. (see also *Hryniak*, para. 66).

²⁴⁹ *Ibid.* at para. 10. See also *O'Dowda v. Halpenny*, 2015 ONCA 22, where the Ontario Court of Appeal stated, at paragraph 10, that, "It was an error of law for the motion judge to ignore the uncontested sworn evidence on the central matter in issue without giving any reasons for so doing. While the judge is entitled to reject such evidence, he would have to give clear reasons for making such a finding."

²⁵⁰ *Turcotte v. Lewis*, 2018 ONCA 359 (C.A.).

matter proceed to trial. The appellants' principal submissions were, firstly, that the summary judgment motions were premature, since *inter alia*, expert's reports on standard of care have not been filed, and were inappropriate because a paper record was unsuitable for the resolution of credibility issues; and secondly, that the motion judge's duty of care analysis was flawed. On the former grounds, Strathy C.J.O., writing for the Court stated "There were conflicts and inconsistencies in the evidence of the individual respondents concerning the events . . . These conflicts and inconsistencies were not resolved by the motions judge because of her decision to take the evidence most favourable to the appellants . . ." ²⁵¹ In remitting the matter to the Superior Court for determination in accordance with R. 20.05, Strathy C.J.O. stated, "While the motion judge said that she accepted the evidence most favourable to the appellants, she never precisely articulated what evidence that was. Nor did she resolve inconsistencies in the evidence. We do not know the factual underpinnings of her analysis. For these reasons, a trial is necessary." ²⁵²

(ii) *Not decontextualize*

(A) Credibility analysis (not conclusory, determine important facts)

Likewise, the Court of Appeal for Ontario in *Lesenko v. Guerette* ²⁵³ allowed an appeal of summary judgment for unjust enrichment to recover money paid to acquire and renovate a house registered in the appellants' names. The motion judge accepted the respondent's evidence and rejected the version of events advanced by the appellants. The Court of Appeal allowed the appeal on the grounds that it was not an appropriate case for summary judgment. Following *Trotter Estate*, Rouleau J.A. stated, "Given the important issues which turn on credibility in this case, the failure to make such findings was an error. If credibility cannot be assessed on a written record, that should indicate that oral evidence or a trial is required: "*Trotter Estate* . . . Care must be taken 'to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantial unfairness enters': *Baywood Homes Partnership v. Haditaghi* . . ." ²⁵⁴

²⁵¹ *Ibid.* at para. 58.

²⁵² *Ibid.* at para. 65. See also: *Khosa v. Homelife/United Realty Inc.*, 2016 ONCA 3.

²⁵³ *Lesenko v. Guerette*, 2017 ONCA 522 (C.A.) (see also *Hryniak*, para. 49).

²⁵⁴ *Ibid.* at paras 17 to 19. See also *790668 Ontario Inc. v. D'Andrea Management Inc.*, 2015 ONCA 557, for a reiteration of the need to assess a motion for summary judgment in the context of the litigation as a whole.

(B) Unable to evaluate credibility on written record — not decontextualize

The Divisional Court in *Henry v. Harvey*²⁵⁵ refused a motion for leave to appeal the refusal to grant summary judgment²⁵⁶ since the motion judge was unprepared to decontextualize consideration of liability, even with options available to avoid trial. Lederer J. stated that “Madam Justice Frank dismissed the application. When she considered the evidence “in context”, she found she was unable to “. . . evaluate the credibility of the deponents on the written record” and concluded that: “None of the options available to me in the exercise of my discretion would assist.” Consistent with *Baywood Homes Partnership v. Haditaghi*, she found that this was “. . . not an appropriate case for a mini-trial as it is the entire issue of liability that must be left for trial rather than one aspect amongst a number.” In the words of the Court of Appeal, in *Baywood Homes Partnership*, Madam Justice Frank was unprepared to “decontextualize” the consideration of liability.”²⁵⁷

(C) Voluminous exhibits — obscure authentic voice — decontextualized affidavit — credibility is important

The Court of Appeal for Ontario in *Baywood Homes Partnership v. Haditaghi*²⁵⁸ allowed the appeal, set aside the judgment and required both the claim and counterclaim to proceed to trial. The motions judge granted summary judgment dismissing the appellants’ action, on the basis that it was precluded by

²⁵⁵ *Henry v. Harvey*, 2015 ONSC 2135 (Div. Ct.) (see also *Hryniak*, para. 66).

²⁵⁶ Some cases must go to trial; a mini-trial would not overcome problem with lack of context — see the decision of the Divisional Court in *The Bank of Nova Scotia v. Russell*, 2016 ONSC 1829 (Div. Ct.), where Marrocco A.C.J.S.C., writing for the Divisional Court addressed the question of whether a Superior Court judge’s jurisdiction to adjourn or hear evidence on a summary judgment motion was restricted or confined by the Supreme Court of Canada’s decision in *Hryniak v. Mauldin* stating at para. 18, “*Hryniak* did not create a rigid formalism which must be adhered to in order to avoid an error of law and it did not erode the inherent jurisdiction of judges of this court.”; at para. 19, “Properly interpreted, the Supreme Court held in paragraph 66 that a judge hearing a summary judgment motion should not resort to the powers ordinarily exercised by a trial judge where there is no genuine issue requiring a trial. The Court did not purport to limit the motion judge’s ability to receive evidence beyond the paper record in order to determine whether to exercise the powers in Rule 20.04 in an attempt to avoid the need for a trial.” and at para. 20, “*Hryniak* is fundamentally a *direction* from the Supreme Court of Canada mandating judges hearing summary judgment motions to *resolve the motion and, where possible, the litigation*, in a way that is proportional to the problems presented by the specific case.” (my emphasis) (see also *Hryniak*, para. 66).

