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Emerging Burdens of the Summary Judgment Motion Judge

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"*Don't get involved in partial problems, but always take flight to where there is a free view over the whole single great problem, even if this view is still not a clear one.*"[2]

I. INTRODUCTION

In 2018, four years after *Hryniak v. Mauldin*[3] ("*Hryniak*") was released, I wrote a chapter of the *Annual Review of Civil Litigation, 2018*[4] considering if the appellate courts in Canada recognized and embraced the "cultural shift"[5] required in order to create an environment promoting timely and affordable access to the justice system and whether the appellate courts struck a balance

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[2] Ludwig Wittgenstein, *Notebooks 1914-1916*.

[3] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

[4] *Sentinels of the Hryniak Culture Shift: Four Years On* in Todd Archibald, ed., *Annual Review of Civil Litigation, 2018* (Toronto: Thomson Reuters, 2018) [*Hryniak, ARCL-2018*].

[5] *Hryniak*, at para. 2 and 32. See also "shift in culture" at para. 28.

between procedure and access to justice in coming to "reflect modern reality and recognize that new models of adjudication can be fair and just."[6]

1. Earlier Conclusions — 2018

In that chapter I concluded that categories of cases found on appeal not to be suitable for summary judgment had already evolved as *Hryniak* predicted, and that appellate decisions concerning "weeding out unmeritorious claims" continued to arise, but mostly in jurisdictions where summary judgment motions judges did not possess the expanded fact-finding powers on summary judgment motions.

(a) Partial summary judgment

I also found that in the few short years since *Hryniak*, the Ontario appellate courts' approach to partial summary judgment had evolved dramatically. The event of seeking partial summary judgment conceded the axiomatic existence of a remaining genuine issue requiring a trial. The concerns expressed about the risk of duplicative proceedings or inconsistent findings of fact at trial, and the prospect of even greater expense and delay, had mandated at that time the curtailment of summary judgment motions for partial summary judgment in Ontario.

(b) Contested credibility

My observation about appellate decisions in those jurisdictions where summary judgment motion judges benefitted from powers to evaluate credibility, to weigh evidence and to draw inferences, was that the appellate courts focused upon the evaluation of credibility, and, at least in Ontario, warned the summary judgment motion judge not to 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.

2. Since 2018

Since the publication of *Sentinels of the Hryniak Culture Shift: Four Years On*, there has become noticeably less express reference to *Hryniak* in the appellate decisions. Accordingly, this survey of summary judgment cases includes appellate decisions, whether or not *Hryniak* is expressly cited.

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[6] *Hryniak*, at para. 2.

3. Approach to Evidence, Credibility and Inconsistent Facts

The appellate court decisions in this survey have often required a standard by which the summary judgment motion judge approaches evidence on the motion, particularly in cases of inconsistent evidence or in evaluation of credibility on central issues, that approaches that of a trial judge. The appellate courts across Canada have provided guidance, both through approbation and criticism on the summary judgment motion judges' approach to fact finding. The appellate courts in some jurisdictions have required the motion judge when there is conflicting evidence to have regard to and analyze the *entire evidentiary record* and consider the *evidence as a whole*.

At the same time, some appellate courts have upheld summary judgments or summary dismissals while endorsing the approach of the motion judge to the evidence, especially where the motion judge concludes that the quality and quantity of the record would not appreciably change at trial, where the decision of the motion judge is found to have provided detailed analysis of credibility and factual finding together with legal reasoning, or has fully and completely explained the reasons for determination on an issue.

This chapter considers whether such requirements of the summary judgment motion judge are effectively moving summary judgment back to the pre-*Hryniak* requirement of a full appreciation of the case before granting summary judgment.

Some appellate judges have articulated the need for pre-summary judgment motion triage. But what threshold will be deployed if those triage hearings are held?

4. Partial Summary Judgment

A distinct trend has emerged. The appellate review of partial summary judgment has been voluminous, and has, at least in Ontario, continued to be viewed as a rare procedure. The restricted approach of the Ontario Court of Appeal to partial summary judgment, consistent with *Hryniak*, is that summary judgment motion judges are to take on the burden, in each motion for partial summary judgment, to determine if the issues are readily bifurcated, and that in turn requires the motion judge to consider the record as if it were a trial, to divine whether issues are discreet or intertwined, and then consider on the dissected issues, whether the motion for summary judgment remains cost efficient. But as I argue here, that requires the summary judgment motion judge to approach the task as that of a trial judge; considering all issues in the proceeding as a whole, and accordingly a review of the record as if at trial.

5. Emerging Clarity on an Exacting Process

The appellate courts in Manitoba and Alberta have welcomed *Hryniak*, and have clarified the process for the summary judgment motion judge.

The Court of Appeal of Manitoba has highlighted that proportionality can cut both ways on summary judgment motions, and has affirmed the two-stage process mandated by *Hryniak*. The clarity comes with a nuanced and exacting process for the summary judgment motion judge.

The Court of Appeal of Alberta delivered a landmark summary judgment decision settling a rift that had developed as to the standard of proof that is required for summary judgment. The "unassailable" test for success in a summary judgment had evolved. But this was rejected by the Court of Appeal with restated key considerations for a motion for summary judgment. The "binary" decision that merit on a summary judgment motion is whether or not a party's position is unassailable, is now replaced with a process based on *Hryniak*.

6. Summary Proceedings

This chapter focuses on summary judgment motions and applications, but not summary trials.[7]

The appellate courts have determined appeals in proceedings that are *related* to summary judgment, but are not strictly about the laws of summary judgment, and which are not motions or applications for summary judgment, but have some common or distinguishing considerations, including these decisions.[8] These are not considered in this chapter.

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[7] The summary trial procedure in British Columbia is not considered in this chapter. Quebec, without a summary judgment equivalent, is also not considered here. See, however, Kathleen Hammond, "Searching for a Summary Judgment Equivalent in Quebec Procedural Law" (2020) 43:1 Dal LJ 209, at page 242. "These observations highlight the ways that Quebec, through its own tools, and without a summary judgment equivalent, is embracing the post-Hryniak cultural shift towards improving access to justice."

[8] The appellate courts have determined appeals in proceedings that are *related* to summary judgment, but are not strictly about the laws of summary judgment, and which are not motions or applications for summary judgment, but have some common or distinguishing considerations, including these: procedural fairness in summary judgment motions (see *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447, *Tozer v. Tassone*, 2019 ONCA 285, *Erland v. Ontario*, 2019 ONCA 689), s. 137.1 *Courts of Justice Act*, R.S.O. 1990, c. C.43 (anti-SLAPP) (see *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166, additional reasons 2019 CarswellOnt 5348 (C.A.), *Labourers' International Union of North America, Local 183 v. Castellano*, 2020 ONCA 71, *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 25, *Zoutman v. Graham*, 2020 ONCA 767, and *Nanda v. McEwan*, 2020 ONCA 431, additional reasons 2020 CarswellOnt 12066 (C.A.), *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 and *Bent v. Platnick*, 2020 SCC 23), relief from forfeiture (see *Ruddell v. Gore Mutual Insurance Company*, 2019 ONCA 328), settlement (*Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc.*, 2018 ONCA 839), adjournment (see *Royal Bank of Canada v. Puzzolanti*, 2018 ONCA 917) , Rule 21 of the *Rules of Civil Procedure* (strike-out)

II. SUMMARY JUDGMENT

Structure

The following discussion of appellate decisions about summary judgment proceeds in this way: (1) Categorization, (2) Partial Summary Judgment, (3) Fact Finding, (4) Existing Record, (5) New Powers, (6) Evaluating Credibility, (7) Drawing Inferences, (8) Weighing Evidence, and (9) Onus and Evidentiary Burden.

1. Categorization[9]

(a) Complexity

(i) Neither novel nor exceptional

In *Goldman v. Weinberg*,[10] the Court of Appeal for Ontario dismissed an appeal from the motion judge's dismissal of the appellant's action on a summary judgment basis. The Court stated "[6] . . . The appellant's claim was neither novel nor exceptional. The issue of the duty of care has been determined by this court on a number of occasions including in *Norris v. Gatlien* (2001), 2001 CanLII 2486 (ON CA), 56 O.R. (3d) 441 (C.A.) and *Wellington v. Ontario*, 2011 ONCA 274, 105 O.R. (3d) 81."[11]

R.R.O. 1990, Reg. 194: Rules Of Civil Procedure and other motions to strike (see *Das v. George Weston Limited*, 2018 ONCA 1053, leave to appeal refused *Arati Rani Das, et al. v. George Weston Limited, et al.*, 2019 CarswellOnt 12859 (S.C.C.), *The Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272, *P.Y. v. Catholic Children's Aid Society of Toronto*, 2020 ONCA 98, *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, *Wong v. Dyker Law Corporation*, 2020 MBCA 19, and *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5), estates (see *Wall v. Shaw*, 2018 ONCA 929 (Div. Ct.)) , setting aside default judgment (see *Zeifman Partners Inc. v. Aiello*, 2020 ONCA 33, *and Themer v. Posie*, 2019 ONSC 7173 (Div. Ct.)*), jurisdictional challenge (see Churchill Cellars Ltd. v. Haider*, 2019 ONSC 1143 (Div. Ct.)), leave for derivative action (see *Drake v. Goodwin*, 2019 ONSC 2865 (Div. Ct.)), class action (see *Berg et al. v. Canadian Hockey League et al.*, 2019 ONSC 2106 (Div. Ct.)), petition to set aside orders under the *Residential Tenancies Act*, S.B.C. 2002, c. 78 (see *Al-Islam v. Valley Street Property Ltd.*, 2019 BCCA 48) and *Construction Act*, R.S.O. 1990, c. C.30 (see *Maplequest (Vaughan) Developments. Inc. v. 2603774 Ontario Inc.*, 2020 ONSC 4308 (Div. Ct.)) and proof of will in solemn form (*McStay v Berta Estate*, 2021 SKCA 51). These are not considered in this chapter.

9 See also *Hryniak, ARCL-2018*, at pages 169-179.

10 *Goldman v. Weinberg*, 2019 ONCA 224.

11 *Ibid.* at para. 6.

(ii) Not novel if duty of care articulated in earlier cases, not complex

In *Foodinvest Limited v. Royal Bank of Canada*,[12] the Court of Appeal for Ontario heard an appeal of the dismissal of a claim on a summary judgment motion. The appellant asserted, *inter alia*, that its claim was not amenable to determination of a summary judgment motion, to which the Court of Appeal stated: "[7] We reject the submission . . . In any event, the claim is not novel. The nature and extent of RBC's duty of care falls to be determined under the principles articulated in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 (CanLII), [2017] 2 SCR 855, at paras. 30-31. Nor did the factual circumstances in which those principles fall to be applied here, rise to a level of novelty or complexity unamenable to the summary judgment process."[13]

(iii) Novel only in narrowest sense, not complex

In *North Bank Potato Farms Ltd. v. The Canadian Food Inspection Agency*,[14] the Court of Appeal for Alberta dismissed an appeal summarily dismissing a negligence action, on the grounds that the action against the federal Crown is barred by section 9 of the *Crown Liability and Proceedings Act*.

The Court of Appeal held that "The summary judgment applications concerned statutory interpretation and its application to a non-contentious factual record.";[15] "[30] . . . Only in the narrowest sense could this issue be considered "novel", and in any event, legal novelty is not an automatic bar to summary judgment, and [32] The record below was not complex; it included contractual and application records, which identified the purpose and intent of the programs and financial information identifying the source of the funds. Credibility was not in issue. It was well within the chambers judge's ability to apply the law to this record in a fair and just manner, and she did not err in doing so."[16]

(b) Amount at stake

(i) Amount of claim large, but really de minimis

In *1658410 Ontario Inc. v. Great Gulf (Dundas) Ltd.*,[17] the Divisional Court of the Ontario Superior Court of Justice dismissed an appeal of the dismissal of

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12 *Foodinvest Limited v. Royal Bank of Canada*, 2020 ONCA 665.
13 *Ibid.* at para. 7.
14 *North Bank Potato Farms Ltd. v. The Canadian Food Inspection Agency*, 2019 ABCA 344, leave to appeal refused *North Bank Potato Farms Inc., et al. v. Canadian Food Inspection Agency, et al.*, 2020 CarswellAlta 459 (S.C.C.).
15 *Ibid.* at para. 29.
16 *Ibid.* at paras. 29 to 32.
17 *1658410 Ontario Inc. v. Great Gulf (Dundas) Ltd.*, 2020 ONSC 428 (Div. Ct.).

the plaintiff's defamation claim by the motion judge, holding that the defamation claims were properly dismissed. D.L. Corbett J. for the Divisional Court, stated "[7] This was an appropriate case for summary judgment. Although the claim asserted was for $1.9 million in the aggregate, even if the defamation claims had succeeded, the damages in this case would have fallen between *de minimis* and the monetary jurisdiction of the Small Claims Court."[18]

(ii) Mere size and complexity of action does not render summary judgment inappropriate

In *Sobeys Capital Incorporated v. Whitecourt Shopping Centre (GP) Ltd.*,[19] when considering suitability for summary judgment, the Court of Appeal of Alberta stated "[25] . . . The mere size and complexity of an action does not render summary judgment inappropriate: *Attila Dogan Construction and Installation Co Inc v AMEC Americas Ltd*, 2015 ABCA 406 at para 24, 609 AR 313. The chambers judge's determination that summary judgment was appropriate is subject to deference. For the reasons already given, subject to the damages claim in the subrogated action, we find no palpable and overriding error in the chambers judge's conclusion that summary judgment was appropriate."[20]

(c) Limitation period defence

Motions for summary judgment seeking dismissal of an action or counterclaim where the issue of discoverability is often the focus are one of the most frequently brought.[21]

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[18] *Ibid.* at para. 7.

[19] *Sobeys Capital Incorporated v. Whitecourt Shopping Centre (GP) Ltd.*, 2019 ABCA 367.

[20] *Ibid.* at para. 25.

[21] In the Court of Appeal for Ontario: *Hawley v. Granger*, 2018 ONCA 834, *Morrison v. Barzo*, 2018 ONCA 979, *Hart v. Balice*, 2018 ONCA 1065, *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718, additional reasons 2018 CarswellOnt 18080 (C.A.), leave to appeal refused *Sun Life Assurance Company of Canada v. Eldon Fehr, et al.*, 2019 CarswellOnt 6811 (S.C.C.), *Nasr Hospitality Services Inc. v. Intact Insurance*, 2018 ONCA 725, *Hart v. Balice*, 2018 ONCA 1065, *Lee v. Ponte*, 2018 ONCA 1021, *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47, leave to appeal refused *Franca Zeppa, et al. v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 CarswellOnt 11588 (S.C.C.), *Hurst v. Hancock*, 2019 ONCA 483, additional reasons 2019 CarswellOnt 11336 (C.A.), *Ridel v. Goldberg*, 2019 ONCA 636, *Ridel v. Goldberg*, 2019 ONCA 636, *Lilydale Cooperative Limited v. Meyn Canada Inc.*, 2019 ONCA 761, *Sosnowski v. MacEwen Petroleum Inc.*, 2019 ONCA 1005, *Asfar v. Sun Life Assurance Company of Canada*, 2020 ONCA 31, *Thistle v. Schumilas*, 2020 ONCA 88, additional reasons 2020 CarswellOnt 3795 (C.A.), additional reasons 2020 CarswellOnt 4782 (C.A.), leave to appeal refused *Jason Michael Thistle v. James Schumilas, Jr.*, 2020 CarswellOnt 11031 (S.C.C.), *Albert Bloom Limited v. London Transit Commission*, 2021 ONCA 74, and in the Divisional Court of the Ontario Superior Court of Justice: *Perrelli*

(d) Wrongful Dismissal Claims — usually well-suited to disposition by summary judgment

In *English v. Manulife Financial Corporation*,[22] the appellant's wrongful dismissal action was dismissed following a motion for summary judgment. The parties agreed that a summary judgment would be appropriate. The Court of Appeal for Ontario allowed the appeal, finding that the appellant's resignation notice was equivocal and the plaintiff was entitled to withdraw it. Benotto J.A. stated "[29] Second, the parties agreed that summary judgment was appropriate. In that regard, this court is in the same position as was the motion judge to decide the case on its merits, as no *viva voce* evidence was received. [30] Third, wrongful dismissal claims are usually well-suited for disposition by way of summary judgment. As this court said in *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63, 329 O.A.C. 284, at para. 12: a straightforward claim for wrongful dismissal without cause, such as the present one,

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v. Richmond Hill (Town), 2018 ONSC 6414 (Div. Ct.); *Western Life Assurance Company v. Penttila*, 2019 ONSC 14 (Div. Ct.), *Rojas v. Porto*, 2019 ONSC 6822 (Div. Ct.), *Cooper v. Toronto (City)*, 2019 ONSC 7486 (Div. Ct.), and *Kleiman v. 1788333 Ontario Inc. o/a BMW Toronto*, 2020 ONSC 6470 (Div. Ct.); in the Court of Appeal of Manitoba: *Breton v. Canada (Attorney General)*, 2019 MBCA 123, in the Court of Appeal of Alberta: *Milota v. Momentive Specialty Chemicals*, 2020 ABCA 413; in the Court of Appeal of New Brunswick: *Ayangma v. Université de Moncton, Campus de Moncton*, 2019 NBCA 72, leave to appeal refused *Noël Ayangma v. Université de Moncton, Moncton Campus*, 2020 CarswellNB 156 (S.C.C.), *Martin v. Girouard*, 2019 NBCA 90, *Province of New Brunswick v. Grant Thornton*, 2020 NBCA 18, leave to appeal allowed *Grant Thornton LLP, et al. v. Province of New Brunswick, et al.*, 2020 CarswellNB 355 (S.C.C.), *Fero Waste & Recycling Inc. v. 048835 N.B. Inc. (Saint John Recycling)*, 2020 CarswellNB 650 (C.A.); in the Nova Scotia Court of Appeal: *Cameron v. Nova Scotia Association of Health Organizations Long Term Disability Plan*, 2019 NSCA 30; In the Court of Appeal of Newfoundland and Labrador: *Fishery Products International Ltd. v. Rose*, 2018 NLCA 65, *Fitzpatrick v. Hefferman*, 2019 NLCA 77; In the Prince Edward Island Court of Appeal: *Ayangma v. The Saltwire Network Inc.*, 2020 PECA 1, leave to appeal refused *Noël Ayangma v. SaltWire Network Inc., operating as The Guardian, et al.*, 2020 CarswellPEI 70 (S.C.C.), *McNally v. Health PEI*, 2018 PECA 14, additional reasons 2018 CarswellPEI 123 (C.A.) and in the Federal Court of Appeal: *Miller v. Canada*, 2019 FCA 61, leave to appeal refused *Philip James Miller v. Her Majesty the Queen in Right of Canada*, 2019 CarswellNat 5902 (S.C.C.) *Labrador-Island Link General Partner Corporation v. Panalpina Inc.*, 2020 FCA 36.

[22] *English v. Manulife Financial Corporation*, 2019 ONCA 612, see also *Total Credit Recovery Ltd. v. Martin et al.*, 2020 NBCA 8 at para. 44 ". . . Wrongful dismissal cases like this one, particularly where no cause for dismissal exists, meet the criteria of *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, and are well suited for summary judgment. Indeed, some courts have "strongly encouraged" such motions in these types of cases. See *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63, [2015] O.J. No. 461, leave to appeal to S.C.C. refused, [2015] S.C.C.A. No. 140.

strikes me as the type of case usually amenable to a Rule 20 summary judgment motion . . ."[23]

2. Partial Summary Judgment[24]

(a) What is partial summary judgment?

Parties to summary judgment motions, motion judges and the appellate courts have sought to define what comprises partial summary judgment in order either to apply or isolate the principles of *Hryniak* concerning partial summary judgment.

In *Virden Mainline Motor Products Limited v. Murray et al*,[25] the Court of Appeal of Manitoba, on the subject of partial summary judgment, Steel J.A., writing for the Court, provided a narrow definition, stating "[6] . . . Summary judgment may be granted for part of a claim, as well as for the entire claim . . ."[26] But that case illustrates only a narrow category of partial summary judgment. Partial summary judgment is now often considered to go beyond that of motions for summary judgment for *somewhat less than the full claim sought* in the originating process or counterclaim, or for the bifurcation of liability and damages. The approach of the appellate courts to defining partial summary judgment has varied, as demonstrated by these cases.

(i) Summary judgment against one defendant

For instance, in *Extreme Venture Partners Fund LLP v. Varma*,[27] where the Court of Appeal for Ontario concluded that a summary judgment against only

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[23] *Ibid.* at paras. 29 to 31; see also *Nagpal v. IBM Canada Ltd.*, 2021 ONCA 274, and *O'Reilly v ClearMRI Solutions Ltd*, 2021 ONCA 385 and *De Palma v. Canadian Federation of Independent Businesses*, 2021 ONCA 406.

[24] See also *Hryniak, ARCL-2018*, pages 182-191.

[25] *Virden Mainline Motor Products Limited v. Murray et al*, 2018 MBCA 82.

[26] *Ibid.* at para. 6.

[27] *Extreme Venture Partners Fund LLP v. Varma*, 2019 ONCA 446; see also *Siemon v. Perth Standard Condominium Corporation*, 2020 ONCA 503, where the Court of Appeal for Ontario found that where the balance of claims are dismissed on a motion for summary judgment, then as van Rensburg J.A., in writing for the Court said, at para. 39, "This was not a case of partial summary judgment and the motion judge's reasons were not deficient."; see also *7550111 Canada Inc. v. Charles*, 2020 ONCA 386, additional reasons 2020 CarswellOnt 11057 (C.A.) where the Court of Appeal allowed the appeal for the narrow purpose of addressing calculation error and otherwise dismissed the appeal argued on the grounds that the motion judge erred by granting summary judgment in the face of a counterclaim and third party claim, and because of the possibility of inconsistent findings, the Court of Appeal for Ontario stated at para. 29 ". . . The well-settled purpose of summary judgment motions is to dispose of any issues that do not require a trial: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 47; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.4(2)." and at para. 30, "The

one defendant "was not a partial summary judgment as the claim against the respondent was dismissed in its entirety",[28] and *Siemon v. Perth Standard Condominium Corporatio*n,[29] where the Court of Appeal for Ontario, dismissing the balance of claims on a motion for summary judgment, van Rensburg J.A., in writing for the Court, said, "This was not a case of partial summary judgment . . ."[30]

However, by way of contrast, in *Mason v. Perras Mongenais*[31] the Court of Appeal for Ontario heard an appeal by the plaintiff from the summary judgment by the motion judge that dismissed the plaintiff's claim for negligence against one defendant. Nordheimer J.A. found that the determination to find if one defendant was liable cannot be determined summarily, as the motion judge did.

