

Access Granted – Rule 7.3 Applications in Alberta

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Presented by:

Kunal K. Nand

and

Kelly Robinson

Chomicki Baril Mah LLP

Edmonton, Alberta

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Kunal Nand & Kelly Robinson

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INTRODUCTION

There has always been some difficulty finding a balance between providing adequate prosecution and defense of civil files versus the trend towards early dispute resolution (and alternate dispute resolution). Recently, our highest court has espoused the benefits of a culture shift from the traditional litigation paradigm. The mechanism of this shift seems to be the summary judgment application process; something that has been lauded by the Highest Court as an alternative to the hefty costs of full trials.

The impetus for the shift follows the numerous movements towards the proportionality of justice and access to the civil justice system itself. Traditionally, Rule 7.3 (and its predecessor) was used to weed out meritless claims as the Court exercised its gatekeeper function. While historically this involved a high standard of proof in order to debar a litigant's day in Court, the Supreme Court of Canada has signalled that perhaps those days have now passed.

The decision in *Hryniak, infra*. has now revamped the test for summary judgment in Alberta, and has been fully embraced by our Court of Appeal. The decision however considered a different civil procedure (Ontario) and Alberta Courts are now left to try and reconcile binding direction to an imperfect parallel in the Alberta Rules. The result is discretion by Courts to address the substantive merits of claims earlier in the litigation process under limited circumstances. The questions that remain focus on how this has affected the traditional burdens in a summary judgment context and how that will affect litigants going forward.

The Supreme Court of Canada

The Supreme Court of Canada reconsidered the summary judgment vehicle in *Hryniak v. Mauldin [Combined Air Mechanical Services Inc. v. Flesch]*, 2014 SCC 7. In that decision, the recently amended Ontario Summary Judgment rule was considered, however, the Court provided additional guidance with respect to the procedure in general. Interestingly, the Court framed its analysis as one of access to justice in light of trial costs [see paras. 1 & 23, *Hryniak, supra*. for example].

Madame Justice Karakatsanis, delivering the unanimous decision of the Court, made the following comments:

- [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

Hryniak, supra. at para. 2

The Supreme Court, while agreeing in the result, disagreed with the Ontario Court of Appeal regarding the interpretation of the Summary Judgment Rules:

- [4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the “full appreciation” of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary finding of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
- [5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

The Court in discussing what it termed the “necessary culture shift” stated beginning at paragraph 27, *ibid.*:

- [27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
- [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.