²⁵⁷ *Ibid.* at para. 3.

²⁵⁸ *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450 (C.A.) (see also *Hryniak*, para. 63).

the terms of a release that he accepted as valid, but did not, however, grant summary judgment on the respondents' counterclaim on two promissory notes. Before refusing to grant summary judgment on the counterclaim, the motion judge conducted what he described as a half-day mini-trial in the exercise of his authority under rule 20.04(2.2) of the *Rules of Civil Procedure*, but after hearing the witnesses, found that he was unable to conclude that the two promissory notes signed by the appellant in favour of the respondent were valid, and he referred the issue of their validity to trial.

Lauwers J.A., writing for the Court, stated, “. . . The summary judgment rules, as interpreted in *Hryniak*, do permit the fact-finding process to be staged, but only where, as noted by Karakatsanis J. . . . She stated, at para. 63, that the power to order a ‘mini-trial’ should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action.”;²⁵⁹ “The motions judge was obliged to assess the advisability of a staged summary judgment process in the context of the litigation as a whole. This he failed to do.”²⁶⁰ “. . . The process, in this context, risks inconsistent findings and substantive injustice.”²⁶¹

Lauwers J.A. stated “What happened here illustrates one of the problems that can arise with a staged summary judgment process in an action where credibility is important. Evidence by affidavit, prepared by a party’s legal counsel, which may include voluminous exhibits, can obscure the affiant’s authentic voice. This makes the motion judge’s task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.”²⁶²

(c) When few documents

(i) *Thinness of documentary issues and significant credibility disputes on material issues*

In *Cook v. Joyce*²⁶³ the plaintiff and defendant each appealed to the Court of Appeal for Ontario, respectively, the partial summary judgment on the motion

²⁵⁹ *Ibid.* at para. 32.

²⁶⁰ *Ibid.* at para. 35.

²⁶¹ *Ibid.* at para. 37. See also: *Actuate Canada Corp. v. Symcor Services Inc.*, 2016 ONCA 217 at paragraph 53.

²⁶² *Ibid.* at para. 44. See also: *SNMP Research International Inc. v. Nortel Networks Corp.*, 2016 ONCA 749, where ensuring that a case does not become decontextualized was in the forefront of the Court of Appeal’s considerations.

²⁶³ *Cook v. Joyce*, 2017 ONCA 49 (C.A.) (see also *Hryniak*, para. 57).

for summary judgment brought by the defendant. The Court considered that the significant credibility issues on material issues required a trial. Brown J.A. stated “. . . Given the significant credibility disputes on material issues in this proceeding, including whether the parties reached an oral settlement agreement, this is not an appropriate case for this court to exercise its fact-finding powers under s. 134(4) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I conclude a genuine issue requiring a trial exists . . . I would direct that claim proceed to trial.”²⁶⁴

8. Drawing Inferences

(a) Cannot draw inferences (Nova Scotia)

The Nova Scotia Court of Appeal in *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*²⁶⁵ allowed an appeal of the dismissal of a third-party claim granted on a motion for summary judgment in which the third party alleged that there was no evidence that anything it did, or failed to do, caused or contributed to the collapse of a portion of a wharf. Leave to appeal was granted since the appeal raised an arguable issue satisfying the test for leave. Farrar J.A. stated, “. . . The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts. This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including: “Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.”; “In my view, the motions judge erred in weighing the evidence in arriving at the conclusion that summary judgment should be granted . . . The Ontario Rule gives the Court the power to weigh the evidence, evaluate credibility and draw inferences from the evidence. That is not the case in Nova Scotia.” Farrar J.A. stated, “. . . If a claim has merit, Rule 6 allows a motions judge to convert an action to an application when it is appropriate to do so.”²⁶⁶

²⁶⁴ *Ibid.* at para. 8.

²⁶⁵ *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61 (C.A.) (see also *Hryniak*, para. 44).

²⁶⁶ *Ibid.* at para. 36. *Alfano v. Canadian Imperial Bank of Commerce*, 2016 ONSC 1979 (Ont Div), provides an example where the motion judge was deemed to have drawn an appropriate inference.