See also the subsequent decision of the Court of Appeal for Ontario in *Dia v. Calypso Theme Waterpark*[32] allowing the plaintiffs' appeal of the summary judgment granted by the motion judge that dismissed the plaintiffs' action against the respondent and certain of the respondent's crossclaims and ordering that the respondent discontinue other crossclaims, making an order one of the grounds for appeal was that it was a partial summary judgment. Nordheimer J.A., writing for the Court of Appeal said "[27] Finally, this case once again points out the risks associated with granting partial summary judgment. The motion judge said that she was not required to decide who was involved in the assault. As I have already pointed out, that is precisely what she was required to do, at least insofar as it involved the respondent. That was the central issue in the action. [28] The motion judge also said that there was no risk of inconsistent findings being made when the balance of the action is tried. Quite the contrary is true. At the trial, if the appellants call one or more of the defendants, which they are entitled to do, there is every prospect that a finger pointing or blame game will result. It does not appear that the motion judge gave any consideration to this possibility. The risk of inconsistent findings is, therefore, very much alive in this case. While the motion judge referred to this court's decision in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, she failed to heed the caution expressed by Pepall J.A., at para. 34: "A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an

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prospect of inconsistent findings does not come into play here. It is not clear to us that a counterclaim has actually been filed or that it was in the record before the motion judge. Regardless, whatever determination may be made in relation to the appellant's related claims will not be inconsistent with the motion judge's conclusion . . . Those issues have been finally determined and the appellant is bound by those conclusions."

28 *Ibid.* at para. 9.

29 *Siemon v. Perth Standard Condominium Corporation*, 2020 ONCA 503.

30 *Ibid.* at para. 39; see also *La Rose Bakery 2000 Inc. v. Intact Insurance Company*, 2019 ONCA 850 and *Hydro Hawkesbury v. ABB AB*, 2020 ONCA 54.

31 *Mason v. Perras Mongenais*, 2018 ONCA 978.

32 *Dia v. Calypso Theme Waterpark*, 2021 ONCA 273.

issue or issues that may be readily bifurcated from those in the main action".[33]

(ii) Action ordered to be tried together with other actions

In *Way v. Schembri*,[34] the Court of Appeal for Ontario considered an appeal from a summary judgment in one action that had been ordered to be tried together with another action. The appellants argued that this was effectively a *partial* summary judgment, where the respondents reply that the motion judge granted *full* summary judgment because it disposed of the appellants' action. On this issue, Nordheimer J.A. stated "The respondents are correct, but only in the most technical sense."[35] For the purpose of the appeal, the Court of Appeal considered it a partial summary judgment.

(iii) Counterclaim — central issue narrow, appropriate if partial

In *1853491 Ontario Inc. v. Regional Waste North Inc.*,[36] the defendants to the counterclaim moved for summary judgment on the counterclaim on the basis that those claims were time barred. The motion judge found that the counterclaim was a separate claim from the respondents' claim in the action and that the respondents to the counterclaim were seeking *complete* summary judgment on the counterclaim. Moreover, even if the motion could be defined as a partial summary judgment motion, there was a discrete issue in this case: whether the counterclaim was defeated by the passage of the limitation period. The Court of Appeal for Ontario found that the central issue in this appeal is a narrow one, the duration of the tolling period was appropriate for summary judgment, partial or otherwise, stating "[18] . . . the motion judge's finding on the limitation issue completely resolved the counterclaim . . ."[37]

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[33] *Ibid.* at para. 27.

[34] *Way v. Schembri*, 2020 ONCA 691, leave to appeal refused *Gordon Schembri, et al. v. Al Way, et al.*, 2021 CarswellOnt 5281 (S.C.C.).

[35] *Ibid.* at para. 16.

[36] *1853491 Ontario Inc. v. Regional Waste North Inc.*, 2019 ONCA 37; see also *Apex Results Realty Inc. v. Zaman*, 2019 ONCA 766, where the Court of Appeal for Ontario dismissed an appeal from a partial summary judgment, stating, at paragraph 3, "The motion judge was aware of the counterclaim, but understandably did not discuss it as Zaman did not raise it in response to the motion for summary judgment on the commission. Nor did he raise the allegation of the respondent's negligence. It is evident the motion judge took the view the counterclaim was not inextricably intertwined with the claim. We agree. On our reading of the counterclaim, it is not inextricably intertwined with the claim. Indeed, it is premised on the existence of a valid buyer representation agreement between the parties. When pressed, counsel was unable to identify the specific issues that were duplicative. We do not give effect to this argument."

[37] *Ibid.* at para. 18.

(iv) Proceedings as a whole

(A) Real risk of inconsistent findings in trial of counterclaim and third-party claim

In *Vandenberg v. Wilken*,[38] the motion judge granted partial summary judgment declaring the agreement of purchase and sale valid, but denied the remedy of specific performance and ordered a trial regarding damages. The Court of Appeal for Ontario agreed with the appellant's submission that the motion judge erred in granting partial summary judgment to the respondents in the main action when there are genuine issues of fact and credibility requiring a trial, and a real risk of inconsistent findings being made in the trial of the counterclaim and third-party claim.

(B) Other claim provides only background and context

But see *M.W. v. Halton (Police Services Board)*,[39] where the Ontario Court of Appeal rejected the plaintiff's argument that the motion judge erred in granting partial summary judgment without considering whether it was appropriate in the context of the litigation as a whole, arguing that the determination of whether the plaintiff was unlawfully detained in February 2015, is also relevant to his tort claims in respect of the March 2016 arrest, and that for this reason, all of the claims should have been allowed to continue. The Court of Appeal disagreed and held that "[33] Although the events of February 2015 provided some *background and context* for what occurred in March 2016, the tort and Charter claims alleged in relation to the events of February 2015 involve separate issues that do not depend on a finding of reasonable and probable grounds for arrest. It is therefore appropriate that the claims related to the February 2015 incident be allowed to proceed independently."[40]

(v) Stay of counterclaim or other action

The issue has arisen whether summary judgment in an action should be stayed pending the hearing at trial of a counterclaim. By failing to stay a summary

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[38] *Vandenberg v. Wilken*, 2019 ONCA 262, leave to appeal refused *Pieter Adriaan Vandenberg, et al. v. Robert Wilken, et al.*, 2019 CarswellOnt 19988 (S.C.C.), but see *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, additional reasons 2019 CarswellOnt 14845 (C.A.), while permitting an appeal regarding the notice period in a wrongful dismissal action, the Court of Appeal for Ontario, proceeded without comment that both parties had each moved for partial summary judgment on two issues regarding the calculation of damages.

[39] *M.W. v. Halton (Police Services Board)*, 2020 ONCA 463.

[40] *Ibid.* at para. 33.

judgment while sending the counterclaim to trial the court can effectively deploy a partial summary judgment result.

(A) Illustration of the issue

In *Fauser Energy Inc. v. Skjerven*,[41] the Court of Appeal for Saskatchewan heard an appeal that "raises classic issues pertaining to the rights of the intermediate parties to a promissory note . . . The second issue concerns the principles to apply when deciding whether to grant a stay of execution of a summary judgment for the amount owing under the note pending the resolution of a counterclaim to resolve a claim for unliquidated damages."[42]

(B) When concurrent civil and criminal proceedings

The question also arose in *The Director of Criminal Property and Forfeiture v. Gurniak et al*,[43] an appeal to the Court of Appeal of Manitoba arising from an action for civil forfeiture of criminal property, with the substance of the appeal being whether a stay should be granted in civil proceedings when there are concurrent criminal proceedings. The Court of Appeal allowed the appeal from the order of a stay found that the motion judge erred in, *inter alia*, finding that a motion for summary judgment does not take this type of action out of the ordinary. Steel J.A. further stated "[83] Civil and criminal actions are distinct proceedings. There are different parties, with different purposes and different standards of proof. The Court should not order a stay of proceedings as soon as there is the slightest risk that evidence will be revealed. The case law in this area is clearly to the effect that a criminal court has the means to protect the rights of an accused and, in this case, the defendants."[44]

(C) Stay of counterclaim pending outcome of counterclaim at trial

However, by way of contrast in *1652620 Ontario Inc. v. Cornerstone Builders Ltd.*,[45] the defendant appealed to the Court of Appeal for Ontario the summary judgment granted to the plaintiff. The motion judge granted summary judgment ". . . finding there was no genuine issue for trial of the monies due under the promissory note." The Court of Appeal rejected the defendant's argument that the motion judge should not have rejected the defendant's defence of equitable set-off, since that claim is not available where the claim is made on a bill of

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41 *Fauser Energy Inc. v. Skjerven*, 2019 SKCA 81.
42 *Ibid.* at para. 1.
43 *The Director of Criminal Property and Forfeiture v. Gurniak et al*, 2020 MBCA 96, see also *Robson v. Canadian Union of Public Employees, Local 3339*, 2019 NBCA 55, re: concurrent Human Rights Investigation, where no stay ordered.
44 *Ibid.* at para. 83.
45 *1652620 Ontario Inc. v. Cornerstone Builders Ltd.*, 2018 ONCA 973.

exchange such as the subject promissory note. The Court of Appeal found that a stay of the summary judgment should have been granted pending the outcome of the respondent's counterclaim at trial.

(vi) Full summary judgment sought, partial summary judgment awarded

Appellate courts have observed that partial summary judgment is granted even when full summary judgment is sought. For instance, in *Brown v. Laurie*,[46] the Court of Appeal for Ontario dismissed the appeal of a partial summary judgment. The respondent moved for summary judgment on his claims in respect of the proceeds and the promissory note. The motion judge granted summary judgment declaring Mr. Brown entitled to the escrowed proceeds and he dismissed the appellants' counterclaim that they are entitled to the proceeds. However, the motion judge did not grant Mr. Brown summary judgment on the promissory note, but instead, directed a trial of that claim. The Court of Appeal said the following on the issue of the suitability of granting partial summary judgment "[23] We disagree. Mr. Brown moved for summary judgment on his entire claim . . ."[47]

(vii) Partial summary judgment is appropriate bifurcation

In *Leitch v. Novac*,[48] the appellant commenced an application seeking a divorce and corollary relief from her husband. The appellant later amended her application to seek damages in conspiracy from the respondent, and other defendants, certain family trusts, and a related corporation, alleging that the respondents had conspired to keep money out of the respondent's hands specifically for the purpose of reducing her family law entitlements. The appellant appealed to the Court of Appeal for Ontario from an order granting partial summary judgment. Hourigan J.A.'s analysis of whether the motion judge should have ordered partial summary judgment illustrates the material risk of inconsistent outcomes "[29] Partial summary judgment is reserved for issues that may appropriately be bifurcated without creating a material risk of inconsistent outcomes, and that may be dealt with expeditiously and cost-effectively: see *Butera v. Chown, Ciarns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at paras. 27-34."[49]

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[46] *Brown v. Laurie*, 2019 ONCA 175; see also *Spiridakis v. Li*, 2021 ONCA 359, where in its reasons the court stated at para 14, "Since the respondents moved for judgment on their entire claim against the appellants, and the dismissal of the counterclaim, their motion was not for partial summary judgment in the sense described by *Butera*."

[47] *Ibid.* at para. 23.

[48] *Leitch v. Novac*, 2020 ONCA 257, additional reasons 2020 CarswellOnt 11050 (C.A.), leave to appeal refused *Michael Novac, Nelly Novac, Sonco Group Inc., Novac 2011 Family Trust and Novac Family Trust (2013) v. Jennifer Ann Leitch*, 2020 CarswellOnt 16731 (S.C.C.).

(b) Partial summary judgment — emerging burden on the summary judgment motion judge

Even before applying the principles of *Hryniak* concerning partial summary judgment, or in Ontario, *Butera v. Chown, Cairns LLP*[50] (hereinafter "*Butera*") concerning partial summary judgment, it now appears incumbent on the summary judgment motion judge to first determine if the motion can be said to be for partial summary judgment, whether styled that way by the moving party or not.

The Supreme Court of Canada in *Hryniak* provided only *two examples* of partial summary judgment "[60] The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, 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."[51]

Butera defined partial summary judgment as a judgment *not resulting in the disposal of the entire action*, but successful in part: "[35] Lastly, I would observe the obvious, namely, that a motion for partial summary judgment differs from a motion for summary judgment. If the latter is granted, subject to appeals, it results in the disposal of the entire action. In addition, to the extent the motion judge considers it advisable, if the motion for summary judgment is not granted but is successful in part, partial summary judgment may be ordered in that context."[52]

However, recent appellant decisions have considered not only the existence of distinct or independent claims and whether summary judgment is against only one defendant, but also whether there is a counterclaim, third-party claim, an order that actions be tried together, or separate civil or criminal proceedings, when concerning the risk of proceeding with a partial summary judgment. When asking if the motion results in the *disposal of the entire action*, the question is begged: does that include counterclaims, third-party claims, other actions ordered to be tried together with the action, or other civil or criminal actions?

Is the summary judgment motion judge left to determine if there is a risk of inconsistent or duplicative findings (as discussed in the next section of this

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[49] *Ibid.* at para. 29.
[50] *Butera v. Chown, Cairns LLP*, 2017 ONCA 783.
[51] *Hryniak* at para. 60.
[52] *Ibid.* at para. 35.

chapter) without first finding if, in reality, a *partial* summary judgment is sought or contemplated?

Perhaps the safest course on a motion for summary judgment is that the motion judge use a purposive approach to determine if there is a risk of inconsistent findings or duplicative proceedings, and then conclude that the motion is for *partial* summary judgment. But on the recent appellant decisions described above, that is not clear.

(c) Guidelines for partial summary judgment

The courts have articulated emerging burdens on the summary judgment motion, which in some cases require the review of not only the entire record produced on the motion, but also what record would be produced on the remaining issues being sent to trial. This development, where it has occurred, is concerning. This presents an even further burden where there is a counterclaim or third-party claim. It is tantamount to making the summary judgment motion judge a trial judge, at least with respect to the record and issues required to be reviewed before deciding if partial summary judgment can be granted.

(i) Part of the claim

In *Virden Mainline Motor Products Limited v. Murray et al*,[53] the Court of Appeal of Manitoba held, "Although the matter will go to trial on the issue of credibility . . . the length and complexity of the trial could be shortened considerably if the applicability of the limitation clause at article 4.1 had been addressed."[54] On the subject of partial summary judgment, Steel J.A., writing for the Court, stated, "Summary judgment may be granted for part of a claim, as well as for the entire claim. Where possible and where it will shorten or expedite the litigation, that should be done . . . However, the motion judge did not fully deal with the limitation bar to the allegations of breach of contract and negligent misrepresentation. There is no genuine issue for trial in relation to those allegations and summary judgment will issue for that part of the claim.[55]

(ii) Entire claim against one party not partial summary judgment

In *Extreme Venture Partners Fund LLP v. Varma*,[56] the Court of Appeal for Ontario dismissed an appeal of the dismissal of the plaintiff's claim against the

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[53] *Virden Mainline Motor Products Limited v. Murray et al*, 2018 MBCA 82.

[54] *Ibid.* at para. 33.

[55] *Ibid.* at para. 6.

[56] *Extreme Venture Partners Fund LLP v. Varma*, 2019 ONCA 446; see also *Siemon v. Perth Standard Condominium Corporation*, 2020 ONCA 503, where the Court of Appeal for Ontario held that where the balance of claims are dismissed on a motion for summary judgment, then as van Rensburg J.A., in writing for the Court said at para. 39,

respondent, one of the defendants. The grounds argued by the appellant included that this was not a proper case for partial summary judgment. The Court of Appeal held that "This was not a partial summary judgment as the claim against the respondent was dismissed in its entirety. The appellants' claims against the other defendants did proceed to trial but, as the claim against the respondent could be determined on a discrete legal issue pertinent only to the liability of the respondent, the motion judge did not err in dismissing the claim on that basis."[57]

(iii) Entire claim but other related action(s)

In *Way v. Schembri*,[58] the Court of Appeal for Ontario considered an appeal from a summary judgment in one action that had been ordered to be tried together with another action allowed the appeal and set aside the summary judgment. For the purpose of the appeal the Court of Appeal considered it a partial summary judgment. Nordheimer J.A., writing for the Court, stated: "Those concerns regarding partial summary judgment are fully engaged in this case because, as the appellants correctly point out, the two actions are factually intertwined . . . there is the very real possibility that conclusions reached by the trial judge could conflict with the result reached by the motion judge. There is also the possibility that the trial judge will reach a better understanding of the relationships between the parties that would give a more informed view of the meaning and purpose behind [a clause]."[59]

"This was not a case of partial summary judgment and the motion judge's reasons were not deficient." See also *7550111 Canada Inc. v. Charles*, 2020 ONCA 386, additional reasons 2020 CarswellOnt 11057 (C.A.), where the Court of Appeal allowed the appeal for the narrow purpose of addressing calculation error and otherwise dismissed the appeal argued on the grounds that the motion judge erred in granting summary judgment in the face of a counterclaim and third party claim, and because of the possibility of inconsistent findings, the Court if Appeal for Ontario stated, at para. 29, ". . . The well-settled purpose of summary judgment motions is to dispose of any issues that do not require a trial: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 47; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.4(2)." and at paragraph 30, "The prospect of inconsistent findings does not come into play here. It is not clear to us that a counterclaim has actually been filed or that it was in the record before the motion judge. Regardless, whatever determination may be made in relation to the appellant's related claims will not be inconsistent with the motion judge's conclusion . . . Those issues have been finally determined and the appellant is bound by those conclusions."

[57] *Ibid.* at para. 9.

[58] *Way v. Schembri*, 2020 ONCA 691, leave to appeal refused *Gordon Schembri, et al. v. Al Way, et al.*, 2021 CarswellOnt 5281 (S.C.C.), see also *Sullivan and the Province of New Brunswick v. Benoit et al.*, 2019 NBCA 49 (where two actions. "That does not mean to say that partial summary judgment is never appropriate. It may remain the procedure of choice to avoid the risk of inconsistent findings and duplicative proceedings . . ."

[59] *Ibid.* at paragraphs 12 and 15 to 18.

(iv) Refuse stay of counterclaim

In *Fauser Energy Inc. v. Skjerven*,[60] the Court of Appeal for Saskatchewan heard an appeal that ". . . raises classic issues pertaining to the rights of the intermediate parties to a promissory note. One issue concerned the principles to apply when deciding whether to grant a stay of execution of a summary judgment for the amount owing under the note pending the resolution of a counterclaim . . . for unliquidated damages."[61] Jackson J.A., writing for the Court, and upholding the decision not to grant a stay of the counterclaim, held that the chambers judge recognized it was open to the chamber's judge to grant a stay of the counterclaim, but refused the stay, though did not dismiss the counterclaim. Jackson J.A. stated "[67] Thus, his dismissal of the summary judgment application in relation to the counterclaim responded, first, to this jurisdiction's current test to refuse summary judgment, which is whether there is a genuine issue for trial derived from the evidence and, second, to the conflict in the evidence . . . rather than to a direct assessment of the merits of the claim. He was thus entitled to comment on the lack of evidence regarding the merits when he refused the stay on the counterclaim."[62]

(v) Refuse stay pending trial of counterclaim

In *1652620 Ontario Inc. v. Cornerstone Builders Ltd.*,[63] the defendant appealed to the Court of Appeal for Ontario the summary judgment granted to the plaintiff. The motion judge granted summary judgment ". . . finding there was no genuine issue for trial of the monies due under the promissory note. The Court of Appeal found that a stay of the summary judgment should have been granted pending the outcome of the respondent's counterclaim at trial, stating "[8] . . . The motion judge did not give any reasons for his decision not to stay execution on the judgment, other than to make a general reference to the equities without more. The failure to give reasons for his decision was an error in principle . . . [9] The conclusion regarding the defence of equitable set-off is not determinative of the issue whether a stay should be granted. In this case, the two claims are interrelated. They both arise out of the relationship between the parties, both as shareholder and employee . . ."[64]

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[60] *Fauser Energy Inc. v. Skjerven*, 2019 SKCA 81.
[61] *Ibid.* at para. 1.
[62] *Ibid.* at para. 67.
[63] *1652620 Ontario Inc. v. Cornerstone Builders Ltd.*, 2018 ONCA 973.
[64] *Ibid.* at paras. 8 and 9.

(vi) Refuse stay when concurrent criminal proceedings

In *The Director of Criminal Property and Forfeiture v. Gurniak et al*,[65] an appeal to the Court of Appeal of Manitoba arose from an action for civil forfeiture of criminal property; the substance of the appeal being whether a stay should be granted in civil proceedings when there are concurrent criminal proceedings. The motion judge granted the stay, finding exceptional or extraordinary circumstances. The Court of Appeal allowed the appeal from the order of a stay. Steel J.A. found that the motion judge erred in the application of the test for issuing a stay of concurrent civil and criminal proceedings, and that the fact that there was a motion for summary judgment does not take this type of action out of the ordinary. He further stated "[83] Civil and criminal actions are distinct proceedings. There are different parties, with different purposes and different standards of proof . . ."[66]

(vii) One issue — where it is possible that the trial judge ''will develop a fuller appreciation of the relationships and the transactional context than the motions judge . . ."

In *Healthy Lifestyle Medical Group Inc. v. Chand Morningside Plaza Inc.*,[67] the Court of Appeal for Ontario allowed an appeal of a partial summary judgment, set aside the judgment and directed the matter proceed to trial on all issues. The Court of Appeal found that, read generously, the amended statement of defence did plead the defence rejected by the motion judge. On the subject of partial summary judgment the Court of Appeal stated the following: "[9] The motion judge's analysis was sparse and perfunctory, and did not address the full scope of the defences raised. In *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, this court cautioned against partial summary judgment where it is possible that the trial judge ''will develop a fuller appreciation of the relationships and the transactional context than the motions judge" which could risk ''inconsistent findings and substantive injustice" para. 37; see also *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, and *Mason v. Perras Mongenais*, 2018 ONCA 978 . . ." [68]

(viii) One issue — is it intertwined with other issues? Litigating in slices

In *Ferrer v. 589557 B.C. Ltd.*,[69] the Court of Appeal for British Columbia determined that the Chambers judge made no error in finding that the issue of

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[65] *The Director of Criminal Property and Forfeiture v. Gurniak et al*, 2020 MBCA 96.
[66] *Ibid.* at para. 83.
[67] *Healthy Lifestyle Medical Group Inc. v. Chand Morningside Plaza Inc.*, 2019 ONCA 6, additional reasons 2019 CarswellOnt 4574 (C.A.).
[68] *Ibid.* at para. 9.

the applicability and enforceability of the Limitation Clause was appropriately determined on a summary trial. Groberman J.A., writing for the Court stated: "[36] While the judge did not specifically mention it, I would observe that one of the most important considerations in determining whether a single issue should be separated out and determined in a summary trial is the question of whether it is intertwined with other issues. In this case, there is very little connection between the Limitation Clause and other issues in the litigation. [37] The judge stated that she did "not view the summary trial application as litigating in slices". The appellants say that she was wrong in that regard. As I see it, the expression "litigating in slices" is simply a way of describing the disposition of litigation in a sequence of hearings. In that sense, the current proceedings could be described as "litigating in slices", but the description is of no moment. Courts are wary of attempts to split up litigation into independent hearings, but in appropriate cases, they will permit that to occur."[70]

(ix) One Issue — key threshold issue

In *Samborski Environmental Ltd. v. Government of Manitoba*,[71] the defendants moved for summary judgment dismissing the plaintiff's claim. Though the pleadings raised a number of issues, the parties agreed that the validity of a licence was a key threshold issue that should be decided first, the plaintiff having acknowledged that if the licence was invalid, there would be no issue requiring a trial. The motion judge agreed, that to streamline the process, the discrete questions of validity of the licence be determined on the motion for summary judgment. The motion judge determined that the licence was not valid and could not be relied upon to conduct its operation. The Court of Appeal of Manitoba dismissed the appeal.