(b) Judicial notice versus inference

The Court of Appeal for Ontario in *Chernet v. RBC General Insurance Company*²⁶⁷ dismissed an appeal of an order granting summary judgment dismissing a claim for damages arising from a motor vehicle accident, on grounds alleged that the motion judge erred by improperly taking judicial notice of scientific and technical matters in determining how the accident occurred and by failing to give the parties an opportunity to respond to his conclusions. The Court of Appeal disagreed that the motion judge improperly took judicial notice of matters that should have been the subject of expert evidence, concluding that “He was simply drawing reasonable inferences from the uncontested facts.”²⁶⁸ In *Kokanee Mortgage M.I.C. Ltd. v. Burrell*, at paragraph 21, the Court of Appeal of British Columbia stated that the judge should not “speculate about the possible existence of other evidence”. This reinforces the judge’s scope as being limited to the evidence before him/her because to do otherwise would “risk undermining the efficacy of the summary judgment rule” due to the potential cost escalation and increase in unnecessary trials.²⁶⁹ The Court said, “It is trite law that both parties on a summary judgment motion are required to put their best foot forward. Summary judgment motions are decided by evidence of the facts and by inferences drawn from those facts. Not by speculation about the facts.”²⁷⁰ In *Canadian Broadcasting Corp. v. Whatcott*, 2016 SKCA 17, 2016

²⁶⁷ *Chernet v. RBC General Insurance Company*, 2017 ONCA 337 (C.A.) (see also *Hryniak*, para. 44).

²⁶⁸ *Ibid.* at para. 8.

²⁶⁹ *Kokanee Mortgage M.I.C. Ltd. v. Burrell*, 2018 BCCA 151, 2018 CarswellBC 975. In *Rajmohan v. Norman H. Solomon Family Trust*, 2014 ONCA 352, 2014 CarswellOnt 5804, the Ontario Court of Appeal stated, at paragraph 7, that they cannot interfere with the inferences that the motion judge drew. This runs counter to other case law that suggests inappropriate inferences are open to the Court of Appeal to interfere with. See also: *Yelda v. Yu*, 2014 ONCA 353, for an example of what was deemed an appropriate inference to draw, which in this case was that the appellant ought to have known before May 25, 2009, that because of her serious back injury, she had serious and permanent impairment of her ability to function on a day-to-day basis. See also: *Goldentuler v. Mercedes-Benz Canada Inc.*, 2014 ONCA 361.

²⁷⁰ *Ibid.* at para. 12; see also, on application of “best foot forward” the decision of the Divisional Court in *Cotnam v. The National Capital Commission*, 2014 ONSC 3614 (Div. Ct.) allowed an appeal of the motion judge dismissal of a motion for summary judgment in a simplified action, for the reason that the motion judge there may be some evidentiary matters benefiting a party. Lofchik J., writing for the court, stated, “The motions judge found that the matter may proceed to trial because there may be some evidentiary matters that may benefit the Respondent should this happen. This is contrary to the jurisprudence which provides that on a summary judgment application a party must put his best foot forward and cannot count on going to trial in the hope that more favourable evidence might surface closer to trial.” (see also *Hryniak*, para. 49). Determining on the evidence before the judge is reinforced in *Kokanee Mortgage M.I.C. Ltd. v. Burrell*, 2018 BCCA 151, when it was stated at paragraph 21 that a judge should

Carswell Sask 75, the Saskatchewan Court of Appeal at paragraphs 15 and 17 stated that “even though summary judgment rules imbue judges with enhanced fact-finding power, the finding and inferences made under those powers must be reasonable – they must be grounded in at least some evidence that is before the court.”

9. Weighing Evidence

(a) Approach

(i) *Hard look at evidence*

The Court of Appeal of Manitoba in *Janz et al v. Janz et al*²⁷¹ heard an appeal of an order of the motion judge granting and directing the trial of four specified issues. In discussing *Hryniak*, Beard J.A., writing for the Court, said, “each step in the civil justice procedure must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.”²⁷² To achieve a broad interpretation, Beard J.A. said, “requires that a court take a hard look at the evidence that is presented to ensure that it discloses a substantial dispute of fact before directing a trial of an issue . . . If every minor dispute of fact requires that an issue be directed for trial, the rule will not fulfil the ultimate goals of reducing cost and delay and thereby increasing access to justice. That said, once a substantial dispute of fact is identified, that dispute is not to be resolved by the motion judge but is to be referred for trial.”²⁷³

(b) Conflict and inconsistency

(i) *Unresolved material inconsistencies in the evidence*

The decision of the Court of Appeal for Ontario in *Isaac Estate v. Matuszynska*²⁷⁴ upheld on appeal the summary dismissal of an action, based

not speculate about the possible existence of other evidence. In *Winnitowy v. Winnitowy*, 2017 SKCA 12, at paragraph 15, it was found that the Chambers judge correctly stated the law, extensively reviewed the evidence, noted the credibility issues and resolved them. This is an example of the type of analysis that is to be conducted in summary judgment cases.

²⁷¹ *Janz et al v. Janz et al*, 2016 MBCA 39 (C.A.) (see also *Hryniak*, para. 5).

²⁷² *Ibid.* at para. 47; while British Columbia has a summary trial procedure, three decisions of the Court of Appeal demonstrate how the broad interpretation principle can apply in that context: *299 Burrard Management Ltd. v. The Owners, Strata Plan BCS 3699* (broad interpretation when considering whether to exercise of discretion to determine a case by summary trial), *Crest Realty Westside Ltd. v. W & W Parker Enterprises Ltd.* and *Cotter v. Point Grey Golf and Country Club*.

²⁷³ *Ibid.* at para. 49.

upon a record comprised of several affidavits from a defendant's lawyer, a statement of fact of a defendant's investigator, an affidavit of a witness and the transcript of her cross-examination. In the dissenting reasons of Pepall J.A. as to the use by the motion judge of her powers under Rule 20.04(2.1) to weigh evidence, assess credibility and draw inference of fact, Pepall J.A. said, "In my view, the new and welcomed approach to summary judgment described in *Hryniak v. Mauldin* . . . does not call for the granting of a judgment anchored on minimal factual findings made in the face of unresolved material inconsistencies in the evidence . . ." ²⁷⁵

(ii) *Head-on conflict on evidence — core issue*

In British Columbia the Court of Appeal in *Kemp v. Vancouver Coastal Health Authority Ltd.*, ²⁷⁶ Newbury J.A. writing for the Court noted that "The judge acknowledged that a "head-on" conflict in the evidence that goes to the core issue in the action will generally constitute an impediment to disposition of an action by summary trial". ²⁷⁷

(iii) *Conflicting affidavits — presumption*

Demonstrating a marked shift away from trial as default method of proving disputed facts on conflicting affidavits, the Court of Appeal of Alberta in *Goodswimmer v. Canada (Attorney General)* ²⁷⁸ dismissed an appeal arising from the striking and summary dismissal by the case management judge of a substantial portion of the claims alleged to arise out of Treaty 8 which the respondents allege are claims that have previously been settled. In response to the appellant's argument that it was an error to grant summary judgment in the face of conflicting affidavits, the Court of Appeal responded "that while there are cases pointing out the dangers of attempting to resolve disputes issues on conflicting affidavits: Not every conflict in the evidence precludes the chambers judge from drawing inferences from the admitted facts, the undisputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability)", ²⁷⁹ and "The presumption against deciding summarily based on conflicting affidavits is primarily concerned with situations where the conflict raises issues of . . . Where the identified disputes

²⁷⁴ *Isaac Estate v. Matuszynska*, 2018 ONCA 177 (C.A.) (see also *Hryniak*, para. 1).

²⁷⁵ *Ibid.* at para. 50.

²⁷⁶ *Kemp v. Vancouver Coastal Health Authority Ltd.*, 2017 BCCA 229 (C.A.), leave to appeal refused *Brenlee Kemp on her own behalf and as Executrix of the Estate of Shannon Jean Kemp, deceased, et al. v. Vancouver Coastal Health Authority Ltd., dba Vancouver General Hospital, et al.*, 2018 CarswellBC 641 (S.C.C.) (see also *Hryniak*, para. 4).

²⁷⁷ *Ibid.* at para. 27.

²⁷⁸ *Goodswimmer v. Canada (Attorney General)*, 2017 ABCA 365 (C.A.) (see also *Hryniak*, para. 49).

²⁷⁹ *Ibid.* at para. 39.

are not on matters of fact, but are really legal opinions, inferences, or subjective views on the interpretation of documents, there is not necessarily an impediment to a summary disposition.”²⁸⁰

(c) Onus, burden and presumptions

(i) *Onus*

The Nova Scotia Court of Appeal in *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*²⁸¹ allowed an appeal of the dismissal of a third-party claim granted on a motion for summary judgment in which the third party alleged that there was no evidence that anything it did, or failed to do, caused or contributed to the collapse of a portion of a wharf. Leave to appeal was granted since the appeal raised an arguable issue satisfying the test for leave. Farrar J.A. stated “. . . The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed . . .”

The Court of Appeal for Ontario in *Northern Industrial Services Group Inc. v. Duguay*²⁸² dismissed an appeal from the summary judgment dismissing the action as against a defendant for damages for breach of contract and fiduciary duty; and granting that defendant’s counterclaim for monies owed to him by NISG under a share purchase agreement, holding that if the moving party meets the onus that there is no genuine issue requiring trial, then the burden shifts to the respondent to show that there is a genuine issue requiring a trial.

(ii) *Evidentiary burden*

The Court of Appeal of Alberta in *Abbey Lane Homes v. Cheema*²⁸³ affirmed the applicability of paragraph 49²⁸⁴ of *Hryniak* and that “In an application for summary dismissal the applicant has the evidentiary burden of showing that there is no genuine issue of material fact requiring trial . . .”

²⁸⁰ *Ibid.* at para. 41.

²⁸¹ *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61 (C.A.) (see also *Hryniak*, para. 44). See also *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124, for an overview of the onus and shifting burden of proof.

²⁸² *Northern Industrial Services Group Inc. v. Duguay*, 2016 ONCA 539 (C.A.) (see also *Hryniak*, para. 66).

²⁸³ *Abbey Lane Homes v. Cheema*, 2015 ABCA 173 (C.A.) (see also *Hryniak*, para. 49).