(x) Where defences not connected to grounds of claims (and observation: before scheduling motion for summary judgment)

In *Brown v. Laurie*,[72] the Court of Appeal for Ontario dismissed the appeal of a partial summary judgment. The respondent moved for summary judgment on his claims in respect of the proceeds and the promissory note, and also sought summary judgment dismissing the counterclaims. The motion judge granted summary judgment declaring that Mr. Brown is entitled to the escrowed proceeds and he dismissed the appellants' counterclaim that they are entitled to the proceeds. However, the motion judge did not grant Mr. Brown summary judgment on the promissory note, but instead, directed a trial of that claim. The

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69 *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83.
70 *Ibid.* at paras. 36 and 37.
71 *Samborski Environmental Ltd. v. Government of Manitoba*, 2021 MBCA 11.
72 *Brown v. Laurie*, 2019 ONCA 175.

appellant argued, *inter alia*, that the motion judge erred in granting judgment on the proceeds claim while directing a trial on the promissory note claim when the two matters are interconnected and not separable. The Court of Appeal disagreed, stating "[23] We disagree. Mr. Brown moved for summary judgment on his entire claim. The motion judge was alive to the risks of granting summary judgment on only part of the claim. He canvassed the factors discussed by this court in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561 at paras. 26 to 35. He concluded that the dangers of duplicative or inconsistent findings did not arise in the circumstances: at para. 63. As a result, he granted partial summary judgment in respect of the Proceeds and directed the claim as to the validity and enforceability of the promissory note to proceed to trial: at para. 72. [24] We see no error in principle in that exercise of discretion by the motion judge. The appellants advanced two defences to resist payment of the promissory note . . . Those defences are not connected to the grounds the appellants advanced for their claim to the Proceeds. In the circumstances, it was open to the motion judge to grant summary judgment only on the claim regarding the Proceeds."[73]

Notwithstanding the decision to dismiss the appeal, the Court of Appeal made the following *observation* regarding motions for partial summary judgment "[25] . . . Before scheduling a summary judgment motion for a claim of that size, we would encourage both counsel and the motions Bench to consider faster and cheaper alternatives for conducting a final adjudication on the merits of the claim. This action required no more than three days for trial. Had that trial taken place a year ago, the parties would not be facing the prospect of further litigation costs following this decision."[74]

(xi) Resolving entire dispute with one party and no overlapping issues

In *Ontario Securities Commission v. Money Gate Mortgage Investment Corporation*,[75] the appellant's appeal to the Court of Appeal for Ontario from a final determination of rights made on a motion for advice and directions in receivership proceedings was dismissed. The appellant argued that the motion judge was not entitled to decide the matter summarily, and that in any event her decision was legally flawed, made on the basis of factual findings that were unavailable on a paper record, and improperly granted what was, in effect, partial summary judgment. The appellant asks us to direct what it says the motion judge should have directed, a trial. Zarnett J.A., writing for the appellate court, concluded that the motion judge did not grant an inappropriate partial

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[73] *Ibid.* at paras. 23 and 24.
[74] *Ibid.* at para. 25.
[75] *Ontario Securities Commission v. Money Gate Mortgage Investment Corporation*, 2020 ONCA 812.

summary judgment, stating: [61] The motion judge's decision resolved the entire dispute between the appellant and the Money Gate receiver concerning the validity of the 254 Mortgage and the Sale Proceeds . . . [62] Nor, in my view, is there a material risk of inconsistent findings even if one were to take into account the appellant's desire to proceed with its action against others . . . [63] The principles that limit the grant of partial summary judgment are aimed at avoiding proceeding in a manner that will not be cost effective, judicious or expeditious because overlapping issues will proceed to trial: *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, 146 O.R. (3d) 135, at para. 14. As I have stated a material risk of inconsistent results is not present. Directing a trial and waiting for the appellant to proceed with its long dormant claim against others would involve delays and would not be cost effective, judicious or expeditious. Nor would it be consistent with the goals of the receivership."[76]

(xii) Resolves issues in counterclaim not in defence, though does not resolve main action

In *1853491 Ontario Inc. v. Regional Waste North Inc.*,[77] the defendants to the counterclaim moved for summary judgment on the counterclaim on the basis that those claims were time barred. The motion judge found that the

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[76] *Ibid.* paras. 59 to 63.

[77] *1853491 Ontario Inc. v. Regional Waste North Inc.*, 2019 ONCA 37; see also *Prominence Resources Inc. v. Zargon Oil & Gas Ltd.*, 2020 ABCA 191, a decision of the Court of Appeal of Alberta, on an appeal where the respondent in a summary judgment application and in the appeal maintained that summary judgment is not appropriate, arguing that the chambers judge correctly identified that the propriety of the transfer was really at the heart of the matter and found that credibility findings were required for him to resolve this issue, argued the record is not suitable for a summary disposition because it will determine evidence that will affect the other issues left for trial . . . in a way that would then tie the hands of the ultimate trier of fact. On that basis, they argue that the chambers judge properly declined to grant summary judgment and dismissed all alternative forms of relief. The Court of Appeal disagreed; at para. 14 stating, "With respect, we disagree. The narrow question of the "propriety of the transfer" from Prominence to Raleigh as posited by the respondents — and apparently accepted by the trial judge — does not adequately frame the issue in context and whether partial summary judgment or other summary disposition is appropriate in the circumstances." and at para. 23 stating: "Moreover, it is helpful to note that even if dismissing an application for summary adjudication, a chambers judge may still be in a position to advance the litigation and may be able to isolate and identify issues that can be tried separately under r 7.1 of the *Alberta Rules of Court*: *Weir-Jones* at para. 49. Indeed, "if it appears that there are aspects of the evidence that preclude a fair adjudication, it would be open to that judge to permit oral evidence, to adjourn the matter, or to take other procedural remedial steps: R. 6.11(1)(g); *Weir-Jones* at para. 46. The chambers application could, if necessary, be converted to and continue as a summary trial: *Weir-Jones* at para. 49.": *Terrigno Investments Inc. v Farrell*, 2019 ABCA 426 at para. 7, [2019] AJ No. 1489.

counterclaim was a separate claim from the respondents' claim in the action and that the respondents to the counterclaim were seeking complete summary judgment on the counterclaim. Moreover, even if the motion could be defined as a partial summary judgment motion, there was a discrete issue in this case: whether the counterclaim was defeated by the passage of the limitation period. The motion judge therefore found that it was an appropriate case for partial summary judgment. On appeal, the appellants argued that the motion judge erred by failing to consider and apply all of the principles from this court's decision in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, and in finding that the counterclaim involved an issue that was separate and discrete from those raised in the main action. The Court of Appeal found that the central issue in this appeal is a narrow one, the duration of the tolling period and was appropriate for summary judgment, partial or otherwise, stating: "[18] Given that the motion judge's finding on the limitation issue completely resolved the counterclaim, we also reject the appellants' submission that this was not an appropriate case for summary judgment, partial or otherwise. [19] We acknowledge that striking the counterclaim does not resolve the main action and also acknowledge that many of the issues the appellants sought to raise in the counterclaim will nonetheless have to be litigated as part of the appellants' defence of that action. Striking the counterclaim does, however, finally resolve issues raised in the counterclaim that are not raised in the defence and will thereby result in a saving of legal costs and trial time."[78]

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[78] *Ibid.* at paras. 18 and 19. See also *Distributions Katrina Inc. v. Enroute Imports Inc.*, 2019 ONCA 441, where the Court of Appeal for Ontario dismissed an appeal from summary judgment on a claim, without set-off or a stay pending the counterclaim, stating that "[5] . . . The normal concerns that arise in relation to granting partial summary judgment do not arise here. No potential for inconsistency has been demonstrated. We decline to interfere with the motion judge's decision to grant judgment on the claim and to decline to stay that judgment."; and see also *Royal Bank of Canada v. Azkia*, 2021 ONCA 89, where the Court of Appeal for Ontario on the appeal of an order for summary judgment for the plaintiff in three separate actions and ordering payment to the plaintiff, dismissing the appellant's counterclaim in one action and granting possession of the subject premises to the plaintiff, dismissed the appeal. See also *Fitzpatrick v. The College of Physical Therapists of Alberta*, 2020 ABCA 164 (C.A.), where the Master partially allowed summary judgment in favour of other respondents, and dismissed the summary judgment application of the current respondents. The chambers judge allowed the summary judgment application of the current respondents on the basis of statutory immunity and limitations defences. The Court of Appeal dismissed the appeal of the current respondents.

(xiii) Risk of overlap in issues — judge must be satisfied affirmatively can be readily bifurcated without causing overlap that could lead to inefficient duplication or a material risk of inconsistent findings or outcomes

In *Service Mold + Aerospace Inc. v. Khalaf*,[79] the Court of Appeal for Ontario allowed an appeal of the defendant bank and set aside the partial summary judgment against it based on strict liability relating to a cheque, but not the plaintiff's claim regarding the payroll claim, and not against the individual defendant. Paciocco J.A., writing for the Court of Appeal for Ontario stated "[14] The principles that guide whether partial summary judgment is appropriate are, however, more complex than those that apply to summary judgment motions generally. In *Hryniak*, at para. 60, Karakatsanis J. recognized that partial summary judgment may "run the risk of duplicative proceedings or inconsistent findings of fact" at trial. There is also the risk that partial summary judgment can frustrate the *Hryniak* objective of using summary judgment to achieve proportionate, timely and affordable justice. If used imprudently, partial summary judgment can cause delay, increase expense, and increase the danger of inconsistent findings at trial made on a more complete record: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at paras. 29-33. These risks, which require careful consideration by motion judges, were known before *Hryniak* and *Butera*, as illustrated by this court's decision in *Corchis v. KPMG Peat Marwick Thorne*, [2002] O.T.C. 475 (C.A.), at para. 3. For this reason, while partial summary judgment has its place, it "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": *Butera* at para. 34, [18] In my view, the motion judge erred in principle when evaluating the risk of overlap in the evidence . . . Her orientation was wrong. In effect, she looked to see whether overlap had been demonstrated. To the contrary, she should not have proceeded to partial summary judgment unless she was satisfied affirmatively that the issues before her could readily be bifurcated without causing overlap that could lead to inefficient duplication or a material risk of inconsistent findings or outcomes . . . [20] More importantly, she gave insufficient weight to the risk of overlap in the evidence relating to the respective limitations defences . . . [23] This case is also illustrative of the delay that partial summary judgment entails. Through no fault of anyone, the summary judgment motion has delayed the trial by close to two years, leaving aside the seven months it has taken to hear the appeal. The motion judge spent over 12 months deliberating in order to write two decisions, a significant expenditure of judicial resources. The delay was predictable and, in my view, not given adequate consideration, particularly when the motion judge came to appreciate after the April 25, 2017 hearing that

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[79] *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369.

the summary judgment motion would require the scheduling, conduct and determination of a mini-trial before the trial itself would move forward."[80]

(xiv) Real risk of inconsistent finding being made in trial of counterclaim and third-party claim (and issues of credibility)

In *Vandenberg v. Wilken*,[81] the appeal arose out of a failed commercial farm real estate transaction that the appellant vendors refused to close because of their allegations of unconscionability, *non est factum*, collusion and conspiracy against the respondent purchasers and third-party real estate agents. The motion judge granted partial summary judgment declaring the agreement of purchase and sale valid, but denied the remedy of specific performance and ordered a trial regarding damages. The Court of Appeal for Ontario agreed with the appellant's submission that the motion judge erred in granting partial summary judgment to the respondents in the main action when there are genuine issues of fact and credibility requiring a trial, and a real risk of inconsistent findings being made in the trial of the counterclaim and third-party claim.

(xv) Improper isolation of issues

In *Temple v. Moorey*,[82] the Court of Appeal for Ontario set aside partial summary judgment that the motion judge had refused to set aside on the basis that the defendant's defence had no merit. The Court of Appel set aside the partial summary judgment because ". . . the motion judge erred in isolating *non est factum* and equitable set-off as the only possible defences when the pleadings and affidavits raised the legitimacy of the promissory notes as a possible defence."[83]

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[80] *Ibid*. at paras. 13 to 23.

[81] *Vandenberg v. Wilken*, 2019 ONCA 262, leave to appeal refused *Pieter Adriaan Vandenberg, et al. v. Robert Wilken, et al.*, 2019 CarswellOnt 19988 (S.C.C.), but see *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, additional reasons 2019 CarswellOnt 14845 (C.A.), while permitting an appeal regarding the notice period in a wrongful dismissal action, the Court of Appeal for Ontario, proceeded, without comment, that both parties had each moved for partial summary judgment on two issues regarding the calculation of damages.

[82] *Temple v. Moorey*, 2020 ONCA 148.

[83] *Ibid*. at para. 2.

(xvi) Factually complex with multiple allegations — whether there is an inherent risk of inconsistent findings (even if parties agree partial summary judgment is appropriate)

In *Leitch v. Novac*,[84] the appellant had commenced an application seeking a divorce and corollary relief from her husband, the respondent. She later amended her application to seek damages in conspiracy from the respondent, and another defendant, certain family trusts, and a related corporation, alleging that the respondents had conspired to keep money out of the husband, respondent's hands specifically for the purpose of reducing her family law entitlements.

The respondents to the conspiracy claim (apart from the husband) brought a motion for partial summary judgment. In her responding motion, the appellant requested summary judgment on the conspiracy claim declaring the existence of the conspiracy and that damages be assessed at trial. Partial summary judgment was granted, dismissing the plaintiff's conspiracy claim as not raising a genuine issue requiring trial. The motion judge concluded that while the appellant could not succeed in her conspiracy claim, she could still pursue at trial a claim to impute additional income to her husband for the purpose of determining support.

The appellant appealed to the Court of Appeal for Ontario from the order granting partial summary judgment. Hourigan J.A., writing for the Court of Appeal explained "This is a factually complex case, with multiple allegations"[85] and that "In summary, the motion judge erred in law by bifurcating the issues and in her analysis of the tort of conspiracy. She also made a palpable and overriding error of fact about critical evidence that Jennifer relied on in support of her conspiracy claim and did not advert to other important evidence in her analysis."[86] Hourigan J.A.'s analysis of whether the motion judge should have ordered partial summary judgment illustrates the material risk of inconsistent outcomes, stating "[31] At no point does the motion judge engage with the question of whether bifurcating the issues is appropriate. Specifically, the reasons are conspicuously silent as to whether there is an inherent risk here of inconsistent findings. I appreciate that the parties both took the position before her that partial summary judgment was appropriate. However, the motion judge was still required to turn her mind to the possibility of a material risk of inconsistent outcomes . . . [32] Jennifer asserts that the risk of inconsistent

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[84] *Leitch v. Novac*, 2020 ONCA 257, additional reasons 2020 CarswellOnt 11050 (C.A.), leave to appeal refused *Michael Novac, Nelly Novac, Sonco Group Inc., Novac 2011 Family Trust and Novac Family Trust (2013) v. Jennifer Ann Leitch*, 2020 CarswellOnt 16731 (S.C.C.).

[85] *Ibid.* at para. 6.

[86] *Ibid.* at para. 4.

outcomes here is genuine because "the factual footprint of the conspiracy claim is substantially the same as the support issues that remain for trial."[87] The appeal was allowed, the partial summary judgment order was set aside, and it was ordered that the case proceed to trial before a different judge.

(xvii) Disposes of entire action against one party

(A) No real risk of duplicative proceedings or inconsistent factual finding

In *La Rose Bakery 2000 Inc. v. Intact Insurance Company*,[88] the appellant, plaintiff appeals from the summary judgment dismissing its action against one defendant insurer seeking coverage for losses resulting from an ice storm. The Court of Appeal for Ontario rejected the argument of the appellant, plaintiff that the motion judge erred by disregarding the principles relating to partial summary judgment described in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, and its progeny. The Court of Appeal stated "[10] The motion disposed of the entire action between the appellant and Intact . . . There was no real risk of duplicative proceedings or inconsistent factual findings. The action was readily bifurcated and the cost of the litigation would be reduced, not increased. Furthermore, although not before the motion judge, Unity had agreed to consent to a dismissal of its cross-claim against Intact based on the outcome of the summary judgment motion. Summary judgment in favour of Intact was appropriate in these circumstances."[89]

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87 *Ibid.* at paras. 29 to 33.

88 *La Rose Bakery 2000 Inc. v. Intact Insurance Company*, 2019 ONCA 850. See also *Hydro Hawkesbury v. ABB AB*, 2020 ONCA 54, where the Court of Appeal for Ontario dismissed the appeal of the respondent, one of the defendants against whom the motion judge granted summary judgment on the plaintiff's contract claim, that had argued on the motion and on appeal, that "that granting summary judgment would not serve the overall interest of justice in that it would prejudice the appellant in its pursuit of its claim against [its co-defendant.]" the Court of Appeal stated at para. 4, "We do not agree with this submission. The summary judgment proceedings have ended the litigation as far as Hydro Hawkesbury is concerned. Hydro Hawkesbury abandoned its tort claims as part of the order made in the summary judgment proceedings. There is no risk that findings of fact in respect of the appellant's contractual relationship with ABB will be inconsistent with any of the findings that were made in the summary judgment proceedings. The motion judge addressed the contractual relationship as it existed between Hydro Hawkesbury and the appellant only. The contractual relationship between the appellant and ABB involves a separate factual inquiry."

89 *Ibid.* at para. 10.

(B) Poses a unique complication — but all questions unaffected by summary judgment

See also *Babin v. C.J.M. Dieppe Investments Ltd. and TG 378 Gauvin Ltd. and Sood*,[90] where the Court of Appeal of New Brunswick upheld the motion judge's decision dismissing, by summary judgment, the plaintiff's claims against one of the defendants finding that the motion judge did not err in finding there was no duty of care and did not err in exercising his discretion in favour of granting that there is no genuine issue requiring a trial involving these parties. Richard C.J.N.B., writing for the Court of Appeal, stated "[38] . . . summary judgment, poses a unique complication. Indeed, Karakatsanis J. recognizes this problem in *Hryniak* . . ."; [39] Consideration need therefore be given to the appropriateness of a summary judgment dismissing the action against one or more of the parties in the case where other parties will nevertheless proceed to trial.; and [42] . . . The questions of whether there was a duty of care by Mr. Babin, and, if so, whether there was a breach of the standard of care, and, if any liability attaches to him, the degree of contributory negligence, if any, are all questions that are unaffected by the summary judgment. The risk of duplicative or inconsistent findings is therefore non-existent."[91]

(xviii) Bifurcation of liability and reference for damages on summary judgment — minimal risk of inconsistent finding of facts (recommended triage process)

In *Malik v. Attia*,[92] the parties entered into separate agreements for the purchase and sale of two abutting residential properties, but the agreements did not close because the appellant purchasers did not have the funds to pay the purchase prices. The seller sought and obtained partial summary judgment declaring that the buyers had breached the agreements. The motion judge ordered the issues of damages and the forfeiture of the deposits to proceed to trial. The buyers appealed to the Court of Appeal for Ontario, on the grounds, *inter alia*, that the motion judge erred by granting partial summary judgment where it was inappropriate to bifurcate the claim, given the nature of the issues and the risk of inconsistent findings of fact. Brown J.A., writing for the Court stated the following concerning the risk of inconsistent findings: "[60] I am not persuaded by this submission. On the issues as framed by the pleadings and the affidavit evidence, the risk of inconsistent findings of fact on the issues of liability, on the one hand, and the issues of forfeiture and damages, on the other,

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[90] *Babin v. C.J.M. Dieppe Investments Ltd. and TG 378 Gauvin Ltd. and Sood*, 2019 NBCA 44.

[91] *Ibid.* at paras. 38, 39 and 42.

[92] *Malik v. Attia*, 2020 ONCA 787.

is minimal."[93] Brown J.A., then considered other matters a motion judge must consider when considering a motion for partial summary judgment, "[61] . . . Reduced to its essence, the decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 promoted summary judgment as a procedural tool that offers the prospect, when used in the right circumstances, to provide litigants with timely and affordable access to the civil court system: at paras. 2-5. Given that simple objective, before embarking on hearing a motion for partial summary judgment a motion judge must determine whether, in the circumstances, partial summary judgment will achieve the objectives of proportionate, timely, and affordable justice or, instead, cause delay and increase expense: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at paras. 29-34; *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, 146 O.R. (3d) 135, at para. 14."[94]

Brown J.A. stated "[62] When faced with a request to hear a motion for partial summary judgment, a motion judge should make three simple requests of counsel or the parties: (i) Demonstrate that dividing the determination of this case into several parts will prove cheaper for the parties; (ii) Show how partial summary judgment will get the parties' case in and out of the court system more quickly; (iii) Establish how partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case.[95] However, the Court of Appeal for Ontario declined to intervene, and dismissed the appeal, with Brown J.A .explaining that "[67] To set aside the judgment solely on the basis that the process added cost and delay would, in its own turn, only add more cost and delay."[96]

Brown J.A. provided the following guidance to motion judges faced with motions for partial summary judgment: "[68] I appreciate that judicial time for civil matters is stretched thin in most regions of this province. But for summary judgment to achieve its stated objective — faster and cheaper access to a final adjudication on the merits — triage processes must be put in place so that judges end up determining a case once and for all on the merits, instead of slicing determinations into a series of partial summary judgments."[97]

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93 *Ibid.* at para. 60.

94 *Ibid.* at para. 61.

95 *Ibid.* at para. 62; see also *Avedian v. Enbridge Gas Distribution Inc. (Enbridge Gas Distribution)*, 2021 ONCA 361, where B.W. Miller J.A., writing for the Court, stated that in the circumstances of the action, the motion ought not to have been allowed to proceed after the trial had been scheduled, noting at paragraph 14 that "In the result, the motion for partial summary judgment added unnecessary delay, expense, and the squandering of available court time . . ."; also *Jastek Master Builder 2004 Inc. v Holmes*, 2021 SKCA 57, on application to pre-empt the plaintiff from proceeding with a summary judgment application.