²⁸⁴ See also *Liu v. Hamptons Golf Course Ltd.*, 2017 ABCA 303 (C.A.), while setting aside an injunction on appeal, stating that, in principle, a permanent injunction can be granted summarily when the [paragraph 49 *Hryniak*] conditions are all met. See also *Attila Dogan Construction and Installation Co. Inc. v. AMEC Americas Limited*, 2015 ABCA 406 (C.A.) (see also *Hryniak*, para. 49).

(iii) *Sufficient evidence*

The Court of Appeal of Alberta in *McDonald v. Brookfield Asset Management Inc.*²⁸⁵ dismissed the plaintiff's appeal of the summary dismissal of the action, for a proposed shareholders' class-action from a failed investment, and found that the chambers judge correctly concluded that the appellant failed to adduce sufficient evidence of the claims, that there was no merit to the proposed claim and that the Court could reach a fair and just determination on the merits of the motion for summary judgment . . ."²⁸⁶

(iv) *Totality of evidence*

The insufficiency of evidence on one issue may not preclude summary judgment. The Court of Appeal of Alberta in *Ashraf v. SNC Lavalin ATP Inc.*²⁸⁷ declared that the summary judgment decision that certain claims could not proceed to trial, was made in error. While finding that there was no basis to upset the decision on personal damages, defamation, special damages and the absence of a restitutionary claim, the Court of Appeal allowed the appeal with respect to setting the common law notice period, since this was a genuine issue for trial, stating that "The trial judge should be given the opportunity to make a decision on damages based on the totality of the evidence."²⁸⁸

(v) *Premature and missing evidence*

Despite the appellants' principal submission that the granting of summary judgment is premature,²⁸⁹ on finding that "missing evidence" would not assist, the Court of Appeal for Ontario in *Sweda Farms Ltd. v. Egg Farmers of Ontario*²⁹⁰ dismissed an appeal of a summary judgment. The Court of Appeal noted that the motion judge ". . . considered the areas of "missing evidence" and concluded for three reasons that this missing evidence was unlikely to assist the appellants."²⁹¹ and ". . . was not prepared to infer that the "missing

²⁸⁵ *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375 (C.A.), leave to appeal refused *Lanny K. McDonald v. Brookfield Asset Management Inc., et al.*, 2017 CarswellAlta 947 (S.C.C.) (see also *Hryniak*, para. 49).

²⁸⁶ *Ibid.* at para. 14.

²⁸⁷ *Ashraf v. SNC Lavalin ATP Inc.*, 2017 ABCA 95 (C.A.) (see also *Hryniak*, para. 49).

²⁸⁸ *Ibid.* at para. 30.

²⁸⁹ But see *Lalonde-Paquette v. Freedman*, 2014 ONSC 1678 (S.C.J.) where the Divisional Court rejected a motion for leave to appeal from the dismissal of a motion for summary judgment alleging the action was statute barred, and the motion judge's conclusion that the motion was premature was upheld. (see also *Hryniak*, para. 49).

²⁹⁰ *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONCA 878 (C.A.), leave to appeal refused *Sweda Farms Ltd. v. Burnbrae Farms Ltd.*, 2015 CarswellOnt 10365 (S.C.C.) (see also *Hryniak*, para. 49).

²⁹¹ *Ibid.* at para. 5.

production” . . . would establish anything material that was not already in evidence.”²⁹²

(vi) *No presumption of truth of pleaded facts*

The Federal Court of Appeal in *Buffalo v. Canada*²⁹³ dismissed the appeal of the Federal Court determination that the issues before it were suitable for determination by way of summary judgment. Dawson J.A., writing the majority reasons, stated, “Moreover, this is not a motion to strike a pleading where one must presume the truth of the material facts as pleaded. Rather, on a motion for summary judgment a court is required, among other things, to make necessary findings of fact.”²⁹⁴

(vii) *Evidence, not pleadings*

This of course differs from basing a summary judgment on the pleadings alone. The Court of Appeal for Ontario in *Collins v. Cortez*²⁹⁵ allowed an appeal and set aside a summary judgment dismissing an action for damages following injuries sustained in a motor vehicle accident, which had determined on the basis that there was no genuine issue requiring a trial because the appellant had not pleaded the facts relevant to discoverability of her cause of action in her statement of claim. Van Rensburg J.A., writing for the Court, stated, “In the present case, the motion judge erred in failing to base his decision on the evidence on the motion and instead relying upon the failure of the plaintiff to plead discoverability facts in her statement of claim, which the judge described as a “fatal mistake.” Again, this was a summary judgment motion, the resolution of which depended on a consideration of the evidence adduced by the parties, and not their pleadings.”²⁹⁶

²⁹² *Ibid.* at para. 5.

²⁹³ *Buffalo v. Canada*, 2016 FCA 223 (F.C.A.), leave to appeal refused *Ermineskin Indian Band v. Canada*, 2017 CarswellNat 665 (S.C.C.), reconsideration / rehearing refused *Chief John Ermineskin, et al. v. Her Majesty the Queen in Right of Canada, et al.*, 2017 CarswellAlta 1107 (S.C.C.), leave to appeal refused *Samson Indian Band v. Canada*, 2017 CarswellNat 667 (S.C.C.), reconsideration / rehearing refused *Chief Victor Buffalo acting on his own behalf and on behalf of all the other members of the Samson Indian Nation and Band, et al. v. Her Majesty the Queen in Right of Canada, et al.*, 2017 CarswellAlta 1109 (S.C.C.) (see also *Hryniak*, para. 49).

²⁹⁴ *Ibid.* at para. 46.

²⁹⁵ *Collins v. Cortez*, 2014 ONCA 685 (C.A.) (see also *Hryniak*, para. 57).

²⁹⁶ *Ibid.* at para. 12.

10. Oral Evidence on Summary Judgment

(a) Discreet but central issue

The Divisional Court in *Forestall v. Carroll*²⁹⁷ granted leave to appeal the dismissal of a motion for summary judgment, finding that the issue on the motion for summary judgment was a discrete but central issue in these proceedings. Corbett J. stated, “The issue before the motions judge was focused . . . If the motions judge concluded that he needed to hear oral evidence from . . . in order to arrive at a fair and just decision, it should have been easy to schedule a brief appearance, perhaps for half a day, to hear that evidence. This testimony aside, I see no reason why the case, as presented to the motions judge, will be any different to a trial judge on this central issue. It seems to me an ideal case for the application of *Hryniak*²⁹⁸ to arrive at a final disposition of the issue of . . . permission to drive the car.”²⁹⁹

(b) Narrow and discreet — small number of witnesses, gathered in manageable time — significant impact

The Court of Appeal for Ontario in *Miller Group Inc. v. James*³⁰⁰ allowed the appeal from the order dismissing the Miller Group’s cross-claim, and dismissing the Miller Group’s motion for summary judgment to dismiss the Jameses’ claim. Addressing oral evidence on a motion for summary judgment, Sharpe J.A. stated, “. . . The issue of whether the Miller Group can establish an implied oral agreement with the Sernoskies for indemnification is one that can and should be determined, if necessary pursuant to the procedure contemplated by rule 20.04 (2.2). This is a narrow and discrete issue involving oral evidence from a small number of witnesses that can be gathered in a manageable period of time and in which evidence is likely to have a significant impact on whether summary judgment is warranted . . .”³⁰¹

²⁹⁷ *Forestall v. Carroll*, 2015 ONSC 5883 (Div. Ct.) (see also *Hryniak*, para. 60).

²⁹⁸ The importance of the issue was highlighted by Corbett J, stating at para. 19 of *Forestall v. Carroll* “It is a rare case where leave to appeal will be granted from a dismissal of a motion for summary judgment, since the moving party lives to fight the issues on the merits again, on another day. For me, this is that rare case. I see good reason to doubt the motions judge’s evidentiary rulings, and I conclude that it is a matter of general importance to the administration of justice to consider whether the approach taken by the learned motions court judge is consistent with the principles set out in *Hryniak v. Mauldin*”.

²⁹⁹ *Ibid.* at para. 18.

³⁰⁰ *Miller Group Inc. v. James*, 2014 ONCA 335 (C.A.) 450 (see also *Hryniak*, para. 65).

³⁰¹ *Ibid.* at para. 11.

(c) Composite record

The Court of Appeal of Alberta in *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*³⁰² dismissed an appeal from the trial decision. In the discussion of the standard of review, Fraser C.J.A. states, “The increase in summary trials is also a movement towards adjudication based less on *viva voce* evidence and more on what might be characterized as a composite record . . .”³⁰³

(d) Unsatisfied with existing record — obliged to call evidence

In *Toronto (City) v. Maple-Crete Inc.*³⁰⁴ the Divisional Court heard a motion for leave to appeal from the dismissal of a motion for summary judgment and in response to submissions that the motion judge was unsatisfied with the evidentiary record before him and was thus obliged to call evidence or was obliged to explain why the case was inappropriate for “using the court’s discretion to call evidence on a summary judgment motion”. Perell J. stated, “If the first step does not lead to a summary judgment, then the court should move to the second step mandated by *Hryniak v. Mauldin*. Under the second step, if there appears to be a genuine issue requiring a trial, then the court should determine whether the need for a trial can be avoided by using the new powers under rules 20.04(2.1) and (2.2).”³⁰⁵

11. Salvaging a Failed Motion

In the Divisional Court decision in *Arminak & Associates Inc. v. Apollo Health and Beauty Care*,³⁰⁶ D. M. Brown J. stated, “A major theme running through the Supreme Court of Canada’s discussion of summary judgment

³⁰² *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 (C.A.), additional reasons 2017 CarswellAlta 1462 (C.A.), leave to appeal refused *EnCana Midstream and Marketing, et al. v. IFP Technologies (Canada) Inc.*, 2018 CarswellAlta 665 (S.C.C.) (see also *Hryniak*, para. 65). See also: *Can v. Calgary Police Services*, 2014 ABCA 322, at paragraph 93, where the Alberta Court of Appeal states that the Alberta Rules of Court imply that a motions court hearing a summary judgment application should not hear oral evidence given in the same manner as a trial, as “the conditions which prompted Ontario to marry two distinct concepts do not exist in Alberta”.