96 *Ibid.* at para. 67.

97 *Ibid.* at para. 68; see also the decision of the Federal Court of Appeal in *ViiV Healthcare Company v. Gilead Sciences Canada, Inc.*, 2021 FCA 122 considering when it is

(xix) Record not allow fair and just determination regarding damages

In *SRG Takamiya Co Ltd. v. 58376 Alberta Ltd.*, [98] the Court of Appeal of Alberta upheld the conclusion of the master and chambers judge that it was fair and just on the record to award summary judgment to the respondent for breach of contract, but the Court of Appeal held that the record does not allow for a fair and just determination regarding the respondent's damages, and, as a result, a trial is necessary. The Court of Appeal allowed the appeal in part and ordered that the matter be returned to the court below for trial on damages arising from the breach of contract, stating in its analysis: "[29] Based on our review of the record, it appears that neither party put its best foot forward . . ."[99]

(xx) Effect of summary judgment is to preclude all further evidence or argument on any issue that is finally determined

In *Energizer Brands, LLC v. The Gillette Company*,[100] the principal issue raised on appeal and cross-appeal to the Federal Court of Appeal is whether the Federal Court erred by granting summary judgment dismissing aspects of the appellants claim, while failing to dismiss other aspects of the claim, thereby granting the motion for summary judgment in part. Dawson J.A., writing for the Court, allowing the appeal of the summary judgment in part, stated: "[51] . . . I would simply add that while a court must always be attentive to the proper scope of motions before it, particular attention is required on a motion for summary judgment where the effect of granting judgment is to preclude all further evidence or argument on any issue that is finally determined."[101]

"appropriate" to bring a motion for summary judgment, and when the court can intervene on a motion to quash a motion for summary judgment, Stratas J.A. writing for the Court, at paragraph 20 said, "The operative principles, above, suggest that in rare circumstances motions to quash or adjourn a motion can be brought. When brought early and dealt with quickly before time is wasted and the resources of the Court and the parties are squandered, they can proactively advance the objectives of Rule 3 and stop harmfullitigation conduct in its tracks . . ."

98 *SRG Takamiya Co. Ltd. v. 58376 Alberta Ltd.*, 2020 ABCA 217; see also *Elkow v. Sana*, 2020 ABCA 350, where the appellant appealed the assessment of damages made against her after she was found to have defamed the respondent. The Court of Appeal observed at para. 5 that "The judge who determined liability on these allegations concluded that summary judgment could not be granted on some of the other allegations, as there were triable issues and possible defences. While those other allegations could have proceeded to trial, the respondent has indicated that she does not intend to pursue them further."

99 *Ibid.* at para. 29.

100 *Energizer Brands, LLC v. The Gillette Company*, 2020 FCA 49.

101 *Ibid.* at para. 51.

(xxi) Butera — pitfalls associated with partial summary judgment. Bifurcation can result in absence of precision in the dispositions of the claims

In *Toronto-Dominion Bank v. 1633092 Ontario Ltd.*,[102] the Court of Appeal for Ontario heard the appeal and cross-appeal of the plaintiff and the defendants of the judgment arising from summary judgment motions brought by both. The plaintiff argued that the judgment against it for negligent breach of contract should not be in favour of all the defendants, and that the plaintiff's claim for an outstanding amount should be granted to the plaintiff immediately with possession of the security. The Court of Appeal allowed the plaintiff's appeal in part, so that it declared that the plaintiff negligently breached its contract with one named defendant, and otherwise dismissed the appeal. In dealing with the cross-appeal, the Court of Appeal addressed the perils associated with partial summary judgment motions and bifurcation, stating: "[30] this court has frequently raised the pitfalls associated with partial summary judgment motions and we do not propose to repeat them here. See *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, and *Mason v. Perras Mongenais*, 2018 ONCA 978. Additionally, bifurcation of proceedings sometimes results in an absence of precision in the disposition of the claims."[103]

(xxii) Other claims provide background and context of the claim, but involve separate issues, not intertwined claims, that would not lead to inconsistent results

In *M.W. v. Halton (Police Services Board)*,[104] the Ontario Court of Appeal rejected an argued ground for appeal asserted by the plaintiff that the motion judge erred in granting partial summary judgment without considering whether it was appropriate in the context of the litigation as a whole, arguing that the determination of whether the plaintiff was unlawfully detained in February 2015 is also relevant to his tort claims in respect of the March 2016 arrest, and that for this reason, all of the claims should have been allowed to continue. The Court of Appeal disagreed and held that this was an appropriate case for partial summary judgment, stating "[31] We disagree . . . The March 2016 claims, which were decided on the basis of reasonable and probable grounds for arrest, could be determined separately from the February 2015 claims. This is not a case where intertwined claims could lead to inconsistent results, as was the case in *Baywood Homes Partnership v. Haditaghi,* 2014 ONCA 450, 120 O.R. (3d) 438, at paras.

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[102] *Toronto-Dominion Bank v. 1633092 Ontario Ltd.*, 2020 ONCA 452, additional reasons 2021 CarswellOnt 24 (C.A.).
[103] *Ibid.* at para. 30.
[104] *M.W. v. Halton (Police Services Board)*, 2020 ONCA 463.

37-38 and *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 418 D.L.R. (4th) 657, at para. 38 . . . [3] Although the events of February 2015 provided some background and context for what occurred in March 2016, the tort and Charter claims alleged in relation to the events of February 2015 involve separate issues that do not depend on a finding of reasonable and probable grounds for arrest . . ."

(xxiii) Butera — rare procedure (and observation regarding Hryniak)

In *Mason v. Perras Mongenais*,[105] the Court of Appeal for Ontario heard an appeal by the plaintiff from the summary judgment by the motion judge that dismissed the plaintiff's claim for negligence against one defendant, the law firm. Nordheimer J.A. found that the determination to find one defendant was liable cannot be determined summarily. On the issue of partial summary judgment Nordheimer J.A. stated: [22] In my view, the motion judge erred in principle in granting partial summary judgment, in the context of this litigation as a whole. In doing so, the motion judge failed to heed the advice given by this court in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, about the risks associated with granting partial summary judgment. Those risks were repeated in this court's decision in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561. As Pepall J.A. said in *Butera*, at para. 34: 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. The motion judge stated that "Granting summary judgment saves little evidence or time at trial."[106]

The appeal was allowed and the summary judgment was set aside. Nordheimer J.A. stated the following regarding the risk of inconsistent findings at trial, and his conclusion that "there is nothing in *Hryniak* that suggests that trials are now to be viewed as the resolution option of last resort. Put simply, summary judgment remains the exception, not the rule."[107], "[41] . . . I note, with some concern, what appears to be an effort by the motion judge (paras. 23 to 30) to isolate the decision in *Butera* and thus apparently limit its precedential effect. If that was his intention, then it was an inappropriate effort. *Butera* addresses, in a comprehensive fashion, the problems that arise when partial summary judgment is sought. Indeed, the decision here invokes all of the concerns identified in *Butera* in that respect, including delay, added expense, the

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[105] *Mason v. Perras Mongenais*, 2018 ONCA 978.

[106] *Ibid.* at para. 39, quoting para. 35 of order of Justice F. L. Myers of the Superior Court of Justice, dated March 6, 2018, with reasons reported at 2018 ONSC 1477 (S.C.J.), reversed 2018 CarswellOnt 20502 (C.A.).

[107] *Ibid.* at para. 44.

unproductive use of scarce judicial resources, and the reality of a limited record . . . [43] Before concluding, I would add one further observation. The motion judge spent considerable effort in his reasons describing what he believed to be the "culture shift" mandated by the decision in *Hryniak*. In particular, he appears to adopt the view that, not only are trials not the preferred method for the resolution of claims, they should be viewed as the option of last resort . . . [44] With respect, the culture shift referenced in *Hryniak* is not as dramatic or as radical as the motion judge would have it. The shift recommended by *Hryniak* was away from the very restrictive use of summary judgment that had developed, to a more expansive application of the summary judgment procedure. However, nothing in *Hryniak* detracts from the overriding principle that summary judgment is only appropriate where it leads to "a fair process and just adjudication": *Hryniak* at para. 33. Certainly there is nothing in *Hryniak* that suggests that trials are now to be viewed as the resolution option of last resort. Put simply, summary judgment remains the exception, not the rule."[108]

3. Fact Finding[109]

(a) Difficult issues and material facts in dispute *versus* not factually or legally complex

The Court of Appeal of Alberta in *Alberta Finance & Mortgage Corporation v. Prasad*,[110] dismissed an appeal from the decision of the chambers judge who reversed the decision of a master who granted summary judgment on a claim for conspiracy, breach of fiduciary duty and appropriation of corporate opportunities, having concluded that "there were conflicts in the evidence, and uncertainties in the record that precluded a fair and just summary adjudication."[111] Slatter J.A., writing for the Court of Appeal concluded that "[2] This record discloses difficult issues about the existence or breach of fiduciary duties, about the subjective intent of the respondent, about whether a director who financed the disputed transaction had any obligation to provide that financing to the insolvent contractor, whether the corporate veil should be pierced, and whether any damages have resulted in any event. The appellant may be able to prove the claim at trial, but the dispute is not suitable for summary adjudication because the material facts are still in dispute."

By way of contrast, in *North Portage Development Corp. v. Cityscape Residence Corp.*,[112] the Court of Appeal of Manitoba dismissed an appeal of a

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[108] *Ibid.* at *paras.* 40 to 44.
[109] See also *Hryniak, ARCL-2018*, pages 191-198.
[110] *Alberta Finance & Mortgage Corporation v. Prasad*, 2019 ABCA 4.
[111] *Ibid.* at para. 1.
[112] *North Portage Development Corp. v. Cityscape Residence Corp.*, 2019 MBCA 36.

summary judgment granting the plaintiff's claim for a declaration that no rent was payable to the defendants under the terms of a sublease and dismissing the defendant's counterclaim. The defendant appealed, asserting a number of grounds for appeal, including that the motion judge failed to order a trial on the issue of the interpretation of a sublease. Lemaistre J.A., writing for the Court of Appeal, stated "[20] The matter was not factually or legally complex and the motion judge found that no further evidence was necessary to determine the meaning and effect of article 4.01 of the sublease. We see no material error or injustice in the motion judge's decision warranting appellate intervention."[113]

(b) Factual matrix — only peripherally involved in other litigation

In *All-Terrain Track Sales and Services Ltd. v. 798839*,[114] the appellants are judgment creditors. They sued the respondent asserting that it had successfully exercised an option contained in a joint venture agreement to acquire an interest in a mining development. The summary judgment motion judge concluded that the party had not satisfied contractual prerequisites for that acquisition of an interest. The appellant argues that the motion judge erred in failing to have regard to the *factual matrix* surrounding the formation of the contract. The Court of Appeal for Ontario disagreed and dismissed the appeal. The Court of Appeal stated: "[19] The appellants focus on the factual findings made in other litigation . . . argue that the motion judge somehow failed to have sufficient regard to other findings made in that litigation. [20] We do not agree. The respondent was only peripherally involved in the other litigation and was not a party to the four contracts interpreted in that litigation. The Pardee joint venture agreement with 39 was not interpreted in that litigation."[115]

(c) Factual matrix — a proper exercise in construction

In *CMT et al. v. Government of PEI et al.*,[116] the Prince Edward Island Court of Appeal dismissed the plaintiffs' appeal from the summary judgment in favor of the defendants, except for one ground of appeal which the Court allowed. Specifically, in regards to the claim by the plaintiff 764 against Government for breach of the MOU, the Court allowed the appeal, set aside the order granting summary judgment and striking the statement of claim, and reinstated the claim. Jenkins C.J.P.E.I., writing for the Court of Appeal, stated "In general terms, the determination that there was no genuine issue requiring a trial on breach of contract is dependent on an exercise in contractual interpretation that was not performed, and the exercise as performed employed an inapplicable rule of construction. The MOU term "financial services centre" was interpreted without

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[113] *Ibid.* at paras. 19 and 20.
[114] *All-Terrain Track Sales and Services Ltd. v. 798839*, 2020 ONCA 129.
[115] *Ibid.* at paras. 19 and 20.
[116] *CMT et al. v. Government of PEI et al.*, 2020 PECA 12.

consideration of the surrounding factual matrix and by instead resorting to the *contra proferentem* rule."[117]

4. Existing Record[118]

(a) Insufficient record with a critical factual void

In *Swampillai v. Royal & Sun Alliance Insurance Company of Canada*,[119] the appellant employer appealed the dismissal of its motion for summary judgment to dismiss the respondent's action for long-term disability to the Court of Appeal for Ontario. The appeal was granted and the Court of Appeal referred the issues of unconscionability and enforceability of the release for determination at trial. The Court of Appeal stated the following about the evidentiary record before the motion judge: "[7] In our view, the motion judge erred by finding unconscionability based on the record before him on summary judgment. In the circumstances of this case, the issue of whether the release is unconscionable and therefore unenforceable is a genuine issue requiring a trial. We say this for two reasons. [8] First, the record before the motion judge was insufficient to permit him to determine that the severance transaction in which the release was signed reached the high threshold of "grossly unfair and improvident" because it included the release of the respondent's long-term disability claim . . . The absence of any information in the record about the appeal proceedings or the potential merit of those proceedings left a critical factual void. Without that information, it is difficult to know the respondent's risk in giving up his entitlement to a claim for long-term disability benefits or whether the admittedly enhanced severance adequately compensated for what may have been released. In other words, there was insufficient information against which the fairness of the transaction could be considered . . ."[120]

(b) Court is free to draw its own factual and legal conclusions [having regard to] the evidence before it

In *Goyetche et al. v. International Union of Operating Engineers et al.*,[121] the Court of Appeal of New Brunswick upheld the motion judge's disposition on the basis that the respondents established there is no genuine merits-based issue requiring a trial. Drapeau J.A. for the Court of Appeal, stated "[47] In applying the test under Rule 22 to a case like the present one, the court must determine what the correct outcome of the sought-after grievance would have been, having regard to the pertinent terms of the Collective Agreements and the Pension Plan,

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[117] *Ibid.* at para. 20.
[118] See also *Hryniak, ARCL-2018* at pages 199-200.
[119] *Swampillai v. Royal & Sun Alliance Insurance Company of Canada*, 2019 ONCA 201.
[120] *Ibid.* at paras. 7 and 8.
[121] *Goyetche et al. v. International Union of Operating Engineers et al.*, 2019 NBCA 16.

and adjudicate on that basis. As the appellants point out in their Supplementary Submission, "in determining the correct outcome of the sought-after grievance, the Court is free to draw its own factual and legal conclusions [having regard to] the evidence before it."[122]

5. New Powers[123]

(a) Fact finding powers are discretionary — different motion judge might have heard *viva voce* evidence

In *Rivas v. Milionis*,[124] the appellants appeal a summary judgment granted by the motion judge in favour of the respondent in which the motion judge found that there were no monies due and owing under a mortgage. The central issue before the motion judge was whether the monies provided by the appellants to pay off the conventional mortgage were a gift or a loan. The Ontario Court of Appeal stated that the motion judge deployed the use of the expanded fact-finding powers rather than requiring a trial. The Court of Appeal stated "[11] In reaching his conclusion, the motion judge said, at para. 56: Having considered the evidence submitted by the parties, I am satisfied that I cannot fairly resolve the matter on the contested record alone and that it is fair and appropriate to use the expanded fact-finding powers rather than requiring a trial or mini-trial on the issue of whether the transfers were intended to be loans or gifts; [12] In making this statement, we take it that the motion judge was satisfied that it was fair for him to go beyond the written record to weigh the evidence, evaluate credibility and draw inferences from the cross-examinations, to make the factual findings that he did. This was not a case where there was any viva voce evidence heard through a mini-trial or the like. [13] While other judges might have chosen to hear directly from the parties before making the factual findings that the motion judge did here, we cannot say that the failure to do so in this case represents an error in principle that would warrant interference by this court."

(b) British Columbia — summary judgment is a limited review and consideration of evidence to determine if moving party is bound to lose or no chance of success, without weighing evidence, which is available only on summary trial

The reasons of Bauman C.J. in the decision of the Court of Appeal for British Columbia in *Beach Estate v. Beach*[125] illustrated the difference between, *inter ali*a, a summary judgment motion and a summary trial in relation to the judge's

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[122] *Ibid.* at para. 47.
[123] See also *Hryniak, ARCL-2018* at pages 200-202.
[124] *Rivas v. Milionis*, 2018 ONCA 845.
[125] *Beach Estate v. Beach*, 2019 BCCA 277.

power to weigh evidence "[48] . . . Rule 9-6 is a challenge on a limited review of evidence. A defendant can succeed on a Rule 9-6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case: . . . Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Canada v. Lameman*, 2008 SCC 14 at paras. 10—11. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *B & L Holdings Inc.* at para. 46, quoting *Progressive Construction Ltd.* at 335.; [49] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial: *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is incontrovertible: any further weighing may only be done in a trial: *Tran v. Le*, 2017 BCCA 222; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 8-12 . . ."[126]

(c) Saskatchewan — treatment of expert opinion evidence on summary judgment motion

In *Hess v. Thomas Estate*,[127] the chamber's judge granted summary judgment for the respondent, refusing to strike two expert opinions, finding that the limitation period and unconscionability issues suitable for summary determination, but not the capacity issue, and that limitation period had not expired and the 2010 lease void for unconscionability. In addressing the issue of whether the chambers judge erred by refusing to strike portions of the expert affidavits, Barrington-Foote J.A., writing for the Court of Appeal for Saskatchewan, setting aside the summary judgment, considered the threshold requirements for the admission of expert evidence, including *R v Mohan* [1994] 2 SCR 9 at paras 17-32 *[Mohan]* and *White Burgess Langille Inman v Abbott and Haliburton Company Inc.*, 2015 SCC 23 at para. 19, [2015] 2 SCR 182 [*White Burgess*] "[36] As Cromwell J. noted, "different considerations may arise under different rules". In Saskatchewan, there are different rules. A judge hearing an application for summary judgment can weigh evidence, evaluate credibility and draw inferences. In this province, a judge hearing a summary judgment application first decides if there is a genuine issue for trial: *Tchozewski v Lamontagne*, 2014 SKQB 71 at para 30, [2014] 7 WWR 397. That decision must be based solely on the admissible evidence before the court. Decisions as to the

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[126] *Ibid.* at para. 48.
[127] *Hess v. Thomas Estate*, 2019 SKCA 26.

admissibility of evidence should accordingly be made *before* the judge determines if there is a genuine issue for trial. When deciding whether to admit an expert opinion, a judge should first determine threshold reliability and if the opinion meets that threshold, should undertake the second step analysis. In doing so, they should, to the extent necessary in light of the nature of the opinion and the other evidence, weigh the evidence, evaluate credibility and draw inferences."[128]

(d) New Brunswick

New Brunswick — no necessity to make findings of fact

In *CG Group Ltd. v. Girouard et al.*,[129] the Court of Appeal of New Brunswick allowed the appeal and set aside the motion judge's decision not granting summary judgment and revoking the Certificate of Pending Litigation. Quigg J.A., writing for the Court of Appeal, stated "[122] In my view, the motion was the appropriate mechanism to reach a fair and just determination on the merits as there was no necessity to make findings of fact. This Court can apply the law to the facts. This is a proportionate, more expeditious and the least expensive means to achieve a just result."[130]

(e) Prince Edward Island

Change to Rules — motions judge may now weigh the evidence, evaluate the credibility of a deponent, and may draw any reasonable inference from the evidence

In *Taha & Taha v. National Bank*,[131] the Prince Edward Island Court of Appeal dismissed the appellant's appeal from an order granting the National Bank of Canada summary judgment regarding a mortgage debt. Murphy J.A. for the Court of Appeal, stated, "[34] The most significant change to the rule is that previously a motions judge on a summary judgment motion was precluded from weighing the evidence, assessing credibility, and drawing inferences of fact. Such powers were previously reserved for the trial judge. The amended Rule 20.04(1) requires the Court to be satisfied there is no genuine issue '*requiring*' a trial as opposed to a genuine issue '*for trial*.' In determining whether there is a genuine issue requiring a trial pursuant to Rule 20.04(5), the motions judge is to consider the evidence submitted by the parties. Unless it is in the interest of justice for such powers to be exercised only at a trial, the motions judge may weigh the evidence, evaluate the credibility of a deponent, and may draw any reasonable inference from the evidence."[132]

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[128] *Ibid.* at paras. 35 and 36.
[129] *CG Group Ltd. v. Girouard et al.*, 2018 NBCA 59, see also *Robson v. Canadian Union of Public Employees, Local 3339*, 2019 NBCA 55.
[130] *Ibid.* at para. 122.
[131] *Taha & Taha v. National Bank*, 2020 PECA 4.
[132] *Ibid.* at para. 34.

(f) Nova Scotia

Real Chance of Success

In *SystemCare Cleaning and Restoration Limited v. Kaehler*,[133] the Nova Scotia Court of Appeal allowed the appeal from a dismissal of a summary judgment motion and ordered that summary judgment be issued. Bourgeois J.A. for the Court of Appeal stated, "[34] In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to Rule 13.04 . . . 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law? 2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact? 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success? 4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law? 5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?"[134]

6. Evaluating Credibility[135]

(a) Qualitative approach

(i) Conflict — real or apparent? Hard look to determine if credibility issue is genuine, or really a simple denial. Summary judgment not to determine serious and legitimate issues of credibility

The Court of Appeal of Manitoba in *Virden Mainline Motor Products Limited v. Murray et al*,[136] allowed an appeal in part, from the decision of the motion judge to dismiss the motion for summary judgment of one of the defendants on the grounds that with respect to the claims "there truly are challenging issues regarding credibility in this case" and held that these issues of credibility were best left for trial. Steele J.A., writing for the Court of Appeal, reviewed the law with respect to summary judgment in Manitoba, as follows "[18] The law with respect to summary judgment in Manitoba is equally well known. It is a two-step test. The test is the same regardless of whether the moving party is the plaintiff or the defendant. The moving party must demonstrate that he has made out a prima facie case. If the moving party is the defendant, as it is here, he must prove, on a prima facie basis, that the plaintiff's action should fail. If he does so,

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[133] *SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29.
[134] *Ibid.* at para. 34.
[135] See also *Hryniak, ARCL-2018* at pages 202-211.
[136] *Virden Mainline Motor Products Limited v. Murray et al*, 2018 MBCA 82.

then the onus shifts to the responding party to show that there is a genuine issue for trial (see *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61 at paras 13-14; and *Shachtay v Shachtay*, 2013 MBCA 17 at para 7)."[137]

On the issue of credibility, Steele J.A. stated: "[19] A motion for summary judgment which is based on affidavit evidence is not the forum in which a court ought to determine serious and legitimate issues of credibility; [20] That said, the court must be careful not to find issues of credibility where none exist. Proportionality requires that a trial not be ordered unless it is necessary in the circumstances. The motion judge must take a hard look at the evidence to ensure that the credibility issues are genuine. Sometimes, evidence that presents as a credibility issue is really a simple denial. Sometimes, the evidence is so overbalanced in one direction that "the credibility issue evaporates" (*Heritage Electric Ltd et al v Sterling O & G International Corporation et al*, 2017 MBCA 85 at para 16. More recently, see *Brotherston v Christiansen et al*, 2018 MBCA 70)."[138]

(ii) While significant differences in the evidence, could be decided

The Court of Appeal of Manitoba in *Aguiar v. 5026113 et al*,[139] upheld the order made by the motion judge on a motion for summary judgment brought by the plaintiff/respondent to remove encumbrances filed against the title to her home by the defendant. Chartier C.J.M., writing for the Court stated that "[4] . . . from his reasons, it is clear that the motion judge was very much alive to the defendants' argument that, because of the parties' different versions of events, this case should not be determined by way of summary judgment. The motion judge rejected this argument. He found that, while there were significant differences in the evidence with respect to the plaintiff's allegations, this was not the case with respect to the evidence on whether there had been compliance with the agreements entered into between the parties and what their impact would be. The motion judge decided that this case could be determined by way of summary judgment. Key to his decision was a favourable assumption he made in favour of the defendants."