³⁰³ *Ibid.* at para. 291.

³⁰⁴ *Toronto (City) v. Maple-Crete Inc.*, 2014 ONSC 2371 (Div. Ct.) (see also *Hryniak*, para. 66).

³⁰⁵ *Ibid.* at para. 33; see also the Divisional Court decision in *Aylsworth v. The Law Office of Harvey Storm*, 2016 ONSC 3938 (Div. Ct.) dismissing an appeal of a summary judgment for wrongful dismissal holding that the motion judge was correct in dealing with the matter by way of summary judgment, and that requiring a trial on narrow issue of mitigation, for modest amount would be “miscarriage of justice”.

³⁰⁶ *Arminak Associates Inc. v. Apollo Health and Beauty Care*, 2014 ONSC 5806 (Div. Ct.) (see also *Hryniak*, para. 69).

motions in *Hryniak v. Mauldin* is the need for continuity in ‘judicial touch’ throughout the summary judgment motion process.”³⁰⁷

The Divisional Court has held that a party should not appeal the directions of a summary judgment motion judge seized of the motion who had not yet disposed of the motion;³⁰⁸ that a judge before whom a motion for summary judgment is adjourned, should seize herself of the matter;³⁰⁹ on appeal from a failed motion for summary judgment, has addressed whether a full trial is required and whether the interests of justice are best served by having the case heard at trial by the judge who heard the summary judgment motion or whether it is best served by having the matter dealt with through the Court’s usual processes.³¹⁰

The Court of Appeal for Ontario has dismissed an appeal of the appellant’s claims at trial, where the appellant argued that the “hybrid” trial model, making extensive use of the work produce of failed summary judgment motions was a reconfiguration of the dismissed motion;³¹¹ has stated that proportionality of process can still be achieved through the use of the pre-trial process available to the parties;³¹² that purported findings of fact by a motion judge who dismisses a summary judgment motion do not have binding effect in the subsequent proceeding unless the motion judge invokes her power to make an order specifying what material facts are not in dispute;³¹³ and held that the rules prohibit a judge who conducts a pre-trial conference from presiding on a summary judgment motion.³¹⁴

³⁰⁷ *Ibid.* at para. 9.

³⁰⁸ *Ibid.* at para.

³⁰⁹ *Gatti v. Avramidis*, 2016 ONSC 606 (Div. Ct.) (see also *Hryniak*, para. 78).

³¹⁰ *Dang v. Anderson*, 2016 ONSC 7844 (S.C.J.), additional reasons 2017 CarswellOnt 198 (S.C.J.) (see also *Hryniak*, para. 78).

³¹¹ *Harris v. Leikin Group Inc.*, 2014 ONCA 479 (C.A.) (see also *Hryniak*, para. 77).

³¹² The Court of Appeal in *Vend-All Marketing Inc. v. Hunter et al.*, 2015 MBCA 10 (C.A.) (see also *Hryniak*, para. 28) dismissed an appeal of the denial of summary judgment, but MacInnes J.A. stated that “proportionality of process can still be achieved through the use of the pre-trial process available to the parties.”

³¹³ Quelling concerns about the effect of a finding of fact on a motion for summary judgment which is dismissed, the Court of Appeal in *Skunk v. Ketash*, 2016 ONCA 841 (C.A.) quashed an appeal of the dismissal of a summary judgment motion by one of the defendants for lack of jurisdiction, holding that purported findings of fact by a motion judge who dismisses a summary judgment motion do not have binding effect in the subsequent proceeding unless the motion judge invokes her power under r. 20.05(1) to make an order specifying what material facts are not in dispute — a power that exists where summary judgment is refused or is granted only in part. (see also *Hryniak*, para. 2).

³¹⁴ *Royal Bank of Canada v. Hussain*, 2016 ONCA 637 (C.A.) (see also *Hryniak*, para. 36).

12. Applications

(a) Applications (Ontario)

The Divisional Court has held that the governing legal principles flowing from *Hryniak* “governs all aspects of civil procedure, and presumably applies equally to applications as it does to motions for summary judgment.”³¹⁵ Similarly, summary judgment in a proceeding brought as an application has not been successfully appealed on that ground alone.³¹⁶

(b) Convert action to application (Nova Scotia)

The Nova Scotia Court of Appeal in *Shannex Inc. v. Dora Construction Ltd.*,³¹⁷ illustrates the differences in the summary procedures available in Ontario and Nova Scotia, and how Nova Scotia imports the *Hryniak* principles on applications to convert an action to an application; and in *Blunden Construction Ltd. v. Fougere*,³¹⁸ how Nova Scotia weeds out meritless actions, and then decides if they can proceed as applications, or should instead be reserved for the more traditional trial by action format.