(iii) Not any serious issues of credibility in respondent's evidence

See also *Gupta v. Canada*,[140] in which an appeal was heard by the Federal Court of Appeal from a motion for summary judgment put forward by the respondent where the appellant's action for damages was dismissed in its entirety. Boivin J.A. writing for the Court stated, "[26] Upon carefully reviewing

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[137] *Ibid*. at para. 18.
[138] *Ibid*. at para. 19.
[139] *Manitoba in Aguiar v. 5026113 et al*, 2019 MBCA 47.
[140] *Gupta v. Canada*, 2021 FCA 31.

the evidence, the Federal Court Judge found that the appellant had not presented proof of the torts . . . and that the evidence provided did not support his claims." Consequently, the Federal Court judge held that no genuine issue for trial existed as the appellant had not established the material facts underlying his allegations of misfeasance and conspiracy. The Federal Court judge further ruled that the appellant had not raised any serious issues of credibility in the respondent's evidence that would require a trial.[141]

(b) Credibility analysis and evaluation

(i) Significant credibility issues not appropriate for summary judgment

In *Monk v. Farmers' Mutual Insurance Company (Lindsay)*,[142] the Court of Appeal for Ontario dismissed an appeal and cross-appeal following trial. In writing for the Court, Brown J.A. reviewed the history of the action, including that the respondent had been successful on their motion for summary judgment, but that the Court of Appeal for Ontario had set aside the summary judgment. A further motion for summary judgment was brought. The motion judge released supplementary reasons for the summary judgment motion stating that the limitation period issue and the claim of breach of fiduciary duty against Muskoka raised significant credibility issues that were not appropriate to decide by way of summary judgment; and he dismissed the summary judgment motion and directed the action to proceed to trial.

(ii) While significant credibility issues, the quality and quantity of the record would not appreciably change at trial

In *Cormier v. 1772887 Ontario Limited (St. Joseph Communications)*,[143] the Court of Appeal for Ontario dismissed the appeal in a wrongful dismissal claim. The respondent advanced a number of grounds, including that it was not an appropriate case for summary judgment because: there were material facts in issue; credibility findings had to be made. The appellate court stated, "[8] The motion judge turned his mind to the question of credibility and found that there were no significant issues of credibility to be determined as few facts were even in dispute. Moreover, he specifically noted that there had been cross-examinations conducted with respect to all of the factual issues and it appeared that the parties had done their best to put forward all records and documents. As such, the quality and quantity of the record would not

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[141] *Ibid.* at para. 26.

[142] *Monk v. Farmers' Mutual Insurance Company (Lindsay)*, 2019 ONCA 616, leave to appeal refused *Diana Lynn Monk v. Farmers' Mutual Insurance Company (Lindsay), et al.*, 2020 CarswellOnt 2382 (S.C.C.).

[143] *Cormier v. 1772887 Ontario Limited (St. Joseph Communications)*, 2019 ONCA 965.

appreciably change at a trial. We see no error in those conclusions, all of which are supported by the factual record in this case."[144]

(iii) Significant credibility issues to be determined, then not suitable for summary judgment application

The Court of Appeal of Alberta in *Lovig v. Soost*,[145] dismissed the appeal of the appellant, the plaintiff in a defamation suit, who had brought a motion for summary judgment that was dismissed by the application judge who found that there were triable issues with respect to the defences raised: justification, fair comment and qualified privilege, noting that there were "significant credibility issues to be determined.", and conclude that summary judgment "is not an appropriate or fair manner to resolve the dispute." Khullar J.A., writing for the appellate court, in upholding the application judge's decision that a summary judgment application is not suitable, noted that the application judge had conducted a careful review of the materials before her, which included 15 affidavits.

(c) Conflict in evidence

(i) Unresolved conflict in evidence

In *Kitchen v. Brian Garratt (Garratt's Garage)*,[146] the Court of Appeal for Ontario allowed an appeal set aside the order of the motions judge granting summary judgment, and remitted the matter back for trial, since "the conflict in the evidence was not resolved."[147]

(ii) Social host liability — if conflicting evidence on knowledge of host

In *Williams v. Richard*,[148] on a motion for summary judgment in a social host claim, the motion judge dismissed the claims, finding that the requisite duty of care had not been established and that even if it were established, the duty of care would have ended before the accident. In its analysis, the Court of Appeal for Ontario discussed some of the jurisprudence suggesting that where there is conflicting evidence about the knowledge of a guest's intoxication that is enough to render a full trial necessary. It stated: "[26] In the context of summary judgment motions, some of the jurisprudence has suggested that the presence of conflicting evidence about the level of a host's knowledge of a guest's intoxication is enough to render a full trial necessary: see *Sidhu* at paras. 40-

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[144] *Ibid.* at para. 8.
[145] *Lovig v. Soost*, 2020 ABCA 66.
[146] *Kitchen v. Brian Garratt (Garratt's Garage)*, 2020 ONCA 309.
[147] *Ibid.* at para. 6.
[148] *Williams v. Richard*, 2018 ONCA 889.

41; *Wardak* at paras. 58-61; *Lutter* at paras. 26, 29-30. In particular, cases that offer conflicting evidence on a host's knowledge of a guest's intoxication via affidavits may be particularly unsatisfactory; there could be a "significant risk of injustice" if such issues were not further explored in a full trial: *Lutter* at para. 30. However, this does not mean that any ambiguity in the evidence on a host's knowledge of a guest's intoxication will result in summary judgment being denied. For example, in *Sabourin*, the motion judge found that even if the plaintiff's evidence was taken at its highest, there was a lack of evidence that the host knew there was excessive drinking or that any guest was showing obvious signs of intoxication: para. 38. As such, there was a lack of reasonable foreseeability and summary judgment was granted."[149]

(iii) Facts in dispute and subject to complex oral agreement — not on own suggest misapprehension or disregard of the evidence

The Court of Appeal for Saskatchewan in *Kuderewko v. Kuderewko*,[150] considered if the chambers judge erred "by way of utilizing summary procedure when the facts in relation to the matter were in dispute, and subject to a complex oral agreement entered into between the parties with respect to the existence of a lease that ought to have led to a refusal to issue the writ?" Leurer J.A., writing for the Court, stated that the Chambers judge instructed himself that "courts have usually exercised some caution before utilizing a summary procedure, especially where the parties' claims are contested."[151] Leurer J.A. found that the chambers judge "fully and completely explained the reasons for his determination on this issue" and that the "assertion that the examination of the evidence was not 'fulsome' or that there was 'conflicting affidavit evidence' does not on its own rise to a suggestion that the Chambers judge misapprehended or disregarded the evidence."[152]

(iv) Summary judgment before cross-examination on affidavits and before document disclosure

In *Wells v. General Motors of Canada Company/Compagnie General Motors du Cana*da,[153] the Court of Appeal for Saskatchewan granted the appellant's appeal and set aside the order for summary judgment dismissing the appellant's claim against the respondent, and provided leave for cross-examinations on the affidavits. The appellant contended that summary judgment should never be

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[149] *Ibid*. at para. 26.
[150] *Kuderewko v. Kuderewko*, 2020 SKCA 22.
[151] *Ibid*. at para. 26.
[152] *Ibid*. at para. 33.
[153] *Wells v. General Motors of Canada Company/Compagnie General Motors du Canada*, 2019 SKCA 29.

granted prior to the completion of document disclosure and, in any event, was premature in this case. On that issue Leurer J.A., writing for the Court of Appeal, found that the chambers judge erred in not allowing cross-examination at least upon one affidavit, stating "[22] More fundamentally, though, the chambers judge took too narrow a view as to when cross-examination is appropriate in a summary judgment context; [24] In my respectful view, the chambers judge erred in principle by concluding that a cross-examination is permitted only where there is contradictory evidence before the court or it is necessary to *clarify* information deposed to by the affiant where the information is solely within the knowledge of the affiant."[154]

(v) Analysis stated, even if use of expanded powers not expressly stated

In *Fortress Carlyle Peter St. Inc. v. Ricki's Construction and Painting Inc.*,[155] the Court of Appeal for Ontario refused an appeal of a summary judgment ordering specific performance of an Agreement of Purchase and Sale, and dismissing the defendant's motion for summary judgment. The defendant appealed and sought to enter fresh evidence on the appeal. The appellant submitted on appeal that it was incumbent on the motions judge to expressly consider whether the expanded summary judgment powers should have been used to resolve conflicts in the evidence, and that additionally, that the motions judge failed to address all of the inconsistencies in the parties' evidence. The Court of Appeal found that it was not necessary for the motions judge to advert to the summary judgment expanded powers rule, where the judge implicitly considered that rule and was satisfied that the interests of justice were served without resort to the expanded powers, and it stated, "[29] He proceeded to provide a detailed analysis of his credibility and factual findings, together with his legal reasoning. In these circumstances, it was unnecessary to advert to the summary judgment expanded powers rule. He implicitly considered that rule and was satisfied."[156]

(vi) Motion judge did not (and could not properly) make findings of fact on credibility determinations

In *Downey v. Arey*,[157] the appellant appealed the grant by the motion judge of summary judgment enforcing an oral agreement of purchase and sale, alleging that the motion judge made several errors, including that a crucial factual question, whether the parties had agreed to extend the closing date, could not be properly resolved by way of motion for summary judgment. The Court of

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[154] *Ibid.* at paras. 20, 22 and 24.
[155] *Fortress Carlyle Peter St. Inc. v. Ricki's Construction and Painting Inc.*, 2019 ONCA 866.
[156] *Ibid.* at para. 29.
[157] *Downey v. Arey*, 2019 ONCA 450.

Appeal for Ontario agreed and held that the matter was a case for trial. It held that Rule 20.04(2.1) identifies two fact-finding powers that could have been used by the motion judge to address the factual disputes raised on this motion. A motion judge can both evaluate credibility and draw reasonable inferences from the evidence on a r. 20 motion, unless the interests of justice require that those powers be exercised only at trial.[158] But the appellate court also found that the motion judge did not make findings of fact based on credibility determinations, and that the motion judge's finding that there was an agreement to extend the closing date to some unspecified date in the future, cannot be explained by reliance on any assessment, positive or negative, of the credibility of either the respondents or the appellant.[159] The appellate court also found that the motion judge could not make the inference made, since the evidence before the judge did not permit that inference.[160]

(vii) Clear conflict on the evidence (not referred to by motion judge)

In *Gordashevskiy v. Aharon*,[161] the Court of Appeal for Ontario heard an appeal from the dismissal by the motion judge for summary judgment on a promissory note and guarantee and the grant by the motion judge of summary judgment in favour of one of the defendants. The appellate court, while agreeing with the motion judge that the plaintiff's motion for summary judgment should be dismissed, opined that it was not appropriate to dismiss the plaintiff's action given the factual dispute. The appellate court found that there was a clear conflict on the evidence.[162] The Court of Appeal explained the error of the motion judge in finding that the facts are not in dispute "[5] The motion judge notes simply: "The facts are not in dispute." The motion judge does not advert to this plain conflict in the evidence, a conflict that should have been resolved at a minimum by way of a mini trial under the summary judgment rules. He does not explain the basis on which he accepted the evidence of Mr. Aharon. While the motion judge correctly instructed himself on the test for summary judgment, he did not apply it by turning his mind to whether the credibility issues could be resolved without viva voce evidence."[163]

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[158] *Ibid*. at para. 12.
[159] *Ibid*. at para. 13.
[160] *Ibid*. at para. 14.
[161] *Gordashevskiy v. Aharon*, 2019 ONCA 297.
[162] *Ibid*. at para. 3.
[163] *Ibid*. at para. 5.

(viii) Summary judgment may be inappropriate where few witnesses and preparing affidavits and cross-examination is as arduous and time-consuming as setting the matter down for trial. Motion judge must articulate specific findings that support a conclusion that a trial is not required, and must either resolve this conflict in the evidence or find that the conflict in the evidence was irrelevant to the determination of the issue (process is inextricably tied to the issue of substance)

In *McCorriston v. Hunter*,[164] the Court of Appeal for Saskatchewan addressed a summary judgment by a chambers judge that resolved issues. At the motion it was argued that a trial was required to deal with the issues. Leurer J.A., writing for the Court, stated that "I see no reason in principle why summary judgment should not be available to resolve family law disputes in this province."[165] Leurer J.A. stated: "[25] I agree . . . to this extent: courts considering an application for summary judgment must be alive to the realities of family disputes. Trial courts need to be cautious when making final orders on the basis of affidavit evidence, particularly in a family law context. An affidavit is the ultimate form of leading a witness. An affiant provides the facts to a lawyer to be included in the client's sworn statement. However, the words and organization of the evidence are heavily influenced by the lawyer who draws the affidavit . . .; [27] Summary judgment may be inappropriate where there are only a few witnesses and the time to prepare affidavits and conduct cross-examinations on them will be as arduous and time-consuming as simply setting the matter down for a short trial . . ." Regarding the approach to be taken on a motion for summary judgment where there is a conflict in the evidence, Leuer J.A. stated: "[39] . . . in order to determine that there was no genuine issue for trial, it was necessary to either resolve this conflict in the evidence or find that the conflict in the evidence was irrelevant to the determination of the . . . issue. In this case, the Chambers judge did neither; [40] It is clear that the Chambers judge did not attempt to resolve the conflict in the evidence . . .; [41] . . . As stated by Benotto J.A. in *Trotter v Trotter*, 2014 ONCA 841 at para 78, 122 OR (3d) 625, "[w]hen conflicting evidence is presented on factual matters, a motion judge is required to articulate the specific findings that support a conclusion that a trial is not required". [42] Alternatively, if the Chambers judge concluded that he was able to reach a just and fair determination of the issues without resolving the conflict, it was incumbent on him to explain why the matters in controversy were not material to a fair and just determination . . .; [43] . . . This error in principle is ultimately grounded in the failure to appreciate that, in a summary judgment context, the issue of process is inextricably tied to the issue of

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[164] *McCorriston v. Hunter*, 2019 SKCA 106.
[165] *Ibid.* at para. 21.

substance.; [45] The danger associated with reaching a conclusion that summary judgment is an appropriate process in a particular case before assessing the merits is that this approach risks obscuring how the facts were found and a fair and just result was achieved. This danger became reality in this case; [47] In the face of the highly conflicting evidence, and in the absence of cross-examination, I doubt very much if it was open to the Chambers judge to make a credibility assessment, but in any event that is not how the Chambers judge presented his reasoning."[166] The appropriateness of summary judgment cannot be measured by the volume of the record put before the court.

(ix) The mere existence of conflicts in the evidence does not lead inevitably to the conclusion that a trial is required

In *Kyrylchuk v. Kyrylchuk Estate*,[167] the Court of Appeal for Saskatchewan dismissed an appeal of the order of the Queen's Bench judge who granted the respondent's application for summary judgment and struck the plaintiff's claim. The appellant argued, *inter alia*, that the chambers judge erred in determining that summary judgment was appropriate because, given the conflicts in the affidavit evidence, a trial was necessary so that the credibility of the witnesses could be properly explored.[168] In dismissing the appeal, Kalmakoff J.A., writing for the Court, stated the following: "[28] While it is trite to say that in order for the summary judgment procedure to be properly employed, the evidence must give the judge confidence that he or she can reach a fair determination . . . the mere existence of conflicts in the affidavit evidence does not lead inevitably to the conclusion that a trial is required. A judge hearing a summary judgment application has the power to weigh evidence, draw inferences and evaluate credibility on the basis of the evidence filed by the parties . . . [29] While evaluations of credibility should not be made by merely choosing one affidavit over another, a judge may properly resolve conflicts in the evidence within the structure of the summary judgment process, even in the absence of *viva voce* testimony, as long as there is a sound basis for doing so. A sound basis may be

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[166] *Ibid*. at para. 25, 27, 39, 40-43, 45 and 47.

[167] *Kyrylchuk v. Kyrylchuk Estate*, 2020 SKCA 62; see also *Donaldson v. Braybrook*, 2020 ONCA 66, on the defendant's appeal from summary judgment granted by the motion judge that declared that the plaintiff had a life interest, with exclusive possession, in a cottage. The Court of Appeal for Ontario allowed the appeal, holding that it was non-exclusive possession. In addressing the analysis of the motion judge, the Court of Appeal stated at para. 18, "The appellants argue that the motion judge erred in law by failing to undertake an analysis of the mother's actual intentions at the time she executed the transfer, in failing to distinguish the difference between an intention to transfer legal title and an intention to transfer beneficial interests, and in concluding that the presumption of resulting trust had been rebutted. They also argue that the evidence simply does not support the conclusion."

[168] *Ibid*. at para. 17.

found in the evidence, including documentary evidence, affidavits from independent witnesses, evidence adduced in cross-examination or questioning, or other undisputed evidence . . . [32] . . . As a whole, that evidence fully addressed the live issues in the summary judgment application. All of this, in my view, provided a solid basis upon which the chambers judge could properly determine that he was able to weigh the evidence, resolve the conflicts and make necessary findings of fact and, thus, be satisfied that a trial judge would be in no better position than he was to evaluate credibility and decide the matter in a fair and proportionate way."[169]

(x) The summary judgment motion judge failed to determine whether summary judgment was appropriate, having regard to and analyzing the entire evidentiary record and the Hryniak analytical framework, and that there were real credibility issues

The proper approach of a summary judgment motion judge (in this case) includes:

- Unnecessary for the motion judge to recite *verbatim* the applicable principles from *Hryniak*, so long as she applied them throughout her decision (and reasons must demonstrate that the motion judge did so)
- Adequate analysis must be set out leading to the conclusion that "there is no genuine issue requiring a trial", having regard to and analyzing the *entire evidentiary record*
- Must explain why unchallenged evidence is rejected (cannot be conclusory) and why evidence is not corroborative
- Must address absence of evidence
- If reject evidence, must provide adequate reasons for doing so, and must assess it with the other evidence in the record
- Must consider evidence as a whole and on entire record
- Must weigh evidence, evaluate it, and make credibility findings

In *Royal Bank of Canada v. 1643937 Ontario Inc.*,[170] the appellants appealed to the Court of Appeal for Ontario from a summary judgment for payment of

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[169] *Ibid.* at para. 28, 29 and 32.

[170] *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98, additional reasons 2021 CarswellOnt 3670 (C.A.); contrast *Weisleder v. Ontario Secondary School Teachers' Federation*, 2020 ONCA 181, an appeal from a summary judgment dismissing a defamation claim, where the Court of Appeal for Ontario said at para. 5, "Although there are cases where the record before the court may be insufficient to decide the issue of malice on summary judgment (see *Baglow v. Smith*, 2012 ONCA 407, 110 O.R. (3d) 481, at paras. 31-32; *McDonald v. Freedman*, 2013 ONSC 6812 (Div. Ct.) at para. 68), "in this case there was an ample evidentiary record before the motion judge that allowed her to make the findings she did. That record included transcripts of examinations for

discovery of the key people at the union together with affidavits of other people and cross-examinations thereon."; and *Nolet v. Fischer*, 2020 ONCA 155 where the Court of Appeal for Ontario dismissed an appeal of a summary dismissal of the plaintiff's claim, on the basis that no duty or breach of duty was proven, and Feldman J.A. writing for the Court of Appeal stated at para. 39, "While the motion judge did not state explicitly why the respondent met her duty of care, it is clear from her reasons that she found that the appellant had not proved that the respondent failed to 'take such care as in all the circumstances of the case is reasonable' to see that the condition of the sidewalk was reasonably safe. I see no error in that conclusion. It was open to the motion judge to view the photographs in conjunction with the evidence of the witnesses and to make a finding regarding the safety condition of the sidewalk and that the appellant was aware of that condition." and at para. 40, "I also see no error in the motion judge's conclusion that there was no genuine issue for trial. The evidence of how the accident happened was explored under oath with all the witnesses, and photographs from the time of the accident were in the record. The motion judge was in as good a position as a trial judge to look at the photos and assess whether the ledge constituted a safety hazard"; see also *Gro-Bark (Ontario) Ltd. v. Eacom Timber Corporation*, 2019 ONCA 341, where the Court of Appeal for Ontario allowed an appeal where the motion judge on a motion for summary judgment found in favour of the respondent's interpretation and granted summary judgment, though his reasons provided little insight into the process that led to that conclusion. The Court of Appeal said at para. 3, "With respect, the motion judge did not engage in the contractual interpretative exercise required by the issue raised on the motion. His reference to the "analysis and statements of law" contained in the respondent's factum, standing alone, cannot be equated to an actual application of the principles of contractual interpretation to the circumstances as they existed in the particular case" *and* at paragraph 4, "The trial judge's 'adoption' of the relevant parts of the respondent's factum may or may not have been intended by the motion judge as a reference to the findings of fact urged by the respondent in those parts of its factum. Even if it was intended as an adoption of those facts, there is nothing in the reasons that explains what evidence the motion judge considered, or how his consideration of that evidence led him to come to the same opinion with respect to the facts as the respondent had urged. In short, there is simply no explanation for why the motion judge arrived at the conclusion he did."; and see also *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, leave to appeal refused *David Carmichael v. GlaxoSmithKline Inc.*, 2021 CarswellOnt 4417 (S.C.C.), where on appeal concerning the proper interpretation of a provision of the *Limitations Act 2002, S.O. 2002*, c24, Schedule B, the defendant appealed the dismissal by the motion judge of the appellant's motion to dismiss the plaintiff's action as statute-barred. A ground of appeal was that the motion judge misapprehended the evidence of incapacity. After reviewing *Pucci v. The Wawanesa Mutual Insurance Company*, 2020 ONCA 265 at para. 61; *Cook*, at paras. 79-80, 82 and *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 2, Jamal J.A. writing for the Court of Appeal, concluded at para. 134 that this is an appropriate case for the Ontario Court of Appeal to exercise fact-finding powers under section 134 of *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1); see also *Danesh v. Vahed*, 2021 ONCA 189, where in its decision the Court said, at paragraph 23 ". . . the motion judge's reasons show that he was alive to the relevant considerations.", and *Hannivan v Wasi*, 2021 ONCA 187, where the Court states, at paragraph 11, "In our view, the motion judge's failure to mention the admission in his reasons does not mean he failed to consider it. The motion judge was clearly alive to the purchaser's submission . . .", and *Zachariadis Estate v. Gionnopoulos*

monies owing under personal guarantees they provided to the respondent. The issue on appeal was: did the motion judge err in granting the respondent's motion for summary judgment because there was no genuine issue requiring a trial about the scope of the appellants' liability to the respondent under their personal guarantees? The appellants submit that there was a genuine issue requiring a trial, as the respondent misrepresented to them that their liability under their personal guarantees was joint and several with a collective exposure limited to $600,000. Roberts J.A., writing for the Court of Appeal, agreed that the motion judge erred and remitted to trial the narrow issue of determining the amount that each appellant owes to the respondent under their respective guarantees.

Roberts J.A. included these statements about the proper approach to the evidentiary record in her analysis "[23] At the heart of this appeal is the motion judge's approach to summary judgment and, specifically, her treatment of the evidence and record before her . . . However, here, appellate intervention is required, as the motion judge fell into error and misdirected herself because she failed to determine whether summary judgment was appropriate, **having regard to the entire evidentiary record** and the *Hryniak* analytical framework . . . [25] While summary judgment is an important tool for enhancing access to justice and achieving proportionate, timely, and cost-effective adjudication, there is no imperative on the court to use it in every case . . . [26] Indeed, notwithstanding the parties' agreement that the action and counterclaims could be determined by summary judgment, it is still incumbent on the motion judge to decide whether it is appropriate to grant summary judgment: *Rules of Civil Procedure*, r. 20.04(2)(b).; [27] In determining whether summary judgment is appropriate, motion judges are required to engage with the *Hryniak* analytical framework process, as described above, look at the evidentiary record, determine whether there is a genuine issue requiring a trial, and assess, in their discretion, whether resort should be taken to the enhanced powers under rr. 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*. To do otherwise runs the risk that, in an effort to dispose of a case in a summary fashion, motion judges will not properly analyze the evidence: *Trotter*, at para. 49. Unfortunately, that is what occurred here."[171]

Estate, 2021 ONCA158, where Rouleau J.A. writing for the Court, states at paragraph 28 "The fact that he chose to address only a sampling of the alleged suspicious circumstances in his reasons does not constitute an error. As this court acknowledged in . . .'[a] trial judge is not required in his or her reasons to demonstrate that all aspects of the evidence have been considered, nor is it necessary that reasons be given for every point raised in the case.'"

[171] *Ibid.* at paras. 23 and 25 to 27; see, by way of contract, the decision of the Court of Appeal for Saskatchewan in *Boreen v. Mosaic Esterhazy Holdings ULC*, 2020 SKCA 132, on the appeal of the plaintiff of the chambers judge's dismissal of her claim against a number of defendants, where Ottenbreit J.A., writing for the Court, said this at paragraph 49, regarding the approach to evidence by the summary judgment motion

Roberts J.A.'s review of the approach of the summary judgment motion judge included these comments: ". . . unnecessary for the motion judge to recite *verbatim* the applicable principles from *Hryniak*, so long as she applied them throughout her decision. However, her reasons do not demonstrate that she did";[172] "The motion judge did not make an adequate analysis set out leading to her conclusion at para. 100(1) that "there is no genuine issue requiring a trial in respect to the validity and enforceability of the guarantees.";[173] "In order to come to this conclusion, the motion judge **was required to analyze the entirety of the evidentiary record before her** and determine whether there was a genuine issue requiring a trial with respect to the appellants' allegations of misrepresentation and, if so, whether the need for a trial could be avoided by using the enhanced powers under rr. 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*. Unfortunately, she failed to do so."[174] Roberts J.A. goes on to say ". . . motion judge's reasons do not adequately explain why she rejected the appellants' unchallenged evidence . . . ;[175] ". . . motion judge failed to

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judge, "As stated in *Northrock Resources v ExxonMobil Canada Energy,* 2017 SKCA 60 at para. 10, [2017] 12 WWR 369 [*Northrock Resources*], "a judge is not required to revisit each and every piece of evidence adduced at trial in his or her reasons". The chambers judge clearly stated that he had considered the affidavits of Ms. Moore and Ms. Boreen, as well as cross-examination thereon. Ms. Boreen's February 16, 2016 affidavit and her crossexamination, as well as the closing submissions of her counsel, dealt with her submission that the designation set forth in the Pension Statement was misleading. Accordingly, there is no merit to Ms. Boreen's argument that the Chambers judge ignored or forgot this evidence. It is, however, understandable why he may not have felt the need to mention it. I will explain.", see also the decision of the Court of Appeal for Saskatchewan in *CE Design Ltd. v. Saskatchewan Mutual Insurance Company*, 2021 SKCA 14, where Schwann J.A., writing for the Court, described at paragraph 1 the nature of the appeal as "This appeal raises numerous questions about multiplicity of proceedings, abuse of process, finality of determinations, territorial competence, and the appropriateness of using the summary judgment procedure in the face of a complex, multi-jurisdictional action . . ." In dismissing the appeal, and considering whether summary judgment was appropriate, Schwann J.A. stated, at para.103 ". . . In any event, the test for summary judgment is not whether all of the available evidence has been uncovered but whether a Chambers judge can make the necessary findings of fact and apply the law to the facts: see *Hryniak v Mauldin*, 2014 SCC 7 at paras. 28 and 49, [2014] 1 SCR 87. Furthermore, while it was up to SMI to put its best foot forward on the summary judgment application, it chose to apply for summary judgment despite the possibility of some other favourable evidence coming forward in the future. It was entitled to take that risk."

[172] *Ibid.* at para. 29.

[173] *Ibid.* at para. 29.

[174] *Ibid.* at para. 30.

[175] *Ibid.* at para. 31, see also *Perkins v. Sheikhtavi*, 2019 ONCA 925, where the Court of Appeal for Ontario dismissed an appeal of a summary judgment awarding damages resulting from the failure to close the purchase of a home, and where the Court of Appeal stated at paragraph 23, "Lastly, the motion judge did not reject uncontested evidence.

reference . . . evidence, and her apparent rejection of the evidence . . . was conclusory and in part appears to be based on a misapprehension of their evidence . . . The motion judge failed to address this absence of evidence";[176] "With respect to . . . evidence, while the motion judge was entitled to reject it, she erred by failing to provide adequate reasons for doing so. Notably, she failed to explain why she labelled . . . lacking particularity and why her observation that certain particulars from his affidavit were not mentioned on his examination for discovery apparently led her to reject his unchallenged evidence.";[177] ". . . The motion judge's concerns about . . . evidence that she did identify, as noted above at para. 17 of these reasons, were not sufficient to reject his evidence out of hand, especially given he had not been cross-examined on his affidavit and there was evidence that . . . if accepted, could corroborate his evidence.";[178] "However, even if the motion judge did not err in rejecting . . . evidence, she was required to go beyond it and assess it together with the other evidence in the record that, if accepted, would support the appellants' version of events and corroborate . . .evidence. She failed to do so.";[179] ". . . the motion judge's reasons are silent with respect to . . . evidence and do not explain why she determined that . . . evidence did not corroborate her husband's evidence.";[180] "Simply put, if the motion judge rejected . . . evidence, she was required to give her reasons. Given that . . . examination for discovery did corroborate her husband's evidence in some particulars, the motion judge erred by stating that it did not, without explaining why it did not.";[181] "While each piece of evidence by itself may not have been sufficient to establish the appellants' allegations of misrepresentation, the motion judge was required to consider **the evidence as a whole** to determine whether, in all of the circumstances of the case, based on the entire record before her, she was able to determine the material issues in dispute without requiring a trial. She failed to do so.";[182] "Since the evidence adduced by the appellants was capable of supporting an allegation of misrepresentation and was unchallenged by the respondent in cross-examination, it was incumbent upon the motion judge to explain why she rejected the evidence . . . Her

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He accepted that there was an unforeseen event. While his reasons do not specifically mention the 20 to 30 per cent decrease in home prices cited by the real estate agents who filed affidavits in support of the appellant's position, he accepted that there was a supervening event but found it was not a 'radical change' such that the appellant should be relieved of her obligations under the contract. There was no rejection of uncontested evidence."

[176] *Ibid*. at para. 32.
[177] *Ibid*. at para. 33.
[178] *Ibid*. at para. 33.
[179] *Ibid*. at para. 34.
[180] *Ibid*. at para. 34.
[181] *Ibid*. at para. 36.
[182] *Ibid*. at para. 37.

conclusory statements were insufficient. While she recited the evidence, she did not weigh it, evaluate it, or make findings of credibility as she was required to do in this case. She could not simply prefer one position over another without providing an explanation that is sufficient for appellate review: *Gordashevskiy v. Aharon*, 2019 ONCA 297, at para. 6;[183] "Rather, she was required to undertake a credibility analysis pursuant to the expanded judicial powers under r. 20.04(2.1) of the *Rules of Civil Procedure* to weigh the evidence, evaluate the credibility of the appellants' deponents, and draw reasonable inferences: *Trotter*, at para. 54. Further, if the motion judge determined she could not assess credibility solely on the written record, she should have considered whether oral evidence or a trial were required: *Trotter*, at para. 55."[184] and "While summary judgment may have been appropriate had the motion judge carried out the requisite analysis under r. 20.04(2.1) of the *Rules of Civil Procedure* and exercised her powers to hear oral evidence pursuant to r. 20.04(2.2), she did not seek to do so."[185] [my emphasis throughout]

(xi) Live issue requiring determination

In *Van Huizen v. Trisura Guarantee Insurance Company*,[186] the appellate insurer appealed from an order of the motion judge dismissing its motion for summary judgment and granting judgment to the respondents. Roberts J.A., writing for the Court of Appeal for Ontario, held that it was an error for the motion judge to grant judgment to the respondents and set aside that order. But the Court of Appeal would not allow the appellant's motion for summary judgment but did not dismiss the respondents' action, because, as stated by Roberts J.A. ". . . there is a live issue requiring determination as to whether the appellant owes a duty to defend . . ."[187]

(xii) Make requisite finding of fact

In *Clarke v. Sun Life Assurance Company of Canada*,[188] the motion judge dismissed the appellant insurer's motion to dismiss the plaintiff's action as statute-barred. The appellant appealed to the Court of Appeal for Ontario and an appeal was allowed in part. Brown J.A. writing for the Court stated: "[25] Given the motion judge's failure to make the requisite findings of fact in respect of ss. 5(1)(a)(iv), (b), and (2), her conclusion that Sun Life had not established the elements of a limitation defence under ss. 4 and 5 of the Act lacked an

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[183] *Ibid*. at para. 39.
[184] *Ibid*. at para. 40.
[185] *Ibid*. at para. 41.
[186] *Van Huizen v. Trisura Guarantee Insurance Company*, 2020 ONCA 222.
[187] *Ibid*. at para. 69.
[188] *Clarke v. Sun Life Assurance Company of Canada*, 2020 ONCA 11.

adequate legal and factual foundation. For that reason, her order must be set aside."[189]

7. Drawing Inferences[190]

(a) Ontario — when Master may draw inference

On appeal from the master who granted partial summary judgement, Gomery J. writing for the Divisional Court[191] in *Dhawan v. Shails et. al.*,[192] granted the appeal and dismissed the claim on the basis of one of two alleged guarantees, and refused to make any determination on the enforceability of the other guarantee, because, as found by the master, this is not an issue appropriate for summary judgment. The appellants claimed that the master exceeded her jurisdiction by using powers reserved to a judge in Rule 20.04(2.1). Gomery J, found "[63] By virtue of rule 20.04(2.1), a judge considering a motion for summary judgment has the power to make findings of fact that a master does not. The master was accordingly correct in declining to draw the inference proposed by Dhawan with respect to the emails. Had she done otherwise, the Shails could have argued that she exceeded her jurisdiction on the motion."[193]

But contrast the above with *R&V Construction Management Inc. v. Baradaran*,[194] an appeal from the decision of the motion judge refusing confirmation of the report of a master who granted summary judgment against the respondent under the *Construction Lien Act*. The master had characterized the motion before her as a motion for summary judgment; found that, as a construction lien master to whom the case had been referred for trial, she had all the powers of a judge, including the enhanced powers on a motion for summary judgment; she exercised those powers, disbelieved some evidence, accepted other evidence, and granted summary judgment for R&V.[195] Corbett and Sutherland JJ., writing for the Divisional Court, found "[6] We agree with the motions judge that, in ordinary civil litigation, a master does not have the Enhanced Powers on a motion for summary judgment. However, in this case Master Albert was a referee to whom a construction lien action had been referred for trial. In this capacity, a master has all the powers of a construction lien referee and is not confined to the jurisdiction conferred on masters in ordinary civil litigation. The procedural powers of a construction lien referee include the full range of powers accorded to a judge under the Rules of Civil

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[189] *Ibid.* at paras. 25 and 26.
[190] See also *Hryniak, ARCL-2018* at pages 211-213.
[191] Divisional Court of the Ontario Superior Court of Justice.
[192] *Dhawan v. Shails et. al.*, 2018 ONSC 7116 (Div. Ct.).
[193] *Ibid.* at para. 63.
[194] *R&V Construction Management Inc. v. Baradaran*, 2020 ONSC 3111 (Div. Ct.).
[195] *Ibid.* at para. 14.

Procedure. These, in turn, include the Enhanced Powers that may be used on a motion for summary judgment. Accordingly, we conclude that the motions judge erred in finding that Master Albert acted without jurisdiction."[196]

(b) Inference when no evidence to the contrary

In *Bank of Montreal v. Georgakopoulos*,[197] the defendants appealed a summary judgment granted against them, on various grounds including that the evidence proffered by the plaintiff was wrongly accepted by the motion judge and did not justify summary judgment. The motion judge found that there was no evidence to the contrary that one of the defendants did not pay his credit card debt. The Court of Appeal for Ontario dismissed the appeal and upheld the inference found by the motion judge.

(c) Failure to draw an adverse inference

In *Fontaine et al. v. Royal Bank of Canada*,[198] the Court of Appeal of New Brunswick concluded that the summary judgment granted against one party on the basis of the Guarantee and Postponement of Claim was justified and must stand, but set aside the summary judgment against another party. Quigg J.A., writing for the Court of Appeal, stated "[2] . . . a) the judge erred in failing to draw an adverse inference from the bank's failure to lead evidence of a "person having personal knowledge" of Mrs. Fontaine's execution of the Guarantee (Rule 22.02(1) of the Rules of Court); and . . ."[199] See also the subsequent decision of the Court of Appeal for Ontario in *Dia v. Calypso Theme Waterpark*.[200] Nordheimer J.A., writing for the Court of Appeal stated "[16] The motion judge was asked to, but did not, draw an adverse inference from the fact that the respondent did not file an affidavit. In declining to do so, she said, at para. 24: I am not, however, prepared to draw a negative inference against Mr. Messina on this basis. Mr. Messina attempted to provide evidence of his personal knowledge by filing his discovery transcript. Having refused to allow him to do so, I will not penalize him further for not having provided evidence of his personal knowledge; his error was in attempting to rely on evidence on which he could not be cross-examined, not in attempting to avoid filing evidence of his personal knowledge. [17] This stated reason for not drawing an adverse inference fails to take into account the fundamental rationale for the express provision in r. 20.02(1) that permits an adverse inference to be drawn, that is, an attempt by the moving party to avoid cross-examination. The fact that the

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196 *Ibid.* at para. 6.
197 *Bank of Montreal v. Georgakopoulos*, 2021 ONCA 60; see also *LeBlanc v Ontario*, 2021 ONCA 204.
198 *Fontaine et al. v. Royal Bank of Canada*, 2018 NBCA 75.
199 *Ibid.* at para. 2.
200 *Dia v. Calypso Theme Waterpark*, 2021 ONCA 273.

respondent did not make himself available for cross-examination, in a case such as this, is precisely the type of situation where an adverse inference would have been properly drawn. After all, this case is largely, if not entirely, an identification case. The respondent sought to have the action dismissed against him on the basis that he was not part of the assault on the two children, without providing the appellants with any real opportunity to test that contention. The fact that the respondent would not affirmatively attest to his non-involvement ought to have been a matter of significant concern to the motion judge."[201]

8. Weighing Evidence[202]

(a) Though powers are presumptively available, motion judge should disclose the use

In *Crescent Hotels and Resorts Canada Company v. 2465855 Ontario Inc.*,[203] the Court of Appeal for Ontario dismissed the appeal of the defendant against which summary judgment had been granted on the plaintiff's motion. The defendant advanced several grounds of appeal, including that the motion judge erred "in principle by weighing evidence without expressly invoking her evidence assessment powers."[204] The appellate court dismissed the appeal and on the above-stated ground saying "[9] . . . weighing the evidence; evaluating the credibility of a deponent; and drawing any reasonable inference from the evidence. These powers are presumptively available to a motion judge; they are not exceptional; and they may be exercised provided their use is not against the interests of justice . . .;[205] "[10] It follows that where a judge weighs the evidence filed on a summary judgment motion — as the reasons of the motion judge in this case clearly disclose that she did — the judge should acknowledge candidly that she is exercising her r. 20.04(2.1) powers and then go on to explain the basis for any resulting findings of fact . . ."[206]

(b) Not unevenly scrutinize the evidence

The Court of Appeal of Manitoba in *The College of Pharmacists of Manitoba v. Jorgenson*,[207] when addressing the merits of an appeal by the defendant of the

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[201] *Ibid.* at para. 16 and 17.
[202] See also *Hryniak, ARCL-2018* at pages 213-217.
[203] *Crescent Hotels and Resorts Canada Company v. 2465855 Ontario Inc.*, 2019 ONCA 268; see also *Carleton Condominium Corporation No. 476 v. Wong*, 2020 ONCA 263 at para. 20, additional reasons 2020 CarswellOnt 7980 (C.A.).
[204] *Ibid.* at para. 7.
[205] *Ibid.* at para. 9.
[206] *Ibid.* at para. 10.
[207] *The College of Pharmacists of Manitoba v. Jorgenson*, 2020 MBCA 80.

summary judgment for the plaintiff for its claims of defamation and nuisance, found that the defendant's argument that a defamation case could not be decided by summary judgment had no merit. Mainella J.A., writing for the Court, said the following with respect to the defendant's argument that the motion judge erred in her determination of whether there was a genuine issue requiring a trial "[30] . . . She explained why the plaintiff had established all the requirements of defamation and nuisance. There is nothing clear from the judge's reasons or the record before me to support the defendant's claim that she unevenly scrutinised the evidence."[208]

(c) Motion judge required to take a hard look at the entire record

In *Demetriou v. AIG Insurance Company of Canada*[209] the Court of Appeal for Ontario heard an appeal from the defendant insurer from a summary judgment granted on a motion for summary judgment. The Court of Appeal found that the motion judge had reversed the burden of proof by ignoring those "suspicious circumstances" in relation to whether the respondent had proven his claim. The appeal was allowed and order was set aside. The Court of Appeal stated "[9] In our view, the motion judge was required to take a hard look at the entire record on the summary judgment motion in order to determine whether there was a genuine issue requiring a trial or whether he could decide the case on summary judgment. Because he did not do so, it is up to this court to do so on the record. In our view, it is clear that the credibility of the claim and of the claimant was squarely in issue and requires a trial."[210]

9. Onus and Burden

(a) Onus and evidentiary burden

(i) Ontario

(A) The issue of whether the legal or persuasive burden has been met is to be considered in the context of *all of the evidence*, including the evidence, or lack of evidence, of facts showing that there is a genuine issue requiring a trial

In an appeal to the Divisional Court of the Ontario Superior Court of Justice in *Summa Engineering Limited v. Sona Construction Limited*,[211] the appellant appealed a summary judgment granted in a consolidated construction lien action. The motion judge held that evidence in the knowledge only of the

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[208] *Ibid.* at para. 30.
[209] *Demetriou v. AIG Insurance Company of Canada*, 2019 ONCA 855.
[210] *Ibid.* at para. 9.
[211] *Summa Engineering Limited v. Sona Construction Limited*, 2018 ONSC 5733 (Div. Ct.).

appellant had not been put forward, that the appellant had not put its "best foot forward",[212] and the Court was entitled to assume that the record on the motion contained all of the evidence that the parties would present, if there was a trial. Bale J., writing for the Divisional Court stated "[16] On this issue, Sona relies on *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 2001 CanLII 24049 (ON CA), 52 O.R. (3d) 97 (C.A.), at para. 31. In that case, the Court held that on a motion for summary judgment, the moving party has the legal burden of satisfying the court that there is no genuine issue for trial (the test in effect at the time), and that the burden never shifts. I would add to that, however, that the issue of

[212] See also *Inspektor v. Solmon*, 2018 ONCA 796, where the Court of Appeal for Ontario dismissed an appeal of a summary judgment dismissing the claim, where the motion judge observed that the appellants "really put no foot forward" on the motion, and *Markham Village Shoppes Limited v. Gino's Pizza Ltd.*, 2018 ONCA 746, additional reasons 2018 CarswellOnt 15673 (C.A.), where the appellant appealed to the Court of Appeal for Ontario a summary judgment for unpaid and damages for future rent ,where the Court of Appeal for Ontario stated, at para. 7, "That said, nothing in these reasons should be taken as an endorsement of the motion judge's treatment of the evidence on damages, particularly the proposition that the appellant's failure to adduce evidence as to the appropriate period for calculating prospective loss of rent in any way compensated for the weakness of the evidence on damages that the respondent tendered. The aphorism that every party to a summary judgment motion is required to put their best foot forward does not displace the burden of proof, which remained throughout on the respondent.": see also *Shinder v. Shinder*, 2018 ONCA 717 and *Fairfield Sentry Limited v. PricewaterhouseCoopers LLP*, 2018 ONCA 696, where Brown J.A., writing for the Court of Appeal for Ontario observed, on an appeal of a summary judgment dismissing an action, stated at para. 55 that ". . . On a motion for summary judgment, the ultimate burden remains on the moving party to demonstrate that no genuine issue requiring a trial exists. However, on a motion for summary judgment a responding party runs significant litigation risk if it leaves unchallenged key evidence of the moving party adduced to establish there is no genuine issue requiring a trial." see also *McKay v. Park*, 2019 ONCA 659, where one ground of appeal asserted was that "the motion judge did not expressly identify who bore the burden", the Court of Appeal for Ontario stated at paragraph 5, "We would not give effect to this ground of appeal. The motion judge is presumed to know the law. It is not necessary for a judge to rehearse in every case who bears the burden. Nor is there any indication that the motion judge got the onus wrong. Her decision to focus only on the areas of contention when explaining her conclusion that there is no genuine issue requiring trial is understandable and appropriate."; see also *Canadian National Railway Company v. Crosslink Bridge Corp.*, 2019 ONCA 349, where the Court of Appeal for Ontario stated at paragraph 8, "We do not accept the appellants' argument that the motion judge misplaced the burden of proof on a summary judgment motion, when in para. 57 she referred to the appellants as having "not met their burden". That reference must be read along with the analysis in the previous seven or eight paragraphs. The motion judge was satisfied that the respondents had demonstrated that this was an appropriate case to use the fact-finding powers under rule 20.04(2.1) and that the evidence demonstrated no genuine issue for trial. The reference in para. 57 comes after an overview of the appellants' case and is, in our view, a finding that the appellants had not rebutted the case for summary judgment put forward by the respondents."

whether the legal or persuasive burden has been met is to be considered in the context of all of the evidence, including the evidence, or lack of evidence, of facts showing that there is a genuine issue requiring a trial: rule 20.02(2) of the *Rules of Civil Procedure*."[213]

(B) Moving party has the initial burden

In *Formosa v. Persaud*,[214] the Court of Appeal for Ontario said "[10] The motion judge applied the correct test for a summary judgment motion and did not reverse the burden. He correctly noted that GR, as the moving party, had the initial burden to establish there was no genuine issue requiring a trial. He was satisfied that this burden had been met based on the record before him, which included affidavits filed by two of GR's lawyers that addressed the claims against them. In the absence of any expert report from either party, he relied on the record to determine that there was no professional negligence. We see no error in that analysis. See also *McPeake v. Cadesky*, 2018 ONCA 554."[215]

(C) Open to motion judge to conclude on the basis of the evidence before him that the respondents had discharged their burden

In *Haley v. Stepan Canada Inc.*,[216] on an appeal of the dismissal of his action on a motion for summary judgment, the Court of Appeal for Ontario did not accept the appellant's submission that the motion judge erred by reversing the onus on the summary judgment motion, and by assuming that the respondents' premises were safe in the face of his expert's opinion about the unsafe condition of the respondents' premises. The Court of Appeal said the following: "[6] The motion judge did not reverse the onus. Rather, he determined, correctly in our view, that the respondents had established that there was no genuine issue requiring a trial. [7] Further, the motion judge was not obliged to rely on the appellant's expert opinion. The appellant's discovery evidence about the area where he said he fell was inconsistent with the information provided to his expert. The expert acknowledged that inconsistency in his cross-examination.