III. CONCLUSIONS

1. Categorization

The enquiry into the suitability of a matter for summary judgment is case specific. But *stare decisis* is a form of categorization. The categories of cases found on appeal not to be suitable for summary judgment has evolved, and has included cases: with legal issues which are unsettled, having complex law intertwined with the facts; where a trial narrative with oral testimony may be required for complicated factual and legal issues and credibility will be a

³¹⁵ *Castillo v. Xela Enterprises Ltd.*, 2016 ONSC 6088 (Div. Ct.); see also re: *Hryniak* applied to administrative proceedings, the decision of the Divisional Court in *Aiken v. Ottawa Police Services Board*, 2015 ONSC 3793 (Div. Ct.) where Justice. Molloy J., writing for the court, stated at para. 33, “What is true for the traditional civil trial system is even more applicable to the administrative tribunal system, which was designed to be a more expeditious and cost-effective process for the resolution of disputes. Even more compelling is the application of these principles to the human rights adjudication process in Ontario, a system that had been mired in backlogs and delays, which the new regime was designed to ameliorate. The recognition and enforcement of human rights principles go to the core of our values as a society.” (see also *Hryniak*, para. 2).

³¹⁶ *Maurice v. Alles*, 2016 ONCA 287 (C.A.) (see also *Hryniak*, para. 49).

³¹⁷ *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 (C.A.) (see also *Hryniak*, para. 5).

³¹⁸ *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52 (C.A.) (see also *Hryniak*, para. 28).

significant factor; which are fact-intensive and complex matters; where there are difficult questions of fact or law, and where credibility is an important assessment; which are important and complex; which are factually complex with conflicting evidence; and those unsuitable by their nature and complexity.

The amount at stake may be a consideration, as is the expense of the procedure contemplated. A “documents only” case may not be suitable for summary judgment if the factual matrix should be considered. On the other hand, the thinness of the documentary record will prompt a more cautious approach to fact-finding. A limitations defence may merit a summary dismissal against one defendant.

Appellate decisions concerning “weeding out unmeritorious claims” arise mostly in jurisdictions not having Ontario’s Rule 20 expanded new fact-finding powers. In Nova Scotia, a meritless case is weeded out or if the case can proceed as an application. The Federal Court of Appeal has upheld striking out of unmeritorious cases. In Alberta, the trial of unmeritorious claims is considered *per se* unreasonable by the Court of Appeal, and summary judgment may be granted if there is no merit to a claim, or if there is no defence to a claim. Decisions following summary trials with conflicting evidence have been upheld on appeal in British Columbia.

2. Partial Summary Judgment

In the few short years since *Hryniak*, the Ontario appellate courts’ approach to partial summary judgment has evolved dramatically. The Divisional Court began by cautiously endorsing the refusal to grant summary judgment where the motion judge found no costs saving. The Ontario Court of Appeal, in a series of appeal decisions, endorsed a broader interpretation, upholding summary judgments that (i) resolved an important claim against a key party, (ii) resolved claims against one defendant, or (iii) determined a claim for rescission. Following suit, the Divisional Court *required* a summary judgment determination of a discreet, but central issue. The Court of Appeal for Ontario then made an important and seemingly abrupt *volte-face* on partial summary judgment. Although there had been two earlier cases foreshadowing concerns about partial summary judgment, neither had ruled that 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, as is now the case in Ontario.

The concerns expressed about the risk of duplicative and inconsistent findings, and the consideration of the prospect of even greater expense and delay, have mandated the curtailment of summary judgment motions for partial summary judgment in Ontario. Of course, even the event of seeking partial summary judgment concedes the axiomatic existence of a remaining genuine issue requiring a trial.

3. Credibility

In those jurisdictions benefitting from the new powers to evaluate credibility, to weigh evidence and draw reasonable inferences, the focus of the appellate court decisions has been upon the evaluation of credibility. The Court of Appeal for Ontario has expressed the view that it is not always a simple task to assess credibility on a written record, and if that cannot be done, it is an indication of the need for oral evidence or a trial. However, the appellate court in Manitoba recommends a hard look at the evidence to see whether there really is an issue of credibility or whether the evidence is so overbalanced (most cogent) in one direction that the credibility issue evaporates. In Alberta, the appellate court reminds us that credibility may be determined in summary proceedings when the affidavit evidence of one party is internally inconsistent, not conflicting on essential facts, or merely manifests conflicting opinion.

What is certain from the appellate decisions in Ontario is that a motion judge should not proceed with a motion for summary judgment having substantial credibility issues or factual inconsistency unless the motion judge can undertake and demonstrate the required analysis for the evaluation of credibility, and provide a precise articulation of how inconsistencies in the evidence are resolved.

4. Arriving at a Just Determination, Result and Resolution

The appellate courts in Canada, represented in this defined survey of their decisions concerning summary proceedings, have embraced *Hryniak* within the limits of the existing procedural framework of their respective jurisdiction. They have shone a light on the requirement of a just process and adjudication, particularly in the determination of credibility, and when seeking partial summary judgment, on the road to a just determination of summary proceedings and a just result.

The shift in culture to provide affordable access to justice is underway, and the appellate courts have been engaged, and will continue to be engaged, as sentinels of the access to justice principles of *Hryniak*, while maintaining, within the procedural framework in place in their respective jurisdictions, some elements of other models of adjudication to ensure both fairness and justice to the parties of a proceeding, in recognition that summary proceedings cannot always provide, in every instance, the just process for a just determination of an action.