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[213] *Ibid.* at para. 16.
[214] *Formosa v. Persaud*, 2020 ONCA 368.
[215] *Ibid.* at para. 10; see also *Bradley v. Bradley, Holmes and MacKay*, 2021 PECA 8, a decision of the Prince Edward Island Court of Appeal, where onus on a motion for summary judgment is described by the Court at paragraph 8. "It is important to remember the onus is always on the moving party to establish there is no genuine issue requiring a trial raised by the pleading they are attacking. In this case the assessment did not pass stage one. The second stage of the test, in which the responding party assumes the evidentiary burden of showing there is a real chance the position taken in the pleading under attack will succeed thereby negativing the moving party's right to summary judgment, never arose."
[216] *Haley v. Stepan Canada Inc.*, 2020 ONCA 737.

The expert's report depended on what the appellant had told him, in contrast to his discovery evidence. [8] It was open to the motion judge to conclude on the basis of the evidence before him that the respondents had discharged their burden as occupiers to take reasonable steps to ensure that the premises were reasonably safe, and that the appellant had failed to raise a genuine issue requiring a trial that the respondents had not done so and that the premises were not reasonably safe."[217]

(D) Moving party bears the evidentiary burden of demonstrating that there is no genuine issue requiring a trial, it must put its best foot forward by adducing evidence on the merits

In *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*,[218] Thorburn J.A., writing for the Court of Appeal for Ontario said: [61] In a summary judgment motion, the moving party bears the evidentiary burden of demonstrating that there is no genuine issue requiring a trial; it must put its best foot forward by adducing evidence on the merits*: Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at paras. 30-32, leave to appeal refused [2016] S.C.C.A. No. 443 . . . [62] The respondents failed to adduce information in their control in respect of the imposition of suspension and expulsion, how expulsion is defined in the Constitution and/or By-Laws, and how, if at all, expulsion differs from loss of membership.; [63] Despite this court's authority under r. 134(4) of the *Courts of Justice Act* to draw inferences of fact, given that the respondents have not filed the necessary evidence to enable this court to determine the rules of expulsion or whether they were followed, it is not possible to determine whether the contractual terms were breached; [64] These are genuine issues to be determined."[219] The Supreme Court of Canada in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*[220] held that the Court of Appeal for Ontario erred in holding that there was an underlying contract and therefore a genuine issue requiring a trial. In the judgment of the Supreme Court of Canada, Rowe J. delivering the judgment of the Court, stated on the issue of onus, at paragraph [25] ". . . While the onus is on the moving party to establish the existence or lack thereof of a genuine issue requiring a trail, [e]ach side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried . . ." and at paragraph [26] "The appellants' position on the motion for summary judgment was that the court had no jurisdiction to

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[217] *Ibid*. at paras. 6, 7 and 8.
[218] *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10, varied on reconsideration 2020 CarswellOnt 8766 (C.A.).
[219] *Ibid*. at paras. 61 to 64.
[220] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22.

review or set aside the decision to expel the respondents. Obviously, if the court has no jurisdiction, then there is no genuine issue requiring a trial. While the onus was on the appellants as the moving parties to prove the absence of jurisdiction, and therefore the absence of a genuine issue requiring a trial, the respondents were required to put their best foot forward and adduce their best evidence to establish the evidentiary foundation for jurisdiction, and by extension a genuine issue requiring a trial."

(E) Reversal of onus — burden was shifted in case where possibility of "blame game" developing

In *Dia v. Calypso Theme Waterpark*[221] the Court of Appeal for Ontario, set aside summary judgment and ordered that the summary judgment be dismissed on a number of grounds. Nordheimer J.A., writing for the Court, stated, "[22] One is that it is evident that the motion judge reversed the onus or burden of proof from the respondent, who was the moving party, to the appellants as responding parties. For example, the motion judge said, at para. 25: The plaintiffs argue that Mr. Messina has not proven that he was not involved in the alleged assault. He is not required to do so. Mr. Messina's burden on this motion is to satisfy me that there is no issue requiring a trial in respect of the plaintiffs' claim against him because the plaintiffs cannot prove that he *was* involved in the alleged assault. He has met that burden. [emphasis in original]. [23] That statement is simply wrong in law. In the circumstances of this case, the respondent was required to prove that he was not involved in the assault. That is the only way he could show that there was no genuine issue for trial as regards the claim against him. It was not up to the appellants to prove the contrary, at least not until the respondent had first met his evidentiary burden. [24] This error appears to have arisen from the motion judge's misunderstanding of the body of case law regarding the obligation of parties on both sides of a motion for summary judgment to 'put [their] best foot forward'. The obligation on the responding party is often captured by the expression 'a respondent on a motion for summary judgment must lead trump or risk losing': 1061590 *Ontario Ltd. v. Ontario Jockey Club* (1995), 1995 CanLII 1686 (ON CA), 21 O.R. (3d) 547 (C.A.), at p. 557. [25] The fact that both sides to a motion for summary judgment may bear evidentiary burdens does not alter where the onus or burden of proof originates. On this point, I repeat the explanation of the burden of proof enunciated by Brown J.A. in *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at para. 30, leave to appeal refused, [2016] S.C.C.A. No. 443, where he said: First, the evidentiary burden on a moving party defendant on a motion for summary judgment is that set out in rule 20.01(3) — 'a defendant may . . . move with supporting affidavit material or other evidence.' As

[221] *Dia v. Calypso Theme Waterpark*, 2021 ONCA 273.

explained in Connerty, at para. 9, only after the moving party defendant has discharged its evidentiary burden of proving there is no genuine issue requiring a trial for its resolution does the burden shift to the responding party to prove that its claim has a real chance of success. [26] The motion judge erred in skipping over the respondent's initial burden and moving straight to the appellants'. In doing so, she improperly shifted the burden of proof onto the appellants to prove their case before the respondent had proven his. The motion judge also erred in her application of the decision in *Sweda Farms*. While the decision in that case does say that the court is entitled to assume that the record on a motion for summary judgment contains all the evidence the parties would present at trial, the case also notes that '[t]here are exceptions to this principle': *Sweda Farms*, at para. 27. An exception that presents itself in this case is the possibility of a 'blame game' developing, as I explain in para. 28 below, or that the plaintiffs might call one or more of the investigating police officers that would provide evidence that was not reasonably available on the motion."[222]

(ii) Manitoba

(A) When a plaintiff moves, he must prove, on a *prima facie* basis, that his action will succeed. If he meets that burden, then the defendant has the burden to establish that there is a genuine issue for determination. If he fails to do so, summary judgment granting the claim will follow (regardless of who is the moving party, the analysis is a two-step process)

Following statutory amendments in Manitoba[223] "a judge *must* grant summary judgment if he or she is satisfied that there is no genuine issue *requiring* a trial with respect to a claim or defence"[224] The motion judge is allowed to weigh evidence, determine credibility and make inferences based on evidence.

In *Berscheid v. Federated Co-operatives et al*,[225] the Court of Appeal of Manitoba heard an appeal of a plaintiff whose motion for summary judgment was dismissed because the ". . . motion judge held that *Berscheid* had not met his prima facie burden to show that he was entitled to the damages claimed. The key

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[222] *Ibid*. at paras. 22 to 26.

[223] *Court of Queens's Bench Rules*, Man Reg 553/88 ,Rule 20.03(1).

[224] *Ibid*. Also see also *Hryniak Comes to Manitoba: The Evolution in Manitoba Civil Procedure in the 2010s* by Gerard J. Kennedy, Assistant Professor, Faculty of Law, University of Manitoba, Manitoba Law Journal, for a history of summary judgment in Manitoba.

[225] *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27, leave to appeal refused *Timothy M. Berscheid v. Federated Co-operatives Limited, et al*., 2019 CarswellMan 34 (S.C.C.).

issue in this case is causation, in particular, the nature and extent of the harm caused to the cattle herd as a result of exposure to the defective supplements and the financial damages that flow from that. These causation issues are matters beyond the ordinary knowledge or skill of a layperson and there was no admissible expert opinion before the motion judge on that issue."[226] Steel J.A., writing for the Court of Appeal, and dismissing the appeal, summarized the law pertaining to summary judgment in Manitoba "[11] Summary judgment is available to either a plaintiff or defendant under r 20.01 of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *QB Rules*). The test to be applied on a motion for summary judgment by a plaintiff is set out in the oft-quoted *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61 (at para 15): When a plaintiff moves, he must prove, on a *prima facie* basis, that his action will succeed. If he meets that burden, then the defendant has the burden to establish that there is a genuine issue for determination. If he fails to do so, summary judgment granting the claim will follow. As was made clear in *Blanco et al. v. Canada Trust Co. et al.*, 2003 MBCA 64, 173 Man.R. (2d) 247 at para. 62, regardless of who is the moving party, the analysis is a two-step process. [12] This Court has repeatedly commented on the applicable standard of review for summary judgment decisions. It is a discretionary decision by the motion judge. It is a discretionary decision because it requires the judge to apply her or his judicial experience and expertise to all of the relevant facts and applicable law and then to make a judgment as to whether the required burden of proof has been met (see *Lenko v The Government of Manitoba et al*, 2016 MBCA 52 at para 35)."[227] Steel J.A. also illustrated how a motion for summary judgment may exemplify the failure to heed the warnings described in *Hryniak*: "[1] . . . sometimes a motion for summary judgment can have the opposite effect intended and unduly complicate matters.; [32] The Supreme Court of Canada's decision in *Hryniak* did not alter the basic test for summary judgment in Manitoba. However, it did make courts acutely aware of the need to consider the concept of proportionality in all aspects of the justice system. So, summary judgment rules should be interpreted broadly to ensure fair access to the

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[226] *Ibid.* at para. 6.

[227] *Ibid.* at paras. 11 and 12; see also *Nash v. Nash*, 2019 MBCA 31, an appeal and cross-appeal of an order for summary judgment granting certain claims of the plaintiff. Pfuetzner J.A., writing for the Court of Appeal of Manitoba (that dismissed the plaintiff appeal, and allowed the defendants cross-appeal only to reduce the costs award) noted, at para. 22, "The motion judge instructed himself on the test for summary judgment with reference to *Homestead Properties (Canada) Ltd v Sekhri et* al, 2007 MBCA 61, where Freedman J.A. wrote (at paras. 14-15): The test is to the same effect regardless of whether the moving party is the plaintiff or the defendant. When a plaintiff moves, he must prove, on a prima facie basis, that his action will succeed. If he meets that burden, then the defendant has the burden to establish that there is a genuine issue for determination. If he fails to do so, summary judgment granting the claim will follow."

affordable, timely and just adjudication of claims; [33] However, proportionality can cut both ways in these type of proceedings. *Hryniak* made clear that, 'While summary 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. [34] 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."[228]

(B) Clarification on the two-stage process on a summary judgment motion. Moving party must satisfy the motion judge that there can be a fair and just determination on the merits. If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition". The responding party must establish why a trial is required. If the responding party fails to do so, summary judgment will be granted. There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible.

Questions arising from subsequent appellate decisions on the two-stage process were put to rest in the following appellate decision. In *Dakota Ojibway Child and Family Services et al v. MBH*,[229] Burnett J.A. summarized the summary judgment motion process in this way: "[108] At the hearing of the motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the

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[228] *Ibid*. at paras. 1 and 32 to 34.

[229] *Dakota Ojibway Child and Family Services et al v. MBH*, 2019 MBCA 91, leave to appeal refused *M.B.H. v. Dakota Ojibway Child and Family Services, et al.*, 2020 CarswellMan 90 (S.C.C.). see also *Shirritt-Beaumont v. Frontier School Division*, 2020 MBCA 31, where Simonsen J.A. states at para. 16, "On a summary judgment motion, the moving party bears the onus, on a balance of probabilities, of establishing that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial (see *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 at paras. 108-9, 111)."; also see similar explanation of the two-part test in *CG Group Ltd. v. Girouard et al.*, 2018 NBCA 59 and *Russell et al. v. Northumberland Co-Operative Limited*, 2019 NBCA 70, leave to appeal refused *Harold Russell, et al. v. Northumberland Co-Operative Limited*, 2020 CarswellNB 112 (S.C.C.).

evidential burden of establishing that there is no genuine issue requiring a trial. [109] If those requirements are met, the responding party must meet its evidential burden of establishing 'that the record, the facts, or the law preclude a fair disposition' (*Weir-Jones* at para 32; and *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 at para 22; see also *Stankovic* at para 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted. [110] The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)). [111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.; [112] In my view, the approach described in *Hryniak* and the two-step process described in *Homestead* are consistent with the new rules in Manitoba; to the extent that *Free Enterprise* suggests otherwise, it should not be followed."[230]

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[230] *Ibid*. at paras. 107 to 112, see also *Sartor et al v. Boon et al*, 2020 MBCA 36 where Steel J.A., writing for the Court of Appeal of Manitoba stated at para. 12, " While Boon objected to the procedure adopted by the motion judge in his factum, he withdrew that ground of appeal at the hearing. That was an appropriate concession. The decision to determine the matter summarily is entitled to deference unless there is a material error. In any event, there were two days of viva voce evidence and one day of final argument in this case, as well as affidavit evidence, case briefs, a case management conference and an agreed book of documents. The Sartors and Boon all testified and the motion judge was well able to determine matters of credibility. Following the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7, the process adopted by the motion judge provided a proportionate, expeditious and less-expensive means to adjudicate the issues in this particular case." See also *Business Development Bank of Canada v. Cohen*, 2021 MBCA 41, where Burnett J.A., writing for the Court, said at paragraph 27, that the motion judge correctly observed ''that the plaintiff must first establish there is no genuine issue requiring a trial, and once that has been established, the defendant must meet his evidential burden of establishing that the record, the facts and the law preclude a fair disposition on a summary judgment."However, in finding that the motion judge erred when he decided, on the record before him and without explanation, that the process allowed him to make the necessary findings of fact, and that the defendant had failed to meet his evidential burden of demonstrating that there is a genuine issue requiring a trial, Burnett J.A. stated at paragraph 51: ''However, generally speaking, *viva voce* evidence will be essential to make an important credibility findings."

(iii) Saskatchewan

(A) Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. Moving party has initial onus: does it extend to negating the existence of a triable issue?

In *Blue Hill Excavating Inc. v. Canadian Western Bank Leasing Inc.*,[231] the defendants appealed the grant of summary judgment in favour of the plaintiff for an amount owing under an equipment lease. The appellant raised four grounds on appeal, including whether the chambers judge misunderstood the onuses applicable in the context of the summary judgment application. On that issue, Leurer J.A. stated, "[23] In *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372 [*Lameman*], the Supreme Court of Canada recognized that an applicant for summary judgment (the defendant in that case) carries an initial burden, stating as follows; [11] . . . Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried."[232]

Leurer J.A. reviewed the case law following *Lameman*, and stated "[26] There is an open question as to whether the initial onus resting on a *plaintiff* who applies for summary judgment extends to negating the existence of a triable issue in connection with a defence, which has been pleaded but which it is incumbent on the defendant to prove. Because both *Peter Ballantyne Cree Nation* and *Deren* involved an application by a *defendant* for summary judgment, in neither case was the Court required to opine on the full extent of the initial onus resting on a *plaintiff* who applies for summary judgment" and Leurer J.A. concluded that there was no basis to set aside the judgment of the chambers judge because of how he approached issues of burden and onus, stating, "[33] If there was an initial onus resting on CWBL in connection with the (unpleaded) defence, CWBL met that onus by leading evidence as to the steps it took to realize, in a prudent way, on the security it held over the equipment. Having led this evidence, the appellants had a choice. The appellants would have been well-within their rights to argue that even on the evidence led by CWBL there was a genuine issue requiring trial. Perhaps with an eye to Rule 7-3(1) and the 'best foot forward' principle they chose, as was their right and the court's expectation, to lead evidence of their own with a view to convincing the Chambers judge that there *was* a genuine issue for trial . . ."[233]

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[231] *Blue Hill Excavating Inc. v. Canadian Western Bank Leasing Inc.*, 2019 SKCA 22.
[232] *Ibid.* at paras. 21, 22 and 23.
[233] *Ibid.* at para. 33.

(B) Strength of evidence on motion for summary judgment

In *Holmes v. Jastek Master Builder 2004 Inc.*,[234] Ottenbreit J.A., writing for the Court of Appeal for Saskatchewan, stated the following regarding the strength of evidence on a motion for summary judgment "[87] This Court has also echoed the comments in *Hryniak* that in order for the summary judgment procedure to be properly employed, the evidence must give the judge confidence that he or she can reach a fair and just determination . . . This Court has not applied the 'strongly supported by the facts' standard since the *Hryniak* decision." and on the issue of the shifting burden stated "[104] . . . While the overall onus of proof on the application for summary judgment against Jastek Valencia was on the purchasers, there was an evidentiary burden on Jastek Valencia, in light of its response, to explain why there was a delay with the third-party architect and to put its evidentiary 'best foot' forward as required by *Hryniak*. It chose not to provide any evidence of diligence with the architect that would substantiate that it had used its best efforts but was thwarted in obtaining the plans through no fault of its own."[235]

(C) Shift of burden

In *Wood Mountain Lakota First Nation No. 160 v. Goodtrack*,[236] the Court of Appeal for Saskatchewan allowed an appeal and increased the amount of summary judgment to include additional damages. Tholl J.A., writing for the Court of Appeal, on the appellant's assertion that the chambers judge erred by refusing certain damages when the plaintiff had led *prima facie* evidence of the loss that was never contradicted or called into question, stated, "[19] In a summary judgment application, the expectation is that each party will put his or her best foot forward within the context of the application. In the matter at hand, once Wood Mountain had provided sufficient evidence to prove its claim, *the burden shifted* to the Goodtracks to adduce evidence that put Wood Mountain's evidence into question . . .[237]

(D) When a party applying for summary judgment has adduced evidence sufficient to make out its claims or defences *prima facie*, the responding party bears the evidentiary burden of showing one or more of its defences or claims has "a real chance of success"

In *Hoffart v. Carteri*,[238] the appellants appealed the summary judgment of the chambers judge in favour of the plaintiffs based on a tenancy agreement. The

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[234] *Holmes v. Jastek Master Builder 2004 Inc.*, 2019 SKCA 132.
[235] *Ibid.* at para. 104.
[236] *Wood Mountain Lakota First Nation No. 160 v. Goodtrack*, 2020 SKCA 10.
[237] *Ibid.* at para. 19.

appellants argued that the chambers judge erred in deciding that the summary judgment procedure could be used, and relying on opinion evidence asserted to be inadmissible. The Court of Appeal for Saskatchewan found that the chambers judge made a single reversible error, that one issue concerning damages should not have been determined on a summary basis. Richards C.J.S., writing for the Court of Appeal stated "[40] Rule 7-3(1) of *The Queen's Bench Rules* specifically provides that a response to an application for summary judgment must not rely solely on the denials in the respondent's pleadings but, rather, must set out in affidavit material or other evidence specific facts showing that there is a genuine issue to be tried. In *Deren v SaskPower*, 2017 SKCA 104, this Court cautioned about the risk of standing flat-footed in the face of a summary judgment application"; [93] When a party applying for summary judgment has adduced evidence sufficient to make out its claims or defences *prima facie*, the responding party, whether plaintiff or defendant, will run the risk of losing on the application if it does not adduce evidence that puts the applying party's evidence, and thereby its success on its claims or defences, into question: *Peter Ballantyne Cree Nation v Canada*, 2016 SKCA 124 at para 31, 485 Sask R 162. To do this, the responding party, whether defendant or plaintiff, must adduce persuasive, admissible evidence establishing that there are triable questions of fact or credibility on an issue that underpins the success of the applying party's claims or defences. In this way, the responding party bears the evidentiary burden of showing one or more of its defences or claims has 'a real chance of success' . . .[239]

(iv) Federal

(A) Heavy burden on the moving party

Canmar Foods Ltd. v. TA Foods Ltd.[240] is an appeal from a decision of the Federal Court which granted summary judgment dismissing a patent infringement action. De Montigny J.A., writing for the Federal Court of Appeal, said "[24] . . . The test is not whether a party cannot possibly succeed at trial, but rather whether the case is clearly without foundation, or is so doubtful that it does not deserve consideration by the trier of fact at a future trial. There does not appear to be any definitive or determinative formulation of the test, but the underlying rationale is clear: a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial . . . This should obviously translate into a heavy burden on the moving party",[241] and regarding the legal burden to

[238] *Hoffart v. Carteri*, 2020 SKCA 50, see also *Hawryliw v Smith*, 2021 SKCA 53.
[239] *Ibid.* at paras. 38 and 40.
[240] *Canmar Foods Ltd. v. TA Foods Ltd.*, 2021 FCA 7.

establish that there is no genuine issue for trial; "[27] The legal burden to establish that there is no genuine issue for trial clearly falls on the moving party. That being said, once the moving party has discharged its burden, the evidentiary burden falls on the responding party, who cannot rest on its pleadings and must come up with specific facts showing that there is a genuine issue for trial . . . [w]hile the burden falls on the moving party, both parties must put their best foot forward". [242]

(B) Standard of proof for summary judgment

(v) Alberta

(A) *Weir-Jones* — standard of proof is no longer that the moving party must demonstrate an *unassailable* position; it is a balance of probabilities

In the Alberta summary judgment landmark decision *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*,[243] (hereinafter "*Weir-Jones*")

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[241] *Ibid.* at para. 24.

[242] *Ibid.* at para. 27.

[243] *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49; see pre-*Weir-Jones* decisions of the Court of Appeal of Alberta, including: *898294 Alberta Ltd. v. Riverside Quays Limited Partnership*, 2018 ABCA 281, where the Court of Appeal of Alberta stated, pre-*Weir-Jones*, in para. 12, "Summary judgment is reserved for the resolution of disputes where the outcome of the contest is obvious (*Whissell Contracting Ltd. v Calgary (City)*, 2018 ABCA 204 at para. 1). Is the "moving party's position . . . unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success very low?" (*Composite Technologies Inc v Shawcor Ltd*, 2017 ABCA 160 at para. 2, 51 Alta LR (6th) 91, and *Geophysical Service Incorporated v Murphy Oil Company Ltd*, 2018 ABCA 380; see also *Rotzang v CIBC World Markets Inc*, 2018 ABCA 153 at para. 15)", *Lay v. Lay*, 2019 ABCA 21, leave to appeal refused *Melanie Anne Lay, et al. v. Bradley Lay, et al.*, 2019 CarswellAlta 1228 (S.C.C.), additional reasons 2019 CarswellAlta 2009 (C.A.), *Singh v. Noce*, 2019 ABCA 55, where the Court of Appeal of Alberta commented on the judgments below at para. 9, "Both the Master and the chambers judge applied the arguably stricter 'unassailable' test, so the outcome of the reserved decisions [*Weir-Jones* and the companion appeal in *Brookfield Residential (Alberta) LP v Imperial Oil Limited*, 2019 ABCA 35) is not determinative to the outcome of this appeal. The Master summarily dismissed the action, and the chambers judge upheld that decision because the position of Mr. Noce and Miller Thomson on the limitation period was "unassailable", in *Roman Catholic Bishop of the Diocese of Calgary v. Schuster*, 2019 ABCA 64, leave to appeal refused *Roman Catholic Bishop of the Diocese of Calgary v. Edmund Schuster, et al.*, 2019 CarswellAlta 1540 (S.C.C.), the Court stated, at para. 6, "The chambers judge held that summary judgment may be granted on a claim for breach of fiduciary duty but in this instance, he declined to do so because the evidentiary record before him was incomplete." and at para. 7, "While the appropriate test for summary judgment remains unsettled, we conclude that on either test, the appeal must be

the Court of Appeal of Alberta observed that a rift had recently emerged in the case law discussing the test for summary judgment in Alberta, and in particular the standard of proof required for summary judgement. The question was whether the standard of proof is that the moving party must demonstrate an *unassailable* position, or is it a balance of probabilities? Slatter J.A., writing for the majority of the Court of Appeal restated the key consideration for summary judgment as follows: "[47] . . . a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial? b) Has the moving party met the burden on it to show that there is either 'no merit' or 'no defence' and that there is no genuine issue requiring a trial? At

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dismissed. Under both tests, a controversy over relevant facts or an inadequate factual record precludes the issuance of summary judgment. Further, summary judgment may not be appropriate where complex or unsettled questions of law exist." and see *also Plesa v. Richardson*, 2019 ABCA 264 (decided by Master ad motion judge *pre-Weir-Jones*) where the Court of Appeal of Alberta held at para. 40, "In this case, the state of the record was not one which afforded sufficient confidence to exercise judicial discretion to summarily resolve the dispute.", see also *Sewak Gill Enterprises Inc. v. Bedaux Real Estate Inc.*, 2020 ABCA 125, where the Court of Appeal for Alberta stated at para. 13, " The decision under appeal was issued prior to release of this court's decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, which clarified the test to be applied on summary judgment applications. As the "unassailable" test applied by the chambers judge involves a more stringent standard for granting summary judgment, there is no basis to conclude that the result would have been different had the chambers judge applied the *Weir-Jones* test.": see also *Allegro v. TD Auto Finance (Canada) Inc.*, 2020 ABCA 175 at para. 57, "What the trial judge did in this case was tantamount to awarding summary judgment, relying on Rule 7.1(3)(b) of the *Alberta Rules of Court*. This is the rule which permits judgment to be given on all of a claim if the court is satisfied that its determination of an issue substantially disposes of a claim. However, this Court in *Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49 has suggested that summary judgment should be declined where the law is so unsettled or complex that it is not possible to apply the law to the facts without the benefit of a full trial record. In other words, the law itself may be the genuine issue requiring a trial . . ." and see also *H2S Solutions Ltd. v. Tourmaline Oil Corp.*, 2019 ABCA 373 at para. 19, additional reasons 2020 CarswellAlta 926 (C.A.) "Further, it is not an answer to the summary disposition proceeding for H2S to suggest that more favourable evidence might be unearthed in the future. Rather, the motion is to be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future: *Canada (AG) v Lameman*, 2008 SCC 14 at para. 19, [2008] 1 SCR 372; *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at para. 37 [*Weir-Jones*]." and para. 20, "In the face of Tourmaline's summary dismissal application, it fell to H2S as the resisting party to demonstrate that Tourmaline had "failed to establish there is no genuine issue requiring a trial": see also *Weir-Jones* at para. 32. H2S was obliged to challenge Tourmaline's entitlement to summary dismissal by demonstrating there were material gaps or uncertainties in the facts, the record, or the law which precluded a fair disposition on the sole issue before the court."

a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication, c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available, d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute. To repeat, the analysis does not have to proceed sequentially, or in any particular order . . ."[244]

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[244] *Ibid*. at para. 47, see *Roberts v. Edmonton Northlands*, 2019 ABCA 229, citing *Weir-Jones*, at para. 8, "The Chambers Justice did not have the benefit of this Court's decision in *Weir-Jones Technical Services Incorporated v Purolator Ltd*, 2019 ABCA 49, but found that whichever test was applied, summary judgment failed. *Weir-Jones* confirms that the party moving for summary judgment must prove there is "no merit" to the claim. This means that Northlands must prove the factual elements of its case on a balance of probabilities and that there is no genuine issue requiring trial. There is no burden on the resisting party, the plaintiffs in this case, to prove their case. Rather the resisting party need only demonstrate "the record, the facts, or the law preclude a fair disposition, or, in other words, that the moving party has failed to establish there is no genuine issue requiring a trial" (*Weir-Jones* at para. 32), see also *Rudichuk v. Genesis Land Development Corp.*, 2020 ABCA 42, where the Court of Appeal of Alberta stated, at para. 31, "The issue before us on appeal is not whether another judge may have reached a different conclusion as to whether summary judgment was available on the record. Rather, it is whether the plaintiffs have established that the chambers judge made a palpable and overriding error or failed to exercise her discretion appropriately. "The ultimate determination of whether summary disposition is appropriate is up to the chambers judge . . . whether a summary disposition will be fair and just will often come down to whether the chambers judge has a sufficient measure of confidence in the factual record before the court": *Weir-Jones* at para. 46. and see also *Giustini v. Workman*, 2021 ABCA 65, where the Court of Appeal of Alberta reviewed the law of summary judgment, stating in para. 23, "The law with respect to summary judgment in Alberta is set out in *Weir-Jones*, para. 47, and *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343 at paras. 5, 12-13, 52, 145. In *Weir-Jones*, this court summarized the governing principles: [as set out in *Weir-Jones*], and stated at para. 24, "As this Court later said in *Hannam*, paras. 146-151, this interpretation allows a summary judgment court to make contested findings of material facts, which the court should not be reluctant to do unless those facts raise a genuine issue requiring a trial. The moving party must prove those facts on which it relies on a balance of probabilities. Courts have latitude with respect to fact finding and assessing the chance of success at trial in the face of conflicting affidavit evidence: *Weir-Jones*, paras. 36-38; *Axcess Mortgage Fund v 1177620 Alberta Inc*, 2018 ABQB 626, paras. 62-65, 76 Alta LR (6th) 101."

(B) Application of *Weir-Jones* test for summary judgment

The application of the *Weir-Jones* test for summary judgment was the subject of the appeal before the Court of Appeal of Alberta in *Hannam v. Medicine Hat School District No. 76*.[245] Thomas, J.A., Wakleling J.A. and Feehan J.A. wrote the Majority reasons, whereas O'Ferrall J.A wrote the dissenting reasons.

The Majority summarized *Weir-Jones* and commented upon it, as follows "[171] . . . The most noteworthy difference between the *Weir-Jones* protocol and the English and American summary judgment rules is the applicable test for granting summary judgment. An Alberta court may grant summary judgment even if the applicant has not convinced the court that the strength of the applicant's case is so much greater than the respondents that the ultimate trial outcome is obvious. *Weir-Jones* allows the summary judgment adjudicator to make contested finding of facts on a balance of probabilities when it is fair and just to do so . . ."[246]

The Majority emphasized these points: "[147] First, this interpretation allows a summary judgment court to make contested findings of material facts . . . This is a departure from the traditional understanding that a dispute about a material fact disqualifies an action from the summary judgment process; [148] Second, summary judgment courts should not be reluctant to make material fact findings; [149] Third, before a summary judgment court resolves a material factual dispute, it should ask if it constitutes a genuine issue requiring a trial. Slatter J.A. explained it this way: 'A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial'; [150] Fourth, the moving party must prove the facts on which it relies on a balance of probabilities. This is consistent with the general trial principle that the plaintiff must prove the facts on a balance of probabilities that establish the elements of the action. [151] Fifth, 'if there is a genuine issue requiring a trial, summary disposition is not available'".[247]

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[245] *Hannam v. Medicine Hat School District No. 76*, 2020 ABCA 343, leave to appeal refused *Angelina Hannam, et al. v. Medicine Hat School District No. 76*, 2021 CarswellAlta 641 (S.C.C.).

[246] *Ibid.* at para. 171; see also *Saito v Lester Estate*, 2021 ABCA 179, at para 18, "It is not the role of this Court [Court of Appeal of Alberta] to second-guess the weight to be given to various pieces of evidence."

[247] *Ibid.* at paras. 147 to 151.

III. CONCLUSION

1. Approach to Evidence, Conflict in Evidence, Credibility and Inconsistency

(a) Movement towards requirement of full appreciation of the case

Hryniak was an overture to judges and counsel in all courts in Canada. It called for a 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"[248] of the Court of Appeal for Ontario in *Combined Air Mechanical Services Inc. v. Flesch*[249] in favour of a just summary judgment adjudication.

It would appear from this survey of the appellate review of summary judgment and summary dismissal over the last three years, that in some jurisdictions and in some respects, summary judgment motion judges are being required to move towards a full appreciation of the case, or at least a *fuller* appreciation of the case. This is not manifested by any express adoption of the full appreciation test by the appellate courts. Rather, it is shown in the appellate review concerning how the motion judge should evaluate credibility or inconsistencies, or his or her approach to fact-finding, and the appellate affirmation of the approach of a summary judgment motion judge.

(b) Examples

For example see in **Ontario**: in the Court of Appeal, where the record before the motion judge was held to be insufficient, and the absence of information in the record left a "critical void",[250] where the Court of Appeal endorses the conclusion of the motion judge that the quality and quantity of the record would not appreciably change at trial,[251] where the Court of Appeal found that the conflict in the evidence was not resolved,[252] where the Court of Appeal held that the motion judge implicitly considered the rule and provided a detailed analysis of his credibility and factual finding together with his legal reasoning,[253] where the Court of Appeal found that the motion judge did not make findings of fact based on credibility determinations, that the finding of an agreement to extend a

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[248] *Hryniak*, at paras. 4, 16, 53 and 54.

[249] *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, additional reasons 2013 CarswellOnt 5398 (C.A.), additional reasons 2013 CarswellOnt 5399 (C.A.), leave to appeal refused 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.).

[250] *Swampillai v. Royal & Sun Alliance Insurance Company of Canada*, 2019 ONCA 201.

[251] *Cormier v. 1772887 Ontario Limited (St. Joseph Communications)*, 2019 ONCA 965.

[252] *Kitchen v. Brian Garratt (Garratt's Garage)*, 2020 ONCA 309.

[253] *Fortress Carlyle Peter St. Inc. v. Ricki's Construction and Painting Inc.*, 2019 ONCA 866.

closing date cannot be explained, and that the motion judge made the inference made, without evidence before the judge that did not permit that inference,[254] where the Court of Appeal held the motion judge did not apply the test for summary judgment by turning his mind to whether the credibility issues could be resolved without *viva voce* evidence,[255] where the Court of Appeal found that the summary judgment motion judge failed to determine whether summary judgment was appropriate, having regard to and analyzing the "entire evidentiary record" and the *Hryniak* analytical framework (including to explain why unchallenged evidence is rejected, to address the absence of evidence, and consider the evidence as a whole and on the entire record),[256] and where the Court of Appeal stated that the motion judge was required to take a "hard look at the entire record".[257]

In **Prince Edward Island**, where the Prince Edward Island Court of Appeal held that the required interpretation of a contract must include a consideration of the surrounding factual matrix.[258]

In **Saskatchewan**, where Court of Appeal for Saskatchewan required that decisions of the motion judge as to the admissibility of evidence should accordingly be made *before* the judge determines if there is a genuine issue for trial,[259] where the Court of Appeal endorsed that the motion judge fully and completely explained the reasons for his determination on this issue,[260] and where the Court of Appeal followed *Trotter v. Trotter*, 2014 ONCA 841, that when conflicting evidence is presented on a factual matters, a motion judge is required to articulate the specific findings that support a conclusion that a trial is not required, or alternatively, if the judge concludes that he was able to reach a just and fair determination of the issues without resolving the conflict, that it was incumbent on him to explain why the matters in controversy were not material to a fair and just determination, and that "the issue of process is inextricably tied to the issue of substance",[261]

In **Manitoba**, where the Court of Appeal of Manitoba held that the motion judge must take a "hard look at the evidence" to ensure that the credibility issues are genuine,[262] and where the Court of Appeal found that there was nothing clear from the judge's reasons or the record to support the defendant's claim that the judge "unevenly scrutinized the evidence".[263]

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[254] *Downey v. Arey*, 2019 ONCA 450.
[255] *Gordashevskiy v. Aharon*, 2019 ONCA 297.
[256] *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98, additional reasons 2021 CarswellOnt 3670 (C.A.).
[257] *Demetriou v. AIG Insurance Company of Canada*, 2019 ONCA 855.
[258] *CMT et al. v. Government of PEI et al.*, 2020 PECA 12.
[259] *Hess v. Thomas Estate*, 2019 SKCA 26.
[260] *Kuderewko v. Kuderewko*, 2020 SKCA 22.
[261] *McCorriston v. Hunter*, 2019 SKCA 106.
[262] *Virden Mainline Motor Products Limited v. Murray et al*, 2018 MBCA 82.

In **Alberta**, where the Court of Appeal for Alberta upheld that a summary judgment is not suitable, despite that the application judge conducted a careful review of materials before her, which included 15 affidavits.[264]

(c) Discussion

These recent appeal decisions concerning how the summary judgment motion judge is to address the evidence on the motion for summary judgment, or endorsing a full consideration of evidence by the motion judge, signal a move to a mandate requiring the summary judgment motion judge to seek a full appreciation of the case.

The appellate court requirement that the motion judge describe the complete record, consider the proceedings as a whole, and the entirety of the evidence, and more clearly and fully recite in any decision on a motion for summary judgment, the existence of all inconsistent evidence and how the motion judge reconciled the inconsistency, takes us back to the pre-*Hryniak* full appreciation of the case.

A trial judge doubtless has a fuller appreciation of the case. Encouraging the summary judgment motion judge to conduct herself/himself as a trial judge would, whether on a motion for partial summary judgment or otherwise, is moving towards a return to the full appreciation test.

In my respectful view, *Hryniak* was never an overture to summary judgment motion judges to seek to conduct a trial on a motion for summary judgment, partial or otherwise.

2. Adoption of Enhanced Powers and Hryniak Two-Stage Process

The Prince Edward Island Court of Appeal[265] reviewed a significant change to the summary judgment rule in Prince Edward Island that previously precluded a motion judge on a summary judgment motion from weighing evidence, assessing credibility, and drawing inferences of fact, but now permitted use of those enhanced powers unless in the interest of justice such powers be exercised only at trial.

Following statutory amendments in Manitoba, a judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trail with respect to a claim or a defence, and the judge is allowed to weigh evidence, determine credibility and make inferences based on evidence. The applicability of the *Hryniak* two-stage process was affirmed by the Court of Appeal of Manitoba,[266] though earlier appellate decisions confirmed that the two-stage

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[263] *The College of Pharmacists of Manitoba v. Jorgenson*, 2020 MBCA 80.
[264] *Lovig v. Soost*, 2020 ABCA 66.
[265] *Taha & Taha v. National Bank*, 2020 PECA 4.
[266] *Dakota Ojibway Child and Family Services et al v. MBH*, 2019 MBCA 91, leave to appeal

process applies regardless of who is the moving party.[267] The "unassailable" test was also retired as the standard of proof for summary judgment.

In Alberta, the *Weir-Jones*[268] test for summary judgment was discussed in *Hannam v. Medicine Hat School District No. 76*,[269] where the majority of the Court of Appeal of Alberta confirmed that *Weir-Jones* allows the summary judgment adjudicator to make contested findings of fact, which is a departure from the traditional understanding that a dispute about a material fact disqualified the action from the summary judgment process.

While these cases remove the summary judgment motion judge from a more binary decision, they do impose the burdens which come with the operation of enhanced powers.

3. Onus and Burden

Most provincial appellate courts have addressed the onus and burden on a motion for summary judgment. Who has the initial or continuing onus on the motion, if, how and when the burden shifts on the motion, and whether the initial onus extends to negating a triable issue, have been considered by the appellate courts.

4. Partial Summary Judgment

This survey of appellate cases concerning partial summary judgment demonstrates that even the definition of partial summary judgment varies on appellate review. The appellate cases have considered much more than granting part of the claim, or somewhat less than the full claim sought, to be the only definition of partial summary judgment. The judge on a motion for partial summary judgment, has the burden of determining even if the judgment sought is partial, given the appellant decisions on cases addressing circumstances where there is with more than one defendant, more than one cause of action, or a counterclaim or third-party claim.

Moreover, appeal decisions have required judges to consider all the issues in the whole case, and sometimes counterclaims, third-party claims, and even other actions, before embarking on a partial summary judgment motion. This often

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refused *M.B.H. v. Dakota Ojibway Child and Family Services, et al.*, 2020 CarswellMan 90.

[267] *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27, leave to appeal refused *Timothy M. Berscheid v. Federated Co-operatives Limited, et al.*, 2019 CarswellMan 34 (S.C.C.), and cases cited therein.

[268] *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49.

[269] *Hannam v. Medicine Hat School District No. 76*, 2020 ABCA 343, leave to appeal refused *Angelina Hannam, et al. v. Medicine Hat School District No.* 76, 2021 CarswellAlta 641 (S.C.C.).

results in the reviewing of the entire record, as if the matter was proceeding at trial.

Appellate guidelines for suitability of partial summary judgment has varied in the cases, *from appellate review of summary judgment where*: it disposed of the action; it is a central and narrow issue that completely resolved the action; has issues that may appropriately be bifurcated without creating a material risk of inconsistent outcomes; the claim was dismissed in its entirety; it is a case where the defences are not conducted to the grounds advanced in the claims; it finally resolved issues raised in the counterclaim that are not raised in the defence; the risk of duplicative or inconsistent findings are non-existent; the parties can demonstrate that dividing the case into several parts will prove cheaper, will get the case in and out of the court system more quickly and the parties can demonstrate will not result in inconsistent findings; or there is an issue or issues that may be readily bifurcated, *to those cases where there is*: a real risk of inconsistent finding; a material risk of inconsistent outcomes; an inherent risk of inconsistent findings; there is a possibility that the trial judge will reach a better understanding; where it is possible that the trial judge will develop a fuller appreciation of the relationships and the transactional context than the motion judge; has an issue intertwined with other issues; where a related action only provides background and context; where it is an error to grant partial summary judgment in the context of the litigation as a whole.

By requiring that a partial summary judgment motion judge both proceed with summary judgment when appropriate, and illustrate that appropriateness, by dissection of the entirety of the record, and through a thorough analysis of both issues on the motion and the case as a whole, places a heavy burden on the summary judgment motion judge, tantamount to requiring the motion judge, while conducting a motion for summary judgment, to carry on the evidentiary consideration, analysis and the writing judgment of that of a trial judge.

These cases demonstrate that after the motion judge established that partial summary judgment is sought, the motion judge is required to be *panoptic*, considering all issues presented in all the proceedings, the record on the motion and that which could be created on trial, and not just the issues for determination on a motion for partial summary judgment identified by the moving party.

5. Conclusion

In conclusion, I find that the burdens upon summary judgment motion judges, emerging from appellate decisions over the last three years, though sometimes based on or built upon other post-*Hryniak* appellate decisions, have become more onerous. There appears to be a general appellate court disapproval of a large number of partial summary judgment motions. The appellant courts' articulated requirements concerning the scrutiny of the record, of the evidence

and of the issues, has also increased the burden of the summary judgment motion judge.